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Reproductive Liberty Under the Threat of Care: Deputizing Private Agents and Deconstructing State Action

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REPRODUCTIVE LIBERTY UNDER THE THREAT OF CARE: DEPUTIZING PRIVATE AGENTS AND DECONSTRUCTING STATE ACTION

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INTRODUCTION

In 1997, as abortion clinics were bombed and set ablaze across the country in connection with the 24th anniversary of *Roe v. Wade*,[1]

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1. Roe v. Wade, 410 U.S. 113 (1973) (decided on Jan. 22, 1973). In January 1997, the Reproductive Services Clinic in Tulsa, Oklahoma was bombed twice—once on the first and again on the nineteenth. *See* Jan Hoffman, *January 19–25; Roe, Revisited*, N.Y. TIMES, Jan. 26, 1997, § 4, at 2 [hereinafter Hoffman, *Roe, Revisited*]. On January 16, 1997, two bombs exploded at a women's health clinic that provided abortion services in the suburbs of Atlanta. *See* Rick Bragg, *2 Bomb Blasts Rock Abortion Clinic at Atlanta*, N.Y. TIMES, Jan. 17, 1997, at A15.

the Supreme Court armed the anti-choice[2] movement with its most powerful weapon. Standing alone, the Supreme Court's decision in *Schenck v. Pro-Choice Network of Western New York*[3] might simply be dismissed as a controversial, perhaps aberrant, use of the First Amendment to endorse violence. Yet when viewed in the context of recent judicial and legislative action, what emerges is a dangerous line of reasoning which restricts reproductive liberty and, in so doing, implicates the feminist ethic of care, which has traditionally been used to promote a more value-centered legal system.[4]

In addition to curtailing civil remedies through *Schenck* and other recent decisions,[5] the judiciary has exposed women seeking abortion services to heightened violence by dismissing charges of criminal conduct by anti-choice protesters.[6] Ongoing legal efforts related to clinic access, welfare, and the state prescribed use of contraception have also quietly put female reproductive liberty in danger.[7] Comparing these movements reveals the common tactics in their respective agendas.

On each of these fronts, the successful denial of reproductive liberty is attributable to the invocation of moral principles and the depiction of women as childbearers. However, a novel twist has been added to such traditional judicial thinking. Through a failure to distinguish public conduct from its private counterpart, in the clinic access arena, private agents may engage in activity which violates female reproductive liberty without sanction by any constitutional principle. Private agents have effectively been "deputized," charged with furthering the state's agenda.

Feminism mirrors the basic principles of this trend by coupling its pledge to a jurisprudence of morality with a desire to explode the

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2. I deliberately choose the label "anti-choice" because the term most accurately reflects that movement's drive to subordinate women's control of reproduction. *See, e.g.*, PATRICIA IRELAND, WHAT WOMEN WANT (1996) (use of "anti-abortion"); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 45, 48 (1994) (use of "pro-life" and "right-to-life"); FAYE WATTLETON, LIFE ON THE LINE 230–33, 312–17, 420–33 (1996) (use of "pro-criminalist"). By contrast, in recognition of the alternatives it protects, I have labeled advocates of abortion as "pro-choice."

3. Schenck v. Pro-Choice Network of W. N.Y., ____ U.S. ____, 117 S. Ct. 855 (1997).

4. *See infra* Part II.

5. *See infra* Part I.

6. *See* United States v. Lynch, 952 F. Supp. 167, 169 (S.D.N.Y. 1997) (finding willful conduct ruling precluded because defendant bishop and monk acted out of "conscience and sincere religious belief"); *see also infra* Part I.C.

7. *See infra* Part III.

public/private dichotomy. These parallels suggest that the feminist ethic of care may undercut efforts to achieve reproductive liberty and gender equality. The debates surrounding welfare and state-mandated contraceptive use reveal another danger created by the image of woman as caregiver. In both areas, the distortion of this image to create a stereotypical "good" nurturer has allowed reproductive rights to be limited by race and class.

This Article uncovers the unsettling parallels between feminism and the recent restrictions on reproductive liberty in order to reveal the threat posed by the feminist ethic of care. By critically reexamining feminism's foundation and direction, the need for greater emphasis on female individuality becomes apparent. My contention is that such a perspective, aggressively supported by the state, will ensure feminism's progress and encourage the achievement of gender equality.

After examining the Supreme Court's decision in *Schenck* and other judicial limitations on clinic access in Part I, Part II discusses the troubling similarities between feminist theory and the rationale employed to justify these recent restrictions on reproductive liberty. Part III follows with another dimension of the ethic of care which may encourage further control over reproductive liberty, allowing a woman's right to reproduction to be marginalized by her class or race. Finally, Part IV concludes by urging feminism's reexamination of the ethic of care and a refocus upon female individuation.

I. *SCHENCK* AND THE LIMITS ON CLINIC ACCESS

A. Pre-Schenck: Bray v. Alexandria Women's Health Clinic

In order to place *Schenck* within proper perspective, reviewing the Supreme Court's earlier decision in *Bray v. Alexandria Women's Health Clinic*[8] proves worthwhile. Filing suit under 42 U.S.C. § 1985(3) to enjoin the anti-choice activists from demonstrating at abortion clinics in the Washington, D.C. metropolitan area, the *Bray*

8. National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part,* and *remanded sub nom.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

petitioners argued that the existence of a private conspiracy deprived women seeking abortion services of the equal protection of the law.[9]

Delivering the majority opinion, Justice Scalia declared that opposition to abortion does not meet the § 1985(3) requirement of sex-based intent.[10] Despite the fact that only women engage in abortion, the disfavoring of abortion was not ipso facto invidious discrimination against women.[11] The Court reasoned that anti-choice demonstrations were not directed against women, but aimed at protecting the "victims of abortion."[12] By excusing the protesters' behavior with this justification, the Court not only inferred that the fetus is life, but unequivocally demonstrated an interest in protecting the fetus without considering the hardships faced by the woman deprived of her constitutional right of choice.[13]

However, even more significant than the *Bray* Court's identification of the "victims" was its argument that the protesters' actions did not reflect a discriminatory intent because their position was shared by

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9. *See* National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1492–93 (E.D. Va. 1989).

10. *See Bray*, 506 U.S. at 270.

11. *See Bray*, 506 U.S. at 271–73 (citing Harris v. McRae, 448 U.S. 297 (1980); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Maher v. Roe, 432 U.S. 464 (1977); Craig v. Boren, 429 U.S. 190 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974)).

12. *Bray*, 506 U.S. at 270. The *Bray* decision is not the first to ignore a woman's personal interest in abortion services. *Roe v. Wade* has been similarly criticized for balancing the rights of the fetus against the rights in a doctor-patient relationship, without any regard for the woman's personal rights. *See* Robin West, *Jurisprudence and Gender, in* FEMINIST JURISPRUDENCE 493, 525–26 (Patricia Smith ed., 1993) [hereinafter West, *Jurisprudence*].

13. In contrast to the characterization of abortion as a decision of "last resort," former Planned Parenthood Director Faye Wattleton understands that "[a]bortion is often a woman's first choice." WATTLETON, *supra* note 2, at 193. Oftentimes, women do not have control over the conditions under which they become pregnant. To deny women access to abortion legitimates the conditions of sexual inequality under which they became pregnant. *See* Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 643–45 (1983) [hereinafter MacKinnon, *Feminist Jurisprudence*]. In addition children consume a woman's privacy. *See* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 86 (1988). Furthermore, the commitment to individual autonomy requires freedom from unwanted pregnancy. *See* ROBERTSON, *supra* note 2, at 49. Abortion may allow a woman to regain control over her own life, preventing such hardships as those often associated with single motherhood. The life-long bond of mother and child will dictate the rest of a woman's life. Protecting abortion rights thereby permits a woman to "make something of her life." *See* West, *Jurisprudence*, *supra* note 12, at 507.

the state.[14] Whether carried out by public or private actors, the Court concluded it was "proper and reasonable [to legitimate] 'a value judgment favoring childbirth over abortion.'"[15] Previously, in *Maher v. Roe*, the Court allowed the state to promote the identical moral judgement by upholding a federal funding scheme which allotted federal monies for childbirth and denied funding to abortion services.[16] Although there is a fundamental right to an abortion, the *Maher* court found that failure to subsidize a right does not interfere with its exercise.[17] The *Bray* decision extended *Maher*'s logic, utilizing it to protect private actions found to be consistent with the state-endorsed morality. By building on *Maher* and its progeny,[18] Justice Scalia reasoned that the private, anti-choice tactics challenged in *Bray* did not constitute discrimination towards women.[19]

In a vigorous dissent, Justice Stevens rebuked the Court for its moral posturing.[20] Justice Stevens likened the brazen actions of the anti-choice protesters to the "organized and violent mobs"[21] Congress had intended to prevent from stealing the citizenry's constitutional rights when it passed § 1985(3).[22] By relegating women to the role of

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14. *See Bray*, 506 U.S. at 274.
15. *Bray*, 506 U.S. at 274 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).
16. *See Bray*, 506 U.S. at 274 (relying on *Maher*, 432 U.S. at 474).
17. *See Maher*, 432 U.S. at 474–75.
18. Relying on *Maher*, the Supreme Court has supported similar measures designed by the state to promote childbirth over abortion through the use of selective funding. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding the denial of Title X funding for family planning facilities providing abortion services); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment's denial of federal funding in cases of therapeutic abortion); *see also* Williams v. Zbaraz, 448 U.S. 358 (1980) (upholding denial of state funding for therapeutic abortions); Poelker v. Doe, 432 U.S. 519 (1977) (relying on similar state inaction argument to uphold city prohibition of nontherapeutic abortion in public hospital).

