

# THE RHETORIC OF DISRESPECT: UNCOVERING THE FAULTY PREMISES INFECTING REPRODUCTIVE RIGHTS

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## I. INTRODUCTION

The contemporary legal and popular "dialogue" about abortion is unlikely to yield acceptable constitutional or public policy solutions. The debate is too polarized, the positions too rigid, to admit any understanding or resolution. Despite the United States Supreme Court's 1973 declaration that the choice to abort a pregnancy is a constitutionally protected right,<sup>1</sup> and the 1992 reaffirmation of that basic right in *Planned Parenthood v. Casey*,<sup>2</sup> reproductive choice remains fragile.

Although *Casey* has stabilized the basic right of choice, access to abortion services has become a problem of significant dimension to many women purportedly endowed with the power to implement

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. 505 U.S. 833 (1992). Several scholarly commentators have opined that *Casey* effectively settled the issue of *Roe v. Wade's* continued viability through its thorough and elegant exegesis upon *stare decisis* and its placement of the abortion issue in a strong "stream" of basic liberty jurisprudence. *E.g.*, JAMES B. WHITE, *ACTS OF HOPE*, 166-83 (1994) (discussing how *Casey* affirms the right of a woman to have an abortion even though the *Casey* decision does not give *Roe* the respect it deserves); David Garrow, Comments to Ohio Legal History Workshop, Ohio State University (Jan. 26, 1995).

that liberty.<sup>3</sup> The Supreme Court has been increasingly willing to

3. See generally BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS* 262 (1995) (noting that today, one in five U.S. women seeking abortion cannot obtain one—because of nonfunding, declining services, fewer providers, attacks on clinics and providers, and restrictive legislation such as burdensome informed consent requirements and waiting periods). The most recent studies document that the number of abortions in 1992 was the lowest since 1979. Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1991 and 1992* 26 *FAM. PLAN. PERSP.* 100 (1994). The number of abortion providers decreases by 65 per year, leaving 2380 in 1992. Hospitals providing abortion services decreased by 18% between 1988 and 1992. *Id.* at 100. Eighty-four percent of U.S. counties have no abortion provider; 92% have one providing more than 400 abortions a year; 94% of nonmetropolitan counties have no provider; 33% of metropolitan areas have either no abortion provider or one serving more than 50 women a year. *Id.* at 103. Between 1988 and 1992, in Missouri, the state whose regulations were approved in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in 1989, abortions declined 29%. *Id.* Mississippi, which had three new providers between 1988 and 1992 had a 48% increase in abortions in that period. However, since 1992, Mississippi's informed consent and waiting period restrictions have resulted in fewer abortions than could otherwise be accounted for by other causes. Frances A. Althaus & Stanley K. Henshaw, *The Effects of Mandatory Delay Laws on Abortion Patients & Providers*, 26 *FAM. PLAN. PERSP.* 228 (1994). Henshaw and VanVort conclude that "it seems unlikely that most of the decline in abortion levels is attributable to reduced numbers of unintended pregnancies." Henshaw & Van Vort, *supra* at 106. Similarly, the public attitude toward abortions, which has been fairly stable over time, and the public attitude toward unwed childbirth, which seems to be getting more tolerant, may partially account for the decreasing number of unintended pregnancies. The accessibility of abortion services, however, seems to account for a significant part of the decrease. Henshaw & Van Vort, *supra* at 106, 112. The primary barriers to accessibility, discounting regulations like waiting periods, appear to be distance (27% of abortion patients travel more than 50 miles; 1/3 of these more than 100 miles); cost (costs vary significantly depending upon the nature of the provider, i.e. specialized clinic, private physician, hospital, and weeks of gestation, with the 10 week gestation abortion costing \$245 on average in a specialty clinic and \$1757 in a hospital outpatient facility; other costs such as transportation, lodging and medical supplies and services afterwards must also be considered); harassment (a 1985 survey by the Alan Guttmacher Institute found that 61% of nonhospital facilities and 88% of facilities that provided more than 400 abortions had experienced harassment; the highest percentage of harassment occurring in the Midwest); length of gestation (after 10 weeks and especially in the second trimester, many providers do not offer abortion services); HIV-status (many providers have not and some will not accept patients who are HIV-positive). Henshaw concludes that "these barriers may now be insurmountable to more women than was the case a decade ago." Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 *FAM. PLAN. PERSP.* 246, 252 (1991). Coupled with increasing legal restrictions, such as gag rules and waiting periods, the number of women facing insurmountable barriers is likely to increase. *Id.* at 252.

The rhetoric of "choice" as rhetoric for availability without provisions for access has also enabled others to use "choice" to support laws and policies that restrict women's access to abortion services. For instance, arguments restricting doctors from learning abortion techniques, terrorism restricting doctors from performing abortions, and the "choices" of "states" and "taxpayers" not to permit abortions in publicly supported hospitals (some coupled with laws requiring doctors to perform certain abortions only in hospitals) are examples of perversions of choice arguments. Cf. *Rust v. Sullivan*, 500 U.S. 173, 196-203 (1991) (upholding "gag" rules that prohibit advising women of the abortion option as not interfering with choice or availability, despite their access implications).

