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# (En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States

Sarah Deer<sup>†</sup>

**ABSTRACT:** American Federal Indian law is often mistakenly assumed to be a gender-neutral discipline. Although Native women suffer disproportionately from numerous maladies, Indian law practitioners rarely engage with questions of gender discrimination or intersectional oppression. Several Canadian scholars have begun to explicate “indigenous feminist legal theory.” This is the first Article in the United States to consider how such a theory might inform the practice of Federal Indian law and tribal law.

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<sup>†</sup> Sarah Deer (J.D., University of Kansas) is a citizen of the Muscogee (Creek) Nation and a 2014 MacArthur fellow. She currently teaches at the University of Kansas in the Department of Women, Gender, and Sexuality Studies and the School of Public Affairs and Administration. She also serves as the Chief Justice for the Prairie Island Indian Community Court of Appeals. Mvto (thank you) to the many scholars and friends who have influenced the development of this Article. I especially want to thank Mary Kathryn Nagle (Cherokee) who has played a pivotal role in bringing gender analysis to Federal Indian law practice. All errors, however, are mine alone.



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## INTRODUCTION

I began writing this Article just six weeks after the historic November 2018 midterm elections. On the evening of November 6, the world of American politics saw the election of the first-ever Native<sup>1</sup> women to Congress—Deb Haaland (Laguna Pueblo) of New Mexico and Sharice Davids (Ho-Chunk) of Kansas.<sup>2</sup> Native women have been subject to the laws of the United States for hundreds of years with absolutely no voice—indeed, no *presence*—in the halls of Congress. That same evening, Peggy Flanagan (White Earth Ojibwe) of Minnesota became the first Native woman to be elected to serve as lieutenant governor of a state. Many other Native women won seats in state legislatures across the country. Native women are also emerging in other types of high visibility political and legal positions. For example, Tobi Young (Chickasaw) became the first Native person to clerk for the United States Supreme Court when Justice Neil Gorsuch appointed her in 2018.<sup>3</sup> We are entering a new era of political visibility of contemporary Native women.

It is within the context of this moment that I assess the field of Indian law and tribal law. This Article considers whether the discipline is keeping up with the times with regard to gender consciousness and lasting equity for Native women and Native Two-Spirit (LGBTQ+) people.<sup>4</sup> I also situate this Article in the context of the #MeToo movement, as several Native women have come forward with their own experiences of sexual abuse and harassment in the Indian law workplace.

This inquiry is also prompted by the numerous issues of inequity that Native women continue to experience in 2019. It is becoming common knowledge that Native women experience extremely high rates of violent crime, including

1. In this Article, I choose to use the word “Native” to mean American Indian and Alaska Native people in the United States. I use “indigenous” to speak more generally about Native people in other countries (including Canada).

2. Julian Brave NoiseCat, “*They’re Gonna Rock It*”: *The First Day Native Women Served on Capitol Hill*, THE NATION (Jan. 7, 2019), <https://www.thenation.com/article/haaland-davids-congress-joy-native-representation/> [https://perma.cc/2XWV-6UFR].

3. Tony Mauro, *Gorsuch Hires Native American Law Clerk, Likely First in SCOTUS History*, NAT’L L.J. (Apr. 14 2018), <https://www.law.com/nationallawjournal/2018/04/14/gorsuch-hires-native-american-law-clerk-likely-first-in-scotus-history/?slreturn=20190117173747> [https://perma.cc/VL5T-PHXJ].

4. Cherokee scholar Qwo-Li Driskill explains, “The term Two-Spirit was chosen as an intertribal term to be used in English as a way to communicate numerous tribal traditions and social categories of gender outside dominant European binaries.” Qwo-Li Driskill, *Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies*, 16 GLQ: A J. LESBIAN GAY STUD. 69, 72 (2010).

domestic violence, sexual assault, stalking, and murder.<sup>5</sup> The federal government's own statistics reveal that the vast majority—over 80 percent—of Native people in the United States have experienced violent victimization.<sup>6</sup> In fact, where there has been progress in Federal Indian law, it has largely turned on the issue of high rates of domestic violence and sexual assault.<sup>7</sup> The rates of violence are an extension of the historical mistreatment and dehumanization of Native women. These practices have continued well into the twenty-first century in the form of hypersexualized images of Native women, often associated with “sexy” Indian Halloween costumes and movies like Disney's *Pocahontas*.<sup>8</sup>

But there are other areas of gender inequity that deserve attention.<sup>9</sup> For example, Native women experience the highest poverty rate in the United States.<sup>10</sup> While Native people in general experience high poverty rates in the United States, Native men are less likely to experience poverty than Native women.<sup>11</sup> Further, in 2018, the American Association of University Women released a report concluding that Native women overall only make fifty-eight percent of a white man's earnings.<sup>12</sup>

Many Native women are unable to access comprehensive reproductive healthcare, including adequate prenatal care.<sup>13</sup> Other reproductive disparities experienced by Native women include higher rates of unintended pregnancies<sup>14</sup>

5. ANDRE B. ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2016), <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [<https://perma.cc/VL5T-PHXJ>].

6. *Id.* at 2 (concluding that 84.3 percent of American Indian and Alaska Native women and 81.6 percent of American Indian and Alaska Native men have experienced violence).

7. See discussion *infra* Part I.

8. See, e.g., CUTCHA RISLING BALDY, WE ARE DANCING FOR YOU: NATIVE FEMINISMS & THE REVITALIZATION OF WOMEN'S COMING-OF-AGE CEREMONIES 32 (2018) (“Throughout history, Native women have been portrayed as either Pocahontas or the squaw. Either Native women are assisting in the colonization of their people, or they are dirty and disregarded as overtly sexual, stupid, and lazy. Native women have also been left out of historical scholarship and treated as peripheral to their nations, cultures, and societies rather than shown as integral or as serving in leadership positions.”).

9. JENNIE R. JOE & FRANCINE C. GACHUPIN, HEALTH AND SOCIAL ISSUES OF NATIVE AMERICAN WOMEN viii (2012) (noting that “[American Indian and Alaska Native] women face extraordinary challenges in all spheres of life: economic, health, social, and education.”).

10. INST. FOR WOMEN'S POL'Y RES., *Status of Women in the States*, at fig. 4.4 (2015), <http://statusofwomendata.org/explore-the-data/poverty-opportunity/poverty-and-opportunity-full-section/#pofig4.4> [<https://perma.cc/DES4-4TKY>].

11. *Id.*

12. AM. ASS'N OF U. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP (2018), <https://www.aauw.org/resource/the-simple-truth-about-the-gender-pay-gap/> [<https://perma.cc/GTP6-YUZH>].

13. Greta B. Raglan et al., *Racial and Ethnic Disparities in Preterm Birth Among American Indian and Alaska Native Women*, 20 MATERNAL & CHILD HEALTH J. 16, 19 (2016).

14. URBAN INDIAN HEALTH INSTITUTE, REPRODUCTIVE HEALTH OF URBAN AMERICAN INDIAN AND ALASKA NATIVE WOMEN: EXAMINING UNINTENDED PREGNANCY, CONTRACEPTION, SEXUAL HISTORY AND BEHAVIOR, AND NON-VOLUNTARY SEXUAL INTERCOURSE 7 (2010), [https://mchb.hrsa.gov/research/documents/finalreports/forquera\\_r40\\_mc\\_08954\\_final\\_report.pdf](https://mchb.hrsa.gov/research/documents/finalreports/forquera_r40_mc_08954_final_report.pdf) [<https://perma.cc/Q4ZE-MSYZ>] (concluding that, “Urban AI/AN had higher rates of unintended pregnancies and higher rates of mistimed pregnancies than NH-whites”).

and higher rates of pre-term births.<sup>15</sup> As a result, in some states, the Native infant mortality rates are up to three times greater than that of whites.<sup>16</sup> Native women also lack adequate access to abortion services, in large part due to the Hyde Amendment, which prohibits the use of federal funding for abortions except in the narrow circumstances.<sup>17</sup>

Health disparities persist beyond reproductive care. According to the federal government's own statistics, Native women are more likely than white women to suffer from obesity, diabetes, hypertension, liver disease, kidney disease, HIV and hepatitis.<sup>18</sup> Native women are also far more likely than white women to suffer from mental health problems, including substance abuse disorders, post-traumatic stress disorder, and suicidal ideation.<sup>19</sup> The suicide rate for Native women and girls between 15 and 24 is six times that of all races combined.<sup>20</sup>

In this Article, I argue that attorneys and legal scholars should intentionally think about gender in the context of Federal Indian law and tribal law to assess whether there are areas for closer consideration and attention. I am primarily interested in whether we can better address gender inequities in the lives of Native women, including gendered violence. As part of this analysis, I explore how attorneys and legal scholars can—and do—support the interests of Native women in their work.<sup>21</sup> As a self-identified Native feminist who is also an attorney, I am interested in asking hard questions about the shortcoming of the Indian Bar to adequately address the needs of Native women and Two-Spirit people.

How do feminism and Indian law “meet”? What are the cross-sections of efforts to promote gender equity and the continued resilient existence of tribal nations? In order to answer these questions, I begin by defining the word “feminism” itself. There are multiple strands of schools of feminist thought—some entirely inconsistent with one another. Therefore, more scholars are now

15. See, e.g., Raglan, *supra* note 13, at 16.

16. See, e.g., Ramona A. Danielson et al., *Disparities in Risk Factors and Birth Outcomes Among American Indians in North Dakota*, 22 MATERNAL & CHILD HEALTH J. 1519 (2018).

17. Dep't of Labor, Health and Hum. Servs., and Educ. and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, §§ 509-510, 111 Stat. 1467 (1997) [hereinafter Hyde Amendment].

18. U.S. DEP'T OF HEALTH & HUMAN SERVS., WOMEN'S HEALTH USA 2011 (2011), <https://mchb.hrsa.gov/whusa11/hstat/hssp/pages/235aianw.html> [<https://perma.cc/8M7S-P5VH>].

19. AMERICAN PSYCHIATRIC ASSOCIATION, MENTAL HEALTH DISPARITIES: AMERICAN INDIANS AND ALASKA 2 (2017).

20. Sally C. Curtin & Holly Hedegaard, *Suicide Rates for Females and Males by Race and Ethnicity: United States, 1999 and 2017*, at 2 (2019), [https://www.cdc.gov/nchs/data/hestat/suicide/rates\\_1999\\_2017.pdf](https://www.cdc.gov/nchs/data/hestat/suicide/rates_1999_2017.pdf) [<https://perma.cc/VM4A-T9HR>].

21. I mean to cast a wide net in terms of the audience for this Article. The practice of Indian law takes many forms, including working for non-profit organizations, government organizations (federal, state, or tribal), or private practice, for-profit lobbying arms and trade organizations. I mean for this Article to be inclusive of all attorneys who practice Indian law—including non-Native practitioners. I believe as a collective, we have a responsibility to our profession to be mindful of the ways that gender and sexuality intersect with our work.

speaking of plural feminisms rather than a monolithic feminism.<sup>22</sup> For the purposes of this Article, I consider feminisms to be legal and social responses to entrenched patriarchy. This simplified definition is, on the one hand, reductive, but on the other, a useful framework because it is broad enough to encompass different types and styles of patriarchy, along with different types and styles of responses. Patriarchy comes in different forms and can be modified to include terms like “hetero-patriarchy” and “settler colonial patriarchy,” which are both relevant for Native women.<sup>23</sup> The thrust of most feminist movements is to overturn sexist and misogynist laws and practices through legal and social action, which, again, can take many forms.

More specifically, in this Article, I approach Indian law using the lens of *indigenous* feminisms. I intentionally choose to use the fraught “f” word in this analysis, even though mainstream feminist movements and Native women have not always had an easy relationship. Indeed, mainstream feminism has historically failed Native women by ignoring or marginalizing issues like sovereignty and self-determination. Moreover, despite the fact that many early white American feminists were influenced by Native women,<sup>24</sup> early American feminists were sometimes the instigators and supporters of horrific Federal Indian law policies, including the boarding school era and child removal.<sup>25</sup> Thus, it makes sense that many indigenous women categorically reject the label of “feminist” because of its Western, colonial connotations, even while supporting Native women’s rights.<sup>26</sup> Some Native women who reject the term “feminism” point out that patriarchy is a foreign concept to traditional tribal cultures.<sup>27</sup> If feminism is a response to patriarchy, Native women have perhaps not needed it.

22. See, e.g., Gina Miranda Samuels & Fariyal Ross-Sheriff, *Identity, Oppression, and Power: Feminisms and Intersectionality Theory*, 23 AFFIL. J. WOMEN SOC. WORK 5, 6 (2008) (noting that “[u]se of the term feminisms in the plural to represent this diversity is an acknowledgment of these [scholarly] efforts.”).

23. Settler colonialism is “a unique brand of colonialism in which colonizers took up permanent and intimate residence among the Native people they exploited and resources they extracted rather than occupying temporary posts.” KATRINA JAGODINSKY, *LEGAL CODES AND TALKING TREES: INDIGENOUS WOMEN’S SOVEREIGNTY IN THE SONORAN AND PUGET SOUND BORDERLANDS, 1854-1946*, at 4 (2016).

24. See Sally Roesch Wagner, *The Indigenous Roots of United States Feminism*, in FEMINIST POLITICS, ACTIVISM AND VISION: LOCAL AND GLOBAL CHALLENGES 267–284 (Luciana Ricciutelli, Angela Miles, & Margaret H. McFadden eds., 2004) (describing how early suffrage activists like Matilda Joclyn Gage were influenced by observations of women of the Iroquois (Haudenosaunee) confederacy).

25. See generally MARGARET D. JACOBS, *WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940* (2009); MARGARET D. JACOBS, *ENGENDERED ENCOUNTERS: FEMINISM AND PUEBLO CULTURES, 1879-1934* (1999).

26. See, e.g., Haunani-Kay Trask, *Feminism and Indigenous Hawaiian Nationalism*, 21 SIGNS 906, 909 (1996) (“I recognized that a practicing feminism hampered organizing among my people in rural communities. Given our nationalist context, feminism appeared as just another haole intrusion into a besieged Hawaiian world. Any exclusive focus on women neglected the historical oppression of all Hawaiians and the large force field of imperialism.”).

27. See, e.g., Laura Tohe, *There Is No Word for Feminism in My Language*, 15 WICAZO SA REV. 103, 104 (2000) (exploring the power of female lineage in Diné culture and noting the fact that the Diné language does not have a word for “feminism”).

Still, I am intentionally choosing to use the term “feminisms” because it carries profound implications for structural change that I see as a critical intervention in the lives of twenty-first century Native women. Though patriarchy may have been a European import, it now exists in the lives of Native people through forced assimilation and cultural hegemony.

But it wasn’t until the late twentieth century that Native women started writing about contemporary feminism in any sustained fashion. Paula Gunn Allen’s 1982 book *The Sacred Hoop* opened up multiple conversations among academic and activist circles about whether certain feminist principles are inherent within tribal cultures.<sup>28</sup> More self-identified indigenous feminists have joined the academy in the past two decades, developing a corpus of writings, including multiple anthologies focused on the way that indigenous feminists analyze political, legal, and social problems.<sup>29</sup>

Native feminists often deploy and explore the concept of “intersectionality,” a term coined by Black legal scholar Kimberlé Crenshaw in 1989.<sup>30</sup> Intersectional feminist theory understands that gender oppression is inextricably linked to other forms of oppression, such as race and class. In other words, experiences of gendered oppression may be substantively different depending on one’s position in society. By conceptualizing Native gender oppression as inextricably linked to settler colonialism and Western imperialism, Native feminists have begun to explicate the unique ways in which Native women experience patriarchy, including the problem of sexism perpetrated by Native men.

However, as Emily Snyder notes, there has been little, if any, sustained focus on how indigenous feminism can inform *legal* theory and practice.<sup>31</sup> As a result of this gap, in 2014 Snyder published what may be the first North American law journal article to begin articulating contemporary indigenous feminist legal theory. In “Indigenous Feminist Legal Theory,” published in the *Canadian Journal of Women and the Law*, Snyder identifies an underdeveloped intersection of three theoretical fields: feminist legal theory, Indigenous feminist theory, and Indigenous legal theory.<sup>32</sup> By exploring this intersection, she ultimately concludes that Indigenous feminist legal theory (IFLT) is “an

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28. PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* (1982).

29. See, e.g., *CRITICALLY SOVEREIGN: INDIGENOUS GENDER, SEXUALITY, AND FEMINIST STUDIES* (Joanne Barker ed., 2017); *INDIGENOUS WOMEN AND FEMINISM: POLITICS, ACTIVISM, CULTURE* (Cheryl Suzack et al. eds., 2010); *MAKING SPACE FOR INDIGENOUS FEMINISM* (Joyce Green ed., 2007).

30. Kimberlé 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, 140 (1989).

31. Emily Snyder, *Indigenous Feminist Legal Theory*, 26 CAN. J. WOMEN & L. 365, 366 (2014) (“[T]here are few scholars accounting for . . . gendered realities in relation to Indigenous laws, and . . . the insights and contributions from their research have yet to be widely embraced.”).

32. *Id.* at 367.

important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex and sexuality.”<sup>33</sup> Whereas mainstream American feminist legal theory has existed for decades,<sup>34</sup> IFLT is a relatively new theory, largely explicated by Canadian scholars of indigenous law, including Snyder, Val Napoleon, and John Borrows.<sup>35</sup> In this Article, I apply IFLT to American Federal Indian law and tribal law as a way to explore how and why Native women experience law and oppression in the United States.

To do so, I explore the substance and practice of Indian law through an IFLT lens. Because IFLT uses an intersectional framework, it offers a way to synthesize how and why Native women suffer multiple different kinds of oppression simultaneously. Native women in the United States experience structural discrimination in the forms of at least four ideologies: sexism, settler colonialism, classism, and racism. Two-Spirit Native people also suffer from insidious forms of homophobia and transphobia. IFLT allows us to see these intersections and begin to think of practical, creative solutions to intersecting oppressions. IFLT also allows us to view tribal sovereignty and gender equity as closely linked. Native women’s liberation is a key component of lasting change in Indian country.<sup>36</sup> I take to heart Snyder’s explication of IFLT as “a spirit of critique that challenges static notions of tradition, identity, gender, sex and sexuality” and offer these critiques in the spirit of improving the lives of Native women and Two-Spirit people. Because IFLT is in its nascent stages of development, I hope that this Article will continue a necessary conversation about the efficacy of feminism in the context of Indian law.

The Article proceeds in three parts. In Part I, I explore how gender oppression is expressed in the context of Federal Indian law, often assumed to be a gender-neutral legal discipline. The only significant “gender” case in Federal Indian law is *Santa Clara Pueblo v. Martinez*.<sup>37</sup> In fact, the very few articles written by feminists about Indian law are almost invariably written about the famous 1978 patrilineal descent case.<sup>38</sup> However, there are gendered

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33. Snyder, *supra* note 31, at 401.

34. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 17 (3d ed. 2013) (discussing the emergence of feminist legal theory in the United States during the 1970s).

35. See, e.g., Emily Snyder, et. al., *Gender and Violence: Drawing on Indigenous Legal Resources*, 48 U.B.C. L. REV. 593 (2015).

36. Indian country is defined at 18 U.S.C. § 1151 as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

37. 436 U.S. 49 (1978).

38. See, e.g., CATHARINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN’S L.J. 347 (2002).

implications in a variety of other contexts in Federal Indian law and policy. I will explore some of those implications and proffer possibilities for sustaining a gender-conscious response. I also consider ways to increase the visibility and profile of Native women in the federal courts by crafting gender-conscious arguments.

In Part II, I consider how gender intersects with tribal legal systems. I am interested in ensuring that Native women are visible within tribal court systems, with the understanding that each tribal nation must approach gendered problems within the context of its own culture and history. In this Part, I also explore the possible remedies that can emerge from the development and reform of tribal statutes and policies. As I often say to my students, there is no reason that tribal codes in the United States cannot have the strongest protections for women, far exceeding those found in state and federal laws. Unfortunately, due to centuries of assimilation, many tribal justice systems adopted American legal “norms,” such as sexism. Some tribal legal systems, though, have managed to maintain some connection to pre-colonial gender equity principles. For this Part, I gathered several published tribal appellate court opinions that consider a question about tribal law and gender. I use these as examples for how tribal attorneys and judges have recognized gendered claims that are grounded in traditional tenets or principles. I also offer some examples of ways in which tribal courts have reinforced patriarchy.

My Article closes with Part III, which is a reflection on the experiences of Native women law students, professors, attorneys and legal scholars. This Part contributes to an ongoing dialogue about sexism faced by Native women attorneys and scholars. I believe the Indian Bar can do a great deal to ensure that Native women and Two-Spirit (LGBTQ+) attorneys in the workplace receive pay equity and respect from co-workers. I ultimately conclude that a gender-conscious Indian law paradigm serves common goals of tribal sovereignty and self-determination.

## I. FEDERAL INDIAN LAW

In this Part, I offer some thoughts on how IFLT can inform the thinking and practice of Federal Indian law.<sup>39</sup> Although issues of gender and sexuality arise every day in the lives of tribal people, much of Federal Indian law, both historical and contemporary, has usually proceeded as if it were gender-neutral, even though problematic results were often heavily gendered. Early Federal Indian law was established and cultivated by a patriarchal government that was

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39. By Federal Indian law, I mean to include both federal case law as well as statutory and regulatory codes.

preceded by colonial systems that emanated from patriarchal countries.<sup>40</sup> American law was based on the common law tradition of England, which largely treated women as property or chattel of their husbands.<sup>41</sup> Thus, at the founding of the United States, American women had little, if any, legal or political power.<sup>42</sup> And it was within this historic patriarchal paradigm that Federal Indian law was developed and fostered. In fact, it was not until the twentieth century that any real progress was made toward government and cultural reform for *any* women in the United States.

Patriarchy influenced the development of Federal Indian law in a variety of ways beyond the scope of this Article.<sup>43</sup> For example, some of the earliest formal legal relations between tribal nations and the federal government were marked with a significant absence and erasure of Native women's political power. One of the challenges faced by early Indian leaders was that European governments almost invariably declined to treat or even negotiate with Native women.<sup>44</sup> Thus, Native women's perspectives rarely found their way into treaty language.<sup>45</sup> Moreover, this tendency to treat only with Native men became part of the hegemonic introduction of patriarchy. As Native men were treated as more powerful in the eyes of Europeans, some internalized the Western concept of natural superiority of men and began to deny Native women their rightful role as equal participants in social and political spheres.<sup>46</sup> To the extent that federal officials encouraged or mandated that tribal nations adopt Christianity, this also introduced patriarchal logics that conceptualize men as heads of the household and women as subservient to men.

Formal government assimilation and forced "civilization" policies, which reached their height in the late nineteenth to mid-twentieth centuries, were also grounded in patriarchal logics.<sup>47</sup> For almost a century, the government forced

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40. See generally OLWEN HUFTON, *THE PROSPECT BEFORE HER: A HISTORY OF WOMEN IN WESTERN EUROPE, 1500-1800* (1995) (exploring how few legal rights European women had).

41. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* CH. 15 (Of Husband and Wife).

42. JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 4 (1991) ("[T]he Founding Fathers believed in the necessity of limiting legal equality primarily to white, male property owners.").

43. I highly recommend the work of Bethany Berger who has painstakingly chronicled the variety of different gendered issues that were embedded in historic Indian law. See Bethany R. Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1 (1997); Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KANSAS J. L. PUB. POL'Y 103 (2004).

44. Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KANSAS J. L. PUB. POL'Y 103, 105-106 (2004); see also BALDY, *supra* note 8, at 33 (noting that "When Westerners came to negotiate, however, they did not invite or involve women . . .").

45. See, e.g., Shirley R. Bysiewicz & Ruth E. Van de Mark, *The Legal Status of the Dakota Indian Woman*, 3 AM. INDIAN L. REV. 255, 266 (1975) ("The truly democratic nature of Dakota society was never comprehended, and the role of Dakota women in that process was completely ignored.").

46. See Joyce Green, *Taking Account of Aboriginal Feminism*, in *MAKING SPACE FOR INDIGENOUS FEMINISM* 20-32, 22-23 (Joyce Green ed., 2007).

47. See, e.g., Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 49



thousands of Native children to attend government or church-run boarding schools to formally indoctrinate them into “white” Christian culture.<sup>48</sup> Patriarchal control and gender hierarchy were institutionalized in these schools.<sup>49</sup> Native boys were taught to farm and weld, whereas Native girls were trained as domestic servants, developing skills in sewing and baking.<sup>50</sup> Native anthropologist K. Tsianina Lomawaima explains, “the underlying federal agenda . . . was to train Indian girls in subservience and submission to authority.”<sup>51</sup> In addition to enforcing Western gender roles, these boarding schools almost universally utilized corporal punishment as the primary means of discipline, and school officials inflicted horrific abuse upon many Native children.<sup>52</sup> Given the high rates of physical and sexual abuse that occurred during the boarding school era, we might even consider that Western gender hierarchies were literally beaten into the children.<sup>53</sup>

Even though gendered hegemony has been central to the colonial project, gendered consciousness is largely absent from Federal Indian law today. Berger notes that the words “women,” “wives,” and “mothers” were not even indexed in Felix Cohen’s famous treatise on Federal Indian Law.<sup>54</sup> In fact, one of the only clear connections between Native women and Federal Indian law comes from

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(2006) (“To Europeans, ownership of land and other property, Christianity, a nuclear family in which the man made all the decisions and children were strictly and harshly disciplined and were taught the value of hard work so that they could acquire more land and material goods, were life’s guiding principles. These principles shaped the devastation wrought by European settlers on America’s indigenous people.”).

48. See, e.g., *id.* at 46; Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 153 (2007); Linda J Lacey, *The White Man’s Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 357-359 (1986); Teresa Evans-Campbell et al., *Indian Boarding School Experience, Substance Use, and Mental Health among Urban Two-Spirit American Indian/Alaska Natives*, 38 AM. J. DRUG ALCOHOL ABUSE 421, 422 (2012).

49. See Eric Margolis, *Looking at Discipline, Looking at Labor: Photographic Representations of Indian Boarding Schools*, 19 VIS. STUD. 54, 55 (2004) (explaining that the long-term goal of boarding schools was “to exterminate the indigenous culture and replace it with the disciplines, habits, language, religion and practices of the dominant one.”).

50. *Id.* at 65 (“[J]ob training was heavily gendered. Boys were trained for farming or industrial occupations . . . girls for domestic service.”).

51. K. Tsianina Lomawaima, *Domesticity in the Federal Indian Schools: The Power of Authority Over Mind and Body*, 20 AM. ETHNOLOGIST 227, 229 (1993).

52. See Robert A. Trennert, *Corporal Punishment and the Politics of Indian Reform*, 29 HIST. EDUC. Q. 595, 595 (1989) (explaining that “corporal punishment was seen as a useful tool in promoting the discipline necessary for assimilation . . . the infliction of pain by means of spanking, whipping, and even beating was justified.”).

53. At a Phoenix boarding school, for example, “matrons regularly used male employees to whip unruly Indian girls.” *Id.* at 600.

54. Berger, *After Pocahontas*, *supra* note 43, at 2-3. Even today, the only references to gender in the current iteration of Cohen’s handbook come from twenty-first century efforts to draw attention to the high rate of victimization experienced by Native women, such as the Violence Against Women Act (VAWA). A word search for “women” in the current 2017 version of the Handbook yields several results, almost all connected to VAWA. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2017).

the seminal 1978 case *Santa Clara Pueblo v. Martinez*.<sup>55</sup> Many consider this case to be one of the most significant Indian law cases of the last century.<sup>56</sup>

In *Santa Clara*, Julia Martinez brought a federal lawsuit alleging gender discrimination by her tribe, the Santa Clara Pueblo.<sup>57</sup> At that time, the Pueblo had a strict patrilineal citizenship law. Because Ms. Martinez married a Navajo man, her children were not eligible for enrollment in the Pueblo, leading to numerous hardships for her family.<sup>58</sup> The case was appealed to the Supreme Court, and the Court was able to sidestep the question of gender discrimination by holding that the Pueblo (like all tribal governments) was immune from such suits.<sup>59</sup> Therefore, the substantive question of gender discrimination is left to the tribal nations. As Tweedy argues, the 1978 decision “led to a widespread, monolithic impression that tribes were not protective of the rights of women.”<sup>60</sup> While the case is largely lauded a “victory” for tribal nations,<sup>61</sup> some observers have raised concern that the decision is now being used by tribal nations to shield discriminatory laws from oversight.<sup>62</sup> Odawa legal scholar Wenona T. Singel writes, “Many have criticized the harm inflicted on individuals by tribes and have questioned whether tribal sovereignty’s legal affirmation was achieved on the backs of women and other oppressed individuals within tribal communities.”<sup>63</sup> This framework requires a feminist analysis—indeed, a *Native* feminist analysis to unpack.

Indigenous feminist legal theory, though, takes us far beyond the contours of *Santa Clara* and patrilineal descent laws, and illuminates the discovery of other gendered issues facing our communities that often are eclipsed in gender-neutral conversations about tribal resiliency and tribal sovereignty. IFLT encourages us to think critically about how Federal Indian law has developed with regard to gender, something that has not been done in mainstream feminist legal theory. Bringing an indigenous lens to mainstream feminist jurisprudence is necessary; merely being feminist in and of itself does not necessarily mean that one understands the historical legacy and nuances of colonization and contemporary Indian law. Many of my feminist friends, for example, are

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55. 436 U.S. 49 (1978).

56. JOANNE BARKER, *NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY* 100 (2011) (“The literature that has addressed the importance of the Martinez decision is exhaustive.”).

57. *Santa Clara*, 436 U.S. at 51.

58. *Id.* at 52.

59. *Id.* at 59 (“[W]e conclude that suits against the tribe under ICRA are barred by its sovereign immunity from suit.”).

60. Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392, 394 (2010).

61. Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 614 (2008) (the case is one of the “major wins for tribal interests.”).

62. Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 585 (2012) (“[F]ederal judges have openly expressed concern that tribal immunity from federal court review leaves tribes free to engage in acts that are deeply troubling on the level of fundamental substantive justice.”).

63. *Id.* at 586.

surprised to hear that Ruth Bader Ginsburg has ruled against tribal interests in several monumental cases.<sup>64</sup> While mainstream feminist theories center a universal “woman” in legal analysis, indigenous feminist theories center a “Native” woman as the focal point for analysis. In the following section, I explain how centering Native women leads to different types of practice strategies and interventions.

#### A. *Feminist Interventions in Federal Indian Law*

Because Federal Indian law on its surface often appears to be gender-neutral, we must be creative in thinking about how to bring gender back into Federal Indian law conversations. Here, I consider how IFLT can inform the praxis and practice of Indian law. For the past five years, I have worked with Cherokee attorney and playwright Mary Kathryn Nagle<sup>65</sup> to file gender-conscious amicus briefs in major Supreme Court Indian law cases. We initially conceived of this project as an intervention for the 2016 case *Dollar General v. Mississippi Choctaw*<sup>66</sup> (described *infra* at Section I.A.1) but have filed similar briefs in three other cases. This is a concerted effort to re-introduce gender as a necessary element of consideration in Indian law cases.<sup>67</sup> We saw the need to consider the impact of Federal Indian law on the lives of Native women and their children in ways that conventional jurisprudence could miss. By providing a gendered intervention, we believe that federal courts can grasp a larger picture of what is at stake than is otherwise possible with a gender-neutral approach. In other words, by arguing on behalf of women we enlarge the lens through which judges can view the case.<sup>68</sup> We are hopeful that these gender-conscious briefs are of interest to at least some of the Justices and may be able to influence votes on key questions of sovereignty and self-determination.

The primary client for these amicus briefs has been the National Indigenous Women’s Resource Center (NIWRC), a national non-profit organization dedicated to addressing domestic violence and sexual assault in tribal communities.<sup>69</sup> Over 100 local and regional anti-violence coalitions (including

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64. See Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003,1004 (2009) (noting that “several of her opinions have garnered considerable (and justified) criticism from Indian law scholars and tribal leaders . . .”).

65. Ms. Nagle serves as counsel of record in these briefs.

66. 136 S. Ct. 2159 (2016).

67. A similar brief had been filed by other attorneys in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2007).

68. FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 5 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (“Feminist consciousness broadens and widens the lens through which we view law and helps the decision maker overcome the natural tendency to see things the same way or do things ‘the way they’ve always been done.’”).

69. *Organizational History*, NAT’L INDIGENOUS WOMEN’S RESOURCE CTR., <http://www.niwrc.org/content/organizational-history> [<http://perma.cc/Z5NM-YMMG>] (“[NIWRC is] dedicated to reclaiming the sovereignty of Native nations and safeguarding Native women and their children.”).

non-Native organizations) have also signed on to these briefs.<sup>70</sup> The following Section summarizes the three briefs we have filed, along with an assessment of their efficacy.

### 1. Dollar General v. Mississippi Choctaw

In *Dollar General v. Mississippi Choctaw*,<sup>71</sup> the Court considered whether non-Indian businesses could be subject to tribal civil jurisdiction. At its core, however, the case was about a young child who had been sexually victimized by a non-Indian,<sup>72</sup> a story that ultimately was eclipsed by the dry, mechanical question of civil adjudicatory authority.

Many Native women's organizations were quite concerned about the stakes in *Dollar General* because the case concerned sexual abuse.<sup>73</sup> The facts reveal an all-too-common theme in Indian country: a non-Indian commits acts of sexual violence and escapes tribal criminal jurisdiction. Since the 1978 Supreme Court decision in *Oliphant v. Suquamish*,<sup>74</sup> tribal justice systems had been prohibited from prosecuting non-Indians—for any crime, no matter how heinous or insidious. According to the National Institute of Justice, most Native victims report that they have had a least one perpetrator who is non-Native.<sup>75</sup> The facts in *Dollar General* date back to 2003, when the white manager of a reservation-based Dollar General retail establishment molested a 13-year-old Choctaw boy who had been temporarily placed with the store though a Youth Opportunity Program.<sup>76</sup> Even though the victim reported the abuse—a rarity in itself—the tribal government had no power to prosecute the perpetrator since he was non-Indian. The question of whether the company could be vicariously liable for the harm, though, raised different legal questions, since *Oliphant* did not directly address civil jurisdiction.

Seeking justice, the child's parents filed a civil lawsuit in Mississippi Choctaw tribal court against the perpetrator's employer, the Dollar General Corporation, which immediately objected to tribal court jurisdiction based on the same principles elucidated in *Oliphant*.<sup>77</sup> Even though Dollar General had a

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70. The *Dollar General* amicus brief included 104 additional organizations beyond NIWRC. Brief of Amici Curiae National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Respondents at 1, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) [hereinafter NIWRC Brief, *Dollar General v. Mississippi Choctaw*].

71. 136 S. Ct. 2159 (2016).

72. *Doglencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

73. Andrew Bard Epstein, *Dollar General Takes Its Case Against Indigenous Sovereignty to the Supreme Court*, THE NATION, (Dec. 7, 2015) <https://www.thenation.com/article/dollar-general-takes-its-case-against-indigenous-sovereignty-to-the-supreme-court/> [<https://perma.cc/8Q3B-NPXQ>].

74. 435 U.S. 191 (1978).

75. ROSAY, *supra* note 5, at 18-19.

76. *Doglencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

77. *Id.* at 169-70.

contractual relationship with the Choctaw tribe and even though they operated a retail store on the reservation, they argued that the tribal court had no jurisdiction over them in this kind of civil tort case.<sup>78</sup> Dollar General appealed the case to the tribal supreme court, then into federal district court and the Fifth Circuit, and lost their argument at every juncture (although the case against the manager himself was dismissed). When the case was granted certiorari by the Supreme Court, NIWRC expressed interest in filing a brief on behalf of Indian country victims.

As we began strategizing about the purpose of the amicus brief, it became clear that our primary goal was to encourage the Justices to consider the long-term ramifications of their decision on victims of abuse. We decided to focus on gender-conscious public policy arguments since the merits briefs were, necessarily, heavily focused on Supreme Court precedents and canons of Indian law. There simply wouldn't be enough space in the merits briefs to include the policy arguments we wanted the Court to consider.

Thus, we took the opportunity to argue that a finding against the tribe would lead to the re-victimization of victims of violent crimes on Indian land, since they would not be able to seek justice in tribal court for the violent and abusive actions of non-Indians.<sup>79</sup> Using statistical data and congressional findings, the brief established that Native women and children are at extremely high risk for violence. This in turn led us to argue that there are limited remedies for this violence, and that the ability to sue a non-Native for violence was crucial to the well-being of Native people.<sup>80</sup>

We also raised what we believed was a novel argument about the "consensual relations" test established in *Montana v. United States* (1981).<sup>81</sup> Under this *Montana* test, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>82</sup> Dollar General argued that this test should not allow suits against nonmembers for common law tort actions, because it does not fit under the categories of taxation or licensing and that nonmembers must offer "clear and unequivocal consent" to adjudicatory jurisdiction.<sup>83</sup> The Choctaw tribe countered that the test includes the phrase "or other means" which should be read to include adjudicative authority over matters that arise as part of the consensual relationship.<sup>84</sup> In the NIWRC brief, we considered Dollar General's arguments in light of sexual abuse, arguing that Dollar General's position

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78. *Id.*

79. NIWRC Brief, *Dollar General v. Mississippi Choctaw*, *supra* note 70.

80. *Id.* at 4.

81. *Id.* at 5-7.

82. *Montana v. United States*, 450 U.S. 544, 565 (1981).

83. Brief for the Petitioners at 18, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

84. Brief for Respondents at 16, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

would create an untenable situation where tribal courts would have to inquire as to whether a non-Indian perpetrator clearly and unequivocally expressed his consent to tribal jurisdiction before he sexually assaulted or abused a Native woman or child. Not only is the scenario implausible, it is unconscionable. Native women and children do not consent to being assaulted on tribal lands, yet this proffered revision of *Montana*'s consensual relationships would render their profound lack of consent a legal nullity.<sup>85</sup>

We urged the Court to find in favor of the Mississippi Choctaw Nation so that other victims would be able to hold offenders accountable in tribal civil courts. While the brief itself did not use the term “feminist,” the brief was informed by IFLT, since it considered the twin oppressions of sexism and settler colonialism in its reasoning. Many Native women from around the country came to the Supreme Court the day of the oral argument and staged a prayerful demonstration to further amplify the importance of the case, which significantly raised the profile of the case for tribal leaders.<sup>86</sup> The oral argument itself focused largely on Federal Indian law precedent, but there were two references to concerns about victims. After Dollar General admitted that they would have to acquiesce to tribal civil jurisdiction regarding business or commercial matters, Justice Kagan asked, “[i]t’s a bit of an odd argument, isn’t it, Mr. Goldstein, that there’s less of a sovereign interest in protecting your own citizens than in enforcing your licensing laws?”<sup>87</sup> Later, during the Choctaw arguments, counsel Neal Katyal referenced the NIWRC brief, stating, “[t]he Domestic Violence brief gives other reasons why in general people want to bring suits in tribal courts because it’s a more familiar process and one closer, geographically, to them.”<sup>88</sup>

Six months later, we learned that the Court had deadlocked at a vote of 4-4 and no opinion was rendered, essentially upholding the Fifth Circuit’s favorable decision for the tribal government but establishing no nationwide precedent.<sup>89</sup> It was the longest pending case of the 2015 term. The tie-vote can be fairly characterized as “victory” or, perhaps more accurately, a “close call,” since it was clear that four justices were willing to strip tribal nations of civil jurisdiction

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85. NIWRC Brief, *Dollar General v. Mississippi Choctaw*, *supra* note 70, at 6.

86. Rebecca Nagle, *Native Women Protest Sexual Violence Case at the Supreme Court*, BITCH MEDIA (Dec. 4, 2015), <https://www.bitchmedia.org/article/native-women-take-fight-against-sexual-violence-supreme-court> [https://perma.cc/73PB-R2GB].

87. Transcript of Oral Argument at 23, *Dollar General v. Mississippi Choctaw*, 136 S. Ct. 2159 (2016) (No. 13-1496).

88. *Id.*

89. Justice Scalia had passed away during the Court’s term, on February 13, 2016, and left the Court with eight justices for a period of time.

over non-Indians.<sup>90</sup> Unfortunately, the absence of a written opinion in this case means that we do not know if the NIWRC brief held any weight or importance for the Court. The next case, however, offered reasons to be more optimistic.

## 2. United States v. Bryant

In the same term as *Dollar General*, we also filed a brief in *United States v. Bryant*.<sup>91</sup> This case tested the constitutionality of the federal habitual offender statute, which allows for federal criminal justice authority over people who have two or more convictions in tribal court.<sup>92</sup> Bryant, the Native defendant, was a serial domestic violence offender with multiple tribal court convictions for increasingly disturbing violent behavior against women. Importantly, the maximum imprisonment sentence that tribal nations were able to impose at that time was one year, pursuant to the Indian Civil Rights Act of 1968 (ICRA).<sup>93</sup> The habitual offender statute was passed as part of the Violence Against Women Act (VAWA)<sup>94</sup> in 2005, and was intended to address the problem of short tribal jail sentences for abusers by providing for federal criminal jurisdiction after two predicate cases.<sup>95</sup> Once charged in federal court under the habitual offender statute, Bryant argued that his tribal court convictions were uncounseled and thus should not have been considered as a trigger for federal prosecution.<sup>96</sup> Even though he had court-appointed counsel in federal court, he argued that the habitual offender statute itself was unconstitutional because it relied on uncounseled tribal court convictions.

Given that the case turned on a fact pattern involving a dangerous serial abuser, NIWRC again filed a brief on behalf of Native victims.<sup>97</sup> Since the merits briefs needed to focus squarely on Sixth Amendment arguments, the NIWRC brief could enlarge the scope of consideration to include victims of crime.<sup>98</sup> Nagle and I crafted the brief using some of the same statistics we had cited in the *Dollar General* brief, again proffering that Native women were at heightened risk for abuse and were in need of special consideration.<sup>99</sup> We argued that the federal habitual offender statute was one of the only ways that serial abusers on

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90. Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Women and Children*, 41 HARV. J.L. & GENDER 179 (2018) (offering an optimistic assessment of the tie vote).

91. 136 S. Ct. 1954 (2016).

92. 18 U.S.C. § 117(a).

93. Indian Civil Rights Act, 25 U.S.C. § 1302.

94. Pub. L. 109-162, tit. IX, § 909 (2006).

95. 18 U.S.C. § 117(a).

96. 136 S. Ct. at 1952.

97. Brief of Amici Curiae National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Petitioner, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

98. *Id.* The entire brief was framed around the central theme of victim safety.

99. *Id.* at 13-14.

reservations could be held accountable. Since tribal courts are limited to a maximum penalty of three years per offense (only one year at the time of Bryant's offenses), abusers such as Bryant were in and out of tribal jail on a regular basis. Thus, the only way to remove him from the community for the long term would be for the federal government to prosecute him pursuant to the habitual offender statute. Ideally, of course, tribal nations would not be limited in their ability to impose an appropriate carceral sentence on a violent offender, but until that limitation is eliminated, this kind of federal prosecution may mean the difference between life and death of Native women on tribal lands. We also advanced tribal sovereignty arguments by linking the safety and well-being of Native women to the strength and prosperity of tribal nations.<sup>100</sup>

Because *Bryant* concerned a law that was passed as part of the Violence Against Women Act, it is somewhat surprising that violence against Native women was only mentioned near the end of the oral arguments, when counsel for the United States remarked that Bryant "kept battering women in Indian country and contributed to that epidemic of domestic violence."<sup>101</sup> The bulk of the oral arguments focused on the Sixth Amendment right to counsel, the Indian Civil Rights Act, and the relevant Supreme Court precedent on those questions.<sup>102</sup>

However, unlike *Dollar General*, which lingered in the Court for over six months, the Court issued its opinion in *Bryant* in less than two months. *Bryant* was a unanimous decision (8-0) in favor of upholding the federal statute, with Justice Ruth Bader Ginsburg authoring the majority opinion.<sup>103</sup> In this case, it is clear that the NIWRC brief was, at the very least, consulted in the construction of the decision.<sup>104</sup> Not only did Ginsburg mention some of the statistics included in the NIWRC brief, but there are also several parallels between the structure of the NIWRC brief and the Ginsburg opinion.<sup>105</sup> This opinion suggested to us that Justice Ginsburg had found the brief informative and relevant.<sup>106</sup>

100. *Id.* at 24.

101. Transcript of Oral Argument at 42, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

102. *Id.*

103. *United States v. Bryant*, 136 S. Ct. 1954 (2016). Justice Thomas authored a concurring opinion. 136 S. Ct. at 1967.

104. Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General...And Beyond*, 2017 ILL. L. REV. 1901, 1930 (2017).

105. Ginsburg quoted two statements of Senator John McCain that we had also used in the brief. *Bryant*, 136 S. Ct. at 1959, 1961. Moreover, she referenced some of the same precedent we cited, including *Crow Dog* and the Indian Civil Rights Act as well as statistical data we used in the brief. *Id.* at 1961. She also cited to work published by Sarah Deer. *Id.* at 1960.

106. Not all Native feminists or tribal sovereignty advocates are in favor of the outcome in *Bryant*. The over-incarceration of Native people is a serious problem, and to the extent that *Bryant* is about increased federal punitive control over Native people, there is not consensus on the question of the habitual offender statute. Tribal and federal public defenders have raised concerns about the ramifications of the *Bryant* decision for the right to counsel in tribal court. See, e.g., Barbara L. Creel & John P. LaVelle, *High Court Denies Rights of Natives*, ALBUQUERQUE J. (June 26, 2016), <https://www.abqjournal.com/798285/high-court-denies-rights-of-natives.html> [<https://perma.cc/6S2W-LZYM>].



### 3. *Carpenter v. Murphy*

Hopeful that the Court was receptive to gender-conscious arguments, NIWRC filed a third amicus brief in late 2018 in *Carpenter v. Murphy*,<sup>107</sup> a case argued in November 2018 but not decided in the 2018-2019 term. The Court has ordered that re-arguments take place in the next term, and the case remains undecided as of the publication of this Article. Because the case centers on the jurisdiction over a grisly homicide, it may seem curious that we filed a brief siding with the arguments of the defendant. From the outside, *Murphy* asks a seemingly gender-neutral question of whether or not there is still a Creek reservation in Oklahoma. But because of the implications for the safety of Native women, NIWRC again participated as an amicus.<sup>108</sup>

The case began in 1999, when Patrick Dwayne Murphy, a citizen of the Muscogee (Creek) Nation (MCN), murdered George Jacobs, another citizen of the MCN on a tract of land that was originally within the exterior borders of the reservation described in the 1866 treaty between the MCN and the United States government.<sup>109</sup> The state of Oklahoma prosecuted the case, and Murphy was convicted and sentenced to death.<sup>110</sup> Several years later, Murphy filed a habeas petition in federal court, arguing, among other things, that since his crime occurred on an Indian reservation—a quintessential type of “Indian country”—the state’s prosecution was unlawful.

It’s important to understand that, with some significant exceptions, the federal government and tribal government, and not the state government, share concurrent jurisdiction over a murder committed by an Indian on an Indian reservation.<sup>111</sup> Murphy argued that he had been tried and convicted in the wrong court—that since his crime occurred on an Indian reservation, the *federal* government should have prosecuted him. The state’s main response was that the reservation no longer existed, and thus state jurisdiction was lawful. Not surprisingly, the merits briefs (and most of the amicus briefs) focused on the federal precedent, the long, sordid history of Oklahoma statehood, and the callous but failed efforts to extinguish the MCN altogether. Although the legal question before the court is relatively simple (“Does the reservation still exist?”), the legal arguments required extensive historical research to uncover Congress’s intended boundaries of the reservation. Although it is not a party to the case, the decision will obviously have great ramifications for the MCN. Once the case

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107. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018).

108. Brief of Amici Curiae National Indigenous Women’s Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault in Support of Respondent, *Carpenter v. Murphy* (2018) (No. 17-1107) [hereinafter NIWRC Brief, *Carpenter v. Murphy*].

109. *Murphy v. Royal*, 875 F.3d 896, 904-905 (10th Cir. 2017) (“Mr. Murphy and the State agree that the offense in this case occurred within the Creek Reservation if Congress has not disestablished it.”).

110. *Id.*

111. Major Crimes Act, 18 U.S.C. § 1153.

reached the circuit level, the MCN was granted leave to participate in oral argument as *amicus curiae*.

The NIWRC brief, unlike the others, brought the interests of Native women to the discussion.<sup>112</sup> We argued that the existing definition of “Indian Country” should not be changed, because it is important that tribal governments exercise expansive territorial jurisdiction to protect women and children from violence. As part of this argument, we noted that in passing VAWA 2013 (explained *infra* at Section I.B), Congress had recently restored tribal criminal jurisdiction over non-Indians who are charged with certain domestic violence crimes. We argued that when Congress passed that law, it clearly demarcated that this jurisdiction would apply to “Indian country” and that Congress could not have anticipated that the Supreme Court would suddenly change the rules for what constituted “Indian country.”<sup>113</sup> We supported the arguments raised by Murphy and other amici that reservation disestablishment could only be achieved through clear congressional intent, which had not happened in this case.

The outcome in the *Murphy* case matters to Native women. If the Court rules that the MCN reservation is still recognized by the United States, it will reaffirm that MCN has the power to police and prosecute crimes committed anywhere within the reservation, providing more safety and security to Native women who rely on their tribal government to respond to domestic violence and sexual assault. By bringing these concerns to the discussion, we hope that the Justices will be sympathetic to arguments from tribal nations that can maximize their potential to protect tribal citizens from harm. Unlike *Dollar General* and *Bryant*, however, the initial oral arguments did not reveal any particular interest in how victims might experience the ramifications of the decision. There is also the possibility of another tie, as Justice Gorsuch has recused himself from the consideration of the case.<sup>114</sup>

It is premature to claim that briefs informed by IFLT will have a significant impact on the Court, but this certainly is not a reason to abandon the efforts. Professor Matthew L.M. Fletcher analyzed the efficacy of amicus briefs in Indian law cases in a 2012 article, concluding that “the best amicus briefs in Indian law cases offer some specialized and useful bits of information to the Supreme Court, information not otherwise available.”<sup>115</sup> The key is finding the synergy between the interests of Native women and the interests of tribal governments. The NIWRC briefs also achieve some of the goals of IFLT by linking the rights of tribal nations to the empowerment of Native women. As similar arguments are offered in future cases (both in the Courts of Appeal and the Supreme Court), we

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112. NIWRC Brief, *Carpenter v. Murphy*, *supra* note 108.

113. *Id.* at 23.

114. Justice Gorsuch was serving as a judge on the 10th Circuit Court of Appeals and took part in the en banc consideration for a re-hearing in the case.

115. Matthew L.M. Fletcher, *The Utility of Amicus Briefs in the Supreme Court's Indian Cases*, 2 AM. INDIAN L.J. 38, 51 (2013).

may begin to develop future strategies about how to convey support for tribal sovereignty through a gendered lens.

### *B. Federal Statutory Reform*

Besides litigation in federal courts, many attorneys work on federal law reform on behalf of tribal nations or tribal interests, and arguments informed by IFLT can be informative here as well. From 1900 to 2015, tribal interests lost 76.5 percent of the time at the Supreme Court.<sup>116</sup> Some argue that efforts to protect tribal interests might be better served by focusing on Congress as opposed to the courts.<sup>117</sup>

Certainly since Native women began working on the Violence Against Women Act, originally passed in 1994, there has been an infusion of Native women's voices into Federal Indian legislation, culminating with the passage of the Tribal Law and Order Act of 2010 (TLOA)<sup>118</sup> and the 2013 reauthorization of the Violence Against Women Act (VAWA 2013),<sup>119</sup> both of which restored crucial aspects of tribal sovereignty.

TLOA and VAWA 2013 were omnibus bills containing a wealth of directives and funding sources to deal with crime in Indian country. They made two significant changes to tribal criminal jurisdiction. In TLOA, the ICRA was revised to allow tribal nations that meet certain benchmarks to sentence offenders to up to three years per offense rather than the previous one-year maximum. In VAWA 2013, Congress restored tribal criminal jurisdiction over non-Indians, but only for the crimes of domestic violence, dating violence, or criminal violation of a protection order, and only if the tribal nation has complied with various federal requirements.<sup>120</sup> While the achievements may seem modest, neither federal law would exist without the activism of Native women, including attorneys, who articulated the need for these restorations of tribal authority.

We can expect to see continued momentum on Congressional actions to address violence against Native women, particularly because of heightened visibility of the "Missing and Murdered Indigenous Women" movements that are emerging across the United States. The first two Native women in Congress are also speaking out and sponsoring legislation intended to address the crisis of

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116. Berger, *supra* note 104, at 1907.

117. Kirsten Matoy Carlson, *Congress and Indians*, 86 COLO. L. REV. 77, 81 (2015) ("[M]any scholars, tribal leaders, and advocates have recently suggested that Congress may be more responsive than the courts to Indian interests and have turned to legislative strategies for pursuing and protecting tribal interests, especially tribal self-determination and jurisdiction.").

118. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

119. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

120. 25 U.S.C. § 1304.

violence against Native women.<sup>121</sup> I am cautiously optimistic that continued engagement with law reform, informed by IFLT, will continue to yield positive results.<sup>122</sup>

In addition to pursuing new legislation like TLOA and VAWA, advocates should also work toward the enforcement of existing Federal Indian law. In truth, much of the substance of TLOA and VAWA are directives to federal agencies to improve the way they implement existing laws and develop policy. For example, TLOA requires the Department of Justice to release a yearly report that summarizes federal prosecution activities in Indian country.<sup>123</sup> Indian law practitioners, along with tribal leaders, must be vigilant to ensure that the provisions are being implemented in ways that improve Native lives. Federal legal reform in Congress is not guaranteed to achieve change on the ground without sustained oversight. For example, a 2017 Office of the Inspector General report concluded that significant goals of TLOA had not been achieved even though the Obama administration had claimed that the law was a success.<sup>124</sup> It is not enough to pass a law—we must ensure its enforcement.

### C. Future Areas for Reform

Thus far, the efforts to bring gender-consciousness to Federal Indian law have focused on criminal justice reform. But there are other gendered issues that deserve renewed attention, including reproductive justice and environmental law. I offer a few thoughts on how IFLT might inform efforts in these arenas. Here, I focus on reproductive justice and environmental justice, though these are only two examples of areas where IFLT could be informative.

Native women have struggled mightily for reproductive justice over the course of the twentieth century. Allegations that the federal government, via the Indian Health Service (IHS), forcibly sterilized Native women or sterilized them without informed consent have been widely documented, with a focus on mid-

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121. See, e.g., The Not Invisible Act of 2019, H.R. 2438; Violence Against Women Reauthorization Act (VAWA) of 2019, H.R. 1585; SURVIVE Act of 2019, H.R. 1351; Studying the Missing and Murdered Indian Crisis Act of 2019, H.R. 2029; The Native Youth and Tribal Officer Protection Act of 2019, H.R. 958.

122. Again, it is important to acknowledge that there is not clear consensus even among Native feminists as to the best way to resolve gender-based violence committed against Native women. Some have raised valid concerns that laws like VAWA and TLOA promote the further assimilation of tribal courts by requiring them to comply with new federal standards, and that the “law and order” model may not be the best way to achieve justice for Native victims of gender-based violence. See, e.g., Kimberly Robertson, *The “Law and Order” of Violence Against Native Women: A Native Feminist Analysis of the Tribal Law and Order Act*, 5 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y 1 (2016).

123. Section 211, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

124. OFF. OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT’S TRIBAL LAW ENFORCEMENT EFFORTS PURSUANT TO THE TRIBAL LAW AND ORDER ACT OF 2010, at i (2017), <https://oig.justice.gov/reports/2017/e1801.pdf> [<https://perma.cc/2VH5-WSC3>].

to-late twentieth century practices.<sup>125</sup> There has been no true reckoning or accountability for this history. Native women have also been targets of aggressive birth control policies, including the use of Depo-Provera and Norplant, long-acting contraceptives that can pose dangers to many women.<sup>126</sup> Indeed, it seems that the unofficial policy of the federal government has been to *stop* Native women from reproducing. As noted in the early passages of this Article, Native women today experience significantly higher rates of pre-term births and infant mortality, and are less likely to access pre-natal care during pregnancy.<sup>127</sup> Changes to federal laws and policies could be informed by IFLT, and perhaps there will be a need for litigation at some point to ensure that Native women have access to the resources necessary to bring healthy lives into the world.

The inverse of this battle is more controversial—namely, that Native women lack access to abortion services when they need to terminate pregnancies, due to the prohibition on using federal dollars to fund abortion services.<sup>128</sup> To be sure, abortion is as contentious within Native communities as it is within the rest of the United States, particularly given the fraught history of sterilization abuse and widespread child removal that has taken place in our communities.<sup>129</sup> Nonetheless, as a Native feminist who supports the right to abortion, I believe we must do more to support the full range of reproductive choices and options to Native women. IHS, as a federally funded agency, cannot provide abortion services for Native women (with limited exceptions for life of the woman, rape, and incest) because the so-called “Hyde Amendment” prohibits the use of federal funding for abortion services. The Hyde Amendment was first passed in 1976, and was upheld in *Harris v. McRae* in 1980.<sup>130</sup> However, no arguments were proffered in *McRae* for Native women.<sup>131</sup> Moreover, there is no comprehensive contemporary movement to repeal the Hyde Amendment in the Native legal community, despite evidence that Hyde Amendment, by prohibiting abortion, puts Native women’s lives and bodies at risk. The Native American Women’s Health Education and Resource Center (NAWHERC), a Native owned-and-

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125. See, e.g., Brint Dillingham, *Indian Women and IHS Sterilization Practices*, 3 AM. INDIAN J. 27 (1977); Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400 (2000); Linda Robyn, *Sterilization of American Indian Women Revisited: Another Attempt to Solve the “Indian Problem,”* in CRIME AND SOCIAL JUSTICE IN INDIAN COUNTRY 39-53 (Marianne O. Nielsen & Karen Jarratt-Snyder eds., 2018).

126. Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 119 (2004).

127. See *supra* notes 13-18 and accompanying text.

128. This law is known as the “Hyde Amendment.” Pub. L. 96-123, § 109, 93 Stat. 926.

129. See, e.g., Carly Thomsen, *From Refusing Stigmatization toward Celebration: New Directions for Reproductive Justice Activism*, 39 FEM. STUD. 149, 151-53 (2013) (chronicling the story of Cecilia Fire Thunder, the first contemporary female president of the Oglala Lakota Nation, who was impeached because of her support for abortion rights).

130. 448 U.S. 297 (1980).

131. A word search of the amicus briefs and the transcript of oral arguments yielded no mention of Native women, tribal governments, or Indian Health Service.

operated non-profit organization near the Yankton Sioux Indian Reservation in South Dakota has been one of the only Native women's entities to address reproductive justice in a sustained fashion.<sup>132</sup> They have raised national concerns about the lack of access to sexual assault forensic exams and Plan B within the Indian Health Service systems. They remain one of the only Native organizations that regularly call for a repeal of the Hyde Amendment. The mainstream efforts to repeal the Hyde Amendment are spearheaded by a nonprofit organization called All Above All, and there are several mentions of Native women in the materials on their webpage.<sup>133</sup>

IFLT is also a useful framework for thinking about environmental law. Gender intersects with issues of environmental protection in several ways. Native women have unique vested interests in tribal environmental law and have been at the forefront of major activism efforts such as the Idle No More movement in Canada and the NoDAPL efforts at Standing Rock.<sup>134</sup> There is a gendered nature to environmental degradation for many tribal cultures, which perceive the earth as feminine.<sup>135</sup> In a practical sense, the oil extraction projects of major corporations have wrought unique health issues for Native women who have discovered, for example, toxins in their breast milk.<sup>136</sup> In addition, extractive projects such as fracking have wreaked havoc on the safety of Native women and children through the creation of "man camps"—temporary housing encampments for non-Native pipeline workers that are set up in or adjacent to tribal lands.<sup>137</sup> These "man camps" have resulted in untold tragedy in many tribal

132. *Reproductive Justice Program*, NATIVE AM. WOMEN'S HEALTH EDUC. RESOURCE CTR., <http://www.nativeshop.org/programs/reproductive-justice.html> [<https://perma.cc/P9AF-SPJM>].

133. *Search Results for "Native"*, ALL ABOVE ALL, <https://allaboveall.org/?s=Native> [<https://perma.cc/NLD9-FH4T>] (showing that a search for "Native" on the website yielded over a dozen hits).

134. See, e.g., Kim TallBear, *Badass (Indigenous) Women Caretake Relations: #NoDAPL, #IdleNoMore, #BlackLivesMatter, Cultural Anthropology*, SOC'Y FOR CULTURAL ANTHROPOLOGY (2016), <https://culanth.org/fieldsights/badass-indigenous-women-caretake-relations-no-dapl-idle-no-more-black-lives-matter> [<https://perma.cc/7KWW-LDY4>] ("Women of the Oceti Sakowin, or the Seven Council Fires, are at the center of the movement at Standing Rock, widely dubbed #NoDAPL."); Meredith Privott, *An Ethos of Responsibility and Indigenous Women Water Protectors in the #NoDAPL Movement*, 43 AM. INDIAN Q. 74, 76 (2019) ("[T]he voices of Indigenous women water protectors (of Standing Rock and beyond) figure prominently, as women water protectors undeniably played a central role in shaping and forwarding this movement.").

135. Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. GEND. & L. (forthcoming 2019) ("Because many tribal cultures ascribe important feminine qualities to the land, the mistreatment of "mother earth" carries important gendered consequences.").

136. See, e.g., Bruce E. Johansen, *The Inuit's Struggle with Dioxins and Other Organic Pollutants*, 26 AM. INDIAN Q. 479, 479 (2002) ("Thus the Arctic, which seems so clean on the surface, has become one of the most contaminated places on Earth—a place where Inuit mothers think twice before breast-feeding their babies because high levels of dioxins and other industrial chemicals are being detected in their breast milk"); Janice Wormworth, *Toxins and Tradition: The Impact of Food-Chain Contamination on the Inuit of Northern Quebec*, 152 CAN. MED. ASSOC. J. 1237, 1237 (1995) ("The levels of polychlorinated biphenyls (PCBs) he found [in Indigenous mothers' breast milk] were five times greater than those among Caucasian women living in southern Quebec.").

137. See, e.g., Kathleen Finn et al., *Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation*, 40 HARV. J.L.

communities because of the high rates of sexual violence and sex trafficking that accompany them.<sup>138</sup>

Thus far, an opportunity has not presented itself for bringing a gender-conscious argument to bear in the environmental context, but that most certainly will change in the coming years as more becomes known as to how environment degradation has unique gendered outcomes.

## II. TRIBAL LAW

In this section, I analyze an IFLT approach to tribal law (as opposed to Federal Indian law). To determine how to bring feminism into conversation with tribal-centric law, we must consider how contemporary Native nations are situated with regard to gender and sexuality, a nearly impossible task when considering the diversity of tribal cultures. While many tribal nations emanate from cultures that are matrilineal and matrilineal, it is clear that some tribal nations operate with patriarchal principles that are products of long-term assimilation with American systems, as discussed earlier in this Article. We cannot assume that tribal justice systems have adequately addressed colonial patriarchy.