    Of course, state influence over reproductive choice is not limited to funding issues. By recognizing a state interest in protecting life after viability, the state's influence over reproductive choice has always been present. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973). More recently, the Court's rejection of the trimester approach and its creation of the "undue burden" test has allowed for an expanded state's interest throughout a woman's pregnancy. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); *see also* Webster v. Reproductive Health Servs. 492 U.S. 490 (1989) (upholding state statute prohibiting public employees assistance in abortions that are not necessary to save a woman's life).
19. *See Bray*, 506 U.S. at 274 (citing *Maher*, 432 U.S. at 474).
20. *See Bray*, 506 U.S. at 309 (Stevens, J., dissenting).
21. *Bray*, 506 U.S. at 309 (Stevens, J., dissenting).
22. *See Bray*, 506 U.S. at 313–14 (citing language of statute).

caregiver through a "blanket refusal"[23] of the right to choose, the protesters' actions amounted to "invidious discrimination."[24] The majority's denial of the private conspiracy claim effectively legitimated discriminatory conduct. *Bray* accomplished nothing less than what was accomplished by the *Bradwell* Court of 1873. *Bradwell v. Illinois* endorsed the belief that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[25] The Court's subsequent decision in *Schenck* similarly confines woman to the role of nurturer.

B. Schenck v. Pro-Choice Network of Western New York

At issue in *Schenck v. Pro-Choice Network of Western New York*, was a woman's effective access to abortion services.[26] The petitioners, a group of health care organizations and clinics, sought to enjoin the respondents from engaging in anti-abortion protests outside its clinics. After granting a temporary restraining order (TRO) to prevent a large scale blockade by the defendants, the District Court granted petitioners' request to convert the TRO into a preliminary injunction.[27]

As the Supreme Court acknowledged in *Schenck*, prior to the petitioners' legal action, the clinics were subjected to "numerous large-scale blockades."[28] The protesters' conduct included marching, standing, kneeling, sitting and lying in the clinic driveways and doorways. As a result, patients as well as doctors, nurses and the clinic's other employees were prevented from entering the clinics.[29] In addition to

23. *Bray*, 506 U.S. at 309 (Stevens, J., dissenting).
24. *Bray*, 506 U.S. at 326 (Stevens, J., dissenting).
25. *Bray*, 506 U.S. at 321 n.15 (Stevens, J., dissenting) (quoting Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgement)).
26. After the initial complaint was filed, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, holding that women seeking abortions were not a protected class under 42 U.S.C. § 1985(3). *Bray*, 506 U.S. at 269. Consequently, the § 1985(3) claim was dismissed by the District Court in *Schenck*. Pro-Choice Network v. Project Rescue, 828 F. Supp. 1018, 1025 (W.D.N.Y. 1993).
27. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1421 (W.D.N.Y. 1992). The petitioners' complaint, filed on September 24, 1990, stated that defendants had announced a blockade for September 28, 1990. The preliminary injunction was granted on February 14, 1992, approximately 1 1/2 years after the filing of the complaint. In the interim, the TRO had been extended. *See Pro-Choice Network*, 799 F. Supp. at 1421.
28. *Schenck*, 117 S. Ct. at 860.
29. *See Schenck*, 117 S. Ct. at 860.

these physical blockades, smaller groups of protesters engaged in conduct that the District Court referred to as "constructive blockade[s]."[30] These efforts were intended "to prevent or dissuade patients from entering the clinics."[31] The constructive blockades actively discouraged entrance by forcing patients "to run a gauntlet of harassment and intimidation in the hope that [they would] turn away before entering."[32] Such measures included trespassing onto clinic parking lots, entering clinics, crowding around cars, and milling in doorways and driveway entrances "in an effort to block or hinder access to the clinics."[33] Protesters also "threw themselves on top of the hoods of cars or crowded around cars as [individuals] attempted to turn into parking lot driveways."[34]

Attempting to persuade women that abortion was immoral, some protesters spoke individually to women entering the clinic. These protesters' techniques could become more aggressive, with varying levels of belligerence. The protesters shouted in the faces of women entering the clinics. Surrounding, crowding, yelling, jostling, grabbing, pushing, and shoving were tactics consistent with the protesters' "in your face" strategy.[35] These "sidewalk counselors" could be heard by patients inside the facilities, their voices amplified by bullhorns.[36]

As the District Court recognized, the cumulative effect of such actions was a disruption of "the atmosphere necessary for rendering safe and efficacious health care."[37] The patients, escorts, and medical staff endured a state of heightened stress and physical danger.[38] Some patients would forego care and go home because they could not withstand the gauntlet of intimidating tactics.[39] Those patients who did reach the clinics would continue to face problems as they would usually "enter the medical facilities visibly shaken and severely distressed."[40] Due to the increased surgical risk caused by added stress,

30. *Pro-Choice Network*, 799 F. Supp. at 1424.
31. *Pro-Choice Network*, 799 F. Supp. at 1424.
32. *Pro-Choice Network*, 799 F. Supp. at 1424.
33. *Schenck*, 117 S. Ct. at 860; *see also Pro-Choice Network*, 799 F. Supp. at 1424.
34. *Schenck*, 117 S. Ct. at 860; *see also Pro-Choice Network*, 799 F. Supp. at 1424.
35. *Schenck*, 117 S. Ct. at 860.
36. *Pro-Choice Network*, 799 F. Supp. at 1425.
37. *Pro-Choice Network*, 799 F. Supp. at 1424.
38. *See Pro-Choice Network*, 799 F. Supp. at 1424.
39. *See Pro-Choice Network*, 799 F. Supp. at 1424, 1427.
40. *Pro-Choice Network*, 799 F. Supp. at 1427.

some women were forced to reschedule their appointments.[41] At times, the delay moved the abortion procedure into the second trimester, increasing health risk.[42] In other cases, the delay resulted in the complete denial of abortion services. For example, forced rescheduling was not a practical option for women who had traveled from out-of-state and could not return.[43] Intimidated post-operative patients who were required to return to the clinic also suffered an increased health risk. By delaying the post-operative appointment, the pre-abortion laminaria, a device which was inserted to achieve cervical dilation, could not be timely removed. Consequently, this increased the risk of serious complications such as infection and bleeding.[44]

In response to such actions, the District Court drafted an injunction containing numerous provisions enjoining the defendants' intimidating and obstructionist activity.[45] However, it was the challenge to three specific provisions which received significant appellate attention. These provisions created the fifteen-foot "fixed buffer zone" around clinic facilities,[46] the fifteen-foot "floating buffer zone" around persons entering or exiting the facilities,[47] and the "cease and desist" provision.[48] This final provision allowed a maximum of two sidewalk counselors to enter the two buffer zones and engage in non-

41. *See Pro-Choice Network*, 799 F. Supp. at 1427. The District Court understood that the increased stress and anxiety were of critical concern as they could cause patients to "(1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they [were] able to obtain health care." *Pro Choice Network*, 799 F. Supp. at 1427; *see also* Deborah A. Ellis and Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in* Schenck v. Pro-Choice Network, 62 BROOKLYN L. REV. 547, 554.

42. *See Pro-Choice Network*, 799 F. Supp. at 1427.

43. *See Pro-Choice Network*, 799 F. Supp. at 1427. Many women traveled to the clinics of western New York from Pennsylvania, Ohio, and Canada. *See Pro-Choice Network*, 799 F. Supp. at 1425.

44. *See Pro-Choice Network*, 799 F. Supp. at 1427.

45. *See Pro-Choice Network*, 799 F. Supp. at 1440.

46. *Schenck*, 117 S. Ct. at 857. The injunction banned "demonstrating within fifteen feet ... of ... doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of [clinic] facilities...." *Pro-Choice Network*, 799 F. Supp. at 1440.

47. *Schenck*, 117 S. Ct. at 857. The injunction banned demonstrating "within fifteen feet of any person or vehicle seeking access to or leaving such facilities...." *Pro-Choice Network*, 799 F. Supp. at 1440.

48. *Schenck*, 117 S. Ct. at 857; *see also Pro-Choice Network*, 799 F. Supp. at 1437, 1440.

threatening dialogue with patients.[49] Such counseling was to "cease and desist" upon the listener's indication.[50]

After a panel of the Second Circuit struck down all three provisions,[51] the Second Circuit en banc modified the panel's decision and affirmed the injunction in its entirety.[52] The Supreme Court upheld the fifteen-foot fixed buffer zone and the exception allowing two sidewalk counselors to enter the zone subject to the "cease and desist" provision.[53] However, the Court rejected the floating zone as overburdening First Amendment rights and rendered moot the challenge to the "cease and desist" provision in so far as it affected sidewalk counseling outside the fixed buffer zone.[54]

By eliminating the floating zone, the Supreme Court effectively forces women to endure physically intimidating, threatening and harmful protest if they wish to exercise their constitutional right of choice. In so doing, the Court endorsed activity not protected by the guarantees of the First Amendment. Why? Affirming the fixed buffer zone, the Court readily understood the protesters' activity did not constitute First Amendment speech. However, the reasoning used to uphold the fixed buffer zone sharply contrasts with the reasoning used to deny the floating zone. Such a comparison not only reveals the disingenuous nature of the Court's opinion, but more importantly, it signals an increased interest in denying reproductive liberty. This interest is consistent with judicial efforts to promote the state's moral agenda.