In comparison to the United States, some foreign countries, such as Canada, must have a unitary policy toward abortion because all women have the same access and funding support. In Canada, this has led to less dialogue and fewer restrictive laws. Ruth Colker attributes this to the fact that in the United States funding laws can ignore women's interest due to their decreased political power and voice, a phenomenon not possible in Canada. Ruth Colker, *Abortion and Dialogue*, 63 *TUL. L. REV.* 1363, 1389 (1989) (noting that poor women in the United States, even if able to choose to have an abortion, often cannot actually have the abortion because of the prohibitive cost).

support legal restrictions that restrict access to abortion services.<sup>4</sup> In addition, murder and violence are being leveled at abortion providers, their clinics, and their families.<sup>5</sup>

The polarized, vituperative and pervasive nature of our society's current political debate about abortion is relatively recent.<sup>6</sup> The explosion of emotion and allegations of bad faith which characterize the extreme rhetoric are a contrast to the historical treatment of the question of abortion.<sup>7</sup> Our society's treatment of the abortion question is paradoxical. Women have aborted pregnancies in every time and every culture.<sup>8</sup> Women have also been overwhelmingly respon-

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4. Compare *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking down several abortion requirements) and *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) (striking down requirements such as informed consent, parental consent, and a 24-hour waiting period) with *Casey*, 505 U.S. 833 (1992) (upholding informed consent, parental consent, and a 24-hour waiting period) and *Webster*, 492 U.S. 490 (upholding state prohibitions on the use of public employees or funds to perform or assist in abortions not necessary to save the life of the mother).

5. Timothy Egan, *Is Abortion Violence a Plot? Conspiracy Is Not Confirmed*, N.Y. TIMES, June 18, 1995, at 1 (noting the increase of arson and murders in abortion clinics since 1992); *As the Terrorism Escalates, the Pro-Choice Struggle Continues*, MS., May/June 1995, at 42, 43 (discussing the increasing violence against abortion clinics and providers, and efforts to stop it); Katie Monagle, *How We Got Here*, MS., May/June 1995, at 54, 56-57 (detailing the harassment and violence of anti-choice activists); *Strategizing: Where Do We Go From Here?*, MS., May/June 1995, at 58 (reporting a roundtable discussion about barriers to procreative choices, especially abortion. Participants included Byllye Avery, founder of the National Black Women's Health Project; Michael Hershman of Fairfax Group, Ltd., which deals with security issues; Brenda Joyner, director of the Feminist Women's Health Center in Tallahassee, Florida; Jennie Lifrieri Ries, a clinic defender in Dobbs Ferry, New York; Eleanor Smeal, president of the Feminist Majority Foundation; and Marcia Ann Gillespie, editor-in-chief of MS.)

6. See generally JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVALUATION OF NATIONAL POLICY, 1800-1900* (1978).

7. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1573-74 (1991) [hereinafter J. Williams, *Gender Wars*] (noting the change from the 1800's, when abortion was legal, providers of abortion openly advertised their services, and abortion did not create the moral dilemma it does now, to the 1990's).

8. "Anthropologists remind us that every known culture, whether literate or preliterate, primitive or modern, has engaged in [abortion]." PATRICK SHEERAN, *WOMEN, SOCIETY, THE STATE, AND ABORTION* 49 (1987) (quoting DAVID MALL, *IN GOOD CONSCIENCE: ABORTION AND MORAL NECESSITY I* (1983)). See HARTMANN, *supra* note 3, at 259 (explaining how, in most societies, abortion has been used for centuries as a common method of birth control and was tolerated implicitly, if not expressly, by social custom and law). Sheeran points out that historically, those who condemn abortion have been men, whereas women have been more likely to accept it. SHEERAN, *supra* at 51. See also Leigh Minturn, *The Birth Ceremony as a Right of Passage Into Infant Personhood*, in *ABORTION RIGHTS AND FETAL "PERSONHOOD"* 87 (Edd Doerr & James Prescott eds., 1989). The 19th century laws outlawing abortion were passed by male legislatures elected by male-only voters influenced by male physicians. See Barbara J. Cox, *Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and Webster v. Reproductive Health Services*, 1990 UTAH L. REV. 543, 561, nn.109 and 114 (1990). Contrary to some popular views, there is no direct connection between a society's views on abortion and its general respect for human life. Stephen J. Schnably, *Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy*, 13 N.Y.U. REV. L. & SOC. CHANGE 715, 742-43 (1985) (citing the abortion laws of Nazi Germany as an example of the lack of an inherent connection between views on abortion and respect for human life).

sible for the care and nurture of children, physically, emotionally and spiritually.<sup>9</sup> In the United States, no one questions the State's lack of power to forbid women from childbearing or to coerce abortion.<sup>10</sup> But a woman's choice *not* to bear a child has led to demands for State control and prohibition.