Historically, tribal nations that wished to operate legal systems that would be recognized by the federal government were nearly always encouraged to build a tribal court based on Western legal principles, to the detriment of traditional tribal dispute processes.<sup>139</sup> As some tribal legal systems became assimilated, they adopted the trappings of Western law and order, a system that is grounded in gender hierarchy.<sup>140</sup> Thus, attorneys who practice within the confines of tribal law also must be thoughtful about the extent to which assimilated court systems have ignored gender as a central component of analysis. Because most tribal legal systems have been heavily influenced by American culture, we see the same challenges with assumptions about gender-neutral laws. Assimilated legal systems adopted much of the framework and philosophy of the American systems of governance, including exact language in many cases.<sup>141</sup> And, of

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& GENDER 1, 2 (2017) (“[T]he influx of well-paid male oil and gas workers, living in temporary housing often referred to as “man camps,” has coincided with a disturbing increase in sex trafficking of Native women.”).

138. *Id.* at 2-3.

139. Kiowa legal scholar Kirke Kickingbird remarks that “European colonists . . . were unwilling or unable to leave the Indian systems of justice intact. The result was a continuing erosion of Indian control over their own institutions.” Kirke Kickingbird, *In Our Image...After Our Likeness: The Drive for Assimilation of Indian Court Systems*, 13 AM. CRIM. LAW REV. 675, 680 (1976).

140. FEMINIST JUDGMENTS, *supra* note 68, at 4 (“[W]hat passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies.”).

141. Many contemporary tribal courts are outgrowths of the first courts established on reservations by the Bureau of Indian Affairs during the late nineteenth century—courts that were designed to assimilate Native people into a western, Anglo-American legal system. See Julia M Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN LAW REV. 253, 257-258 (2017).

course, the early American legal system is hardly the starting point for a government interested in gender equity in society. In that sense, re-infusing gender and sexuality into our tribal legal systems moves us closer to a decolonizing approach to tribal legal matters.

In this Part, I argue that issues of gender and sexuality can and should be considered in the context of tribal court litigation and tribal statutory development. Ann Tweedy's excellent 2010 article, *Sex Discrimination Under Tribal Law*, takes a comprehensive look at sex discrimination prohibitions in tribal constitutions, statutes, cases, and policies.<sup>142</sup> It is important to note that the Indian Civil Rights Act (ICRA) currently allows tribal governments and courts to make gender differentiations under certain circumstances. ICRA imposes certain language from the federal constitution onto tribal governments, including the following passage, which mirrors language from the Fourteenth Amendment: "[No Indian tribe shall] deny to any person within its jurisdiction the *equal protection* of its laws or deprive any person of liberty or property without *due process* of law."<sup>143</sup> Under most readings of Federal Indian law, tribal courts are free to interpret that equal protection and due process language in ways that may differ from the interpretation of the federal Constitution by the federal judiciary. Still, many tribal courts do not deviate significantly from federal constitutional law in interpreting ICRA language.

In federal courts, of course, the equal protection provision of the Fourteenth Amendment was not applied to gender discrimination until the late twentieth century, and gender discrimination has never seen more than "intermediate scrutiny"—a concept that is not altogether clear given the few gender discrimination cases that reach the highest Court. In *United States v. Virginia*, perhaps the most "feminist" decision ever issued by the Supreme Court, Justice Ginsburg stopped short of requiring "strict scrutiny" in gender distinction cases, writing that gender classifications must be given "heightened scrutiny."<sup>144</sup>

Many tribal codes indicate that custom and tradition are viable laws,<sup>145</sup> yet we do not often see much engagement with culture and tradition, at least in the appellate courts of tribes that publish their opinions. There are vital lessons embedded within many tribal legal concepts, and gender can play a role in many different types of cases.

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142. Tweedy, *Sex Discrimination Under Tribal Law*, *supra* note 60.

143. 25 U.S.C. § 1302(a)(8) (emphasis added).

144. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

145. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 248 (1994).



### A. *Gender in Tribal Court Litigation*

For the past several years, I have collected an assortment of tribal court opinions that engage with gender as a legal category. Because most tribal appellate cases are not readily accessible,<sup>146</sup> these cases are not necessarily representative of how all tribal courts consider gender. I am currently working with an inventory of approximately twenty tribal court cases that engage with gender in a meaningful way, including in dicta, in an effort to widen the scope. I gathered this corpus of decisions by performing keyword searches in various tribal court databases, including gendered words such as “woman” and “matrilineal” and selecting cases where tribal judges and justices had to consider the role of gender in their analyses.

This collection includes both district level opinions as well as appellate level opinions. Almost all of the decisions are cases of first impression, meaning that there is not a corpus of cases where the tribal court had already considered gendered issues in this context. I describe some of these decisions below, not to explicate any particular patterns but rather as a sample of different ways in which tribal law and gender intersect. It should also be noted that these cases are not binding authority on the development of laws for other tribal nations (although they could be cited to as persuasive authority for other tribal courts, if relevant).

#### I. *Hepler v. Perkins*

*Hepler v. Perkins*<sup>147</sup> is a relatively early case that arose out of southeastern Alaska. In resolving a custody dispute between a non-Indian father and a Tlingit mother, the tribal court referred a question of customary law to a Court of Elders, who returned this statement on matrilineal clan membership. “Children of female members of a clan are children of the clan regardless of where or under what circumstances they may be found. Clan membership does not wash off, nor can such membership be removed by any force, or any distance, or over time. Clan membership continues even in death, and in re-birth it is renewed.”<sup>148</sup>

By codifying this statement into case law, matrilineal clanship is seen as the traditional principle that informed the tribal court’s decision that the Sitka Tribe has jurisdiction over the children of female family members regardless of where they reside.

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146. See Bonnie Shucha, *Whatever Tribal Precedent There May Be: The (Un)Availability of Tribal Law*, 106 LAW. LIBR. J. 199 (2014) (“For a majority of the 566 federally recognized tribes in the United States today, no law has been published.”).

147. 13 Indian L. Rep. 6011 (Sitka Cmty. Ass’n Tr. Ct., Apr. 7, 1986).

148. *Id.* at 6016.

## 2. Naize v. Naize

The Navajo Nation Supreme Court is perhaps the most well-known tribal court for drawing upon customary principles in deciding contemporary legal cases.<sup>149</sup> Here, I explore two cases that concern gender roles. The first, *Naize v. Naize*,<sup>150</sup> is a 1997 divorce case. The appeal considered spousal maintenance ordered by the trial court. The former husband had been ordered to pay his very ill former spouse \$200 per month for three years.<sup>151</sup> The tribal court had also ordered him to provide a truckload of wood and coal during the winter months for an indefinite period.<sup>152</sup>

While there was no spousal maintenance explicitly called for in the Navajo statutory code, the Court determined that Navajo courts can look to “traditional Navajo teachings” that one should not “throw their family away” to justify the order of spousal maintenance. The Court reasoned that

traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife’s residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife’s immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage. If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance.<sup>153</sup>

With this understanding, the Court upheld the award of monetary payments after analyzing the significant hardships faced by the wife.<sup>154</sup> Interestingly, the Court went on to strike down the order of indefinite supply of winter wood and coal, stating that another tradition of Navajo people is that there must be finality in divorce cases so that harmony can be restored.<sup>155</sup>

## 3. Riggs v. Attakai

In *Riggs v. Estate of Attakai*,<sup>156</sup> the Navajo Court was called upon to determine the appropriate party to hold a leasing permit for sheep grazing, and it

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149. See generally RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009).

150. 1 Am. Tribal Law 445 (1997).

151. *Id.* at 447.

152. *Id.* at 447.

153. *Id.* at 449.

154. *Id.* at 449-50.

155. *Id.* at 450.

156. 7 Am. Tribal Law 534, No. SC-CV-39-04, 2007 WL 5886339 (Navajo June 13, 2007).

ultimately codified matrilineal land tenure in its decision.<sup>157</sup> After exploring a gender-neutral five-factor test for awarding grazing permits that was established by a 1991 Navajo case, the *Riggs* Court held that the five-factor test should be applied

consistent with the Navajo Fundamental Law which defines the role and authority of Diné women in our society. Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes.<sup>158</sup>

Again, it should be noted that this a case of a Navajo court interpreting Navajo law, and perhaps another tribal court would analyze the question differently in light of different tribal traditional practice. But we should also notice what the Court is doing here—it is pushing back against the patriarchal history of westernized jurisprudence by clearly laying out the importance of Navajo women to tribal culture. This doctrine may become relevant in a future case that considers protections for Native women and girls.

#### 4. *The Bigfire Cases*

The Supreme Court of the Winnebago Tribe of Nebraska consolidated a series of criminal cases implicating gender and equal protection in 1998.<sup>159</sup> The Winnebago Tribe prosecuted three male teenagers under a gender-neutral statutory rape tribal statute provision that stated that “any person who subjects an unemancipated minor to sexual penetration is guilty of sexual assault in the second degree.” Two of the males were 17 and their female victims were 12. In the third case, the male was 15 and the female victim was 13. The defendants alleged that the victims consented to the sexual penetration and raised equal protection arguments because the underage females were not prosecuted.<sup>160</sup> The defendants relied on federal case law to support their position.

The legal question presented by these cases was whether it is impermissible to prosecute only boys and not girls under the sexual assault statute. The Winnebago court engaged with custom and tradition to side with the prosecution. The Court begins by referencing the work of an ethnologist who published the following tribal teaching in 1923, which says:

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157. *Id.* at 536. (“Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.”).

158. *Id.* at 536.

159. *Winnebago Tribe of Neb. v. Hugh Bigfire*, 25 Indian L. Rep. 6229, 6229 (Winn. Sup. Ct. 1998).

160. *Id.* at 6230.

My son, never abuse your wife. The women are sacred. If you abuse your wife and make her life miserable, you will die early. Our grandmother, the earth, is a woman, and in mistreating your wife you will be mistreating her. Most assuredly will you be abusing our grandmother if you act thus. And as it is she that is taking care of us you will really be killing yourself by such behavior.<sup>161</sup>

The Court then explains how this traditional teaching can inform the legal analysis, noting that:

This quotation nicely summarizes Ho-Chunk thinking on gender relationships. Gender differences constitute a natural part of life. Indeed, the Earth, the Grandmother who gives life, is female. Thus, gender role differentiation and gender differences in legal or customary treatment related to those roles are natural and expected. In Ho-Chunk culture, therefore, gender differences or disparities in treatment do not signal hierarchy, lack of respect or invidious discrimination, but, rather, are a respected and natural part of life. They are, indeed, part of the way that the Winnebago world view brings meaning to life.<sup>162</sup>

In considering these traditional tenets about gender in the Ho-Chunk culture, the Court applies strict scrutiny to gender discrimination and ultimately concludes that the Tribe had a compelling interest for gender discrimination in this case.

##### 5. *Casteel v. Cherokee Nation*

Not all tribal court engagement with gendered questions is necessarily positive. *Casteel v. Cherokee Nation*<sup>163</sup> is the only tribal appellate case I have discovered where there is clear indication that a litigant made an intentional and direct feminist argument to a tribal judiciary. It was rejected soundly. The case itself involved the termination of an employee for sexual harassment. The Cherokee Judicial Appeals Tribunal<sup>164</sup> determined that the Tribe failed to meet its burden of proof—that is, they did not establish a pattern of behavior necessary to terminate the employment.

However, it is apparent that the attorney for the Cherokee Nation (a woman) objected to the fact that the judicial panel was comprised of three men, a notion that was soundly rejected by the Tribunal, which stated:

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161. *Id.* at 6232 (citing PAUL RADIN, *THE WINNEBAGO TRIBE* 122 (1923)).

162. *Bigfire*, 25 Indian L. Rep. at 6232.

163. *Casteel v. Cherokee Nation*, 5 Okla. Trib. 147 (1996).

164. Today, this is known as the Cherokee Supreme Court.

We further reject the statement made by . . . counsel for the Cherokee Nation . . . that this Court, being composed of three male judges, is incapable of applying the reasonable person standard in this case. Bias, no matter how well meaning, has no place in the courtroom. [The attorney] is hereby admonished to be more respectful when addressing this Court in the future.<sup>165</sup>

Although I do not have access to the transcript of the oral arguments and thus cannot assess exactly what the attorney argued, it is clear that this particular tribal court was opposed to considering how the gender makeup of the court might influence its decision. This case serves as a reminder that arguments informed by IFLT may not be successful in tribal court, and as a reminder that we must not romanticize the idea of bringing gendered issues to tribal court.

### *B. Tribal Statutory Development*

In this Section, I consider several ways that IFLT can inform the development of contemporary gender-conscious tribal statutory law. This Section of the Article is perhaps the most daunting, because as an advocate for tribal political and legal independence, I do not seek to tell tribal nations how to govern themselves. Instead, I am interested in encouraging tribal leaders to consult with the women and Two-Spirit people of their nations before passing laws that may affect or endanger them.

I encourage tribal attorneys and legislators to consult with local women before passing laws that criminalize their behavior. For example, some tribal nations have passed laws which allow tribal prosecutors to file criminal child abuse or neglect charges against pregnant women who use drugs or alcohol during pregnancy.<sup>166</sup> There is ample room for debate on the efficacy of this policy, and certainly sound minds can disagree, but my concern is whether the women of those particular communities have had a chance to weigh in on something as significant as criminalizing behavior during pregnancy. If possible, tribal legislatures and tribal litigants should consult female elders and leaders in the community about the best way to respond to the crisis of infants born with drugs in their system or other related concerns. Ideally, these female elders would be able to offer insight as to how traditional principles and tenets inform contemporary practices. Perhaps tribal nations could consider developing local

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165. 5 Okla. Trib. at 3.

166. See, e.g., Standing Rock Sioux Tribal Code of Justice Sec. 4-1204 (Child Neglect); White Mountain Apache Criminal Code, Sec. 2.82 (Endangering an Unborn Child); Reno-Sparks Indian Community Law and Order Code, Sec. 4-5-310 (Fetal Endangerment); Shoalwater Bay Tribe Code of Laws, Sec. 2.02.09 (Endangering a Fetus).

women's task forces, which would be able to assess the needs of women in the community so that the tribal nation's legislature can be better informed.

Gendered issues arise in a variety of different ways in tribal codes. Tribal nations could have the best laws in the world when it comes to addressing sexism. Tribal governments may wish to revisit their laws on divorce, custody, extended family, sexual violence, juvenile justice—all places where Native conceptions of gender might be relevant. Tribal nations can ensure, through statutory reform, that women and LGBTQ+ employees have expansive remedies for discriminatory treatment. Tribal governments might consider developing stricter laws and policies on sex trafficking, the establishment of “man camps,” and other efforts to enhance the safety of the communities. Even in those cases where the tribal nation is not allowed to prosecute non-Indians, tribal governments could amplify civil remedies for victims, including expansive protection orders and civil tort remedies. Tribal governments could set training requirements for first responders and other tribal officials that may come into contact with victims of gender-based violence. They may also strengthen employment protections for victims of violence who might miss work due to the physical, psychological, and legal barriers. There is no limit to the way that sovereign nations can imagine and explicate a system that seeks to end gendered oppression.

### III. GENDER EQUITY IN LEGAL EDUCATION & PRACTICE

If IFLT is to have “legs” and begin to be used as a tool in both Federal Indian law and tribal law, we need to cultivate a new generation of attorneys, scholars, and activists who can begin the development of a unique approach to jurisprudence when it comes to tribal governments. Unfortunately, Native women have been absent from the legal academy and nearly absent from legal scholarship in the United States. The earliest law review article about Native women I have found in my research was published in the *American Indian Law Review* in 1975.<sup>167</sup> The first law review article about violence against Native women was not published until 1993.<sup>168</sup> Even in 2019, there are still only a handful of law review articles that focus on Native women. Whereas there has been an explosion of Native feminist interventions in other scholarly disciplines such as history, sociology and indigenous studies,<sup>169</sup> there is very little Native feminist intervention in the law.

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167. Bysiewicz & Van De Mark, *The Legal Status of the Dakota Indian Woman*, *supra* note 45.

168. James W. Zion & Elsie B. Zion, *Hozho' Sokee' – Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993).

169. Several interdisciplinary anthologies about Native feminisms have been published in the last 10 years. See, e.g., *INDIGENOUS WOMEN AND FEMINISM*, *supra* note 29; *CRITICALLY SOVEREIGN*, *supra* note 29.

To cultivate future feminist interventions in Indian law, I contend that we must do more to recruit and support Native women law students, and, ultimately, more Native women law professors. While Native men can certainly advance the cause of Native women, it is important that feminist interventions are backed by Native women attorneys who feel confident about advancing legal arguments on behalf of other Native women. There are very few Native women lawyers in the United States, and only a handful of Native women teaching in law schools.<sup>170</sup> This must change if we are to see significant shifts in the way that Native women can inform and influence the practice of Indian law in the United States. I believe that IFLT should begin to be taught in the law school curriculum, including in Indian law, feminist jurisprudence, and critical legal studies.

Unfortunately, Native women attorneys also experience racism and sexism in the legal workplace—both in the private and public sectors. For the past 20 years, I have heard anecdotal stories from other Native women attorneys about discrimination and abuse in the workplace. But there was no way of estimating the prevalence of discrimination because, until 2015, there was no comprehensive study of Native attorneys in the United States that asked such questions. The National Native American Bar Association (NNABA) commissioned such a study and published the results in 2015.<sup>171</sup> Over 500 attorneys responded to the study, and the results were illuminating. The study reveals that Native women attorneys suffer an unacceptable rate of gender-related discrimination in the profession. For example, nearly 38 percent of Native women respondents said they have experienced demeaning comments or harassment based on gender in the workplace.<sup>172</sup> Thirty-five percent reported that they had been discriminated based on gender<sup>173</sup> and nearly thirty percent reported that they had been denied appropriate compensation due to gender.<sup>174</sup> Of those Native women who had left the legal profession, 33 percent did so in part because of gender bias.<sup>175</sup> The study also revealed that Native women were mistreated by Native men in the legal workplace, revealing that the problem goes beyond non-Indian discrimination.<sup>176</sup>

Native women working for the federal government have also suffered from discrimination. A 2017 survey of Bureau of Indian Affairs (BIA) employees

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170. According to one article, as of 2008 there were only 21 Native American women in legal academia in the United States. Meera E Deo, *Looking Forward to Diversity in Legal Academia*, 29 *BERKELEY J. GENDER L. & JUST.* 352, 357 (2014).

171. NATIONAL NATIVE AMERICAN BAR ASSOCIATION, *THE PURSUIT OF INCLUSION: AN IN-DEPTH EXPLORATION OF THE EXPERIENCES AND PERSPECTIVES OF NATIVE AMERICAN ATTORNEYS IN THE LEGAL PROFESSION* (2015), [http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA\\_report\\_pp6.pdf](http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf) [https://perma.cc/8HZ6-EZBP].

172. *Id.* at 36.

173. *Id.* at 36.

174. *Id.* at 37.

175. *Id.* at 39.

176. *Id.* at 32.

showed 40 percent had experienced some form of harassment—primarily racial and sexual—in their workplaces in the past 12 months.<sup>177</sup> In fact, BIA suffers from the highest rate of harassment within the Department of Interior.<sup>178</sup> The perpetrators were typically older males.<sup>179</sup>

In the past two years, several prominent officials within the BIA have been investigated for sexual harassment. One BIA supervisor in the Southwest regional office repeatedly sexually harassed women—one subordinate said that he “pulled down the front of her shirt to ask if she was wearing a bra” and another subordinate reported that he “put his hand up her skirt.”<sup>180</sup> Managers were informed about his behavior but did not act immediately.<sup>181</sup> In April 2018, BIA Director Bryan Rice resigned abruptly after reports surfaced that he had harassed and bullied women subordinates.<sup>182</sup> The problems with sexist culture in the federal government are not limited to the BIA. During the Obama administration, William Mendoza, who was the director of the White House Initiative on American Indian and Alaska Native Education, resigned after pleading guilty to attempted voyeurism after video footage showed him taking “up skirt” photos on the Washington, D.C. Metro.<sup>183</sup>

A series of recent investigative reports on sexual harassment in the lives of Native women uncovered a plethora of stories about the behavior of Native men in high profile positions.<sup>184</sup> While not specific to the attorney experience, these

177. CFI GROUP, SUPPLEMENTAL STATISTICAL REPORT: BUREAU OF INDIAN AFFAIRS (BIA) WORK ENVIRONMENT SURVEY 2 (2017), [https://www.doi.gov/sites/doi.gov/files/uploads/bia\\_wes\\_supplemental\\_statistical\\_report.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/bia_wes_supplemental_statistical_report.pdf) [<https://perma.cc/LE9J-72B5>].

178. *Landmark Study Finds High Rate of Workplace Harassment at Bureau of Indian Affairs*, INDIANZ.COM (Dec. 14, 2017), <https://www.indianz.com/News/2017/12/14/landmark-study-finds-high-rate-of-workpl.asp> [<https://perma.cc/YD8A-S94E>].

179. Anna V. Smith, *Harassment pervades the Bureau of Indian Affairs*, HIGH COUNTRY NEWS (Mar. 13, 2018), <https://www.hcn.org/issues/50.6/tribal-affairs-harassment-pervades-interiors-bureau-of-indian-affairs> [<https://perma.cc/9RPH-3MH8>].

180. Wills Robinson, *“Predator” Interior Department Official Told a Subordinate He “Wanted to Get Naked and Show Her What It’s Like to be with a “Real Man” and Told Another She Wasn’t Too Old to be “Spanked Over His Knee,”* DAILY MAIL (Dec. 13, 2018), <https://www.dailymail.co.uk/news/article-6484087/Interior-Department-official-accused-predator-harassed-subordinates.html> [<https://perma.cc/8F38-RC7B>].

181. *Id.* See also *Insufficient Actions by BIA Management and Human Resource Officials in Response to Sexual Harassment Reports*, OFF. OF INSPECTOR GEN. (Sept. 18, 2017), <https://www.doi.gov/reports/insufficient-actions-bia-management-and-human-resource-officials-response-sexual-harassment> [<https://perma.cc/V46N-V9FE>].

182. *Bureau of Indian Affairs Director Resigned After Harassment Claim: Report*, DAILY BEAST (May 2, 2018), <https://www.thedailybeast.com/bureau-of-indian-affairs-director-resigned-after-harassment-claim-report> [<https://perma.cc/MPE7-WBHU?type=image>]. See also Anna V. Smith, *Bureau of Indian Affairs Director Resigned*, HIGH COUNTRY NEWS (Apr. 26, 2018), <https://www.hcn.org/articles/tribal-affairs-bureau-of-indian-affairs-director-resigns> [<https://perma.cc/R9Y9Z-CMV6>].

183. Wills Robinson, *Surveillance Footage Shows One of President Obama’s Senior Officials Following a Woman around DC Metro Station and Taking a Picture Up her Skirt with His Cell Phone*, DAILY MAIL (July 27, 2018), <https://www.dailymail.co.uk/news/article-5997025/Obama-advisor-William-Mendoza-seen-taking-picture-womans-skirt-DC-Metro.html> [<https://perma.cc/C4RX-F7VN>].

184. Mary Annette Pember, *#MeToo in Indian Country: ‘We Don’t Talk About this Enough,’* INDIAN COUNTRY TODAY (May 28, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-in-indian-country-we-don-t-talk-about-this-enough-oXkstdPmDk2-zSXoDXZSZQ/> [<https://perma.cc/XX>].



stories indicate that many Native women experience unacceptable rates of harassment in the workplace, often perpetrated by powerful and respected men in their communities. These survivors of harassment interviewed for the series of articles “shared an overwhelming fear about losing their jobs, the chances for future employment, housing, social services for themselves and their families as well as the love, respect and support from close knit Native communities.”<sup>185</sup>

These levels of sexism, harassment, and assault cannot continue to be part of the lives of Native women attorneys and government workers. In the era of the #MeToo movement, the Indian Bar must do better to address a culture of toxic masculinity that seems to have permeated some of the most important workplaces in Indian law today.

### CONCLUSION

This Article has focused primarily on sex and sexism as a key intervention in IFLT, but we also must remember that issues of sexuality and gender identity are also impacted by legal hegemony and settler colonialism. Because these issues deserve full attention, in future pieces, I will strive to consider how homophobia and other forms of discrimination against Two-Spirit people can be addressed through IFLT.

The safety and well-being of tribal nations depends on the safety and well-being of Native women. Patriarchy and settler colonialism have taken their toll on the lives of Native people and IFLT can offer new, innovative ways of thinking about gender liberation in the context of tribal sovereignty. In the *Dollar General* brief, Mary Kathryn Nagle and I used the following traditional quotation from the Cheyenne to open our argument. I use it now in closing.

“The Nation shall be strong so long as the hearts of the women are not on the ground.”

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V5-R4N6]; Mary Annette Pember, *#MeToo What Happens When Native Women Come Forward with Harassment Complaints*, INDIAN COUNTRY TODAY (May 29, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-what-happens-when-native-women-come-forward-with-harassment-complaints-6W2mE2aNgE6bJw4m84nHTg/> [https://perma.cc/8GYK-7YYPG]; Mary Annette Pember, *#MeToo. Toxic Masculinity: Addressing a Terrible Truth*, INDIAN COUNTRY TODAY (May 30, 2019), <https://newsmaven.io/indiancountrytoday/news/metoo-toxic-masculinity-addressing-a-terrible-truth-RuptdDeOa0atVczu7G-WCA/> [https://perma.cc/C9LH-LWZ9].

185. Pember, *#MeToo in Indian Country*, *supra* note 184.

# Resuscitating the Black Body: Reproductive Justice as Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity

Jill C. Morrison<sup>†</sup>

**ABSTRACT:** 2019 marks 400 years since the first Africans were brought to the Virginia colony as captives, and deemed not human beings but rather the property of others. Black women have endured reproductive oppression since our arrival in the United States. This Article argues that current methods of reproductive oppression attempt to restore the State’s property interest in the bodies of Black women—specifically the basic rights of use and exclusion—once secured by enslavement. This Article seeks to identify some of the ways that current restrictions on women’s reproductive liberty mimic systems that once formally commodified Black women’s sexuality and reproductive labor. It concludes, however, that a Reproductive Justice framework can help remove these property interests in Black women’s bodies and return them to their rightful “owners.”

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<sup>†</sup> Visiting Professor of Law and Executive Director, Women’s Law & Public Policy Fellowship Program, Georgetown University Law Center. LL.M., Georgetown University Law Center; J.D., Yale Law School. With credit to Professor Dorothy E. Roberts, who described the range of legally imposed means of oppressing Black women’s reproductive freedom in *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (2017). This paper was written for *Racialization of American Law*, taught by Professor Sherrally Munshi, at Georgetown University Law Center, Fall 2017.

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## INTRODUCTION

The Reproductive Justice (RJ) movement arose in recent decades in response to a pro-choice movement concerned primarily with preventing births and terminating unwanted pregnancies.<sup>1</sup> This focus ignored the very real threats to Black<sup>2</sup> women's reproductive autonomy seen since our arrival on America's shores. These include barriers to becoming pregnant, having healthy pregnancies and births, and raising children to adulthood in safe environments. Both human rights and social justice frameworks are integral to RJ.<sup>3</sup> RJ adopts the human rights approach of positive rights: affirmative duties imposed upon the State to actualize rights. RJ recognizes that the right to privacy and governmental non-intrusion—at the core of much reproductive rights discourse—is inadequate to address the needs of the most vulnerable and marginalized women.<sup>4</sup>

This Article explores how present-day reproductive oppression reflects an attempt by the State to retain a property interest in Black women's bodies once held by their owners during the time of enslavement. Rather than endorsing the view that sexuality and reproduction are legitimately conceptualized as property, this Article merely seeks to identify some of the ways that current restrictions on women's reproductive liberty mimic systems that once formally commodified

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1. LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 54-57 (2017).

2. I capitalize Black but use the lowercase when it was used in the original source. For the reasoning behind the capitalization of Black, see Lori L. Tharps, *The Case for Black With a Capital B*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html> [<https://perma.cc/6GFC-JESZ>].

3. ROSS & SOLINGER, *supra* note 1, at 78-89.

4. Legal scholar Dorothy Roberts observes that the choice framework “aligns with a neoliberal market logic that relies on individuals’ purchase of commodities . . . instead of the state investing in health care and the other social needs of the larger public.” Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights> [<https://perma.cc/TGN5-MJ3U>].

Black women's sexuality and reproductive labor. The Reproductive Justice framework seeks to remove these property interests in Black women's bodies and return them to their rightful "owners."

Part I describes how racialized rhetoric is used to justify reproductive oppression and support the State's property interest in Black women's reproductive capacity and sexuality. Part II analyzes the reproductive and sexual oppression of Black women through a framework of the property rights of use and exclusion.<sup>5</sup> During enslavement, these property rights were exploited by the owner; currently, these property rights are exploited by the State. Part III proposes that the RJ framework serves to emancipate Black women from continued attempts to render their sexuality and reproductive labor the property of the State, attempting to sever this badge of inferiority established during enslavement.

## I. THE RACIALIZATION OF RHETORIC OPPOSING ACCESS TO REPRODUCTIVE HEALTH SERVICES

Despite the consistent demonization of Black women's reproductive decision-making, this issue is all too often sidelined in examinations of the legacy of enslavement and racial oppression.<sup>6</sup> This Section provides a sampling of the ways that race has been inserted into debates about abortion and contraception. Each of these examples illustrates Black women's treatment as passive objects who have no control over their reproductive decisions. These rhetorical tools are an extension of the dehumanizing treatment enslaved women experienced as the reproductive property of others, described in Section II.A. This rhetoric also provides support for the oppressive policies that negate Black women's agency, explored in Section II.B.

### A. Contraception and Abortion as Tools of a Conspiracy of Genocide

*The myth of abortion as Black genocide depends on denying Black women their humanity and their agency to make medical decisions regarding their reproduction.*

Shyrisa Dobbins-Harris<sup>7</sup>

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5. The other property rights include those of possession and transfer. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 86 (3d ed. 1993).

6. Pamela Bridgewater has observed that despite a comprehensive treatment of reparations for the descendants of enslaved Africans, Randall Robinson devotes little attention to the reproductive and sexual exploitation of enslaved women. Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 113 (2005).

7. Shyrisa Dobbins-Harris, *The Myth Of Abortion As Black Genocide: Reclaiming Our Reproductive Choice*, 26 NAT. BLACK L.J. 85, 90 (2017). This article provides a comprehensive critique of the "abortion as Black genocide" rhetoric and also highlights the Reproductive Justice Movement's response.

Abortion rates have declined significantly for all groups since the early 1980s, but the rate for Black women remains at almost three times the rate as for White women.<sup>8</sup> Black women comprise fifteen percent of the U.S. population, but account for almost twenty-eight percent of women having abortions.<sup>9</sup> The abortion rate is higher among Black women because the unintended pregnancy rate is three times higher than that of white women.<sup>10</sup> Despite the well-documented and complex factors causing the high abortion rate among Black women, this fact is often used as “evidence” that abortion is a racist plot to diminish the Black population.<sup>11</sup> In November 2018, Mississippi Governor Phil Bryant defended a lynching joke by Senator Cindy Hyde-Smith, claiming that the Black community should be more concerned with abortion than with racism.<sup>12</sup>

This claim of genocidal conspiracy about both abortion and contraception was made prior to *Roe v. Wade*,<sup>13</sup> the Supreme Court case decriminalizing abortion. Marcus Garvey, the leader of the Back to Africa Movement of the 1930s, decried birth control as “race suicide.”<sup>14</sup> Both the Black Panthers and Nation of Islam opposed birth control and abortion, but the genocide argument was much more common among the Panthers, who viewed Black children as potential soldiers in the fight for Black freedom. The Nation’s opposition was rooted in religious principles and women’s duty to raise children.<sup>15</sup>

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8. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1906 tbl.1 (2017) (showing rates of 10 abortions per 1,000 for White women versus 27.1 per 1,000 for Black women according to the most recently available data).

9. *Id.*

10. Causes of unintended pregnancy among Black women include higher poverty rates, lower marriage rates, less access to comprehensive sexuality education, lower health insurance coverage, and less access to the most effective forms of contraception. Susan Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV. 2-4 (2008).

11. Some individuals may indeed have a racist motivation for supporting abortion, and welcome the high abortion rate among Black women. Likewise, conservatives were once strong proponents of contraception, recognizing the potential impact on electoral politics. Loretta Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, RACIAL EQUITY TOOLS 7 (2005), <http://www.racialequitytools.org/resourcefiles/The-Color-of-Choice---Public-Version-with-footnotes-1.pdf> [https://perma.cc/822Q-59QP].

12. Amanda Michelle Gomez, *Mississippi Governor Defended Lynching Joke by Calling Abortion “Black Genocide,”* THINKPROGRESS (Nov. 15, 2018, 10:20 AM), <https://thinkprogress.org/misogynoir-mississippi-governor-phil-bryant-black-genocide-defense-cindy-hyde-smith-453c135339b9/> [https://perma.cc/RZK2-3AP9].

13. 410 U.S. 113 (1973).

14. DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 84 (2017). See also Miriam Zoila Perez, *Past and Present Collide as the Black Anti-Abortion Movement Grows*, COLORLINES (Mar. 3, 2011, 9:35 AM), <https://www.colorlines.com/articles/past-and-present-collide-black-anti-abortion-movement-grows> [https://perma.cc/F2TE-6SDH].

15. JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 96-97 (2003).

These organizations were justified in their suspicion of State-supported family planning.<sup>16</sup> Birth control was the government's preferred panacea to poverty, promoting contraception, abortion, and sterilization rather than actually responding to poverty's root causes and providing meaningful social and economic support to struggling families.<sup>17</sup> While the Nation of Islam has maintained its stance,<sup>18</sup> eventually, the Black Panthers adopted a position in support of abortion and contraception when freely chosen by the individual.<sup>19</sup> This came at the urging of Black feminists who recognized reproductive freedom as a critical part of community empowerment.<sup>20</sup>

The issue was unsurprisingly a contentious one within mainstream civil rights organizations, which were heavily grounded in the church. Despite the controversy over the use of abortion and contraception by Black women, prominent individuals and organizations supported both measures as a tool for women's empowerment. The National Council of Negro Women supported family planning in 1941.<sup>21</sup> Speaking on behalf of the Student Nonviolent Coordinating Committee's Black Women's Liberation Committee, Frances Beal stated that Black women must determine "when it is in the interest of the struggle to have children or not have them."<sup>22</sup> Shirley Chisholm, the first Black woman in the House of Representatives, was a strong supporter of access to safe, legal abortion, recognizing that most women dying from illegal abortions were Black and Brown.<sup>23</sup>

It was as easy then as it is now to distinguish government-imposed population control from individually chosen family planning, yet this rhetoric was reinvigorated in 2009 by the documentary *Maafa 21: Black Genocide in 21st Century America*, made by a white antiabortion activist.<sup>24</sup> The two-hour film charts the alleged plan to eliminate the "surplus" Black population, those who were rendered superfluous after emancipation when they could not be used for free labor.<sup>25</sup> Investigative reporter Akiba Solomon describes the film as "the

16. *Id.* at 85-87.

17. *See id.* at 87-88. *See also* JOHANNA SCHOEN, CHOICE & COERCION: BIRTH CONTROL, STERILIZATION AND ABORTION IN PUBLIC HEALTH AND WELFARE (2005) (describing governmental efforts to reduce childbearing among low-income women and women of color).

18. *See Nation of Islam leader warns against abortion*, DOMINICA NEWS ONLINE (Dec. 5, 2012, 7:39 AM), <http://dominicanewsonline.com/news/homepage/news/muslim-leader-warns-students-against-abortion/> [<https://perma.cc/7BWE-AUS5>] (recounting Minister Louis Farrakhan telling students at Dominica State College that "abortion should never be an option"); *see also* ELIJAH MUHAMMAD, HOW TO EAT TO LIVE: BOOK 1 83 (2018) (in which the former Nation of Islam leader likens birth control to suicide).

19. NELSON, *supra* note 15, at 89. The leadership of Elaine Brown also played a role in the Party Platform's inclusion of women's liberation. *Id.* at 109.

20. *Id.* at 109.

21. Perez, *supra* note 14. *See also* Ross, *supra* note 11, at 9.

22. Perez, *supra* note 14.

23. NELSON, *supra* note 15, at 77-79 (2003).

24. Mark Crutcher, *Maafa 21: Black Genocide in 21st Century America*, YOUTUBE (Oct. 27, 2012), <https://www.youtube.com/watch?v=HshhtiNm2Kc> [<https://perma.cc/9H5V-QHFP>].

25. With far more evidentiary support, Michelle Alexander has argued that the Prison-Industrial Complex has developed as a "remedy" to underemployment and poverty in communities of color. *See*

closest the predominately white, Christian right has come to successfully exploiting Black Nationalist themes and aesthetics.”<sup>26</sup>

Planned Parenthood is the primary focus of those claiming that abortion constitutes Black genocide, with its founder Margaret Sanger receiving much of the criticism. It is well-documented that Margaret Sanger believed in eugenics—limiting reproduction to the mentally and physically fit.<sup>27</sup> Yet Sanger still rejected the idea of State control of women’s reproductive choices that was at the heart of eugenic ideology.<sup>28</sup> Planned Parenthood has addressed and denounced this and other troubling actions and beliefs held by Sanger.<sup>29</sup> Furthermore, there is no evidence that Sanger coerced women of color into using family planning.<sup>30</sup> It is also well-documented that Sanger was invited to work in partnership with Black leaders, organizations, and healthcare providers to increase access to contraception in Black communities.<sup>31</sup> Scholars have documented the questionable motives for including Black healthcare workers and maintaining Black leadership in the project, yet this reality coexisted with Black women’s desire to control the timing and spacing of their pregnancies.<sup>32</sup>

There is also a claim that Planned Parenthood situates its facilities in predominately Black areas, with the implication being that Black women terminate their pregnancies at higher rates simply because abortion services are conveniently available. Aside from this argument being incredibly simplistic and insulting, it is also false. Less than ten percent of abortion facilities are located in neighborhoods with a majority Black population.<sup>33</sup> Both today and in Sanger’s

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generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

26. Akiba Solomon, *The Missionary Movement to Save Black Babies*, COLORLINES (May 2, 2013, 7:40 AM), <https://www.colorlines.com/articles/missionary-movement-save-black-babies> [https://perma.cc/933C-7NXF].

27. ROBERTS, *supra* note 14, at 57-59.

28. PLANNED PARENTHOOD, *OPPOSITION CLAIMS ABOUT MARGARET SANGER* 4 (2016), [https://www.plannedparenthood.org/uploads/filer\\_public/37/fd/37fdc7b6-de5f-4d22-8c05-9568268e92d8/sanger\\_opposition\\_claims\\_fact\\_sheet\\_2016.pdf](https://www.plannedparenthood.org/uploads/filer_public/37/fd/37fdc7b6-de5f-4d22-8c05-9568268e92d8/sanger_opposition_claims_fact_sheet_2016.pdf) [https://perma.cc/FYC5-24WT].

29. *Id.* In addition to evidence of her belief in eugenics, it has been documented that Sanger spoke to a meeting of the women’s auxiliary of the Ku Klux Klan. *Id.* at 3.

30. Margaret Sanger did not support abortion. The procedure was not just illegal, but quite dangerous in Sanger’s day. Imani Gandy, *How False Narratives of Margaret Sanger Are Being Used to Shame Black Women*, REWIRE (Aug. 20, 2015), <https://rewire.news/article/2015/08/20/false-narratives-margaret-sanger-used-shame-black-women/> [https://perma.cc/3R6Q-2N5C].

31. PLANNED PARENTHOOD, *supra* note 28, at 1. The Harlem Project was supported by The Urban League, W.E.B. Du Bois, and Abyssinian Baptist Church. It was in fact Du Bois who paternalistically accused impoverished Black people of “breeding carelessly,” a quote that is often misattributed to Sanger. *Id.* at 5.

32. ROBERTS, *supra* note 14, at 77-78.

33. Using data from its survey of abortion providers, the Alan Guttmacher Institute found that 60 percent of abortion facilities are in predominately white areas. ALAN GUTTMACHER INSTITUTE, *News in Context, Claim that Most Abortion Clinics Are Located in Black or Hispanic Neighborhoods Is False* (June 1, 2014), <https://www.guttmacher.org/article/2014/06/claim-most-abortion-clinics-are-located-black-or-hispanic-neighborhoods-false> [https://perma.cc/7Y9R-HSQU] (relying on data from Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 FAMILY PLANNING PERSPECTIVES 3 (2014)).

day, Black women make their reproductive decisions as other women do: in the context of their current lives, families, plans for the future, finances, education and employment goals.

The most prominent campaign in recent memory arose from the Radiance Foundation, with billboards placed in predominately Black areas declaring, “Black children are an endangered species.”<sup>34</sup> Another campaign from Life Always proclaims, “The Most Dangerous Place for an African American is in the Womb.”<sup>35</sup> The founder and spokesperson for the organization is a biracial adoptee, but the campaign is funded by white-led and Republican-supporting organizations like Georgia Right to Life.<sup>36</sup> These and other “pro-life” supporters asserting an interest in the disproportionate rate of abortions among Black women have otherwise shown no commitment to the well-being of mothers, infants, or children of any race.<sup>37</sup> Campaigns by Black women’s organizations have responded to these claims, including Trust Black Women, a project of SisterSong: Women of Color Reproductive Justice Collective.<sup>38</sup>

### B. *The Co-opting of Black Lives Matter*

The most recent racialized anti-abortion rhetoric grows out of the Black Lives Matter (BLM) movement. BLM, started by Black women in 2013, has an explicitly anti-patriarchal frame.<sup>39</sup> BLM has also partnered with RJ organizations, including Trust Black Women.<sup>40</sup> The two organizations issued a solidarity statement affirming their common goals. In a joint interview, they described the intersection of the movements, and how RJ demands that parents be able to raise their children to adulthood free of State violence and poverty, with quality education and in healthy environments.<sup>41</sup>

34. RADIANCE FOUNDATION, *Black Children Are An Endangered Species* (Feb. 4, 2010), <http://www.toomanyaborted.com/black-children-are-an-endangered-species/> [<https://perma.cc/ZE2V-JEZ5>].

35. “*The Most Dangerous Place for an African-American is in the Womb*”: *Black Politician Criticises Anti-Abortion Billboard*, DAILY MAIL (Feb. 24, 2011), <https://www.dailymail.co.uk/news/article-1360125/The-dangerous-place-African-American-womb-Black-politician-criticises-anti-abortion-billboard.html> [<https://perma.cc/2XNH-LVR3>].

36. Solomon, *supra* note 26.

37. See, e.g., NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, A DOUBLE BIND: WHEN STATES DENY ABORTION COVERAGE AND FAIL TO SUPPORT EXPECTING AND NEW PARENTS (Sept. 2016), <http://www.nationalpartnership.org/research-library/repro/abortion/a-double-bind.pdf> [<https://perma.cc/8DW3-MCT5>] (reporting lack of workplace supports for parents in states with the most abortion restrictions, largely tracking Republican-dominated state legislatures).

38. See TRUST BLACK WOMEN, [www.trustblackwomen.org](http://www.trustblackwomen.org) [<https://perma.cc/BV42-SPU8>].

39. See *Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> [<https://perma.cc/52WC-YFW5>]; see also *What We Believe*, MOVEMENT FOR BLACK LIVES, <https://blacklivesmatter.com/about/what-we-believe/> [<https://perma.cc/QE9Z-5ZR7>].

40. Kenrya Rankin, *Black Lives Matter Partners with Reproductive Justice Groups to Fight for Black Women*, COLORLINES (Feb. 9, 2016), <https://www.colorlines.com/articles/black-lives-matter-partners-reproductive-justice-groups-fight-black-women> [<https://perma.cc/XUH2-R2QT>].

41. *Id.*



Attempting to draw attention away from BLM and redirect to their anti-abortion campaign, the Radiance Foundation's most recent poster reads: *Black Lives Matter In and Out of the Womb*.<sup>42</sup> The founder of the Radiance Foundation has also decried the "hypocrisy" of the aforementioned partnership, noting that Planned Parenthood "kills more unarmed black lives in one day than police are accused of killing in one entire year."<sup>43</sup> Again, this statement presumes that Black women have no agency in determining whether or not to continue a pregnancy.

Yet others have identified those opposing abortion in the name of "Black Lives" as the actual hypocrites. One columnist describes his exchange with a self-proclaimed pro-lifer, challenging him on commitment to Black lives with regard to housing, education, and police brutality. He describes abortion opponents' purported interest in the lives of Black children as "cynical and offensive" when the same individuals do nothing to improve the lives of Black people.<sup>44</sup>

Even Black clergy who are opposed to abortion have rejected the use of Black Lives Matter by those who have shown no concern for the Black community. Recognizing that Black women are acting in consideration of the totality of their lives, they have opposed recent attempts to ban abortion, and spoken out about addressing the social conditions faced by Black families. "Those who are most vocal about abortion and abortion laws are my white brothers and sisters, and yet many of them don't care about the plight of the poor, the plight of the immigrant, the plight of African-Americans."<sup>45</sup>

### C. Slavery Rhetoric<sup>46</sup>

Another common tool among those opposing abortion is to compare it to slavery. They assert that one day, the fact that abortion was deemed acceptable

42. See Feminista Jones, *How Anti-Abortion Extremists are Exploiting #BlackLivesMatter to Vilify African-American Women*, OPEN DEMOCRACY (Oct. 16, 2017), <https://www.opendemocracy.net/5050/feminista-jones/anti-abortion-extremists-exploiting-black-lives-matter> [https://perma.cc/4UMR-5NWU]. The "in and out of the womb" part of the poster, superimposed over a Black infant, is faded out.

43. Ryan Scott Bomberger, *#Blacklivesmatter, White Guilt and the Marketing of Racism*, RADIANCE FOUND., (July 8, 2016), <https://www.theradiancefoundation.org/blacklivesmatter/> [https://perma.cc/XRD5-FKAA]. The article goes on to state that "those with Black skin" present the biggest threat to other Black people. *Id.*

44. Leonard Pitts Jr., *The hypocrisy of anti-abortion activists*, BALTIMORE SUN (May 26, 2019), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0526-pitts-abortion-20190522-story.html> [https://perma.cc/SSU7-EKGY?type=image].

45. John Eligon, *When "Black Lives Matter" Is Invoked in the Abortion Debate*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/us/black-abortion-missouri.html> [https://perma.cc/KX4E-96BE].

46. Arguments have also been made by abortion rights supporters comparing the forced continuation of pregnancy to slavery. See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990). Debora Threedy argues that such appropriation by either side

to Americans will seem as unthinkable as (white) Americans' acceptance of slavery 200 years ago. The tactic serves two purposes: to link abortion to something that people—especially those who consider themselves progressive—would consider morally reprehensible today, and to further draw upon the “abortion as a plot to destroy the Black race” narrative.<sup>47</sup>

Although the comparison has been made since *Roe*,<sup>48</sup> it was most recently re-popularized by Black Republican presidential candidate (and current Secretary of the Department of Housing and Urban Development) Ben Carson.<sup>49</sup> Carson explicitly compared women who have abortions to slave owners, stating,

During slavery, a lot of the slave owners thought that they had the right to do whatever they wanted to that slave . . . . And, you know, what if the abolitionists had said, you know, “I don’t believe in slavery. I think it’s wrong. But you guys do whatever you want to do”? Where would we be?<sup>50</sup>

Putting aside the obvious logical and factual weakness of the analogy, it completely erases the reproductive experiences of enslaved women. As RJ activist Imani Gandy observes, “if abortion is like slavery . . . then what of the women who suffered under slavery? What of the women who performed self-abortions in order to resist slavery? They cease to exist.”<sup>51</sup>

Carson’s analogy results in the complete erasure of women who were experiencing both enslavement and pregnancy. In thinking of the things that slave owners “thought that they had the right to do,” Carson does not consider that among those “rights” were forced breeding, rape, and removal of children from their mothers. If the enslaved woman is centered in his analysis, not only does the “slavery equals abortion” analysis fail, but reproductive oppression begins to look far more like slavery than does abortion. Given that reproductive oppression was essential to maintaining the system of slavery, this analogy is a far easier one to draw, but only if Black women are considered.

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indicates a failure to adequately appreciate the racial implications of such an analogy. Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 1 MICH. J. GENDER & L. 3, 15 (1994).

47. Chloe Angyal, *A New Federal Court Judge Compared Abortion to Slavery. He’s not Alone*, HUFFINGTON POST (July 26, 2017, 3:47 PM), [https://www.huffpost.com/entry/judge-abortion-slavery\\_n\\_5978ce3fe4b0c95f3760fc00](https://www.huffpost.com/entry/judge-abortion-slavery_n_5978ce3fe4b0c95f3760fc00) [https://perma.cc/9CYN-W7K9].

48. The most comprehensive academic treatment of this analogy is JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013).

49. Emily Crockett, *Why Republicans like Ben Carson Love Comparing Abortion to Slavery*, VOX (Nov. 1, 2015), <https://www.vox.com/identities/2015/11/1/9654462/ben-carson-abortion-slavery> [https://perma.cc/8LLT-2EGW].

50. *Id.*

51. Imani Gandy, *Abortion Is not like Slavery, So Stop Comparing the Two*, REWIRE (Nov. 12, 2013), <https://rewire.news/article/2013/11/12/abortion-is-not-like-slavery-so-stop-comparing-the-two/> [https://perma.cc/2FKZ-F96A].

*D. Racial Targeting at Crisis Pregnancy Centers (CPCs) and Abortion Facilities*

The first Crisis Pregnancy Center (CPC) was established in 1967 in Hawaii, with the express purpose of dissuading women from having abortions through false information.<sup>52</sup> Founder Robert Pearson said that a woman who wanted to terminate her pregnancy “has no right to information that will help her kill her baby.”<sup>53</sup> CPCs are organizations that advertise pregnancy testing and options, leading women to think that they provide abortion services.<sup>54</sup> Once in the door, staff use a variety of methods to convince women to continue their pregnancies. Methods include generous offers of financial support to help raise the child (which never materialize); convincing women that abortion causes breast cancer and infertility (which is untrue); exaggerating the likelihood of complications, including death; and using ultrasound pictures to evoke emotional responses.<sup>55</sup>

Most insidiously, some CPCs tell women that they can get an abortion at any time during their pregnancies, leading them to believe that there is no urgency in their decision.<sup>56</sup> Other CPCs tell women that they are earlier in their pregnancy so that women believe they have more time to decide to have an abortion than they actually do, or that they are likely to miscarry so that there is no need for an

52. *Crisis Pregnancy Centers: An Affront to Choice*, NAT’L ABORTION FED’N (2006), [http://prochoice.org/wp-content/uploads/cpc\\_report.pdf](http://prochoice.org/wp-content/uploads/cpc_report.pdf) [<https://perma.cc/GYX3-29F7>].

53. *Id.*

54. Several states and local jurisdictions have attempted to require CPCs to make clear that they do not provide abortion services, or else to direct women to resources for comprehensive care. Most of these efforts have been significantly scaled back, with the Supreme Court recently finding that such a requirement violates the right to free speech. *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). In New York, CPCs are now only being required to disclose: “This facility does not have a licensed medical provider on site to provide or supervise all services.” Lauren Evans, *New Law Hasn’t Stopped Anti-Abortion “Pregnancy Centers” From Misleading Women*, VILLAGE VOICE (Sept. 13, 2017), <https://www.villagevoice.com/2017/09/13/562988/> [<https://perma.cc/7WJE-VKNF>]; see also David G. Savage, *Supreme Court Agrees to Hear Antiabortion Challenge to California Disclosure Law for Pregnancy Centers*, L.A. TIMES (Nov. 13, 2017), <http://www.latimes.com/politics/la-na-pol-abortion-court-california-20171113-story.html> [<https://perma.cc/YV9L-LWHB>]; Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, N.Y. TIMES (Jan. 4, 2013), <https://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html> [<https://perma.cc/8XJM-PAHH>].

55. See, e.g., NARAL PRO-CHOICE AMERICA, *CRISIS PREGNANCY CENTERS LIE: THE INSIDIOUS THREAT TO REPRODUCTIVE FREEDOM* 8, 10 (2015), <https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf> (breast cancer and death risks); *id.* at 9 (mental health risks); MELISSA KLEDER & S. MALIA RICHMOND-CRUM, NARAL PRO-CHOICE MD. FUND, *THE TRUTH REVEALED: MARYLAND CRISIS PREGNANCY CENTER INVESTIGATION* 3 (Jan. 14, 2008) [hereinafter *TRUTH REVEALED*], <http://www.prochoicemd.org/assets/bin/pdfs/cpcreportfinal.pdf> [<https://perma.cc/YW9Q-4KGE>] (breast cancer, infertility and mental health risks). CPC workers have also been filmed using these tactics. See 12<sup>TH</sup> & DELAWARE (Loki Films 2010) (showing a CPC claiming that abortion causes breast cancer and infertility); JACKSON (Girl Friday Films 2016) (documenting a CPC client being told that she could “die from it [abortion],” that a CPC’s provision of clothes and diapers for the pregnant client’s one-year-old were contingent upon her attendance of abstinence classes, and a CPC worker performing an ultrasound offering to write “hi mommy” on the picture for a woman who was considering terminating her pregnancy).

56. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 1255.

abortion.<sup>57</sup> These tactics may result in a woman having a later, more expensive and more dangerous procedure, or carrying an unwanted pregnancy to term.<sup>58</sup>

While Planned Parenthood facilities are not primarily found in Black neighborhoods, the same cannot be said for CPCs. Citing the high rates of abortion in communities of color, CPCs have explicitly targeted what they call “underserved” communities.<sup>59</sup> Tactics include buying airtime in media outlets serving the Black community and advertising on public transportation routes in Black neighborhoods.<sup>60</sup>

While data on the race of staff members of CPCs is not available, CPCs are largely funded by conservative, evangelical Christian organizations, and most have white, male leadership.<sup>61</sup> Another significant portion of their funding comes from governments: the federal government, which contracts with CPCs to provide “abstinence only” education; and states, which support CPCs with tax breaks, direct financial support, and fees collected from “Choose Life” license plates.<sup>62</sup>

CPCs view women of color as passive victims of abortion, rather than individuals exercising their own volition, justifying the need for these “urban initiatives.”<sup>63</sup> This reproductive paternalism, and presumption that Black women are not competent decisionmakers regarding their own reproduction, reflects the most abhorrent and stereotyped notions about Black women’s humanity and competency. This harks back to enslavement, which “marked Black women . . . as objects whose decisions about reproduction should be subject to social regulation rather than to their own will.”<sup>64</sup>

This racial targeting also occurs at facilities providing abortion care. A Black obstetrician/gynecologist regularly receives racial taunts from protesters as he enters a facility where he practices, being called “a filthy negro abortionist” by a white man.<sup>65</sup> Another Black provider hears, “You’re killing the black race!”

57. 12<sup>TH</sup> AND DELAWARE, *supra* note 55 (a woman at a CPC was told she was seven weeks pregnant instead of ten). NARAL PRO-CHOICE AMERICA, *supra* note 55, at 12 (miscarriage claim); TRUTH REVEALED, *supra* note 54, at 4 (telling a woman she could get an abortion at any point in her pregnancy). See also Jenny Kutner, “I Feel Like I Was Tricked”: New Documentary Uncovers How Crisis Pregnancy Centers Lie to Women, SALON (Sept. 18, 2014), [https://www.salon.com/2014/09/18/i\\_feel\\_like\\_i\\_was\\_tricked\\_new\\_documentary\\_uncovers\\_how\\_crisis\\_pregnancy\\_centers\\_lie\\_to\\_women/](https://www.salon.com/2014/09/18/i_feel_like_i_was_tricked_new_documentary_uncovers_how_crisis_pregnancy_centers_lie_to_women/) [<https://perma.cc/34KP-9U72>] (last visited Apr. 4, 2019) (purposely misdating gestation).

58. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 7.

59. FAMILY RESEARCH COUNCIL, A PASSION TO SERVE: HOW PREGNANCY RESOURCE CENTERS EMPOWER WOMEN, HELP FAMILIES, AND STRENGTHEN COMMUNITIES 26 (2011).

60. NARAL PRO-CHOICE AMERICA, *supra* note 55, at 16.

61. National Abortion Federation, *supra* note 52, at 14. These include the Pearson Foundation and Liberty Foundation. The Christian Action Council’s Care Net is headed by a Black man.

62. *Id.* at 11-14.

63. The Family Research Council’s report also claims (incorrectly) that abortion facilities are concentrated in minority areas. See *supra* note 59, at 26.

64. ROBERTS, *supra* note 14, at 23.

65. DAVID S. COHEN & KRYSTEN CONNOR, LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM 96 (2015).

yelled by the same woman every Friday.<sup>66</sup> A white protestor outside of an Alabama clinic says to a reporter, “The KKK would be happy with what’s happening here today . . . [a]ll these black babies being murdered. Black babies’ lives matter.”<sup>67</sup>

I was working with the Center for Reproductive Law & Policy in the Summer of 1993, challenging Mississippi’s parental consent law. As I walked into the clinic to take depositions, a white protester holding a Black infant in the 90-degree August heat yelled out to me, “Malcolm X wouldn’t want you to kill your baby.” My white female supervisor was also of childbearing age, but I was the sole target of the protestors’ attention. Under the guise of “saving Black babies,” the protestors saw nothing wrong with making assumptions based on my status as a Black woman. Protestors have continued to use the tactic of racial shaming at this particular clinic. In the opening scene of the documentary *Jackson*, a protestor makes reference to Martin Luther King’s most famous speech, calling out to a woman walking into the clinic, “Mommy, please don’t kill me. I have a dream, Mommy.”<sup>68</sup>

### E. So-called “Race Bans”

Building on the argument that the higher abortion rate among Black women is some sort of evidence of a genocidal conspiracy, legislation has been proposed to ban abortion based on race.<sup>69</sup> In order to directly target Black women’s reproductive decision-making, proponents claim that the disproportionate rate of abortions among Black women is driven by some animus that these women have against their fetuses based on its race.

Ironically, the only reported cases of abortion motivated by the race of the fetus involve white women. Typically, these women are pressured by parents to terminate the pregnancy because the man who impregnated their daughter was

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66. *Id.* at 97.

67. Angyal, *supra* note 47.

68. JACKSON, *supra* note 55.

69. Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. 4924, 114th Cong. (2016). Arizona is the only state with a law banning race- and sex-selective abortions. *See* Ariz. Rev. Stat. Ann. § 13-3603.02. Rep. Trent Franks (R. Az.), who recently resigned from the House amid allegations that he offered staffers money to conceive a child with him, was the champion of these bans. Ben Johnson, *Banning Abortion Based on Sex and Race is “The Civil-Rights Struggle That Will Define Our Generation”*: Congressman, LIFESITE NEWS (Apr. 14, 2016), <https://www.lifesitenews.com/news/banning-race-and-sex-selective-abortion-is-the-civil-rights-struggle-that-wil> [<https://perma.cc/8HRJ-3HS8>]; Katie Rogers, *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/us/politics/trent-franks-sexual-surrogacy-harassment.html> [<https://perma.cc/A6AY-2ZK7>]. PRENDA and the Arizona law are the only efforts to directly restrict abortion based on race, but every abortion restriction has a disproportionate impact on women of color. Common restrictions include waiting periods, bans on Medicaid funding, and parental involvement requirements. This is not only because of their higher abortion rates, but also due to their lower incomes, lower rates of insurance, reduced access to transportation, and employment that typically does not allow time off. ROBERTS, *supra* note 14, at xiv.

Black.<sup>70</sup> These abortions procured by white women obviously were not included in the statistics about abortion among Black women cited in the findings of legislation to prevent “race-based” abortions.

This legislation is often coupled with efforts to ban sex-selective abortion.<sup>71</sup> The “Prenatal Non-Discrimination Act” cites extensive evidence suggesting that some individuals choose to terminate their pregnancy based on the sex of the fetus, but it can only cite the racial disparity in abortion rates as “evidence” of individuals choosing to abort based on the fetus’s race.<sup>72</sup> This is because there is no evidence of Black women basing their abortion decision on the race of the fetus they are carrying. Fortunately, courts see these laws for what they are: attempts to prevent women from terminating their pregnancies. Most recently, Indiana’s race- and sex-selection ban has been enjoined by the Seventh Circuit Court of Appeals.<sup>73</sup>

The Supreme Court recently denied Indiana’s request for review of the provisions related to race and sex-selective abortions on the ground that the issue had not been presented in any other Court of Appeals.<sup>74</sup> Justice Clarence Thomas wrote a dissent that attempted to draw a connection between the disproportionate abortion rate among Black women and eugenic motives, while devoting nary a word to Black women’s capacity for decision-making.<sup>75</sup> Adam Cohen, the author cited liberally by Justice Thomas in making his arguments about the eugenic consequences of abortion and contraception explicitly rejected Thomas’ mischaracterization of his work:

Between eugenic sterilization and abortion lie two crucial differences: who is making the decision, and why they are making it. In eugenic sterilization, the state decides who may not reproduce, and acts with the

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70. See, e.g., Ernie Suggs, *Senate Abortion Bill Continues to Stir Emotions*, ATLANTA JOURNAL-CONSTITUTION (Apr. 6, 2010), <http://www.ajc.com/news/local-govt--politics/senate-abortion-bill-continues-stir-emotions/miKKzUrS4Z3UvnFm8pSDtM/> [<https://perma.cc/S3WC-Q6RQ>]; Associated Press, *Police: Parents Kidnap Plot Motivated by Race*, NBC NEWS, (Sept. 19, 2006), [http://www.nbcnews.com/id/14893787/ns/us\\_news-crime\\_and\\_courts/t/police-parents-kidnap-plot-motivated-race/#.WjLlFWnGpo](http://www.nbcnews.com/id/14893787/ns/us_news-crime_and_courts/t/police-parents-kidnap-plot-motivated-race/#.WjLlFWnGpo) [<https://perma.cc/UK7M-AVNX>].

71. Skewed sex ratios indicating son preference are documented among some sub-populations in the United States. Bans on sex-selective abortion, however, do not address the underlying causes of son preference and subject certain women to racial profiling when they are seeking abortion care. NAT’L WOMEN’S L. CTR., RACE AND SEX SELECTION ABORTION BANS ARE HARMFUL TO WOMEN 11 n.6 (Aug. 2015), <https://www.nwlc.org/wp-content/uploads/2015/08/prendafactsheet.pdf> [<https://perma.cc/2JCM-7FGW>] (noting that the ratio could be the result of assisted reproductive technology and not abortion).

72. Compare H.R. 4924, § 2(a)(1) with H.R. 4924, § 2(a)(2).

73. Planned Parenthood of Indiana and Kentucky, Inc. v. Indiana State Dept. of Health, 888 F.3d 300 (7th Cir. 2018).

74. Box v. Planned Parenthood of Indiana and Kentucky, No. 18-483, slip op. at 3 (May 28, 2019).

75. *Id.* slip op. at 17. Thomas also perpetuates the myth that Sanger targeted the Black community, despite evidence that she rejected race-based eugenics. See Gandy, *supra* note 30.

goal of “improving” the population. In abortion, a woman decides not to reproduce, for personal reasons related to a specific pregnancy.<sup>76</sup>

This legislation is based on the unproven hypothesis that Black women are terminating their pregnancies because they do not want to have Black children. Based on this rationale, proponents argue that race bans are consistent with U.S. law that prohibits race discrimination.<sup>77</sup> Yet in practice this would require doctors to give special scrutiny to Black women presenting for abortion care, which would further entrench race discrimination rather than prevent it.