By upholding the fixed buffer zone, the Court acknowledged that the protesters' violent tactics were not worthy of First Amendment protection. Even the "classic speech" of leafleting and commenting on public matters could justifiably be prohibited by a court faced with "a record that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct."[55]

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49. *See Schenck*, 117 S. Ct. at 857; *see also Pro-Choice Network*, 799 F. Supp. at 1437, 1440.
50. *See Schenck*, 117 S. Ct. at 870.
51. *See* Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359 (2d Cir. 1994) (upholding all aspects of the injunction except the three provisions creating the fixed and floating buffer zones and sidewalk counselor exceptions).
52. *See* Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 377 (2d Cir. 1995) (en banc).
53. *See Schenck*, 117 S. Ct. at 868–70.
54. *See Schenck*, 117 S. Ct. at 866–68.
55. *Schenck*, 117 S. Ct. at 867.

In contrast, the rationale used to deny the floating zone contained no such understanding. Finding the floating zones invalid, the Court conveniently ignored the abusive conduct and simply concluded that the floating buffer zones "burden more speech than is necessary."[56]

The Supreme Court's willingness to reject the floating zone, while maintaining a fixed zone, is troubling. Allowing only a fixed buffer zone simply requires moving the "in your face" conduct[57] beyond the fifteen-foot mark.[58] The response of Planned Parenthood President Gloria Feldt to the *Schenck* decision underscores this realization:

> [O]ur concern for our patients and staff extends farther than 15 feet. Outside the buffer zone, the court has put its faith in anti-choice protesters to behave with decency and respect toward women seeking reproductive health care services. Recent history has shown this to be a dubious faith at best.[59]

By striking down the floating zone, the Supreme Court deceptively legitimated coercive conduct. While the District Court and the Supreme Court gave similar descriptions of the protesters' activities, unlike the District Court, the Supreme Court's recitation of the facts did not include a detailed account of the physical danger faced by the women.[60] Only Judge Winter's concurrence in the Second Circuit's en banc decision honestly upheld all terms of the injunction and reaffirmed the limits of the First Amendment: "[T]he First Amendment does not, in any context, protect coercive or obstructionist conduct

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56. *Schenck*, 117 S. Ct. at 867. This test of burdening "no more speech than necessary" was articulated in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) several years after the *Schenck* complaint was initially filed. Consequently, though the District Court drafted the injunction under the earlier time, place, and manner test for content-neutral injunctions, the timing of *Schenck's* review by the Supreme Court and Second Circuit (both by the panel and en banc) required review under the heightened *Madsen* test. *See Schenck*, 117 S. Ct. at 866–68; *Pro-Choice Network of W. N.Y.*, 67 F.3d at 386–87; *Pro-Choice Network of W. N.Y.*, 67 F.3d at 368–72; *Pro-Choice Network*, 799 F. Supp. at 1432–33.

57. *Schenck*, 117 S. Ct. at 860.

58. The Second Circuit described fifteen feet as a "very short radius." *Pro-Choice Network of W. N.Y.*, 67 F.3d at 389.

59. *Supreme Court II: REAX*, ABORTION REPORT (Feb. 20, 1997) <http://cloakroom.com/pubs/areport/main.htm>.

60. *See Schenck*, 117 S. Ct. at 859–64. Affirming the District Court's opinion, the Second Circuit, sitting en banc, did note the adverse health risks faced by women. *See Pro-Choice Network of W. N.Y.*, 67 F.3d at 383.

that intimidates or physically prevents individuals from going about ordinary affairs."[61] While recognizing that the marketplace of ideas gives "primacy to the right to persuade," such right was not intended to encompass the persuasive forces of coercion and obstruction.[62] Similarly, Judge Winter justified the need for both buffer zones, as *together* they would prevent opportunities for "nose-to-nose" intimidation, while still allowing non-threatening dialogue between the two sidewalk counselors and the ability to converse at a distance of fifteen feet.[63] Judge Winter properly balanced valid First Amendment arguments against the petitioners' constitutional right to seek abortion services.[64]

Discussed in the context of female reproductive liberty, the Supreme Court's decision in *Schenck* goes beyond implicating the First Amendment and creating a questionable hierarchy of rights which prioritizes the First Amendment over a woman's constitutional right of choice.[65] The *Schenck* decision's real significance is its successful

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61. *Pro-Choice Network of W. N.Y.*, 67 F.3d at 394 (Winter, J., concurring). As a preface to his opinion, Judge Winter remarked that his concurrence was necessary as Judge Oakes' majority opinion did not openly acknowledge that the First Amendment was never intended to protect coercive and obstructionist conduct. *See Pro-Choice Network of W. N.Y.*, 67 F.3d at 394.

    The U.S. District Court of Connecticut relied on Judge Winter's opinion in granting an injunction which included a five-foot "zone of separation" between defendant Scott and individuals entering the Summit Women's Center of Bridgeport, Connecticut. *See* United States v. Scott, 958 F. Supp. 761, 781 (D. Conn. 1997). In issuing his opinion, Judge Alan Nevas attempted to distinguish such a zone from the floating buffer zone rejected by the Supreme Court in *Schenck*. *See Scott*, 978 F. Supp. at 781 (1997). Judge Nevas' order also enjoined defendant Scott from coming within fourteen feet of the clinic's entrance. *See Scott*, 978 F. Supp. at 784 (1997). For further discussions of The Freedom of Access to Clinic Entrances Act of 1994 (FACE), see *infra* note 69.

62. *See Pro-Choice Network of W. N.Y.*, 67 F.3d at 394–95 (Winter, J., concurring).

63. *See Pro-Choice Network of W. N.Y.*, 67 F.3d at 397–98 (Winter, J., concurring).

64. While recognizing the government's other interests in ensuring traffic flow and securing private property, Winter underscored his focus upon individual rights by stating:

> coercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic moves, and private property is not invaded. A placid scene that is the result of citizens not going where they wish to be in order to avoid bullying is hardly consistent with a marketplace of ideas.

Pro-Choice Network of W. N.Y., 67 F.3d at 397 (Winter, J., concurring).

65. In drafting a content-neutral injunction restricting speech in the abortion protest context, the court must ensure "that the constitutional rights of one group are not

advancement of the state-endorsed morality of childbirth to abortion. Complementing the anti-choice movement's fanatical commitment to childbirth and the elimination of abortion rights,[66] *Schenck* provides a rationale which effectively "deputizes" the protesters, appointing them to advance the state's commonly held moral agenda.[67]

The rationale used by *Schenck* to deny the constitutional right of choice and legitimize obstructive conduct seems rooted in the reasoning of *Bray*. As in *Schenck*, *Bray* utilized the state's moral posturing to endorse reprehensible private action. In so doing, rather than protecting alternative reproductive decisions, the position of the anti-choice movement was selectively promoted. *Bray* and *Schenck* evidence a pattern of recruiting private agents to serve as the public's moral deputies.

C. United States v. Lynch

Just as *Schenck* and *Bray* license private actions as a means of coercing female reproductive choice in the civil context, a similar phenomenon emerges within the criminal context. Presiding over the U.S. District Court of the Southern District of New York in the case of *United States v. Lynch*, Judge John E. Sprizzo dismissed the criminal contempt charges brought against two protesters who had violated a permanent injunction by obstructing access to the Women's Medical Pavilion of Dobbs Ferry, New York.[68] Like *Schenck*, which had limited reproductive rights by deceptively relying on First Amend-

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sacrificed in the interest of the constitutional rights of another." New York State Org. for Women v. Terry, 886 F.2d 1339, 1364 (2d Cir. 1989).

66. Because of the anti-choice proponents' refusal to evaluate the impact of birth upon the woman's life or to consider making exceptions in the case of health concerns, rape, or fetal deformity, it is commonly charged that the anti-choice proponents' true goal is the control of women's lives. *See* ROBERTSON, *supra* note 2, at 66. For further discussion of this position, see *supra* note 2.

67. A recent case suggests there is some limit to the tactics abortion protesters may use to advance their cause. NOW won a federal civil suit against Operation Rescue and the Pro-Life Action League. The jury awarded over $85,000 in damages to two clinics that were targets of harassment. The jury found that the defendants' "acts of intimidation . . . amounted to a vast enterprise under the Racketeer Influenced and Corrupt Organizations law." *Abortion Protesters Found Liable; Threats, Violence Used, Jury Rules*, THE RICHMOND TIMES DISPATCH, Apr. 21, 1998, at A1; Jon Jeter, *Jury Says Abortion Opponents are Liable; Efforts to Close Clinics Violate Racketeering Law*, WASH. POST, Apr. 21, 1998, at A1.

68. United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997).

ment claims, and *Bray*, which had eliminated the potential power of § 1985(3), Judge Sprizzo further restricted reproductive liberty by undermining the Freedom of Access to Clinic Entrances Act of 1994 (FACE).[69]

Bishop Lynch and Brother Moscinski did not dispute that they had obstructed cars and their drivers from entering the clinic, by sitting and praying in the clinic's driveway.[70] They further understood the injunction to directly enjoin them from such activity.[71] Despite such acknowledgments, the criminal contempt charges were dismissed by Judge Sprizzo, based on his finding that the defendants' "conscience-driven religious belief" precluded the willfulness element necessary for a criminal conviction.[72] Among those surprised by Judge Sprizzo's dismissal of the charges were the defendants themselves.[73]

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69. The injunction was issued on Feb. 23, 1996 in *United States v. Lynch*, 95 Civ. 9223 (JES). It was subsequently upheld by the Second Circuit. *See* United States v. Lynch, No. 96-6137 WL 717912 (2d Cir. Dec. 11, 1996). The incident which gave rise to the criminal contempt charges occurred on Aug. 24, 1996. *See Lynch*, 952 F. Supp. at 167.