This article documents my search to understand the fragility of reproductive rights. That fragility cannot be explained by characterizing *Roe* and its progeny as baseless, unreasoned and/or unprincipled legal decisions.<sup>11</sup> As this article demonstrates, the fragility is explained by two reasons. First, the unexamined premises in the legal building blocks of reproductive rights reflect an attitude of disrespect for and mistrust of women and of their moral capacity to make difficult decisions. These premises have been incorporated into case law and the public discourse concerning reproductive rights, undermining any granting to women of a power to choose. Second, the Court and the public consistently fail to put abortion into the context of procreation when considering the proper roles of individuals and the State with respect to procreative decisions. This failure distorts the question of procreative choice and obstructs our thinking about the State's role within it.

Until approximately the mid-nineteenth century, both the common law and society in general treated first trimester abortions

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9. Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1312 (1991); see Catherine Hantzis, *Is Gender Justice a Completed Agenda?*, 100 HARV. L. REV. 690, 694, 701 (1987) (book review) (noting that despite increasing numbers of fathers who care for their children, it remains primarily the women's responsibility); Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 375-76 (1992) (noting that women are expected to give up their personal interests to take care of their children, while men are not); see also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 117-18 (1987) (explaining how our country's founders counted on women to transmit values in the home setting).

10. *Accord* Siegel, *supra* note 9, at 356, 361 (noting that early legislators would not have enacted any law that prevents a woman from having a child—and in fact enacted laws that criminalized abortion and contraceptives—partly due to the belief that a woman's primary social function and role was that of motherhood, or as "child-rearer").

11. The joint opinion of Justices O'Connor, Kennedy and Souter in *Casey*, 505 U.S. at 843, makes it clear that *Roe's* fundamental thrust recognizing the right to choose is powerful and lasting. *Id.* at 846. See also WHITE, *supra* note 2, at 168-80 (explaining how the joint opinion supports *Roe* more because of *Roe's* own merits than for the sake of *stare decisis* although *stare decisis* also plays a vital role in the opinion).

(before "quickenings") as relatively unproblematic.<sup>12</sup> The successful movement to criminalize abortion in the United States in the late nineteenth century has been attributed to several converging factors.<sup>13</sup> One scholar notes that the Industrial Revolution resulted in the creation of sex roles which identified middle-class women with the "sphere of domesticity," which included the private enclave of home, reproduction, and childrearing.<sup>14</sup> Actions deemed inconsistent with the nurturing virtues of such domesticity included control of fertility, and therefore, the practice of abortion.<sup>15</sup> Another scholar has documented the importance of the emergence of the medical profession, which sought to consolidate its power over health care delivery.<sup>16</sup> Home care, including abortion, was frequently provided by nonphysicians, and the American Medical Association ("AMA") used the outlawing of abortion to eliminate their

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12. See J. Williams, *Gender Wars*, *supra* note 7, at 1573 (explaining that quickening normally occurs late in the fourth or early in the fifth month of pregnancy). Up until 1800, no state had a law outlawing abortion. Instead, states followed the common law, which permitted abortion prior to quickening of the fetus. Even states which outlawed abortion after quickening did not penalize abortion as harshly as they penalized homicide. Many jurisdictions did not punish a pregnant woman who obtained an abortion, but only the person who performed it. MOHR, *supra* note 6, at 3-4, 265; SHEERAN, *supra* note 8, at 53. The distinction between the moral and legal implications of ending embryonic fetal life versus the moral and legal implications of taking the life of a born person continues to exist. See Schnably, *supra* note 8, at 733-34 n.55 (discussing different views on issuing criminal penalties for abortion). Indeed, many proponents of the view that abortion is murder would not punish it as murder, signaling a belief that there is a difference between the two. See RONALD DWORIN, *LIFE'S DOMINION* 13-14 (1993) (citing several polls on these beliefs); *Id.* at 20-22 (noting the distinction between the rhetoric of "murder" and the equation of fetal life with born life); Edward A. Langerak, *Abortion: Listening to the Middle*, 9 HASTINGS CENTER REP., Oct. 1979, at 24 (claiming inconsistencies in extreme positions for and against abortion, and urging the moderate beliefs, which seem fairly widely held, that moral problems increase as the fetus approaches live birth); Minturn, *supra* note 8, at 87 (explaining historical distinctions between abortion and murder); Lynn Morgan, *When Does Life Begin*, in *ABORTION RIGHTS AND FETAL "PERSONHOOD"* 99 (Ed Doerr & James Prescott eds., 1989) (detailing cultural actions which display the belief that abortion and murder are different).

13. See generally MOHR, *supra* note 6, at 20-45 (discussing how the first wave of abortion legislation, between 1821 and 1841, was due to legislators' and physicians' desire to control the practice of medicine, rather than from public attitudes toward abortion); SHEERAN, *supra* note 8, at 55-58 (explaining the historical progression of abortion laws in the United States and England in the 1800's and 1900's).

14. J. Williams, *Gender Wars*, *supra* note 7.

15. J. Williams, *Gender Wars*, *supra* note 7, at 1564-73, 1581-84; Siegel, *supra* note 9, at 321 (noting that lawmakers defined a woman's role as "wife" with reference to her obligation to bear children).