Finally, the fact that this theory is completely fabricated by those pushing an anti-abortion agenda does not mean that such a reason to terminate a pregnancy would be invalid. RJ principles assert that women’s decisions regarding pregnancy termination should be left to them alone. It is plausible that a Black woman, seeing the degree of State and private violence inflicted upon Black children and adults, would determine that she would rather not carry a pregnancy to term and raise a child in such a climate.<sup>78</sup>

## II. CLAIMING A PROPERTY INTEREST IN BLACK WOMEN’S BODIES: PAST AND PRESENT

The racialized rhetoric described in Part I contributes to a particular narrative about Black women’s autonomy, agency, and value. It characterizes Black women as objects, and not actors. This particular form of objectifying Black women was also an integral part of how they were controlled during enslavement. As property, they were merely to be acted upon, with their owners holding all rights over them.

Property theory posits that there are two primary property rights: use and exclusion. For the purposes of this analysis, the right of use of one’s reproductive capacity and sexuality includes all of the benefits that one could draw from her own sexual decision-making and reproductive labors. With regard to the right of exclusion, this means one’s right to determine who has sexual access to her body, whether that body will be used for reproduction, and whether that body will be subjected to restrictions based on one’s reproductive status (for example, the state of being pregnant). The RJ framework considers these rights as encompassing the right to decide whether or not to have children, the right to

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76. Adam Cohen, *Clarence Thomas Knows Nothing of my Work*, THE ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> [https://perma.cc/3HW7-WEW3].

77. H.R. 4924, § 2(a)(2)(B).

78. This echoes the decisions of enslaved Black women to resist the institution of slavery by terminating their pregnancies or even killing their children. See ROBERTS, *supra* note 14, at 49; see also NIKKI M. TAYLOR, *DRIVEN TOWARD MADNESS: THE FUGITIVE SLAVE MARGARET GARNER AND TRAGEDY ON THE OHIO* (2016).

raise children with adequate supports, and the right to express one's sexuality free from violence or coercion.<sup>79</sup>

#### A. Enslaved Women as Reproductive Property<sup>80</sup>

Inasmuch as enslaved Africans were the property of their owners, the sexual and reproductive capacities of women were also owned. Women's sexuality and reproduction merely reinforced their status as property. Saidiya Hartman notes that Black women's sexuality and reproduction were an integral part of their value as labor.<sup>81</sup> This Section identifies but a few of the ways that owners possessed the property rights of use and exclusion in Black women's sexuality and reproduction.

##### 1. The Right to Use: Being Denied the Benefit of One's Reproductive Labor<sup>82</sup>

Enslaved parents lived with the reality that their children might be taken from them at any time, with the threat of family separation often used as the ultimate punishment.<sup>83</sup> The joy that parents receive in seeing their children grow and thrive was often denied to enslaved women. The realities of raising children while in bondage cannot be romanticized,<sup>84</sup> yet it is well-documented that strong family ties grew despite the precariousness and instability posed by enslavement.<sup>85</sup>

Once sold to another owner, many parents lacked even the most basic knowledge regarding their children's whereabouts, condition, or even of whether they were dead or alive.<sup>86</sup> The harm done by separating mothers and children was lifelong. As women grew to old age, they were denied the comfort and care

79. ROSS & SOLINGER, *supra* note 1, at 9.

80. A comprehensive review of all the ways Black women's reproductive capacities were rendered property in enslavement is beyond the scope of this piece.

81. Saidiya Hartman, *The Belly of the World: A Note on Black Women's Labors*, 18 SOULS 166, 166 (2016).

82. The right to use was also often denied in the selection of partners, the right to marry (or to receive permission from the owner), and the right to cohabit with a partner of one's choosing. See Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 195 (1987); see generally Dacia Green, *Ain't I...?: The Dehumanizing Effect of the Regulation of Slave Womanhood and Family Life*, 25 DUKE J. GENDER L. & POL'Y 191 (2018).

83. Burnham, *supra* note 82, at 201-02. See also Green, *supra* note 82, at 211-12.

84. Given this reality, enslaved women practiced contraception, abortion, and infanticide to spare their children the perils of slavery. See Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 27-28 (2001).

85. Burnham, *supra* note 82, at 190.

86. DeNeen L. Brown, "My Mother was Sold From Me": After Slavery, the Desperate Search for Loved Ones in "Last Seen Ads," WASH. POST (Sept. 7, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/09/07/my-mother-was-sold-from-me-after-slavery-the-desperate-search-for-loved-ones-in-last-seen-ads/?utm\\_term=.2d425e24826e](https://www.washingtonpost.com/news/retropolis/wp/2017/09/07/my-mother-was-sold-from-me-after-slavery-the-desperate-search-for-loved-ones-in-last-seen-ads/?utm_term=.2d425e24826e) [<https://perma.cc/HR7K-7Z5H?type=image>] (describing archive of ads placed after the Civil War by both mothers and children).



of their own children, but broader notions of family and fictive kin ensured that the elderly received family-like care and attention.<sup>87</sup> Even those with the good fortune to live in close proximity to their children still had no control over their upbringing.<sup>88</sup> For children who were not sold, owners determined what work the children would do, their food rations, and their discipline for any perceived infraction.<sup>89</sup>

Andrea Freeman identifies breastfeeding as another benefit of reproduction denied to enslaved Black women.<sup>90</sup> Sometimes masters forced enslaved women to stop breastfeeding their own children because of nursing's contraceptive properties, or because it disrupted their ability to work.<sup>91</sup> The practice of using an enslaved woman as a wet nurse for white children on some plantations meant that both mothers and their children were denied the benefits of breastfeeding.<sup>92</sup>

In being deprived of an ongoing relationship with the children they bore, the ability to nurture their own children, and the right to direct and influence the upbringing of the children even when nearby, Black women were denied the benefits of their own reproductive labor.

## 2. *The Right to Exclude: Rape and Forced Breeding*<sup>93</sup>

Rape was a common feature of enslavement, and enslaved women had no right to exclude others from access to their bodies. The crime of rape was not recognized between an owner and an enslaved woman.<sup>94</sup> In *State of Missouri v. Celia*, a case in which an enslaved woman killed her owner for raping her, the court found that the rape statute did not apply because the definition of woman

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87. DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 117 (1999).

88. Burnham, *supra* note 82, at 204.

89. *Id.*

90. See generally Andrea Freeman, *Unmothering Black Women: Formula Feeding as an Incident of Slavery*, 69 HASTINGS L.J. 1545 (Aug. 2018).

91. *Id.* at 1556-57.

92. *Id.* at 1558.

93. There are many other examples of practices that limited enslaved women's right to exclude others from their bodies. New Orleans and several other cities had a thriving market for "fancy girls," enslaved women of mixed race sold solely for the purpose of being held in sexual bondage as the concubine of one man or to be prostituted to many. WHITE, *supra* note 87, at 37. The "father of American gynecology," J. Marion Sims, subjected enslaved women to medical experiments without the benefit of anesthesia. HARRIET WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 65-66 (2008). A statue of Sims, like the statues of others who have committed atrocities concurrently with their good works, has been the subject of recent controversy. DeNeen L. Brown, *A Surgeon Experimented on Slave Women Without Anesthesia: Now his Statues are Under Attack*, WASH. POST (Aug. 29, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/08/29/a-surgeon-experimented-on-slave-women-without-anesthesia-now-his-statues-are-under-attack/?utm\\_term=.6593c3db06d8](https://www.washingtonpost.com/news/retropolis/wp/2017/08/29/a-surgeon-experimented-on-slave-women-without-anesthesia-now-his-statues-are-under-attack/?utm_term=.6593c3db06d8) [<https://perma.cc/MB5T-MMLZ>]. These women had no right to refuse to be experimented on, and were thus denied the right to exclude others from the use of their bodies. *Id.*

94. Burnham, *supra* note 82, at 199.

did not include enslaved women.<sup>95</sup> As property, an owner had the right to use a woman in any way he pleased. This impunity also extended to the owner's family members, overseers and even visitors to the household.<sup>96</sup>

One particularly dehumanizing practice, compared to animal husbandry, was "breeding"—the intentional pairing of female and male slaves for qualities that would benefit the owner.<sup>97</sup> Certain enslaved women were forced to mate with certain enslaved men, even if they were committed or married to someone else.<sup>98</sup> These practices can also be viewed as a violation of the right to use, as enslaved women were denied the right to procreate with the man of their choice.

Related to both rape and breeding practices, enslaved women were required to prove their worth by bearing as many children as possible.<sup>99</sup> Bearing children brought rewards in the form of better food, clothing, and a lighter workload.<sup>100</sup> Some owners even promised freedom to women upon birthing a particular number of children.<sup>101</sup> In consideration of the brutality of enslavement, a woman who attempted to meet such goals to improve her conditions can hardly be said to have been acting of her own volition.

## B. *Regulating Black Women as Property of the State*

Current attempts at reproductive oppression reflect the State's property interest in Black women's sexuality and reproduction. Rather than an owner determining the rights of use and exclusion, legislation now accomplishes the same end by either targeting or disproportionately affecting Black women.

### 1. *The Right to Use: Family Caps*<sup>102</sup>

The "Family Cap" is shorthand for State policies that deny an increase in cash benefit assistance to families who have an additional child while receiving

95. Evelyn Brooks Higginbotham, *African American Women's History and the Metalanguage of Race*, 17 J. WOMEN SOC'Y 251, 257-58 (1992); see also DeNeen L. Brown, *Missouri v. Celia, a Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST (Oct. 19, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-rape-her-then-claimed-self-defense/?utm\\_term=.5aacd076401e](https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-rape-her-then-claimed-self-defense/?utm_term=.5aacd076401e) [https://perma.cc/2RHT-FGR9].

96. Burnham, *supra* note 82, at 200.

97. *Id.*; Green, *supra* note 82, at 202.

98. Burnham, *supra* note 82, at 200 n.55. Burnham also documents the limitations imposed on marriage for enslaved persons, including the requirement to first receive permission from the master. *Id.* at 195-97.

99. This was especially important after the ban on further importation of enslaved Africans in the mid-1800s. Bridgewater, *supra* note 84, at 14.

100. *Id.* at 17.

101. Burnham, *supra* note 82, at 198.

102. For an overview of coercive practices in health and public welfare systems, see SCHOEN, *supra* note 17. State attempts to limit or discourage Black women's use of their bodies for childbearing have been extensively documented: for sterilization abuse, see NELSON, *supra* note 15, at 65-67; for coercion in the use of long-acting reversible contraceptives, see Rachel Benson Gold, *Guarding Against Coercion*

Temporary Aid for Needy Families (TANF).<sup>103</sup> Through financial coercion, the State attempts to limit reproduction among low-income women, who are disproportionately Black. Not only are wealthier women not subjected to this attempt to restrict their childbearing, but those with greater means are given tax credits for each additional child.

Family Caps emerged from the “welfare queen” myth widely popularized in the 1970s by then-presidential candidate Ronald Reagan.<sup>104</sup> This backlash and narrative about race and poverty began shortly after the civil rights movement successfully gained equal access to public benefits programs for those Black people who had migrated to the North.<sup>105</sup> When benefits were primarily being accessed by white families in need, there was little public outcry from taxpayers or discussion of the worthiness of the beneficiaries.<sup>106</sup> This narrative reflects beliefs about who deserves to be a mother. Roberts notes that images of motherhood as worthy and honorable do not include Black mothers. “The image of the welfare mother quickly changed from the worthy white widow to the immoral Black welfare queen.”<sup>107</sup>

The logic animating Family Caps is that women have children in order to receive more benefits, so denying them additional funds will cause them to refrain from childbearing.<sup>108</sup> This presumes that women receiving benefits, disproportionately women of color,<sup>109</sup> are motivated by something different than other women in their childbearing decisions. Contrary to the myth underlying the policy, women receiving cash assistance benefits have the same average number of children as all women: two.<sup>110</sup>

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*While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POL’Y REV. 8, at 10-12 (2014). See also Elizabeth A. Stewart et al., *The Burden of Uterine Fibroids for African-American Women: Results of a National Survey*, 22 J. WOMEN’S HEALTH 807 (Oct. 2013) (discussing the overuse of hysterectomies as treatment for fibroids).

103. CTR. ON REPRODUCTIVE RTS. & JUST., BRINGING FAMILIES OUT OF ‘CAP’TIVITY: THE PATH TOWARD ABOLISHING WELFARE FAMILY CAPS 2 (Aug. 2016), [https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps\\_FA2.pdf](https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-Caps_FA2.pdf) [<https://perma.cc/RE8Z-WB36>]. Family Caps were an option made available to the states in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, President Bill Clinton’s plan to reform welfare. Since 1995, seven states have repealed their Family Caps, and seventeen still impose a family cap. *Id.*

104. Rachel Black & Aleta Sprague, *The “Welfare Queen” Is a Lie*, THE ATLANTIC (Sept. 28, 2016), <https://www.theatlantic.com/business/archive/2016/09/welfare-queen-myth/501470/> [<https://perma.cc/JAZ5-ZNHC>].

105. *Id.*

106. *Id.*

107. ROBERTS, *supra* note 14, at 207.

108. One researcher observed, “It would be a quantum leap in faith to believe that \$42 influences an act that is usually spontaneous and occurs nine months before birth.” Patricia Donovan, *Does the Family Cap Influence Birthrates? Two New Studies Say “No,”* GUTTMACHER REPORT (Feb. 1, 1998), <https://www.guttmacher.org/gpr/1998/02/does-family-cap-influence-birthrates-two-new-studies-say-no> [<https://perma.cc/NFM4-WGES>].

109. Blacks and Hispanics receive TANF benefits at disproportionately higher rates than whites. A third of TANF recipients are non-Hispanic whites. GENE FALK, CONG. RESEARCH SERV., R43187, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): SIZE AND CHARACTERISTICS OF THE CASH ASSISTANCE CASELOAD (2016).

110. CTR. ON REPRODUCTIVE RTS. & JUST., *supra* note 103, at 5.

Studies have largely shown that the only effect of the Family Cap is to drive families further into poverty.<sup>111</sup> Other studies have shown that in states that had both Family Caps and Medicaid coverage for abortion, the abortion rate increased.<sup>112</sup> This is obviously not an outcome that self-identified social conservatives would publicly claim as a victory, especially if their goal was to “protect” children.

Khiara Bridges notes that that federal government continues to be the primary propagator of the idea that all social ills are caused by childbearing among poor—often falsely equated with Black—women.<sup>113</sup> Bridges notes that by excluding the work of mothering for a group of women who are disproportionately Black, welfare policy reinforces the historic belief that “mother” is not a legitimate identity for Black women the way it is for white women.<sup>114</sup> This is another way in which the State attempts to limit Black women’s ability to use their bodies for reproduction and benefit from their reproductive labor.

## 2. *The Right to Exclude: The Detainment and Prosecution of Addicted Women*<sup>115</sup>

Beginning with the rise of the crack epidemic in the 1980s, prosecutors targeted addicted pregnant women for criminal punishment.<sup>116</sup> Charges typically included child endangerment, drug delivery and homicide, even though the text

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111. *Id.* at 6–7.

112. MICHAEL CAMASSO, FAMILY CAPS, ABORTION AND WOMEN OF COLOR 27 (2007); *See also* Jennifer Preston, *Births Fall and Abortions Rise Under New Jersey Family Cap*, N.Y. TIMES (Nov. 3, 1998), <https://www.nytimes.com/1998/11/03/nyregion/births-fall-and-abortions-rise-under-new-jersey-family-cap.html> [<https://perma.cc/5XCA-Z8Q3>].

113. Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609, 610 (2009).

114. *Id.* at 642–43.

115. Barriers to abortion and contraceptive access, such as restrictions on insurance coverage, also violate the right to exclude because women are compelled to become pregnant and possibly carry pregnancies to term against their wishes. Additionally, as during enslavement, Black women still suffer disproportionate rates of sexual assault. Black women have the second-highest probability of surviving rape in their lifetimes (21.2 percent). Native Americans have the highest at 27.5 percent. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORALITY WEEKLY REP. 1, 6 tbl. 2 (Sept. 5, 2014). Because of the distrust of police, Black women are less likely to report rape and have experienced re-victimization when they attempt to seek justice against their attackers. *See, e.g.*, Lauren Rosenblatt, *Why It’s Harder for African American Women to Report Campus Sexual Assaults, Even at Mostly Black Schools*, L.A. TIMES (Aug. 28, 2017), <http://www.latimes.com/politics/la-na-pol-black-women-sexual-assault-20170828-story.html> [<https://perma.cc/C5FX-4HC5>].

116. Such interventions are not limited to addicts. Women have been subjected to State intervention for failure to follow doctors’ orders, for suspicion of causing fetal harm, for suicide attempts, and for failure to submit to a cesarean section. *See generally* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147 (2007).

of these laws gave no indication that they were intended to be enforced against a pregnant woman for her actions during pregnancy.<sup>117</sup>

These laws were justified as efforts needed to “protect” fetuses from their “bad mothers.” Both the punitive nature of these laws, and the lack of other efforts by states to actually advance maternal, fetal, and newborn health greatly undermined states’ purported justifications. Furthermore, these laws operated under several false assumptions: that women did drugs in order to harm their fetuses; that women did drugs without regard to harm to their fetuses; that the threat of punishment would prevent them from becoming addicted; that the threat of punishment would inspire them to stop immediately; and there was treatment available for those who wanted to stop using drugs.

Despite evidence that women of all races use illicit substances at equal rates, Black women are more than half of those prosecuted for alleged fetal harm.<sup>118</sup> This is largely attributed to selective prosecution, as well as close scrutiny of women using public facilities, who are disproportionately Black.<sup>119</sup> Healthcare providers also limit their testing to drugs disproportionately used by Black women, which are not actually those most dangerous to fetal development.<sup>120</sup>

Studies have shown that poverty and inadequate nutrition were the predominant factors in poor outcomes among women using crack cocaine during pregnancy. Alcohol is actually more harmful to fetal development than cocaine. With the rise of opioid use among white people, commentators have observed a marked shift in the discourse of addiction; from one of individual moral failure to a national public health crisis.<sup>121</sup> This again illustrates how Black women are pathologized.

These forced interventions constitute the most drastic type of State intrusion into women’s lives.<sup>122</sup> By virtue of their pregnant status, women are denied the right of privacy, and the right not to give evidence against themselves as

117. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 HEALTH POL., POL’Y & L. 299, 323 (2013).

118. *Id.* at 310 tbl.1.

119. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. SOC. CHANGE 381, 387-88 (2008).

120. The “crack baby” myth has been largely disproven. Laura M Betancourt et al., *Adolescents With and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLY TERATOLOGY 36 (2011).

121. Jesse Mechanic, *When a Drug Epidemic Hit White America, Addiction Became a Disease*, HUFFINGTON POST (July 10, 2017), [https://www.huffingtonpost.com/entry/when-a-drug-epidemic-hit-white-america-addiction-became\\_us\\_5963a588e4b08f5c97d06b9a](https://www.huffingtonpost.com/entry/when-a-drug-epidemic-hit-white-america-addiction-became_us_5963a588e4b08f5c97d06b9a) [https://perma.cc/N3D5-MA7H]; Vann R. Newkirk II, *What the ‘Crack Baby’ Panic Reveals About The Opioid Epidemic*, THE ATLANTIC (July 16, 2017), <https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/> [https://perma.cc/PP59-9KLA].

122. One private intervention started by a white woman pays substance addicted women \$200 to get sterilized or use LARCs, contraception over which they have no control. Erika Derkas, *The Organization Formerly Known as Crack: Project Prevention and the Privatized Assault on Reproductive Wellbeing*, 19 RACE, GENDER & CLASS 179, 180 (2012). See also PROJECT PREVENTION, <http://www.projectprevention.org/> [https://perma.cc/ZB2J-N464].

protected by the U.S. Constitution.<sup>123</sup> Under the guise of fetal protection, states have arrested and detained women, wholly depriving them of their liberty. Some judges have offered reduced sentences to addicts for using invasive, long-acting forms of contraception.<sup>124</sup> State legislatures have also proposed that addicted women be required to use invasive, long-acting forms of contraception, or be sterilized.<sup>125</sup> Other women have been subjected to parole only on the condition of submitting to treatment, which, like other punitive interventions, is ineffective according to addiction experts.<sup>126</sup> If the only way addicted pregnant women can avoid prosecution is to terminate their pregnancy, this is also a violation of their fundamental rights, and could be deemed a violation of their right to use as well.<sup>127</sup>

### III. REPRODUCTIVE JUSTICE: REJECTING THE STATE'S ATTEMPT TO SECURE A PROPERTY INTEREST IN BLACK WOMEN'S BODIES

As the property of their owners, enslaved Black women could neither use their own bodies for their own benefit, nor exclude others from having access to their bodies. In the 150 years since emancipation, Black women have continued to be oppressed by governmental control of their reproduction, frustrating their own desires to procreate, parent, or abstain from pregnancy and childbearing. Current methods of reproductive oppression, in which the State holds property rights over Black women's bodies through restrictive laws and policies, replicate what was once owners' private property interest in their female slaves.

Black women in the United States have always been burdened with advancing others' priorities with regard to their reproductive decision-making. From arriving on the shores of Virginia in 1619<sup>128</sup> to emancipation, their duty was to increase the wealth of their masters, while at the same time being denied the entitlements and pleasures of motherhood. In the twentieth century, the duty imposed by their own community was to build Black warriors and voters, with

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123. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1425 (1991).

124. Despite some improvement in the narrative around addiction stemming from the opioid crisis, judges are still coercing pregnant addicts to use contraception. See *Rise in Drug-Addicted Babies Prompts Judge's Controversial Solution*, CBS NEWS (July 21, 2017), <https://www.cbsnews.com/news/opioid-crisis-tennessee-judge-neonatal-abstinence-syndrome-birth-control-inmate/> (Tennessee judge offering reduced sentence to both male and female inmates suffering addiction).

125. Roberts, *supra* note 123, at n.217 (describing Ohio bill).

126. Ehrlich, *supra* note 119, at 392.

127. Paltrow & Flavin, *supra* note 117, at 308.

128. Although this date is widely acknowledged as the arrival of African peoples in the American colonies, one scholar cautions that Africans had a history in the Americas predating 1619, and that the sole focus on 1619 renders Africans mere subjects in America's history when they were much more. See Michael Guasco, *The Misguided Focus on 1619 as the Beginning of Slavery in the U.S. Damages Our Understanding of American History*, SMITHSONIAN MAG. (Sept. 13, 2017), <https://www.smithsonianmag.com/history/misguided-focus-1619-beginning-slavery-us-damages-our-understanding-american-history-180964873/> [<https://perma.cc/8EPV-M6KC>].

little consideration given to the mental and physical strains that motherhood imposed on women living with racism, sexism, and poverty. In the twenty-first century, Black women are at the center of the culture wars. Their childbearing is perceived as the root of all social ills, yet they are the subject of “rescues” by those who claim to be pro-life. At the same time, they are denied any meaningful social support for healthy parenting and are criminalized for their reproductive decisions. They are demonized as threats to the Black community for deciding to terminate pregnancies—often in consideration of what is best for the children they are already raising. And police or private vigilantes can kill Black male children who are deemed threats to the white community and suffer no consequences.<sup>129</sup>

RJ seeks to move Black women from the position of object to the position of subject, from acted upon to actor. Reproductive Justice organizations led by Black women and based in the communities they serve have been responding to these current attempts to render Black women objects without agency, and centered the time- and place-specific needs of Black women. In addition to SisterSong’s Trust Black Women, In Our Own Voice: National Black Women’s Reproductive Justice Agenda works with eight local partner organizations to advance policies in Washington, D.C. and around the nation that take into consideration the historical mistreatment of Black women and exploitation of our reproductive capacities. These organizations have led local and national fights to decriminalize sex work, expand birthing options for women on Medicaid, and destigmatize abortion.

Reproductive oppression has always been and continues to be heavily racialized. Therefore, as Bridges argues, the regulation of Black women’s sexuality and reproduction must be treated as a matter of racial justice.<sup>130</sup> The discourse about Black women’s reproductive and sexual capacities is still influenced by the notion developed during enslavement that Black women’s reproductive labors are for the benefit of others; that they are the property of others, be it individual masters or the State acting as master. The Reproductive Justice movement serves to resuscitate the Black body that has been killed by the reproductive oppression so eloquently described by Professor Dorothy Roberts over twenty years ago. Current attempts to marginalize and objectify Black women vis-à-vis their reproductive capacities reflect this centuries-long history of oppression, and must be explicitly rejected on this basis.

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129. Alana Horowitz Satlin, *Hillary Clinton Meets With Mothers of Trayvon Martin*, Jordan Davis, Michael Brown and Tamir Rice, HUFFINGTON POST (Nov. 3, 2015), [https://www.huffpost.com/entry/hillary-clinton-gun-violence-black-lives-matter\\_n\\_563881d3e4b00a4d2e0bb83f](https://www.huffpost.com/entry/hillary-clinton-gun-violence-black-lives-matter_n_563881d3e4b00a4d2e0bb83f) [<https://perma.cc/2HK3-9JVS>]. Their children’s respective ages were 17, 17, 18 and 12. Only Jordan Davis’s killer was convicted. *Id.*

130. Bridges, *supra* note 113, at 611.

# Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”)

or

## Johnny and the WHP

Blanche Bong Cook<sup>†</sup>

**ABSTRACT:** Title 8, United States Code, Section 1409—one of this country’s citizenship transmission laws—creates a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the “WHP”). Section 1409 governs the transmission of citizenship from United States citizens to their children, where the child is born abroad, outside of marriage, and one parent is a citizen and the other is not. Section 1409, however, draws a distinct gender distinction between women and men: An unwed female American citizen who births a child outside the United States, fathered by a foreign man, automatically transmits citizenship to her child. An unwed male American citizen, by contrast, who fathers a child abroad with a foreign woman has the distinctly male prerogative to either grant or deny citizenship to his foreign-born nonmarital child at his leisure.

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<sup>†</sup> Associate Professor of Law, University of Kentucky College of Law. B.A., Vassar College. J.D., University of Michigan School of Law. Assistant United States Attorney, 2005-2014, U.S. Department of Justice. I would like to thank Jon Weinberg, Christopher Lund, Sarah Abramowicz, Justin Long, Lance Gable, Bryan Kent Wallace, Rebecca Robichaud, Rachel Settlege, Sabrina Balgamwalla, Natsu Taylor Saito, Stewart Chang, Leti Volpp, and Joseph Singer for their helpful comments on previous drafts. I must also extend my sincere gratitude to Lauren Madison, Jacqueline Yee, and Henry Schneider, my tireless, loyal, and hardworking research assistants. I must also thank my librarian, Michelle LaLonde, for her tireless research efforts, thorough attention to detail, and prompt responses. I also want to extend my sincere gratitude to my Administrative Assistant, Rhonda Agnew, a brilliant and kind woman. Any errors are mine. Finally, and most importantly, for my parents, who possessed the profound courage to love across the racial divide, free from black and yellow hypersexualization and negation. Your capacity of heart is my enduring blessing. I dedicate this piece to the inestimable number of American children abandoned by their American fathers abroad. I hope this Article does some modicum of justice for you.



On the surface, it might appear that § 1409 treats men and women differently because it is easy to determine a child's mother, as opposed to a child's father, at birth. In fact, a majority of the Supreme Court has deployed these "natural" differences between men and women to shield § 1409 from three separate gender-based equal protection challenges. Justice Ginsburg, however, has keenly observed, "[H]istory reveals what lurks behind § 1409." What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal category of citizenship to perfect sovereignty<sup>1</sup> in itself and vulnerability in "foreign" women for the very purpose of sexual domination.

The historical model for this racialized regime of sexual domination is the classic case of *Dred Scott*,<sup>2</sup> where the denial of citizenship to anyone of African descent further facilitated a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In *Dred Scott*, the exclusion of anyone of African descent from personhood, through the legal mechanism of citizenship, perfected power in white men and vulnerability in racialized others. By excluding anyone of African descent from citizenship, enslaved owners continued to enjoy an unbridled property right in the use and enjoyment of the enslaved. The denial of citizenship to the enslaved facilitated their use as property. Following suit, § 1409 makes citizenship the property of men, through which they can exclude their nonmarital foreign-born children from membership in the American polity. Section 1409 vests in these fathers not just a right to exclude their children, but to discard them, leaving them profoundly vulnerable to the sting of "illegitimacy," ethnic and racial animus, and financial precarity—a form of destruction, while simultaneously empowering these fathers to sexually possess, control, use, and enjoy foreign women. Section 1409 understands all too well: in order to sexually exploit the mother, one must control the status of the child.

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1. To "perfect sovereignty" means to make perfect or to make power perfect in itself.

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

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## INTRODUCTION

American<sup>3</sup> militarism and sexual tourism have much in common: Each has left an indelible footprint on the bodies of foreign women and the world.<sup>4</sup> As Kristin Collins<sup>5</sup> has argued, this footprint is an inestimable number of children that American men have fathered and abandoned around the world.<sup>6</sup> On the streets of Olongapo, Philippines alone, the home of a former American naval base, countless abandoned Amerasian children are reduced to prostitution and crime.<sup>7</sup> Far from innocence, accident, or some act of nature, these children are the products of centuries of American imperialism, lawmakers, judges, administrators, military men, and sexual tourists, who, taken together, reflect a societal policy that creates supremacy by making property of others.

3. I use the terms “American” and “America” deliberately, not to insult the other countries with whom America shares a hemisphere, but to shed light on the irony of “America” as a bastion of freedom and equality contrasted with the underlying thesis of historical denigration in this Article.

4. Sex trafficking is a global problem. As of September 2017, 24.9 million people were trafficked each year; of these, over seventy percent were women and girls. *Fact Sheet: Human Trafficking by the Numbers*, HUM. RTS. FIRST (2017), <http://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf> [https://perma.cc/ERX7-JLSJ]. Estimates vary, but trafficking for the purpose of sexual exploitation could drive as much as seventy-nine percent of all human trafficking. Policy Analysis & Research Branch, *Global Report on Trafficking in Persons*, U.N. OFF. ON DRUGS & CRIME (Feb. 2009), [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf) [https://perma.cc/7BND-DHXL]. The trafficking of women and children is frequently reported as the world’s fastest-growing crime. *See, e.g.*, Morgan Brinlee, *13 Sex Trafficking Statistics That Put The Worldwide Problem Into Perspective*, BUSTLE (July 30, 2018), <https://www.bustle.com/p/13-sex-trafficking-statistics-that-put-the-worldwide-problem-into-perspective-9930150> [https://perma.cc/8ADW-KJ3P]. *But see Fact Sheet, supra* (estimating that sex trafficking comprises nineteen percent of all human trafficking).

5. This Article relies heavily on Kristin Collins’s trailblazing, comprehensive, and brilliant work on citizenship transmission laws. This piece, however, is the first treatment of § 1409 that applies a Critical Race Feminist lens and property rubric to § 1409. In doing so, this piece highlights the white heteropatriarchal operations of § 1409, which, as I argue throughout this article, creates a white heteropatriarchal property right in philandering, sexual, exploitation, and rape. This Article centralizes the role of power, as it is raced, classed, and gendered in order to expose the ways in which the sexual exploitation of foreign women becomes the routinized practice of a highly industrial nation, namely the United States, through § 1409.

6. It is impossible to know how many children American men have abandoned abroad. *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2212 (2014). In an act of willful blindness, no government bureaucracy maintains records of the nonmarital foreign-born children discarded by their American fathers. Just the numbers of nonmarital foreign-born children in Asia from American servicemen alone varies based on the source. *See Amerasian Immigration Proposals: Hearing on S. 1698 Before the Subcommittee on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 63 (1982) (statement of Alfred Keane, Dir., Americans for International Aid) (estimating between 30,000 and 80,000 Amerasians in Southeast Asia); JOHN SHADE, AMERICA’S FORGOTTEN CHILDREN: THE AMERASIANS 15 (1981) (estimating the number of Amerasians born in Vietnam at between 20,000 and 100,000); Collins, *Illegitimate Borders, supra*, at 2212 n.308 (“Estimates vary significantly, from 20,000 to more than 200,000.”). John Shade suggests that by 1952 over 200,000 children had been born in Japan to American servicemen. SHADE, *supra*, at 24. If that is true, the number of children born to servicemen in Asia in the second half of the twentieth century could be closer to 300,000.

7. Joseph M. Ahern, *Out of Sight, Out of Mind: United States Immigration Law and Policy as Applied to Filipino-Amerasians*, 1 PAC. RIM L. & POL’Y J. 105, 108 (1992).

Collectively, these actors have decided that mass destruction is worth the price of a frolic.

Vulnerability is the lynchpin of exploitation.<sup>8</sup> Historically, white heteropatriarchy—that is, power as it is raced, classed, sexed, and gendered<sup>9</sup>—has deployed the legal mechanism of citizenship to perfect sovereignty in itself and vulnerability in others for the specific purpose of sexual exploitation. Title 8, United States Code, § 1409 is a variation of this scheme. It is a biopower (or a legal mechanism) that subjugates the bodies of women for both sexual pleasure and racial purity, all the while exerting control over populations.<sup>10</sup>

Section 1409 regulates the transmission of citizenship from American citizens to their nonmarital, foreign-born children.<sup>11</sup> Section 1409, however, draws an explicit gender distinction based on the sex of the parents: An unwed citizen mother, who has a child abroad with a foreign man, transmits citizenship automatically to her child. By contrast, an unwed citizen father who fathers a child abroad with a foreign woman has the prerogative to transfer citizenship to his child and, if he so desires, to complete a process to do so, which includes agreeing in writing to provide financial support to his child until the child is eighteen years old.<sup>12</sup>

Many have argued that § 1409 treats citizen fathers and mothers differently because it is relatively simple to determine a child’s mother, as opposed to the father at birth. The Supreme Court has, in fact, used this “natural,” “biological,” and “physiological” distinction between men and women to immunize § 1409 from three distinct gender-based equal protection challenges.<sup>13</sup> Despite

8. See generally Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147 (2019) (arguing that the creating and sustaining of vulnerability are necessary ingredients for sexual exploitation, at the individual level of traffickers as well as the routinized operations of highly industrial nations, like the United States).

9. “White heteropatriarchy” refers to a racialized system of power and control based on white supremacy, compulsory heterosexuality, patriarchy, and an imposed gender-binary system. Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 573 (2017).

10. Biopower is literally having power over other bodies, “an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations.” 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 139-40 (Robert Hurley trans., Vintage Books ed. 1990) (1979) (“The old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life . . . in the field of political practices and economic observation, of the problems of birthrate, longevity, public health, housing, and migration.”).

11. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 235-36, 238-39, §§ 301, 309, 8 U.S.C. §§ 1401-1409.

12. *Id.* § 1409(a), 1409(c) (2018).

13. See *Flores-Villar v. United States*, 564 U.S. 210, 131 S. Ct. 2312 (2011) (evenly split per curiam) (affirming lower court rejection of gender equal protection challenge to the physical presence requirement in § 1409); *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (stating “[g]iven the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity”); *Miller v. Albright*, 523 U.S. 420, 436 (1998) (Stevens, J.) (plurality opinion) (upholding legitimization against gender based equal protection challenge for several reasons, including it ensured reliable proof of paternity, stating, “There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective”).

technologically advanced paternity testing, like DNA testing, § 1409 continues to thrive on antiquated justifications about the “natural” and “biological” differences between men and women—presumptions that scholars have universally denounced as “sexist, narrow-minded, and patently conservative.”<sup>14</sup>

So why does § 1409—with its explicit gender disparity between unwed citizen fathers and mothers when sexually active abroad in foreign places—continue to endure?<sup>15</sup> As Justice Ginsburg shrewdly noted, “[H]istory reveals what lurks behind § 1409.”<sup>16</sup> What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal mechanism of citizenship to perfect sovereignty in itself and vulnerability in racialized and “foreign” others for the purpose of sexual exploitation. The gender asymmetry in the transfer of citizenship between men and women in § 1409 reflects norms that privilege and protect male sexual prerogative outside of marriage while structurally supporting the creation and maintenance of vulnerability for purposes of sexual exploitation in foreign women.<sup>17</sup> More concretely, § 1409 creates a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the WHP).

Under § 1409, Congress, with the Supreme Court’s blessing, conferred a property right to citizen men in the form of citizenship. Under this particular form of citizenship, citizen men have a property right to either grant or deny citizenship to their nonmarital foreign-born children. The prerogative to grant or deny citizenship functions like property. Section 1409 confers to citizen men a package of entitlements, a bundle of rights, that includes the right to exclude, transfer, destroy, possess, control, use, and enjoy.<sup>18</sup> Under § 1409, citizen men have a right to exclude their nonmarital foreign-born children from the American polity. By bestowing citizen fathers with the right to exclude their children from citizenship, § 1409 entitles these fathers to abandon their children, leaving them profoundly vulnerable to the sting of “illegitimacy,”<sup>19</sup> ethnic and racial hatred,<sup>20</sup>

14. Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405, 407 (2013) (quoting Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 245-50 (2003)).

15. Other scholars have attempted to answer this question. See Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians’ Amicus Brief in Flores-Villar v. United States*, 91 B.U. L. REV. 1485, 1487 (2011); Collins, *Illegitimate Borders*, *supra* note 6, at 2137-38 (“At formative moments in the development of American nationality law, gender- and marriage-based domestic relations laws were enlisted by administrators, judges, and legislators to deny the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws.”).

16. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

17. See Collins, *A Short History*, *supra* note 15, at 1495 (“By restricting derivative citizenship as between Citizen fathers and their nonmarital foreign-born children, federal citizenship law perpetuates a system of sexual ethics that privileges men’s sexual prerogative outside marriage.”).

18. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1731 (1993) [hereinafter Harris, *WAP*] (describing the ways in which whiteness functions as property, in that whiteness conforms to the general contours of property, including the rights of possession, use, disposition, transfer or alienability, use and enjoyment, and most important, the absolute right to exclude).

19. Collins, *Illegitimate Borders*, *supra* note 6, at 2167.

20. In criticizing the *Dred Scott v. Sanford* decision, upholding the constitutionality of antebellum slavery, in 1857, then presidential candidate Abraham Lincoln stated, “There is a natural disgust in the

and financial precarity<sup>21</sup>—a form of destruction and statelessness.<sup>22</sup> Section 1409 simultaneously invests in these fathers a biopower to continue the sexual possession, control, use, and enjoyment of foreign women. (For more on this, see Figure 1, p. 101.) Unprotected philandering, sexual exploitation, and rape, liberated from parental responsibility,<sup>23</sup> are property interests that flow from Congress's grant of power to citizen men under § 1409. Section 1409 is where American citizenship for men becomes indistinguishable from the right to engage in hypermasculinity.<sup>24</sup> Although this may initially seem hyperbolic, once

minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races." ABRAHAM LINCOLN, *From Speech on the Dred Scott Decision at Springfield, Illinois, in SELECTED SPEECHES AND WRITINGS* 117, 119 (First Library of Am. Paperback Classic Edition 2009) (speech given June 26, 1857). In the same speech, Lincoln again references "the amalgamation of the races" as an "odium." LINCOLN, *supra*.

21. Collins, *Illegitimate Borders*, *supra* note 6, at 2167.

22. In 2014, upon recognizing that discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See U.N. HIGH COMM'R FOR REFUGEES, A SPECIAL REPORT: ENDING STATELESSNESS WITHIN 10 YEARS (Nov. 2010), <https://www.unhcr.org/en-us/546217229.pdf> [<https://perma.cc/9CQR-H76S>]; U.N. HIGH COMM'R FOR REFUGEES, THE CAMPAIGN TO END STATELESSNESS: APRIL 2016 UPDATE 1 (referring to speech of UNHCR "highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally"), <https://www.refworld.org/docid/571e23fb7.html> [<https://perma.cc/NU4H-6DU7>]; see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017).

23. The determination of citizenship for foreign-born nonmarital children and parentage are two separate legal matters. Both citizenship and parentage of foreign-born children can be determined independently. Although citizenship and parentage are two separate legal matters, the absence of citizenship is a deliberate obstacle and interference with the establishment of a parental relationship as a practical matter. The absence of citizenship for the nonmarital foreign-born offspring makes it more difficult pragmatically to take advantage of parental duties and support. Moreover, the absence of citizenship inhibits the ability to establish a parental relationship.

24. See *infra* Figure 1, p. 101. Throughout this article, I use "hypermasculine sexual performance," "hypermasculine performance," or "hypermasculinity" as a shorthand for "unprotected philandering, sexual exploitation, and rape," within the context of my analysis of § 1409. In addition, I use "hypermasculinity" as primarily a performance of control over others. Drawing from Angela Harris, hypermasculinity is the exaggerated performance of masculinity, enacted out of an anxiety about the status of one's manhood, and deployed in order to bring others under one's domination and control through sexual performance, humiliation, and sexualized physical violence. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000). As Harris states, "men achieve masculinity at the expense of women." Harris, *supra*, at 785. Hypermasculinity makes of bodies and persons "sites" for the performance of their masculinity, as if to prove it—to inscribe it—permanently upon the flesh or psyche of another. Harris demonstrates how the state is complicit in hypermasculinity through the American military and police work, both of which are primary sites and practices for gender violence. As Harris points out, fundamentally grounded in an "us" v. "them" culture, the police is "what street gangs aspire to be: sovereign protectors of turf, defenders of the innocent, and possessors of a monopoly on violence and moral authority" who "share a commitment to masculine ideals, moving within a culture of honor in which respect must be paid or violence will follow." Harris, *supra*, at 794-795. As Harris states, "[M]ilitary work . . . offers individuals a chance at all the privileges of hegemonic masculinity in exchange for embracing and excelling at the job." Harris, *supra*, at 798. Harris, in conversation with Eve Kosofsky Sedgwick, explicates the hypermasculinity of the American military as follows:

[T]he military is a place where both men's manipulability and their capacity for violence is at a premium. As is true elsewhere in the culture, the privileges of masculinity require that one establish intimate relationships with other men; yet the very closeness of these bonds provokes the terror of being marked homosexual and of losing one's masculine privileges. The instability of masculine identity under these circumstances makes insecure men easily manipulable (anxious and eager to prove their masculinity) and potentially violent (for not only status but also personal identity itself is at stake). The military both exemplifies and

placed in a historical context of white heteropatriarchy's use of citizenship to both ensure racial purity and to create vulnerability for purposes of sexual exploitation, this net result is undeniable.<sup>25</sup>

Section 1409 is part of a long-enduring legacy of using the legal category of citizenship, coupled with matrilineal succession (the status of the child following that of the mother), to control women's bodies for racial purity and sexual pleasure. This practice dates back to antebellum slavery, but continues forward to the sexual practices of the American military and sexual tourism.<sup>26</sup> Moreover, the ability to control the legal status of the nonmarital child is vital to sexually dominating, controlling, and exploiting the mother. The blueprint for § 1409's racialized regime of sexual domination is the classic case of *Dred Scott*,<sup>27</sup> where the denial of citizenship to anyone of African descent further facilitated a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In *Dred Scott*, the lethal trifecta of (1) excluding anyone of African descent from personhood, through the legal mechanism of citizenship; (2) the continued propertization of bodies; and (3) the rules of matrilineal succession outside marriage—the status of the offspring of an enslaved woman and a white man follows the status of the mother—perfected power in white men and vulnerability in anyone of African descent. By excluding anyone of African descent from citizenship, men, white men in particular, continued to enjoy a white heteropatriarchal property right in the unbridled use and enjoyment of the enslaved.

Following suit, § 1409 creates the WHP, a white heteropatriarchal property right in philandering, sexual exploitation, and rape. Section 1409 creates a property right that is “white” in that citizenship has been, and continues to be, highly racialized. Historically, white heteropatriarchy has used the legal category

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shrewdly exploits the internal structure of masculinity: Military culture, like prison culture, both seeks to make men doubt their own masculinity and encourages them to prove their manhood through violence and casual sexuality.

*Id.* at 787-88 (citation omitted). Throughout this piece, I discuss § 1409's impact not just on the American military, but also sexual conduct abroad, particularly sexual tourism. Thus, the use of hypermasculinity has particular resonance within the military, but it also has application within the entire scene of sexual tourism, as domination, subjugation, and performance are fundamentally a part of sexual exploitation.

25. Collins, *A Short History*, *supra* note 15, at 1496 (“Limitations on citizenship claims asserted by or on behalf of the nonmarital foreign-born children of American fathers highlight the troubling practice of sexual exploitation of non-white foreign women by white American men. If this suggestion strikes some readers as speculative, consider the statement of Edwin Borchard, one of the most well-respected citizenship law experts of the early Twentieth Century, who in 1912 uncritically declared that it ‘seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.’” (quoting EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 612 (1915))).

26. Collins, *Illegitimate Borders*, *supra* note 6, at 2152.

27. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; but see Joshua J. Schroeder, *The Body Snatchers: How the Writ of Habeas Corpus was Taken from the People of the United States*, 35 QUINNIPIAC L. REV. 1, 60-61 (2016) (“But even today, when all of the Justices symbolically express disgust over *Dred Scott* the U.S. Supreme Court *still* has not expressly overruled *Dred Scott* or explained why its approach fails constitutional muster.”).

of citizenship to make America white—synonymous with whiteness—to make America the private property of whites.<sup>28</sup> Of necessity, white supremacy, and its handmaiden racial purity, require control over women’s bodies. White heteropatriarchy, however, not only exerts control over women’s bodies for racial purity, but also for pleasure.

To be clear, like *Dred Scott* and the entire system of antebellum slavery, § 1409 is not averse to what Abraham Lincoln called the “disgust” and “odium”<sup>29</sup> of racial mixing, miscegenation, or the “amalgamation of the races.”<sup>30</sup> After all, masters, overseers, and other males regularly raped the enslaved, male and female.<sup>31</sup> Rather, the historical concern of § 1409 is to exclude foreigners from the polity—the governing body; ownership and inheritance of property—and the privileges and immunities of citizenship—“white space.”<sup>32</sup> Although any citizen

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28. See Harris, *WAP*, *supra* note 18, at 1736 (“The right to exclude was the central principle, too, of whiteness as identity . . . [t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded.”); see also GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 1 (2006) (chronicling the United States’ historical legislation and policies that expressly excluded non-White groups from entitlements); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (documenting the legal, historical, social, and political forces that create whiteness); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES*, 55 (2d ed. 1994) (arguing racial formation refers to “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.”); Dana Milbank, Opinion, *Yes, Half of Trump Supporters Are Racist*, WASH. POST (Sept. 12, 2016), [https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a\\_story.html](https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a_story.html) [https://perma.cc/MPN4-QPJH]; Steve Phillips, Opinion, *Trump Wants to Make America White Again*, N.Y. TIMES, (Feb. 15, 2018) <https://www.nytimes.com/2018/02/15/opinion/trump-wants-to-make-america-white-again.html> [https://perma.cc/ZVL2-GD54] (arguing that the aggressive pace of immigrants of color deportations, the elimination of the DACA program protecting immigrant children, and the constant dog-whistling cry to build a wall are all efforts to make America White again).

29. See LINCOLN, *supra* note 20.

30. See *id.* at 118.

31. There are no databases and few records of rapes during antebellum slavery. In an early stroke of legal realism, however, in 1857, then-presidential candidate Abraham Lincoln estimated that white males had raped enslaved black women at least 405,751 times around the time of 1850 alone. Abraham Lincoln, *Speech on the Dred Scott Decision* (June 26, 1857), U. VA., <https://www.virginia.edu/woodson/courses/aas-hius366a/lincoln.html> [https://perma.cc/LN4H-9BYN] (“In 1850 there were in the United States, 405,751, mulattoes. Very few of these are the offspring of whites and *free* blacks; nearly all have sprung from black *slaves* and white masters.”). As to the sexual assault of male slaves, Thomas Foster writes, “The rape of slave men has also gone unacknowledged because of the current and historical tendency to define rape along gendered lines . . . [which] has obscured our ability to recognize the climate of terror and the physical and mental sexual abuse that enslaved black men also endured.” Thomas A. Foster, *The Sexual Abuse of Black Men Under American Slavery*, 20 J. HIST. OF SEXUALITY 445, 448 (2011). Thomas argues that there are accounts from both the eighteenth and nineteenth centuries, including the eighteenth-century diary of a Jamaican planter Thomas Thistlewood, who tersely noted two incidents of homosexual assault. In one entry he recorded: “Report of Mr. Watt Committing Sodomy with his Negroe waiting Boy.” The language is specific enough to indicate this was a case of sodomy. Thistlewood’s diary also noted “strange reports about the parson and John his man.” While the term “strange reports” is not precise, Trevor Burnard interprets it as meaning homosexual activity. *Id.* at 453-54.

32. As Elise Boddie explains, “space itself has social, cultural, and—in particular—racial meaning” and this “racial meaning helps to instigate territorial behavior in which one racial group seeks to exclude another racial group from what it perceives to be its own space.” Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 435 (2010).



man, including a man of color, can exclude or confer citizenship on his nonmarital foreign-born child, the American polity, as an institution, is synonymous with whiteness. The driving force in the bundle of rights that § 1409 confers upon citizen men is the right to exclude from the American polity, which structurally assumes whiteness. Section 1409 grants citizen men the right to transform their nonmarital foreign-born children into trespassers on (white) American soil. Congress protects citizen men from their nonmarital foreign-born children who, with the power of citizenship, might roam freely in America, and perhaps, arrive at the family gathering in the suburbs and ask Dad for inheritance as well as a serving of turkey.

Section 1409 is “male” in that it confers privileges upon men that it withholds from women. These are the right to decide whether to transfer citizenship to offspring, an ability to abandon offspring, and the right to engage in unprotected sex outside of marriage free from the responsibilities of parenthood. It would not be hyperbolic to say that § 1409 elevates a class of johns, purchasers of sex, sexual exploiters, philanders, sexual tourists, and rapists beyond the reach of parenthood and confers to them a statutorily sanctioned right to discard their children.<sup>33</sup> It might also not be hyperbolic to say that Congress, with the Supreme Court’s blessing, is facilitating an international, worldwide brothel.

Section 1409 is heteropatriarchal in that it facilitates a privilege in men to perform heterosexually on foreign women free from the sanction of parenthood and the burden of “illegitimate” inheritors. It paradigmatically exemplifies what Andrew Krinks calls “the heteropatriarchal familist ideal,” as it is a law that organizes life, human embodiment, social structures, and the political economy according to male desire by subjugating female bodies with a dominant-elite male gaze<sup>34</sup> for the purposes of phallogentric sexual pleasure and the perpetuation of male-centered authority and lineage—and describes this all as the natural order.

Section 1409 ensures female subjugation in two ways: First, § 1409 keeps foreign women steadfastly prone. Specifically, § 1409 enables citizen men to go abroad, spread their seed, and then dictate the terms of their relationship with their children and the mothers of their children or whether to have any relationship at all. Section 1409 assists citizen men in leaving the foreign mothers of their children solely responsible for those children. Section 1409 thwarts any duty owed by American fathers to their nonmarital foreign-born children or the

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33. See Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 22 (observing that § 1409 reinforces men’s “sexual irresponsibility” by giving “U.S. men, but not U.S. women, a choice to disavow the children they conceive with foreign partners”).

34. Using Foucault’s “Panopticon,” the “gaze” creates a sense of “constant and permanent visibility,” so that the subject self-monitors and thoroughly internalizes the unrelenting surveillance. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195, 201-02 (1977).

mothers of their children.<sup>35</sup> Second, § 1409 regulates the sexual activity of citizen women engaged in nonmarital sex with foreign men through the sanction of automatic parental responsibility—a kind of reproductive punishment.<sup>36</sup>

On the surface, it may seem that § 1409 grants a privilege to citizen women that it denies citizen men: an opportunity to transfer citizenship automatically. By contrast, men must undergo a more arduous process.<sup>37</sup> That, however, is § 1409’s normative hegemonic trick: disguising treachery as something “good,” and obfuscating the sexual domination of women as the biological difference between men and women. Section 1409 camouflages the sexual domination of women as a bonus for citizen mothers. This deflects attention away from the hypermasculine sexual performance of men with foreign women and the sanctioning of women with reproductive punishment for analogous sexual conduct with foreign men. Structurally, conceptually, and symbolically, § 1409 entertains male sexual prerogative and female domination, subjugation, and control.

In § 1409, Congress has turned a physiological difference between establishing paternity and maternity into assumptions, and therefore material realities, about sexual behavior. These assumptions are inextricably linked to male power, prerogative, and privilege. Women are not permitted the same range of sexual prerogative and agency as men under § 1409. Under § 1409, women, particularly citizen women, should be home raising children, not out “whoring.” If Congress wanted to avoid the gender asymmetry of § 1409, it could have granted both citizen men and women prerogative citizenship for their children, but that would not exact punishment on citizen women who philander with

35. This paper analyzes the application of American law on nonmarital foreign-born children, their American fathers, and their foreign mothers. This paper does not address the foreign laws applicable to nonmarital foreign-born children, their American fathers, and their foreign mothers. Section 1409 extinguishes any duty American fathers owe to their nonmarital foreign-born children and the mothers of those children under American law. I do not argue that American law eliminates the duties foreign countries impose on these fathers.

36. Saddling women with sole responsibility for children born outside of marriage as a form of reproductive punishment has a long history around the globe. *See, e.g.,* Mary L. Shanley, *Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67 (1995) (explaining that giving custody of nonmarital children to mothers reflects not “hostility to biological fathers” but the “patriarchal roots of family law,” which produce “devastating social and economic consequences” for women); Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000) (arguing that divesting nonmarital fathers of parental rights harms mothers who are exclusively charged with the care and support of children); Sabina Mariella, Note, *Leveling Up Over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, 96 B.U. L. REV. 219, 227 (2016) (stating that unwed citizen mothers who conceive a child abroad with a noncitizen bear legal responsibility for their children by the default assignment of their citizenship to their children at birth; and that the distinction encourages men to conceive children outside of marriage, and compels women to bear the costs and the stigma of non-marital sex alone when men are unwilling to do so). Furthermore, saddling women with primary, if not sole responsibility, for nonmarital children is Congress’s baseline assumption in § 1409, as well as the legal doctrine the Supreme Court ratifies and normalizes to shield § 1409 from equal protection challenge, as discussed in detail in Part IV.

37. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1707.

foreign men.<sup>38</sup> While § 1409 saddles women with the responsibilities of parenthood, it invests in men a property right to roam freely and abandon their children. As Justice Ginsburg shrewdly noted in the context of a § 1409 gender-based equal protection challenge, “There are . . . men out there who are being Johnny Appleseed.”<sup>39</sup>

Section 1409 outsources the white heteropatriarchal work of the state to individual men—individual citizen fathers—middle managers—as gatekeepers at the American borders of what Angela Onwuachi-Willig calls “white space”<sup>40</sup> and perpetrators of racialized and gendered violence. It confers a right in men to police white and nationalistic supremacy’s control over the purity of bloodlines while simultaneously ensuring access to vulnerable foreign female bodies for pleasure. Section 1409 outsources the supply of available bodies for sexual domination beyond the border by liberating men from obligations under American law for the children who result from their sexual conquest. It thereby demonstrates the endless adaptability of white heteropatriarchy, particularly its limitless ability to morph into modern forms of female subjugation abroad despite the end of antebellum slavery domestically. Section 1409 allows citizen men to engage in hypermasculinity, as it shuts the door to hapless wards of the state discarded by their citizen fathers. Far from being an insignificant matter, § 1409 impacts the lives of an inestimable number of children abandoned by their American fathers.

Taken together, § 1409 creates an intersectional hierarchy—a hierarchy that is raced, classed, sexed, and gendered. Section 1409 grants citizen fathers the right to exclude their foreign-born children from the polity while facilitating the vulnerable conditions necessary to continue exploiting foreign women. Property, like citizenship, allocates resources, but in the context of § 1409, property and citizenship collude to dominate others and to ratify a hierarchical social order,

38. See Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 527 (1988) (“Gender performances . . . are governed by . . . punitive and regulatory social conventions.”); Stewart Chang, *Feminism in Yellowface*, 38 HARV. J. L. & GENDER 235, 262 (2015) (“Gender performance is intertwined with community expectations of how members of each gender must behave, and when those expectations are not followed, society sanctions and marginalizes deviant actors.”). Section 1409 envisions and concretizes a world in which women should be at home raising children, not out “whoring,” or having children with foreign men, and when they do, §1409 exacts a kind of punishment by saddling women with the responsibilities of parenthood. Compare, however, § 1409’s vision of men engaged in unprotected sex with foreign women who at their leisure can escape both the responsibilities of parenthood and responsible sex by being allowed to abandon their children.

39. Collins, *A Short History*, *supra* note 15, at 1495 (“Justice Ginsburg noted wryly, ‘[t]here are . . . men out there who are being Johnny Appleseed,’” and “Justice O’Connor articulated a similar concern, observing that our sex-based citizenship laws are ‘paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children.’” (quoting Transcript of Oral Argument at 31, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071))); see *Nguyen*, 533 U.S. at 92 (O’Connor, J., dissenting).

40. Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017) (discussing the development of America as “white space” and the strategies, practices, and tactics for protecting it).

all under the hegemonic cover of nature.<sup>41</sup> Treating § 1409 as solely a problem of the biological differences between men and women allows it to surreptitiously advance its white heteropatriarchal agenda. It is not just race. It is not just class. It is not just gender. It is all of these things working in concert. Although § 1409 does not explicitly reference race, its explicit silence works an implicit racialized, as well as gendered, result.<sup>42</sup> Section 1409 is a citizenship regulation that facilitates a white heteropatriarchal desire to perform hypermasculinity, while simultaneously functioning as a broader mechanism of population control. Section 1409 is a classic case of sexually explicit discrimination, masking and obfuscating<sup>43</sup> racially implicit sexual subjugation, to work a white heteropatriarchal favorable outcome.<sup>44</sup>

Enough cannot be said about § 1409. Section 1409 is perched at the entangled, intertwined, and mutually reinforcing valences of race, class, gender, sexuality, war, the American military, rape, sex, sexual tourism, sex trafficking, hypermasculinity, reproductive domination, racial purity, citizenship, property, belonging, and statelessness.<sup>45</sup> It is ripe for intersectional analysis. Section 1409 exemplifies how sexism keeps racism in place and racism keeps sexism in place, with all the spoils awarded to white heteropatriarchy.<sup>46</sup> What is at stake in equal protection challenges to § 1409 is not only its constitutionality, but also white heteropatriarchy’s entrenched legacy of creating and sustaining hierarchy, vulnerability, and regimes of violence and exploitation.

Part I of this Article lays out the text of § 1409. Drawing on the extensive work of Kristin Collins, Part II historically contextualizes § 1409 to reveal its mens rea. Historical contextuality de-obfuscates § 1409’s coercive nature and underlying legal legacy.<sup>47</sup> Part II grounds § 1409’s genesis in the legacy of antebellum slavery to expose how the absence of citizenship in enslaved females in combination with the rule of matrilineal succession worked to facilitate the WHP—a white heteropatriarchal property right in philandering, sexual exploitation, and rape, prototypically exemplified in *Dred Scott*.

41. See Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014).

42. See Collins, *Illegitimate Borders*, *supra* note 6, at 2134 (“[A]n important yet overlooked reason for the development of gender- and marriage-based derivative citizenship law—*jus sanguinis* citizenship—was officials’ felt need to enforce the racially nativist policies that were a core component of American nationality law for over 150 years.”).

43. See FOUCAULT, *THE HISTORY OF SEXUALITY*, *supra* note 10, at 86 (“[P]ower is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.”).

44. As Kimberlé Crenshaw coined the term intersectionality, § 1409 is quintessentially “the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.” Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991).

45. See generally SUSAN ZEIGER, *ENTANGLING ALLIANCES: FOREIGN WAR BRIDES AND AMERICAN SOLDIERS IN THE TWENTIETH CENTURY* 9 (Kindle ed., 2010).

46. Crenshaw, *Mapping the Margins*, *supra* note 44, at 1249.

47. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1673.

Drawing on the work of Cheryl Harris and modern theories of property, Part III proposes a theoretical foundation for the WHP as a conceptual model. As a conceptual model, the WHP problematizes § 1409's function, brings it into sharp relief, and exposes it to the precious antiseptic light of day. Historical contextuality and property as a theoretical framework expose the choices and values underlying § 1409, particularly the value of male access to the bodies of foreign women outweighing the value of discarded and abandoned foreign life. Using the historical context of § 1409, as well as the property rubric of the WHP, Part IV analyzes the Supreme Court cases that have sustained the constitutional solvency of § 1409: *Fiallo v. Bell*,<sup>48</sup> *Miller v. Albright*,<sup>49</sup> *Nguyen v. INS*,<sup>50</sup> and *Sessions v. Morales-Santana*.<sup>51</sup> Part IV centralizes whiteness, hypermasculinity, and hypersexualized foreign women as the central tenets, governing principles, and driving forces upon which the Supreme Court has clung in defending the property interests embedded in § 1409. Whiteness, hypermasculinity, and hypersexualized foreign women are part of the intellectual machinery and Supreme Court narratives that justify the nefarious operations of § 1409. Part IV demonstrates how § 1409 is part of an intended and organized regime of racialized sexual domination, all ratified in law. As argued in more detail in Part IV, in the last of the four cases, *Morales-Santana*, Justice Ginsburg, writing for the majority, launched a Herculean effort to find an equal protection violation in § 1409. More specifically, she found that the more lenient physical presence requirement that applied to female citizens, not males, violated equal protection. In fashioning a remedy, however, the Court preserved male privilege at the expense of women, applying the more onerous standard to both men and women, as opposed to nullifying the more onerous standard entirely. Part V proposes solutions, including automatic citizenship for nonmarital foreign-born children of both citizen men and women.

#### I. WHAT IS TITLE 8, UNITED STATES CODE, § 1409?

The United States has “two sources of citizenship, and two only—birth and naturalization.”<sup>52</sup> As to “birth” citizenship, the Fourteenth Amendment guarantees that every person “born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.”<sup>53</sup> As to naturalization, congressional acts govern the acquisition of citizenship by persons not born in the United States.<sup>54</sup>

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48. 430 U.S. 787 (1977).

49. 523 U.S. 420 (1998).

50. 533 U.S. 53 (2001).

51. 137 S. Ct. 1678 (2017).

52. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898).

53. *Id.*; see U.S. CONST. amend. XIV, § 1.

54. *Wong Kim Ark*, 169 U.S. at 703.

There are two sources of birthright citizenship: (1) place of birth (*jus soli*) or (2) parentage (*jus sanguinis*).<sup>55</sup> This Article addresses the latter, *jus sanguinis* citizenship—a right to citizenship by virtue of a circumstance or condition in existence at the time of a child’s birth.<sup>56</sup> More specifically, this Article focuses on a form of *jus sanguinis* citizenship applicable to American citizens, male and female, who have children out of wedlock and in foreign places, a set of laws known as citizenship transmission laws or derivative citizenship laws, codified in Title 8, United States Code, §§ 1401 and 1409.<sup>57</sup>

When citizenship derives from parentage (*jus sanguinis*), American citizenship laws explicitly discriminate on the basis of marital status as well as the gender of the parents in the transmission of citizenship to foreign-born children.<sup>58</sup> Title 8, United States Code, § 1401(g) governs citizenship transmission to children born outside of the United States and its outlying possessions to married parents when one is a citizen and the other is an alien.<sup>59</sup> Section 1401 provides that the child is also a citizen if, before the birth, the citizen parent had been physically present in the United States for a total of five years, at least two of which were after the parent turned fourteen years of age.<sup>60</sup>

As for children born under the same circumstances, but to unmarried parents, § 1409(a) sets forth the following requirements when the father is the citizen parent and the mother is an alien:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person’s birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years—
  - (A) the person is legitimated under the law of the person’s residence or domicile,
  - (B) the father acknowledges paternity of the person in writing under oath, or

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55. The Fourteenth Amendment confers *jus soli* citizenship based on place of birth. See U.S. CONST. amend. XIV, § 1. Acts of Congress, however, govern the grant of citizenship to persons born outside of the United States. See *Wong Kim Ark*, 169 U.S. at 702-03 (explaining that persons born outside of the United States only acquire citizenship by birth pursuant to acts of Congress).