FACE provides for both civil and criminal penalties against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).

FACE's passage has been attributed to the 1993 killing of Dr. David Gunn outside the Ladies Center, Pensacola, Florida abortion clinic by Michael Griffin. However, within months of FACE's passage, Paul Hill would kill Dr. Bayard Britton and escort Jim Barrett outside the Ladies Center, wounding Jim's wife, June Barrett. Paul Hill was convicted, his case being the first brought under FACE. In 1994, at two clinics in Brookline, Massachusetts, John Salvi shot and killed Shannon Lowney and Lee Ann Nichols, wounding five others. For an accounting of the violence of 1993–1994 and the passage of FACE, see, for example, IRELAND, *supra* note 2, at 274–93.

Since the passage of FACE, the National Abortion Federation has reported the incidents of violence at abortion clinics for the year 1995 and the first seven months of 1996 to include "43 bomb threats, 67 stalking incidents, 43 death threats, 41 vandalism incidents, 15 arsons, 2 bombings and 1 attempted murder." Ellis & Wu, *supra* note 41, at 547 n.4 (quoting National Abortion Federation, Incidents of Violence and Disruption Against Abortion Providers 1 (1996)).

70. *See Lynch*, 952 F. Supp. at 168.

71. *See Lynch*, 952 F. Supp. at 168.

72. *See Lynch*, 952 F. Supp. at 170.

73. Commenting on Judge Sprizzo's decision, defendants' lawyer, A. Lawrence Washburn, Jr., was quoted as saying, "He surprised us all." Jan Hoffman, *Judge Acquits Abortion Protesters on Basis of Religious Beliefs*, N.Y. TIMES, Jan. 19, 1997, § 1 at 25 [hereinafter Hoffman, *Judge Acquits*].

When Judge Sprizzo originally issued the injunction, he had expressly rejected the religious principle defense.[74] The Second Circuit had soundly agreed, upholding the original injunction.[75] However, less than a month after the Second Circuit's affirmation, it was religious principle which excused the defendants' violation of the injunction. As charged by Vice President Al Gore, Judge Sprizzo's invocation of religious excuse to defend violent acts was "an appalling act of hypocrisy."[76] Like the Supreme Court in *Schenck* and *Bray*, Judge Sprizzo had relied on moral, rather than legal, reasoning to legitimize explicitly prohibited conduct and to further restrict reproductive liberty.[77]

Judge Sprizzo's decision was immediately interpreted as an invitation to violence. As Director Randi Fallor of the Dobbs Ferry Clinic worried, "Is it O.K. for them now to block our door? . . . For them to place bombs in the clinic? For them to shoot us, as long as they're sincere in their moral beliefs?"[78] Similarly, Vicki Saporta of the National Abortion Federation, expressed concern that Sprizzo's decision would allow police, as well as protesters, to ignore the law. Without enforcement, "People will take it to the next level and then the next and they end up getting violent."[79]

Examined collectively, these recent developments in the civil and criminal contexts reflect a new trend in efforts to curtail female reproductive liberty.[80] By aligning the morality of private and state action, the courts have legitimized the otherwise impermissible conduct of the anti-choice movement. By deputizing private agents to promote the public moral agenda, this jurisprudential trend reflects principles surprisingly similar to those espoused by feminism.[81] Such parallels pose a unique problem for feminist theory.

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74. *See Lynch*, 1996 U.S. App. LEXIS 32729 (quoting Judge Sprizzo from portions of the appealed transcript of record, 95-cv-9223).
75. *See Lynch*, 1996 U.S. App. LEXIS 32729.
76. Hoffman, *Roe, Revisited*, *supra* note 1, at 2.
77. For a discussion of *Schenck* and *Bray*, see *supra* Parts I.B., I.A, respectively.
78. Hoffman, *Judge Acquits*, *supra* note 73, at 25.
79. Hoffman, *Judge Acquits*, *supra* note 73, at 25; *see also New York: Reax from Protesters' Acquittal*, ABORTION REPORT (Jan. 21, 1997) <http://www.cloakroom. com/pubs/areport/main.htm>.
80. *See supra* Parts I, III.
81. *See* Nat Hentoff, *Justice O'Connor and the Myth of the 'True Woman'*, WASH. POST, Nov. 23, 1991, at A27. In remarks delivered at the annual James Madison Lecture at New York University, Justice O'Connor forecast that the similarities between feminism and the law's traditional subordination of women would subvert women's progress towards equality. *See* Hentoff, *supra*. For further criticism of the "essential woman" of feminism, see *infra* Part IV.A.

II. The Threat of Care for Reproductive Liberty

A. Feminism and the Ethic of Care

As *Schenck* and *Bray* exemplify, the public/private parlance is common to any reproductive discussion. Feminism has typically taken the position that the dichotomy of public and private is one which perpetuates women's subordination. By effectively endorsing the discrimination which exists within the private sphere, the distinction between private rights and public power[82] becomes a governmental mechanism utilized to "fortify private relationships of power."[83]

Examining the public/private dichotomy in the context of reproductive liberty, feminism criticizes the characterization of abortion as a private right.[84] Critics fear that couching abortion rights in the language of privacy invites restriction, as there is no public obligation to protect a private right.[85] Traditional male dominance within the private sphere exacerbates these concerns. The right of privacy is translated as "the right of men 'to be let alone,' to oppress women one at a time."[86] Similarly, the public/private dichotomy impedes state intervention in the domestic violence debate.[87]

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82. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging the family as a private realm beyond public intervention).

83. Dorothy E. Roberts, *Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. Pitt. L. Rev. 363, 390 (1996) [hereinafter Roberts, *Limits of Equality*].

84. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

85. MacKinnon, Feminism Unmodified 97 (1987) [hereinafter MacKinnon, Unmodified]. For further advancement by Catherine MacKinnon of abortion as a positive, public right, see *infra* note 93.

86. MacKinnon, Unmodified, *supra* note 85, at 102. Recognizing the limits of the public/private dichotomy, other feminists have found some value in the right of privacy. *See, e.g.*, Allen, *supra* note 13; Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 Geo. Immgr. L.J. 303, 306–08 (1997); Roberts, *Limits of Equality*, *supra* note 83, at n.24.

87. *See, e.g.*, Honorable Karen Burnstein, *Naming the Violence: Destroying the Myth*, 58 Alb. L. Rev 961, 964–65 (1995) (failure to recognize domestic violence as a public issue serves to condone it); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1869–77 (1996); Elizabeth Schneider, *The Dialectic of Right and Politics, Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589, 645–48 (1986) (discussing the developing recognition of domestic violence as a public harm); Elizabeth Schneider, *Making Reconceptualization of Violence Against Women Real*, 58 Alb. L. Rev. 1245, 1250–51 (1995) (arguing for the reconceptualization of domestic violence as a social problem which requires a public solution); Elizabeth Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973 (1991); Malinda L. Seymore, *Isn't It a Crime: Feminist*

In this manner, feminist theory has exposed the violence of privacy,[88] "exploding" the public/private distinction.[89] Such progress is intertwined with feminism's attack on liberalism. Similar to its criticism of the public/private dichotomy, feminism portrays liberalism as a means of masking male dominance through its neutral principles, abstract rules, and rights talk.[90]

In contrast to liberalism and its "ethic of justice," feminism relies on the "ethic of care"[91] to advance a jurisprudence which provides for a state-imposed moral structure.[92] With a moral center and commitment to positive rights, feminism responds to liberalism's inability to

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Perspectives on Spousal Immunity and Spousal Violence, 90 NW. U. L. REV. 1032, 1070–73 (1996) (analyzing the tension of the spousal immunity doctrine on private versus public debate in the domestic violence context); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative*, 105 YALE L.J. 2117 (1996) (discussing how the struggle against domestic violence as a right of marital privacy has led to the "modernization" of arguments permitting the perpetuation of domestic violence); Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153 (1993) (advancing a feminist approach which recognizes the strengths and weaknesses of the privacy and equality doctrines and argues for the application of the privacy doctrine to advance certain values such as autonomy over personal decisions).

88. *See* Schneider, *The Violence of Privacy*, *supra* note 87, at 979.

89. MACKINNON, UNMODIFIED, *supra* note 85, at 100.

90. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580–82 (1986); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 45–46 (1990) [hereinafter West, *Foreword*].

For a comparison of liberalism's basic tenets of individualism and neutrality, and abstract rules with feminism's themes of relation, responsibility, and contextuality, see, for example, MacKinnon, *Feminist Jurisprudence*, *supra* note 13 (arguing for supplanting liberalism with feminism); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) [hereinafter McClain, *Atomistic Man*] (finding many of feminism's qualities existing within liberalism); Roberts, *Limits of Equality*, *supra* note 83 (criticizing the facially neutral language of liberty, equality and privacy as a means of promoting white supremacy); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (proposing similar evolution from liberalism to feminism); Sherry, *supra* (arguing for the integration of feminism and liberalism); West, *Foreword*, *supra* (advocating an integration of liberalism and feminism).

For a history on the triumph of liberalism over classic republicanism in the drafting of the U.S. Constitution and the Bill of Rights, see Sherry, *supra* at 551–62. *See also* Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486–87.

91. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (2d ed. 1993). For further discussion of Gilligan's influence on feminism, see *infra* note 98 and accompanying text.