16. MOHR, *supra* note 6, at 148-70 (explaining how physicians' outspokenness against abortion led to public intolerance of abortion and influenced restrictive abortion laws).

competition.<sup>17</sup> Another scholar discusses the impact of the eugenics and nativism movements on the issue.<sup>18</sup> Opposition to genetic "undesirables" procreating coalesced with the fear that using abortion to decrease the fertility of native-born, white, middle-class women, but not to decrease the concomitant high fertility rates among immigrant populations, would threaten the character of the country.<sup>19</sup> By the late nineteenth century, restrictive abortion laws were the norm.<sup>20</sup> At no point, however, was abortion ever treated as equivalent to murder, or punished with similar severity.<sup>21</sup> In the mid-twentieth century, liberalized abortion laws, supported by the AMA and usually following the lead of the Model Penal Code, were becoming the new norm.<sup>22</sup>

*Roe v. Wade*<sup>23</sup> in January 1973 marked the United States Supreme Court's entry into the issue. Relying on past decisions which held that personal control is a fundamental right in decisions affecting one's body, home, family, marital relationship, and interest in reproductive control (to procreate and to use contraception) free from

17. See MOHR, *supra* note 6, at 145-70 (noting that the AMA used its claim to superior scientific expertise to claim a moral high ground in opposition to abortion and detailing the physicians' crusade against abortion). See also SHEERAN, *supra* note 8, at 53-58 (noting that prohibition of abortion increased as a result of the physicians' campaign); JOYCE GELB & MARIAN LIEF PALLEY, *WOMEN AND PUBLIC POLICIES*, 129-31 (1982) (explaining that certain physicians pushed for restrictive legislation to wipe out competition from less qualified doctors who were threatening their practices by advertising their willingness to perform abortions); Siegel, *supra* note 9, at 280-319 (explaining how doctors used scientific reasoning to discount a woman's role in reproduction); Thomas A. Shannon, *Abortion: A Challenge for Ethics and Public Policy*, in *ABORTION AND THE STATUS OF THE FETUS* 3, 3-4 (William Bondeson, Tristram H. Englehardt, Jr., Stuart F. Spicker, & David H. Winship eds., 1983) (noting that early abortion legislation was written to protect the mother and not out of concern for the fetus). But see Warren M. Hern, *The Politics of Choice: Abortion as Insurrection*, in *BIRTHS AND POWER* 127, 133-34 (W. Penn Handwerker, ed., 1990) (noting that some of the medical reasoning behind pushing for restrictive abortion laws was in response to women's health, as abortion had become more dangerous for some women than childbirth).

18. Linda Gordon, *Why Nineteenth Century Feminists Did Not Support "Birth Control" and Twentieth Century Feminists Do: Feminism, Reproduction, and the Family*, in *RETHINKING THE FAMILY* 40, 142-44 (Barrie Thorne with Marilyn Yalom, eds., 2d ed. 1982).

19. *Id.* at 42-44 (explaining that nineteenth century women's rights advocates sought greater respect for motherhood). See Shannon, *supra* note 17, at 3 (noting that white Anglo-Saxon Protestants would be outnumbered by immigrants if greater numbers of white women underwent abortions); GELB & PALLEY, *supra* note 17, at 129-31; Siegel, *supra* note 9, at 297-300.

20. MOHR, *supra* note 6, at 171, 226.

21. SHEERAN, *supra* note 8, at 54-55; see also *supra* note 7 and accompanying text; authorities cited *supra* note 12.

22. See SHEERAN, *supra* note 8, at 57-58 (noting that the AMA's anti-abortion campaign led to the criminalization of abortion); J. Williams, *Gender Wars*, *supra* note 7, at 1575-76; *Roe v. Wade*, 410 U.S. 113, 142-49 (1973) (discussing the positions of the AMA and the American Bar Association on abortion).

23. 410 U.S. 113 (1973).

governmental mandate,<sup>24</sup> the Supreme Court determined that a woman's liberty interest in reproductive control by terminating a pregnancy was protected within the right of privacy.<sup>25</sup> Since *Roe v. Wade*, legislative and popular efforts to restrict the availability of abortion have persisted. The Court conceded the legislative power to refuse to fund abortions in 1977 and 1980.<sup>26</sup> Until 1989, however, the Supreme Court steadfastly resisted the direct assaults upon women's choice against all but a few legislative initiatives.<sup>27</sup> With *Webster v. Reproductive Health Services*,<sup>28</sup> however, the Court began to allow restrictive legislation to survive constitutional attack. This new approach culminated with *Planned Parenthood v. Casey*<sup>29</sup> in 1992, which upheld restrictions the Court had struck down in *Thornburgh*.<sup>30</sup> What emerged was a still-recognized but diminished right of a woman to choose abortion, a right which frequently paled in comparison to an increasingly valued state interest in preserving fetal life. Coupled with the growing practical unavailability of abortion services, *Casey* creates concern that women's procreative choices will increasingly be reduced.