56. Collins, *A Short History*, *supra* note 15, at 1487.

57. *Id.*

58. Compare 8 U.S.C. § 1401(c)-(e), (g)-(h) (2019), with 8 U.S.C. § 1409.

59. 8 U.S.C. § 1401(g).

60. *Id.* As will be discussed in more detail in Part IV, the last § 1409 challenge to reach the Supreme Court, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017), nullified an earlier version of this physical presence requirement.

(C) the paternity of the person is established by adjudication of a competent court.<sup>61</sup>

In addition, § 1409(a) incorporates the physical presence requirement of § 1401(g).

In stark contrast, when a citizen woman gives birth to a nonmarital foreign born child fathered by a foreign man, the requirements for the transmittal of citizenship are described in § 1409(c):

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.<sup>62</sup>

Section 1409 thus imposes a set of requirements on citizen fathers that it does not impose on citizen mothers, namely proof of paternity by clear and convincing evidence, a written agreement by the father to pay child support, and paternal acknowledgment of the child before the child's eighteenth birthday.<sup>63</sup> Before turning to the historical context out of which § 1409 emerged, it is imperative to highlight several distinguishing features of § 1409—features that explain the power § 1409 confers to men.<sup>64</sup> Sections 1409(a)(3) and (4) set a statute of limitations (eighteen years) for citizenship claims brought by or on behalf of nonmarital foreign-born children of citizen fathers; nonmarital foreign-born children of citizen mothers have no such limitations.<sup>65</sup> Section 1409(a)(3)'s requirement of financial support in writing and § 1409(a)(4)'s requirement of legitimation (a father's declaration of paternity under oath or a court order of paternity) confer control to men.<sup>66</sup> Section 1409(a)(1) requires the "blood" relationship between the child and father,<sup>67</sup> but that relationship requirement may

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61. 8 U.S.C. § 1409(a).

62. 8 U.S.C. § 1409(c).

63. See 8 U.S.C. § 1409(a).

64. See *id.*; Collins, *Illegitimate Borders*, *supra* note 6, at 2235.

65. 8 U.S.C. § 1409(c).

66. 8 U.S.C. § 1409(a).

67. See Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707, 735 (2002) (demonstrating that the legislative history reveals that the superfluosity of the legitimation requirements in 1409(a)(4), when 1409(a)(1) already requires a biological relationship, originated from an adoption of the coverture principles into § 1409(a)(4), with the three legitimation options merely simplifying the previously complex legitimation rules); Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 306 (2002).

be satisfied against the father’s will or without the father’s consent.<sup>68</sup> By contrast, §§ 1409(a)(3) and (4) pivot around male prerogative. This prerogative is absolutely central to an analysis of § 1409. Unlike women, who transfer citizenship automatically, § 1409 gives men the power to exclude their nonmarital foreign-born children from citizenship. In doing so, it allows men to engage in unprotected hypermasculinity while abroad with foreign women, liberated from the responsibilities of parenthood.

As discussed in more detail in Part IV, § 1409 is particularly pernicious because the Supreme Court has tucked the power § 1409 confers to men behind the “natural” differences between men and women in establishing genetic parentage. It is this obfuscating function that Justices Stevens and Kennedy, both American servicemen ostensibly intimately familiar with the sexual practices and ethics of the military, deployed in shielding § 1409 from equal protection challenges. In the doctrine that shields § 1409 from challenge, the “natural” difference between men and women is used to obfuscate the hegemonic function of § 1409. In this way, § 1409 gives the owner of citizenship an entitlement to foreign women’s bodies that becomes naturalized in the everyday.

As developed in more detail in Part II, § 1409 did not evolve out of nature and the biological difference between men and women. As Kristin Collins has argued, § 1409 is a product of choices, particularly choices about values and the relationship between rights and power.<sup>69</sup> White heteropatriarchy prefers to truncate history because it appears more innocent in freeze-frame analysis, which is fundamental to its obfuscating survival, deniability, and claims of sweet innocence. Section 1409 is the product of centuries of individual decisionmakers, lawmakers, judges, administrators, and other legal actors with vested interests that are raced, classed, sexed, and gendered.<sup>70</sup> Section 1409 bestows a right on men who father nonmarital children abroad to abandon those children. It enables citizen fathers to control the terms of the legal relationship with their children as well as with the mothers of their children. It also empowers citizen men to determine whether to have a relationship at all.<sup>71</sup> The power Congress confers to citizen men is absolutely central to both an understanding and critique of § 1409. The intersectionality of marital status and gender-differentiated norms for the transference of citizenship—the distinction between automatic parenthood for women and prerogative parenthood for men—is part of an enduring legacy that (1) grants men the right to engage in unprotected sexual conduct outside of

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68. Tuan Anh Nguyen v. INS, 533 U.S. 53, 67 (2001) (remarking on how paternity can be established against the father’s will or knowledge if DNA samples from a few strands of hair are collected years after the birth).

69. Singer, *supra* note 41, at 1323; Collins, *Illegitimate Borders*, *supra* note 6, at 2137.

70. Collins, *Illegitimate Borders*, *supra* note 6, at 2134, 2144 (contextualizing § 1409 historically as a product of lawmakers, judges, and administrators who made choices based on “racially nativist nation-building project” and “norms and mores concerning gender, parental roles, [and] sexuality”).

71. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1698.



marriage with foreign women without incurring the full weight of parenthood; (2) sanctions women with parenthood for engaging in sex outside of marriage; (3) protects men from the children they abandon; and (4) protects the polity from children men have abandoned, all strapped in § 1409.

## II. § 1409'S CONTEXTUALITY REVEALS ITS MENS REA

As Justice Ginsburg noted, "History reveals what lurks behind" the derivative citizenship statute.<sup>72</sup> What lurks behind § 1409 is a long legacy of white heteropatriarchy deploying the legal mechanism of citizenship to create property rights in others, more pointedly to perfect sovereignty in itself and vulnerability in others. Both the historical context of § 1409 and the conceptual model proposed in Part III—the WHP—serve the same function: to expose the nefarious underbelly of § 1409 and to subject it to precious antiseptic light. Section 1409 is a direct descendant of antebellum slavery, where the trifecta of propertizing vulnerable bodies, barring citizenship, and following matrilineal succession outside of marriage<sup>73</sup> made the enslaved a perennial source of unbridled cheap sex while simultaneously eliminating "illegitimate" inheritors from individual lines of inheritance or belonging in the American polity. Grounding § 1409 squarely within its racist, sexist, and hypermasculine past eliminates any claims or justifications involving nature, innocence, or unintendedness. Instead, both historical contextuality and the WHP cast § 1409 as a deliberate societal policy created by intentional individual decisions, all vested with interests in whiteness, hypermasculinity, and hypersexualized and racialized female bodies upon which to perform sexual violence. It is historical context that gives § 1409 content.

The history of § 1409 exposes the choices and vested interests of American imperialism, policymakers, judges, administrators, servicemen, and sexual tourists in a legal regime that enshrines, ratifies, and protects hypermasculine performances on the bodies of foreign women liberated from paternity and citizenship claims from their offspring. Nature and neutrality did not create § 1409 or the normative base that interprets and safeguards it. White heteropatriarchy did. The history of § 1409 epitomizes the law's active role in

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72. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017); *see also Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) (arguing that sex-based statutes, like § 1409, cannot be viewed in a vacuum; but rather, their gender based disparity becomes clearer when historicized and placed in historical context, stating, "Sex based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's 'long and unfortunate history of sex discrimination.'" (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *Miller v. Albright*, 523 U.S. 420, 460-61 (1998) (Ginsburg, J., dissenting) (revealing the hegemonic trick of § 1409, which masquerades as something favorable toward women, but when placed in historical context reveals that it privileges ideas about women being primary caregivers stating, "But pages of history place the provision in real-world perspective.").

73. Collins, *Illegitimate Borders*, *supra* note 6, at 2152.

creating and sustaining racialized and gendered hierarchies in the American polity.<sup>74</sup> Far from innocent, its history reveals its hegemonic function in normalizing the denigration of women and the abandonment of “illegitimate” children. In addition to cloaking its function with nature, § 1409 achieves its hegemonic operation by assuming a baseline that seamlessly incorporates the vested interests of the WHP as political ideology, legal doctrine, and philosophical assumptions while peddling these vested interests as biological, natural, and “just the way things are.”<sup>75</sup>

Furthermore, the history of § 1409 reverses the pathological gaze: rather than fixating on hypersexualized foreign women, who Justice Kennedy disturbingly said “may be unsure of the father’s identity,”<sup>76</sup> or the evil specter of millions of war babies raiding the government coffers and flooding American bureaucracies with fraudulent claims of inheritance and citizenship, historical context focuses attention on a class of johns, purchasers of sex, sexual exploiters, philanders, and rapists, as well as the judges, lawmakers, and administrators that are complicit in their scheme. Moreover, reversing the pathological gaze through historicizing lays the foundation to bring § 1409 in line with modern notions of democracy and fairness.

As part of this historical contextualization, Section II.A squarely grounds § 1409 in its roots, antebellum chattel slavery. Drawing on Kristin Collins’s extensive work on § 1409, Section II.B discusses *Guyer v. Smith*<sup>77</sup> as part of the lineage of § 1409 and as an example of white heteropatriarchy’s adaptability after *Dred Scott* appeared imperiled. Section II.C traces three governing forces in the historical development of American citizenship and immigration law: (1) whiteness, (2) hypermasculinity, and (3) female subordination. These governing principles comprise the central tenets of the WHP as well as of immigration law generally. As will be discussed in Part IV, these central tenets will become the three prongs that the Supreme Court uses to immunize § 1409 from equal protection challenges. Finally, as Collins has argued, Section II.D explicates how Congress and the military actively discouraged interracial marriage between American men and racialized foreign women, while simultaneously facilitating sex trafficking between them, all of which led to disproportionate numbers of racialized children being discarded by their American fathers. Part II, overall, provides the historical tissue connecting § 1409’s deliberate restrictions on citizenship claims asserted by or on behalf of the nonmarital foreign-born children of American fathers to what Collins calls “a troubling practice of sexual exploitation of non-white foreign women by white American men.”<sup>78</sup>

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74. *Id.* at 2139-40.

75. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352 (1988).

76. *Nguyen*, 533 U.S. at 54.

77. 22 Md. 239 (1864) (foreign-born children who remain illegitimate do not qualify for citizenship).

78. Collins, *A Short History*, *supra* note 15, at 1492.

#### A. Dred Scott and the Anatomy of the WHP

Vulnerability is the lynchpin of exploitation.<sup>79</sup> Antebellum chattel slavery exemplifies this point. Without the full protections of citizenship, African Americans had no access to the courts or police and were, therefore, prone to unbridled performances of power on their vulnerable black flesh.<sup>80</sup> In 1662,<sup>81</sup> the Virginia colonial assembly ruled that “[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother.”<sup>82</sup> In reversing the traditional common law presumption that the father determined the status of the child, the rule of matrilineage for the enslaved in combination with the negation of citizenship concretized the continued vulnerability of enslaved women to rape, philandering, and sexual exploitation. As Cheryl Harris noted, it also facilitated the reproduction of a white heteropatriarchal-dominated labor force.<sup>83</sup> As founding father Thomas Jefferson bragged, the profitability of enslaved black women could be realized more efficiently from breeding than from labor, stating, “I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man.”<sup>84</sup> In remarking on the economic incentives for owners to rape their enslaved, abolitionist Henry Highland Garnet concluded that the true treachery of slavery arose from the enslaver’s desire to possess the sexuality of the slave,

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79. Cook, *Stop Traffic*, *supra* note 8 (manuscript at 3).

80. In her autobiography about slavery, Harriet Jacobs described the complete control her master exerted over her: “[H]e was my master. I was compelled to live under the same roof with him . . . He told me I was his property; that I must be subject to his will in all things.” HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, CLASSIC AFRICAN AMERICAN WOMEN’S NARRATIVES 223 (William L. Andrews ed., Oxford Univ. Press 2003) (1861). In describing Jacobs’s narrative, Henry Louis Gates, Jr., stated it “charts in vivid detail precisely how the shape of her life and the choices she makes are defined by her reduction to a sexual object, an object to be raped, bred or abused.” Gates, *To be Raped, Bred or Abused*, N.Y. TIMES BOOK REV., Nov. 22, 1987, at 12; see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1437 (1991) (describing acts of unbridled power stating, “Slaveowners forced women to lie face down in a depression in the ground while they were whipped. This procedure allowed the masters to protect the fetus while abusing the mother.”).

81. Many historians of Africans in the United States begin with the arrival, in 1619, of a ship in Jamestown carrying twenty black persons, likely slaves, although possibly indentured servants. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 20-21 (Oxford Univ. Press 1979) (1978). It is interesting to note that the Virginia colonial assembly set rules on matrilineal succession less than fifty years after the arrival of that ship.

82. Harris, *WAP*, *supra* note 18 at 1719 (citing HIGGINBOTHAM, *supra* note 81, at 43). By the late 1600s and early 1700s, the legislatures of various colonies adopted similar rules of classification. See, e.g., HIGGINBOTHAM, *supra* note 81, at 128, 252 (citing a 1706 New York statute; and then citing a 1755 Georgia law).

83. Harris, *WAP*, *supra* note 18 at 1719 n.37 (“According to Paula Giddings, the Virginia statute completed ‘[t]he circle of denigration . . . [in] combin[ing] racism, sexism, greed, and piety’ in that it ‘laid women open to the most vicious exploitation.’ She noted that ‘a master could save the cost of buying new slaves by impregnating his own slave, or for that matter having anyone impregnate her.’” (quoting PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 37 (1984))).

84. Harris, *WAP*, *supra* note 18 at 1720 n.38 (quoting Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805)).

writing, “Every man who resides on his plantation may have his harem, and has every inducement of custom, and of pecuniary gain, to tempt him to the common practice.”<sup>85</sup> As Kimberlé Crenshaw has noted, for the enslaved woman, “[t]heir femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection.”<sup>86</sup> This dichotomy is central to an understanding of § 1409’s function. The negation of citizenship in both child and mother coupled with matrilineage outside marriage aided white men in raping enslaved women, protected white men from the duties and responsibilities of fathering children, and protected the racial purity of white sovereignty, the governing principles underlying § 1409.

These intersectional governing principles that privilege white heteropatriarchy<sup>87</sup> lie at the heart of *Dred Scott*, a Supreme Court decision that further entrenched antebellum plantation slavery and the legal domination of black people. *Dred Scott* accomplished much: (1) it affirmed the continued use of the “Negro” as property<sup>88</sup>; (2) it held that anyone of African descent was not a citizen, including free blacks<sup>89</sup>; and (3) it affirmed that the status of the enslaved child followed that of the mother (matrilineage outside marriage).

85. 2 HARRIET MARTINEAU, *SOCIETY IN AMERICA* 320 (AMS Press, Inc. 1966) (1837) (footnote omitted). In an early stroke of legal realism, Lincoln remarked on the scale of white males raping enslaved females in the mid-nineteenth century and argued that slavery incentivized the amalgamation of the races though rape, rather than racial purity:

In 1850 there were in the United States, 405,751, mulattoes. Very few of these are the offspring of whites and *free* blacks; nearly all have sprung from black *slaves* and white masters. A separation of the races is the only perfect preventive of amalgamation but as all immediate separation is impossible the next best thing is to *keep* them apart *where* they are not already together. If white and black people never get together in Kansas, they will never mix blood in Kansas. That is at least one self-evident truth. A few free colored persons may get into the free States, in any event; but their number is too insignificant to amount to much in the way of mixing blood. In 1850 there were in the free states, 56,649 mulattoes; but for the most part they were not born there—they came from the slave States, ready made up. In the same year the slave States had 348,874 mulattoes all of home production. The proportion of free mulattoes to free blacks—the only colored classes in the free states—is much greater in the slave than in the free states. It is worthy of note too, that among the free states those which make the colored man the nearest to equal the white, have, proportionally the fewest mulattoes the least of amalgamation. In New Hampshire, the State which goes farthest towards equality between the races, there are just 184 Mulattoes while there are in Virginia—how many do you think? 79,775, being 23,126 more than in all the free States together.

Lincoln, *supra* note 31.

86. Kimberlé 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, 158-59 (1989).

87. In *Dred Scott*, Chief Justice Taney, writing for the majority, famously declared that people in America of African descent had “no rights which white man was bound to respect” whether born free, set free, or enslaved. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Chief Justice Taney explained that the Constitution did not confer citizenship to African Americans. They were “not included, and were not intended to be included, under the word ‘citizens’ in the Constitution” and “therefore [they can] claim none of the rights and privileges” of citizenship. *Dred Scott*, 60 U.S. at 404; see Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 265-266 (2008).

88. *Dred Scott*, 60 U.S. at 410.

89. *Id.* at 395.

Taken together, these policies ensured the continued vulnerability of the enslaved to sexual exploitation.<sup>90</sup> *Dred Scott* exemplifies how the denial of citizenship concretized the use of African Americans as property and left African Americans in a form of statelessness, leaving them vulnerable and defenseless targets for sexual terrorism. In *Dred Scott*, the denial of citizenship to anyone of African descent left them without recourse to the courts or to legal protection, and therefore vulnerable to unbridled performances of rape, power, and rituals of spectacle.<sup>91</sup> Without citizenship and personhood, one cannot assert an interest in or against property. The combined effect of propertization, lack of citizenship, and the rule of matrilineage allowed white males to continue unprotected and unbridled feats of hypermasculinity on the bodies of enslaved women without incurring illegitimate inheritors and while maintaining racial purity in the polity.<sup>92</sup>

Like *Dred Scott*, § 1409 demonstrates how property and citizenship occupy central roles in the allocation, preservation, and maintenance of sovereignty and vulnerability. As in antebellum slavery, § 1409 illustrates how property laws, and the policies they animate, have long channeled the benefits of full citizenship through one's relationship to property. *Dred Scott* solidified a property right in philandering, rape, and sexual exploitation, as well as a right of sovereignty in the owner and vulnerability in the victim. In antebellum slavery and § 1409, white heteropatriarchal sexual autonomy is achieved through the foreign woman's sexual subjugation (the propertization of her sexual function).<sup>93</sup> Similarly, white heteropatriarchal reproductive freedom is achieved through the denial of reproductive freedom for the enslaved and the disenfranchisement of the enslaved female and her child. Additionally, the denial of citizenship to the enslaved enshrined the antebellum enslavers' economic investment in the enslaved's sexual function.<sup>94</sup> The enslavers' economic investment in the

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90. *Id.*

91. *Id.* at 406. See also Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. CIV. RTS. & C.L. 51, 52, 75 (2005) (arguing that the paradigms of private property, enslavement, and sexuality shared a nexus of white males generating wealth and sexual gratification through cheap land, the exploitation of enslaved labor, and the exploitation of black female labor and sexuality; and that these paradigms interacted to create the white male "American Dream" of cheap land, cheap labor, and cheap sex).

92. To be clear, *Dred Scott* was only one among many cross-pollinated and cyclically reinforcing factors that ensured the racial domination of African Americans.

93. Crusto, *supra* note 91, at 81 ("[W]hite masters exploited enslaved black women to satisfy their desire for cheap sex."); see also Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 334 (1996) ("[W]hile sexual contact between Black men and white women was rigorously policed, the sexual abuse and rape of Black women was decriminalized. This allowed for the full sexual exploitation of Black women's bodies and systematic sexual abuse without social consequences or legal sanction." (footnote omitted) (citing Kimberlé Williams Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402, 413 (Toni Morrison ed., 1992))).

94. Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) ("Both pimps and antebellum slave masters have and had economic investments in women's sexual functions.").

enslaved’s sexually subjugated function was so important to the nation that it rose to the occasion of constitutional protection. As the Chief Justice Roger Taney famously declared, people in America of African descent had “no rights which white man was bound to respect” whether born free, set free, or enslaved.<sup>95</sup> Taney explained that the Constitution did not confer citizenship to African Americans.<sup>96</sup> They were “not included, and were not intended to be included, under the word ‘citizens’ in the Constitution” and “therefore [they can] claim none of the rights and privileges” of citizenship.<sup>97</sup> For blacks, this constitutional relationship ensured complete subjugation for the very purpose of unbridled exploitation.<sup>98</sup>

In *Dred Scott*, Chief Justice Taney grapples with the question, “What must white supremacy do to own the sexual function of the enslaved?” In answering this question, Chief Justice Taney understands a vital element of § 1409. The continued use and enjoyment of the enslaved’s sexual function requires controlling the status of the offspring. In other words, the white father’s right to discard his child, abandoning fatherly responsibility as a matter of law, is the *sine qua non* of owning the enslaved mother’s sexual function. Eliminating fatherly responsibility licensed white males to continue the naked proprietization of the enslaved’s sexual function for hypermasculine performance. Like § 1409, Chief Justice Taney achieves the “absenting of fatherly responsibility” by endorsing the rule of matrilineage for the enslaved. Harkening all the way back to the Roman Empire and the Institutes of Justinian, Chief Justice Taney made it abundantly clear that, as in § 1409, the enslaved followed the status of the mother, noting that in the Roman Empire, slave status “was decided by the condition of the mother,” and quoting the Institutes of Justinian to show that slaves had long been “born such of bondwomen.”<sup>99</sup> Like § 1409, Chief Justice Taney and the *Dred Scott* Supreme Court understood that the continued sexual domination of the mother mandated the right to legally discard the child.

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95. *Dred Scott v. Sanford*, 60 U.S. at 407.

96. *Id.* at 404.

97. *Id.*

98. Article I, Section 2, Clause 3 of the Constitution allowed southern states to count slaves as three-fifths persons for the purposes of apportionment in Congress (even though the slaves could not, of course, vote). JUAN F. PEREA ET. AL., *RACE AND RACES* 104 (3d ed. 2015). Article I, Section 9, Clause 1 restrained Congress’s ability to stop the slave trade by expressly denying congressional power to prohibit importation of new slaves until 1808. PEREA, *supra*. Furthermore, Article IV, Section 2, Clause 3 mandated that slaves who escaped into freedom in the North were required to be sent back to their owners in the South. PEREA, *supra*. Article IV, Section 2, Clause 3, contains the Fugitive Slave Clause, which states:

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

PEREA, *supra*. In effect, these constitutional provisions, by ensuring slavery and rendering non-free persons property, legally prohibited Blacks from being citizens and asserting fundamental rights. *Id.* Each of these clauses of the Constitution made black bodies vulnerable to exploitation by operation of law.

99. *Dred Scott*, 60 U.S. at 478-79; see Collins, *Illegitimate Borders*, *supra* note 6, at 2151.

Lest there be any doubt about white heteropatriarchy's use of citizenship to create vulnerability for the express purpose of sexual exploitation, in 1867, then-presidential candidate Abraham Lincoln drew the connection between citizenship, property, and sexual domination in the following response to the *Dred Scott* decision:

This very *Dred Scott* case affords a strong test as to which party most favors amalgamation [of the races], the Republicans or the dear union-saving Democracy. Dred Scott, his wife and two daughters were all involved in the suit. We desired the [C]ourt to have held that they were citizens so far at least as to entitle them to a hearing as to whether they were free or not; and then, also, that they were in fact and in law really free. Could we have had our way, the chances of these black girls, ever mixing their blood with that of white people, would have been diminished at least to the extent that it could not have been without their consent. But Judge Douglas is delighted to have them decided to be slaves, and not human enough to have a hearing, even if they were free, and thus left subject to the forced concubinage of their masters, and liable to become the mothers of mulattoes in spite of themselves—the very state of case that produces nine tenths of all the mulattoes—all the mixing of blood in the nation.<sup>100</sup>

In grounding the utter savagery that was antebellum slavery in the original intent of the Founding Fathers, Chief Justice Taney made the following statement, which bears repeating in its entirety because his narrative provides foundational grounding for the WHP and recurring themes in the legal doctrines surrounding § 1409:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>101</sup>

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100. Lincoln, *supra* note 31.

101. *Dred Scott*, 60 U.S. at 407.

Several distinguishing features of Chief Justice Taney's straightforward, transparent, undiluted, de-obfuscated, and fully intended white supremacist mantra should be noted, as they are ongoing themes in the genealogy and doctrine of § 1409. In order to appreciate the function of § 1409, one might substitute foreign women and their nonmarital children fathered by American men in the quote above for the contemplated "negro" or enslaved. The idea of inferiority as a justification for the domination and propertization of human beings has an extensive history in Western thought. It is just this notion of "inferiority" that will figure prominently in the legal doctrine surrounding § 1409 as it relates to the exclusion of foreigners and both the hypersexualization and sexual domination of foreign women ("treated as an ordinary article of merchandise and traffic"<sup>102</sup>), developed in more detail in Parts III and IV.

Chief Justice Taney's mantra reflects the deliberate creation of a form of statelessness ("no rights which the white man was bound to respect"<sup>103</sup>) for the express purpose of propertization, commodification, and sexual trade. Section 1409 facilitates a wall of immunity around citizen men while abroad as they procreate and sexually exploit foreign women, leaving both their offspring and foreign women in a figurative and literal form of statelessness. It is the very exclusion of anyone of African descent—foreign women and their children—from the legal category of citizenship that facilitates their vulnerability to dominant desire and fetish.

In drawing the distinction between both the "private pursuits and public world," Chief Justice Taney dog-whistles a veiled appeal to an ongoing theme in § 1409, the distinction between the sexual politics and cultural norms of the slave quarters versus that of the big house, the master's house.<sup>104</sup> Under § 1409, as in antebellum slavery, citizen men can activate the sexual politics and cultural norms of the slave shacks and preserve their respectability politics at home in the "big house." Section 1409 outsources the supply of enslaved females to the platforms of hypersexualized foreign women for hypermasculine sexual performance. Section 1409 provides the "dark place," where citizen men can let their sexual energy explode unbridled and come unhinged. It allows citizen men the opportunity to keep their impulses in check under cover of respectability politics while at home, and then let their impulses go unchecked abroad. It liberates citizen men from the expectation of respectability at home, so that they can go abroad liberated from those cultural restraints and come unhinged in the slave shacks. It allows citizen men to present fine-tuned, highly moral, dignified images in the American public, and then let their unrestrained impulses explode in the foreign places, the dark places, and in a final stroke of genius, to deny it

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102. *Id.*

103. *Id.*

104. *Id.*



ever happened.<sup>105</sup> Section 1409 restrains the foreign-born nonmarital child's ability to push against the private/public boundary between male prerogative in the shack and respectability in the big house. Allowing the foreign-born nonmarital child, particularly those who are racialized, the free-flowing freedom to show up at Dad's home, his house of worship, and in his community would pierce the veneer of respectability and would subject Dad to tremendous questioning about what exactly happened down in the shack. Congress has restrained the foreign-born nonmarital child from pushing across the partition of private slave shack politics and publicly damaging respectability in the big house of the American polity. Furthermore, § 1409 allows for the illusion that the Japanese comfort women and rapes in the Congo are "foreign" phenomena by those "evil" people, rather than the routinized practices of a highly industrial nation, right here at home.

Unlike the individualized actions of citizen men, § 1409 makes sexual domination systemic. Citizen men are not making decisions as atomized individual agents or singular secretaries of state, but rather, from a long enduring culture of white heteropatriarchal supremacy. Congress has created a power imbalance between foreign women and citizen men, which also functions as part of the sexually exploitative draw and allure for citizen men toward foreign women. It is where vulnerability becomes enticing. The grant or denial of citizenship acts as a white heteropatriarchal cudgel—a whip—in the already highly imbalanced power relationship between citizen men, who are coming from a rich country, and foreign women, who often are not. Facilitating the domination of foreign women, therefore, is part of the property right that Congress bestows on citizen men. The ability to dictate the terms of the relationship with foreign women and their offspring as well as to determine whether there will be a relationship at all becomes dialectical in that it reinforces the vulnerability while simultaneously serving as enticing.

Before turning to the theoretical framework for the WHP, one more comparison between § 1409 and antebellum slavery may be illustrative. Dorothy Roberts explains that a common method of whipping the pregnant enslaved female throughout the South illustrates the slave owners' dual interest in owning the enslaved woman, particularly her sexual function, and maximizing her use as a reproductive harvester: "Slaveowners forced [pregnant] women to lie face down in a depression in the ground while they were whipped. This procedure allowed the masters to protect the commercial fetus while abusing the mother."<sup>106</sup> Both § 1409 and the whipping of the pregnant enslaved vividly

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105. Anthony Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 464 (1997) ("Race is a form of pleasure in one's body which is achieved through humiliation of the Other and, then, as the last step, through a denial of the entire process . . . . By denying their fetishization of 'race,' whites create a culture in which they are both masters and innocents.").

106. Roberts, *Punishing Drug Addicts*, *supra* note 80, at 1438.

illustrate that control over the child was inextricably intertwined with the continued domination of the mother. In antebellum slavery, the slave owner was incentivized to protect the child’s life for commercial gain, while still exerting complete domination over the enslaved mother. In § 1409, the right to eliminate the child from personhood, as a practical matter, is endemic to the continued sexual enjoyment of foreign women. Controlling the child is fundamentally important to dominating the mother. Whether the gain or loss is protected, the goal is the domination of the female body, which necessitates control over the offspring.

In order to understand the intersectional interconnectedness and mutually reinforcing layers of race, class, gender, property, and citizenship in § 1409, it is imperative to acknowledge how slavery created a culture that incentivized and normalized sexual terrorism. The history of rape during antebellum chattel slavery provides the quintessential backdrop for understanding the moves and maneuvering in § 1409: by denying citizenship to both enslaved and their offspring coupled with matrilineage outside marriage, slaveholders were able to perpetuate a property interest in rape, sexual exploitation, and philandering, the prototype for § 1409. Moreover, non-inheritance erased any claim of legacy between an enslaved child and white father—for the children of Thomas Jefferson and Sally Hemmings, for example—while effectively ensuring that the legal heirs of white ruling-class men remained white, all embedded in § 1409.<sup>107</sup>

#### B. Guyer: *Extending the WHP*

Although the Fourteenth Amendment effectively overruled *Dred Scott*, it remains foundational for using citizenship to create a white heteropatriarchal property right in sexual domination. As Cheryl Harris helps us to understand, after legalized forms of white supremacy, like slavery or segregation, were overturned, the white heteropatriarchal property right in hypermasculinity evolved into a more modern form through the law’s ratification of the settled expectations of white heteropatriarchal privilege as a legitimate and natural baseline.<sup>108</sup> Section 1409 demonstrates the unrelenting adaptability of white heteropatriarchy: It achieves the propertization of foreign human bodies without announcing itself as such. It is an example of how even after slavery was outlawed, the same result can be achieved by other means. *Guyer v. Smith*,<sup>109</sup> decided in 1864, also illustrates this point.

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107. E. Michelle Rabouin, “*Gifting Children of Promise*”: *Re-Imagining the Academic Margins as Transformative Legal Space*, 3 J. GENDER RACE & JUST. 581 (2000).

108. Harris, *WAP*, *supra* note 18 at 1741.

109. 22 Md. 239 (1864).

As the advancement of abolition undermined the legal substructure of slavery and when *Dred Scott* was no longer sound precedent,<sup>110</sup> *Guyer* maintained a stronghold over a white heteropatriarchal power to sexually exploit foreign women, to be free of the inheritance claims of their offspring, and to protect the polity from racialized others. According to Kristin Collins, the *Guyer* court incorporated into citizenship law “the same set of domestic relations law principles that had been instrumental to the maintenance of slavery and the denial of citizenship for persons of African descent: laws that recognized the unmarried mother as the source of status for her children, including slave status.”<sup>111</sup> *Guyer* recognized the ability to preserve a hierarchal order that preserved vulnerability, precarity, and disenfranchisement in foreign women by continuing the use of matrilineage for nonmarital children.

In *Guyer*, a white American citizen fathered two nonmarital foreign-born sons with a woman “of African descent.”<sup>112</sup> When the American citizen father died, he bequeathed land in America to his sons. Upon recognizing the contestability of the sons’ claims to citizenship, two other white men (the “interlopers”), challenged the sons’ claim to the property. The *jus sanguinis* citizenship statute relevant at the time allowed for citizenship transmission to foreign-born children but was silent on the marital status of the parents.<sup>113</sup> Despite the intentions of the individual citizen father, as a matter of systemic policy, the *Guyer* court declared that foreign-born “illegitimate” children of American fathers were not citizens under the statute.<sup>114</sup>

Like *Dred Scott* and § 1409, *Guyer* did many things at once. It illustrates how white heteropatriarchy uses both citizenship and property laws to allocate sovereignty to itself and vulnerability to others. It exemplifies white heteropatriarchy’s unrelenting fundamental compulsion and need to control vulnerable bodies in space, specifically lines of inheritance and ownership. It shows the resiliency of white heteropatriarchy in using both citizenship and property laws to exclude racialized foreign others from the polity and preserve the ability to engage in sexual conduct with foreign women without the burdens of parenthood as a matter of societal policy, ratified in law. Furthermore, and as Collins demonstrates in granular detail, for decades after *Guyer*, administrators, judges, and legislators enlisted the antebellum-slavery-based matrilineage-outside-of-marriage/patrilineage-inside-marriage distinction to ensure racial purity in the polity and the continued sexual control of foreign women. As

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110. Collins, *Illegitimate Borders*, *supra* note 6, at 2149 (noting that fifteen days before *Guyer* was decided “Maryland adopted a new state constitution that abolished slavery and declared that ‘all men are created equally free’” (citing BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* 131 (1984))).

111. *Id.* at 2141.

112. *Id.* at 2140.

113. *Id.*

114. *Id.*

Collins demonstrates, for decades, these decisionmakers denied the citizenship claims of nonwhite children, especially those who were excludable under the race-based immigration and naturalization laws, in an effort to ensure racial purity.<sup>115</sup>

*C. Whiteness, Hypermasculinity, and Hypersexualized Foreign Women: The Driving Forces of American Immigration and Citizenship Law*

Whiteness, hypermasculinity, and the narrative of hypersexualized foreign women have coursed through the veins of citizenship transmission since the founding.<sup>116</sup> They are the three organizing tenets that govern the field of citizenship. These three straps in the WHP have shaped and designed the entire regulatory field, and the boundaries and contours of America.<sup>117</sup> Section 1409 is merely one in a myriad of laws that use the legal category of citizenship as a means of granting or denying rights, creating vulnerability for purposes of exploitation, and distributing resources and burdens.<sup>118</sup> Derivative citizenship laws involve a quagmire of statutes, administrative decisions, and policy practices. However, three unifying principles explain the chaos: (1) the need for racial purity and white supremacy; (2) the sanctioning of white women for having sex with foreign men; and (3) the creation and maintenance of vulnerability in foreign women for hypermasculine sexual exploitation.

As for whiteness, citizenship as a legal mechanism is the primary site of “racial formation.”<sup>119</sup> It is where America not only constructs itself as white,<sup>120</sup> but also bulwarks its porous boundaries against “aliens” and simultaneously perfects its ability to exploit.<sup>121</sup> Since its inception, America has used the legal category of “citizenship” to make America synonymous with whiteness.<sup>122</sup> In its very first citizenship act, the Naturalization Law of 1790, Congress explicitly

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115. *Id.* at 2137-38.

116. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1680; *see also* Chang, *supra* note 38 (arguing that the regulation of sex is a central tenet of U.S. immigration policy); Eithne Luibhéid, *Heteronormativity, Responsibility, and Neo-liberal Governance in U.S. Immigration Control*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 69 (Brad Epps et al. eds., 2005) (“Sexuality has long been a concern to the framers of U.S. immigration law and policy, and it has consistently comprised an important axis for the regulation of newcomers.”).

117. Collins, *A Short History*, *supra* note 15, at 1492 (“The history of U.S. citizenship law cannot be understood without due recognition of racism’s central role in shaping the entire regulatory field.”).

118. Freddy Funes, Note, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past the Chinese Exclusion Case*, 11 *SCHOLAR* 341, 342 (2009).

119. OMI & WINANT, *supra* note 28 at 1-3.

120. *See* Onwuachi-Willig, *supra* note 40, at 1119.

121. *See* Collins, *A Short History*, *supra* note 15, at 1496.

122. *See* LÓPEZ, *supra* note 28. For a much more detailed history that centralizes race, *see* Collins, *Illegitimate Borders*, *supra* note 6. For a much more detailed history of derivative citizenship statutes that centralize gender, *see* Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36.

restricted naturalized citizenship to “free, white persons.”<sup>123</sup> Whiteness remained the gold standard when Congress passed racially exclusionary immigration laws, including the Chinese Exclusion Act of 1882,<sup>124</sup> the Immigration Act of 1891,<sup>125</sup> and the Geary Act of 1892.<sup>126</sup> Although there were amendments to this “whites only” restriction, racial bars to naturalization were not fully extirpated until 1952.<sup>127</sup>

White supremacy, however, was not the only driving force shaping immigration policy. As in *Dred Scott*, the creation, maintenance, and regulation of sexual subjugation were also guiding principles in American citizenship and immigration law. The demonization and perennial hypersexualization of Asian women also typify the centralized role of sex and sexual conduct regulation in immigration law. Stewart Chang argues that Asian women, particularly Chinese women, were monolithically constructed as pernicious prostitutes, the antithesis to normative American sexuality, a foreign peril that threatened the integrity of American domestic unity. Quoting historian Nayan Shah, Chang explains, “[D]uring the nineteenth century anti-Chinese advocates characterized Chinese immigration as a racial war where the most pernicious weapon was the Chinese female prostitute, who . . . was ‘infusing a poison into the Anglo-Saxon blood’ and imperiling the future of the American nation.”<sup>128</sup> Capitalizing on the stereotype of Asian women as immoral and sexual deviants, President Ulysses S. Grant signed the Page Act of 1875, which restricted the immigration of Chinese women who were presumed to be prostitutes.<sup>129</sup> Following the Page Act, the Chinese Exclusion Act was just one of a myriad of laws that systemically excluded Asians, including the renewal of the Chinese Exclusion Act in 1884, 1888, and 1892.<sup>130</sup> The 1917 Immigration Act created the “Asiatic Barred Zone,”

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123. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795) (limiting *jus sanguinis* citizenship to the children of U.S. citizen fathers; restricting naturalization to “free white” persons).

124. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

125. Immigration Act of 1891, ch. 551, 26 Stat. 1084.

126. Geary Act of 1892, chs. 60-61, 27 Stat. 25 (repealed 1943).

127. See LÓPEZ, *supra* note 28. It should be noted that in addition to congressional acts, the Supreme Court has consistently held that that “[t]he power of exclusion of foreigners [is] an incident of sovereignty” and that therefore questions arising from the exercise of that sovereignty “are not . . . for judicial determination.” *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). Furthermore, until 1965, American citizenship laws standardized racial and national-origins restrictions. See Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 180 n.64 (2017) (“Race-based immigration and naturalization laws and race-salient national-origins quotas were gradually repealed starting in the 1940s and were finally repudiated by Congress in the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), and in the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).”).

128. Chang, *supra* note 38 at 240 (quoting NAYAN SHAH, *CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO’S CHINATOWN* 107 (2001)).

129. *Id.* (citing Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974)).

130. See generally H.R. Res. 282, 112th Cong. (2011) (resolution regretting the passage of discriminatory laws against the Chinese beginning in the nineteenth century).

which prohibited immigration from most of Asia.<sup>131</sup> The Immigration Act of 1924 followed, which extended exclusion to all “alien[s] ineligible for citizenship,” including Asians.<sup>132</sup> According to Chang, throughout the nineteenth century, the Asian prostitute was politically manipulated as a racial other against which normative citizens and immigrant subjects who could racially and culturally belong in America were defined.<sup>133</sup>

In addition to whiteness, heteropatriarchy governed the laws associated with citizenship transmission. Beginning in 1790, white citizen fathers had the right to transmit citizenship to their marital foreign-born children provided that the mother was also white and otherwise eligible for naturalization.<sup>134</sup> White married citizen mothers, however, did not have the right to transmit citizenship to their white marital foreign-born children until 1934.<sup>135</sup> Racial purity requires control over women’s bodies; thus, under the Expatriation Act of 1907, female citizens automatically forfeited citizenship if they married an alien, a practice known as marital expatriation.<sup>136</sup> The same act prohibited women from transmitting citizenship to their foreign-born children.<sup>137</sup>

As Collins argues, “Prior to 1934, the text of the derivative citizenship statute recognized only the foreign-born children of citizen fathers as citizens, thus using the patrilineal norms that had long characterized domestic relations law to regulate [white] membership in the American polity.”<sup>138</sup> As in *Dred Scott*, outside marriage, matrilineal lineage was recognized for foreign-born nonmarital children.<sup>139</sup> As in *Dred Scott*, the foreign mothers of nonmarital children, fathered by American men abroad, were not citizens. Following matrilineal norms outside marriage allowed citizen men to continue sexual engagement with foreign women free of legal responsibilities for fathering children.

Collins further argues that the primacy placed on marriage to secure the transfer of citizenship to foreign-born children was no accident; rather, the centrality of marriage “remained a vital and racially exclusionary principle from

131. Immigration Act, ch. 29, § 3, 39 Stat. 876 (1917) (repealed 1952).

132. Chang, *supra* note 38, at 268 (quoting Immigration Act, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (restricting immigration for all “alien[s] ineligible for citizenship” and setting an annual quota of 150,000 immigrant entries per year based on national origin, where immigration from each eligible nation was limited to two percent of the number of foreign-born persons of that nationality residing in the United States as of the 1890 census)).

133. *Id.* at 242.

134. Collins, *Illegitimate Borders*, *supra* note 6, at 2235 (citing Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 104 (repealed 1795)).

135. *Id.* (citing Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797).

136. Collins, *A Short History*, *supra* note 15, at 1490 (citing Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228).

137. Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228.

138. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 178–79 (footnotes omitted); see also Miller v. Albright, 523 U.S. 420, 462 (1998) (Ginsburg, J., dissenting) (“In 1855, Congress clarified that citizenship would pass to children born abroad only when the father was a United States citizen.” (citing Act of February 10, 1855, § 2, 10 Stat. 604)).

139. Collins, *A Short History*, *supra* note 15, at 1490.

the late nineteenth century into the early twentieth century. The marriage requirement was racially exclusionary because marriage was not a race-neutral institution.”<sup>140</sup> The Supreme Court did not declare miscegenation laws unconstitutional until 1968.<sup>141</sup> According to Collins, the marriage requirement was also racially exclusionary because immigration administrators constrained definitions of marriage and legitimacy in cases involving citizenship claims of nonwhite children.<sup>142</sup>

The 1922 Cable Act terminated marital expatriation; thus, marriage to an alien no longer forfeited a woman’s citizenship automatically.<sup>143</sup> A woman, however, still lost her United States citizenship if she married an alien ineligible for citizenship, such as Chinese men.<sup>144</sup> In 1934, Congress passed an immigration act that allowed citizen-mothers, for the first time, to confer citizenship on their children.<sup>145</sup> Under the Nationality Act of 1940, Congress preserved equality in the transmission of citizenship to marital children based on the parent’s sex, but established a completely different scheme for nonmarital children, one that discriminated on the basis of marital status and the sex of the parents.<sup>146</sup> Nonmarital foreign-born children of citizen mothers were automatically entitled to citizenship. Nonmarital foreign-born children of citizen fathers, however, acquired citizenship only upon legitimation or adjudication of paternity during the child’s minority.<sup>147</sup> Drawing from Collins, by recognizing mothers as the source of parental responsibility for nonmarital children and preserving a father’s prerogative regarding his nonmarital children, the 1940 Act, like coverture, shielded men from the burdens of childcare and support for their non-marital offspring.<sup>148</sup>

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140. Collins, *Illegitimate Borders*, *supra* note 6, at 2182–83.

141. *Loving v. Virginia*, 388 U.S. 1 (1967).

142. Collins, *Illegitimate Borders*, *supra* note 6, at 2154.

143. Cable Act of 1922, ch. 411, § 3, 42 Stat. 1022.

144. *Id.* at §§ 3, 5.

145. Act of May 24, 1934, ch. 344, 48 Stat. 797. The Act amended § 1993 of the Revised Statutes to read:

Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother . . . has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child’s twenty-first birthday, he or she shall take an oath of allegiance to the United States of America.

48 Stat. 797, *supra*.

146. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138–40; *see* Collins, *Illegitimate Borders*, *supra* note 6, at 2150.

147. Nationality Act of 1940, §§ 201, 205, 54 Stat. 1138–40.

148. *See* Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 234 (2003). As Collins notes, the common law imposed a duty on women of nonmarital children to care for those children, but protected men from the property, support, and status claims of those children. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1683.

Before turning to the next section, there are a few features of citizenship transmission that require highlighting. It is important to note that § 1409, like marriage expatriation, is an example of coverture,<sup>149</sup> a continuum of laws that regulated or controlled women’s bodies for purposes of racial purity, regulated women’s sexual practices outside marriage through the sanction of parenthood, and legally ratified sexualized violence.<sup>150</sup> Like coverture, § 1409 incorporated the common law regime that allocated the rights and responsibilities of parenthood according to marital status and parental gender.<sup>151</sup> As Collins argues, “The history of coverture and the transmission of American citizenship brings an elementary point into focus: the allocation of parental rights is always correlated with the allocation of parental responsibility.”<sup>152</sup> Drawing from Collins, this basic legal truism and its numerous implications for citizenship law suggests that the gendered injustice caused by § 1409 is its creation and perpetuation of a legal regime that squarely fixates full responsibility for foreign-born nonmarital children on women, while allowing men to escape and to continue engaging in unprotected hypermasculinity free of reproductive sanction. As Collins argues, “Once we recognize this gendered operation of § 1409, broader failures of equal protection analysis come into relief.”<sup>153</sup>

Furthermore, both slavery and coverture allowed men to solidify their dominance over women and set the stage for modern approaches to derivative citizenship.<sup>154</sup> The ideologies, discourses, and strategies that entrenched citizenship and property codes in antebellum slavery and coverture continue to have tremendous traction in our shared societal consciousness, particularly in the narratives that justify racialized and sexualized domination as exemplified in victim blaming, slut shaming, and the ways in which the bodies of women continue to be viewed as the property of men, discussed in more detail in Section III.C. Although women’s formal legal status has changed, contemporary approaches to derivative citizenship reflect a racialized commitment to female subordination.<sup>155</sup>

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149. Coverture, in the common law, defined marital unity as a merging of a married couple into a single person—the “head” of the marriage—the husband. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11-13 (2000); CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991); M. Isabel Medina, *Derivative Citizenship: What’s Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do with It?*, 28 *GEO. IMMIGR. L.J.* 391, 453 (2016).

150. Coverture included a continuum of laws that created a right in men to dominate women, including marriage as a status contract, regulation of divorce and child custody, legal treatments of women’s obligations for housework and child care, lack of recognition of marital rape, and legal sanctioning of domestic violence. Elizabeth Beaumont, *Gender Justice v. the “Invisible Hand” of Gender Bias in Law and Society*, 31(3) *HYPATIA J. FEMINIST PHIL.* 668, 676 (2016).

151. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1672.

152. *Id.*

153. *Id.*

154. *Id.* at 1681.

155. Beaumont, *supra* note 150, at 676.



D. *World War I, World War II, Korea, and Vietnam: Foreign Woman As “Whore” and the Military Sex Trade*

It is imperative to contextualize § 1409 in the hypermasculine sexual ethics of the American military. As Susan Zeiger notes, war engagements are powder kegs for sexual exploitation from the brothels of the French demimonde, to the German bordellos, to sprawling “camp towns,” often military-run, that provided sex trafficking for American GIs in Korea, the Philippines, Okinawa, Vietnam, and Thailand.<sup>156</sup> As Zeiger notes, the loneliness, fear, boredom, lust, and racially exoticizing and fetishizing tastes of servicemen combined with the economic vulnerability of foreign women detonate sexual exploitation.<sup>157</sup> American military engagements are primary sites for hypermasculinity with all the trappings incident to sexualized violence, including exponential incidents of rape.<sup>158</sup> When contextualizing § 1409 in the hypermasculine sexual practices of

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156. ZEIGER, *supra* note 45.

157. *Id.* at 19-20 (“Having endured the ‘rigors of the front,’ these men were eager to be sexually serviced.”) It should also be noted that the glove-like fit between war and sexual exploitation is not unique to the United States. See, for example, the comfort women the Japanese made of Korean women, rape as warfare in the Congo, and the former Yugoslavia.

158. Because sexual assault is a severely underreported crime, no one can know just how pervasive the culture of sexual assault is in the American military, let alone how often American servicemen sexually assault when they are abroad. Thirty-three percent of women in the military will experience sexual assault. Approximately twenty percent of all rapes for military personnel get reported. See Kristina B. Wolff & Peter D. Mills, *Reporting Military Sexual Trauma: A Mixed-Methods Study of Women Veterans’ Experiences Who Served from World War II to War in Afghanistan*, 181 MIL. MED. 840 (2016). Between nine and a half and thirty-three percent of women report experiencing either an attempted or completed rape during their military service. See Juleyka Lantigua-Williams, *Taking Military Sexual Trauma Seriously*, THE ATLANTIC (Sept. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/09/women-vets-and-mst/498866/> [https://perma.cc/85VE-S426]. Approximately one out of every five women in the United States is raped in her lifetime. For a woman in the military, her chances of being raped increase to one out of every three women. Kristina Bell et al., *When Public Institutions Betray Women: News Coverage of Military Sexual Violence Against Women 1991-2013*, 10 J. INTERDISC. FEMINIST THOUGHT 1 (2017). Of the 5,277 service members who reported an incident of sexual assault that occurred during military service, 4,193 were women, while 1,084 were men. The number of women had increased by thirteen percent from the previous year. Lisa Ferdinando, *DoD Releases Annual Report on Sexual Assault in Military*, U.S. DEP’T OF DEF. (May 1, 2018), <https://dod.defense.gov/News/Article/Article/1508127/dod-releases-annual-report-on-sexual-assault-in-military> [https://perma.cc/AC2M-PJRA]. Women in combat are 180 times more likely to be sexually assaulted by a fellow soldier than killed by the enemy. *The Military’s Sexual Assault Epidemic*, THE WEEK (Mar. 31, 2013), <http://theweek.com/articles/466100/militarys-sexual-assault-epidemic> [https://perma.cc/JZ4M-6PNH]. Up to thirty-six percent of women veterans screened at Virginia treatments centers showed signs of trauma from either sexual abuse, harassment, or assault which occurred while on active duty. See Valerie A. Stander & Cynthia J. Thomsen, *Sexual Harassment and Assault in the U.S. Military: A Review of Policy and Research Trends*, 181 MIL. MED. 20, 21 (2016). If these reported rates of sexual assault within the military itself are any indication of the pervasiveness of a sexual assault culture in the American military, where there are legal protections for American service men and women, then one might reasonably assume that assault culture abroad is even more expansive. Moreover, the military is characterized by a patriarchal structure that emphasizes masculine ideas, dominance, and control. This is demonstrated in instances when men primarily dominate leadership and high-ranking positions. The military’s hypermasculine dynamic is associated with the acceptance and perpetration of sexual assault, where a man’s sense of patriarchal entitlement makes it easier for them to justify sexual assault. The men’s feelings of entitlement to regular sex is perceived to be the link between masculinity and rape-related attitudes. Carl Andrew

the American military, three themes emerge: (1) governmental prohibition of marriage between American servicemen and racialized foreign women; (2) military facilitation of sex trafficking between servicemen and racialized foreign women; and, as Collins has argued, (3) the combined impact of governmental policies that restricted marriage with racialized foreign women and the facilitation of sexual exploitation led to a disproportionate number of racialized nonmarital foreign-born children being abandoned by their fathers.<sup>159</sup>

History is replete with examples of both Congress and the American military restricting interracial marriage. As Zeiger chronicles, the government’s repression and condemnation of interracial relationships was a central feature of marriages between members of the military and foreigners from World War I through the Korean War and the Vietnam War: “In World War I, for instance, U.S. military and civilian authorities took a paternalistic stance toward white soldiers” and white foreign women, “determined to ‘protect’ them from sexually promiscuous foreign women.”<sup>160</sup> When it came to black soldiers, however, in addition to an outright ban on interracial marriages, military officials warned allies of the sexual danger that black servicemen posed to the white women of other nations.<sup>161</sup> In another example, the American Expedition Forces threatened a Filipino-American serviceman with statutory rape charges for attempting to marry a German woman with whom he had fathered two children.<sup>162</sup>

In World War II, the government, with the support of the military, maintained its ban on interracial soldier marriage. In 1945, the War Brides Act explicitly excluded women who were “ineligible for citizenship” because of their race, such as Asian women, and the privilege of preferential immigration status was denied to them.<sup>163</sup> As Collins argues, “The racial prohibitions incorporated into the War Brides Acts meant not only that a soldier could not bring his racially excludable wife home, but also—pursuant to explicit military policy—that the soldier would not likely be given permission to marry his racially excludable girlfriend in the first place.”<sup>164</sup>

Continuing through the Korean and Vietnam Wars, the military actively thwarted marriages between soldiers and their Asian girlfriends,<sup>165</sup> but facilitated

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Castro et al., *Sexual Assault in the Military*, 17 MIL. MENTAL HEALTH 2-3 (May 16, 2015), <http://cir.usc.edu/wp-content/uploads/2015/06/Sexual-Assault-in-the-Military.pdf> [https://perma.cc/VA4Q-D67M].

159. See Collins, *Illegitimate Borders*, *supra* note 6.

160. ZEIGER, *supra* note 45, at 6.

161. *Id.*

162. *Id.* at 36.

163. Collins, *Illegitimate Borders*, *supra* note 6, at 2208 (citing War Brides Act, Pub. L. No. 79-271, § 1, 59 Stat. 659, 659 (1945) (excluding brides under immigration laws from preferences provided in Act)).

164. Collins, *Illegitimate Borders*, *supra* note 6, at 2208-09.

165. Rose Cuisson Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1407-11, 1429 (2011).

and encouraged sex trafficking.<sup>166</sup> Citing Zeiger, Collins explains this duality and its impact on nonmarital foreign-born children:

[A]s Zeiger demonstrates, during the Vietnam War the military “vigorously and systematically discouraged marriage for American service personnel in Vietnam, placing a wide array of bureaucratic and financial obstacles in front of marriage aspirants.” Instead, drawing on a set of conventions and practices that had emerged during the Korean War, the military encouraged nonmarital sexual liaisons between American soldiers and local women, including long-term “contract” arrangements. The children born to such relationships were illegitimate and hence not American citizens.<sup>167</sup>

As in the Korean War, during the Vietnam War, the American military actively facilitated a sex trafficking culture, through “R & R” programs, for example, which facilitated sexual exploitation between servicemen and foreign women.<sup>168</sup> In elaborating on the impact of the duality of racially restrictive marriage policy and military-facilitated sex trafficking, Zeiger argues the combined policies shared a common core:

The intention to preserve and extend male control over women. This intention was overt in regard to prostitution. The image of a military red-light district, guarded by American MPs, surrounded by a wall topped with broken glass, and staffed by army “inspected” prostitutes, is an apotheosis of female disempowerment. But crucial features of overseas marriage policy during World War II also created a wall of male control around the foreign brides of American servicemen. The procedures for wives to enter the United States and the establishment of paternity claims were both areas in which the alien spouse was denied standing to act independently and on her own behalf. In the matter of paternity, an alien woman, married or unmarried, who had given birth to the child of a U.S. serviceman had no access to child support, nor the child, access to citizenship, unless the American father formally agreed to recognize the child. Similarly, though a GI dependent was,

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166. ZEIGER, *supra* note 45, at 79; Bruce Cumings, *Silent but Deadly: Sexual Subordination in the U.S.-Korean Relationship*, in SAUNDRA POLLOCK STURDEVANT & BRENDA STOLZFUS, LET THE GOOD TIMES ROLL: PROSTITUTION AND THE U.S. MILITARY IN ASIA 169 (1992); *see also* Linda Trinh Võ & Marian Sciacchitano, *Moving Beyond “Exotics, Whores, and Nimble Fingers”: Asian American Women in a New Era of Globalization and Resistance*, 21 FRONTIERS: J. WOMEN STUD. 1, 4 (2000) (“The trafficking of Asian women as commodities in the global sex trade continues because of the U.S. military presence in Asia, the sex tour industry in Asia, and the Asian mail-order bride business. The construction of Asian women as hyperfeminine erotic exotics who willingly and passively service male desires has contributed to these thriving sex industries.” (citation omitted)).

167. Collins, *Illegitimate Borders*, *supra* note 6, at 2211 (citing ZEIGER, *supra* note 45).

168. ZEIGER, *supra* note 45, at 79-80.

theoretically, eligible for transportation to the United States, only the American serviceman could file a transportation request.<sup>169</sup>

As the result of American military bases in Philippines, thousands of Filipino mothers filed a \$68 million dollar lawsuit arguing that America had a legal responsibility to educate and provide medical care for an estimated 8,600 Amerasians in Olongapo, the site of Subic Bay Naval Station, about the size of Singapore.<sup>170</sup> The court filings described the Navy’s direct role in the local bar and sex industry, where the Navy helped regulate the clubs, some of which were owned by Navy officers or retirees. They registered 15,000 to 17,000 “hospitality” women and gave them information and medical care aimed at limiting venereal disease. The Navy also approved off-base apartments where many sailors lived with girlfriends.<sup>171</sup> In remarking on Olongapo, one Navy Judge Advocate stated, “[W]e participated in creating the world’s biggest brothel. Olongapo is called ‘the city of 10,000 whores.’”<sup>172</sup> In describing the carnival-like atmosphere of the brothels for American servicemen, the judge advocate stated:

If you’re an impressionable young kid, and you’re taken in tow—outside to Olongapo which is just row after row of bars, massage parlors, and no-pretext brothels—what does that do to a young kid’s view on the value of women?

These gals would do the most degrading things—and do them in public. And it was always in a group. A gal would come along to a table in a bar and literally “serve” all the guys at the table. It was always in groups. In fact, girls would do tricks with their bodies and orifices on stage—that was very common. One game was to have the girl go under the table and fellate each guy—and whoever’s face cracked soonest would buy the next round of drinks. This was true in all the enlisted bars—in the officer clubs there wouldn’t be the group sex, but there would be group performances.

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169. *Id.*

170. Bruce Lambert, *Abandoned Filipinos Sue U.S. Over Child Support*, N.Y. TIMES (June 21, 1993), <https://www.nytimes.com/1993/06/21/world/abandoned-filipinos-sue-us-over-child-support.html> [https://perma.cc/3KMC-MXCQ]. Olongapo had the largest prostitution trade near any military base in Asia. Approximately 15,000 to 17,000 sex workers worked in Olongapo and neighboring towns. An estimated 9,000 of these women worked in over 330 bars, massage parlors, and other “entertainment” establishments in Olongapo. Elizabeth Kolby, Comment, *Moral Responsibility to Filipino Amerasians: Potential Immigration and Child Support Alternatives*, 2 ASIAN L.J. 61, 64 (1995).

171. Lambert, *supra*, at 173.

172. Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 711-12 (1996).

Subic Bay was an automatic stop for all the ships in the Pacific. So all the guys experienced this. This was not just a few of the guys or some small proportion; this was all the guys . . . .

That place was a circus. If I had to guess at the percentage of sailors—officer and enlisted—who never partook of those activities in Olongapo and Subic, I'd guess five percent.

The one thing that strikes me is: I don't think it's possible to overestimate the influence of places like Olongapo. And these included graduates of the top law schools in the country—and we were all affected by it . . . . I mean I can't overstate it; it was beyond anything I'd ever seen or ever have seen since . . . . The whole carnival atmosphere cannot be overstated.<sup>173</sup>

This fun-filled, carnival-like frat house circus contrasts sharply with the utter squalor American servicemen, with insatiable appetites for unprotected “One Dollar Chicky-Chicky Girls,” create for their abandoned children, described in more detail in Section III.C. The descriptions above provide context for the property right Congress gives these servicemen to go abroad and “Let the Good Times Roll”<sup>174</sup> without any fear that their offspring might show up at their Senate hearings, houses of worship, and family gatherings to remind Dad, his family, and his community of all those raucous fun-filled nights, all the laughter, and all the giggling. The images also reflect the moral bankruptcy of the American military in facilitating and subsidizing sex trafficking while restricting interracial marriage and the life chances of children Americans fathered. As Collins poignantly argues, the combined restrictions on interracial marriage, particularly to racialized foreign women, and the military's active facilitation of sex trafficking, particularly with racialized foreign women, along with the derivative citizenship laws enacted by Congress, resulted in “the predominantly white babies of World War II soldiers [becoming] citizens and ‘baby boomers,’ while a very significant population of nonmarital Amerasian babies were excluded and became ‘bui doi’—children of the dust.”<sup>175</sup>

### III. JOHNNY, HIS WHIP, AND HIS SUPPORTING CAST OF CHARACTERS, JEZEBEL AND OFFRED

Congress, with the Supreme Court's blessing, has equipped citizen men with both a dagger and a shield when traveling abroad and spreading their seed.

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173. *Id.* at 711–12.

174. See generally STURDEVANT & BRENDA STOLZFUS, *supra* note 166.

175. Collins, *Illegitimate Borders*, *supra* note 6, at 2213.

Section 1409 is a weapon to engage in hypermasculinity liberated from the shackles of reproductive burdens and responsibilities—freed from reproductive punishment or sanction. Under § 1409, men have a right—which is so valued that it rises to the occasion of a property interest—to proclaim to the world, "I want to whore all I want without a care in the world," and to not suffer the reproductive sanction or punishment of forced parental responsibility against their male prerogative, autonomy, and freedom.

Section 1409 is a direct descendant of antebellum chattel slavery: using the legal category of citizenship, § 1409 perfects sovereignty in white heteropatriarchy and vulnerability in racialized and gendered others. According to Joseph Singer, "the legal system makes constant choices about what interests to define as property."<sup>176</sup> Moreover, "[s]tate power defines and allocates property rights, and property rights, in turn, allocate power and vulnerability. Seemingly neutral definitions of property rights by the courts [and Congress] distribute power and vulnerability in ways that construct illegitimate hierarchies based on race, sex, class . . . and sexual orientation."<sup>177</sup> In § 1409, Congress delegated to citizen men the sovereign power of "the legal category of citizenship," which functions like property. In § 1409, Congress conferred upon citizen men a package of entitlements that work on the valences of white, male, and hypermasculine supremacy, taken together as white heteropatriarchy. Under § 1409, citizen men have the right of exclusion, what Cheryl Harris calls "the conceptual nucleus of whiteness"—the right to discard and exclude their children from the American polity, which is historically and consistently synonymous with whiteness. As part of the package of entitlements, § 1409 gives American men the power to abandon their children to circumstances tantamount to destruction. As Joseph Stigler states, "Ownership, with the attendant right to exclude others, confers power on the owner—power to deny other people things they need to live."<sup>178</sup> In having the right to exclude and destroy, citizen men can continue the right to control, use, and enjoy foreign women free from the responsibilities and regulation of parenthood. Section 1409 turns foreign women into things to be used and their offspring into stuff to be discarded. If property is a legal relation among persons with respect to things, then § 1409 creates a legal relation of racialized and gendered sexual subordination shared between citizen men with respect to foreign women. Section 1409, like property, creates a stable basis of expectation with respect to sexual control over foreign women because it mitigates the burdens of parenthood. To the extent that property is inherently distributional,<sup>179</sup> § 1409 allocates a valued resource, citizenship.