92. *See, e.g.*, Karst, *supra* note 90; McClain, *Atomistic Man*, *supra* note 90; Scales, *supra* note 90; Sherry, *supra* note 90; West, *Foreword*, *supra* note 90.

achieve social justice through neutral principles and negative rights.[93] Allowing law to define the "moral crux of the matter," feminism abandons "abstract universality," while embracing "concrete universality."[94]

Feminist theory legitimizes a legal focus on gender subordination and demands state accountability.[95] A jurisprudence of community-shared virtues, contextuality and responsibility has further appeal as it is premised on a basic understanding of female identity.[96] In contrast

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93. A promotion of positive rights is a means of addressing the law's discriminatory impact without a showing of discriminatory intent. *See* Karst, *supra* note 90, at 487–89; Roberts, *Limits of Equality*, *supra* note 83.

Mary Ann Glendon promotes positive rights in her critical response to the negative rights approach followed by Judge Posner in *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) and adopted by the Supreme Court in *Deshaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989). GLENDON, *supra* note 90, at 92–95. For further feminist promotion of positive rights, see, for example, Sherry, *supra* note 90, at 569. *See also* ALLEN, *supra* note 13, at 106 (finding governmental "indirect" constraints of reproductive liberty as problematic as "direct" constraints).

Criticizing the denial of public funding for abortion services, Catharine MacKinnon attacks the rationale of state inaction as a device for perpetuating existing inequality based on gender, class, and race. MACKINNON, UNMODIFIED, *supra* note 85, at 3–4. In order to protect reproductive liberty as a matter of right, the omnipresent nature of sexual inequality must not be ignored. *See* MACKINNON, UNMODIFIED, *supra* note 85, at 95. "Access to abortion is necessary for women to survive unequal social circumstances. It provides a form of relief, however, punishing in a life otherwise led in conditions that preclude choices in ways most women have not been permitted to control." MACKINNON, UNMODIFIED, *supra* note 85; *cf.* ROBERTSON, *supra* note 2, at 22–24, 29 (arguing decidedly against a positive rights approach for reproductive liberty despite acknowledging it should receive "presumptive primacy" when in conflict with state interests).

94. Scales, *supra* note 90, at 1387–88. Likewise, Mary Ann Glendon agrees with Justice Brandeis that the government is inevitably in the position of developing morality. For "good or ill . . . [o]ur government is the potent, the omnipresent teacher." GLENDON, *supra* note 90, at 87 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)). In so doing, Glendon criticizes Oliver Wendell Holmes who denounced "confusion between legal and moral ideas." GLENDON, *supra* note 90, at 86 (quoting Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 458–59 (1897)). For further comparison of feminism's contextual morality with liberalism's morality of noninterference, see Karst, *supra* note 90, at 499–501; West, *Foreword*, *supra* note 90, at 54. For a discussion of the subordination of women through the legal imposition of morality, see *infra* Part IV.A (discussing subordination of women through feminism).

95. *See* Scales, *supra* note 90, at 1393.

96. *See, e.g.*, GLENDON, *supra* note 90, at 134–41; Sherry, *supra* note 90, at 581–82 (recognizing that, while women emphasize "connection, subjectivity, and responsibility, men emphasize autonomy, objectivity, and rights"). Sherry argues that feminism tracks the classic republican theory of such philosophers as Jefferson, Aris-

to liberalism's male-oriented separation thesis, feminism relies on a connection thesis derived from an understanding of inherently female traits.[97]

Heavily influenced by the work of Carol Gilligan, feminists portray the female as interdependent.[98] Unlike the independent male, the female develops as a relational being due to biological factors, as well as sociological and more existential factors.[99] Such factors contribute to a female's sense of connection. With the mother as homemaker, a daughter's early emotional development comes through identification with her mother and the learned ability to empathize and be intimate.[100] This relational identity results in the female concept of goodness being equated with self-sacrifice.[101]

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totle and Machiavelli, while liberalism represents the modern individualistic paradigm. Sherry, *supra* note 90, at 543–47.

97. *See* McClain, *Atomistic Man*, *supra* note 90, at 1181.

98. Carol Gilligan's work promotes feminist's emphasis on existential connection with others, which entails a certain way of learning, creation of morality. *See* West, *Jurisprudence*, *supra* note 12, at 500–01.

For cultural feminism's positive reliance on Gilligan, see, for example, McClain, *Atomistic Man*, *supra* note 90, at 1182–83; Sherry, *supra* note 90, at 580, 585–87; West, *Jurisprudence*, *supra* note 12, at 500–01. *See also* John Hardwig, *Should Women Think in Terms of Rights?*, *in* FEMINISM & POLITICAL THEORY 53 (Cass R. Sunstein ed., 7th ed. 1990); Karst, *supra* note 90. For a negative treatment of this connection by radical feminists, see MACKINNON, UNMODIFIED, *supra* note 85, at 38–39; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]. For a comparison of cultural feminism's and radical feminism's perspectives on the female relational quality, see *infra* note 103 and accompanying text.

99. West claims this understanding of woman as "essentially connected" is feminism's "central insight." West, *Jurisprudence*, *supra* note 12, at 494, 503–04, 524. Biological factors contributing to female connection are pregnancy, intercourse, and breast feeding. *See* West, *Jurisprudence*, *supra* note 12, at 494, 503–04.

100. *See* GILLIGAN, *supra* note 91, at 8 (relying on work of Nancy Chodorow); *see also* West, *Jurisprudence*, *supra* note 12, at 501. By contrast, it is at this time that a male's sense of isolation develops. Perceiving the obvious differences between mother and self, the male develops with a greater sense of separation and individuation. *See* GILLIGAN, *supra* note 91, at 8; *see also* West, *Jurisprudence*, *supra* note 12, at 501.

With this background, cultural feminists promote the notion that "women value intimacy, develop a capacity of nurturance and an ethic of care for the 'other' with which we are connected, just as we learn to dread and fear separation from the other." West, *Jurisprudence*, *supra* note 12, at 500.

101. *See* GILLIGAN, *supra* note 91, at 70. As a result of making choices from a relational perspective, a woman's ability to succeed is impaired as she sacrifices her own interests in order to prevent the victory which comes at the cost of her competitor's failure and the risk that he will reject her. *See* GILLIGAN, *supra* note 91, at 17.

To critics of the ethic of care, it is exactly this readiness to sacrifice self for others which prevents women from moving beyond the traditional role as nurturer and pre-

Consequently, a woman's personal identity and self-esteem become linked to her ability to care.[102]

As a result of these sharp differences between male and female identity, feminism's ethic of care contrasts with liberalism's ethic of justice down to its very foundation. While liberalism views man as an individualistic being and shapes a moral and political framework to protect this identity, feminism generates a jurisprudence to complement the female relational quality. Promoting the "ethic of care," feminism argues this ethic should replace the "ethic of justice" as our guiding jurisprudential principle.[103]

B. The Threat of Care

The *Schenck* decision reveals an undesirable twist in feminism's call for a moral jurisprudence, built upon the promotion of shared virtues and the eradication of the public/private distinction. By coupling similar principles in the clinic access cases, the judiciary has

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vents the recognition of women as equal and full citizens. *See* McClain, *Atomistic Man*, *supra* note 90, at 1197–98. As Justice O'Connor has warned, feminist efforts to promote woman as nurturer may only maintain women in stereotypical roles. *See* Hentoff, *supra* note 81, at A27. The related notion of a woman's connection with others also creates a liability for women by creating a "dread" of separation. *See* McClain, *Atomistic Man*, *supra* note 88, at 1186; West, *Jurisprudence*, *supra* note 12, at 502.

In her study of young girls, Carol Gilligan found this separation anxiety to become particularly acute when young girls entered their adolescence years which demand greater autonomy. *See* GILLIGAN, *supra* note 91, at 8–9. As a result of recognizing such limitations in the ethic of care, Gilligan believes maturity cannot be attained without an integration of the ethics of care and justice. *See* GILLIGAN, *supra* note 91, at 100.

102. *See* GILLIGAN, *supra* note 91, at 17.

103. *See* West, *Jurisprudence*, *supra* note 12, at 502. It should be noted that feminists do not uniformly argue for the transformation of existing jurisprudence in order to substitute feminism for liberalism. Many argue for the integration of the two theories, allowing feminism to supplement liberalism. *See, e.g.*, Karst, *supra* note 90 (supplementation); MacKinnon, *Feminist Jurisprudence*, *supra* note 13 (transformation); Scales, *supra* note 90 (transformation); *see also* McClain, *Atomistic Man*, *supra* note 90, at 1183. It is my assertion that either a transformation or supplementation approach risks furthering woman's subordination, as both heavily focus on female connection.

Another critical difference noted between cultural and radical feminists is their varying support for the ethic of care. However, despite such differences, both cultural and radical feminist theory is rooted in a perception of the female as inherently "connected." Consequently, by focusing on connection, both approaches risk subordinating women. *See supra* note 98 and accompanying text (discussing the distinctions between cultural and radical feminism).

endorsed a morality that favors childbirth over abortion.[104] In deputizing private agents to promote this morality, the courts have ignored a woman's constitutional right to abortion services. These parallels between the ethic of care and recent judicial decisions suggest that feminism's complete dismissal of private rights may in fact strengthen efforts to restrict reproductive liberty.