The full-scale battle for the "hearts and minds" of the American public continues at a fever pitch. Fought in homes, outside clinics, in the media, in academic writings, in the halls of administrative agencies, in legislatures, and in the courts, the war has created a lot

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24. *Id.* at 152-53 (citing *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (contraception); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (child rearing and education); *Meyer v. Nebraska*, 262 U.S. 390, 399 (child rearing and education)).

25. "The right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153.

26. *Maher v. Roe*, 432 U.S. 464, 480 (1977); *Harris v. McCrae*, 448 U.S. 297, 326-27 (1980).

27. Compare *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (allowing reporting of the abortion, recordkeeping of the woman's health, and requiring informed consent of the patient) with *Thornburgh v. American College of Obstetrics and Gynecologists*, 476 U.S. 747 (1986) (striking down legislation subjecting a woman to a detailed anatomical description of the fetus at two week gestational increments from fertilization to full term, and requiring her to contact agencies supportive of carrying the child to term before getting an abortion).

28. 492 U.S. 490 (1989) (upholding the prohibition of the use of public employees, funds, and facilities for the purpose of performing, aiding, encouraging, or counseling a woman to have an abortion not necessary to save her life).

29. 505 U.S. 833 (1992).

30. *Thornburgh v. American College of Obstetrics and Gynecologists*, 476 U.S. 747 (1986). *Thornburgh* struck down legislation that required a woman to hear an anatomical description of the fetus at two week gestational increments. *Casey*, however, overruled *Thornburgh* on this point and upheld informed consent provisions that required an abortion provider to give a woman truthful, non-misleading information about the nature of an abortion procedure, health risks related to abortion as well as childbirth, and the gestational age of the fetus. *Casey*, 505 U.S. at 882.

of debris.<sup>31</sup> A great deal of the debris is attributable to the legal framework from which abortion rights arose and in which procreative choice and state control are analyzed. This legal framework is riddled with too much disrespect for women to form a promising foundation for legal solutions.<sup>32</sup> We need a new paradigm. That paradigm must repudiate the vision of women<sup>33</sup> that society has constructed and the law has internalized. It must be a model for decisionmaking reflective of the human truths of procreation and respectful of the moral dimensions of the decision to transmit life to another.

There are a few positive effects of this conflagration. This fury has made us aware; it has made us think; it has made us care. Emotion as well as reason has a necessary place in human decisionmaking, and thus, by definition, in moral judgment.<sup>34</sup> I am optimistic that if we clear out the debris, accord each other the human decency of trusting the good faith and moral integrity of those with whom we disagree,<sup>35</sup> and become willing to accept the burdens and rewards of mutual social responsibility for supporting the moral life of individuals and the physical life of all of us, we can address the social problem this debate has become with reason as well as with concern.

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31. *Accord* Siegel, *supra* note 9, at 278 (noting that the Court in *Roe* did not have available all the resources in 1972 which are now available that detail the history of the nineteenth century campaign to criminalize abortion. Siegel then reexamines the decision in light of the historical reasons for the campaign, which the Court overlooked.).

32. One problem is our society's failure to come to grips with the inequality inherent in state control over female fertility. Respect and equality are both tied to compassion - the understanding of another's life conditions as they are. Without this respect and compassion for the persons and interests "behind" a right, "a system of rights is unlikely to be very effective." Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011, 1027 (1989) (citing Andreas Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOMENOLOGICAL RES. 221, 235-36 (1982)). A "robust respect for rights" is a precondition to both liberty and the exercise of responsibility by individuals. Robin West, *The Supreme Court 1989 Term: Forward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 79 (1990).

33. The vision which needs to be repudiated is not a vision of women fulfilling the critically important role of motherhood with dignity and morality. The vision in need of repudiation is the vision that women have no moral agency (at least not apart from their mothering duties) and do not deserve respect for their ability to make moral decisions, both within and outside of the context of procreation.

34. For an eloquent defense of the role of emotion in moral decisionmaking, see Sidney Callahan, *The Role of Emotion in Ethical Decisionmaking*, 18 HASTINGS CENTER REP. 9 (June/July 1988). See also NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 25-36 (1984) (arguing that problem-solving in ethical situations requires moving between the analytic/rational and receptive/caring-feeling modes, with awareness of the complexity of the issue addressed).

35. I must draw an important exception to those few anti-choice believers who also participate in and condone violence, from murder to harassment, as a method of "expression."

One author defines "good faith" in abortion as requiring pro-lifers to respect women's well-being and pro-choicers to respect the value of prenatal life. Colker, *supra* note 3, at 1363 n.1. With such a basis, fruitful dialogue becomes possible.



Our disagreements about the nature of fetal life and the moral consequences of its termination are inescapable.<sup>36</sup> Those who believe that fetal life is the moral and physical equivalent of born life and that abortion is murder will probably never convince those who believe that fetal life differs fundamentally both morally and physically from the life of a born person. But my sense is that the vast majority of us share a reverence for life<sup>37</sup> and a belief that we are moral agents with a profound moral responsibility for life. I think most of us believe procreation should be engaged in with love and moral seriousness. And I believe that most of us see a profound difference between government edict and love and morality.