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176. Harris, *WAP*, *supra* note 18, at 1791 n.82 (quoting Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 47 (1991)).

177. *Id.* (quoting Singer, *Sovereignty and Property*, at 8).

178. Singer, *supra* note 41, at 1322.

179. Joseph W. Singer, *Property*, in *THE POLITICS OF LAW* 240, 249 (David Kairys 3d ed. 1998).

In § 1409, Congress has given men a right to mitigate any duty or responsibility owed to their children or the mothers of their children, under American law. Furthermore, Congress has granted American men a birthright to either create American citizens or to exclude and destroy them. At the same time, Congress has suppressed the ability of foreign women to create American citizens. Foreign women are good enough to sexually exploit, but not to create American citizens outside of wedlock. The right Congress gave to citizen men in the form of a choice as to the citizenship of their children mitigates the rights and decision making of foreign women who birth American citizens. The decision is one of male prerogative.

Through this process, whiteness, maleness, and hypermasculinity take on the character of property in much the same way as Cheryl Harris's "whiteness as property,"<sup>180</sup> where whiteness, maleness, and the heteropatriarchal familist ideal become the governing organizing principles of all space—citizenship. Whiteness is the touchstone and talisman of American entitlement and sense of belonging. Section 1409 is "male" in that it is an exclusively male prerogative. It is heteropatriarchal familist in that § 1409 extends a property right, part of the package of entitlements, which encompasses the right to engage in hypermasculine sexual performance freed from reproductive sanction or punishment—free from the consequences of creating children. This Article refers to the entire process outlined in this Part III as a white heteropatriarchal property right in philandering, sexual exploitation, and rape (the "WHP").

The WHP is a conceptual model that negates the claim that § 1409 emerged from the biological and natural differences between men and women. On the contrary, the WHP exposes § 1409 as the product of foundational choices—choices about the relationship between rights and power.<sup>181</sup> The WHP casts § 1409 as a form of property that, as a social institution, privileges the rights of men to perform hypermasculinity on foreign women and discard their children. The WHP exposes Congress's creation of an institution and social arrangement that distributes a highly significant social good—citizenship—and justifies privilege. The WHP places § 1409 in a moral framework, so that its obfuscating layers, hidden presumptions, and allocation of rights and duties can be scrutinized and measured against a society that pledges allegiance to liberty and justice. The WHP questions whether § 1409 is an outlier in a society that rejects forms of social life and political systems, like slavery, as a way of organizing control over humans.<sup>182</sup> In its foundational choices, § 1409 creates a property system inconsistent with the norms governing a free and democratic society that treats each person with equal concern and respect.<sup>183</sup> As discussed in more detail

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180. Harris, *WAP*, *supra* note 18.

181. Singer, *supra* note 41, at 1323.

182. *Id.* at 1325.

183. *Id.* at 1336.

in Part V, § 1409 stands at odds with the rhetoric surrounding abortion rights and women’s reproductive integrity, specifically the morality of sexually responsible behavior, the sanctity of human life, and the responsibilities and duties of parenthood.

This Part lays the theoretical underpinnings for the claim that § 1409 creates the WHP. Drawing from Cheryl Harris and other modern theories of property, Section III.A further explicates § 1409 as a property right. Drawing from Anthony Farley and Angela Harris, Section III.B explicates the hypermasculine performance aspect of the WHP. Finally, Section III.C introduces Jezebel, the whore, the Aristotelian evil snare of men, and Johnny’s doppelganger. She embodies the narrative of victim blaming that allows Johnny to engage in treachery and still maintain his innocence. She is part of the cast of characters embedded in the DNA of § 1409. She becomes the hidden justification, “slut shaming,” in the interpretive base and doctrine that protects § 1409 from equal protection challenges in four Supreme Court cases, discussed in Part IV. Just as Jezebel symbolizes foreign women, Offred embodies citizen women. Offred is the main character in Margaret Atwood’s *The Handmaid’s Tale*, which depicts a dystopian universe where women are banished to reproductive enslavement and harvesting.<sup>184</sup> Offred is the citizen woman automatically saddled with parental responsibility.<sup>185</sup>

#### A. *The WHP as Property*

According to Cheryl Harris, “whiteness as property” names the concept that whiteness is a form of property because (1) whiteness is constitutive of what it means to be a free person; (2) the law excludes others from whiteness (strictly policing its boundaries); and (3) crucial legal rights and advantages flow from whiteness.<sup>186</sup> Whiteness satisfies the functional criteria of property because it includes the enjoyment of rights and privileges as well as the dominion over land, bodies, and other forms of materiality. By both shielding white people from the vulnerability that comes from lacking rights, land, or wealth, and conferring upon white people the ability to materially increase their power, white personhood confers a kind of property right that solidifies white supremacy conceptually, spatially, and ontologically.<sup>187</sup> According to Harris, property is possessed not only in the form of land, but in the form of white personhood.

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184. MARGARET ATWOOD, *THE HANDMAID’S TALE* (Anchor Books Penguin Random House ed. 1998).

185. I mention Offred here because she is the subject of upcoming scholarship—a companion piece that argues that § 1409 creates moral and legal accountability, as well as equality asymmetry with laws involving abortion and the criminalization of women for birthing drug-dependent children. Although some of these arguments are explored in this piece, future scholarship will explore those ideas in depth.

186. Harris, *WAP*, supra note 18, at 1725-30.

187. *Id.* at 1713.



White personhood, according to Harris, is exclusively given the powers of possession, which manifests materially in the owning of property, immunity from legal harm, and the subordination of non-whites.<sup>188</sup> Whiteness itself is the property of being able to *possess* rights, power, immunities, as well as land and human beings. White people have created supremacy in themselves by making property of others. Drawing from Harris, and as Andrew Krinks observes, whiteness is the preeminent mode of ownership and power and, in turn, has the authority to bend blackness to its will. Whiteness *becomes* the Earth because whiteness subsumes everything into itself, likewise materially manifesting itself onto the world, such that blackness can both literally and figuratively function as intrusion or trespass, simply for existing in what is sometimes explicitly or implicitly understood as “white space”<sup>189</sup> or America.

Drawing from Harris, § 1409 is where the monopolization of citizenship in the hands of citizen men traveling abroad, and the propertization of foreign bodies conflates ideologically, doctrinally, and materially: citizenship is where white heteropatriarchy perfects sovereignty in itself and vulnerability in others through a kind of statelessness<sup>190</sup>—a place without rights, what Chief Justice Taney called, “no rights which the white man was bound to respect”<sup>191</sup>—and a place implemented by force and ratified by law.<sup>192</sup> Citizenship, therefore, polices the boundaries of whiteness at the nation’s border as a means of preserving the material and psychological benefits of whiteness as well as lines of inheritance.<sup>193</sup> Section 1409 sets the boundary between the American polity and racial “filth,” bringing down the value of white cleanliness and societal order. Section 1409 draws a divide between America and inestimable numbers of foreign women whose sexual exploitation by American men marks them as the undesirable “other” imperiling white space and societal cleanliness. Section 1409 keeps foreign women and their children fathered by American men frozen as “dirty secrets” petrified in the white heteropatriarchal mind and a material world of limitless exploitation beyond the border far, far away.

Harris provides the connection between property and relationships of domination and exploitation in the following:

[P]roperty is a legal construct by which selected private interests are protected and upheld. In creating property “rights,” the law draws boundaries and enforces or reorders existing regimes of power. The

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188. *Id.* at 1725-30.

189. Onwuachi-Willig, *supra* note 40, at 1121.

190. Harris, *WAP*, *supra* note 18, at 1715 (“Although the systems of oppression of Blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.”).

191. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

192. *Id.*

193. Onwuachi-Willig, *supra* note 40, at 1119.

inequalities that are produced and reproduced are not givens or inevitabilities, but rather are conscious selections regarding the structuring of social relations. In this sense, it is contended that property rights and interests are not “natural,” but are “creation[s] of law.”<sup>194</sup>

Under § 1409, Congress, with the Supreme Court in tow, has made a choice to grant the WHP legal status, which allocates and distributes power and vulnerability for the express purpose of sexual domination and commodification. These choices are not the product of physiological differences between men and women, but rather, valued access to foreign women for hypermasculine purposes. Section 1409 is where citizen men become ideological propositions enforced through power, and foreign women and their nonmarital children become ideological propositions imposed through subordination, all of whom exist in a material reality of power and control that § 1409 creates.<sup>195</sup> Under § 1409, citizen men become weapons of law and a resource deployable at the social, political, and institutional level to maintain control over foreign women and their children while engaged in the sexual exploitation of foreign women.<sup>196</sup>

Under § 1409, the legal mechanism of citizenship maneuvers, much like property, to endow white heteropatriarchy with both the ideological and material right to exclude, possess, control, enjoy, transfer, and destroy.<sup>197</sup> In that way, § 1409 satisfies the functional criteria of property.<sup>198</sup> Like property, § 1409 creates rights and privileges in white heteropatriarchy, and it also creates duties in foreign women and their offspring, namely to respect the rights and privileges in American men and to accept their own denigration at the hands of American men. Section 1409 creates “outside” children. In this way, property not only protects value, it creates value. Section 1409 protects and creates value in whiteness and vulnerability in foreignness. It protects and creates value in maleness and vulnerability in femaleness. It protects and creates value in

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194. Harris, *WAP*, *supra* note 18 at 1730.

195. *Id.* (“The law constructed ‘whiteness’ as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of ‘reification’: ‘Its basis is that a relation between people takes on the character of a thing and thus acquires a ‘phantom objectivity,’ an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.’”).

196. *Id.* at 1734 (“The state’s official recognition of a racial identity that subordinated Blacks and of privileged rights in property based on race elevated whiteness from a passive attribute to an object of law and a resource deployable at the social, political, and institutional level to maintain control.”).

197. Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness As Property and Racial Performance As Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 30 (2015). (quoting Harris, *WAP*, *supra* note 18, at 1736 (“The right to exclude was the central principle, too, of whiteness as identity . . . . [t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded.”)).

198. Harris, *WAP*, *supra* note 18, at 1731 (arguing that whiteness functions as property in the right to exclude, possess, transfer, use, dispose, and enjoy).

heteropatriarchal sexual performance and the material circumstances necessary to sexually exploit.

At the core of whiteness is what Harris calls its conceptual nucleus of exclusion.<sup>199</sup> Making whiteness a kind of property “reproduces black subordination” by default, because the construction of whiteness as superior and as the access to wealth, property, and citizenship, is not possible apart from the dehumanization of blackness.<sup>200</sup> Thus, whiteness not only sets up the dichotomy of insider and outsider, but by positioning itself inside the circle of rights and privileges and situating the other outside the charmed circle, it also establishes racial hierarchy that enables the vulnerable conditions for exploitation. In Harris’s words, “The fundamental precept of whiteness—the core of its value—is its exclusivity. But exclusivity is predicated not on any intrinsic characteristic, but on the existence of the symbolic Other . . . .”<sup>201</sup> In other words, as with many objects generally in a capitalist society, the thing in and of itself lacks value. The ability to exclude creates value. Valorized whiteness requires dehumanized blackness in order to be powerful materially and symbolically. If whiteness is property, then blackness is always trespass.<sup>202</sup>

Drawing from Harris, the “white” in the WHP is the right to exclude from the American polity, which is synonymous with whiteness. The driving force in the bundle of rights, or package of entitlements, that § 1409 confers to citizen men, regardless of their race, is the right to exclude, which structurally assumes whiteness. In fact, and as discussed in more detail in Part IV, which analyzes the Supreme Court cases that have addressed § 1409, it is the power of exclusion that triggers Congress’s plenary power in areas of immigration. It is also Congress’s plenary power that has shielded § 1409 from a more exacting scrutiny than would otherwise apply to explicit race, gender, or nationality disparity in other areas of law.<sup>203</sup> As Harris states, “American law has recognized a property interest in whiteness that although unacknowledged now forms the background against which legal disputes are framed, argued, and adjudicated.”<sup>204</sup> Moreover, § 1409 not only policies the boundaries of white space, but it also sets up a perimeter around foreign women against whom citizen men form their masculine identities through hypermasculine sexual performance. And then, in an endless

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199. *Id.* at 1714; see also Onwuachi-Willig, *supra* note 40, at 1153; MICHELLE ALEXANDER, THE NEW JIM CROW 257-58 (2012) (“[A]n aspect of human nature is the tendency to cling tightly to one’s advantages and privileges and to rationalize the suffering and exclusion of others.”).

200. Harris, *WAP*, *supra* note 18 at 1731.

201. *Id.* at 1789.

202. Onwuachi-Willig, *supra* note 40, at 1156-57. This concept might also explain why black equality, for some whites, looks like trespass, a feeling some characterize as being left behind.

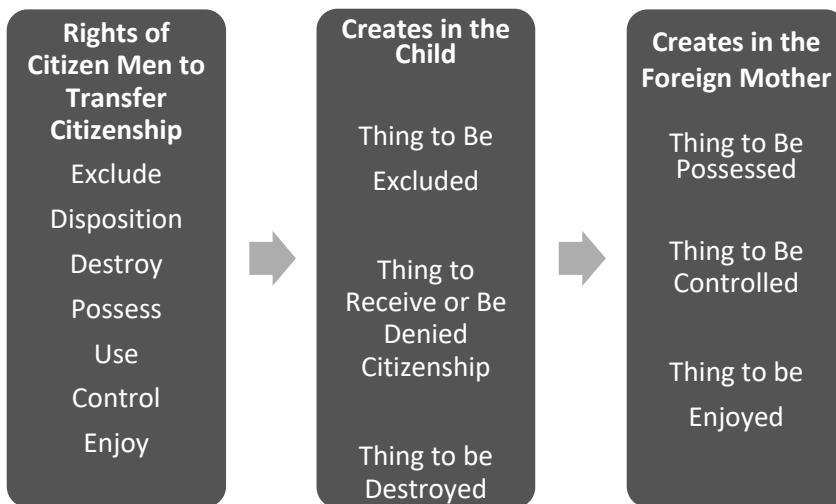
203. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); Michael G. McFarland, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 N.Y.U. ANN. SURV. AM. L. 467, 509 (2008).

204. Harris, *WAP*, *supra* note 18, at 1714.

stream of ironies, the foreign woman’s sexual exploitation by American men becomes yet another reason to deny her children citizenship. As discussed in more detail in Part IV, the Supreme Court has justified the constitutional solvency of § 1409 by raising the evil specter of millions of war babies ready to raid the government coffers, and an equal number of menacing foreign women who do not know the identities of their children’s fathers; thus, the sexual immorality and depravity of these foreign women become yet another reason to deny their children access.

Extending from Harris, § 1409 creates the WHP. By conferring a package of entitlements to citizen fathers, more specifically by granting citizen fathers the right to exclude their nonmarital foreign-born children from the polity—to deny them citizenship—§ 1409 vests in these men not just a right to exclude their children, but a right to effectively destroy them, while simultaneously investing in these fathers a biopower to continue the sexual possession, control, use, and enjoyment of foreign women. The following chart is a visualization of the WHP.

Figure 1: Visualization of the WHP



To further illustrate the power conferred by § 1409 and to humanize the claim that § 1409 creates a right in citizen fathers to abandon their children in circumstances tantamount to destruction, consider the following passage from Bonnie Kae Grover, describing the “bui doi,” “children of the dust,”<sup>205</sup> the

205. Collins, *Illegitimate Borders*, *supra* note 6, at 2213. Similarly in the Philippines, the Amerasians, fathered by Americans, are known as “throwaway children,” “bye, bye, Daddy,” “half dollar,” or “souvenir.” Lambert, *supra* note 170. They live on the margins, endure high rates of poverty and ill health even by Filipino standards, and are frequently abandoned as infants or raised by young single mothers. Many thus turn to prostitution. Emily Rauhala, *Filipino Children of U.S. Troops Have Mixed*

children American military men fathered and abandoned during the Vietnam War, when America was out spreading democracy.<sup>206</sup> These discarded children are now middle-aged and living in squalor facilitated by their American fathers and the societal policies embedded in § 1409:

Most Amerasians were born to working class women and thus lack the education and resources to relocate to the United States or even make contact with their fathers. Many of them look strikingly occidental, but far from conferring an advantage, their Western appearance subjects them to scorn and derision. Vietnam is a relatively homogeneous society in which Amerasians cannot hide that their mothers consorted with a hated enemy. Some mothers abandoned their children, placed them in orphanages, or gave them to relatives to raise. Today, they are subject to intense discrimination. Most cannot find jobs and live on the streets or lead lives of crime and prostitution. Many live in official compounds built for their protection or otherwise depend on the government for safety. There has been little public pressure to make amends and little hue and cry in the United States to try to relieve the conditions under which these children live.<sup>207</sup>

In sum, modern theories of property explain the power of the WHP and its formidable strength in the face of constitutional challenge. Although many laws that facially discriminate on the basis of gender have been overturned, partially because their explicit gender references trigger a greater burden of justification, § 1409 remains entrenched. It remains resilient because it protects a time-honored property right behind the obfuscating glare of legal doctrine's power to ratify the settled expectations of white heteropatriarchal privilege as natural—the legitimate natural baseline—evinced in the biological differences between

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*Feelings on American Return*, WASH. POST (May 15, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/filipino-children-of-us-sailors-and-soldiers-have-mixed-feelings-on-american-return/2016/05/15/a12b8a7a-1621-11e6-971a-dad9ab18869\\_story.html](https://www.washingtonpost.com/world/asia_pacific/filipino-children-of-us-sailors-and-soldiers-have-mixed-feelings-on-american-return/2016/05/15/a12b8a7a-1621-11e6-971a-dad9ab18869_story.html) [https://perma.cc/3W3D-MLBL].

206. “No one knows how many Amerasians were born—and ultimately left behind in Vietnam—during the decade-long war that ended in 1975. In Vietnam’s conservative society, where premarital chastity is traditionally observed and ethnic homogeneity embraced, many births of children resulting from liaisons with foreigners went unregistered.” David Lamb, *Children of the Vietnam War*, SMITHSONIAN MAG. (June 2009), <https://www.smithsonianmag.com/travel/children-of-the-vietnam-war-131207347> [https://perma.cc/ZUB3-EDAJ]. Congress enacted legislation in 1987 giving Amerasians special immigration status. James Dao, *Vietnam Legacy: Finding G.I. Fathers, and Children Left Behind*, N.Y. TIMES (Sept. 15, 2013), <https://www.nytimes.com/2013/09/16/us/vietnam-legacy-finding-gi-fathers-and-children-left-behind.html> [https://perma.cc/7BAL-QNAL]. Since then, more than 21,000 Vietnamese Amerasians have relocated to the United States. Dao, *supra*. “It is also estimated that there are roughly 50,000 Filipino Amerasians, due to the United States’ 94-year occupation of the archipelago from the Spanish-American War in 1898 until withdrawal in 1992.” Emily von Hoffmann, *The Forgotten Americans: Meet the Abandoned Children of U.S. Military Servicemen Abroad*, PIXEL MAG. (Nov. 19, 2015), <https://medium.com/pixel-magazine/the-forgotten-americans-meet-the-abandoned-children-of-us-military-servicemen-abroad-3fc54f8cd8f3> [https://perma.cc/7L23-3WKN].

207. See Bonnie Kae Grover, *Aren’t These Our Children? Vietnamese Amerasian Resettlement and Restitution*, 2 VA. J. SOC. POL’Y & L. 247, 254 (1995).

men and women, which cannot be disturbed without overturning the entire natural order.<sup>208</sup> Part IV illuminates how the Supreme Court has entrenched and legitimated the settled expectations of the WHP through the obfuscating might of nature and biology, turning those hegemonic maneuvers into legal doctrine, which reifies a material reality of sexualized racial domination.

Before turning to the performative aspects of the WHP, it is imperative to highlight the novelty of this article, and that is the value of applying a property rubric to § 1409; centralizing the lives of racialized women as the interpretive base for a critique of § 1409; and the value of intersectional analysis to unearth the pernicious endurance of the WHP. Although the current controversy surrounding § 1409 is rightfully multifaceted, a property analysis is absent from the dialogue and debate. And yet a property perspective is ubiquitous in § 1409. Applying a property rubric to citizenship reveals that both citizenship and property share the same conceptual nucleus—exclusion. Property involves how society recognizes value,<sup>209</sup> how society organizes space, and how society organizes people in space. Drawing from Harris, white heteropatriarchy has usurped all space and relegated vulnerable bodies to particularized places, for the purpose of exploitation. Space, therefore, becomes hierarchical on the valences of race, class, and gender. In restricting the movement and actions of nonmarital foreign-born children, Congress has fundamentally framed § 1409 as a property interest. In § 1409, Congress is grappling with what to do with disposable children—how to physically cordon them off from the American polity—how to leave them behind as a “dirty” and “dark” secret.

Not just Congress, but the Supreme Court, in immunizing § 1409 from equal protection challenges, has justified § 1409 as protecting government coffers, legitimate lines of inheritance for citizen men, and the nation’s (white) boundaries from undesirability, in the form of nonmarital foreign-born children and their immoral mothers. Section 1409 is a direct descendant of antebellum slavery: it is where citizenship and property collude to render foreign women vulnerable to hypermasculine performance. From the standpoint of property, it allows American men to treat both foreign women and their own children as if they were nonhuman, much like slave laws allowed white men to treat their own enslaved children and the mothers of those children as property. It makes

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208. Harris, *WAP*, *supra* note 18, at 1714 (“After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.”).

209. Quoting James Madison, Cheryl Harris states:

In James Madison’s view, for example, property ‘embraces everything to which a man may attach a value and have a right,’ referring to all of a person’s legal rights. Property as conceived in the founding era included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.”

Harris, *WAP*, *supra* note 18, at 1726.

children fathered by American men trespassers on American soil. It makes individual citizen men border agents at the nation's white borders materially, psychically, and aesthetically—defending the nation's boundaries from penniless vagrants, bringing down the value of whiteness with racialized filth. Citizenship, like Harris's whiteness as property, confers tangible and economically valuable benefits and is jealously guarded as a valued possession, allowed only to those who meet a strict standard of proof.<sup>210</sup> In immunizing § 1409 from equal protection challenges, the Supreme Court is engaged in a turf battle—warfare—protecting the nation from undesirability, particularly racialized trespassers fathered by American men, discarded and left behind. To the extent that property law and property rights have an inescapable distributive component,<sup>211</sup> Congress has distributed a set of rights and privileges to citizen men that work along the valences of whiteness, hypermasculinity, and foreign female subjugation—the three straps in the WHP. Moreover, as discussed in more detail in Part IV, each of the Supreme Court cases that have upheld § 1409 can be read as the Supreme Court's defense of property interests embedded in the WHP. Finally, applying a property rubric to § 1409 reveals it as a white heteropatriarchal project—fundamental to white heteropatriarchal identity formation, whereby sexually subjugated foreign women become a rite of passage in masculine identity formation, American immigration and citizenship policy, and American imperialism.

### B. *The WHP as Performance*

In arguing that § 1409 creates a property right in white heteropatriarchal performance on vulnerable bodies, I reference several theorists. Most immediately, I reference Anthony Farley and his seminal article *The Black Body as Fetish Object*, particularly Farley's argument that black bodies have provided platforms, canvasses, stages, and theater for the formulation and formation of "whiteness."<sup>212</sup> Farley argues, "The white identity is created and maintained by decorating black bodies with disdain, over and over again"<sup>213</sup> and that "[r]ace is a form of pleasure in one's body which is achieved through humiliation of the Other and, then, as the last step, through a denial of the entire process."<sup>214</sup> Whiteness, as an identity, emerges out of this discourse; for "[i]f the black body is the site and cite of all ills, then the white body is not."<sup>215</sup> Moreover, once the black body, and by extension foreign women, particularly foreign nonwhite women, is branded as the site for all ills, it provides carte blanche for sexual

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210. *Id.*

211. Singer, *Property*, *supra* note 179, at 249.

212. Farley, *supra* note 105, at 464.

213. *Id.* at 463.

214. *Id.* at 464.

215. *Id.* at 475.

exploitation because the foreign body, and foreign land, become an indispensable justification for sexual domination and canvass for unbridled sexual fantasy.<sup>216</sup>

Far from aberrant, these performances are endemic to the formation of white heteropatriarchal identity, and by extension, American sovereignty. It is through these performances that white heteropatriarchy takes material shape. Angela Harris, citing Elaine Scarry, maps out the connective tissue between these performances on vulnerable bodies and the creation of sovereignty, dominion, and control:

Literary theorist Elaine Scarry argues that one of the properties of human pain is that its characteristics—its vibrancy, its reality, its certainty—can be transferred away from a human body and onto something else, something that in itself does not appear vibrant, real, or certain. In this sense, pain, and the violence that induces it, is a means of creation, a way of making ideas real, the way bloodless ideas such as property and sovereignty are made real in war and conquest by the presence of actual blood and the mutilation and destruction of human bodies.<sup>217</sup>

In the context of § 1409 and its history, white heteropatriarchal performance on vulnerable bodies, including philandering, sexual exploitation, and rape, is a way of materializing an idea about inferiority and superiority, entitlement and property, sovereignty and vulnerability, and belonging and statelessness upon the foreign female’s very flesh. Such an inscription is a form of maintaining power over foreign women. It is a modality of domination. Section 1409 enables a performance on vulnerable bodies that functions as an identity formation, a rite of passage, that draws the line between domination and subjugation. Section 1409 facilitates a male citizen release valve through the inscription of sexualized performance on foreign women, creating a hierarchy of mastery and submission and superiority and inferiority, which taken together reestablishes masculinity.

### C. *Johnny’s Doppelganger Jezebel—the Whore and Aristotelian Evil Snare of Men*

Jezebel is Johnny Appleseed’s necessary mirror image, foil, or doppelganger—the foreign woman as “whore” and Aristotelian evil snare of men. Johnny Appleseed, of course, is the embodiment of white heteropatriarchy,

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216. See *id.* at 475. (discussing the branding power of narratives of supremacy to justify the use of black bodies as places for a canvass for both pleasure and humiliation).

217. Harris, *Gender, Violence, Race, and Criminal Justice*, *supra* note 24, at 781.



wielding his WHP. Joan Tarpley defines Jezebel as “the wanton, libidinous black woman whose easy ways excused white men’s abuse of their slaves as sexual ‘partners’ and bearers of mulatto offspring.”<sup>218</sup> Stacey Floyd-Thomas explains “the Aristotelian evil snare of men” as the necessary supporting narrative of rape culture and sexualized regimes of violence. As she explains, “[s]ex is an undisciplined result of a body overtaking its soul—a powerful force that drives men more than it does women, yet one nonetheless caused by women. Since the mind should control the body, sexual activity should be controlled as well.”<sup>219</sup> Interrelated patterns of sexism follow suit, for as kings and warriors, men are superior and must guard both their bodies and those of women who are subject to a “strict watch.”<sup>220</sup> According to Floyd-Thomas, when men rape women, it is because women have used their bodies to ensnare the soul of men:

As a result, misogyny is rational, and heterosexism is a virtue. Likewise, sexual activity should be severely restricted for women of the same social and economic class as the men whose sexual needs are so powerful and demanding, but it is nonetheless allowed and encouraged for men with “lower-class” women (women outside the circle of dominant-class men).<sup>221</sup>

Hypersexualized, exoticized, and licentious, Jezebel embodies a form of victim blaming that reflects a discourse of domination. She is the narrative and direct outgrowth of laws that made vulnerable bodies property (e.g., *Dred Scott* and laws of coverture).<sup>222</sup> Victim blaming normalizes exploitation because the pathology of the perpetrator is rendered invisible by blaming the victim. Victim blaming is a fundamental precept of hegemony because it explains societal order as the fault of its victims. Jezebel, the whore, or the snare, is a quintessential counterpart to Johnny, the embodiment of white heteropatriarchy: through the snare (victim blaming), Johnny can engage in hypermasculinity and treachery and still maintain his innocence—and the importance of Johnny’s innocence can never be imperiled, questioned, or undervalued. No matter how treacherous, Johnny must always be innocent and his actions utterly deniable. By way of example, it is the constant over-pathologizing of vulnerable women, which leads

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218. Joan Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1345 (1996) (defining Jezebel as “the wanton, libidinous black woman whose easy ways excused white men’s abuse of their slaves as sexual ‘partners’ and bearers of mulatto offspring”).

219. BEYOND THE PALE: READING ETHICS FROM THE MARGINS 12 (Stacey M. Floyd-Thomas & Miguel A. De La Torre eds., 2011). This view of women, particularly loose women, as the Aristotelian Evil Snare of Men, is also reflected in the books of the Old and New Testaments. See *Proverbs* 23:27-28 (“For a whore is a deep ditch; and a strange woman is a narrow pit. She also lieth in wait for a prey, and increaseth the transgressors among men.”); *1 Corinthians* 6:13 (“Now the body is not for fornication, but for the Lord; and the Lord for the body.”).

220. BEYOND THE PALE: READING ETHICS FROM THE MARGINS, *supra* note 219.

221. BEYOND THE PALE: READING ETHICS FROM THE MARGINS, *supra* note 219.

222. Cook, *Stop Traffic*, *supra* note 8.

to their (over)criminalization. It explains why we incarcerate women who give birth to children dependent upon illicit substances, but we allow Johnny to spread his seed all over the globe and discard his children. As another example, the American military sometimes facilitated the circumstances in which servicemen fathered children—for instance, by establishing “R & R centers”—but that facilitation did not factor into Justices Stevens’s and Kennedy’s opinions upholding the constitutionality of § 1409. They instead justified upholding § 1409 in part because they believed that many foreign women “do not know the identity of the fathers.”<sup>223</sup>

The hypersexualized, fetishized, and racialized narrative of Jezebel, as seen in the Supreme Court’s references to foreign women who do not know the identities of the fathers of their children, is what allows Johnny to engage in treachery and sexual transgression while maintaining his innocence. Jezebel is the foreign women whose demonization provides cover for Johnny’s pathology—his whoring. Jezebel is also the exoticized footstool for Johnny’s unbridled and unhinged sexual fantasy and fetish. She is the “goings on” between master and enslaved in the dirty slave shacks. Jezebel renders Johnny’s hypermasculinity obfuscated, hidden from view, and latent because the focus shifts from Johnny’s WHP onto the hypersexualized body of a racialized foreign woman. To be clear, Jezebel is not a reflection of how foreign or racialized women are, but rather, what white heteropatriarchy needs them to be.<sup>224</sup> She is a deliberately created fiction to render invisible the pathology of the WHP. She is one aspect of a complex set of images and mythology that deny humanity in order to rationalize exploitation.<sup>225</sup> In the lexicon of the master, she is an “evil” deserving of rape and barred from the big house along with her disposable children.

Jezebel, like the libidinous enslaved woman and the exoticized Asian woman, is simultaneously a product of white heteropatriarchal fantasy, sexual conduct, deniability, and excuse. By way of illustration, victim blaming was a narrative created and sustained by the American military to justify sexual exploitation and to provide a defense and justification for rape. The narrative serves a two-fold purpose: both of which perfectly track the workings of implicit bias and the pathological gaze: it (1) over-valorizes the innocent men of the military and (2) pathologizes foreign women. It concretizes the concept of the American warrior as pure and at the mercy of the foreign woman as evil and transcended.<sup>226</sup> According to Susan Zeiger, victim blaming created a veil,

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223. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1702; Kolby, *supra* note 170, at 63–65 (discussing the U.S. government’s role in encouraging the growth of prostitution in Angeles City, just outside Clark Air Force Base, and Olongapo, next to Subic Bay Naval Stations, both in the Philippines).

224. Chang, *supra* note 38, at 250, 261 (2015).

225. Roberts, *Punishing Drug Addicts*, *supra* note 80, at 1437.

226. ZEIGER, *supra* note 45, at 15.

providing the right conditions to perpetuate the sexual exploitation, but to hide it from public approbation that might undermine public support for the war. In other words, it hid it in plain sight for continued pleasure, but cloaked it for protection from condemnation.<sup>227</sup> Section 1409 facilitates the sexual exploitation of foreign women, but is enshrouded with obfuscating veils to assuage guilt and to remain hidden so that the viewer of the American scene can continue to participate in the implicit bias bubble, where one can consciously and simultaneously commit treachery, wallow in ignorance, steep oneself in denial, and then claim, “Oh my goodness. Well . . . I just didn’t know.”

As developed in more detail in Part IV, the Supreme Court has deployed the evil snare to immunize § 1409 from gender-based equal protection challenges. When the Court submerged § 1409’s gender disparity in “the problems of determining paternity” and foreign women who did not know the identity of their children’s father, the snare becomes part of the victim blaming process that inverts the gaze of pathology from the perpetrator to the victim, further obfuscating the perpetrator’s treachery. This move is key in the context of § 1409 because it becomes part of the government’s justification for § 1409 and is adopted in the majority opinions by both Justice Stevens and Justice Kennedy, military men.<sup>228</sup> In their majority opinions, the snare is lurking in the background. Johnny and Jezebel are engaged in what Angela Harris calls a Manichean<sup>229</sup> struggle of good and evil, where the innocent Johnny falls prey to the conniving trickery of the evil Jezebel and must be liberated by the Supreme Court.

#### IV. THE SUPREME COURT OPINIONS AND THREE STRAPS IN THE WHP— WHITENESS, HYPERMASCULINITY, AND FEMALE SUBORDINATION

On four separate occasion in the last twenty years, the Supreme Court has had an opportunity to bring § 1409 in line with modern standards of decency that mark the maturation of an advancing nation. The Court has, however, declined such advancement. The Court has instead erected legal narratives that ratify and normalize white heteropatriarchal entitlement, privilege, and power. The Court has submerged the gender asymmetry in § 1409 into the natural differences between men and women as well as Congress’s plenary power to police the nation’s borders. In the last of the four cases, Justice Ginsburg, writing for the majority, found that the more lenient physical presence requirement that applied

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227. *Id.* (stating that “[p]olitical considerations also played a role, chiefly President Wilson’s need to steer unsettled public opinion in support of the European war; an army with high moral standards was an important condition of war support for many American voters, especially evangelicals”).

228. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001).

229. Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 78.

to female citizens, not males, violated the Equal Protection Clause.<sup>230</sup> In fashioning a remedy, however, the Court applied the more onerous standard applicable to men to women; thus, in a valiant effort to bring the gender asymmetry in § 1409 in line with modern notions of fairness, the Supreme Court preserved male privilege at the expense of women.

So why has § 1409 proven so resilient? It is resilient because it strikes at the core of American identity: it perpetuates racial discrimination through gender discrimination with an added bonus of hypermasculine sexual performance. As such, it operates along three axes: (1) whiteness, (2) hypermasculinity, and (3) female subjugation, the three straps in the WHP. Each of these axes become justifying principles as the Supreme Court defends the property interests and allocation of rights embedded in the WHP. As to the first category, “whiteness,” in its earlier approaches to § 1409, the Court explicitly—and later implicitly—found that § 1409 triggered Congress’s plenary power to police the nation’s white borders against aliens and national security threats.<sup>231</sup> As such, with the exception of Justice Ginsburg’s majority opinion in *Morales-Santana*, the Court has applied a diluted form of scrutiny, much lower than the constitutional exacting applied to most explicitly discriminatory statutes.<sup>232</sup>

As discussed in more detail in this Part IV, each of the opinions that have upheld the constitutionality of § 1409 have raised the evil specter of the “alien” in various forms to trigger using the plenary power doctrine to shield § 1409, whether it was Congress’s recognized authority to protect the country from communists, national security threats, Jezebel, millions of war babies, or racialized deportable criminals. The massively destructive abandonment of inestimable numbers of children fathered by American men was not viewed as unconscionable, but rather became a reason to justify § 1409.<sup>233</sup> Both Justices Stevens and Kennedy explicitly raised the enormous number of war babies, to the tune of millions, to justify § 1409’s gender asymmetrical treatment between men and women. As argued in more detail in Part V, both Congress’s and the Supreme Court’s actions are not only lacking in morality, they are not in keeping with the fundamental values of liberty, equality, and democracy. Moreover, as argued in Part V, to the extent that the Court is poised to overturn *Roe v. Wade*<sup>234</sup> and wax eloquent about the sanctity of life, the morality of sexually responsible behavior, and the responsibilities of parenthood, the attitudes adopted by the

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230. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698, 198 L. Ed. 2d 150 (2017).

231. *Fiallo*, 430 U.S. at 792 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

232. Mariella, *supra* note 36, at 222 (arguing that there is “substantively diluted scrutiny of § 1409’s gender classification, even though such sex-based classifications are typically reviewed under heightened scrutiny”).

233. See Collins, *A Short History*, *supra* note 15, at 1494 (stating “it is not at all clear that a majority of the sitting justices would consider it a problem, as a constitutional matter, that our citizenship laws insulate male soldiers and the United States from citizenship claims by or on behalf of nonmarital foreign-born children, regardless of the racial dimension of the phenomenon”).

234. *Roe v. Wade*, 410 U.S. 113 (1973).

Court in cases involving § 1409 reveal a bankrupt moral hypocrisy lacking in constitutional integrity.

The second axis along which the Supreme Court defended § 1409 is hypermasculinity. Section 1409 shields hypermasculinity from the reach and regulation of reproductive sanction and punishment. The Court has never explicitly addressed the halo effect that § 1409 gives to male sexual prerogatives outside marriage; however, it has dog-whistled this concern through empirical evidence involving the number of men serving abroad and engaged in sexual tourism. In dissenting opinions, both Justices Ginsburg and O'Connor have remarked on the sexual prerogatives underlying § 1409. Justice Ginsburg noted that "[t]here are . . . men out there who are being Johnny Appleseed," and Justice O'Connor articulated a similar concern, stating that our sex-based citizenship laws are "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."<sup>235</sup>

As to the third category, "female subjugation," § 1409 does three things. First, it facilitates the regulation of citizenized women's bodies to ensure racial purity in the polity by sanctioning them with automatic motherhood for birthing nonmarital foreign-born children. As argued in more detail in Part V, this automatic sanctioning is a form of reproductive regulation and punishment. Second, § 1409 keeps foreign women prone to male power by dispossessing their children, leaving both with little recourse or protection. Third, in upholding § 1409 against constitutional challenge, the Court regularly reaches for the snare. In numerous passages, the Court states that the gender asymmetry in § 1409 results from "lurking" problems of paternity proof—code for untrustworthy, loose foreign women or, more candidly, what Justice Stevens calls women who may not know who the father is.<sup>236</sup> Thus, the Court has hidden the hypermasculinity embedded in § 1409—the WHP—inside the snare—victim blaming.

Using the Court's three justifying principles—whiteness, hypermasculinity, and the evil snare—this Part provides an analysis of four of the § 1409 Supreme Court cases.<sup>237</sup> *Fiallo v. Bell*,<sup>238</sup> *Miller v. Albright*,<sup>239</sup> *Nguyen v. INS*,<sup>240</sup> and *Sessions v. Morales-Santana*.<sup>241</sup> In particular, the Court's contrasting approaches

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235. See *supra* note 35.

236. *Nguyen*, 533 U.S. at 65 (stating that "[g]iven the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity").

237. *Flores-Villar v. United States* involved a gender-based equal protection challenge to the physical presence requirement in § 1409. 564 U.S. 210 (2011) (*per curiam*), *aff'd* 536 F.3d 990 (9th Cir. 2008). However, the Court declined to reach this issue, and, in a four-four *per curiam* decision, affirmed the lower court without opinion. As a result, I have not included *Flores-Villar* in my analysis.

238. 430 U.S. 787 (1977).

239. 523 U.S. 420, 424-26 (1998) (Stevens, J.) (plurality opinion).

240. 533 U.S. at 56-57.

241. 137 S. Ct. 1678 (2017).

between *Fiallo*, *Miller*, and *Nguyen*, on the one hand and *Morales-Santana*, on the other, demonstrate the need for historical contextuality and anti-subordination principles<sup>242</sup> when deciding gender-based equal protection challenges.

A. *Fiallo*: *Immigration Preferences and Lurking Johnny*<sup>243</sup>

*Fiallo* addressed immigration preferences and was decided squarely within the ambit of immigration law. Section 1409, by contrast, is a derivative citizenship statute that confers citizenship at birth. Nevertheless, *Fiallo* laid the doctrinal groundwork for the derivative citizenship cases considered in this Part IV.<sup>244</sup> *Fiallo* established three doctrinal principles underlying § 1409 cases: (1) white exclusion and the evil specter of alien undesirability; (2) male prerogative and the doctrine of absenting fathers; and (3) the disturbing narrative of the hypersexualized snare—all to justify the WHP.

In *Fiallo*, decided in 1977, a group of citizen fathers and their nonmarital foreign-born children brought a gender-based equal protection challenge against § 101(b)(1) of the INA. Section 101(b)(1) excluded them from immigration preferences.<sup>245</sup> More specifically, it excluded unwed fathers, but not mothers, from the definition of “parent,” and their nonmarital children from the definition of “child.”<sup>246</sup> Rather than separate Congress’s ability to expel or exclude aliens, on the one hand, and Congress’s gender discrimination on the other, the Court conflated the issues and rejected the plaintiffs’ claims.<sup>247</sup> The Court tucked and elided Congress’s gender discrimination behind Congress’s plenary power, applied rational basis review, and stated, “Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial

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242. In describing the need for anti-subordination principles in vulnerability theory, legal scholar Angela P. Harris states:

Vulnerability, in policy analysis, is commonly treated as a fixed characteristic of the population or individual in question, rather than as the outcome of social and political relations. By obscuring the political and institutional components of vulnerability, conventional policy analysis has the potential to portray domination as difference, and to hide the problem of unequal distribution of benefits and burdens within a universalist framework. Recognition of vulnerability must therefore be supplemented with an explicit commitment to the anti-subordination principle, which requires us to look for power and injustice even in our language and our frameworks for research and policy.

Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV’T 96, 148–49 (2014) [hereinafter Harris, *Vulnerability and Power*].

243. While *Fiallo* was decided squarely within the ambit of immigration law, *Miller*, *Nguyen*, *Flores-Villar*, and *Morales-Santana* considered the derivative citizenship statute, which transfers citizenship at birth. Antognini, *supra* note 14, at 413, 428. Nevertheless, *Fiallo* laid the doctrinal groundwork for the derivative citizenship cases considered in this Part IV.

244. Antognini, *supra* note 14, at 413, 428.

245. *Fiallo v. Bell*, 430 U.S. 787, 791 (1977).

246. *Id.* at 781.

247. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 189.

control.”<sup>248</sup> The Court narrowed the role for judicial review in immigration cases and rejected heightened scrutiny in assessing the constitutionality of a gender-based immigration statute, which Justice Thurgood Marshall, the only person of color on the court, advanced in his dissent.<sup>249</sup> Instead, the Court held that the gender explicit discriminatory selection criteria was reasonable “because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.”<sup>250</sup>

### 1. *The Evil Specter of Alien Undesirability as Threat*

In an interesting analogy, the Court drew a parallel between alien threats to national security, namely the Chinese, with the plaintiffs in order to justify Congress’s plenary power to exclude. Citing *Fong Yue Ting*, one of the foundational Chinese Exclusionary Act cases,<sup>251</sup> Justice Powell, writing for the majority, implicitly analogized the plaintiffs, nonmarital foreign-born children and their fathers, to vast hordes of Chinese invading white American soil who will not assimilate. Using racialized alien invasion as justification, Justice Powell deferred to Congress in matters of “the admission of aliens and their right to remain” as a necessity, “touching as it does basic aspects of national sovereignty.”<sup>252</sup> In drawing the analogy between the plaintiffs and hordes of Chinese, the Court raised the evil specter of alien undesirability to justify exclusion. The Court created a narrative of excludability premised on racialized undesirability, potential criminality, and national security threat. The Court’s likening plaintiffs to racialized aliens reveals the Court’s actual concern, as opposed to the facts before the Court, which was policing the nation’s boundaries from undesirability—the conceptual nucleus lying at the very heart of whiteness in the WHP.<sup>253</sup> It is this foundational concern that will dilute the level of scrutiny in the gender-based equal protection cases that follow *Fiallo*, specifically *Miller*,

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248. *Fiallo*, 430 U.S. at 792 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

249. *Id.* at 800 (Marshall, J., dissenting); Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 189.

250. *Fiallo*, 430 U.S. at 799.

251. *Id.* at 792 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). *Fong Yue Ting* was one of the Chinese Exclusionary Act cases, as well as a foundational case on plenary power, which, along with *Chae Chan Ping*, evokes the imagery of Chinese as vast hordes invading the United States. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

252. *Fiallo*, 430 U.S. at 792-93.

253. See Antognini, *supra* note 14, at 426-27; Collins, *Illegitimate Borders*, *supra* note 6, at 2154 (noting that well into the twentieth century, the Fourteenth Amendment notwithstanding, other formal rules that governed membership in the American polity—such as immigration and naturalization laws—were shaped in significant ways by racial nativism). It is clear that gender-based domestic relations law principles incorporated into *jus sanguinis* citizenship law served a larger racially nativist nation-building project.

Nguyen, and Flores.<sup>254</sup> As explained in more detail in Section IV.E, Justice Ginsburg’s opinion, writing for the majority in *Morales-Santana*, guts the use of the plenary power doctrine to restrain constitutional oversight by the judiciary.<sup>255</sup>

## 2. Absenting Fathers, a Dred Scott Move

As Albertina Antognini noted, in an exercise of judicial activism, the Court relied on two justifications that were not actually in the record or capable of observation: perceived absent fathers, as opposed to the actual ones that were before the Court, and “lurking problems of proof,” as opposed to real ones.<sup>256</sup> Together, as Antognini argues, the “perceived absence” of close family ties and the “serious problems of proof that usually lurk in paternity decisions” rendered gender discrimination between men and women in *Fiallo* imperceptible.<sup>257</sup> The invisible—absentee fathers and lurking problems of establishing paternity—justified the visible gender disparity in the statute.<sup>258</sup>

Furthermore, before the Court decided *Fiallo*, Collins argues that the Court had begun to endorse nonmarital father’s rights in the domestic setting.<sup>259</sup> Given the trend in doctrinal recognition of father’s rights, what accounted for the Court’s normalizing absentee fatherism in *Fiallo*? The answer lies in *Dred Scott*. In *Dred Scott*, the Supreme Court understood that the white male right to discard the child was essential to securing the sexual function of the enslaved female. In *Fiallo*, therefore, absentee fatherism became, as Antognini argues, the Court’s desired baseline<sup>260</sup>—the father engaged in hypermasculine conduct and yet freed from parental responsibility—around which to construct material reality—the WHP. Rather than honor patrilineage and fathers’ rights trending through domestic common law, the Court set a baseline of the absentee father for nonmarital foreign-born children.<sup>261</sup> The baseline assumed and normalized absentee fatherism, making the invisible immunized from equal protection

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254. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 190.

255. *Id.* at 221.

256. Antognini, *supra* note 14, at 415 (stating “the Court articulated its reasoning in terms of that which cannot actually be observed—a perceived absence as opposed to an actual one, and lurking problems of proof as opposed to present ones”). Despite all the “lurking” elements the Court found, including absent fathers, fraudulent paternity claims, criminality, and untrustworthy foreign women, the Court did not find Johnny Appleseed.

257. *Id.*

258. *Id.*

259. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 188 (“By the time *Fiallo* was decided, the Court had repudiated some of the limits on recognition of the relationship of a father and his nonmarital child—limits that were standard in the common law and had been incorporated into modern policies regulating the family.”)

260. Antognini, *supra* note 14, at 415, 417-18 (“[A] continuous theme runs through all these cases: an unwed father, unlike an unwed mother, begins from an absence he must refute both in terms of proving paternity and establishing the existence of a parental relationship with his child.”).

261. *Id.*



challenges.<sup>262</sup> Drawing from Antognini, the Court endorsed the legal fiction of an absent father because absenting fatherly responsibility for citizen men sexually active abroad, unmarried, and with foreign women is exactly what the Court sought to preserve.<sup>263</sup> what Hortense Spiller calls, “Mama’s Baby, Papa’s Maybe.”<sup>264</sup> In creating the fiction of the absentee father, the Court created a material reality and normalized it.

Drawing from the work of Angela Harris,<sup>265</sup> the Court’s reasoning in *Fiallo* exemplifies the absence of anti-subordination principles in legal reasoning. The Court’s reference to “lurking problems of proof of paternity” is a proxy for two things: (1) the “natural” differences between men and women and (2) sexually loose, untrustworthy foreign women, who tell lies about paternity, Jezebel the evil snare.<sup>266</sup> In a classic case of “slut shaming,” the Court takes the pathological gaze off Congress and the WHP, and instead, fixates it on foreign women. The problem in the statute, therefore, is due to the pathology of foreign women and not male philandering or Congress creating and perpetuating inequality. The problem becomes one of the individual—a foreign woman—and not the institution that has created a power imbalance based on gender—Congress. In fixating on the foreign woman’s “bad” choices, the Court masks Congress’s role in perpetuating inequality. The inequalities Congress created in the statute get obfuscated behind the pathology of foreign women. Similarly, the Court tucked the gender inequality in the statute behind the biological difference between maternity and paternity and diverted attention away from Congress creating different social and political outcomes based on gender.<sup>267</sup> As Angela Harris helps us understand, by deflecting away from the political and institutional components of the gender asymmetry in the statute, the Court is portraying domination as biological difference, and obfuscating the unequal distribution of resources (citizenship) and burdens (parenthood) within the universalist framework of nature.<sup>268</sup>

### 3. *The Aristotelian Evil Snare*

Another basis for the Court’s rejection of plaintiffs’ sex discrimination claim was the classical evil snare — “a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in

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262. *Id.*

263. *Id.* at 425.

264. Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 *DIACRITICS* 65 (1987) (discussing children as the responsibilities of the mother and the prerogatives of fathers); see also Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1706 (discussing same as enshrined in legal opinions addressing 1409).

265. Harris, *Vulnerability and Power*, *supra* note 242, at 146–47.

266. *Fiallo v. Bell*, 430 U.S. 787, 813 (1977) (citing *Trimble v. Gordon*, 430 U.S. 762, 771 (1977)).

267. Harris, *Vulnerability and Power*, *supra* note 242, at 146–47.

268. *Id.*

paternity determinations,”<sup>269</sup> “when [paternity] depends upon events that may have occurred in foreign countries many years earlier,”<sup>270</sup> far, far away. As Antognini, however, argues “the element of the foreign was only suspect when tied to determinations of paternity, as opposed to maternity.”<sup>271</sup> The government was far more transparent, locating the “foreign,” in the promiscuity of foreign women, stating very clearly:

Unlike the identity of the mother, which will often appear on the birth certificate and which frequently can be corroborated by the testimony of relatives, midwives, or medical personnel, the sole evidence that a man has fathered a particular child is often the testimony of the mother—and she may not know.<sup>272</sup>

As Antognini notes, although the government portrayed the unwed foreign mother as having numerous, even simultaneous, sexual partners such that she may not know the biological father, these were not the foreign mothers before the Court in *Fiallo*.<sup>273</sup> By raising the evil specter of the snare, the Court deflected attention away from the unequal distribution of benefits and privileges in the immigration preferences based on gender. Rather than focusing on the inequality of the statute, the asymmetry was lost in the snare.

#### B. Miller: *Paternal Acknowledgment and Heeere’s Johnny*

*Miller* set the stage for the Court’s white heteropatriarchal preoccupations, both explicit and implicit, in the context of § 1409. In particular, *Miller* reinforced three ongoing doctrinal principles underlying § 1409: whiteness, hypermasculinity, and foreign female subordination, the three major straps in the WHP. First, *Miller* reified America’s white exclusionary interests in policing its borders: The lead plurality opinion framed and dog-whistled these issues as the “war baby problem.”<sup>274</sup> Second, *Miller* ratified the WHP by submerging § 1409’s gender disparity inside the physiological differences between men and women when establishing paternity.<sup>275</sup> According to the lead majority opinion, men should be required to do more when transferring citizenship than women should because proof of paternity is subject to fraud. Again, the Court is masquerading the WHP in concerns about the biological differences between men and women.

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269. *Fiallo*, 430 U.S. at 799 (emphasis added).

270. *Id.* at 808 n.8.

271. Antognini, *supra* note 14, at 423-24.

272. Brief for Appellee, *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297), 1976 WL 181347, at \*44-45.

273. Antognini, *supra* note 14, at 417-18.

274. *Miller v. Albright*, 523 U.S. 420 (1998).

275. *Id.*

Third, when dog-whistling concerns about problems proving paternity, the Court is solidifying the narratives that justify the WHP, namely foreign woman as snare.<sup>276</sup>

In *Miller*, the Supreme Court found just the Madame Butterfly/Miss Saigon trope it was looking for: a military man, a white male, who conducted military service abroad, fathered a daughter out of wedlock<sup>277</sup> with a racialized foreign woman (Filipina), left the foreign woman, and—in an extra gesture of Johnny good ole’ innocence—may not have been aware of his racialized foreign child when he returned to America. As a result of American involvement in Asian wars during the twentieth century, inestimable numbers of children were born to American servicemen and Asian women.<sup>278</sup> Miller was just this man. Miller served in the Philippines, in 1970, during the Vietnam War. Although the exact figures are unknown, in the Philippines alone, American servicemen fathered approximately 30,000 to 50,000 children.<sup>279</sup> Miller never legitimated his daughter and returned back to America. In order to transfer citizenship to his daughter, the version of § 1409 applicable to Miller required that he establish or acknowledge paternity before his daughter turned eighteen, which he failed to do. Miller challenged the legitimation requirement in a gender-based equal protection claim.<sup>280</sup>

The decision in *Miller* resulted in highly fractured concurring and dissenting opinions. Writing the lead plurality opinion, Justice Stevens, himself a military man,<sup>281</sup> joined by Chief Justice Rehnquist, also a military man, rejected the equal protection claim. Justice Stevens provided three highly dubious justifications for the legitimation requirement: (1) it fostered ties between the child and America;<sup>282</sup> (2) it encouraged “a healthy relationship between the citizen parent

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276. *Id.*

277. Justice Stevens, one of the more liberal justices on the bench, makes much of Petitioner’s “illegitimacy.” *Miller*, 523 U.S. at 424.

278. Kolby, *supra* note 170.

279. *See id.*

280. Although the petitioner in *Miller* raised the constitutionality of the gender asymmetry in the derivative statute, a majority of the Court did not resolve the issue. Four Justices, in two different opinions, rejected the challenge to the gender-based distinction, with two finding the statute to be consistent with the Fifth Amendment. *See* 523 U.S. at 423 (Stevens & Rehnquist, JJ.) (plurality opinion) (concluding that the Court could not confer citizenship as a remedy even if the statute violated the Equal Protection Clause as a separation of powers issue). *Id.* at 452 (Scalia & Thomas, JJ., concurring). Three Justices dissented and would have found the statute violative of the Equal Protection Clause. *Id.* at 460 (Ginsburg, Souter & Breyer, JJ., dissenting). *Id.* at 471 (Breyer, Souter & Ginsburg, JJ., dissenting). Finally, two Justices did not reach the issue as to the father, having determined that the child, the only petitioner in *Miller*, lacked standing to raise the equal protection rights of their father. *Id.* at 445 (O’Connor & Kennedy, JJ., concurring).

281. John Paul Stevens, Letter to the Editor, *The Dissenter*, N.Y. TIMES (Nov. 4, 2007), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9903E0DF153DF937A35752C1A9619C8B63.html> [<https://perma.cc/C6YH-7X28>] (Justice Stevens was a naval officer at Pearl Harbor from 1942 to 1945).

282. *Miller*, 523 U.S. at 434 n.11; Pillard & Aleinikoff, *supra* note 33, at 10.

and the child while the child is a minor,”<sup>283</sup> and (3) it ensured reliable proof of paternity.<sup>284</sup> As in *Fiallo*, Justice Stevens’s justifications go to the heart of the WHP: (1) whiteness, (2) hypermasculinity, and (3) foreign femaleness as snare.

### 1. Whiteness and the “War Baby Problem”

In grappling with questions about how to imagine and construct the American polity, Justice Stevens emphatically voiced concerns about the war baby threat to the nation’s borders and coffers. In both *Miller* and *Nguyen*, military men feature prominently not only in the facts, but also the imagination, discursive preoccupations, and reasoning employed by the Court.<sup>285</sup> In both *Miller* and *Nguyen*, the military man was proxy for the inestimable numbers of children abandoned by their fathers and threatening the government chest as well as foreign Jezebels. Estimating the impact of § 1409 on the number of nonmarital children abandoned by their fathers and imperiling the nation through sought-after citizenship, Justice Stevens stated:

Given the size of the American military establishment that has been stationed in various parts of the world for the past half century, it is reasonable to assume that this case is not unusual. In 1970, when petitioner was born, about 683,000 service personnel were stationed in the Far East, 24,000 of whom were in the Philippines . . . . Of all Americans in the military at that time, only one percent were female. These figures, coupled with the interval between conception and birth and the fact that military personnel regularly return to the United States when a tour of duty ends, suggest that Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children. It was surely reasonable when the INA was enacted in 1952 and remains equally reasonable today.<sup>286</sup>

As Collins notes, rather than being a source of moral shame, sympathy, or legal accountability, the sheer numbers of war babies, according to Justice Stevens, is even more reason to insulate male soldiers and the United States from citizenship claims by or on behalf of nonmarital foreign-born children, and to shut the nation’s door to millions of hapless wards fathered by American men.<sup>287</sup> In a Ninth Circuit case raising a similar issue, Judge Andrew Kleinfeld was even more blunt in his finding that Congress was well within its constitutional authority to pass a statute that would minimize the burdens created by “paternity

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283. *Miller*, 523 U.S. at 438.

284. *Id.* at 436.

285. Antognini, *supra* note 14, at 433.

286. *Miller*, 523 U.S. at 439 (1998).

287. Collins, *A Short History*, *supra* note 15, at 1485.

and citizenship claims” asserted by “the women the [U.S.] soldiers left behind and their children.”<sup>288</sup> “This may not be pretty,” he noted, “but it is a rational basis for a sex distinction.”<sup>289</sup>

Interestingly, the significant number of war babies undermined any claim that the legitimation requirement encouraged ties. In fact, just the opposite, it was one in a myriad of laws and administrative regulations intended to dissuade American fathers from transferring citizenship.<sup>290</sup> Furthermore, it was intended to protect not just the nation’s welfare coffers, but individual men from inheritance and property claims from “illegitimate children” or the unexpected nonmarital foreign-born visitor that might appear years later at the family gathering, looking for “Daddy.”

## 2. *Mama’s Baby, Johnny’s Maybe*

Justice Stevens maintained that § 1409 would have survived intermediate scrutiny because it did not involve sex discrimination; instead, the legitimate biological differences between mothers and fathers and the legitimation requirement for fathers equalized a mother’s right to abort.<sup>291</sup> In a series of confections, Justice Stevens reasoned that mothers and fathers did not engage in legally relevant conduct before birth and that after birth, there remained no legally relevant joint conduct unless the parties married, which would confer citizenship.<sup>292</sup> In the case of an unwed mother and father, however, Justice Stevens appeared to suggest that the legitimation requirement equalized a mother’s right to abort with a father’s right to also decline parenthood.<sup>293</sup> In other words, men should receive a right to decline fatherhood in exchange for a woman’s right to abortion.

In many ways, *Miller* is a case study in the WHP. By grounding his justification in biological determinism, Justice Stevens doctrinally enshrined the baseline and hid it from constitutional scrutiny. Under Justice Stevens’s obfuscating reasoning, the difference in citizenship transmission based on sex was biological, and therefore, did not trigger gender discrimination. In submerging disparity in nature, Congress as an institutional actor (1) engaging

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288. *Id.* at 1494 (quoting *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1129 (9th Cir. 1999) (Kleinfeld, J., dissenting)).

289. *Id.*

290. *Id.*

291. *Miller*, 523 U.S. at 434 n.11, 444-45 (Stevens, J.) (plurality opinion); Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1708. The distorted application of the Equal Protection Clause should be noted: Abortion allows women to have sex without consequences (though the burden is never shifted onto the man, whereas in the case of § 1409, the burden is shifted to the foreign woman after the child is born).

292. Antognini, *supra* note 14, at 444.

293. *Miller*, 523 U.S. at 433 (“If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion—an alternative that is available by law to many, and in reality, to most, women around the world.”).

in an inequitable distribution of resources based on sex and (2) facilitating hypermasculinity by limiting the legal consequences of these activities, is hidden from view, constitutional or otherwise. When Justice Stevens argued that because women have greater legal rights (the right to conceive or abort), women should receive greater parental rights,<sup>294</sup> his reasoning reinforced the allocation of full legal responsibility for nonmarital children to women, while preserving a man's sexual prerogatives and liberty, as well as a property right in hypermasculinity.<sup>295</sup> Justice Stevens's reasoning did what it was intended to do: It perpetuated a regime that protects men's ability to engage in sexual activity outside marriage with mitigated responsibilities of parenthood.<sup>296</sup> As Collins notes, by arguing the only legally relevant conduct happens after birth, when a woman chooses to have a child, Justice Stevens sublimates the pre-birth joint conduct of both men and women, rendering the pre-birth conduct irrelevant for purposes of allocating parental rights and responsibilities.<sup>297</sup> Born or unborn, the burden and responsibility of a nonmarital foreign-born child never shifts to the father or his home country. Justice Stevens's grounding of the gender asymmetry in the physiology of women obfuscates § 1409's true functions, which is to maintain in men the right to regulate legitimate lines of inheritance and to be liberated from the responsibilities of nonmarital children, all the while engaging in the WHP.<sup>298</sup>

### 3. *Snare Redux*

Justice Stevens, joined by Justice Rehnquist, the two military men on the court, made several dog-whistles to the suspicious circumstances in which Miller, and most military men, fathered children abroad. As Justice Stevens noted, "[D]espite recent scientific advances, it still remains preferable to require some formal legal act to establish paternity, coupled with the clear-and-convincing evidence standard to deter fraud."<sup>299</sup> In another passage, Justice Stevens famously stated that the foreign women who birth nonmarital foreign-born children may not know who the father is.<sup>300</sup> In each of these passages, and as elaborated more fully in the next section, the Court is submerging the constitutional validity of § 1409, and by extension the use of the WHP, in the victim blaming problems of loose women fraudulently claiming paternity on poor innocent Johnny, the unwitting dupe, in desperate need of protection and liberation by the Supreme Court.

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294. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1674.

295. *Id.* at 1673.

296. *Id.* at 1684.

297. *Id.* at 1700.

298. *Id.*

299. *Miller v. Albright*, 523 U.S. 420, 437 (1998).

300. *Id.* at 438.

C. Nguyen: *Paternal Acknowledgement and Johnny by Proxy*

In 2001, the Supreme Court revisited § 1409's legitimation requirement in *Nguyen v. INS*.<sup>301</sup> In a five-four decision, the Court held that § 1409 withstood another equal protection challenge. Like Charlie Miller, the Court seized upon another military man. This time the Court found a military man by proxy.<sup>302</sup> Nguyen's citizen father was not a serviceman, but a military contractor.<sup>303</sup> Nevertheless, the Court continued to rely on the military man, citing even more empirical data about the vastness of servicemen stationed overseas during the year Nguyen was born.<sup>304</sup> Although Nguyen's father had raised his son, he had not completed the legitimation process in § 1409(a)(4).