Without some appreciation of private rights, coercive behavior aimed at restricting abortion rights becomes difficult to condemn. *Bray* endorsed the violent tactics of private citizens by recognizing that they promoted a state-endorsed morality. Similarly, in *Schenck*, the obstructionist conduct of the protesters was legitimized because it furthered the state preference of childbirth to abortion. Likewise, Judge Sprizzo in *Lynch* followed moral principles in order to dismiss criminal charges. Portraying the protesters as heroes struggling to enforce childbirth, by denying the constitutional right to abortion services, women were once again deprived of reproductive liberty.[105]

As troublesome as the courts' denial of the public/private distinction, the logic followed in *Schenck*, *Bray*, and *Lynch* bears another dangerous likeness to feminism. By restricting abortion rights, the clinic access cases insist on the female's role as mother. Likewise, feminism's promotion of the ethic of care implies that a woman's role of caregiver is undeniable, thereby also restricting a woman's ability to shape her identity. Since control over reproductive choice is central to the quest for gender equality, these similarities suggest the ethic of care may be an unlikely way to achieve equality.[106]

III. The Marginalizing Control of Welfare and Norplant

A. Welfare Reform

In addition to the moral posturing behind the clinic access cases, the morality driving the recent overhaul of welfare also poses a threat to reproductive liberty and gender equality. However, unlike the clinic access cases, which seem to uniformly promote childbirth by denying entrance to abortion facilities, welfare reform reveals another

104. *See supra* Part I.

105. *See Lynch*, 952 F. Supp. at 167 n.3.

106. *See supra* notes 13, 93 and accompanying text (recognizing woman's control over her reproduction is directly linked to the achievement of gender equality).

troubling dimension of endorsing a state-imposed ethic of care and definition of the female as caregiver. The debate surrounding welfare suggests the public is also willing to dictate who may reproduce by distinguishing between stereotypical perceptions of "good" and "bad" nurturers.[107]

Welfare reform, culminating in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[108] is a clear example of the use of law to eliminate "irresponsible reproduction."[109] Rallying support for such reform through "personal responsibility" rhetoric charged to equate "good" mothering with economic worth and childbirth within marriage, single mothers receiving welfare were cast as the unfit parents.[110] Despite statistics indicating otherwise,[111] single mothers were depicted as the cause of poverty by relying on a welfare system which encouraged illegitimacy and unemployment through its financial rewards.[112] As explained by promoters of welfare reform, the existing welfare system discouraged recipients from working, prevented marriage, and encouraged women to have more children in order to increase the size of their welfare check.[113] Given this backdrop, the family cap was championed as the means to

107. *See* Linda McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 340 (1996) [hereinafter McClain, *"Irresponsible" Reproduction*] (characterizing the distinction as one of "responsible" and "irresponsible" reproduction).

108. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

109. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 370.

110. Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1963 (1993).

111. For a discussion of the theory of welfare's causation of poverty and illegitimacy, see, for example, McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 347–48, 353–56; White, *supra* note 110, at 1964; Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2013, 2024–26 (1995) [hereinafter *Welfare Queen*].

112. Statistics reveal that 45% of the women who go on AFDC do so as a result of divorce or marital separation, 30% do so as a result of a the birth or acquisition of a child, while 12% become new recipients as a result of income loss or decrease. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 355–56 n.61 (relying on House Comm. on Ways and Means, 103d Cong., 2d Sess., Overview of Entitlement Programs, 1994 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 451 (1994)); *see also Welfare Queen*, *supra* note 111, at 2021 n.44–45 (reporting similar statistics from an earlier study).

113. *See, e.g.*, Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 159 (1996); McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 353, 374; White, *supra* note 110, at 1966 (relying on Robert Scheer, *Welfare Debate Driven by Half-Truths, Distortions*, L.A. TIMES, Oct. 28, 1992, at A1); *Welfare Queen*, *supra* note 111, at 2019.

promote the noble goals of work, marriage, and two-parent families.[114] In the alternative, the family cap policy would create a form of economic pressure which would remove a single mother's motivation for having more children.[115]

The danger of inverting cause and effect to explain welfare as the cause of poverty was readily apparent.[116] By masking racism in neutral language, welfare reform became "a 'fourth generation code word' for race."[117] Using rhetoric to endorse a "quick fix" approach, also ignored the more complex, institutional explanations for poverty and welfare dependency.[118] By denying poverty's real causes and choosing instead

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114. Family caps essentially prevent an increase in the amount of welfare allotted a family despite any increases in family size after reaching a certain number of children. *See* Appleton, *supra* note 113, at 159–61 (discussing the development of the family cap policy). Mandatory work requirements passed as part of welfare reform are also viewed as a means to promote the goals of marriage, childbirth within wedlock, and work. *See* Appleton, *supra* note 113, at 167–68.

115. *See, e.g.*, Appleton, *supra* note 113, at 159; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 353–54; White, *supra* note 110, at 1966; *Welfare Queen*, *supra* note 111, at 2019.

116. In questioning why the "welfare-causes-poverty" myth has such wide appeal, Lucie White suggests such reasons as the need for a simple explanation of poverty, persistent racism, and America's individualist spirit. White, *supra* note 110, at 1965–67. For a discussion of the racism inherent in the welfare debate, see *infra* note 117 and accompanying text.

117. White, *supra* note 110, at 1966 (citing Robin Toner *New Politics of Welfare Focuses on Its Flaws*, N.Y. TIMES, July 5, 1992, at A1, A16 (quoting Children's Defense Fund leader Marion Wright Edelman)). The conventional belief is that blacks make up a disproportionate figure on the welfare roles. *See* White, *supra* note 110, at 1966 (relying on Robert Scheer, *Welfare Debate Driven by Half-Truths, Distortions*, L.A. TIMES, Oct. 28, 1992, at A1). *See also Welfare Queen*, *supra* note 111, at 2019 nn.31–32 (describing the "typical image" of the "welfare queen" as an "urban, black, teenage mother," who has children to increase her welfare check and lives in public housing). Such images are not validated by the statistics. For example, in 1991, blacks accounted for less than 39% of the welfare population, white families accounted for approximately 38%, Hispanic families made up 17%, and Asian-Americans and Native Americans made up the remainder. *Welfare Queen*, *supra* note 111, at 2020 n.35.

Despite the contradictory statistics, such negative images of welfare recipients persist on account of more historical stereotypes, which credit whites as being "industrious, intelligent, responsible," while blacks are stereotyped as "lazy, ignorant and shiftless." Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1949 (1993) [hereinafter Roberts, *Crime, Race*] (relying on Kimberle W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–71 & n.151).

118. A woman's poverty may be the result of such factors as unemployment, underemployment, racism, and inadequate work conditions, as well as the gender unique problems of sexual harassment, gender discrimination, and domestic violence. *See, e.g.*, CATHERINE T. KENNEY & KAREN R. BROWN, REPORT FROM THE FRONT LINES:

to blame the poor for their condition, the state has come to control the reproductive rights of economically disadvantaged women.

Like the eugenic sterilization laws subordinating women in the 19th and early 20th centuries,[119] current welfare reform is driven by a desire to punish the perceived social deviants, rather than a sincere commitment to cure poverty.[120] By promoting a good nurturer myth, welfare reform utilizes the classic definition of feminine goodness to marginalize poor women and women of color.[121] The law works to punish blacks and the poor, to limit their reproduction, and to treat them as outcasts.

Like the clinic access cases, recent challenges to the family cap policy have failed because the law is imposing a definition of feminine goodness which restricts a woman's identity, denies her reproductive liberty, and discriminates.[122] Dismissing a challenge to New Jersey's family cap policy in *C.K. v. Shalala*,[123] the court found that it was rational to create a ceiling on benefits and impose a family cap, as such a system would encourage individuals to leave the welfare roles and enter the work force.[124] In furthering the state interest in altering the cycle of welfare dependency, the court readily acknowledged its interest in promoting individual responsibility and family stability by discouraging women from having children out of wedlock.[125]

THE IMPACT OF VIOLENCE ON POOR WOMEN (1996); Martha F. Davis & Susan Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141 (1995); McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 383; White, *supra* note 110, at 1963, 1986–88.

119. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 368 n.123; Roberts, *Crime, Race*, *supra* note 117, at 1963–64. Early studies supporting this campaign to sterilize poor families purported to show that tendencies towards alcoholism, poverty, criminality, harlotry, and stupidity were inherited. *See* Roberts, *Crime, Race*, *supra* note 117, at 1963–64. Furthermore, the famous case of *Buck v. Bell* is now widely acknowledged as part of this effort to control the reproductive rights of the poor and unmarried. Buck v. Bell, 274 U.S. 200 (1917). For a discussion of *Buck*, see Roberts, *Crime, Race*, *supra* note 117, at 1961–68.

120. *See* Roberts, *Crime, Race*, *supra* note 117, at 1963–64.

121. *See* White, *supra* note 110, at 1966–68. As Professor McClain notes, reinforcing such stereotypes also prevents any acknowledgment of shared male accountability. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 345–46.

122. For a discussion of the clinic access cases, see *supra* Part I.

123. C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995), *aff'd sub nom.* C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996). For extensive discussion of the *C.K.* litigation, see Appleton, *supra* note 113, at 163–65; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 398–99, 401–03.

124. *See C.K.*, 883 F. Supp. at 1015; *see also* Appleton, *supra* note 113, at 164.

125. *See C.K.*, 883 F. Supp. at 1015.