It is both primary and inescapable that procreation requires moral decisionmaking.<sup>38</sup> My sense is that the vast majority of us want people to make the most moral and best decisions they can about begetting, bearing, and raising our children. We want every child to be loved, cared for and raised to be a happy, good human being and productive citizen.<sup>39</sup> I daresay that most of us would believe we lived

36. Although not nearly as furious and popularly engaged in as in the United States today, debates about abortion have persisted throughout human history: "Morally, the question of whether or not the fetus was 'alive' had been the subject of philosophical and religious debate amongst honest people for at least 5,000 years." SHEERAN, *supra* note 8, at 51 (quoting MOHR, *supra* note 6, at 4). See also Roger Wertheimer, *Understanding the Abortion Argument*, in *THE RIGHTS AND WRONGS OF ABORTION* 23 (Marshall Cohen, Thomas Nagel, & Thomas Scanlon eds., 1974) (explaining the many different arguments for and against abortion); Laurence Thomas, *Abortion, Slavery, and the Law: A Study in Moral Character*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 227, 228 (Jay Garfield & Patricia Hennessey eds., 1984) (arguing that the anti-abortionist view that pro-choice people are of low moral character, and their comparison of pro-choice people to slaveowners, is false); Schnably, *supra* note 8, at 727-48 (discussing different approaches in determining when a fetus is a person); Mary C. Segers, *Can Congress Settle the Abortion Issue?*, *HASTINGS CENTER REP.*, June 1982, at 20, 22-24, 26 (discussing the constitutional and political problems Congress would create if it passed a law declaring that life begins at conception).

37. Ronald Dworkin claims that the disputants in the debates over abortion and euthanasia both share a common reverence for the sacredness of human life, but disagree upon the best means for expressing that reverence and protecting the value of life. DWORKIN, *supra* note 12, at 84-89, 100-01.

38. Accord MOHR, *supra* note 6, at 4; SHEERAN, *supra* note 8, at 51; Siegel, *supra* note 9, at 327 (noting a Los Angeles Times survey that equated abortion with immorality) (citing George Skelton, *Most Americans Think Abortion is Immoral*, *L.A. TIMES*, Mar. 19, 1989, at A1); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 64-105 (1982) (examining the types of moral reasoning women go through when determining whether to terminate a pregnancy).

39. Cf. Siegel, *supra* note 9, at 371-72 (explaining that most women would find it more difficult to give a child up for adoption than to have an abortion because once the child is born, a woman will form strong emotional bonds with the child. These bonds, combined with familial and social pressure, will obligate her to raise the child.). Siegel also notes that forcing a woman to bear and rear a child (by prohibiting abortion) affects her ability to plan her life and career. Siegel, *supra* note 9, at 373. These factors may affect the child's happiness and quality of life. Siegel, *supra* note 9, at 373-74 nn.441-43. Siegel also explains that motherhood "forced" on a woman because of restrictive abortion laws may lead her and her children to live in poverty. Siegel, *supra* note 9, at 377.

in a reproductive utopia if every sex act were truly mutually consensual and engaged in with mature respect for self and partner, every pregnancy were a blessing, abortion could be rare or nonexistent, and every child had a happy, loving home with emotional, physical, spiritual and financial nurturance and security. But this is not the world in which we live, and it cannot be the world for which our legal, social, political and moral solutions are designed.

This article attempts to expose and clear away the debris which the law has contributed to our national struggle. Part II analyzes the Supreme Court's view of women and brings to light unacceptable premises about women's moral capacities and reproductive roles which have contaminated public belief and debate. Part III focuses upon the privacy cases to reveal the premises they have adopted. Those premises are dissonant with any intended protections of moral judgment or reservation of decisionmaking power to women. By incorporating these premises, the law of abortion rights has imbedded within itself a conflict with women and disrespect for women's moral judgments. The Conclusion suggests how the unacceptable premises of Supreme Court jurisprudence have contaminated the abortion cases, and led to the current impasse. The faulty premises that have perverted legal analysis must be changed for constructive movement to occur.

With the defective premises exposed, we can reevaluate abortion jurisprudence. The pernicious effects of such unexamined premises can then be understood and repudiated. We can seek and incorporate more helpful and viable premises. With this larger task in mind, I have taken the first steps toward a new premise in this article.

Let us respect our differences and accept the responsibility inherent in our common ground.

## II. THE PREMISES OF DISRESPECT: THE IMAGE OF WOMEN IN SUPREME COURT CASES

### *A. Introduction*

In seeking to unravel our cultural assumptions about procreation, women, and morality, I have concentrated on Supreme Court opinions which deal with those, often intersecting, matters. I have examined the Court's rhetoric and assumptions, as well as its actions and

rulings, to reveal how our culture has viewed abortion.<sup>40</sup> Through this exploration, I have identified a cultural belief system about women that helps explain the current morass in regard to procreative choice and government control over it.