Justice Kennedy, sometimes the critical swing vote in matters of equality, wrote the majority opinion, joined by Justice Stevens, who often sides with the more liberal end of the Court except in matters concerning the sexual privileges of his fellow servicemen, namely philandering while abroad. The more conservative flank of the Court, Justices Rehnquist, Scalia, and Thomas, joined the majority opinion. Justice O'Connor wrote a dissenting opinion, in which the liberal arm of the Court joined: Justices Ginsburg, Breyer, and Souter. Engaging an ahistorical formalistic approach, the majority grounded its rejection of Nguyen's challenge in the physiological differences between men and women.<sup>305</sup> According to the majority, Congress had two legitimate interests in the gender asymmetry of the statute: (1) men, unlike women, required additional biological proof of paternity to guard against fraudulent conveyances of citizenship<sup>306</sup> and (2) the legitimation requirement fostered ties between a child, father, and nation.<sup>307</sup>

In reaching its conclusion, the majority made several arguments, all of which bear heavily on the WHP. First, the Court stated that citizen women abroad can decide to have their child in America by traveling home, thus, conferring *jus soli* citizenship. As a result, § 1409 automatically confers citizenship to citizen women.<sup>308</sup> Men, on the other hand, have no control over where the child is born. Second, in amplifying the narrative of foreign woman as snare and raising the

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301. *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

302. Antognini, *supra* note 14, at 434.

303. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1700.

304. *Nguyen*, 533 U.S. at 65-66; Antognini, *supra* note 14, at 434.

305. Justice Kennedy shelved the separation of power question that had plagued constitutional challenges to the derivative citizenship statute: whether the plenary power doctrine usurped the field of judicial inquiry. *Nguyen*, 533 U.S. at 61 (2001) ("Given [the determination that the statute survives heightened scrutiny], we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."). Instead, he concluded that the statute survived even under heightened scrutiny. *Id.*

306. *Id.* at 62.

307. *Id.* at 64-65.

308. *Id.* at 61.

evil specter of the “war baby” problem, Justice Kennedy laid bare his true concerns:

Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, *nor is it always clear that even the mother will be sure of the father’s identity*. This fact takes on particular significance in the case of a child born overseas and out of wedlock. *One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries . . . .* [I]n 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female.<sup>309</sup>

Extending the Court’s concerns beyond the sexual practices of the American military, the Court went on to express a preoccupation with citizen men who go abroad and participate in sexual tourism, stating:

The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners’ argument, which would mandate, contrary to Congress’ wishes, citizenship by male parentage subject to no condition save the father’s previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Canada and Mexico. . . . Visits to Canada and Mexico add to this figure almost 34 million additional visits. . . . *And the average American overseas traveler spent 15.1 nights out of the United States in 1999*. Especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility.<sup>310</sup>

Leaving aside the Court’s preoccupation with citizen men’s hypermasculinity practices outside marriage in the military and in the sexual tourism industry, the majority opinion is a case study in failing to use historical context and anti-subordination principles when deciding equal protection cases. The failure to historicize § 1409 allowed the Court to draw false symmetries in power between men and women. Moreover, the failure to adopt anti-subordination principles enabled the Court to perfect the scapegoating narrative of the snare. In doing so, the Court obfuscated three backbone principles of the WHP: (1) exclusion, (2) hypermasculinity, and (3) protecting innocent unwitting male dupes from the hazards of foreign female conniving and trickery.

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309. *Nguyen*, 533 U.S. at 65 (emphasis added).

310. *Id.* at 66 (emphasis added).



### 1. *The Excludability Principle and Criminal “Half Castes”*

The Court did not explicitly decide *Nguyen* on the grounds of Congress’s plenary power to exclude aliens.<sup>311</sup> However, as in *Fiallo* and *Miller*, the Court raised the specters of evil to reinforce the need to maintain exclusionary power. As Collins notes, in *Nguyen*, the specter of evil took the form of Nguyen himself. In the second paragraph of the body of the opinion, Justice Kennedy dog-whistled the procedural posture of Nguyen’s case: Nguyen had been convicted of two counts of child sexual assault and was, therefore, subject to deportation proceedings.<sup>312</sup> Later in the opinion, Justice Kennedy noted again that Nguyen’s exclusion from citizenship by any route, derivative citizenship or naturalization, was “due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws.”<sup>313</sup> In *Nguyen*, the Court found its idealized facts: (1) an American military serviceman by proxy, who had fathered a nonmarital child while abroad with a foreign woman and (2) an exponentially undesirable racialized offspring, much better than vast hordes of Chinese—not only foreign, but also criminal.

As Collins argues, the centrality of the petitioner’s criminality in a § 1409 case is not unique to *Nguyen*. Indeed, many of the § 1409 cases come before courts in the procedural posture of deportation proceedings due to the petitioner’s criminal conviction.<sup>314</sup> Part of the resiliency of § 1409 in the face of gender-based equal protection challenges, therefore, is the perceived need to fortify the nation’s borders against “illegitimates” who are not just racialized, but also criminalized with an added dose of snared mothers.<sup>315</sup> Within the first two paragraphs of *Nguyen*, Justice Kennedy mentions Nguyen’s association with Vietnam or Vietnamese origin five times.<sup>316</sup> Here again, what is at stake in § 1409 cases is as much about race as it is about gender—policing the nation’s white borders from racialized criminal aliens whose mothers are “loose.”<sup>317</sup>

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311. Although the Court did not explicitly decide *Nguyen* on plenary power grounds, many scholars have suggested that, in fact, the plenary power was lurking in the background and also explained the Court’s diluted version of equal protection scrutiny. See Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 221.

312. *Nguyen*, 533 U.S. at 57.

313. *Id.*; see Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1700.

314. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 196.

315. *Id.* at 170 (stating “the line between citizen and noncitizen was being determined not in the abstract but in the context of the enforcement of deportation laws that were, at their different moments in time, politically salient and legally contested.”).

316. *Nguyen*, 533 U.S. at 57.

317. Centralizing criminality to restrict immigration policies is common practice. See Dan Cadman, *Birthright Citizenship Policy Creates Downstream Problems*, CTR. FOR IMMIGR. STUD. (Oct. 5, 2016), <http://cis.org/Cadman/Birthright-Citizenship-Policy-Creates-Downstream-Problems>, [<https://perma.cc/M56D-XW2M>].

## 2. *The Cool WHP*

The absence of historical context allowed the majority to ratify the white heteropatriarchal interests underlying § 1409 using the obfuscating glare of neutrality dipped in nature and physiological differences. By deploying the natural differences between men and women, the majority normalized the operations of the statute. By grounding disparate gender treatment in nature, the majority opinion in *Nguyen*, like *Miller*, adhered to a tautology: women and men are being treated differently because they are naturally different.<sup>318</sup>

The contrasting dissenting and majority opinions in *Nguyen* highlight the inadequacy of ahistorical formalist approaches to § 1409 and equal protection jurisprudence generally.<sup>319</sup> Unlike the dissenting opinion, the ahistorical formalist approach of the majority downplayed the societal policies of discrimination that form the underbelly of § 1409. By contrast, the dissenting opinions in both *Miller*, authored by Justice Ginsburg, and *Nguyen*, authored by Justice O’Connor—the only two women on the Court at the time—placed the statute in the proper historical context of supremacy, domination, and denigration.<sup>320</sup> By placing the statute in the proper context of its discriminatory past, the dissenting opinion eliminated many claims of innocence or hegemonic goodness, like fostering relationships between the child, father, and the nation. Rather, the dissenting opinion artfully pointed out that the history of § 1409 actively negates any claim of developing a relationship between the child, father, and nation. In fact, it fosters the exact opposite, the prerogative of males to discard their nonmarital offspring and to block them from inheritance and themselves from parental accountability.

Similarly, decontextualization also allowed the majority in *Nguyen* to draw false symmetries of power between men and women. According to the majority, women, unlike men, should have the power to confer automatic citizenship because they have the power to determine where a child is born: a pregnant citizen mother, living abroad, can travel back to the United States and give birth to her child in order to confer citizenship to her child.<sup>321</sup> Men, on the other hand, should not be saddled with automatic citizenship because they have no equivalent power to decide where the child is born. However, a historically contextualized assessment of § 1409 suggests that derivative citizenship has nothing to do with the power of women to decide the place of birth. Rather, the need to preserve the male prerogative to confer citizenship and retain autonomy

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318. Collins, Note, *When Fathers’ Rights Are Mothers’ Duties*, *supra* note 36, at 1705.

319. See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 75, at 1341 (highlighting the problems with ahistorical, decontextualized approaches to antidiscrimination law).

320. *Nguyen*, 533 U.S. 53, 74 (2001) (stating “[s]ex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation’s ‘long and unfortunate history of sex discrimination.’”).

321. *Id.* at 61.

from parenthood drives the difference in the law. It ensures, among other things, that men can continue their hypermasculinity and sexual exploitation of foreign women.

Despite all its obfuscating, circularity in reasoning, and immunizing, the majority reveals its true preoccupation in two ways. First, it recognizes that paternity tests can, in fact, eliminate fraudulent citizenship claims with scientific accuracy, thereby defeating problems of proof. Yet, according to the Court, DNA samples can be taken against the father's will and "scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child."<sup>322</sup> Conceding the issue of proof, the Court, therefore, reveals its real concern: protecting male prerogative, power, and privilege. The historical contextuality of § 1409 reveals the utter falsity of the alleged congressional interest. Far from encouraging a relationship between father and child, § 1409's DNA is aimed at protecting men from their offspring and the polity from racial impurity.<sup>323</sup>

Second, without mincing words, the majority opinion acknowledges the traditional behavior it sought to protect: millions of incidences of hypermasculinity. The detailed recitation of empirical evidence about servicemen and trips out of the country, and 15.1 lonely nights—all proxies for hypermasculine performance—clearly delineate the Court's preoccupation with preserving the WHP, policing the borders, and protecting the government coffers. The majority not only shelters the rights and privileges of servicemen and sexual tourists from constitutional scrutiny, but reifies and protects their right to engage in hypermasculinity as a matter of legal doctrine. By assuming the WHP as baseline, the Court protects the settled expectations of hypermasculine sexual performance.

### 3. *Jezebel*

*Nguyen* marked the most elaborate use of the snare yet. Like *Fiallo* and *Miller*, the Court made several allusions to the explicit and implicit snare: 3,418,566 active duty servicemen; 54 million good-natured Americans "willing" to travel abroad (meaning to engage in sexual tourism), spending 15.1 lonely nights on average outside the United States; and famously, foreign women who do not know the identities of the fathers of their children. In perfecting Jezebel through the snare, however, the Court performed an awe-inspiring double backflip from the springboard of the harlot; it held that Congress had a legitimate interest because men required "additional biological proof of paternity to ward off fraudulent conveyances of citizenship."<sup>324</sup> Here, the Court obfuscated the underbelly of § 1409, in not only the biological differences between the sexes

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322. *Id.* at 55.

323. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 170.

324. *Nguyen*, 533 U.S. at 62.

and problems of proof, but also in characterizing the snare that commits fraud. Here, the Court achieves the two-step process of (1) over-valORIZING innocent men, who are good-natured adventure seekers and servicemen abroad, serving their country, and (2) pathologizing foreign women engaged in trickery against the unwitting innocent dupes. The two-step process achieves what Zeiger calls a concretization of the American warrior as pure and at the discretion of the foreign woman as evil and transcended.<sup>325</sup>

*Nguyen*’s majority opinion exemplifies the problems with failing to historically contextualize and adopt anti-subordination principles when addressing equal protection challenges. By contrast, the dissent fully contextualized the derivative citizenship statute in its highly gender discriminatory past. And in doing so, it made no references to the snare; instead, the dissent applied robust scrutiny and found § 1409:

paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Under this law . . . ‘when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background.’<sup>326</sup>

Rather than submerging the nefarious underbelly of § 1409 in the snare, the dissent kept a fixed gaze on the political and institutional instigators responsible for a disparate distribution of benefits and burdens, while avoiding the use of a universalist framework, like the natural differences between men and women.

In both *Miller* and *Nguyen*, the Supreme Court, and in particular, the military men Justices Stevens and Kennedy, found their legal subject of choice—the American military man who, like the American polity, must be rescued from foreign “whores” and war babies. In both cases, the Supreme Court participated in the racialized politics of rescuing citizen men, particularly American military men, from the shackles of hypersexualized foreign women and their “illegitimate” offspring. In this way, the Supreme Court engaged in what Eithne Luibheid calls “public discourses on sexuality,” which legitimate the exclusion and condemnation of particular migrants.<sup>327</sup> Drawing from Stewart Chang, the Supreme Court has engaged in Foucault’s Panopticon, whereby spectacle and public visibility effectuate state power over subjects through surveillance and supervision applied by institutional mediums of state authority.<sup>328</sup> In both *Miller* and *Nguyen*, the Supreme Court created a narrative of the idealized man who

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325. ZEIGER, *supra* note 45, at 23, 40, and 65.

326. *Nguyen*, 533 U.S. at 92 (O’Connor, Souter, Ginsburg & Breyer, JJ., dissenting) (citation omitted).

327. Chang, *supra* note 38, at 268 (citing EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 144 (2002)).

328. *Id.* (citing FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 34, at 200-02).

must be rescued from the “lurking,” evil vixen. In both cases, the Supreme Court situated foreign women in the normative pattern of the snare, who, because they had multiple sex partners at the same time, “do not know the identities of the father.” In both cases, the Supreme Court discursively shuts war babies out as citizen subjects. And, in both cases, the American military man must be rescued from the hypersexualized foreign woman in order to continue his hypersexual conduct, tapping the WHP all the while and yet always so pure, wholesome, and innocent. In another note of irony, the Supreme Court differentiates the lawful immigrant subject from the excludable alien across the normative conceptions of proper sexuality, meaning the looseness of foreign women is attributed to their children as grounds for exclusion. Meanwhile, Johnny keeps the WHP.<sup>329</sup> The logic of § 1409 does more than exclude the children; it keeps the foreign woman fixated in the hypermasculine mind as a “slut,” perpetually prone, and not a mother of proper American citizens.

*D. Morales-Santana: Physical Presence Requirements and Johnny Meets His Match*

In a Herculean effort, after the Supreme Court rejected three opportunities to bring § 1409 into gender equality compliance, Justice Ginsburg, writing for the majority, masterfully situated § 1409 in its historically nefarious underbelly. Rejecting any ahistorical formalist traditions that deplete § 1409 of its heteropatriarchal content, Justice Ginsburg hit the nail squarely on the head, stating, “History reveals what lurks behind § 1409.”<sup>330</sup> After historically situating § 1409 in its heteropatriarchal past,<sup>331</sup> Justice Ginsburg took a scalpel to the institutional question that had plagued constitutional challenges to § 1409 in the past: specifically, whether the plenary power doctrine immunized § 1409 from a more exacting scrutiny.<sup>332</sup> Distinguishing the *Fiallo* line of reasoning that Congress acted within its plenary power, Justice Ginsburg maintained that *Fiallo* applied to immigration preferences whereas *Morales-Santana* involved a claim of citizenship at birth.<sup>333</sup> Rather than take the historical freeze-frame approach to § 1409, which facilitated obfuscation, circularity, and entrenchment, Justice Ginsburg reached the merits of *Morales-Santana*’s gender disparity claim and found § 1409 constitutionally infirm. The remedy meted out by the Court, however, joined a long tradition of burdening women and preserving white heteropatriarchal privilege in an effort to achieve gender symmetry.<sup>334</sup> Rather

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329. *Id.* at 266.

330. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

331. *Id.* at 1689 (2017) (stating “[s]ections 1401 and 1409, we note, date from an era when the law books of our Nation were rife with overbroad generalizations about the way men and women are”).

332. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 194.

333. *Morales-Santana*, 137 S. Ct. at 1694.

334. See Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 221.

than extend the more lenient residency requirement to both mothers and fathers, the Court applied the more onerous standard to both.

Like *Nguyen*, Luis Ramón Morales-Santana presented the problem of a racialized criminal in the procedural posture of a deportation proceeding.<sup>335</sup> Morales-Santana was a nonmarital foreign born child, born in the Dominican Republic to a Dominican mother and a citizen father.<sup>336</sup> The version of the derivative citizenship statute applicable to Morales-Santana mandated that, prior to his birth, his citizen father had to be physically present in the United States for five years, at least five of which were after his citizen father was fourteen.<sup>337</sup> By contrast, the physical presence requirement for noncitizen mothers was one year. Morales-Santana’s citizen father missed satisfying the physical presence requirement by a mere twenty days.<sup>338</sup> Morales-Santana filed an equal protection claim challenging the gender disparity in the physical presence requirement.<sup>339</sup> After saturating the physical presence requirement in § 1409’s discriminatory history, the Court applied heightened scrutiny, and summarily rejected the government’s specious justifications that the requirement ensured a connection between the child and citizen father and prevented statelessness for the child. By way of remedy, however, the Court applied the more onerous standard to both men and women.

### 1. *Whiteness*

In eliminating plenary power applicability to § 1409, Justice Ginsburg created an opening for heightened scrutiny, specifically on issues of gender, but perhaps also on future claims involving nationality and race. The genesis of § 1409’s more extensive physical presence requirement in the Nationality Act of 1940 was Congress’s effort to reduce the number of Chinese and Mexican citizenship claims under the derivative citizenship statute.<sup>340</sup> Although Justice Ginsburg did not linger on the racialized history of § 1409, arguably because the case directly addressed gender disparity, she did note that the Roosevelt Administration “[f]ear[ed] that a foreign-born child could turn out ‘more alien than American in character.’”<sup>341</sup> More importantly, as Kristin Collins notes, when Justice Ginsburg dismissed the plenary power line of reasoning, she undermined the kinds of racial purity arguments that the government had steadfastly maintained during *Fiallo* and all three of the equal protection cases

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335. *Morales-Santana*, 137 S. Ct. at 1688.

336. *Id.* at 1686.

337. *Id.* (citing 8 U.S.C. § 601(g) (1940) (now known as § 301(g) of the Immigration and Nationality Act, current version at § 1401(g)). Currently, the requirement is five years pre-birth, two of which are after the citizen father turns 14.

338. *Id.* at 1686.

339. Immigration and Nationality Act of 1952, 8 U.S.C. § 1409, §§ 301(a)(7), 309(a).

340. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

341. *Morales-Santana*, 137 S. Ct. at 1692.

involving § 1409 prior to *Morales-Santana*.<sup>342</sup> In *Morales-Santana*, by way of illustration, the Solicitor General argued that given *The Chinese Exclusion Case*, the derivative citizenship was a form of naturalization and “the power to confer or deny citizenship on individuals born abroad . . . is also an aspect of the power to exclude aliens from the Nation”<sup>343</sup>—a power that “is an incident of every independent nation” and “a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”<sup>344</sup> Although Justice Ginsburg did not expressly address this argument, she distinguished *Fiallo* and its application to § 1409, shrewdly laying a foundation for heightened scrutiny in the future.<sup>345</sup>

## 2. *The Maintenance of WHP Privilege*

Throughout the opinion, Justice Ginsburg was highly critical of the sexism animating § 1409, particularly the idea that “[i]n marriage, the husband is dominant, wife subordinate; unwed mother is the natural and sole guardian of a nonmarital child.”<sup>346</sup> According to the Court, “lump characterizations” that “unwed fathers care little about, indeed are strangers to, their children” “no longer passes equal protection inspection.”<sup>347</sup> Perhaps, *Morales-Santana* signals the first chink in the armor of the WHP, laying the foundation for future challenges. However, what the Court gives with one hand, it takes with the other. Rather than disturbing the statutory scheme that sustains a white heteropatriarchal property right in philandering, sexual exploitation, and rape, the majority opinion applied the more burdensome physical presence requirement applicable to fathers to mothers. The Court could have nullified the more burdensome requirement and applied the more lenient requirement to both mothers and fathers. In explaining the Court’s decision to apply the more burdensome physical presence requirement on both fathers and mothers, the Court cited congressional intent and stated that Congress would not have intended application of the more lenient rule to both citizen fathers and mothers.<sup>348</sup>

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342. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

343. Brief for Petitioner at 15, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191), 2016 WL 4436132, at \*15.

344. *Id.*

345. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 184.

346. *Morales-Santana*, 137 S. Ct. at 1690.

347. *Id.* at 1695.

348. *Id.* at 1701.

3. *Evil Foreign Woman as Snare Finally Put to Rest (At Least Temporarily, in the Majority Opinion in Morales-Santana)*

Gratefully, the majority opinion did not engage in any of the previous dog-whistling about evil foreign women as Aristotelian snare and hypersexualized narratives regarding foreign women that justify the WHP. The Court’s effective use of historical context negated the evil specter of the snare. Although the Court was highly critical of the gender implications of the statute, it did not grapple with the racial content of § 1409, let alone the Supreme Court’s materialized animus against foreign women or its self-serving narratives about the untrustworthiness of foreign women. Setting aside the issue of whether Congress would eliminate the longer physical presence requirement, extending the less onerous standard to both citizen men and women would rightfully undermine a broader statutory scheme animated by white heteropatriarchal property rights in hypermasculine sexual performance.<sup>349</sup> Such an approach could acknowledge the intersectional past of § 1409 and explicitly reject its white heteropatriarchal interests. As the Court keenly recognized, “[N]ew insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.”<sup>350</sup>

## V. SOLUTIONS

“[T]he misfortune of an illegitimate birth cannot deprive a man of his nationality . . . . He is a part of society.”<sup>351</sup>

Section 1409 is anathema in a nation that pledges allegiance to the values of a free and democratic society committed to treating each person with equal concern and respect under the law. If a measure of democratic governance is to protect individuals against wrongful discrimination and ensure that all individuals are treated alike in the eyes of the law, § 1409 is incomprehensible. Section 1409 allocates the precious resource of citizenship impermissibly on the grounds of nationality, gender, and marital status. The rugged history of § 1409 demonstrates the entrenchment of using matrilineage coupled with the absence of citizenship to create precarity, particularly for the purpose of hypermasculinity. The history of § 1409 fails to suggest justifications based on the problems of proving paternity or fostering ties between an abandoned child and the father or this nation.<sup>352</sup> Rather, the history of § 1409 establishes that what

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349. Collins, *Equality, Sovereignty, and the Family*, *supra* note 127, at 217-18.

350. *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

351. Collins, *Illegitimate Borders*, *supra* note 6, at 2165 (citing Letter from John Russell Young, U.S. Legation, Peking, China, to Charles Seymour, U.S. Consul, Canton, China (Feb. 23, 1885)).

352. Collins, *Illegitimate Borders*, *supra* note 6, at 2138.



is at stake is the nation's interest in guarding its white borders and coffers<sup>353</sup> from undesirable foreign others and regulating the sexuality of men and women; it gives men autonomy, where it sanctions women.<sup>354</sup> Section 1409 is a deliberately induced process for pleasure that wreaks hazards in precarity.

In this section, I propose three solutions: (1) introducing automatic citizenship for both men and women for their nonmarital foreign-born children, (2) bringing § 1409 into moral, legal accountability, and equality symmetry with abortion rights cases, and (3) emphasizing the need to gather evidence to substantiate claims for race and national origin discrimination.

#### *A. Automatic Citizenship for Children of Citizen Men and Women*

The children of both men and women should have automatic derivative citizenship. The elimination of male prerogative in § 1409 would establish symmetry in morality, legal accountability, and equality. Automatic citizenship for the children of both men and women would equalize treatment between men and women, eliminate the WHP, and establish symmetry in treatment between foreign women and American women, as well as the children of citizen mothers and fathers. As Isabel Medina argues, the willing citizen mother or the willing citizen father would have the right to transmit citizenship with ease.<sup>355</sup> At the same time, neither would be able to so easily escape parental responsibilities.<sup>356</sup> Although some might argue that maintaining automatic derivative citizenship for women may continue to saddle them with reproductive burden, such arguments support the need to maintain reproductive freedom for women, not the gender asymmetry in § 1409.

Congress should not create a system that empowers men to discard their children, equips men to abandon their children after engaging in unprotected hypermasculinity, or devises institutional conditions for precarity. The political rhetoric surrounding abortion rights and reproductive punishment may have some application here: If these fathers do not want the responsibilities of children, they should refrain from making them. The prospect of parenthood might also produce more responsible sexual behavior. The same solution would also greatly reduce fraudulent paternity and citizenship claims. As argued by the

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353. Collins, Note, *When Fathers' Rights Are Mothers' Duties*, *supra* note 36, at 1691 (citing *Miller v. Albright*, 523 U.S. 420, 432 n.9 (1998) (Stevens, J.) (plurality opinion)) (noting that "one explanation for the limitations on fathers' right to transmit citizenship is to minimize the financial burden on the states").

354. *Id.*; see also Mariella, *supra* note 36, at 227 ("The effect of the distinction therefore encourages men to conceive children outside of marriage, and compels women to bear the costs and the stigma of non-marital sex alone when men are unwilling to do so.").

355. Mariella, *supra* note 36, at 227.

356. *Id.* at 258.

dissent in *Nguyen*, if the underlying reasoning was the difficulty of determining paternity, increases in technology have negated that impossibility.<sup>357</sup>

In proposing the solution of symmetry in automatic citizenship, I draw partially from Martha Fineman’s vulnerability theory to this extent: If the state systemically excludes you from citizenship, from the means of inheriting and owning property, from wealth, humanity, personhood, and basic resources, then the state has a heightened duty to make you whole and to provide access to the sanctioned mechanism of reliance and resilience.<sup>358</sup> Congress, through § 1409, has created a right in citizen men that mitigates rights in their children and the mothers of their children, while simultaneously creating the conditions of precarity. Congress has created clear privileges and equally distinct vulnerabilities that perpetuate inequitable institutional practices and operations. Having created these conditions, Congress should abolish them.<sup>359</sup>

### *B. Immoral Asymmetry, Legal Hypocrisy, and Foreign Lives Matter*

The inconsistencies in morality, legal accountability, and equality that § 1409 creates are legion. Section 1409 signals to the world that the interest men may have in hypermasculinity outweighs the value of life and that the price of a frolic is worth the expense of mass destruction. In the context of nonmarital foreign-born children, § 1409 suggests that a foreign woman is good enough to sexually exploit, but not good enough to create citizens.<sup>360</sup> Inside America, a

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357. *Nguyen*, 533 U.S. at 80.

358. Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 636–39 (2013).

359. As for arguments related to scarcity, lack of resources, overburdening the government coffers, and administrative difficulty, such rebuttals conflate substance and procedure. Difficulty does not qualify the legitimacy or the importance of symmetry between citizen men and women, citizen and foreign women, and between the children of foreign women and citizen women, as well as eliminating a right that functions like a property right to engage in unprotected hypermasculinity with foreign women free from the responsibilities of parenthood. Moreover, the United States had abundant resources when a Republican-controlled Congress and President Donald Trump exacted a nearly \$1.5 trillion tax cut package that mainly benefitted the wealthy. In 2018, the top-earning 1 percent of households—those earning more than \$607,000 a year—will pay a combined \$111 billion less in 2018 in federal taxes than they would have if the laws had remained unchanged since 2000. Steve Wamhoff & Matthew Gardner, *Federal Tax Cuts in the Bush, Obama, and Trump Years*, INST. ON TAX’N & ECON. (July 11, 2018), <https://itep.org/federal-tax-cuts-in-the-bush-obama-and-trump-years> [<https://perma.cc/W3EQ-WUEZ>]. It is more than the tax cut received over the same period by the entire bottom 60 percent of earners, according to an analysis in the process of being published. *Id.* A July 2018 report tallied all the major federal tax cuts and tax increases since 2000. Cumulatively, the top 1 percent of earners have received 22 percent of all tax cuts during that period; the top 20 percent of earners (those earning more than \$111,000) have received 65 percent of tax cuts. *Id.* Similarly, at the time of writing, the Trump Administration is considering bypassing Congress to grant another \$100 billion tax cut mainly for the wealthy. Alan Rappeport & Jim Tankersley, *Trump Administration Mulls a Unilateral Tax Cut for the Rich*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/us/politics/trump-tax-cuts-rich.html> [<https://perma.cc/VQ55-TAXB>].

360. Dorothy E. Roberts, *Who May Give Birth to United States Citizens?*, 17 WOMEN’S RTS. L. REP. 275 (explaining that a state referendum to deny undocumented immigrants *jus soli* citizenship signals that

woman's right to choose and to be free from reproductive punishment may be in jeopardy. Outside America, men can discard human life freely. Inside America, lawmakers put women in jail for giving birth to drug-dependent children, but allow men to discard their nonmarital children abroad at their whim. Inside America, the Fourteenth Amendment eliminates a caste system where some persons born in the country are citizens, but some are not.<sup>361</sup> Outside America, Congress has created a caste system for children based on the sex, nationality, and marital status of their parents. Both Congress and the courts can see the sanctity of human life and the responsibilities of parenthood when controlling women's bodies, but not men's. Both the Court and Congress can see life within the nation's boundaries. Neither the Court nor Congress can see the value of human life beyond its borders when mothers are unwed and foreign and fathers are Johnny Appleseed. If we, as a society, hold mothers criminally accountable for giving birth to drug-dependent children, we should extend the same morality and legal accountability to American men traveling abroad and discarding their children. Conversely, if Congress will allow American men to travel abroad and father children and discard them, then lawmakers should refrain from holding women accountable for birthing drug-dependent children.<sup>362</sup>

The history of § 1409 and its justifications bring into sharp relief the Court's hypocrisy as to the sanctity of human life and parenthood. There should be uniformity, symmetry, and consistency in morality and the value of life in abortion politics, the transferal of citizenship, and criminal prosecutions of mothers whose children are born dependent upon illicit substances. If both Congress and the courts can only see the value of life and the sanctity of parenthood when exerting control over a woman's body, and are blind to the value of life and sanctity of parenthood when fathers are philanderers and mothers are foreign and unwed, then perhaps Congress and the courts are not really interested in life or parenthood, but rather controlling women's bodies and preserving male prerogative, power, and privilege. Life is no more or less precious when it is made within the borders or beyond them. It is no more or less sacred when made with two citizens or one.

### *C. Gathering Evidence About Disparate Impact Based on Race and Nationality*

It is beyond the scope of this paper to argue that, given the property interest in citizenship, the denial of *jus sanguinis* birthright citizenship to nonmarital

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Americans believe undocumented workers are good enough to exploit, but are not good enough to be citizens).

361. *Id.*

362. The inherent ironies in morality, legal accountability, and inequality between § 1409 and the criminal prosecutions of mothers who give birth to drug-dependent children are the subjects of another piece of upcoming scholarship.

foreign-born children of American fathers triggers a violation under the Due Process Clause, subject to strict scrutiny analysis. Similarly, it is beyond the scope of this paper to answer whether a disparate impact claim based on the race or nationality of nonmarital foreign-born children or their mothers is an effective vehicle for exposing the discriminatory animus underlying § 1409 or whether disparate impact analysis has been so thoroughly gutted as to make such an effort futile. At a minimum, as Isabel Medina argues, disaggregated data is fundamentally necessary from federal agencies determining derivative citizenship claims by the race, nationality, gender, and marital status of applicants and whether the application is rejected or approved.<sup>363</sup> Fundamental equality, justice, and fairness require documenting the impact of race, national origin, gender, and marital status on the derivative citizenship decision-making process.<sup>364</sup> As Justice Ginsburg’s majority opinion in *Morales-Santana* demonstrates, § 1409 requires a thorough vetting within its raced, sexed, and classed historical context under a robust strict scrutiny to prevent spurious justifications, hegemonic feats of replicating inequality in the baseline, and drawing false symmetries in power between men and women, all in an effort to perpetuate hypermasculine conduct and regimes of sexual subordination.

#### CONCLUSION

Congress, with the Supreme Court’s blessing, has created a white heteropatriarchal property right in philandering, sexual exploitation, and rape. In doing so, Congress has given men a right that suppresses any duty owed to their children or to the mothers of their children: They can discard them. As the Supreme Court sits perched and ready to roll back the tide of women’s reproductive autonomy and undermine the integrity of *Roe v. Wade*, let it extend its moralizing about the responsibilities of parenthood, sexually responsible behavior, and the sanctity of human life to the inestimable numbers of children Americans have fathered and discarded. Congress, the courts, policymakers, and administrators have all seen fit to give men a right, amounting to a property right, to father children abroad and abandon them. Rather than subject this practice to the exacting, antiseptic light of day, the Court has ratified and reified this right over centuries of doctrine.

For some, the words of Chief Justice Taney in *Dred Scott* will appear shocking to the conscience, antiquated, and unfathomable. The day will come, however, when we look back on § 1409 with the same wonder. Future generations, as well as the current generation, must fundamentally

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363. Medina, *Derivative Citizenship*, *supra* note 149, at 444.

364. *Id.*

understand: "Power concedes nothing without a demand."<sup>365</sup> Power is neither natural nor inevitable. It is made. And it can be unmade.

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365. FREDERICK DOUGLASS, *Speech Before the West Indian Emancipation Society, in TWO SPEECHES BY FREDERICK DOUGLASS* 22 (Rochester, N.Y., C.P. Dewey 1857).

# Salary History and Pay Parity: Assessing Prior Salary History as a “Factor Other Than Sex” in Equal Pay Act Litigation

Jennifer Safstrom<sup>†</sup>

**ABSTRACT:** Inquiries about a prospective applicant’s salary history are controversial because of the role such inequities play in the broader gender pay equity debate. The use of prior salary to determine compensation can perpetuate pay discrimination for women, especially women of color, and lock them into cycles of underpayment when these inequities are carried over from job to job. Reliance on salary history perpetuates historical discrimination and is antithetical to the language and purpose of Title VII and the Equal Pay Act. The purpose of this paper is to critically analyze the legal reasoning relied upon to interpret these laws, especially in light of the new cases emerging in this field, and to assess the potential impacts of these differing interpretations across the circuit courts. This paper offers a nuanced analysis of the courts’ reasoning, including an analysis of the text and context of the legislation and how this influences appellate courts’ divergent interpretation and reasoning. Given that this circuit split primes the issue for Supreme Court consideration, this Article considers the implications of the various interpretations.

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<sup>†</sup> Dunn Legal Fellow, American Civil Liberties Union (ACLU) of Virginia; Georgetown Law, J.D., 2018; University of Miami, B.A., 2011. I extend my sincere appreciation to Professor Irv Gornstein and Judge Sri Srinivasan for teaching the course that inspired this paper. I deeply appreciate the opportunity to learn from the dedicated staff at the National Women’s Law Center and the Equal Employment Opportunity Commission, who work tirelessly for gender and workplace equity, with special thanks to Amy Matsui and Susan Oxford for their guidance and encouragement. Many thanks to Sarah Greenberg, Lorell Guerrero, and the entire staff of the *Yale Journal of Law & Feminism* for their insight, feedback, and support. I extend my love and gratitude to my family for always believing in me. All views and opinions expressed herein are my own.

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I. INTRODUCTION TO THE EQUAL PAY ACT AND THE CIRCUIT SPLIT ON THE  
USE OF SALARY HISTORY

The Equal Pay Act (“EPA” or “Act”) was originally passed in 1963 to eliminate disparities in pay based on sex.<sup>1</sup> However, more than fifty years after its passage, the wage gap persists.<sup>2</sup> Women confront a pervasive “gender-based wage gap across industries, occupations, and education levels.”<sup>3</sup> This Article assesses the differing interpretations of the EPA in the current circuit split, analyzing whether prior salary history is a factor other than sex that can be considered by employers when making salary determinations, as well as the legal and social impacts of these different approaches.

Currently, there is a robust national debate about the extent to which employers can rely on prior salary history in the context of the EPA. The debate in the courts has significant consequences for countless workers: if prior salary history is a factor other than sex, employers may permissibly consider a female employee’s previous wages to make salary determinations, despite the fact that women’s wages are often impacted by sex and that such a policy would perpetuate existing cycles of under-payment. Against the backdrop of a broad

1. Although gender and sex have distinct meanings, the terms are used interchangeably in this paper to describe the pay gap, which is based on both an individual’s biological or physiological traits as well as a person’s gender identity in the context of society’s perception and treatment of the individual (biases, expectations, tropes, roles, etc.). This understanding is meant to be inclusive of transgender, gender-queer, gender-fluid, and gender non-conforming individuals.

2. Yuki Noguchi, *50 Years After The Equal Pay Act, Gender Wage Gap Endures*, NPR (June 10, 2013), <https://www.npr.org/2013/06/10/189280329/50-years-after-the-equal-pay-act-gender-wage-gap-endures> [https://perma.cc/6TQB-BH7H].

3. JEANNE H. BALLANTINE, KEITH A. ROBERTS & KATHLEEN ODELL KORGEN, *OUR SOCIAL WORLD: INTRODUCTION TO SOCIOLOGY* 276 (7th ed. 2016).

national debate on the issue of gender pay equity, much of the recent emphasis on salary history stemmed from a Ninth Circuit opinion that deepened an existing split between the federal courts of appeal on the question of whether prior salary is a “factor other than sex” under the EPA.<sup>4</sup>

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in 2009. Pursuant to the office’s established policy, Rizo’s salary as a new employee was “based exclusively on [her] most recent prior pay, regardless of qualifications, education, or even the kind of work the individual had been doing”; thus, Rizo began on step one of the salary scale.<sup>5</sup> But in 2012, she discovered that a newly hired male math consultant had started on step nine of the salary scale, with an initial salary \$13,000 more than Rizo’s fourth year salary, despite being less educated and less experienced than Rizo.<sup>6</sup> The County conceded Rizo’s prima facie case: “Rizo is paid less than her male colleagues for performing the exact same job.”<sup>7</sup> However, despite acknowledging that Rizo was paid less than her male counterpart for the same work, the County asserted that the discrepancy was permissible because it was based on Rizo’s prior salary—a “factor other than sex.”<sup>8</sup>

The district court sided with Rizo, determining that her prior salary history was not a valid factor under the EPA.<sup>9</sup> On an interlocutory appeal, the Ninth Circuit reversed the district court based on the circuit’s prevailing precedent in *Kouba v. Allstate Insurance Company*, before ordering rehearing of the case en banc.<sup>10</sup> A six-judge majority of the Ninth Circuit held that “[p]rior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages.”<sup>11</sup> In overruling *Kouba*, the majority “conclude[s], unhesitatingly, that ‘any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.”<sup>12</sup>

The majority opinion received attention not only because it overturned *Kouba* to set new precedent in the Ninth Circuit and deepened the existing circuit

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4. Danielle Paquette, *Court: Employers Can't Pay Women Less Because of Their Salary History*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/news/work/wp/2018/04/09/court-employers-cant-pay-women-less-because-of-their-salary-history/?utm\\_term=.3c4569fa4a29](https://www.washingtonpost.com/news/work/wp/2018/04/09/court-employers-cant-pay-women-less-because-of-their-salary-history/?utm_term=.3c4569fa4a29) [<https://perma.cc/3EK4-2HLS>].

5. Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Appellee, *Rizo v. Yovino*, 2016 WL 5869872 (9th Cir. Oct. 5, 2016) (No. 14-cv-4932) at 4.

6. *Id.* at 4.

7. Brief for Appellee at 21, *Rizo v. Yovino*, 2016 WL 5846093 (9th Cir. Sept. 28, 2016).

8. *Id.*

9. *Rizo v. Yovino*, 2015 WL 9260587, at 9 (E.D. Cal. 2015).

10. *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017), *and on reh'g en banc*, 887 F.3d 453 (9th Cir. 2018); *see also* *Kouba v. Allstate Ins. Co.*, 691 F.3d 873 (9th Cir. 1982).

11. *Rizo v. Yovino*, 887 F.3d at 460 (9th Cir. 2018).

12. *Id.*



split by determining that salary history could never be used, but also because it was one of the final opinions authored by the late Judge Stephen Reinhardt.<sup>13</sup> The Ninth Circuit's opinion noted that "[p]rior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death."<sup>14</sup>

Counsel for the Fresno County School District appealed the Ninth Circuit's en banc decision to the United States Supreme Court, providing the Court an immediate opportunity to serve as a final arbiter to this question on the use of salary history.<sup>15</sup> However, the Supreme Court vacated and remanded the Ninth Circuit's decision on other grounds, which may ultimately permit employers to consider workers' prior salaries. The Court instead addressed the issue of whether the circuit court erred when it counted Judge Reinhardt as a member of the majority since he died before the court's opinion in this case was issued on April 9, 2018, eleven days after he passed away on March 29.<sup>16</sup> The Court determined that "the Ninth Circuit erred in counting [Judge Reinhardt] as a member of the majority" by allowing "a deceased judge to exercise the judicial power . . . after his death," noting that "federal judges are appointed for life, not for eternity."<sup>17</sup>

The Supreme Court's decision, though it did not directly address the question of salary history, vacated the Ninth Circuit's precedent on this question. With Judge Reinhardt's vote, the majority of six of eleven judges would have "constitute[d] a precedent that all future Ninth Circuit panels must follow."<sup>18</sup> As the Supreme Court observed, "[w]ithout Judge Reinhardt's vote, the opinion attributed to him would have been approved by only five of the ten members of the en banc panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons."<sup>19</sup>

Thus, the Supreme Court's decision has the potential to revive case law that allows employers to consider workers' prior salaries, at least in certain circumstances, in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. In the wake of the Supreme Court's per curiam decision in *Rizo v. Yovino*, the debate over the

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13. Sam Roberts, *Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/obituaries/stephen-reinhardt-liberal-lion-of-federal-court-dies-at-87.html> [<https://perma.cc/985J-W94L>].

14. *Rizo v. Yovino*, 887 F.3d 453, 455 (9th Cir. 2018).

15. McGuire Woods, *9th Circuit: Employers May Not Use Pay History as Defense to Equal Pay Act Claims* (Apr. 12, 2018), <https://www.mcguirewoods.com/Client-Resources/Alerts/2018/4/9th-Circuit-Employers-Pay-History-Defense-Equal-Pay-Act-Claims.aspx> [<https://perma.cc/VM9R-JM2S>].

16. *Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019).

17. *Id.* at 710.

18. *Id.* at 708.

19. *Id.*

use of salary history in the courts is ongoing. Importantly, this deliberation in the courts is occurring against a backdrop of legislative action by several state and localities, many of which have banned employers from inquiring about an employee's prior salary.<sup>20</sup>

The question of prior salary history has generated sharp division because of the ongoing role it plays in broader gender pay equity debate. Many advocates argue against an employer's use of prior salary history because "reliance on that information to determine compensation, forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job."<sup>21</sup> As such, reliance on salary history perpetuates historical discrimination and is antithetical to the language and purpose of the EPA. However, others see salary history as an essential, non-discriminatory inquiry. There are many employers that "use salary history to evaluate and compare applicants' job responsibilities and achievements," "to determine the market value of an applicant or the position," even though "salary is not a neutral, objective factor" for decision making.<sup>22</sup>

Although estimates of the wage gap vary, on average, women earn seventy-seven cents for every dollar that men earn.<sup>23</sup> Ongoing research demonstrates that pay disparities are worse for women of color<sup>24</sup> and can be exacerbated by geographic differences.<sup>25</sup> According to one estimate, "women employed full time in the United States lose a combined total of more than \$900 billion every year due to the wage gap."<sup>26</sup>

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20. Ryan Golden & Valerie Bolden-Barrett, *Women Who Refuse to Disclose Salary History More Likely to Be Paid Less*, HR DIVE (June 29, 2017), <https://www.hrdive.com/news/women-who-refuse-to-disclose-salary-history-more-likely-to-be-paid-less/445993/> [<https://perma.cc/A85F-5V9M>].

21. *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, NAT'L WOMEN'S LAW CTR. 1 (Dec. 2018), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=L4k1CnSW08yrWJX3kf5jG0uXmA\\_Zn1dtVVFiBELGORvF7TQ0b3UU11qYPr1C8nl05VJ9PgPk0ejgBEjWLh1nk9lqmPDyBPL0xskJC1-Eu-Q](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=L4k1CnSW08yrWJX3kf5jG0uXmA_Zn1dtVVFiBELGORvF7TQ0b3UU11qYPr1C8nl05VJ9PgPk0ejgBEjWLh1nk9lqmPDyBPL0xskJC1-Eu-Q) [<https://perma.cc/FYY3-MKS4>].

22. *Id.* at 1-2.

23. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 5 <http://www.census.gov/prod/2013pubs/p60-245.pdf> [<https://perma.cc/8G2X-6EKE>].

24. National Partnership for Women & Families, QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE (Sept. 2017), <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/quantifying-americas-gender-wage-gap-by-race-2017.pdf> [<https://perma.cc/TXJ4-6LDF>].

25. National Women's Law Center, THE LIFETIME WAGE GAP, STATE BY STATE (Apr. 4, 2018), <https://nwlcl.org/resources/the-lifetime-wage-gap-state-by-state/> [<https://perma.cc/39P3-9GBZ>].

26. National Partnership for Women & Families, AMERICA'S WOMEN AND THE WAGE GAP 2 (Apr. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf> [<https://perma.cc/U28W-6LA8>].

To address issue of pay inequity, the EPA requires:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]<sup>27</sup>

This language adopts an equal pay for equal work standard, in which two similarly situated employees who are performing the same work must be paid the same, regardless of their sex. The EPA creates four exceptions to this general rule, where salary differentials between the sexes can be permissible “pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>28</sup>

To establish a *prima facie* case under the EPA, the plaintiff must show: “(i) the employer pays different wages to employees of the opposite sex; ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and iii) the jobs are performed under similar working conditions.”<sup>29</sup> Because the EPA does not have an intent requirement,<sup>30</sup> once the plaintiff has demonstrated that workers of one sex are paid more for equal work than are employees of the opposite sex, the burden of proof shifts to the employer; the employer defendant must show the pay differential is justified, such as under one of the Equal Pay Act’s four exceptions, which constitute an affirmative defense to the claim.<sup>31</sup> If the defendant satisfies their burden, the plaintiff may still rebut with evidence that the employer’s proffered reason was a pretext for discrimination on the basis of sex.<sup>32</sup>

The purpose of this Article is to critically analyze the legal reasoning relied upon to interpret the EPA in the context of prior salary history cases, as well as to assess the potential impacts of these differing interpretations across the circuit courts. Part II will analyze the circuit split on the question of salary history as a “factor other than sex” under the EPA, including the arguments related to the statute’s text, legislative history, and purpose. Part III will provide a summary of legislative action that has been taken with regard to salary history. Part IV will evaluate some of the current and potential policy consequences resulting from

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27. 29 U.S.C. § 206(d)(1).

28. *Id.*

29. *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).

30. *Meeks v. Comput. Assocs. Int’l*, 15 F.3d 1013, 1019 (11th Cir. 1994) (noting that “[i]n contrast to Title VII, the EPA establishes a form of ‘strict liability’”).

31. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

32. *Belfi*, 191 F.3d at 136.

the ongoing salary history debate. Finally, Part V will provide a summary of the main conclusions and recommendations of this Article.

## II. THE CIRCUIT SPLIT: IS PRIOR SALARY A “FACTOR OTHER THAN SEX”?

The federal courts of appeal are split on the question of whether prior salary is a “factor other than sex” under the EPA. These different methods of interpreting the EPA in turn influence the role that prior salary history can play in making employment compensation decisions. This Section summarizes the circuits’ varying perspectives.

The courts’ divergent interpretations arise from the different textual interpretations, legislative history, and purpose-based arguments they consider. The textual interpretation of the EPA is informed by each court’s understanding of legitimate business reasons that could permissibly constitute a “factor other than sex.” A court’s skepticism of a company’s business decision making and its inclination to override employers’ exercise of that judgment influence the textual analysis. Additionally, although not every circuit considers legislative history, the understanding of the legislative history and comparisons with other exceptions to the EPA also inform the approach that the courts have taken. Finally, the courts have also relied on the EPA’s remedial purpose in assessing whether prior wages are a “factor other than sex.”

### A. *Summarizing the Approaches Adopted by the Circuits*

One perspective is that the Equal Pay Act does not permit the consideration of prior salary history. The Ninth Circuit explained this interpretation in its recent en banc decision in *Rizo v. Yovino*, in which the court held that “prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>33</sup> The court reasoned that there was an attenuated relationship between prior salary and legitimate factors other than sex that relate to qualification, skill, or experience; as such, salary history “does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality.”<sup>34</sup> Accordingly, employers in the Ninth Circuit’s jurisdiction may not rely on salary history in their employment decisions. Although this decision has been vacated by the Supreme Court on the grounds that Judge Reinhardt’s vote was impermissibly counted in the six-judge majority and does not carry precedential weight, the majority’s reasoning nonetheless presents a unique analysis of the salary history inquiry. The term “majority” is still used in this Article to distinguish this analysis from the three concurring

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33. 887 F.3d 453, 456 (9th Cir. 2018).

34. *Id.* at 467.

opinions adopted by the remaining five judges of the court; the remaining judges concurred in the judgment, but declined to adopt the full breadth of the reasoning set forth in Judge Reinhardt's opinion.

The second mode of analysis, proffered by the Seventh Circuit, directly opposes the Ninth Circuit's position. Under the Seventh Circuit's approach, salary history is always a "factor other than sex." The court has acknowledged that "many empirical studies show that women's wages are less than men's on average," but it ultimately determined that discriminatory wage patterns are "something to be proved rather than assumed."<sup>35</sup> Since all market wages cannot be assumed to be discriminatory, unless the plaintiff can prove that that "sex discrimination led to lower wages in the 'feeder' jobs" or that the employer's wage scale directly violated the Equal Pay Act, there is no actionable claim.<sup>36</sup> As such, employers may freely consider salary history, with only narrow exceptions.

The third approach, adopted by several circuits, stakes out a middle ground between the positions of the Ninth and Seventh Circuits and allows employers to assess prior salary history under specific circumstances. Circuit courts have articulated this position in different ways. The Eighth Circuit permits employers to use prior salary as an affirmative defense, but the "court carefully examines the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages for female employees."<sup>37</sup> Similarly, the Second Circuit allows salary history to be used as an affirmative defense if the employer can prove "that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense."<sup>38</sup> The Eleventh Circuit has held that prior salary history, on its own, "cannot solely carry the affirmative defense,"<sup>39</sup> as has the Tenth Circuit by prohibiting "an employer from relying solely upon a prior salary to justify pay disparity."<sup>40</sup>

The Ninth Circuit's concurring opinions in *Rizo v. Yovino* echo this perspective. Judge McKeown's concurrence, joined by Judge Murguia, eschews the majority's bright-line test categorically banning the consideration of prior salary history in favor of an approach that uses "prior salary along with valid job-related factors such as education, past performance and training . . . [to] provide a lawful benchmark for starting salary in appropriate cases."<sup>41</sup> Judge Callahan, joined by Judge Tallman, expressed that while it was impermissible to use "prior pay" as the exclusive determinant of pay under the EPA, "prior pay is not inherently a reflection of gender discrimination" because those differences could

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35. *Wernsing v. Dep't of Human Services*, 427 F.3d 466, 470 (7th Cir. 2005).

36. *Id.*

37. *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

38. *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

39. *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

40. *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).

41. *Rizo v. Yovino*, 887 F.3d 453, 470 (9th Cir. 2018).

be based on other, legitimate factors “such as the cost of living in different parts of our country.”<sup>42</sup> The final concurrence, by Judge Watford, reasoned that an employer may rely on prior salary but “bears the burden of proving that its female employees’ past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces . . . [which] in most instances that will be exceedingly difficult to do.”<sup>43</sup>

Under this third approach, courts allow employers to consider salary history, but not as the sole justification for gender pay disparities. This perspective aligns most closely with that of the Equal Employment Opportunity Commission (“EEOC” or “Commission”), which takes the position that “prior pay alone cannot justify a compensation disparity under the EPA because the practice perpetuates the gender pay gap that continues to exist.”<sup>44</sup> Given this range of possible interpretations, it is important to understand the reasoning upon which the EEOC and circuit courts have based their analysis, in order to fully appreciate how these differing statutory readings directly impact female workers.

#### *B. Analyzing the Textual Arguments Presented in the Circuit Split*

The EPA requires that:

[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . [that] requires equal skill, effort, and responsibility . . . performed under similar working conditions[.]<sup>45</sup>

The EPA also permits employers to assert an affirmative defense to justify an identified pay gap based on “any other factor other than sex.”<sup>46</sup>

Relying on this language, the circuits have differed in their understanding of what should fall within the scope of a permissible “factor other than sex.” In characterizing what constitutes an “acceptable business reason” for salary differences under this catchall exception, courts’ interpretations have been influenced by two factors. The first factor is the closeness with which courts scrutinize the pretext behind an employer’s decisions. A court’s interpretation is strongly influenced by its willingness to critically assess the legitimacy of an

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42. *Id.* at 477.

43. *Id.* at 478-79.

44. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372), 2016 WL 5869872 (explaining the EEOC “is the agency charged with interpreting, administering, and enforcing the Equal Pay Act along with other federal employment discrimination statutes”) (internal citations omitted).

45. 29 U.S.C. § 206(d)(1).

46. *Id.*

employer's reliance on salary history and the purported connection to experience, ability, or other job-related performance metrics. The second is the court's willingness to defer to the employer's business judgment. A court's understanding of the statutory provision is influenced by its willingness not merely to insert itself as an economic agent in the market, but possibly to contradict an employer's business judgment.

The Ninth Circuit majority interpreted "factor other than sex" as "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."<sup>47</sup> In reaching this conclusion, the Ninth Circuit relied on two canons of construction: *noscitur a sociis* and *ejusdem generis*.

The canon *noscitur a sociis* gives related meaning to words grouped together in a list. Applied to the text of the EPA, "factor other than sex" appears as a catchall exception along with three specific exemptions to the pay parity requirement: seniority, merit, and productivity systems. The court reasoned that these three exclusions "share more in common than mere gender neutrality [as] all three relate to job qualifications, performance, and/or experience."<sup>48</sup> This supports the Ninth Circuit's reasoning that "the more general exception ['factor other than sex'] should be limited to legitimate, job-related reasons as well."<sup>49</sup>

The Ninth Circuit's application of the canon of *ejusdem generis* also supports this reading. The canon requires that a general term, when appearing at the end of a list of more specific terms, be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."<sup>50</sup> In reading the other exceptions as related to qualifications, performance, or experience, the court concluded that "[a] similar factor would have to be one similar to the other legitimate, job-related reasons" provided in the EPA.<sup>51</sup> Because the court found that salary history bore an attenuated relationship from these valid metrics, it determined that prior salary "does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality."<sup>52</sup>

Alternatively, the exception could be interpreted as any factor besides sex, including any business-related factor other than sex, encompassing salary history. Prior to its most recent ruling, the Ninth Circuit had "relied upon the express language of the EPA which says a pay differential is nonactionable if the differential is pursuant to 'a differential based on *any* other factor other

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47. *Rizo*, 887 F.3d at 460.

48. *Id.* at 461-62 (internal citations omitted).

49. *Id.*

50. *Id.* at 462.

51. *Id.*

52. *Id.* at 467.

than sex.”<sup>53</sup> Although not explicitly relying on the canons of construction, this argument identifies a more general unifying characteristic between the exceptions: they are all business-related.<sup>54</sup> Given “virtually every dictionary defines the word ‘any’ as ‘regardless of kind,’” then the appropriate reading of “any other factor other than sex” is *any* factor.<sup>55</sup> The use of the word “any” also supports a broad reading of the fourth exception of the EPA. A broad reading of the exception “expressly permit[s] an employer to assert prior salary history as a legitimate, nondiscriminatory reason for a pay differential.”<sup>56</sup>

The Seventh Circuit takes this conclusion one step further. Based on the court’s prior decisions in *Dey* and *Covington*, the court held that a “factor [other than sex] need not be ‘related to the requirements of the particular position in question,’ nor must it even be business-related.”<sup>57</sup> The Ninth Circuit’s earlier precedent in *Kouba*, characterizing the fourth exception as business-related factors other than sex, is directly criticized by the Seventh Circuit. Writing for a unanimous panel, Judge Easterbrook chastises the Ninth Circuit for originating the acceptable business requirement without explaining its genesis, in a move that “was [as] advanced as ukase.”<sup>58</sup> The rebuke extends to all circuits that have followed the same reasoning because the acceptable business reason requirement is not grounded in the statutory text.<sup>59</sup> Under this expansively interpreted exception to the EPA, salary history is a legitimate business consideration, on par with seniority and merit pay systems.

### *Pretext & Business Judgment*

In its decision in *Corning*, the Supreme Court concluded that the company’s ongoing disparity in base wages between night and day workers was pretext and “operated to perpetuate the effects of the company’s prior illegal practice of paying women less than men for equal work.”<sup>60</sup> Accordingly, the Court found the wage differential discriminatory, despite being “phrased in terms of a neutral factor other than sex.”<sup>61</sup> This decision supports scrutiny by courts to ensure that when an employer asserts an affirmative defense, it is not a pretext or post-hoc

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53. Brief of Appellants at 26, *Rizo v. Yovino*, 2016 WL 3901069 (9th Cir. 2016) (No. 16-15372) (emphasis added) (citing *Kouba*, 691 F.2d at 875).

54. Some courts have noted that a “factor other than sex” does not include literally any other factor, but any factor that was adopted for a legitimate business reason. See *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-31 (6th Cir. 1983).

55. Jeffrey K. Brown, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits’ Misapplication of the Equal Pay Act’s “Any Other Factor Other Than Sex” Defense*, 13 HOFSTRA LAB. & EMP. L.J. 181, 191 (1995).

56. Brief of Appellants, *supra* note 53, at 26 (citing *Kouba*, 691 F.2d at 877).

57. *Wernsing*, 427 F.3d 466 at 470.

58. *Id.* at 469.

59. *Id.*

60. *Corning Glass Works v. Brennan*, 417 U.S. 188, 209-10 (1974).

61. *Id.* at 209-10.



rationalization for discrimination.<sup>62</sup> However, it is unclear if this decision would permit courts to assume bias in the underlying salary history because the EPA “permit[s] employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of ‘other factors other than sex.’”<sup>63</sup>

Courts vary greatly in how closely they review these determinations, particularly with regard to pretext. The Second Circuit frames the pretext inquiry as “whether the employer has use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.”<sup>64</sup> The Second Circuit has also held that “an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential.”<sup>65</sup> In determining whether an employer’s use of a civil service exam and job classification system were permissible, the court held that these systems could constitute an affirmative defense as a factor other than sex “if defendants prove that the system is bona fide,” meaning the employer “must prove that the exam for custodians and the practice of filling the custodian’s position only from among the top three scorers on the exam are related to performance of the custodian’s job.”<sup>66</sup>

In comparison, the Sixth Circuit reviewed an employer’s “head of household” provision, which permitted employees to extend medical and dental coverage to a spouse, but only if the spouse earned less than the employee. The court found the policy justified by business interests, as an employer could legitimately conclude that “choosing a comprehensive fringe benefit package faces the challenge of maximizing employee satisfaction while minimizing or controlling cost.”<sup>67</sup> In Judge Hillman’s dissent, he notes several reasons why he is critical of the relationship between the head of household policy and the company’s purported justifications. These reasons include: (1) the comparatively low percentage of female employees eligible for spousal benefits, (2) that “nearly three-fourths of the affected employees . . . were female,” (3) that benefits extended “to so few employees is not reasonably related to . . . [the company’s] asserted justification of maximizing employee satisfaction,” and (4) that there was no evidence of employee satisfaction increases.<sup>68</sup>

In the context of prior salary history, the analysis of pretext is related to the court’s assessment of an employer’s business judgment. In *Gunther*, the Supreme Court acknowledged that “courts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer . . . who

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62. Some courts have used clear language to hold there is no valid affirmative defense for “illusory” and “post-event” justification for unequal pay. *See e.g.*, *Odomes v. Nucare, Inc.*, 653 F.2d 246, 251-52 (6th Cir. 1981).

63. *Washington Cty. v. Gunther*, 452 U.S. 161, 170 (1981).

64. *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (citation omitted).

65. *Id.*

66. *Id.* at 527.

67. *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

68. *Id.* at 255 (Hillman, J., dissenting).

[has] established and applied a bona fide job rating system so long as it does not discriminate on the basis of sex.”<sup>69</sup> The interpretation of the catchall exception can vary based on a court’s perspective of its role in reviewing business decisions that result in pay disparities.

For instance, the Seventh Circuit explained that “Congress has not authorized federal judges to serve as personnel managers for America’s employers,” which is why a broad reading of the catchall exception supports deference to employers in exercising business judgment.<sup>70</sup> This interpretation underpins the court’s general reasoning, that while “[i]t remains possible that pay differences between men and women reflect discrimination,” such discrepancies can also be attributed to individual “choices made about allocating time between family and market endeavors.”<sup>71</sup>

By contrast, the Ninth Circuit’s holding is infused with far less deference to an employer’s business judgment because “[n]ot every reason that makes economic sense—in other words, that is business related—constitutes an acceptable factor other than sex.”<sup>72</sup> In an effort to sidestep “too many improper justifications for avoiding the strictures of the Act,” the court relies on intent and precedent to support its interpretation, which prohibits actions by employers that aim “to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*.”<sup>73</sup>

These interpretive differences are explored further in the context of legislative history and precedent. These comparisons underscore how the court’s perspective of its role in resolving these issues, as well as a court’s willingness to be critical of business judgments, impact the contours of how “any other factor other than sex” is interpreted across the various circuits.

### C. Summarizing the Circuit Courts’ Legislative History Arguments

The Supreme Court analyzed the legislative history of the EPA in its decision in *Corning*. In a later decision that discusses the *Corning* Court’s analysis, the Supreme Court found that the “language and legislative history of

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69. *Washington Cty. v. Gunther*, 452 U.S. 161, 171 (1981) (internal citation omitted).

70. *Wernsing v. Dep’t of Human Services*, 427 F.3d 466, 468 (7th Cir. 2005).

71. *Id.* at 471.

72. *Rizo v. Yovino*, 887 F.3d at 466 (9th Cir. 2018) (citing the Supreme Court’s decision in *Corning*, which “readily dismissed the notion that an employer may pay women less under the catchall exception because women cost less to employ, thus saving the employer money. The Court explained that the market forces theory—that women will be willing to accept lower salaries because they will not find higher salaries elsewhere—did not constitute a factor other than sex even though such a method of setting salaries could have saved the company a considerable amount and so would have constituted a good business reason.”) (internal quotations omitted).

73. *Id.* at 456-57, 466.

the provision are not unambiguous,” adding to the complexity of the salary history debate.<sup>74</sup>

The Court begins its analysis of the legislative history by noting that the original version of the EPA created only two exceptions, for seniority or merit systems; this was met by pushback from witnesses during the House and Senate committee hearings.<sup>75</sup> Those exceptions were insufficient to account for the “formal, systematic job evaluation plans” used by many employers “to establish equitable wage structures in their plants” by taking into account “four separate factors in determining job value—skill, effort, responsibility and working conditions.”<sup>76</sup> In addition, critics of the bill expressed concerns that the EPA’s language was “unduly vague and incomplete” and that the “Secretary of Labor would be cast in the position of second-guessing the validity of a company’s job evaluation system.”<sup>77</sup> The Court observes that “Congress acted in direct response to these pleas” by amending the EPA to reflect that equal pay also required “equal effort, responsibility, and similar working conditions,” which were at the heart of job classifications, formed a “legitimate basis for differentials in pay.”<sup>78</sup> In sum, the Court concludes this demonstrates Congress’ intent to keep “well-defined and well-accepted principles of job evaluation . . . [so] that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act.”<sup>79</sup>

The Court relied upon this analysis of legislative history in *Corning* to conclude that the fourth affirmative defense was added to the EPA “because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted.”<sup>80</sup> Circuit courts have relied upon this legislative history analysis in interpreting the EPA, but have also added to this interpretative context.