As Justice Scalia had done in *Bray*, the court justified its decision in *C.K.* by finding a state right to dictate a woman's reproductive choice.[126] *C.K.* becomes yet another example of the adoption of a jurisprudence which attempts to forcibly modify behavior to conform to express "official value judgments about sensitive, divisive and personal issues."[127]

While welfare reform has a disparate impact on women of poverty and color, it also attempts to subordinate all women by extolling marriage as the answer to a woman's poverty.[128] The characterization of women as helpless creatures, incapable of avoiding financial ruin without a man's assistance, allows welfare reform to protect traditional gender roles—man as breadwinner and homeprovider, woman as childbearer and homemaker.[129] By forcing poor women to choose

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> [I]t cannot be gainsaid that the Family Cap sends a message that recipients should consider the static level of their welfare benefits before having another child, a message that may reasonably have an ameliorative effect on the rate of out-of-wedlock births that only foster the familial instability and crushing cycle of poverty currently plaguing the welfare class.

C.K., 883 F. Supp. at 1014; *see also* Appleton, *supra* note 113, at 164; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 401–03.

126. "[W]hile a state may not hinder one's exercise of protected choices, it is not obligated to remove obstacles that it did not create, including a lack of financial resources." *C.K.* 883 F. Supp. at 1014 (relying on Rust v. Sullivan, 500 U.S. 173, 201 (1991); Harris v. McRae, 448 U.S. 297, 317 (1980)).

127. Appleton, *supra* note 113, at 164–65.

128. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 354; White, *supra* note 110, at 1986–89. As recognized by Lucie White, promoting marriage as "the answer" naively presumes a class of men, ready, willing, and able to marry and provide for their wives and children. She describes this foolish assumption as part of the "voodoo logic" espoused by Dan Quayle in his attack on television character Murphy Brown and his claim that marriage is "probably the best anti-poverty program there is." White, *supra* note 110, at 1986 (quoting Douglas Jehl, *Quayle Deplores Eroding Values; Cites TV Show*, L.A. TIMES, May 20, 1992, at A1).

129. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 385–92. The fear of man's obsolescence, if welfare was not reformed, could be heard in Dan Quayle's warnings about the welfare system: "A welfare check is not a father. The state is not a husband." *Excerpts from Vice President's Speech on Cities and Poverty*, N.Y. TIMES, May 20, 1992, at A20. Such fear may have been instilled through Charles Murray's suggestion that the state had tampered with the "natural forces," discouraging marriage by providing a woman with the economic alternative of welfare. McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 354. Society's increased readiness to accept such "deviant behavior" as single motherhood, evident, for example, in the popularity of television character Murphy Brown, may also have contributed to the increased use of moral rhetoric in the recent welfare debate. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 349.

between having children within a marriage or not having them at all, welfare reform becomes another strategic means to restrict female reproductive choice and subordinate women. If successful, the economic pressure exerted by welfare reform will have a devastating impact upon a poor woman's right to reproductive choice.[130] The sadly ironic outcome is that welfare reform may force women to resort to abortion in order to prevent the potential children who will be denied welfare as a result of the family cap.[131]

B. Norplant

As in welfare reform, the state passes judgment on women and their ability to raise children through policies mandating the use of the contraceptive Norplant. With its coercive implantation motivated by race and class bias, poor women of color are increasingly marginalized.[132] Like welfare reform, these existing prejudices allow female reproductive rights to be dictated based upon a public image of the good mother. Black women are presumptively "unworthy of procreating."[133] Welfare reform and Norplant's prescription reveal society's

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A feared consequence of using economics to force marriage is the lack of financial alternatives for women trapped in violent relationships. This tendency towards violence is particularly real in low-income marriages. *See* White, *supra* note 110, at 1987–89. One outraged reaction to Dan Quayle and his encouragement of marriage was that of a fourteen-year-old girl who was reported to ask him during a visit, "What would you prefer? A single mom, or a dad who gets drunk and beats your mom?" Hector Toban, *Visit: Remarks on One-Parent Families Anger Some L.A. Students*, L.A. TIMES, May 21, 1992, at A1, A40.

130. While recognizing the strength of economic pressures, non-economic motives also have a strong influence on a woman's decision to have children. Such motives include societal pressure, domestic violence, religious beliefs, and personal convictions. *See* Appleton, *supra* note 113, at 165; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 385.

131. *See generally* Appleton, *supra* note 113; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 401–05.

132. The *Philadelphia Inquirer*'s public endorsement of a proposal allowing cash payments to welfare recipients who accepted Norplant was quickly recognized as an attack on minority birth. The original article was met with such anger that an apology was subsequently printed. *See* Roberts, *Crime, Race*, *supra* note 117, at 1972 (discussing *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILA. INQUIRER, Dec. 12, 1990, at A18); *Apology: The Editorial on 'Norplant and Poverty' Was Misguided and Wrongheaded*, PHILA. INQUIRER, Dec. 23, 1990; *see also* ROBERTSON, *supra* note 2, at 71, 86–89 (discussing same, yet concluding that associating economic incentives with use of Norplant by welfare recipients is non-coercive state action).

133. Roberts, *Crime, Race*, *supra* note 117, at 1974.

limited vision of the "good" female nurturer—white, affluent, and married. Falling outside these parameters results in restricted reproductive rights.

Similarly, Norplant's use by the state in the criminal context has been charged as a means to oppress poor women, particularly those of color.[134] The case of Darlene Johnson, a black woman who pled guilty to child abuse and was forced to have Norplant inserted as a condition of probation, is commonly cited for its underlying prejudice. Johnson's case came before a California judge in 1991. While Johnson initially agreed to the condition, she subsequently petitioned for a rehearing after learning of Norplant's medical risks. At the rehearing the judge stated that:

> It is in the defendant's best interest and certainly in any unconceived child's interest that she not have any more children until she is mentally and emotionally prepared to do so. The birth of additional children until after she has successfully completed the court-ordered mental health counseling and parenting classes dooms both her and any subsequent children to repeat this vicious cycle.[135]

IV. Refocusing Feminism

A. Feminism's Surviving "Essential Woman"

Traditionally, feminism has been criticized for sharing the law's "middle class ideal of care," and more recent feminist theory has tried to account for racial, class, and cultural differences.[136] Yet, despite this

134. *See* Roberts, *Crime, Race, supra* note 117, at 1967–68. The use of Norplant in the criminal context is also criticized for its lack of connection to targeted criminal activity such as theft. Dorothy Roberts argues that when the connection between the crime and the punishment becomes so tenuous, racial motivations provide the only plausible explanation. Roberts, *Crime, Race, supra* note 117, at 1968.

135. Michael Lev, *Judge Is Firm on Forced Contraception but Welcomes an Appeal*, N.Y. Times, Jan. 11, 1991, at A17. While the case received a great deal of attention, Johnson's appeal ultimately became moot after she violated the terms of her probation by testing positive for drugs. *See* Robertson, *supra* note 2, at 81; Roberts, *Crime, Race, supra* note 117, at 1967–68; *see also* Tamar Lewin, *Implanted Birth Control Device Renews Debate over Forced Contraception*, N.Y. Times, Jan. 10, 1991, at A20.

136. Kimberle Crenshaw has been instrumental in demonstrating how women are marginalized by the intersection of gender with such factors as race, class, and immigration status. *See* Drucilla Cornell, The Imaginary Domain: Abortion, Pornography

progress towards a multi-axis perspective, feminism continues to bear a troublesome similarity to recent efforts restricting female reproductive liberty. Like the clinic access cases and other recent public policies dictating reproductive rights, the feminist ethic of care continues to advance a definite image of woman as nurturer. By perpetuating such an image and insisting upon community-shared virtues, feminism tacitly endorses the public's role of "morality monitor" and dictator of procreative rights.[137] Once having invited the public to assume this role, feminism provides society with an irresistible temptation to invidiously distinguish between "good" and "bad" nurturers.[138] Feminism therefore risks "modernizing" the law's traditional subordination of women, along with its heightened marginalization of women of color and poverty.[139]

The contextual decision-making element of the essential female also risks devaluing female autonomy, thereby endangering reproductive liberty.[140] By encouraging the legal system to adopt the feminist responsibility-oriented approach, feminism risks endorsing increased state scrutiny of the morality of a woman's individual reproductive choice.[141] However, as the law's renewed emphasis on

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AND SEXUAL HARASSMENT 6 (1995); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT at ix (1988) (recognizing the need not only to note such differences, but to address them fully). *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and the Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

137. *See* West, *Foreword*, *supra* note 90, at 83.

138. Feminists like Robin West have admitted to the need for a certain distrust of the government, as we cannot presume that our leaders and citizenry will act morally. West, *Foreword*, *supra* note 90, at 74–79, 83–84. For a discussion of the questionable motives of political leaders and strategists in the recent morally driven welfare debate, see Appleton, *supra* note 113, at 181; McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 404–05. *See also supra* Part III (discussing the discrimination underlying welfare reform and the state prescribed use of Norplant).

139. *See generally* Siegel, *supra* note 87 (arguing that legal reform has served as a means of perpetuating domestic violence).

140. *See* McClain, *Atomistic Man*, *supra* note 90, at 1244. Feminism characterizes a woman's decision-making ability as grounded in a contextual process which assesses the impact on all affected individuals. For a discussion of this process in making decisions regarding abortion, see GILLIGAN, *supra* note 91, at 73–98; Appleton, *supra* note 113, at 165; West, *Foreword*, *supra* note 90, at 82–85.