My thesis is simple: the United States Supreme Court has consistently viewed women through their reproductive capacity.<sup>41</sup> Women

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40. A critical insight, which post-modern theorists have revitalized, is that language and discourse are constitutive of law and society. *E.g.*, Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 104-05 (1992) (noting that legal actors translate rhetoric into law); ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* 21-22 (1988) (proposing that phallogocentric discourse and language define the law, reality, and the female body); MARY JO FRUG, *POSTMODERN LEGAL FEMINISM* x, xix, xxxix, 125-31 (1992) (arguing that legal rules, language, and discourse determine the meaning of the female body); J. Williams, *Gender Wars*, *supra* note 7, at 1561 (noting that society views a woman as "selfish" if she puts her needs above the needs of her children).

Human myth makers have known of this important role of language and discourse for centuries, and modern anthropologists document the impact of myth on culture and social structure. *See, e.g.*, JOSEPH CAMPBELL & BILL MOYERS, *THE POWER OF MYTH* 8 (1988) (explaining how myths teach us to be members of our society). *Id.* at 9 (discussing how myths in a homogeneous society are more readily constructed and understood than in a society of persons from different backgrounds). In such societies, law replaces the ethos that myth provides. *Id.* at 13 (proposing that myths offer life models). *Id.* at 32 (proclaiming that myths deal with "the maturation of the individual" ... and ... "how to relate to this society and how to relate this society to the world of nature and the cosmos").

The United States is a highly pluralistic society that does not have the shared heritage of myth common in smaller, less complex, and more importantly, homogeneous cultures. Myth, however, binds peoples together in irreplaceable ways. We need myths to represent our shared past, present and future.

Our culture's creation myth is the Constitution, and our Supreme Court decisions are the myth of our social structure. For instance, note the reverential attitudes and language reserved for the "Framers" and "Founders" in our cultural and constitutional discourse. As one of my Constitutional Law students remarked to me one day, we treat them as secular "gods" and their words as the "Word." The Biblical nature of constitutional exegesis bears out how importantly it is constitutive of our culture as well as of our law. *Cf.* Joan Williams, *Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651, 1655 (1989) (citing MICHAEL PERRY, *MORALITY, POLITICS, AND LAW* 140 (1988)), who argues that constitutional adjudication is the "moral discourse of the constitutional community," and charges judges with developing a "prophetic" meaning). Thus the unspoken premises, the accepted beliefs, the very discourse of Supreme Court jurisprudence—especially constitutional jurisprudence—reflect our cultural code and world view, as much as they embody our law.

41. "[W]ithin law, women are treated in four ways: as a sex class, as different from men—reproducers and gendered mothers; as the same as men, like men, and therefore not women; as absent but as a class different from men; and as absent but as a class the same as men." EISENSTEIN, *supra* note 40, at 55. What is consistent is the use of maleness as the center of each view and as descriptive of "normalcy." EISENSTEIN, *supra* note 40, at 55, 69. Women's reproductive capacity, differing from men's, has been identified as "other," and in that alien form, viewed with much misunderstanding. EISENSTEIN, *supra* note 40, at 102-05. *See also* Siegel, *supra* note 9, at 265, 267-68, 331-35 (explaining that social discourse about women's roles has converged with discourse about women's bodies. Siegel discusses how this convergence has influenced legislation and court decisions. Beginning with *Muller v. Oregon*, 208 U.S. 412 (1908), the Supreme Court justified social and labor laws restricting women by looking at their bodies and their reproductive and childbearing functions. In *Muller*, the Court upheld a state law that prohibited females from working more than ten hours a day because their "physical structure" puts them at a disadvantage and because the physical well-being of women is in the public interest because women are responsible for bearing healthy babies.).

have been subsumed into their reproductive organs. The woman as an independent person with interests and needs is invisible in the Court's decisions: instead, law has treated women first and foremost as potential or actual mothers. Concomitantly, law has failed to recognize women as moral agents, capable of making trustworthy decisions in complex situations.<sup>42</sup>

Female reproductive capacity gives women an exclusive experience.<sup>43</sup> Women's reproductive capacity has been used to identify them not only as different from, but inferior to men.<sup>44</sup> Women's supposed inferiority encompasses physical, emotional, intellectual and moral capacities.<sup>45</sup> Because they are different, women have been relegated to a separate sphere of activity, identified with their

42. See Siegel, *supra* note 9, at 340 ("Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities") (citing *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991)); *Bradwell v. Illinois*, 80 U.S. 130, 139, 140-41 (1872) (Bradley, J., concurring) (reasoning that because a woman's "paramount destiny and mission" is to be a wife and mother with no legal identity apart from her husband, who can not make legally binding contracts without her husband's consent, she is incompetent to have a separate career); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785, 801 (1986) (White, J., dissenting) (noting that the majority erred in assuming that receiving certain information about the abortion procedure would increase a woman's anxiety and affect her ability to make a decision); *Rust v. Sullivan*, 500 U.S. 173, 196-203 (1991) (holding that a "gag rule" prohibiting physicians in federally funded agencies from discussing abortion as an option with pregnant women was not a constitutional invasion, but consistent with a State power to encourage childbirth, apparently believing that mere awareness of the option to abort would lead women to choose it).