References to written reports provide additional insight for interpreting the EPA. The Ninth Circuit references the House Committee’s report, which characterizes “a bona fide job classification program” as one “that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.”<sup>81</sup> The court also relied upon the committee’s “illustrative list of other factors in addition to job classification programs which would be covered under the fourth exception” which included “shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy

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74. *Gunther*, 452 U.S. at 168.

75. *Corning Glass Works v. Brennan*, 417 U.S. 188, 199 (1974).

76. *Id.*

77. *Id.* at 200.

78. *Id.* at 200-01 (internal citations omitted).

79. *Id.* at 201.

80. *Rizo*, 887 F.3d at 464 (citing H.R. REP. NO. 88-309, at 3 (1963), as reprinted in 1963 U.S.C.C.A.N. 687, 689).

81. *Id.* (citing H.R. REP. NO. 88-309, at 3 (1963), as reprinted in 1963 U.S.C.C.A.N. 687, 689).

objects, differences based on experience, training, or ability.”<sup>82</sup> The Ninth Circuit also notes the “Senate Committee Report likewise confirms that Congress intended the catchall exception to cover factors other than sex only insofar as they were job related.”<sup>83</sup> This analysis is largely echoed by the Second Circuit, which also refers to the report, in noting that while “there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay . . . a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense.”<sup>84</sup>

*Gunther* and *Rizo* both make reference to Representative Robert Griffin, but rely on different statements by the congressman to support their analysis. In *Gunther*, the Court noted that Representative Griffin’s explanation “that the fourth affirmative defense is a ‘broad principle,’ which ‘makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation.’”<sup>85</sup> The Ninth Circuit quotes Representative Griffin’s description of the catchall exception: “Roman numeral iv is a broad principle, and those preceding it are really examples.”<sup>86</sup> Both statements may be reconciled when read in unison; however, when read independently from one another, it is possible these two statements, though made by the same person, could be construed in multiple ways to support various conclusions.

By contrast, the Seventh Circuit dismisses reliance on legislative history by posing this question: “But what relevance can this have now that anti-discrimination statutes have been in force for more than two generations?”<sup>87</sup>

#### D. Examining the EPA’s Purpose in the Circuits’ Rationales

Courts have also evaluated the purpose of the EPA in assessing the scope of a “factor other than sex.” The Supreme Court, in its decision in *Corning*, stated, “Congress’ purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination” to eliminate wage structures that reflected “an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”<sup>88</sup> Additionally, in interpreting the EPA as a broadly remedial statute, the Supreme Court held the Act “should be construed

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82. *Id.* (internal quotations omitted).

83. *Id.*

84. *Aldrich*, 963 F.2d at 525.

85. *Gunther*, 452 U.S. at 171 (citing 109 CONG. REC. 9203 (1963)) (also noting the statements of several other legislators that aligned with Representative Griffin’s statements, citing remarks made by Reps. Frelinghuysen, Thompson, Goodell, Kelly, Pucinski, and Thompson).

86. *Rizo*, 887 F.3d at 464.

87. *Wernsing*, 427 F.3d at 471.

88. *Corning*, 417 U.S. at 195 (citing S. REP. NO. 88-176, at 1 (1963)).

and applied so as to fulfill the underlying purposes which Congress sought to achieve.”<sup>89</sup>

In its most recent decision in *Rizo*, the Ninth Circuit has determined that “it is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing endemic sex-based wage disparities, would create an exception for basing new hires’ salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex.”<sup>90</sup> Relying on the broad remedial purpose of the statute, the Ninth Circuit concludes “Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.”<sup>91</sup> This is particularly evident when recognizing that at the time of the EPA was passed, “an employee’s prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other.”<sup>92</sup>

Although the Second Circuit ultimately reaches a different conclusion than the Ninth Circuit, the court in *Aldrich* concludes that “job classification systems may qualify under the factor-other-than-sex defense only when they are based on legitimate business-related considerations also comports with the general policy goals Congress sought to effectuate by enacting equal pay legislation.”<sup>93</sup> The court notes that in the absence of “a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.”<sup>94</sup>

These perspectives of the EPA’s purpose stand in contrast to the Seventh Circuit’s analysis. The court prioritizes the “benefit of making the job more attractive to the best candidates—because the state’s civil service criteria call for more attention to employees’ background and skills than to the market.”<sup>95</sup> Judge Easterbrook’s opinion suggests the opposition’s analysis is “manufactured by the judges rather than discovered by digging through legislative debates” and “lacks any footing in enacted texts.”<sup>96</sup> Rather than elevating the EPA’s purpose, the Seventh Circuit opinion eschews purpose in arriving at its decision to always permit the use of salary history as a “factor other than sex.”

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89. *Id.* at 208.

90. *Rizo*, 887 F.3d at 460.

91. *Id.* at 461.

92. *Id.*

93. *Aldrich*, 963 F.2d at 525.

94. *Id.*

95. *Wernsing*, 427 F.3d at 468.

96. *Id.* at 470.

### III. THE STATUS OF FEDERAL, STATE, AND LOCAL LEGISLATION

Ongoing litigation on the federal level has deepened the circuit split regarding whether prior salary history is a permissible affirmative defense based on “a factor other than sex.” However, the debate regarding prior salary history is not cabined to the judicial arena. This Section briefly describes how legislative action on the state level provides a rich backdrop against which to analyze the circuit split, especially in the wake of federal inaction on this question.

Although the Equal Pay Act does not permit wage discrimination, it was not understood to afford protection on the federal level to safeguard against disclosure of past salary information—until the Ninth Circuit’s decision in *Rizo* prohibited reliance on salary history under the EPA. State legislation regarding prior salary history, on the other hand, has multiplied in recent years. At least five states, including Massachusetts, Delaware, New York, California, and Oregon, in addition to several cities, have also passed measures that ban employers from inquiring about salary history.<sup>97</sup> New Jersey’s governor signed an executive order to address this issue.<sup>98</sup>

The scope and protections of these laws vary. The Massachusetts law, for instance, includes an anti-retaliation provision.<sup>99</sup> Delaware’s provision includes strong punitive measures, including “penalties from \$1,000 to \$5,000 for a first offense, and up to \$10,000 for a subsequent offense.”<sup>100</sup> New York City’s provision includes even more severe fines. While “unknowing” violations can result in penalties as high as \$125,000, “knowing and continuing” violations can be fined up to \$250,000.<sup>101</sup>

The proliferation of state legislation to ban prior salary history is ongoing. In addition to Florida and New Hampshire, which “already have pay equity bills drafted for consideration in their respective 2018 legislative sessions,” another eleven states are considering “passing similar salary history ban laws” this year.<sup>102</sup> Although growing in popularity, not all legislative efforts to ban prior salary history have been successful.

For example, last August, Illinois Governor Bruce Rauner vetoed a bill that would prohibit employers from inquiring about an applicant’s salary history,

97. Ryan Golden & Valerie Bolden-Barrett, *Women Who Refuse to Disclose Salary History More Likely to Be Paid Less*, HR DRIVE (June 29, 2017), <https://www.hrdrive.com/news/women-who-refuse-to-disclose-salary-history-more-likely-to-be-paid-less/445993/> [<https://perma.cc/T62W-524D>].

98. N.J. Exec. Order 2018-01 (Feb. 1, 2018), [http://nj.gov/governor/news/news/562018/approved/20180116a\\_eo.shtml](http://nj.gov/governor/news/news/562018/approved/20180116a_eo.shtml) [<https://perma.cc/KTG4-WWE7>].

99. Levi Perkins, *Salary History Bans Gain Momentum*, CORP. SCREENING BLOG (Oct. 26, 2017), <https://www.corporatescreening.com/2017/08/03/salary-history-bans-gain-momentum> [<https://perma.cc/Z5AY-WHSZ>].

100. *Id.*

101. Joseph Maddaloni Jr. & Cynthia L. Flanagan, *Salary History Ban Laws Aim to Close Gender Pay Gaps*, N.J. L. J. (Mar. 20, 2018), <https://www.law.com/njlawjournal/2018/03/20/salary-history-ban-laws-aim-to-close-gender-pay-gaps> [<https://perma.cc/8BL7-SRLM>].

102. *Id.*

although the bill passed in a bipartisan manner and by a wide margin in both the state House (91-24) and Senate (35-18).<sup>103</sup> In his veto message, Governor Rauner favorably acknowledged the Massachusetts salary history law as a best-in-the-country approach because of its benefits—for *employers*.<sup>104</sup> Governor Rauner encouraged the Illinois legislature to adopt Massachusetts' legislative language, underscoring a provision that permits employers to seek pay history once they have offered a candidate the job and salary. The exclusion of this provision from the Illinois bill was viewed positively, as some advocates have expressed concern that post-offer salary disclosures “could reduce an employee’s raise or bonus down the road if it is revealed he or she was earning much less before,” effectively undermining the purpose of the legislation.<sup>105</sup> Despite the bill’s popularity, and the fact that a “veto override [would] require 71 votes in the House and 36 in the Senate,” the state legislature has failed to override the veto—twice—effectively rendering the legislation dead.<sup>106</sup>

The activity on the state and local level reflects a willingness to act in the face of federal stagnation on wage parity efforts, as Congress has not been able to pass legislation to address pay disparities resulting from salary history. Perhaps most notable is Congress’ failure in prior sessions to pass the Paycheck Fairness Act, which was most recently re-introduced in 2019.<sup>107</sup> The proposed Paycheck Fairness Act includes a provision banning the use of wage, salary, and benefit history in “considering the prospective employee for employment” or in “determining the wages for such employment . . . [unless] voluntarily provided by a prospective employee . . . to support a wage higher than the wage offered by the employer.”<sup>108</sup> The legislation would also prohibit employers from requesting prior salary directly from a prospective employee’s past employers and protect employees from retaliation.<sup>109</sup> In addition to creating a limit to the “any other factor other than sex” catchall exception currently in the EPA, the Act

103. *Illinois Governor Vetoes Ban on Salary History Inquiries*, GARTNER INC. (Aug. 31, 2017), <https://www.cebglobal.com/talentedaily/illinois-governor-vetoes-ban-on-salary-history-inquiries/> [<https://perma.cc/BV5J-G8Z2>].

104. Memorandum from Bruce Rauner, Governor of Illinois, to Ill. House of Representatives, 100th General Assembly (Aug. 25, 2017), [http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB2462gms&GA=100&SessionId=91&DocTypeId=HB&LegID=103476&DocNum=2462&GAID=14&Session\[https://perma.cc/FJ2V-YR9Z\]](http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB2462gms&GA=100&SessionId=91&DocTypeId=HB&LegID=103476&DocNum=2462&GAID=14&Session[https://perma.cc/FJ2V-YR9Z]); see also Alexia Elejalde-Ruiz, *Rauner Vetoes Bill That Would Bar Employers From Asking About Salary History*, CHI. TRIB. (Aug. 28, 2017), <http://www.chicagotribune.com/business/ct-illinois-no-salary-history-bill-veto-0829-biz-20170828-story.html> [<https://perma.cc/2NLE-9XQL>].

105. Monique Garcia, *Dems push Gov. Rauner to sign bill advocates say could bring women more equal pay*, CHI. TRIB. (Aug. 8, 2018), <https://www.chicagotribune.com/news/local/politics/ct-met-rauner-wage-bill-democrats-20180808-story.html> [<https://perma.cc/KD8H-N9Y6>].

106. Elejalde-Ruiz, *supra* note 104; see also Kate Tornone, *Second Attempt at Illinois Salary History Ban Fails*, HR DIVE (Nov. 9, 2017), <https://www.hrdiver.com/news/second-attempt-at-illinois-salary-history-ban-fails/510534> [<https://perma.cc/S5BP-6P5G>].

107. Paycheck Fairness Act, H.R. 7, 116th Cong. § 10 (2019); Paycheck Fairness Act, S. 270, 116th Cong. § 8 (2019).

108. H.R. 7; S. 270.

109. H.R. 7; S. 270.

would provide a specific penalty: employers would be “liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed \$10,000 plus attorneys’ fees, and shall be subject to such injunctive relief as may be appropriate.”<sup>110</sup>

Especially since the start of the Trump Administration, many advocates have grown increasingly concerned about pay parity efforts on the federal level. Most significantly, Trump suspended an Obama-era policy that would have required “private employers with over 100 workers [to] have had to disclose pay data to the Equal Employment Opportunity Commission on top of information on gender, race, and ethnicity already provided to the agency,” which advocates are concerned will decrease transparency and allow the pay gap to grow.<sup>111</sup> The Trump Administration also rolled back other pay equity efforts, including the White House Equal Pay Pledge, just days after taking office. The pledge “encouraged companies to take action to advance equal pay” and included notable companies such “Patagonia, Estée Lauder, InterContinental Hotels, Mastercard, Yahoo, Square and Zillow.”<sup>112</sup>

In the absence of federal legislation and in the wake of these executive acts, there is increasing pressure on the courts to resolve the circuit split on this question. This would make clear whether additional federal legislation is necessary to add protections for employees nationwide, or if existing protections under the EPA are sufficient to ensure true pay equality for women. The current state of affairs, with federal legislation unlikely to be forthcoming and the question still hotly contested among the circuits, also heightens the importance of developing state-level policies designed to combat barriers to wage parity, including prior salary history, in order to create affirmative protections not otherwise guaranteed through litigation or legislation.

#### IV. POLICY AND POLITICAL CONSIDERATIONS IN DETERMINING THE NEXT STEPS OF THE SALARY HISTORY DEBATE

This Section identifies central issues that are likely to influence the national debate regarding the role of salary history in employment decisions. Situated within the larger salary history discussion, these issues concern the efficacy of

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110. H.R. 7; S. 270.

111. Clare O’Connor, *Trump Halting Equal Pay Measure “‘A Blatant Attack On Women,’”* *Activists Say*, FORBES (Aug. 30, 2017), <https://www.forbes.com/sites/clareoconnor/2017/08/30/trump-halting-equal-pay-measure-a-blatant-attack-on-women-activists-say/#a39aa2a395b1> [https://perma.cc/T7K7-J9Q3].

112. Mandana Massoumi, *INSIGHT: A Wave of Statewide Equal Pay Legislation Continues Despite the Trump Administration’s Move in the Opposite Direction*, BLOOMBERG L. (July 12, 2018), <https://news.bloomberglaw.com/daily-labor-report/insight-a-wave-of-statewide-equal-pay-legislation-continues-despite-the-trump-administrations-move-in-the-opposite-direction> [https://perma.cc/A5ME-6RAH].



salary history bans, the role of courts and legislatures, the use of prior salary in negotiations, and the unique impact on women of color.

Prior to analyzing these considerations, consider an illustrative example to demonstrate the significance of the wage gap: assume that a man's starting salary is \$5,000 more than a woman's. In addition to the immediate differential in their earning, over time this gap is exacerbated. First, even if raises are given at the same percent each year, because the base amount the man receives is higher, so too is the dollar value that is represented by an equal percentage raise. What started as a \$5,000 gap per year grows into a differential that is more than \$15,000 per year over four decades; in this example, the gap has grown more than three times.<sup>113</sup> In addition to an annual differential, there is a huge gap in the cumulative earnings between these employees. By the time the two workers are 60, extra earnings for the male total over \$360,000.<sup>114</sup> Finally, the wage differential is made more acute by added value of savings, which augment this differential. Putting the salary differential into a savings account with 3 percent interest would put the man's total earnings at nearly \$570,000 more than the woman's total earnings.<sup>115</sup>

This example demonstrates the impact of the wage gap, not only in direct earnings and day-to-day expenditures for women, but in the compounding nature of this differential. An initial disparity creates a wealth gap that increasingly impacts the economic security and wealth-building opportunities for women over the long-term.

Although these figures help quantify the impact and escalation of wage differentials, even when differences are initially minor, these numbers fail to capture how this impacts the lived experiences of women. Betty Dukes was the named plaintiff in a claim against Wal-Mart for gender discrimination in pay and promotion policies and practices.<sup>116</sup> She described the direct and personal impact of her lower salary by explaining: "When you subtract my living [expenses], I'm not living — I'm existing. I have an 88-year-old mother. Economically, there's nothing I can do for my mom to make her life more golden in her golden years, because I have no resources to do that."<sup>117</sup>

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113. *Id.*

114. *Id.*

115. See JEANNE H. BALLANTINE, KEITH A. ROBERTS, KATHLEEN ODELL KORGEN, *OUR SOCIAL WORLD: INTRODUCTION TO SOCIOLOGY* (2016).

116. *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

117. Dave Jamieson, *Betty Dukes, Renowned Dukes v. Walmart Plaintiff, Takes Her Fight Back to Capitol Hill*, HUFFINGTON POST (Jun. 20, 2012), [http://www.huffingtonpost.com/2012/06/20/betty-dukes-walmart-supreme-court\\_n\\_1613305.html](http://www.huffingtonpost.com/2012/06/20/betty-dukes-walmart-supreme-court_n_1613305.html) [<https://perma.cc/FBX9-PC8F>] (discussing plaintiff in *Dukes v. Walmart* after the Supreme Court failed to certify what would have been the largest class action lawsuit in U.S. history, representing a proposed class of more than a million women alleging gender discrimination in pay and promotion policies and practices).

*A. Assessing the Implementation and Efficacy of Salary History Bans*

An ongoing point of contention, even among advocates who all favor pay equity, is whether banning the use of prior salary history is an effective remedy to resolve the pay gap. Although salary history prohibitions are meant to close the gender wage gap, they may also have adverse consequences. Employers may assume that women who refuse to disclose their pay have earned less or that they are more determined to negotiate their salary aggressively, making them a less appealing candidate. Women may also be perceived adversely for initiating salary negotiations, even if men are not similarly penalized.<sup>118</sup>

Other concerns have been expressed about existing legislative measures banning the use of prior salary history. For instance, even though the Massachusetts law provided other employment protections, some have been critical of the bill's salary history provision as superfluous. A main critique is that employers have a work-around: asking prospective employees about their salary expectations. *HR Professionals Magazine* provides several suggestions of questions that employers should ask in lieu of salary history, including: "What are your salary expectations?" This gives the candidate the ability to share what they seek to make for the role. It lets you decide if you should keep talking with them. It also tells you whether they've done their homework or not."<sup>119</sup>

There is an additional concern that adopting a particular policy or standard will have the effect of backing courts and legislatures into a corner, especially if the adopted rule is not effective. The process of undoing precedent or rescinding legislation may be even more difficult. Those persuaded by this argument might support the adoption of the middle-ground approach taken by most circuits, which permits the consideration of salary history in limited circumstances and under close scrutiny by the courts. As expressed in *Taylor*, the Eighth Circuit was "reluctant to establish a per se rule that might chill the legitimate use of gender-neutral policies and practices."<sup>120</sup> This moderate approach may help build judicial consensus, while also balancing the concerns of employers and employees.

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118. Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity> [https://perma.cc/6C7D-94EX].

119. *The Salary History Question: Alternatives for Recruiters and Hiring Managers*, HR PROF'L MAG. (2017), <http://hrprofessionalsmagazine.com/the-salary-history-question-alternatives-for-recruiters-and-hiring-managers> [https://perma.cc/NT38-RZQD].

120. *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003).

*B. Evaluating the Most Effective Actor: Courts vs. Legislatures*

With both active federal litigation over the EPA's application to prior salary history and a marked increase in state and local legislation on the issue, many equal pay advocates may question which approach to favor.

While it might be quicker for the Supreme Court to resolve the circuit split, there are potential shortcomings to judicial interventions for equal pay. Judge Nancy Gertner assesses employment discrimination law's skewed evolution in her essay entitled *Losers' Rules*. She contends that judicial remedies are inadequate to address gender-based employment discrimination, including the gender pay gap, despite long-standing legislation that makes it illegal for employers to discriminate on the basis of sex. As such, while litigation efforts should continue, state legislation should be an ongoing focus for equal pay advocates.

First, Judge Gertner asserts, judges do not see the strongest cases of discrimination because they are settled rather than litigated.<sup>121</sup> Second, defendants prevail more frequently at the summary judgment stage, likely in part because the plaintiff bears the burden of proof in employment discrimination cases.<sup>122</sup> Additionally, when a court grants defendants summary judgment, it authors an opinion in opposition to the plaintiff; however, when courts deny summary judgment, the case proceeds to trial and no pro-plaintiff record is established.<sup>123</sup> Finally, interpretive bias resolves ambiguity in favor of defendants, creating another advantage for employers.<sup>124</sup>

Such asymmetrical decision making has created a one-sided body of law that undermines the plaintiffs who challenge gender-based employment discrimination. As a result, judges follow distorted precedent that reifies and affirms the biased judicial decision-making process. Moreover, courts are more likely to presumptively view gender-based employment discrimination claims as trivial, particularly in factually complex or ambiguous cases, giving defendants the benefit of the doubt.<sup>125</sup> Inconsistent pay for plaintiffs' attorneys, protracted lawsuits, and high litigation costs complicate litigation and often create

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121. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. F. 109, 115 (2012).

122. *Id.* (basing claim on Federal Judicial Center report, summary judgment motions, which are overwhelmingly brought by defendants, were granted more often in employment discrimination cases than in the aggregate).

123. *Id.*

124. *Id.* at 118 (ignoring explicitly discriminatory statements, such as in the "stray remarks" doctrine, fundamentally distorts the outcome of discrimination cases by dismissing direct evidence of bias upon which plaintiffs could rely).

125. *Id.* at 117 (noting that "one-sided heuristics—rules of thumb that oversimplify, dismiss, and often demean proof of discrimination" not only favor the efficient dismissal of cases, but elevate the concern of creating false positives over the concern for "false negatives that leave meritorious claims of discrimination unredressed").

additional incentives to settle.<sup>126</sup> These aspects of the judicial system reinforce a strong pro-defendant narrative that, when juxtaposed with an anti-plaintiff judicial decision-making framework, makes it more difficult for claims to succeed.

These biases in the litigation process have substantial implications for the power dynamics between the parties and make it is easy to see why a legislative resolution may be preferable. However, state policymaking is not without its own challenges. For instance, preemption laws have been used to usurp local legislation on a range of issues—from preventing gun regulation<sup>127</sup> to curtailing environmental regulation.<sup>128</sup>

Most recently, preemption laws have been a dominant instrument in state regulation to squelch local experimentation and curtail the expansion of employment protections. Such efforts have been successfully used to preempt localities from setting minimum wage laws. For example, cities and counties have been extremely effective in passing legislation to increase the minimum wage, demonstrated by the fact that “more than 40 cities or counties in states such as California, New Mexico, and Arizona have adopted local minimum wage laws.”<sup>129</sup> As a result, at least twenty-five states currently have “laws that preempt cities from passing their own local minimum wage laws.”<sup>130</sup> Efforts in some states, like Missouri, have been in direct opposition to city expansions. Missouri’s preemption law will effectively roll back “St. Louis’ \$10-an-hour minimum wage ordinance passed earlier this year . . . [meaning] thousands of minimum-wage earners in the city could go back to earning the state rate of \$7.70 an hour.”<sup>131</sup>

Advancement of local and state policies has the impact of substantively expanding employment protections within those geographic areas. While state policymaking would require a piecemeal approach, achieve less consistent nationwide practices, and face potential preemption challenges, these policies can help ensure that pay gaps, particularly for women, are not compounded over time. These laws can complement the protections of the EPA or potentially

126. Greg Ryan, *What Defense Attys Should Know Before Going Plaintiff*, LAW360 (Aug. 20, 2013), <http://www.law360.com/articles/466366/what-defense-attys-should-know-before-going-plaintiff> [https://perma.cc/V9YZ-YL7W].

127. See *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (2017), <http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/#state> [https://perma.cc/4SAS-6YYH].

128. Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES (2017), <https://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf> [https://perma.cc/F5FT-P384].

129. *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT’L EMP. L. PROJECT 1 (July 2017), <http://www.nelp.org/content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf> [https://perma.cc/7QWH-3DGR].

130. *Id.* at 2.

131. Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (July 18, 2017, 4:39 PM), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back> [https://perma.cc/MR4C-FSKT].

provide additional coverage, depending on the ultimate interpretation adopted by the Supreme Court. Moreover, the laboratories of democracy theory suggests that experimentation with various policies can also help bring to light unintended consequences of such laws and help advocates move closer to the goal of pay parity.

These state and local policies may also catalyze broader change. For instance, national companies seeking to adopt a consistent practice within their organization may change organization-wide salary-setting practices if they operate in at least one state with a salary history ban. Several industry-leading employers “like Amazon, Bank of America, Wells Fargo, and Progressive have eliminated salary history questions from the hiring process, and other employers are following suit.”<sup>132</sup> One recent survey found that nearly 40% of surveyed employers “had implemented a policy to stop asking about a candidate’s salary history” and that 40% of employers without an existing policy were likely to adopt a salary history ban in the next 12 months. Thus, even in the absence of a consistent national policy or uniform interpretation of existing legislation, widespread discourse on the issue, or even a single state’s policy, could have national consequences.<sup>133</sup>

Although there are benefits to a federal approach, “the policymaking benefits associated with devolution, including mutual learning, iterative regulation, helpful redundancy, and healthy competition” suggest that state and local policymaking should be more than a secondary alternative.<sup>134</sup> As Heather Gerken explains in *Federalism 3.0*, “the fact that states are embedded in a federal regime also allows them to play a crucial role in defending congressional prerogatives, checking executive overreach, and safeguarding the separation of powers.”<sup>135</sup> States should be viewed as robust democratic actors. Accordingly, the development of state and local legislation is an affirmative strategy to pursue, not in lieu of federal legislation, but as a complement to national policymaking efforts. Ultimately, our policies benefit from the refinement that results from the interaction between federal and state actors; this iterative process is a function of the structure of our democracy itself, where “[c]ooperative federalism is paired with uncooperative federalism,” to create a feedback loop within the system of checks and balances.<sup>136</sup>

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132. Genevieve Douglas, *States Begin to Block Bans on Pay History Inquiries; Will Others Follow?*, BLOOMBERG L. (Apr. 9, 2018), <https://www.bna.com/states-begin-block-b57982090883> [https://perma.cc/ABS6-D9MK].

133. *Id.* at 1721.

134. Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1720 (2017).

135. *Id.*

136. *Id.*

### C. Accounting for the Impact of Salary History in Negotiations

While experts have posited many reasons for pay discrepancies—ranging from occupational segregation, to the impacts of maternity leave and motherhood, to overt discrimination—gender pay inequity persists.<sup>137</sup> These major and systemic workplace issues impact working women daily, as does “the lack of adequate lactation rooms in most office buildings, antiquated office dress codes that require women to wear high heels to work and the size of safety gear available[, such as those used by] female astronauts [and soldiers].”<sup>138</sup>

Salary negotiations are another possible cause of pay disparities, and negotiations often prompt questions related to salary history. As illustrated in the earlier example, salary differentials can result in both short-term and long-term inequities.<sup>139</sup> Even an initially small pay disparity can eventually lead to disparities of several hundred thousand dollars. Lower salaries constrain spending, whereas a worker’s ability to save generates additional earnings. In this way, seemingly small differences in pay result in substantial long-term inequities.

There are other concerns about the use of salary history in the pay negotiation and wage-setting process. The National Women’s Law Center (“NWLC”) identifies several additional complications. First, NWLC cites recent research that proves that women, particularly women of color, face bias in the salary-setting process. In an experiment, researchers found that employers offered the male applicant, John, a salary nearly \$4,000 higher than the female applicant, Jennifer, despite the fact that both candidates had identical resumés, except for the name.<sup>140</sup> Intentional or not, conscious or otherwise, this bias increases the likelihood that women will face disparities that are magnified, not

137. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/> [<https://perma.cc/PQ3N-SHYL>]; Miriam Valverde, *Hillary Clinton Says Donald Trump Doesn’t Believe in Equal Pay*, POLITIFACT (Nov. 2, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/nov/02/hillary-clinton/hillary-clinton-says-donald-trump-doesnt-believe-e> [<https://perma.cc/AGZ2-R3L2>].

138. These institutional barriers are as embedded and routine as “temperature setting, [which] in most workplaces is calibrated to men’s metabolic rates, so women are often uncomfortably cold,” which chills strides towards full inclusion of women in all careers. Marisa Porges, *What the Failed All-Female Spacewalk Tells Us About Office Temperature: In a For-Men, By-Men World, the Little Things Still Really Do Matter*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/opinion/nasa-female-spacewalk.html> [<https://perma.cc/4U8D-TDDU>].

139. CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: APPROPRIATE PROCESS AND PROBLEM SOLVING* (2006).

140. National Women’s Law Center, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job* (June 2017), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4\\_mv06F7CjAivNg3wj3gjP5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4_mv06F7CjAivNg3wj3gjP5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus) [<https://perma.cc/E5H2-QG3V>] (referencing Corrine A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, PROC. NAT’L ACAD. SCI. (Aug. 2012), <http://www.pnas.org/content/109/41/16474.abstract#aff-1> [<https://perma.cc/FCL5-6X6H>]).

neutralized, by the salary negotiation process. In addition, “women are more likely to have worked in lower paid, female-dominated professions that pay low wages simply because women are the majority of workers in the occupation.”<sup>141</sup> Moreover, because women carry “the majority of caregiving responsibilities,” they are more likely “to reduce their hours or leave the workforce to care for children and other family members.”<sup>142</sup> These dynamics also impact educated women. Even though this group is “the least likely to stop working after having children,” it is important to recognize the social and economic dynamics “that push couples who have equal career potential to take on unequal roles,” as women often move to less demanding jobs or reduce their hours in order to accommodate their partner’s career and earning potential.<sup>143</sup> Recognizing that “[w]omen don’t step back from work because they have rich husbands ... [but that] [t]hey have rich husbands because they step back from work” is the first step to understanding how this phenomenon intersects with the compounding effects of the pay gap.<sup>144</sup> Overrepresentation in low-wage industries, accumulation of unpaid caregiving responsibilities, and practical limitations on earning capacity present additional hurdles for women to overcome in salary negotiation.

In addition to these obstacles in negotiation, other challenges that result from the use of prior salary history information include salaries that may not reflect current market conditions or a candidate’s current qualifications; preemptive screening of candidates because of salaries that are too high or too low, without an assessment of skill, knowledge, or experience; and salary disclosures that artificially deflate wages because employers are less likely to pay an applicant significantly more than their previous role.<sup>145</sup>

Courts have also recognized the difficulty of overcoming sexism in pay negotiations. The Ninth Circuit’s opinion in *Rizo* notes the limits of its holding, particularly with regard to salary negotiations:

Today we express a general rule and do not attempt to resolve its applications under all circumstances. We do not decide, for example, whether or under what circumstances past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions relating to individualized negotiations for decision in subsequent cases.<sup>146</sup>

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141. *Id.*

142. *Id.*

143. Claire Cain Miller, *Women Did Everything Right. Then Work Got ‘Greedy’: How America’s Obsession with Long Hours has Widened the Gender Gap*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html> [<https://perma.cc/3WBJ-2282>].

144. *Id.*

145. *Id.*

146. *Rizo*, 887 F.3d at 461.

Although specifically noting that the majority's opinion "should in no way be taken as barring or posing any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations," the concurrences by Judges McKeown and Callahan express concern that this holding could upset settled precedent.<sup>147</sup>

While the Ninth Circuit's ruling prohibits the reliance on salary history generally, it is unclear if or how this holding can break a cycle that often occurs in employment: prior salary is used to determine one's new salary. When employers are banned from inquiring about applicants' previous wages, applicants are relieved from having to disclose information that could be used against them to artificially deflate their salary. This ban breaks the cycle of underpayment. This rationale, which has prompted states like Massachusetts to take action to remedy the pay gap, will likely have a continuing influence on ongoing jurisprudence in about the use of prior salary history, particularly in the context of negotiations.<sup>148</sup>

#### *D. Understanding the Implications for Women of Color Using the Lens of Intersectionality*

There are many employment challenges faced by women of all races, including underrepresentation in high level, high-paying positions, and overrepresentation in low-paying jobs.<sup>149</sup> Only 5 percent of CEOs at Fortune 500 companies are women.<sup>150</sup> Women comprise less than 30 percent of earners at the top 10 percent and less than 20 percent of earners at the top 1 percent.<sup>151</sup> By contrast, "[w]omen make up 63 percent of workers earning the federal minimum wage, a wage rate stuck at \$7.25 since 2009."<sup>152</sup> Additionally, "[f]emale-dominated occupations — such as childcare and restaurant service — continue to occupy the lower rungs of the U.S. wage ladder."<sup>153</sup>

It should come as no surprise that the rates of female poverty are also higher—with 13.4 million women (13.4%) aged 18-64 living in poverty, as compared with 9.4 million (9.7%) of adult men.<sup>154</sup> This gap grows further when comparing poverty rates for single-parent households with children, where

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147. *Id.* at 468-78.

148. Frank, *supra* note 118.

149. *Economic Inequality Across Gender Diversity*, INST. FOR POL'Y STUD. (2019), <https://inequality.org/gender-inequality> [<https://perma.cc/3WBJ-2282>].

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*



female-headed households “had a poverty rate of 35.6 percent, more than twice the 17.3 percent rate for households led by single men with children.”<sup>155</sup>

The gender wage gap also perpetuates the gender wealth gap, where earnings over time result in an even wider schism between the sexes, both directly and indirectly. Wage disparities impact pension plan payments and Social Security payouts, both of which are partly based past earnings.<sup>156</sup> More tangentially, women have smaller retirement savings but longer life expectancies than men, which are impacted by their earnings.<sup>157</sup> Women “hold nearly two-thirds of outstanding student loan debt” even though they only make up about half of college students.<sup>158</sup> These are just some of the ways women’s debt and savings are uniquely impacted by the gender wage gap.

Ongoing research shows that pay disparities are often worse for women of color.<sup>159</sup> According to research compiled by the American Association of University Women (“AAUW”), most women of color face an even greater wage gap than white non-Hispanic women, whose earnings were 77 percent that of white men.<sup>160</sup> In comparison, native Hawaiian and other Pacific Islander women earn 65 percent, black women earn 61 percent, native women earn 58 percent, and Latina women earn 53 percent as much as white men.<sup>161</sup> Only Asian women outpace white non-Hispanic women, but still only earn 85 percent as much as white men.<sup>162</sup> Accordingly, women of color are typically at an even greater disadvantage and disproportionately bear the impact of the wage gap. As the wage gap grows, so does the impact on the poverty and wealth gaps for women of color.

Sociologists have investigated “how racial and gender discrimination play important roles in creating and reinforcing this particular wage gap,” including research demonstrating that “office rules are applied more harshly to women of color than to others, and that some predominantly white workplaces have racially inhospitable environments that serve to push women of color out.”<sup>163</sup> Researchers have also investigated “how black women working in male-

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155. *Id.*

156. *Id.* (“In 2017, the \$15,000 average annual Social Security benefit for women lagged the benefit for men by \$4,000.”).

157. *Id.*

158. *Id.*

159. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, QUANTIFYING AMERICA’S GENDER WAGE GAP BY RACE (Mar. 2019), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4\\_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTiNeEztBdEIP1kvbus](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTiNeEztBdEIP1kvbus) [<https://perma.cc/2X6D-89VW>].

160. KEVIN MILLER & DEBORAH J. VAGINS, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP, AAUW 9 (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The\\_Simple\\_Truth](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth) [<https://perma.cc/QP2L-ECZL>].

161. *Id.*

162. *Id.*

163. Adia Harvey Wingfield, *About Those 79 Cents*, THE ATLANTIC (Oct. 17, 2016), <https://www.theatlantic.com/business/archive/2016/10/79-cents/504386> [<https://perma.cc/QP2L-ECZL>].

dominated executive ranks encounter both racial and gender stereotypes as well as disparities in mentorship that limit their career trajectories.”<sup>164</sup> These studies complement the findings of New York University researcher Deirdre Royster, whose work shows “that social networks help white men more than black men when it comes to looking for skilled jobs,” underscoring the importance of access to insider networks.<sup>165</sup>

This research is similar to the resumé study showing gender bias in salary-setting, in which employers on average offered John a starting salary nearly \$4,000 more than Jennifer, although their resumé were otherwise identical.<sup>166</sup> Similar research has demonstrated that the same phenomenon occurs with respect to race. One study of employers in Boston and Chicago found that white-sounding names—Greg Baker and Emily Walsh—generated a callback rate 50% higher than that of equally qualified applicants with African-American-sounding names—Lakisha Washington and Jamal Jones.<sup>167</sup> Another recent study showed racial discrimination in the evaluation of identical writing samples. Half of the reviewers were told the candidate was white and the other half were told the candidate was African-American.<sup>168</sup> Even though the memos were identical, “reviewers rated the memo thought to be written by a white man an average score of 4.1 out of 5, while they rated the memo thought to be written by an African-American man a score of 3.2 out of 5.”<sup>169</sup> These statistics illuminate a difficult reality: “contemporary bias is often subtle, unconscious, and institutionally based.”<sup>170</sup>

Broad statistics like these contain useful insights for advocates of pay equity, but they don’t tell the whole story. First, there is additional complexity within the subgroups in the statistics cited. For instance, although Asian women are paid more than women from other minority groups, the general group statistics do not fully reflect the experiences of all Asian women, as there is also diversity within this group. In the United States, Asian women “of Indian and Chinese descent are on average paid better . . . but Burmese, Hmong, and Laotian women on average are paid significantly less—60 percent or less of what white men are paid.”<sup>171</sup> A simple comparison between ethnic groups glosses over the different experiences of Asian women based on their country of origin.

Second, there are additional impacts on women who hold more than one minority identity. As seen with the intersection of gender and race in

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164. *Id.*

165. *Id.*

166. National Women’s Law Center, *supra* note 140.

167. Jamillah Bowman Williams, *Accountability as a Debiasing Strategy: Testing the Effect of Racial Diversity in Employment Committees*, 103 IOWA L. REV. 1593, 1597 (2018).

168. *Id.* at 1598.

169. *Id.*

170. *Id.*

171. MILLER, *supra* note 160, at 10.

employment, “[w]omen of color . . . experience particularly high levels of poverty, unemployment, and other economic hardships.”<sup>172</sup>

This is further compounded for women of color who are also members of other minority or historically disadvantaged groups due to their age,<sup>173</sup> disability,<sup>174</sup> sexual orientation, or gender identity.<sup>175</sup> Adopting an intersectional lens in which “categories like gender, race, and class are best understood as overlapping and mutually constitutive rather than isolated and distinct” can inform solutions that account for the experiences of all women.<sup>176</sup> The importance of intersectionality is that it “deliberately focus[es] on those on the fringes” to ensure that a “focus on women” includes all women.<sup>177</sup>

The concept of intersectionality, first introduced by legal scholar Kimberlé Crenshaw, recognizes that race and gender are interconnected and interrelated, rather than discrete categories of analysis.<sup>178</sup> Because a person “does not experience oppressions or privileges discretely, but simultaneously . . . women of color often have unique intersectional experiences that neither men of color nor white women can relate to.”<sup>179</sup>

Intersectional problems require intersectional solutions. It is critical to address bias in salary history, as well as other gender-based forms of discrimination, ranging from stereotyping to the motherhood penalty, that afflict all women. However, it is not sufficient to advocate for salary parity, pregnancy or caregiver protections, or other policies that benefit women as a monolith. A comprehensive and multi-faceted solution that is also intersectional will better address the broad impacts of the gender wage gap, including its implications for women’s access to housing, education, and credit. Implementing policies that “improve the quality of jobs held mainly by women, tackle occupational segregation, enforce equal pay and employment opportunities, and improve work family benefits for all workers, will help the incomes of women and their families grow and strengthen the economy.”<sup>180</sup> Accordingly, “any efforts to close the gender-pay gap should address not just the processes that perpetuate gender discrimination . . . but also the mechanisms that reproduce racial inequalities” so

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 11.

176. Wingfield, *supra* note 163.

177. Jennifer Kim, *Intersectionality 101: Why “We’re Focusing on Women” Doesn’t Work for Diversity & Inclusion*, MEDIUM (Apr. 10, 2018), <https://medium.com/awaken-blog/intersectionality-101-why-were-focusing-on-women-doesn-t-work-for-diversity-inclusion-8f591d196789> [<https://perma.cc/WZN7-DKQP>].

178. Kimberlé 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.

179. Kim, *supra* note 177; see also Wingfield, *supra* note 163.

180. Erica Williams, *On Equal Pay Day, a Look at How EITCs Help Women in Every State*, CTR. ON BUDGET & POL’Y PRIORITIES (Apr. 10, 2018), <https://www.cbpp.org/blog/on-equal-pay-day-a-look-at-how-eitcs-help-women-in-every-state> [<https://perma.cc/5FD3-HZRE>].

that the pay gaps that remain are “driven only by differences in skill, education, and experience—not by race or gender.”<sup>181</sup>

## V. CONCLUSION

The question of whether prior salary history is a “factor other than sex” under the EPA will likely be determined by the Supreme Court, as the circuit split on this question was not answered in the Court’s review of Ninth Circuit’s en banc decision in *Rizo*. This Article summarizes the existing circuit divide on this question, assessing arguments related to the statute’s text, legislative history, and purpose. Additionally, state legislative efforts to address problems that arise from the use of prior salary history provide important context for the evolution of a national dialogue on this issue. Finally, while the policy consequences of the ongoing salary history debate are uncertain, special attention should be paid to the efficacy of salary history bans, the role of courts and legislatures in setting the scope of use of salary history information, the impact of prior salary in employment negotiations, and the unique barriers faced by women of color. In addition to achieving the goal of pay equity through the elimination of prior salary history, advocates should promote intersectional solutions that improve the outcomes for all women. Such solutions include enhancing union protections, mandating paid leave and flexible scheduling, and designing tax and economic policies that help all workers. Ultimately, these court decisions, legislative choices, and national discussions will help ensure that the fundamental goal of the Equal Pay Act is realized: offering truly equal employment opportunities to all workers, regardless of sex or salary history.

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181. Wingfield, *supra* note 163.



# Reconstructing State Intervention in Pregnancy to Empower New Zealand Women

Taylor Clare Burgess<sup>†</sup>

**ABSTRACT:** Over the last twenty years, New Zealand courts have extended the State’s child protection powers to the fetus as an “unborn child.” The child care and protection agency, Oranga Tamariki, purports to protect children, but its oversight regulates pregnant *women’s* choices about how they run their lives and what they do with their bodies. This Note argues for a reconstruction of State intervention in pregnancy to empower pregnant women’s fully autonomous decision making and provide the social conditions and resources to support family life.

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<sup>†</sup> Yale Law School, LL.M. 2019; University of Auckland, B.A./LL.B (Hons) 2015. I am grateful to Alice Miller for her generous support and comments on earlier versions of this Note. My thanks to the *Yale Journal of Law & Feminism* editing team.

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## INTRODUCTION

State child protection agencies have a vexed relationship with pregnancy. The vexed relationship arises from the paradox of pregnancy raising two subjects of State interest: a present pregnant woman and a future child. In this moment of paradox, pregnancy can be a positive opportunity for the State to support pregnant women to prepare for wanted, healthy pregnancies and stable parenting relationships. Equally, pregnancy can be a site of pernicious State regulation that restricts a pregnant woman's ability to make decisions about her own life and imposes a government standard for family life that excludes women who fall outside white middle-class norms of "good" motherhood.

The promise and peril in State intervention is illustrated by the work of New Zealand's new government agency for children and young people, Oranga Tamariki—Ministry for Children. In 2017, Oranga Tamariki replaced the former government agency for child protection services, Child, Youth and Family, after an Expert Advisory Panel found the agency was failing to meet the needs of children and young people.<sup>1</sup> Oranga Tamariki aims to build a child-centered, investment approach to working with children and young people. The Ministry intends to replace the traditional "crisis response" model for child protection services with a system "focused on prevention and early intervention, with the aim of having fewer children moving through the system and into care."<sup>2</sup> Critically, this investment model is built on "high aspirations" for tamariki Māori (Māori children and young people).<sup>3</sup>

In the new "investment model," prevention and early intervention begin with pregnancy. Oranga Tamariki sees pre-birth as a "unique opportunity" to work

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1. Modernising Child, Youth and Family Expert Panel, Expert Panel Final Report: Investing in New Zealand's Children and their Families 20 (2015) [hereinafter Final Report]; see also Cabinet Social Policy Committee Minute of Decision "Organisational Form to Support the New Operating Model for Vulnerable Children."

2. *What We Do*, ORANGA TAMARIKI, <https://www.orangatamariki.govt.nz/about-us/what-we-do> [<https://perma.cc/NNQ8-PFL2>].

3. FINAL REPORT, *supra* note 1, at 11; and *Who We Are*, ORANGA TAMARIKI, <https://www.orangatamariki.govt.nz/about-us/overview/> [<https://perma.cc/FRL9-JFY8>].

with families, whānau<sup>4</sup> and other professionals to assess parenting capacity, determine a family's needs and implement a plan that will secure the immediate safety of the newborn infant and its "brightest future."<sup>5</sup> The pre-birth practice framework is supported by a line of New Zealand cases holding that the agency is empowered to investigate reports of concern for an "unborn child" and apply to the courts for statutory orders over that "unborn child."<sup>6</sup>

Oranga Tamariki is a part of New Zealand's broader efforts to rectify a shameful record of neglecting certain groups of children's wellbeing and make New Zealand "the best place in the world to be a child."<sup>7</sup> In 2016, New Zealand's child poverty monitor found 27 percent of New Zealand children lived in households experiencing income poverty and seven percent lived in severe poverty.<sup>8</sup> Almost one in four New Zealand children have been subject to at least one report to child protective services by age seventeen and around one in ten have suffered abuse or neglect.<sup>9</sup> While Indigenous Māori are found at all levels of socio-economic status in New Zealand,<sup>10</sup> Māori children experience significantly higher rates of deprivation and disadvantage than New Zealand European children. Māori children are twice as likely as non-Māori to live in food insecure households and have significantly higher rates of mortality and hospitalization for medical conditions.<sup>11</sup>

New Zealand's contemporary efforts to address child poverty are anchored in its context of colonization. In New Zealand's colonial history, the Crown alienated Indigenous Māori land and resources and undermined the Māori

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4. "Whānau" is the Māori concept of an extended family or family group, or "a multigenerational collective made up of many households that are supported and strengthened by a wider network of relation" *Whānau*, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=whanau> [<https://perma.cc/TYXJ-HEBL>]; see also FIONA CRAM, FAMILIES COMMISSION—KŌMIHANA Ā WHĀNAU, SAFETY OF SUBSEQUENT CHILDREN: MĀORI CHILDREN AND WHĀNAU 11 (2012).

5. ORANGA TAMARIKI PRACTICE CENTRE, STRENGTHENING OUR RESPONSE TO UNBORN BABIES, <https://practice.orangatamariki.govt.nz/policy/assessment-and-decisionmaking/key-information/strengthening-our-response-to-unborn-babies/> [<https://perma.cc/C4YN-V7W5>].

6. See, e.g., *In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC); *Re an Unborn Child* [2003] 1 NZLR 115 (HC); *L v. Chief Executive Oranga Tamariki—Ministry for Vulnerable Children* [2018] NZHC 1420.

7. Jacinda Ardern, 40th Prime Minister of New Zealand, Speech to 9th Annual Social Good Summit (Sept. 24, 2018), <https://perma.cc/D5K5-HKNY>. See also NEW ZEALAND GOVERNMENT, OUR PLAN: THE GOVERNMENT'S PRIORITIES FOR NEW ZEALAND, <https://www.beehive.govt.nz/sites/default/files/2018-09/Our%20Plan.pdf> [<https://perma.cc/LE78-9LMC>].

8. M. DUNCANSON ET AL., NEW ZEALAND CHILD AND YOUTH EPIDEMIOLOGY SERVICE, CHILD POVERTY MONITOR: TECHNICAL REPORT 3 (2017). The 2018 report of the Child Poverty Monitor did not include updated income poverty rates due to issues relating to sample size.

9. Bénédicte Rouland & Rhema Vaithianathan, *Cumulative Prevalence of Maltreatment Among New Zealand Children, 1998-2015*, 108 AM. J. PUB. HEALTH 511, 512 (2018).

10. See EXPERT ADVISORY GROUP ON SOLUTIONS TO CHILD POVERTY, WORKING PAPER NO. 14: REDUCING CHILD POVERTY IN MĀORI WHĀNAU 1 (2012), <https://www.occ.org.nz/assets/Uploads/EAG/Working-papers/No-14-Reducing-poverty-in-Maori-children.pdf> [<https://perma.cc/PVV7-SKXT>].

11. See M. DUNCANSON ET AL., NEW ZEALAND CHILD AND YOUTH EPIDEMIOLOGY SERVICE, UNIVERSITY OF OTAGO, DUNEDIN, CHILD POVERTY MONITOR TECHNICAL REPORT (2018), <http://www.nzchildren.co.nz/> [<https://perma.cc/25M5-RVVS>].



cultural, spiritual and economic base. New Zealand's policies, institutions and infrastructure are steeped with notions of Māori inferiority and Pākehā (New Zealand European) superiority.<sup>12</sup> The legacy of colonization is "the differential distribution of social, political, environmental and economic resources and wellbeing . . . with Māori bearing the brunt of disparities."<sup>13</sup>

This Note argues that extending the State's discretionary child protection powers to the fetus as an "unborn child" in New Zealand's environment of structural inequality and colonial oppression perversely acts to constrain the rights and interests of the very women the State has an obligation to empower. I contend that the State should not abandon pregnancy intervention, but reconstruct interventions in line with an affirmative concept of the right to privacy emphasizing the duty of the State to provide social conditions and resources to support pregnant women's fully autonomous decision making.

The Note begins in Part I by tracing how the New Zealand courts have found the State's child care and protection powers extend to protect the "unborn child" from harm. I outline how Oranga Tamariki pursues this accepted State interest in the "unborn child" through an intensive investment model that prioritizes prevention and early intervention services beginning before birth. Part II argues that framing the fetus as an "unborn child" has served to obscure pregnant women and drive State intervention.

Part III demonstrates that applying the construct of the "unborn child" in the context of New Zealand's structural inequality, colonial oppression, and dominant white middle-class notions of family and motherhood disproportionately impacts Māori women and women experiencing poverty. Part IV highlights the perversity of the State interventions constraining rather than empowering pregnant women. At the individual level, State oversight infringes a woman's right to privacy. At the collective level, the unequal State oversight imposes an invidious standard for family life and distracts the public from the broader State supports required for all to improve children's wellbeing.

Part V argues for a reconstruction of pregnancy intervention to empower all pregnant women and support families. Two core features of traditional child protection services, the paramountcy principle and the child rescue model, are fundamentally incompatible with the autonomy of pregnant women. While this structure endures, New Zealand will be unable to achieve positive, empowering intervention within the child protection branch. However, the State's vexed relationship with pregnant women cannot be resolved by the State withdrawing from pregnancy altogether. Reconstruction of State intervention is supported by

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12. See Fiona Cram, *Poverty*, in MĀORI AND SOCIAL ISSUES 156, 156 (Tracey McIntosh & Malcolm Mulholland eds., 2011.) "Pākehā" is a term used to describe New Zealanders of European descent: *Pākehā* MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=pakeha> [<https://perma.cc/A6PD-CLPZ>].

13. *Id.* at 156.

an affirmative concept of the right to privacy, reproductive justice, the Crown's obligations under Te Tiriti o Waitangi,<sup>14</sup> and New Zealand's international treaty obligations to support family life.<sup>15</sup>

# I. NEW ZEALAND EXTENDS CHILD CARE AND PROTECTION POWERS TO THE "UNBORN CHILD"

From 2017 to 2018, Oranga Tamariki received 1,949 separate reports of concern that an "unborn child" in New Zealand had been, or was likely to be, harmed, ill-treated, abused, or neglected.<sup>16</sup> Oranga Tamariki took further care and protection action on 1,235 of these reports of concern and obtained custody orders for a total of 125 unborn children in New Zealand during that year.<sup>17</sup> This part traces how New Zealand came to extend its broad, discretionary child protection powers to the fetus as the "unborn child" and how this extension has served to obscure the interests of pregnant women in New Zealand.

## A. *New Zealand's Mission to Invest in Children and Young People*

Oranga Tamariki carries the flag for New Zealand's mission to invest in its children and young people. The 2017 establishment of Oranga Tamariki, and associated amendments to statutory child protection powers, followed a decades-long struggle over how to ensure the child protection system meets the needs of all children and families in New Zealand.<sup>18</sup>

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14. In 1840, representatives of the British Crown signed Te Tiriti o Waitangi, or the Treaty of Waitangi, with representatives of iwi/tribal groups. The Treaty is New Zealand's founding constitutional document and was meant to create a partnership between Māori and the British Crown that affirmed Māori sovereignty and guaranteed collective rights to land and resources. Te Tiriti o Waitangi 1840; *see also* Claire Charters & Tracey Whare, *Shaky Foundations: The Fundamental Flaw at the Heart of a "Model" Treaty Involving New Zealand and the Indigenous Māori Community*, 34 *WORLD POLICY J.* 11, 11 (2017).

15. Convention on the Rights of the Child, 1577 U.N.T.S. (ratified 6 April 1993).

16. Letter from Steve Groom, Gen. Manager Pub., Ministerial and Executive Services Oranga Tamariki, to Ministry for Children (Jan. 29, 2019).

17. *Id.* Oranga Tamariki initiated a "partnered response" for a further 129 reports that did not meet the statutory threshold for care and protection but required "family focused case management." The custody orders figure includes custody orders under ss 78, 101, 102, 110(2)(a), and 140 of the Oranga Tamariki Act.

18. State Sector (Ministry for Vulnerable Children, Oranga Tamariki) Order 2016 (N.Z.). When first established, the Ministry was called the "Ministry for Vulnerable Children, Oranga Tamariki." The name was amended to "Oranga Tamariki—Ministry for Children" from January 18, 2018, following a public debate about the stigma of the word "vulnerable." *See, e.g.,* Craig McCulloch, 'Vulnerable' dropped from Children's Ministry name, *RADIO NEW ZEALAND* (Dec. 11, 2017), <https://www.radionz.co.nz/news/political/345957/vulnerable-dropped-from-children-s-ministry-name> [<https://perma.cc/229E-Y5YB>]. The former agency for child protection services—Child, Youth and Family—had been reviewed almost continuously since 1988, including 14 restructures between 1998 and 2008. *See* MODERNISING CHILD, YOUTH AND FAMILY EXPERT PANEL, MODERNISING CHILD, YOUTH AND FAMILY EXPERT PANEL: INTERIM REPORT 6 (2015) [hereinafter INTERIM REPORT], <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/evaluation/modernising-cyf/interim-report-expert-panel.pdf> [<https://perma.cc/2V8Z-VQ7S>].

New Zealand's Children's Commissioner, Judge Andrew Becroft, diagnosed Child, Youth and Family's core problem as a failure to understand and seize the opportunity for radical change laid down in its governing Act, the Children, Young Persons, and Their Families Act 1989.<sup>19</sup> The opportunity was to embrace the Māori worldview and pivot powers on children's wellbeing as members of their broader whānau, hapu, iwi, and family groups.<sup>20</sup> This radical vision was an answer to the groundbreaking 1988 Puao-Te-Ata-Tu (Daybreak) report, which called out the insidious and destructive institutional racism in the monocultural services of the Department.<sup>21</sup> Puao-Te-Ata-Tu underlined the system's "profound misunderstanding or ignorance of the place of the child in Maori society."<sup>22</sup> Despite the 1989 Act's opening for change, a focus on traditional Pākehā family structures has continued to permeate the practice of social work.

Concerns about Child, Youth and Family's performance and impact on vulnerable children culminated in the April 2015 appointment of an independent expert panel to lead a "complete overhaul" of the agency.<sup>23</sup> The Modernising Child, Youth and Family Panel found the care and protection system focused on managing immediate risk and containing short-term costs instead of working to support "better lives" for children in the long-term.<sup>24</sup> Overall, children in contact with the system had significantly worse health, education and incarceration outcomes as young adults than their peers who had had no contact with Child,

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19. OFFICE OF THE CHILDREN'S COMM'R, MAIEA TE TŪRUAPŌ, FULFILLING THE VISION: SUPPORTING YOUNG PEOPLE WITH AT-RISK BEHAVIOUR TO LIVE SUCCESSFULLY IN THEIR COMMUNITIES 5 (2018).

20. Children, Young Persons, and Their Families Act 1989 (N.Z.) [hereinafter the "1989 Act"]. "Family group" is defined in the 1989 Act to mean an extended family with at least one adult member "with whom the child or young person has a biological or legal relationship" or "to whom the child or young person has a significant psychological attachment," or that is the child's or young person's whānau or other culturally recognized family groups." *Id.* at pt. 2(1). In general, "Iwi" is defined as an "extended kinship group, tribe, nation, people, nationality, race – often refers to a large group of people descended from a common ancestor and associated with a distinct territory." IWI, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=iwi> [https://perma.cc/4VPR-YPCL]. "Hapū" is defined as a "kinship group, clan, tribe, subtribe – section of a large kinship group and the primary political unit in traditional Māori society." In traditional society a hapū "consisted of a number of whānau sharing descent from a common ancestor" and "[a] number of related hapū usually shared adjacent territories forming a looser tribal federation (iwi)." HAPŪ, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=hapu> [https://perma.cc/WL7L-CVVT].

21. THE MAORI PERSPECTIVE ADVISORY COMM., PUAO-TE-ATA-TU (DAY BREAK): THE REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON A MAORI PERSPECTIVE FOR THE DEPARTMENT OF SOCIAL WELFARE 19 (1988), <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf> [https://perma.cc/Z8LC-5C6U].

22. *Id.* at 7.

23. INTERIM REPORT, *supra* note 18, at 5; *Independent Expert Panel to Lead Major CYF Overhaul*, NEW ZEALAND GOV'T (Apr. 2, 2015), <https://www.beehive.govt.nz/release/independent-expert-panel-lead-major-cyf-overhaul> [https://perma.cc/6XVA-GELC].

24. INTERIM REPORT, *supra* note 18, at 79.

Youth and Family.<sup>25</sup> Children who had been in the care of Child, Youth and Family experienced re-abuse and re-victimization at an appalling rate, with anecdotal evidence of significant victimization of children while they were in the State's care.<sup>26</sup> The Panel recommended a bold overhaul to shift the system's focus to the child and their need for a stable and loving home.<sup>27</sup> The recommended changes included establishing a new department (now Oranga Tamariki) as a single point of accountability with an expanded mandate to support long-term outcomes.<sup>28</sup>

Oranga Tamariki is defined by a child-centered "investment approach" to protective services.<sup>29</sup> The investment approach looks to future long-term outcomes of public spending and services and relies increasingly on data to measure returns on those investments.<sup>30</sup> The approach favors an intense delivery of child protection services at the earliest possible opportunity with two payoffs in mind: first, the social benefits of improved life outcomes for children in contact with the service; and second, the fiscal benefits to the State through avoided lifetime costs in the social welfare, justice and health systems and productivity gain in the private sphere.<sup>31</sup> The shift to an investment focus is part of a broader social investment agenda between 2011 to 2017 under New Zealand's National Party-led governments.<sup>32</sup>

#### *B. Oranga Tamariki and the State's Broad, Discretionary Child Protection Powers*

The Oranga Tamariki Act 1989 sets out the Ministry's care and protection powers.<sup>33</sup> The Act is New Zealand's primary care and protection statute and aims

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25. *Id.* at 8. For children born in 1990 and 1991, administrative data showed that by age 21 the children who were "known" to the care and protection system were twice as likely to have left school without at least a Level 2 NCEA qualification, seven times more likely to have been subsequently referred to Child, Youth and Family by the Police for youth offending, more than twice as likely to be in receipt of social welfare benefit and nine times more likely to receive a custodial sentence in the adult corrections system. *Id.* at 36. "NCEA," or the "National Certificate of Educational Achievement" is the main national qualification for secondary school students in New Zealand. *How NCEA Works*, NEW ZEALAND QUALIFICATIONS AUTHORITY, <https://www.nzqa.govt.nz/ncea/understanding-ncea/how-ncea-works/> [https://perma.cc/2PUN-PGUV].

26. INTERIM REPORT, *supra* note 18, at 7.

27. *Id.* at 20.

28. *Id.* at 15.

29. MINISTRY FOR VULNERABLE CHILDREN, ORANGA TAMARIKI, STRATEGIC INTENTIONS 2017-2022, at 19 (2017), <https://www.orangatamariki.govt.nz/assets/Uploads/Documents/Strategic-Intentions-2017-2022.pdf> [https://perma.cc/7MCA-XH9L].

30. FINAL REPORT, *supra* note 1, at 31, 39.

31. FINAL REPORT, *supra* note 1, at 10 and 16.

32. See Tom Baker & Simone Cooper, *New Zealand's Social Investment Experiment*, 38 CRITICAL SOC. POL'Y 428, 429 (2018). The social investment agenda has been criticized for prioritizing the easy-to-measure fiscal outcomes and its relationship to "data-driven governance." *Id.* at 434.

33. To carry out recommendations of the Expert Panel, Parliament amended the 1989 Act in two main branches of reform: the Children, Young Persons, and Their Families (Advocacy, Workforce, and Age Settings) Amendment Act 2016 and the Children, Young Persons, and Their Families (Oranga

“to promote the well-being of children, young persons and their families and family groups.”<sup>34</sup>

To understand how New Zealand’s care and protection model disproportionately impacts women who fall outside the dominant norms of “good” motherhood, it is necessary to introduce three core features of the Oranga Tamariki child protection system. First, the “paramountcy principle” guides all decision making under the Oranga Tamariki Act; second, the trigger for Oranga Tamariki intervention is a “report of concern” from any person in New Zealand; third, this trigger initiates a formal Oranga Tamariki response framework consisting of mandatory statutory duties and discretionary assessments of need.

The “paramountcy principle” guides all decision making under the Oranga Tamariki Act. The paramountcy principle requires that in all matters relating to the application of the Act the “welfare and interests of the child or young person shall be the first and paramount consideration.”<sup>35</sup> As I will outline in Part II, this principle is a critical move to privilege the child in the relationship between State and family.

The trigger for Oranga Tamariki care and protection intervention is a report of concern under Section 15 of the Act. A report of concern is a report to the agency that a child or young person has been, or is likely to be, harmed, ill-treated, abused, neglected or deprived.<sup>36</sup> The reports of concern triggering the Ministry’s powers may be made in respect of a “child or young person,” meaning “a person under the age of 14 years.”<sup>37</sup> “Any person” may make a report of concern; the notifier may be anyone from a family member, to a neighbor, to a police officer responding to an incident at the family home.<sup>38</sup>

In practice, government agencies are responsible for a significant proportion of the reports of concern: in 2017, seventy-five percent of reports of concern came from notifiers in the category Court, education, police, health or “other government.”<sup>39</sup> A further 6.2 percent came from non-government organizations

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Tamariki) Legislation Act 2017. The changes included renaming the 1989 Act with the alternative titles “the Oranga Tamariki Act 1989” and “the Children’s and Young People’s Well-being Act of 1989.” Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, Section 5 (N.Z.). Some changes came into force after the Legislation Act received the royal assent; others are being brought into force by Order in Council on different dates, but no later than July 1, 2019. *Id.* at Section 2.

34. Oranga Tamariki Act 1989, Section 4 (N.Z.) [hereinafter Oranga Tamariki Act], <http://www.legislation.govt.nz/act/public/1989/0024/127.0/DLM147088.html> [https://perma.cc/P79F-FAQ3].

35. *Id.* Section 6.

36. *Id.* Section 15.