141. *See* West, *Foreword*, *supra* note 90, at 81–85. West reasons that promoting a woman's decision to have an abortion as a responsible choice is a means of preventing the decision from being publicly misconstrued as simply a decision of convenience. She argues that the introduction of morality into legal decision making limits the risk of abortion being viewed as an immoral act. *But see* McClain, *Atomistic Man*, *supra* note 90, at 1246–55 (discussing West, *Foreword*, *supra* note 90). In criticizing West's

morality demonstrates, public moral posturing ultimately endangers a woman's reproductive liberty.[142]

While not all feminists support the "official" feminine identity rooted in care and connection, the "unofficial" feminine alter-ego is similarly flawed.[143] In contrast to the "official" female identity, the female alter-ego craves separation.[144] This image, espoused by radical or dominance feminism, understands the subordination implicit in woman's connection with others. Connection is characterized as "invasive and intrusive: Women's potential for material 'connection' invites invasion into the physical integrity of our bodies, and intrusion into the existential integrity of our lives."[145] However, despite such realizations, radical feminism remains transfixed upon a woman's connection and dependence upon others.[146] Consequently, it also subordinates women by portraying them as helpless victims in a pervasively patriarchal world.[147]

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responsibility-oriented approach, McClain expresses concerns, which include the fear that such an approach may award the fetus personhood. The recent clinic access cases evidence the realization of such concerns, as the legal endorsement of the protester's activity have relied on such a human conception of the fetus. *See supra* notes 12–13 and accompanying text.

142. *See supra* Part II.B. McClain warns that "resting reproductive freedom upon convincing others that it is responsibly exercised seems especially dangerous: It overlooks the highly controversial nature of the abortion issue and ignores the role of people's conviction about family, religion, and the proper role of women in opposition to abortion." McClain, *Atomistic Man*, *supra* note 90, at 1254. Despite such resistance to societally imposed morality, McClain's attitude toward reproductive liberty has altered in her more recent work to one of endorsing "individual accountability," rather than staunchly protecting "individual autonomy." McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 366–67.

143. *See* West, *Jurisprudence*, *supra* note 12, at 505–10. West refers to cultural feminism's celebration of connection as feminism's "official version," while radical feminism's critique of such connection supplies feminism's "unofficial" version.

144. *See* West, *Jurisprudence*, *supra* note 12, at 509; *see, e.g.*, MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 98; MACKINNON, UNMODIFIED, *supra* note 85; MACKINNON, *Feminist Jurisprudence*, *supra* note 13.

145. West, *Jurisprudence*, *supra* note 12, at 500; *see also* West, *Jurisprudence*, *supra* note 12, at 505–06 (explaining radical feminism's oppressive characterization of pregnancy and intercourse).

146. West, *Jurisprudence*, *supra* note 12, at 499 (claiming that a significant divide between cultural and radical feminism does not exist, as both are premised on the "connection thesis").

147. Drucilla Cornell expresses the concern that MacKinnon's identification of women as "fuckees" perpetuates the very images of female subordination and weakness that her theory tries to overcome by demanding protection for women. CORNELL, *supra* note 136, at 21–24. West also warns that radical feminists risk alienating themselves by

In sharing a focus on care and connection, both strands of feminism fail to appreciate a woman's individual capacity. Rather than promoting the flawed ethic of care, feminism could perhaps better serve its stated commitment to achieving equality and maintaining diversity by championing the individuality of women.

B. A Call for Feminine Individuation

In order to maintain diversity in the pursuit of equality,[148] feminism must not impair woman's unique development.[149] Learning from its efforts to account for the variables of race, class, and culture, feminism must now sincerely embrace variations in marital status, parental status, and sexual orientation.[150]

While such an approach shares liberalism's language of autonomy and individual rights, a feminist refocus on individualism is critically different from "straight" liberalism.[151] Protecting the individual within

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failing to recognize that many women freely engage in sexual intercourse. *See* West, *Jurisprudence*, *supra* note 12, at 516.

148. West describes the ultimate utopian world as one in which the presence of difference amongst people is celebrated. West, *Jurisprudence*, *supra* note 12, at 528–29. In contrast to feminism, liberalism prevents such diversity by creating a paradigm in which liberty is preferred to equality, as the two principals inevitably conflict. "'Face it,' . . . 'seriously protecting individual liberty means relinquishing the fantasy of complete racial equality." Roberts, *Limits of Equality*, *supra* note 83, at 371.

149. In advocating for individuation, Cornell reminds us that a person's development is "an endless process of working through personae." CORNELL, *supra* note 136, at 5.

150. *See, e.g.*, ALLEN, *supra* note 13, at 85 (responding to radical feminist's arguments for eradicating the family with a reconception of the family in order to maintain the family's nurturing quality without exploiting women); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 125 (1995) (arguing single motherhood as a "deliberate choice"); McClain, *Atomistic Man*, *supra* note 90, at 1198–99 (suggesting feminism can learn from women's experiences outside of the heterosexual context); McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 430–32 (recognizing the strengths of single motherhood); West, *Jurisprudence*, *supra* note 12, at 528 (observing that women are not always caretakers and can individuate).

151. In this sense, I am referring to the traditional critique of liberalism as "hyperindividualism." *See* GLENDON, *supra* note 90, at 75; *see also* West, *Jurisprudence*, *supra* note 12, at 495–96, 505, 513 (contrasting "official" liberalism with "official" feminism); West, *Foreword*, *supra* note 90, at 71 (concluding that liberal legalism prevents society's imposition of such civic virtues as "mercy, compassion, public involvement, fellow-feeling, sympathy, or simply, love"); *cf.* ALLEN, *supra* note 13, at 103–06 (finding Dworkin's view of a liberal state to include an emphasis on social justice and that his logic would support preventing both direct and indirect government restraints on female reproductive liberty); McClain, *Atomistic Man*, *supra*

a feminist vein maintains an orientation toward promoting community welfare.[152] As Dorothy Roberts asserts, it is by respecting the individual that a community "affirms the personhood of all its members."[153]

Moreover, a feminist perspective distinctly shapes the state's role. Liberalism adopts a neutral role for the state as it works towards achieving individual autonomy.[154] In so doing, liberalism presupposes that one has the right to achieve one's own ends.[155] By contrast, a feminist perspective recognizes that the state must take an active role in breaking down existing hierarchies of power in order to ensure this initial right of individuation.[156] It is only after ensuring the "precondition" of individuation that one can begin the endless process of working toward her autonomy.[157]

Influenced by feminism, state inaction, as well as action, would be recognized as perpetuating hierarchies built on gender, race, and class.[158] In the effort to guarantee the reproductive liberty of all women, existing means of subordinating women (such as the rationales of state inaction and private action) would be addressed.[159] In summary, the state would facilitate, not eliminate, female autonomy and the attainment of reproductive liberty.

In the feminist spirit, such an approach confronts the existence of patriarchy.[160] However, the refocus upon individuation encourages

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note 90, at 1203–28 (arguing that feminism has mischaracterized the liberalist theories of Rawls and Dworkin by failing to recognize their emphasis on community values).

152. *See supra* notes 91–103 and accompanying text (discussing feminism's emphasis on shared community virtues).

153. Roberts, *Limits of Equality*, *supra* note 83, at 403 (quoting Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1480 (1991)).

154. *See* Roberts, *Limits of Equality*, *supra* note 83, at 368–71; Sherry, *supra* note 90, at 566–69; West, *Jurisprudence*, *supra* note 12, at 496, 513; *see also supra* notes 88–103 and accompanying text (discussing the feminist critique of liberalism's focus on individualism).

155. *See* West, *Jurisprudence*, *supra* note 12, at 513.

156. *See* West, *Jurisprudence*, *supra* note 12, at 513.

157. *See* CORNELL, *supra* note 136, at 4–5; West, *Jurisprudence*, *supra* note 12, at 513.

158. For a discussion of feminist support for state recognition of positive rights, see *supra* notes 91–94 and accompanying text.

159. *See supra* Parts I, III (discussing both legislative and judicial justifications used to limit clinic access, deny abortion funding, and otherwise control reproductive liberty).

160. *See* McClain, *"Irresponsible" Reproduction*, *supra* note 107, at 445–46.

feminism to take a "quantum leap" of faith.[161] By believing in the diversity and strength of the female gender, it is hoped that feminist theory can evolve beyond its firm entrenchment in the existing system, thereby allowing feminism to imagine woman outside the confines of a patriarchal world.

CONCLUSION

Through recent judicial decisions and legislative action in the areas of clinic access, welfare, and contraception, we witness the continual subordination of women and the further marginalization of women of color and poverty. On each of these fronts, the legal justification for denying female reproductive liberty has been found in principles paralleling the feminist ethic of care. In each instance, there has been a call for a jurisprudence based on a common morality rather than on abstract, neutral rules. Similarly, recent legal action and feminist theory share a baseline identification of woman as a dependent creature, with her identity built upon her relations with others. Feminism argues in theory that such principles will achieve feminism's most basic goal of gender equality. Actual application suggests otherwise. Relying on the nurturing female, an image echoed by feminism, the state's adoption of an ethic of care has curtailed, rather than enhanced, reproductive liberty. By maintaining this female image, feminism inadvertently risks "modernizing" the law's ability to subordinate women. This danger demands a sharp refocus of feminist energies. Rather than promoting an ethic of care, feminism may best serve women by focusing on its most basic principle of achieving equality through a full recognition of female diversity and individuality. In so doing, feminism would not minimize the important role woman serves as caregiver, but would prevent the encouragement of a system which dictates this role. Such control denies life's infinite choices. Moreover, it invites the law to differentiate between good and bad nurturers, with the likely result that women of color and poverty will be further marginalized.

Pursuing a theory of individuation, feminism would allow women to shape their own identities and prevent the state from dictating the terms of female reproductive liberty. With the state positioned to facilitate female reproductive liberty, feminism would ensure progress towards gender equality.

161. West, *Jurisprudence*, *supra* note 12, at 516 (quoting ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE: SELECTED PROSE, 1966–1978, at 272 (1979)).