37. *Id.* Sections 2(1), 15. “Young person” has different meanings in different parts of the Act but is essentially a person over the age of 14 and under the age of 18 years.

38. Certain organizations, including school boards, District Health Boards, and the New Zealand Police, are required to adopt, report on and require a “child protection policy” on how to identify and report child abuse and neglect under Section 15 of the Oranga Tamariki Act. *See* Children’s Act 2014 (N.Z.), <http://www.legislation.govt.nz/act/public/2014/0040/latest/DLM5501618.html> [https://perma.cc/5QZT-FQD4].

39. M. DUNCANSON ET. AL., *supra* note 11, at 29.

and 8.9 percent from family.<sup>40</sup> This means that the entry point into the Oranga Tamariki system is the judgment by a person in a government agency, family or community that a child's wellbeing may be at risk and a decision to bring that judgment to the attention of Oranga Tamariki.

Once Oranga Tamariki receives a report of concern, its care and protection powers follow a mix of discretionary assessments and mandatory actions. Oranga Tamariki is required to arrange an investigation into a report of concern if it appears "necessary or desirable," but has a broad discretion to determine what is "necessary or desirable" in a given case.<sup>41</sup> Oranga Tamariki must progress the investigation if it "reasonably believes that the child or young person is in need of care or protection,"<sup>42</sup> but again has the discretion to form a reasonable belief around whether the child or young person meets the definition of being in "need of care or protection" in Section 14 of the Act.<sup>43</sup>

The broad definition of "need of care and protection" includes where a child or young person is being, or is likely to be physically, emotionally or sexually harmed, where the child's "development or physical or mental or emotional well-being" is being impaired or neglected in a serious and avoidable manner, and where the child's parents or guardians are unwilling or unable to care for them.<sup>44</sup> It is important to note the standards of "harm," "ill-treatment," "abuse," and "neglect" are not defined in the Act.<sup>45</sup> The concepts are applied on the assessment of the notifier making a report of concern, the Oranga Tamariki staff member determining the appropriate response to that report, and ultimately the family group conference or Court making a decision about how to proceed to protect the child.<sup>46</sup> As I will argue in Part III, these subjective assessments are vulnerable to personal bias and racist or classist preferences.

If an Oranga Tamariki officer forms a reasonable belief that a child is in need of care and protection, they must notify a care and protection coordinator, who will convene a family group conference.<sup>47</sup> The family group conference will then consider the needs of the child and make decisions, recommendations and plans for their care and protection.<sup>48</sup> Oranga Tamariki is required to consider the

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40. *Id.*

41. Oranga Tamariki Act, Section 17.

42. *Id.* at Section 17(2).

43. *Id.* at Section 14.

44. *Id.* at Section 14(1)(a), (b) and (f).

45. For the agency's general guidance to notifiers on how to identify and respond to abuse in a family, see ORANGA TAMARIKI—MINISTRY FOR CHILDREN, *Identify Abuse*, <https://www.orangatamariki.govt.nz/identify-abuse/> [https://perma.cc/EKR4-9ZB4].

46. See MARK HENAGHAN ET.AL, FAMILY LAW IN NEW ZEALAND 6.558 (17th ed. 2015) for an overview of how the New Zealand Courts interpret and apply the care and protection standard in Section 14 of the Oranga Tamariki Act.

47. Oranga Tamariki Act, at Sections 17-18.

48. *Id.* at Sections 28-29.

decisions, recommendations or plan and give effect to them by providing services and resources under the Act.<sup>49</sup>

Following the investigation and family group conference process, Oranga Tamariki may decide to turn to the Family Court to apply for a declaration that the child or young person is in need of care or protection.<sup>50</sup> The Court will only grant such a declaration if satisfied that it is not practicable or appropriate to provide care or protection to the child by other means, including by the implementation of the family group conference plan.<sup>51</sup> Where the Court makes the declaration that the child is in need of care or protection, it may then make one of the varied orders in Part 2 of the Act, including orders for services and assistance, support, and for the custody of the child.<sup>52</sup>

Oranga Tamariki is making these discretionary assessments of the critical care and protection needs of children and young people in the context of a perceived crisis of child wellbeing in New Zealand. In recent high-profile child abuse cases, the public and news media have been quick to condemn Oranga Tamariki and its predecessors for failing to act and letting children slip through the net.<sup>53</sup>

### C. *New Zealand Courts Extend Child Protection Powers to the Fetus as “Unborn Child”*

Though the Oranga Tamariki Act care and protection powers apply in respect of a “child” defined as “a person under the age of 14 years,”<sup>54</sup> from 1995 the New Zealand courts have extended these protections to the fetus. In the first key decisions to raise this issue the courts have accepted that the child protection branch of government is empowered to respond to concerns about the wellbeing of a fetus (deemed an “unborn child”) and that the court may grant protective orders over the “unborn child,” including orders formally placing the “unborn child” in the custody of the State.<sup>55</sup>

The first decision to raise the question of whether care and protection powers apply before birth is *In the matter of Baby P (an unborn child)*.<sup>56</sup> The Department of Social Welfare (a predecessor to Oranga Tamariki) brought a “novel

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49. *Id.* at Section 34. There is an exception if the Chief Executive considers the decisions, recommendations or plan to be impracticable, unreasonable or clearly inconsistent with the principles of the Act. *Id.* at Section 34(1).

50. *Id.* at Section 67.

51. *Id.* at Section 73.

52. *Id.* at Section 83.

53. See, e.g., Edward Gay, *Child, Youth and Family Blind to Moko Warning Signs*, RADIO NEW ZEALAND (Dec. 13, 2017), <https://www.radionz.co.nz/news/national/346133/child-youth-and-family-blind-to-moko-warning-signs> [https://perma.cc/H7AA-N688].

54. Oranga Tamariki Act at Section 2(1).

55. *Id.*

56. *In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC).

application” to the Family Court for a care and protection order over the “unborn child” of a 15-year-old girl (referred to throughout the judgment as “the mother”)<sup>57</sup> who was already in the custody and guardianship of the Department.<sup>58</sup> The mother had been in a violent relationship with “H,” the father of Baby P. Judge Inglis observed that, “the relationship persisted” despite this violence, including a reported incident of H hitting the mother’s stomach when he knew she was pregnant.<sup>59</sup> Judge Inglis quoted his previous assessment of the relationship in the care and protection proceedings for the mother: “It is quite clear to any sensible person that there is no hope whatever for their relationship but of course [the mother] is too immature to understand the dangers, which to any sensible adult are totally obvious.”<sup>60</sup>

The question before the Court was whether “Baby P” was a “child” as defined in the Children, Young Persons and Their Families Act 1989.<sup>61</sup> Judge Inglis emphasized that whether the Court should exercise its care and protection powers in respect of the unborn child was a matter of discretion rather than jurisdiction.<sup>62</sup> The only New Zealand case with any bearing on the issue was *R v Henderson*,<sup>63</sup> a decision on appeal from Mr. Henderson’s criminal conviction for causing the death of an unborn child. The Court held that the fetus, which had been estimated to be at 26 weeks maturity, had been an “unborn child” for the purposes of the Crimes Act and there was no need to require the Crown to prove that the child was capable of being born alive.<sup>64</sup>

Just as the Crimes Act protected the life of the unborn child, the Children, Young Persons, and Their Families Act could be interpreted “in light of modern medical and physiological knowledge” to provide a different kind of protection for that unborn child in the child protection system.<sup>65</sup> Judge Inglis was satisfied

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57. *Id.* at 578.

58. *Id.* at 583.

59. *Id.* at 583.

60. *Id.* at 583.

61. *Id.* at 578. At the time of the judgment the definition was “boy or girl under the age of 14 years,” Section 2(1). On July 14, 2017 “boy or girl” was replaced with “a person.” Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, *supra* note 33, at Section 7(2).

62. *Baby P*, [1995] NZFLR at 580.

63. *R v Henderson* [1990] 3 NZLR 174 (CA). In *Baby P*, Judge Inglis also outlined two English decisions, *In re D (A Minor)* [1987] AC 317 (CA) and *In re F (in utero)* [1988] 2 WLR 1288 (CA), but with the proviso that “overseas cases are of no direct help except to the extent that they indicate how similar problems have been resolved within a different statutory or common law context.” *Baby P*, [1995] NZFLR at 58.

64. *Baby P*, [1995] NZFLR at 583.

65. *Id.* Here the Judge was referring to a passage of the 1977 Report of the Royal Commission of Inquiry into Contraception, Sterilisation and Abortion (quoted in *R v Henderson*, [1990] 3 NZLR at 181, and repeated in *Baby P*, [1995] NZFLR at 582) that observed “It may now be said that it is inaccurate to speak of the child having an independent circulation only after birth, when in fact it is firmly established that a child has an independent circulation while still within the womb and that severing of the navel cord separates the child from the placenta, not the body of its mother.” NEW ZEALAND ROYAL COMMISSION ON CONTRACEPTION, STERILISATION AND ABORTION, CONTRACEPTION, STERILISATION AND ABORTION IN NEW ZEALAND: REPORT OF THE ROYAL COMMISSION OF INQUIRY 279 (1997).



that “child” could include “at least an unborn child which has achieved a state of development where it could survive independently of the mother.”<sup>66</sup>

The Judge exercised his discretion to grant the declaration and vested the interim custody of the “unborn child” in the Director-General of Social Welfare.<sup>67</sup> He suggested it would be difficult to think of “a more appropriate case” for exercising the jurisdiction, noting that Baby P “requires protection not only from his violent father but also from his mother’s immaturity and apparent infatuation with the father.”<sup>68</sup> The orders would provide Baby P with protection during birth as an extension of the agency’s existing protection of the mother.

Fundamentally, *In the matter of Baby P* sets up the unborn child question as a moment for the Court to demonstrate its commitment to the protective jurisdiction under the radical reforms of the 1989 Act. This commitment is clear in Judge Inglis’s description of the particular local context of a jurisdiction designed to provide care and protection for the powerless and his reliance on the principle of the paramountcy of the child’s welfare and interests.<sup>69</sup>

This commitment to the Court’s protective jurisdiction continued in a second decision, *Re an Unborn Child*.<sup>70</sup> Here the Department of Child, Youth and Family Services (another predecessor to Oranga Tamariki) applied to the High Court for an order under the Guardianship Act 1968 to place the unborn child under the guardianship of the Court.<sup>71</sup> Justice Heath described the facts giving rise to the application as “truly extraordinary.”<sup>72</sup> The pregnant woman “Nikki” and her producer appeared on a national television documentary to share their plans to use footage from the birth of Nikki’s child in a pornographic film.<sup>73</sup> The Department’s chief social worker met with Nikki and the producer and attempted to reach an undertaking that they would not feature images of the baby in the film. After the meeting was unsuccessful, the chief social worker applied to the Court to place the “unborn child” under the guardianship of the Court.<sup>74</sup>

Justice Heath in the High Court held that the term “child” in the Guardianship Act could include an “unborn child.”<sup>75</sup> He saw two difficulties with the reasoning of Judge Inglis in *Re Baby P*. First, Justice Heath held that the issue could not be a matter of discretion rather than jurisdiction to exercise the

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66. *Baby P*, [1995] NZFLR at 583.

67. *Id.* at 584.

68. *Id.* at 584.

69. *Id.* at 581.

70. *Re an Unborn Child*, [2003] 1 NZLR 115 (HC).

71. *Id.* at 1. The Guardianship Act contains different powers to the care and protection functions under the then Children, Young Persons, and Their Families Act 1989 (now named the Oranga Tamariki Act 1989), but the Judge held the interpretation of “child” in the Guardianship Act would be equally applicable to the 1989 Act. *Id.* at 50.

72. *Id.* at 2.

73. *Id.* at 3.

74. *Id.* at 6.

75. *Id.* at 63. As noted above the Judge explicitly stated this interpretation would be equally applicable to the Children, Young Persons, and Their Families Act 1989, at 50.

Court's powers in respect of the unborn child: for there to be any power to exercise, the Court had to be satisfied that the object of jurisdiction—here, the fetus—fell within the definition of “child” in the statute providing those powers.<sup>76</sup> Second, Justice Heath was concerned that Judge Inglis had reached the view that Baby P was a “child” within the meaning of the Act primarily on his own judgment that Baby P was at a stage of development that should fall within the definition.<sup>77</sup>

Ultimately, Justice Heath arrived at the same answer as *In the matter of Baby P* “by a different route.”<sup>78</sup> The Judge had regard to New Zealand's obligations under the United Nations Convention on the Rights of the Child, in particular the preamble statement that the child “by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*.”<sup>79</sup> The Judge further relied on elements of New Zealand law that supported the interests of the “unborn child to varying degrees,” such as the regulation of abortion and the criminal offence of “killing unborn child.”<sup>80</sup>

Having found that the Act's jurisdiction extended to an “unborn child,” the Judge considered that it would be a matter of discretion whether to exercise the jurisdiction in an individual case.<sup>81</sup> Discretion would allow the Court to focus on the “utility and need for such orders” and avoid the “otherwise impossible” task of “endeavouring to determine the precise moment in time (for legal purposes) that an unborn child is subject to the Court's jurisdiction.”<sup>82</sup> Justice Heath recorded briefly that the decision on whether to make an order would “no doubt” be impacted by the stage of pregnancy involved and the “(general) inability” of the Court to compel a mother to do something against her will in respect of her fetus.<sup>83</sup>

On the facts before the Court, Justice Heath was satisfied that there was a likely risk of emotional harm to the unborn child from sexual exploitation of its image in the planned film and that it was necessary for the Court to intervene. The Judge emphasized his concerns that Nikki was not putting her own interests before the interests of her unborn child: he opined that her desire to be a star had overridden her judgment, and that there was nothing to suggest she had given

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76. *Id.* at 54.

77. *Id.* at 55.

78. *Id.* at 56, 63.

79. *Id.* at 61 (emphasis added); Convention on the Rights of the Child, *supra* note 15 (quoting G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959)); see also Anjori Mitra, “*We’re Always Going to Argue about Abortion*”—*International Law’s Changing Attitudes Towards Abortion*, 1 N.Z. WOMEN’S L.J. 142, 152 (2017) (discussing the debate and compromise regarding the references to the “unborn” in the Convention and the ambiguity of “appropriate legal protection”).

80. *Re an Unborn Child*, [2003] 1 NZLR at [61]; Crimes Act 1961, Section 182.

81. *Id.* at [63].

82. *Id.*

83. *Id.*

more than a “passing thought” to the possibility of adverse effects on the unborn child.<sup>84</sup> He doubted Nikki’s own statement that she was concerned about the unborn child’s safety, health, and best interests, noting that she had not explained her thought process to conclude the unborn child would not be harmed by being associated with the pornographic film.<sup>85</sup> Justice Heath placed Nikki’s “unborn child” in the guardianship of the Court and issued various injunctions prohibiting filming of the labor.<sup>86</sup>

Just as the mother in *In the matter of Baby P* could not be trusted to act like a sensible adult in her relationship with the violent father of Baby P, Nikki could not be trusted to prioritize the interests of her unborn child in deciding whether and how to feature her labor in the pornographic film. In these circumstances, the Court saw itself as obliged to step in to lift up the interests of the fetus and protect this powerless subject from harm.

The final key decision extending care and protection powers to the “unborn child” is the 2018 judgment of *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*.<sup>87</sup> A family member of the pregnant woman, Ms. T, and the Oranga Tamariki social worker for Ms. T and Mr. L’s older child made reports of concern in respect of the unborn child. The reports raised Ms. T’s allegedly poor mental health and the fact that Ms. T’s five older children had been removed from her care.<sup>88</sup> On receipt of the reports of concern, Oranga Tamariki commenced an investigation under Section 17 of the Oranga Tamariki Act.<sup>89</sup>

In the High Court the applicants sought orders essentially preventing Oranga Tamariki from “harassing” or “persecuting” them or from sending social workers to their home.<sup>90</sup> Justice Muir was required to consider whether the statutory powers of Oranga Tamariki extended to an “unborn child.” The Judge concluded that the Oranga Tamariki care and protection powers and responsibilities to receive and respond to reports of concern were not restricted to “children who have been born.”<sup>91</sup>

Justice Muir favored a focus on the “utility and need” of intervention in a given case in the Court’s discretion.<sup>92</sup> The utility and need to investigate any report of concern received before birth was “inescapable.” The Judge considered that the contrary conclusion requiring Oranga Tamariki to wait until the birth of

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84. *Id.* at [82].

85. *Id.* at [79].

86. *Id.* at [109].

87. *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC.

88. *Id.* at [12].

89. *Id.* at [13].

90. *Id.* at [3].

91. *Id.* at [27].

92. *Id.* at [32], [35].

the child to take action would frustrate the paramountcy principle and the Act's overarching purpose of promoting the wellbeing of children.<sup>93</sup>

Overall, the New Zealand courts have framed the “unborn child” cases as exceptional decisions to protect the welfare of the particular “unborn child” before the Court and avoided making any general statement about when a fetus becomes a “child.” In *In the matter of Baby P*, Judge Inglis suggested that the English decision of *Re F (in utero)* was valuable in providing compelling reasons why a discretion to intervene to protect an “unborn child” should be used “cautiously, sparingly, and only in exceptional cases.”<sup>94</sup> Justice Heath in *Re an Unborn Child* similarly emphasized that the Court would not lightly override parental decisions, particularly in decisions over an unborn child where “nobody but the mother has any real control.”<sup>95</sup>

Yet the courts' reasoning does not confine permissible State intervention over the “unborn child” to care and protection action on formal orders approved by the court. In practice, the State's intervention in the “unborn child” begins with the reports of concern and investigations that precede a family group conference or formal application for court orders under the Act. The power (and duty) to receive and investigate reports of concern hinges on the courts' acceptance in these key cases that the term “child” in the Oranga Tamariki Act can include an “unborn child.”<sup>96</sup> This acceptance activates the care and protection system for all “unborn children”: once Oranga Tamariki receives any report of concern about an unborn child, it is not only permitted, but statutorily mandated, to follow the same investigation process that it would for any child or young person post-birth. The courts' emphasis on a discretionary judicial consideration of the woman's interests and stage of pregnancy has been at the expense of any clear, unambiguous guidance about when and how Oranga Tamariki should exercise these prior care and protection powers over a pregnant woman. This prior permissible phase of State intervention is the real legacy of the “unborn child” cases.

#### *D. Oranga Tamariki Investment Model Doubles Down on Interventions Before Birth*

The new Oranga Tamariki investment model for early intervention doubles down on the accepted State interest in the “unborn child” and duty to protect that

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93. *Id.* at [34].

94. *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC) at 581 (citing *Re F (in utero)* [1988] 2 WLR 128 (CA)).

95. *Re an Unborn child*, [2003] 1 NZLR at [61], [73], [88].

96. Interestingly, the courts have avoided explicitly stating that “child” includes “unborn child.” The closest direct statement is in *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC at [36-37] where Justice Muir states that he does not accept “child” must be confined to those who have been born.

“unborn child” through its focus on prevention and support services that begin before birth.<sup>97</sup> Pre-birth intervention is not just permitted, but encouraged and prioritized as a central feature of the agency’s model.

Oranga Tamariki encourages early intervention services before birth to identify families at risk of poor life outcomes and address those risk factors to ensure that children thrive.<sup>98</sup> “Early” intervention can begin as early as pre-20 weeks’ gestation, although the Oranga Tamariki practice centre advises that a formal referral to family group conference or application for court orders should be delayed until after 20 weeks for the reason that there would then be “less chance of something going wrong in the pregnancy.”<sup>99</sup>

The Oranga Tamariki practice centre identifies pre-birth as a time in a woman and future child’s life that presents a “unique opportunity” to work with whānau and other professionals. The State has identified that its duties under the new model include working with whānau to provide intense support mechanisms: supporting ante-natal health and alcohol, drug and smoking abstinence efforts, engaging with fathers, and identifying wider whānau strengths and resources to support the newborn. The services aim to maximize the opportunity to mobilize support systems within the family, whānau and community, give the parents the time to demonstrate change before birth, and support parents to meet basic needs of the child at birth.<sup>100</sup>

The work also includes monitoring specific women and families with a view to assessing the expectant parent or parents’ capacity to care for a child, their willingness to address any concerns raised by Oranga Tamariki, and their ability to make any changes that Oranga Tamariki considers necessary before birth to provide a safe, healthy environment for the child.<sup>101</sup> For example, Oranga Tamariki might visit the expectant parent or parents’ home, speak with family or whānau about possible support systems, review any prior history with care and protection services, and seek information about parental substance abuse or mental health issues.

The Oranga Tamariki early intervention model presents a paradox. A good State would indeed support women in constrained circumstances to ensure that they have the best material and personal circumstances to decide whether to carry their pregnancy to term. Such support furthers the State’s interest in the health and wellbeing of both the pregnant woman and her fetus. However, as I will argue below, delivering these interventions through the child protection branch of government under the overarching imperative to prioritize the interests of the

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97. See State Sector (Ministry for Vulnerable Children, Oranga Tamariki) Order 2016 (N.Z.), *supra* note 18, at 20.

98. *Id.* at 28.

99. ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.

100. *Id.*

101. ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.

child perversely operates to constrain the pregnant woman rather than empower her.

## II. FRAMING FETUS AS “UNBORN CHILD” OBSCURES PREGNANT WOMEN AND DRIVES STATE INTERVENTION

Framing the fetus as an “unborn child” serves to obscure pregnant women and drive State intervention. This Part sets out how the courts adopt the term “unborn child” and move between two different senses of the fetus as a child: the fetus as a child itself (albeit unborn) and the fetus as a future child. The “unborn child” frame sets up a continuum between the unborn and born child that drives the State to extend its well-established obligation to make the welfare and interests of the child its first and paramount consideration. This framing obscures the pregnant woman and leads the State to subordinate her interests to those of the fetus.

From the first New Zealand decision to address the State’s care and protection powers before birth, the courts and the State have favored the term “unborn child” to describe the fetus. Judge Inglis began his judgment in *In the matter of Baby P (an unborn child)* by explaining that he would speak of the “baby” as an “unborn child” following Lord Denning, “who characteristically avoided any attempt at euphemism” by speaking in “simple English” of the “unborn child inside the mother’s womb.”<sup>102</sup> The “unborn child” term is carried through subsequent decisions and the Oranga Tamariki practice materials refer to “unborn babies.”<sup>103</sup> Recently, an amendment to the Oranga Tamariki Act to create specific care and protection provisions for “subsequent children” explicitly defined the new term “subsequent child” as “a child, born or unborn.”<sup>104</sup>

The courts move between two different senses of the term “unborn child.” The first sense is the fetus as a child itself, albeit unborn. This sense underlies Judge Inglis’s humanizing descriptions of “Baby P” as “a little boy in good health” and as “a young human being at a present stage of development where he could now live independently of the mother.”<sup>105</sup> The fetus is presented as an existing child in need of protection from a present risk of harm: Judge Inglis

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102. *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC) at 578 (citing *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 801 at 802).

103. *Id.*; see also *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC; ORANGA TAMARIKI PRACTICE CENTRE, *supra* note 5.

104. Oranga Tamariki Act 1989, Section 2(1) definition of “subsequent child” (emphasis added). Unfortunately the regime is outside the scope of this Note, but it essentially creates a reverse onus for parents who have had older children removed from their care by the Courts with a finding that there is “no realistic prospect” that the children will be returned to their care: Section 18B. If the parent(s) have a subsequent child they bear an onus to show that they are unlikely to inflict harm on their child: Section 18A(3)–(5).

105. *Baby P*, [1995] NZFLR at 578.

questions why such “unborn children” should be any less protected by the State than other children.<sup>106</sup>

The second sense is the fetus as “future child” or “the child who will be but is not yet born.”<sup>107</sup> Justice Muir in *L v Chief Executive of Oranga Tamariki* focuses on the need for protection of this future child when he declares the inescapable need for proper investigation “in advance of the birth of the child” in order for Oranga Tamariki to be ready to protect against any harm or neglect at birth.<sup>108</sup> In essence, this “future child” framing looks at pre-birth action as necessary to promote post-birth interests.

Neither sense of the “unborn child” turns on the viability of the fetus. Judge Inglis initially relied on viability in *In the matter of Baby P (an Unborn Child)* by holding the “child” term could “at least” include an “unborn child,” such as Baby P, at a stage of development where it could survive independently of the mother.<sup>109</sup> In *Re an Unborn Child* Justice Heath doubted the utility of the focus on viability and preferred an interpretation that avoided the need to determine a precise point in time where the jurisdiction would fall on an “unborn child.”<sup>110</sup> The judge contended that “endless arguments” over the stage at which an unborn child becomes a child would serve no useful purpose and that the stage of pregnancy should instead impact what order would be appropriate in a given case.

Once the fetus is framed as an “unborn *child*,” it is a short step to accept that Oranga Tamariki—the care and protection agency responsible for the care and protection of *children* and young people—has an interest in that fetus. The “child” description effectively sets up a continuum between the unborn and the born child where it would be nearly impossible to draw a clear line between the two and thus unjust to deny one the protection that the State guarantees to the other.<sup>111</sup>

In this light, the State’s interest in the “unborn child” is a product of protection and pragmatism. Oranga Tamariki has a well-established responsibility to advance the wellbeing of children and to assist children to prevent them from suffering harm.<sup>112</sup> From this starting point, the courts are loath to withhold the Act’s critical protection from the “unborn child.” Oranga Tamariki and the courts dismiss rigid distinctions between birth and pre-birth as cumbersome barriers to the pragmatic application of available tools to achieve what is perceived as the best outcome for the fetus. Judge Inglis suggests that

106. *Id.* at 579.

107. ROSAMUND SCOTT, RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT 23 (Hart Publishing, 2002).

108. *L v Chief Executive of Oranga Tamariki—Ministry for Vulnerable Children*, [2018] NZHC at [27] and [34].

109. *Baby P*, [1995] NZFLR at 583.

110. *Re an Unborn Child*, [2003] 1 NZLR at [63]–[64].

111. *See id.* at [66].

112. Oranga Tamariki Act, Section 4.

there is nothing to indicate that unborn children “should to any less extent be protected from harm, be entitled to have their rights upheld, or be entitled to have their welfare promoted.”<sup>113</sup> It would be “artificial and pointless” to wait until the birth of the child.<sup>114</sup>

Framing the fetus as an “unborn child” uplifts the interests of the fetus as “child” and obscures the pregnant woman in a manner that reinforces the pragmatic application of the Oranga Tamariki Act. The Oranga Tamariki Act framework provides a clear, strong direction for the courts and Oranga Tamariki to make the welfare and interests of a child the paramount consideration.<sup>115</sup> The force of the paramountcy principle contrasts with the ambiguous, ill-defined competing autonomy or privacy interests of the pregnant woman. The courts have made oblique references to the “rights of the mother”<sup>116</sup> and the “(general) inability of the court to make orders which compel a mother to do something against her will.”<sup>117</sup> But the courts have not ventured further to unpack those rights in any depth or to interrogate when and how the pregnant woman’s interests deviate from those of the fetus.

The dominating focus on the “unborn child” as a separate subject of the court’s jurisdiction overshadows the pregnant woman’s interests. The “unborn child” becomes the primary, or even the only, subject of the court’s jurisdiction, which stems from its powers to protect vulnerable children. The pregnant woman is a far less salient character in this dynamic. She is a potential source of harm to the child and therefore a potential subject of the Court’s order, but ultimately she is peripheral to the court’s responsibility towards her fetus.

### III. DISCRETIONARY “UNBORN CHILD” INTERVENTIONS DISPROPORTIONATELY IMPACT WOMEN EXPERIENCING POVERTY AND INDIGENOUS MĀORI WOMEN

The discretionary “unborn child” interventions target a marginalized subset of the population. In this Part, I theorize and establish that using the report of concern triggers to apply broad discretionary child protection powers in a society of structural inequality and dominant white middle-class norms of good motherhood disproportionately impacts women experiencing poverty and Māori women.

While Oranga Tamariki routinely claims an interest in the fetus when it responds to reports of concern before birth, it is unlikely to claim this routine interest evenly across all parts of the population. The child protection model is neither neutral nor universal, but instead targets a marginalized subset of the

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113. *Baby P*, [1995] NZFLR at 579.

114. *Id.* at 584.

115. Oranga Tamariki Act, Section 6.

116. *Baby P*, [1995] NZFLR at 584.

117. *Re an Unborn Child*, [2003] 1 NZLR at [64].



population. The targeted subset is determined first by which children are subject to the reports of concern that activate the State's powers and later by the State's assessment of whether the child is in "need of care or protection" in the sense of being (or being likely to be) "harmed," "ill-treated," "abused," or "seriously deprived."<sup>118</sup> These are not objective standards. They reflect the norms of the decision makers and are vulnerable to classist and racist preferences.<sup>119</sup>

Oranga Tamariki applies the discretionary child protection model before birth in a society of structural inequality and dominant white middle class norms of good motherhood. "Good" motherhood norms center on the individual woman as a primary caregiver, separated from the collective resources and support of her broader family group or whānau. They include the expectation that a woman be a chaste, responsible, protective carer who puts her child first.<sup>120</sup> Such norms are peppered throughout the "unborn child cases." In *In the matter of Baby P*, we see Judge Inglis's rigid expectations for the young pregnant woman to keep herself and her fetus safe from her abusive partner.<sup>121</sup> In *Re an Unborn Child*, we hear Justice Heath's concern that the pregnant woman, Nikki, might be failing to selflessly prioritize her fetus's interests over her desire for fame.<sup>122</sup>

Oranga Tamariki is more likely to oversee the pregnancies of women experiencing poverty. The 2015 review of child protection services in New Zealand recorded that most families of children referred to the agency had "high levels of long-term need and disadvantage," including long-term unemployment and low income.<sup>123</sup> In the cohort of children born in New Zealand between 2005 and 2007, 46 percent had parents living in a high deprivation area at the time of their birth.<sup>124</sup>

The relationship between poverty and involvement with Oranga Tamariki can in part be explained by the fact that families experiencing poverty are likely to have greater contact with other government agencies. In the 2015 review, 39 percent of the children known to Child, Youth and Family by age five had a mother who had been receiving a benefit for more than four of the five years

118. Oranga Tamariki Act, Sections 17(2), 14(1)(a).

119. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 114, 158 (2011); see also Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 788 (2001).

120. Simran Dhunna, Beverley Lawton & Fiona Cram, *An Affront to Her Mana: Young Māori Mothers Experiences of Intimate Partner Violence*, J. INTERPERSONAL VIOLENCE 1, 7 (2018).

121. See FAMILY VIOLENCE DEATH REVIEW COMMITTEE, FIFTH REPORT JANUARY 2014 TO DECEMBER 2015F 57 (2016) for a critique of how family violence policies hold mothers responsible for "failing to protect" their children from intimate partner violence in which they are a victim.

122. *Re an Unborn Child*, [2003] 1 NZLR.

123. INTERIM REPORT, *supra* note 18, at 32.

124. *Id.* at 32–33. The report does not define "high deprivation," but since 1991 New Zealand has run a New Zealand index of deprivation following each census, which reflects eight dimensions of material and social deprivation: communication (access to the Internet at home), income, employment, qualifications, home ownership, support, living space and transport). See M. DUNCANSON ET AL., CHILD POVERTY MONITOR TECHNICAL REPORT (N.Z. Child & Youth Epidemiology Serv. ed., 2018), <http://www.nzchildren.co.nz/> [<https://perma.cc/25M5-RVVS>].

prior to their birth.<sup>125</sup> Almost 60 percent had a primary caregiver on a benefit at the time of birth. As noted in Part I, contact with government agencies creates an opportunity for the agency to enter and supervise family life and may culminate in reports of concern.

The relationship between poverty and Oranga Tamariki oversight can also reflect a judgment that poor women are not good mothers. This judgment may come from the notifier making a report of concern to trigger Oranga Tamariki intervention, the Oranga Tamariki staff member deciding that a care and protection investigation is necessary, or the Court making orders in respect of the child. In the United States, Professor Dorothy Roberts, acclaimed scholar in race, gender, and the law, has identified how the contemporary child welfare system confuses poverty with neglect and maintains a fundamental division between poor and other families.<sup>126</sup> Professor Khiara Bridges has further emphasized how in public obstetrics care poverty “is presumed to indicate the absence of a moral vigilance that might manifest in harm to [a pregnant woman’s] child.”<sup>127</sup> Bridges shines a light on how poverty “is thought to index a moral permissiveness, the magnitude of which the state has the duty to determine and upon which the health and safety of the woman’s unborn child hinges.”<sup>128</sup>

Arguably, poverty is one indicator of vulnerability and need for the services that Oranga Tamariki can provide to support families. Yet the problem with this justification for targeted intervention is that Oranga Tamariki assessments and statutory services are indeed premised on a series of judgments about parenting and whether the child or young person is in need of care or protection. A need for care and protection is not just a need for services: it hinges on the formation of a belief that the child in question is in need of care or protection, in the sense that they are likely to be harmed, ill-treated, abused, or seriously deprived—or that their parents or guardians are unwilling or unable to care for them.<sup>129</sup> As I suggest above, these judgments are not objective and may reflect classist preferences for childrearing.

Oranga Tamariki interventions in pregnancy are likely to have a significant impact on Māori women. Māori children and young people are significantly over-represented in the care and protection system—at the time of the 2015 review of child protection services, the majority of children known to the agency identified as Māori.<sup>130</sup> In general, Māori children are more likely to come into contact with care and protection services, to be referred to care and protection

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125. INTERIM REPORT, *supra* note 18, at 33.

126. DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 27 (2002).

127. Bridges, *supra* note 119 at 168.

128. *Id.* at 167.

129. Oranga Tamariki Act, Section 14(a). This is not exhaustive: a child is deemed to be in need of care or protection if they fall within any of the descriptions in Section 14(a) to (i).

130. FINAL REPORT, *supra* note 1, at 21.

services for perceived risk of harm, and to stay in the care and protection system. Māori children make up 56 percent of the children in contact with child protection services by age five, yet only thirty percent of all children born in New Zealand.<sup>131</sup> For a subset of reports of concern made regarding “unborn children” and children within five days of birth, Māori children made up 47 percent of reports of concern in 2018, 51 percent in 2017, and 55 percent in 2016.<sup>132</sup>

The reasons for overrepresentation of Māori in child protection data are complex. A 2015 New Zealand study *Understanding Overrepresentation of Indigenous Children in Child Welfare Data* summarized how Indigenous people explain that overrepresentation is a result of a combination of factors extending beyond socio-economic disadvantage:

assimilationist policies of colonial governments leading to the fragmentation of families, inequitable distribution of the goods and resources of society (e.g., employment, housing, and wealth), systemic racism of a child welfare protection system imposing white middle-class notions of family and child-rearing upon indigenous families . . . , and racial bias in reporting of maltreatment and in child welfare agency decision making.<sup>133</sup>

The 1988 *Puao-Te-Ata-Tu* report captures the historical perspective on child protection services in New Zealand.<sup>134</sup> In New Zealand’s colonial history, inappropriate Pākehā structures and Pākehā determination of Māori issues “worked to break down traditional Maori society by weakening its base—the whanau, the hapu, the iwi.”<sup>135</sup> These forces made it almost impossible for Māori to maintain tribal responsibility for their own people.<sup>136</sup> Ani Mikaere, a prominent scholar on Māori self-determination and the status of Māori women, makes clear that the “disruption of Maori social organisation was no mere by-

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131. *Id.* at 34.

132. Letter from Steve Groom, General Manager Public, Ministerial and Executive Services Oranga Tamariki—Ministry for Children to author (Dec. 17, 2018) (on file with author). This data was provided in response to a request under the Official Information Act 1982 for the proportion of reports of concern regarding an “unborn child” where the “unborn child” was of Māori ethnicity.

133. Fiona Cram et al., *Understanding Overrepresentation of Indigenous Children in Child Welfare Data: An Application of the Drake Risk and Bias Models*, 20 CHILD MALTREATMENT 171 (2015) (citations omitted).

134. DEP’T SOCIAL WELFARE, PUAO-TE-ATA-TU (DAY BEAK): THE REPORT OF THE MINISTERIAL ADVISORY COMMITTEE ON A PERSPECTIVE FOR THE DEPARTMENT OF SOCIAL WELFARE 18 (1988), <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf> [<https://perma.cc/ZE5E-FN49>].

135. *Id.*

136. *Id.*

product of colonization, but an integral part of the process” by which the Crown aimed to destroy the principle of collectivism that ran through Māori society.<sup>137</sup>

The particular impact of colonization on Māori women must be examined at the “intersection of being Māori and female and all of the diverse and complex things being located in this intersecting space can mean.”<sup>138</sup> Scholars of *mana wāhine*, a type of Māori feminism, have emphasized the unique narratives and experiences of Māori women in the ongoing history of colonization.<sup>139</sup> Mikaere illustrates how the traditional Māori worldview emphasized the essential role of women and the supremacy of their spiritual power in controlling tribal rituals.<sup>140</sup> Mikaere explains that this pattern “of acknowledging the worth of women was reflected in *whānau* life,” where “*whānau* dynamics operated to ensure that women were well-treated by their husbands and in-laws. . . and the presence of many to assume responsibility for child rearing enabled women to perform a wide range of roles, including leadership roles.”<sup>141</sup>

Under colonization, the Crown and settlers minimized the spiritual and traditional roles of Māori women and recast the role in negative terms.<sup>142</sup> This represented a devaluation of women, which was reinforced by the introduction of an English concept of “family” that limited women to narrow domestic roles as the individual “mother of children.”<sup>143</sup> Urbanization and land confiscation policies further dislocated women from their extended *whānau* support networks. Naomi Simmonds notes that when “the *whānau* unit became progressively smaller, the responsibilities of individual women grew.”<sup>144</sup>

Social and economic disadvantage for Māori is one key driver of vulnerability for *whānau*.<sup>145</sup> In June 2018, the unemployment rate for Māori was 9.4 percent, compared to 3.6 percent for New Zealand Europeans.<sup>146</sup> Low income rates for Māori are consistently higher than the European group: in the period 2015 to 2016, 28 percent of Māori children lived in low income households as compared to fourteen percent of European children.<sup>147</sup> A higher proportion of Māori children are in sole-parent beneficiary families and households: 47 percent of sole parent beneficiary recipients are Māori.<sup>148</sup> These high levels of

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137. Annie Mikaere, *Collective Rights and Gender Issues: A Maori Women's Perspective*, in COLLECTIVE HUMAN RIGHTS OF PACIFIC PEOPLES 79, 93 (Nin Tomas ed., 1998) [hereinafter Mikaere Collective Rights].

138. Naomi Simmonds, *Mana Wahine: Decolonising Politics*, 25 WOMEN'S STUD. J. 11, 11 (2011).

139. *Id.* at 16.

140. Ani Mikaere, *Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Māori*, 18 Y.B. N.Z. JURIS. 134, 139 (2005) [hereinafter Mikaere Cultural Invasion Continued].

141. *Id.* at 141.

142. *Id.* at 149; see Mikaere Collective Rights, *supra* note 137, at 92.

143. Mikaere Cultural Invasion Continued, *supra* note 140, at 149–50.

144. Simmonds, *supra* note 138, at 16.

145. CRAM, *supra* note 4, at 7.

146. DUNCANSON ET AL., *supra* note 8.

147. *Id.*

148. *Id.*

disadvantage are “symptomatic of the unequal distribution of goods and services within [New Zealand] society,” where Māori have inequitable access to and outcomes from universal services such as healthcare and education.<sup>149</sup>

Further drivers of Māori whānau vulnerability are prejudice and discrimination within New Zealand society.<sup>150</sup> The increase in Māori overrepresentation at successive decision points in the child protection system suggests an ongoing role of bias against Māori in child protection agency decision making.<sup>151</sup> Half of referrals to the agency pertain to Māori children and young people; but Māori comprise six out of every ten children and young people in State care.<sup>152</sup> The 2016 report of the Modernising Child, Youth and Family Expert Advisory Panel explicitly acknowledged that “conscious and unconscious bias in the system” was a possible cause of this overrepresentation.<sup>153</sup>

The extension of care and protection powers in the “unborn child” cases is particularly significant for pregnant women who are most likely to be targeted by State oversight and least likely to be privileged by dominant norms of good motherhood. In New Zealand’s context of structural inequality and colonization, this impact is likely to fall heavily on women experiencing poverty and Māori women. This uneven impact must be front of mind when considering how State pregnancy interventions serve to constrain rather than empower pregnant women.

#### IV. STATE PREGNANCY INTERVENTIONS PERVERSELY CONSTRAIN, RATHER THAN EMPOWER, PREGNANT WOMEN

Perversely, New Zealand’s State pregnancy interventions constrain rather than empower pregnant women. This Part draws out the individual and collective constraints on pregnant women’s rights, interests and autonomy that are obscured and ambiguous under the courts’ “unborn child” framework discussed in Part II.

At the individual level, State oversight of pregnancy may infringe upon a woman’s right to privacy in that it unduly restricts her ability to make decisions about her own life. The right to privacy provides a clear framework for evaluating what limits on a pregnant woman’s autonomy are justified and what limits exceed the proper powers of the State. Privacy includes “the ability to make important decisions about one’s own life” and embodies the concept of

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149. CRAM, *supra* note 4, at 21.

150. *Id.* at 7, 21.

151. Emily Keddell & Gabrielle Davie, *Inequalities and Child Protection System Contact in Aotearoa New Zealand: Developing a Conceptual Framework and Research Agenda*, 7 SOCIAL SCI. 89, 97 (2018).

152. *Id.*

153. FINAL REPORT, *supra* note 1, at 7.

autonomy.<sup>154</sup> Autonomy incorporates the concepts of self-determination—“a person’s interest and right . . . in reflectively making significant personal choices”—and bodily integrity, the ability “to decide what happens in and to one’s body.”<sup>155</sup>

Privacy is a promising developing tool to protect women’s reproductive choices in New Zealand. At the international level, New Zealand has adopted a right to privacy through the International Covenant on Civil and Political Rights (ICCPR), which protects against arbitrary or unlawful interference with a person’s privacy, family and home.<sup>156</sup> At the domestic level there is no statutory privacy right: the New Zealand Bill of Rights Act 1990 does not create a right to privacy, and the Privacy Act 1993 provides protections for informational privacy but does not create a standalone right. The editors of *Privacy Law in New Zealand* suggest that the omission under the Bill of Rights Act may be attributed to the uncertainty and ambiguity of the privacy concept and the difficulty of defining the right.<sup>157</sup>

Despite the absence of a standalone right, a fundamental right to privacy may be developed through New Zealand’s common law, in light of its international commitments under the ICCPR and through the comparative precedents for privacy rights in the United States and Canada.<sup>158</sup> The Bill of Rights is not a comprehensive statement of all the rights and freedoms in New Zealand<sup>159</sup> and the New Zealand courts have acknowledged the need to develop the common law consistently with the guidance of international treaties to which New Zealand is a party, even where the international obligations are not expressly incorporated in statute.<sup>160</sup> Notably, the 2018 Law Commission briefing on alternative approaches to abortion law recorded the New Zealand Privacy Commissioner’s submission that abortion engages a fundamental privacy right inherent in bodily autonomy and self-determination.<sup>161</sup>

Dorothy Roberts highlights the value of a privacy right in her groundbreaking 1991 article “Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy.”<sup>162</sup> Roberts draws out two

154. See NEW ZEALAND LAW COMMISSION, ALTERNATIVE APPROACHES TO ABORTION LAW: MINISTERIAL BRIEFING PAPER 53 (2018), <https://lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20ALR%20Ministerial%20Briefing%20Paper%20-%20FINAL.pdf> [<https://perma.cc/96AH-ZZJN>].

155. SCOTT, *supra* note 107, at 13-14.

156. International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

157. Stephen Penk, *Thinking About Privacy*, in *Privacy Law*, in NEW ZEALAND 20 (Stephen Penk & Rosemary Tobin eds., 2d ed. 2016).

158. See, e.g., *R v Morgentaler* [1988] 1 S.C.R. 30; *Roe v. Wade*, 410 U.S. 113 (1973).

159. Penk, *supra* note 157, at 20.

160. *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1 at [6].

161. NEW ZEALAND LAW COMMISSION, *supra* note 154, at [3.4]; PRIVACY COMMISSIONER’S SUBMISSION TO THE LAW COMMISSION ON ABORTION LAW REFORM, <https://www.privacy.org.nz/assets/Uploads/Abortion-Law-Reform-submission-to-Law-Commission.pdf> [<https://perma.cc/662X-JXHE>].

162. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

critical benefits of a privacy concept for advancing the reproductive rights of women of color: the right emphasizes the value of “personhood” and protects against the abuse of government power.<sup>163</sup> Personhood is particularly significant because it affirms the role of Black women’s will and challenges the historical devaluation of Black motherhood in the history of the United States.<sup>164</sup> Privacy delineates the limits of government power in a way that is particularly valuable for women of color who, in countries where persons of color are in minority or marginalized groups, are most vulnerable to government control of their private decision making.<sup>165</sup>

Extending care and protection powers to “unborn children” compromises the privacy right of pregnant women. Oranga Tamariki claims to address children but its oversight regulates pregnant *women’s* choices about how they run their lives and what they do with their bodies. The regulation may span what they ingest, who they partner or live with, where they live and when or how they travel.<sup>166</sup> A nebulous concern about interfering with pregnant women’s choices in this way is acknowledged in the New Zealand “unborn child” cases but never articulated as a real, salient competing right to privacy.<sup>167</sup>

The right to privacy is not absolute.<sup>168</sup> The protection within the ICCPR prohibits only “arbitrary” or “unlawful interference” and privacy claims are balanced against competing public interests. One may argue that some State engagement with pregnant women’s choices is justified because the limit on decision making is minimal (for example, the idea of discouraging pregnant women from smoking or consuming alcohol) and outweighed by the State’s interest in promoting the health of the population.

Yet Oranga Tamariki oversight goes beyond minimal health interventions in two ways. First, Oranga Tamariki oversight of pregnant women’s choices comes with the understanding that if the State determines these choices are putting an “unborn child” at risk of harm, the State may activate its care and protection powers to either reach a family group conference plan for the “unborn child” or apply to the court for formal orders. The most intrusive formal order would place

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163. *Id.* at 1468.

164. *Id.* at 1469.

165. *Id.* at 1469-70.

166. Memorandum from Mindy Jane Roseman on the State of the Field: Fetal Personhood and Women’s Rights 11 (on file with author).

167. For example, Justice Heath in *Re an Unborn Child* emphasizes that the “invasive step” of interfering with the pregnant woman’s decisions as a mother should only be taken for very good reasons. *Re an Unborn Child*, [2003] NZLR at [27]-[28]. See also Justice Heath’s discussion of the academic criticism of *In the matter of Baby P (an unborn child)*, [1995] NZFLR 577 (FC): “The decision was criticised on the basis that it ran the risk of creating a conflict with the mother’s own interests; in particular, the decision created the potential for the Court making orders which controlled the mother’s behaviour during pregnancy, albeit, ostensibly, for the purposes of promoting the welfare of the unborn child.” *Unborn Children: ‘Persons’ and Maternal Conduct*, 5 MED L. REV. 143 (1997).

168. Penk, *supra* note 157, at 19.

the “unborn child” in the custody of Oranga Tamariki and allow Oranga Tamariki to remove the child at birth.<sup>169</sup>

Second, Oranga Tamariki is a State agency centered on the care and protection of children. Activating the care and protection function of Oranga Tamariki before birth fundamentally pits the rights of the pregnant woman against her fetus. It separates the interests of the fetus (the “unborn child”) and prioritizes those interests as the paramount consideration for the agency and the court. As outlined above, the interests of the pregnant woman and her fetus will often overlap and may be the same. But the controlling interest is that of the fetus: when there is a tension between the interests of the two subjects the pregnant woman’s interest will be secondary to the imperative of preventing harm to the fetus, and when there is no tension the recognition of the pregnant woman’s interest is contingent on that aligned interest of her fetus. The pregnant woman is instrumental to the best interests of her fetus. This process obscures the pregnant woman, even as it fails to fully support her ability to determine the conditions of her parenthood.

The interference with pregnant women’s privacy—both their autonomy in decision making and their bodily integrity—is a harm in itself. Interference may also create a risk of physical and mental harm to the pregnant woman and to the fetus. The threat of State punitive approaches to pregnancy, including the threat of seeking custody orders to remove the child from its parent at birth, can deter women from seeking State assistance or voluntarily engaging with social services during pregnancy.<sup>170</sup> For example, the judgment in *Re an Unborn Child* records that the pregnant woman, Nikki, was unable to give evidence as she had been admitted to hospital and it was “likely that the stress of [the] proceeding has caused her current health problems.”<sup>171</sup> In *L v Chief Executive of Oranga Tamariki—Ministry for Children*, Justice Muir commented that the applicant parents did not appear in the hearing because they were “in hiding” from the State.<sup>172</sup>

At the collective level, Oranga Tamariki oversight can impose a standard for family life that excludes women who fall outside dominant norms of good motherhood.<sup>173</sup> If the Oranga Tamariki interest in “unborn children” disproportionately targets women experiencing poverty and some Māori women, that interest in practice goes beyond an individual interference with lifestyle decisions in privacy and becomes a judgment about who is entitled to become a

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169. Oranga Tamariki Act at Section 78.

170. Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines the Health of Women and Children* 6 (Center for Reproductive Rights, 2000), [https://www.reproductiverights.org/sites/default/files/documents/pub\\_bp\\_punishingwomen.pdf](https://www.reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf) [<https://perma.cc/B3TY-YBFK>].

171. *Re an Unborn Child*, [2003] NZLR at [73]–[74].

172. *L v Chief Executive of Oranga Tamariki—Ministry for Children*, [2018] NZHC 1420 at 9.

173. See, e.g., Roberts, *supra* note 162, at 1463.



mother.<sup>174</sup> In this sense the policies perpetuate the subordination of women in New Zealand. The policies simultaneously claim to value life through prioritizing interventions for the “unborn” life to meet “high aspirations” for the long-term improvement in health, education and other social outcomes<sup>175</sup> while devaluing existing life and motherhood in the pregnant woman.

Further, Oranga Tamariki oversight of individual pregnant women distracts the public from the broader State supports that are required to improve child wellbeing. The policies alleviate the burden on the State to address broader deprivation and discourages society from inquiring into other non-intrusive, non-punitive solutions to the problem of child wellbeing.<sup>176</sup>

It is perverse that the State interventions in pregnancy serve to constrain rather than empower pregnant women. The State is not only failing to address the complex history of structural inequality and colonial oppression that renders certain pregnant women vulnerable to Oranga Tamariki oversight, it is imposing interventions that further constrain the very women it has an obligation to empower. Fundamentally, the State does not trust women to be partners in its interventions to protect the fetus or “unborn child” from harm and help it to thrive at birth. While the State purports to work with a pregnant woman to support her health and prepare for birth,<sup>177</sup> its efforts are hedged by a distrust of women’s choices and an eagerness to step in to replace the woman’s judgment with that of Oranga Tamariki and the Court.<sup>178</sup>

#### V. RECONSTRUCTING STATE PREGNANCY INTERVENTION TO EMPOWER PREGNANT WOMEN

New Zealand must reconstruct State pregnancy intervention to empower all pregnant women. I acknowledge that any reconstruction of pregnancy intervention within the State child protection branch will face the problem of how to overcome the structural limits of the paramountcy principle and the rescue model. Notwithstanding these challenges, the State’s vexed relationship with pregnant women cannot be resolved by the State withdrawing from pregnancy altogether. The State must instead rise to the challenge of reconstructing pregnancy interventions that promote women’s wellbeing and autonomous decision making.

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174. *Id.* at 1459–60.

175. FINAL REPORT, *supra* note 1, at 11; *Who We Are*, ORANGA TAMARIKI, <https://www.oranga-tamariki.govt.nz/about-us/overview/> [<https://perma.cc/ZU8H-MYVT>].

176. Roberts, *supra* note 162, at 1436.

177. *See supra* Part I.

178. *See, e.g., In the matter of Baby P (an unborn child)* [1995] NZFLR 577 (FC) at 583–84.

*A. Problem of Overcoming Paramountcy Principle and Rescue Model*

Two core features of traditional child protection services are fundamentally incompatible with the autonomy of pregnant women: the paramountcy principle and the rescue model. These structural limits cast doubt on whether the State can achieve positive, empowering pregnancy intervention within the child protection branch of government.

The “paramountcy principle” is the principle introduced in Part I that the child’s welfare and interests must be the first and paramount consideration in all decision making under the primary statute for the care and protection of children.<sup>179</sup> When the State applies the paramountcy principle to the fetus in the frame of an “unborn child” it sets up a contest between the woman and her fetus and the woman and her future child. As I have outlined in Parts II and IV, the principle elevates the fetus to the position of “child” whose welfare and interests should be prioritized at the expense of the interests of the pregnant woman.

The second challenge arises from the “rescue model.” The “rescue model” is the idea that the State meets its responsibilities for child wellbeing by establishing standards for the care and protection of children and intervening to “rescue” children when parents fail to meet those standards.<sup>180</sup> As I have explained in Parts I and III, the State sets the standards for the care and protection of children and the discretionary application of these standards in an environment of structural inequality and colonial oppression serves to impose dominant white middle-class norms of parenting and motherhood.

The rescue model places the primary responsibility for child wellbeing on individual parents and ignores the social or economic conditions that constrain the parents’ ability to meet the standards for care.<sup>181</sup> It works on an assumption that families should be independent from the State and that good parents will be able to meet all of a child’s needs.<sup>182</sup> This underplays the complex economic and social constraints on parents’ everyday ability to care for their children and reduces the State role to moments of crisis.<sup>183</sup> Because intervention is triggered by reports for these crisis moments, intervention becomes a punitive response to individual failure. The State intervenes to punish deficient parents through intrusive oversight of their decision making and the looming threat of moving the children from the parents’ custody to the custody of the State.<sup>184</sup>

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179. See Oranga Tamariki Act at Section 6 (demonstrating the “paramountcy principle”).

180. See ROBERTS, *supra* note 126, at 74.

181. *Id.* at 89.

182. See, e.g., EMILY KEDDELL, THE CHILD YOUTH AND FAMILY REVIEW: A COMMENTARY ON PREVENTION 19 (2017), [https://thepolicyobservatory.aut.ac.nz/\\_data/assets/pdf\\_file/0006/81249/Emily-Keddell-CAN-report-June-2017.pdf](https://thepolicyobservatory.aut.ac.nz/_data/assets/pdf_file/0006/81249/Emily-Keddell-CAN-report-June-2017.pdf) [<https://perma.cc/59LE-GPYG>]; Dorothy Roberts, *The Child Welfare System’s Racial Harm*, 44 NOMOS 98, 104 (2003).

183. ROBERTS, *supra* note 126, at 89.

184. *Id.* at 90–91.

The new investment focus of Oranga Tamariki is a partial move away from rescue responses and towards early support of families. However, such innovations continue to be pasted on top of the traditional crisis response structure where reports of concern trigger discretionary Oranga Tamariki contact and interventions are guided by the child's paramount interests. While this structure endures, pregnancy intervention within the child protection branch cannot be effective to empower pregnant women.

*B. Reconstructing, Not Rejecting, State Intervention*

Yet the State's vexed relationship with pregnant women cannot be resolved by the State's withdrawal from pregnancy altogether. In the reproductive health information context, Professor Lynn Freedman has called for a questioning of the traditional modes of thinking about human rights that reject State involvement, arguing that: "Our goal is not simply to eradicate the practice or prevent state intrusion on a basic freedom by rejecting any state involvement in the issue. Women need and want high quality reproductive health services, and states are key to ensuring that they get them."<sup>185</sup>

Freedman's call to use human rights principles to think about how, not whether, the State should intervene in individual lives to best promote human dignity and welfare is equally pertinent to the examination of State intervention in pregnancy. Denying State support for pregnant women would simply impose a different kind of limit on women's ability to make decisions and take action to prepare for wanted, healthy pregnancies and stable parenting relationships.

For this reason, the objective is not to do away with State intervention in pregnancy but for the State to reconstruct it in a way that promotes women's wellbeing and autonomous decision making. The reconstruction of State intervention in pregnancy is supported by an affirmative concept of the right to privacy, the concept of reproductive autonomy, the Crown's positive obligations to Māori under Te Tiriti o Waitangi and New Zealand's international treaty obligations.

Dorothy Roberts presents an affirmative right to privacy that emphasizes a duty of the State to provide the necessary social conditions and resources to support fully autonomous decision making.<sup>186</sup> Critically, the affirmative view recognizes the connection between privacy and equality, where "the dehumanization of the individual" is tied to the broader "subordination of the group."<sup>187</sup> Roberts contends that the government's "duty to guarantee

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185. Lynn P. Freedman, *Censorship and Manipulation of Reproductive Health Information: An Issue of Human Rights and Women's Health*, in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* 1, 2 (Sandra Coliver ed., 1995).

186. Roberts, *supra* note 162, at 1479.

187. *Id.* at 1480.

personhood and autonomy stems not only from the needs of the individual, but also from the needs of the entire community.”<sup>188</sup>

Erin Nelson has proposed an account of reproductive autonomy that:

favours State intervention to the extent that it involves positive involvement by the State in the lives of pregnant women who need support in order to exercise reproductive autonomy (even only to a limited extent), and whose capacity for autonomy will be increased by the provision of such support and assistance.<sup>189</sup>

This focus on enhancing autonomy is most pertinent for the pregnant woman, who is carrying the fetus and thus will be the most directly affected of any State intervention. It also extends to the other parent or involved family members: the autonomy constraint is both in avoiding constraining the ability of the family to make choices, and in promoting the ability to make choices.

The objective of building positive State intervention is further supported by the New Zealand Crown’s positive obligations to Māori under Te Tiriti o Waitangi. The Oranga Tamariki Act, and any statute dealing with the control of children, is colored by the key Treaty principles of partnership, protection and participation.<sup>190</sup> In the context of child protection services, the Treaty preserves and protects the familial organization of Māori.<sup>191</sup> By July 1, 2019, Oranga Tamariki will carry new statutory duties to recognize and provide a practical commitment to the Treaty principles.<sup>192</sup> The duties include ensuring that the policies, practices and services of Oranga Tamariki “have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whanau, hapū, and iwi.”<sup>193</sup> In the context of health services, the Treaty principles further require the State to work together with Māori communities to improve strategies for Māori health, involve

188. *Id.*

189. ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 204 (2013).

190. *Barton Prescott v. Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); *New Zealand Māori Council v. Attorney-General* [1996] 3 NZLR 140 (CA). This Note does not address the ongoing critique of the Treaty principles. See, e.g., ANI MIKAERE, COLONISING MYTHS MĀORI REALITIES HE RUKURUKU WHAKAARO 139 (2011).

191. *Barton Prescott v. Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

192. Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, Section 14.

193. “Mana tamaiti (tamariki)” is defined in the Act as “the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person.” *Id.* at Section 1(7). “Whakapapa” is defined as “the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend” and “whanaungatanga” as “the purposeful carrying out of responsibilities based on obligations to whakapapa,” “the kinship that provides the foundations for reciprocal obligations and responsibilities to be met” and “the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection.” *Id.*

Māori in all levels of decision making and delivery of services, and ensure that Māori have at least the same level of health as non-Māori.<sup>194</sup>

State support of pregnancy is consistent with New Zealand's international treaty obligations to support family life. The ICCPR describes the family as "the natural and fundamental group of unit of society," which is "entitled to protection by society and the State" under Article 23 of the Convention. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women requires State parties to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary."<sup>195</sup>

While the Convention on the Rights of the Child's protections before birth must be limited and are subject to a debate around whether the definition of "child" includes "the unborn,"<sup>196</sup> the Convention clearly emphasizes the positive obligation for the State to provide the conditions for a healthy family life. In particular, Article 19(2) of the Convention directs States to provide "protective measures" against abuse and neglect, including "effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child."<sup>197</sup> Article 24(2)(d) requires States to ensure appropriate pre-natal and post-natal healthcare.<sup>198</sup> Article 27(3) places the primary responsibility for a child's living conditions on their parents but also points States to "provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."<sup>199</sup> These positive obligations to support families do not hinge on the fetus itself being a child, but should extend to support in preparation for birth.

### *C. Steps Towards Reconstruction*

I propose two initial steps toward reconstruction of State pregnancy intervention to empower New Zealand women.

The first step is to move away from narrowly targeted crisis interventions and towards broad universal support. One piece of this shift is to address the disjunction between motherhood norms and motherhood realities that leads discretionary Oranga Tamariki interventions to target a marginalized subset of

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194. MINISTRY OF HEALTH, THE GUIDE TO HE KOROWAI ORANGA: MĀORI HEALTH STRATEGY 12 (2014), <https://www.health.govt.nz/system/files/documents/publications/guide-to-he-korowai-oranga-maori-health-strategy-jun14-v2.pdf> [<https://perma.cc/E3CS-TN33>].

195. Convention on the Elimination of All Forms of Discrimination Against Women, art. 12, Dec. 18, 1979, 1249 U.N.T.S. 13.

196. See Mitra, *supra* note 79, for a discussion of the debate and compromise regarding how to approach the "unborn" in the Convention in the context of disagreement on State approaches to abortion and the ambiguity of the preamble reference to "appropriate legal protection" before birth.

197. Convention on the Rights of the Child, *supra* note 15, art. 19(2).

198. *Id.* art. 24(2)(d).

199. *Id.* art. 27(3) makes clear this is subject to the State's "national conditions" and "means."

pregnant women. Oranga Tamariki must work to embrace understandings of parenting that effectively disrupt the place of white, middle-class norms of good motherhood as the center of care and protection standards. A further piece is to prioritize universalized support services that aim to provide the social and economic conditions necessary for parents to meet the expected standards of care and enhance the existing capacities of the whānau to engage in self-determination and autonomous decision making.<sup>200</sup> Such services would provide critical support for families to prepare for birth without the looming threat of punitive interventions to override the judgment of the pregnant women or place the fetus into the formal custody of the State.

The second step is to abandon the State's claimed interest in the fetus as an unborn child separate from the pregnant woman and replace this with an interest in the health and wellbeing of the family or whānau. The interest in the family or whānau may mean the pregnant woman alone, the pregnant woman and her wanted future child, the pregnant woman and partner, or the pregnant woman and a broader family group. Instead of shoehorning pregnancy interventions into the traditional care and protection model and thereby sacrificing the rights-bearing pregnant woman to the paramount interests of her fetus, the model would situate the woman within her chosen family and community and provide conditions for her empowerment.

#### CONCLUSION

State intervention in pregnancy must be reconstructed to maximize its promise and guard against its perils. On the promise side, a reconstructed intervention must recognize that pregnancy is indeed a unique opportunity for the State to put a family in the best possible position to prepare for a wanted, healthy pregnancy and a stable parenting relationship. On the peril side, State intervention must recognize that the fetus is not a child and that traditional child protection tools are inappropriate. This does not mean that the State does not have any duties toward a wanted child, but these duties are tied to the woman's desire to produce a healthy child and her rights to the conditions that make this desired result possible.

There are no easy solutions to the State's vexed relationship with pregnancy. Going forward, it will be necessary to examine whether positive, empowering, affirmative intervention can be achieved within the child protection branch or whether the child protection branch is inevitably a site of constraint for pregnant women. The inquiry must interrogate how the State can bring its duty to grapple

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200. L. Ruwhiu, *Indigenous Issues in Aotearoa New Zealand*, in M. CONNOLLY, M. & L. HARMS, *EDS.*, *SOCIAL WORK: CONTEXT AND PRACTICE* 107, 118 (2009).

with the deeper structural conditions limiting children's wellbeing in New Zealand into its immediate relationship with individual families.