43. See Colb, *supra* note 40, at 106 (noting that science and nature rhetoric degrades a woman's reproductive capability).

44. Colb, *supra* note 40, at 116-17 (explaining that because men do not share women's ability to gestate, the role of gestation in reproduction is ignored or diminished in judicial rhetoric. Pregnancy, therefore, is devalued and turned into a basis for devaluing women themselves as inferior to men and/or unsuited to "male" arenas, such as the workplace.). See EISENSTEIN, *supra* note 40, at 32-33 (explaining that the process of establishing difference based upon reproductive capacity and then choosing one set of characteristics and denominating it as "normal" or superior is the core of patriarchy). David A.J. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, 51 LAW & CONTEMP. PROBS. 123, 125 (1988) (noting that women, being identified with family life, were considered to be part of a morally inferior class whose work in the family was important only because it "released men for public life").

45. Vast amounts of literature have exposed and supported this effect of identifying women as "different from" men, and then associating the difference as inferiority. See generally Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987); Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Martha Minow, *The Supreme Court 1986 Term - Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) [hereinafter J. Williams, *Deconstructing Gender*]; Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in FEMINIST LEGAL THEORY 15, 22-25 (Katherine Bartlett & Roseann Kennedy eds., 1991) [hereinafter W. Williams, *Equality Crisis*]; Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); GILLIGAN, *supra* note 38; Alison Jaggar, *Sexual Difference and Sexual Equality*, in LIVING WITH CONTRADICTIONS: CONTRADICTIONS IN FEMINIST SOCIAL ETHICS 18 (Alison Jaggar ed., 1994); EISENSTEIN, *supra* note 40.

role in reproduction: women are mothers, domestics, and in need of protection.<sup>46</sup>

Two attitudes emerged from this cosmology. First, the denizens of the domestic sphere had lesser capacities and were deserving of less respect for themselves and their life views.<sup>47</sup> Second, this distinct world appeared unknowable to those excluded from its initiation rite—pregnancy and childbirth. As unknowable, it became mystic and mysterious, separate in a cosmic way. Both of these attitudes were instrumental in the development of law as it related to women in general and to women in their reproductive roles.

Reducing women to their reproductive roles distorted the way that law dealt with them. Such distortions were inherent aspects of the

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46. This view of the world and womanhood is markedly urban, industrial, middle-class, heterosexual, and (probably) white. As my colleague Richard Aynes and other scholars have pointed out, the "cult" of domesticity was a luxury which the rural, poor, and working classes had no real access to in practice, although they may have been confined by it in theory. See DEBORAH RHODE, *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE*, 1-9, 204-07 (1990) (noting that male-imposed difference between men and women has disadvantaged women. As an example, Rhode discusses how social conventions confined women to tedious, low status, and low-paying work.); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, in *FEMINIST LEGAL THEORY*, *supra* note 45, at 57, 67-68 (noting how some African-Americans criticize women of their own race for failing to live up to a white female standard of Motherhood); STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 42-67 (1992) (discussing the roles of tradition, stereotypes, and myths in love and the family); Schnably, *supra* note 8, at 854 (noting that the image was not universally met, but was "universally aspired to.") (citing Epstein, *Family Politics and the New Left: Learning from Our Own Experience*, *SOCIALIST REV.*, May-Aug. 1982, at 141, 145.)).

47. However, women did earn a kind of respect for fulfilling their assigned roles to "care for and socialize their children," and to "provide a caring refuge" for their husbands. Schnably, *supra* note 8, at 853 (describing the woman's function in the traditional, late-nineteenth century, bourgeois family).

case law which formed the source of the right recognized in *Roe*.<sup>48</sup>

Although *Roe* completed a cycle of breaking free from the myth in practice, it relied upon its cosmology in theory.<sup>49</sup> And just as a science based upon fairy tale and mythology can be exposed as absurd by unbelievers, a legal right based upon fairy tale and mythology can be destroyed by opponents. This tension helps to explain the rift over abortion that our society currently finds nearly unbridgeable.

The cases which form the foundation for *Roe v. Wade* fall into two classes: cases about women and women's roles and cases about privacy. These two strands meet initially in *Griswold v. Connecticut*,<sup>50</sup> but find their unity in *Roe*. By exploring each class of case, I will demonstrate how they incorporate the faulty premises of disrespect and female identification with reproduction in ways that have led to the problems in abortion jurisprudence.

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48. Interestingly, those who believe in the myth of woman's limited role and capacity are usually the most vociferous opponents of *Roe*. See Schnably, *supra* note 8, at 725-29 (discussing three different approaches to abortion, each based on one's belief of women's role in society). Many scholarly studies of the members of both the pro-choice and pro-life movements establish that at its core, a great deal of the disagreement arises from attitudes about women, women's roles, and family structure. It is important to note that these attitudes are not universal and not strictly divided according to identity with either side of the debate. They are also not the only reasons behind a person's position with respect to abortion. See FAYE GINSBURG, *CONTESTED LIVES*, 139-45, 169-70, 194-97 (1989) (reporting that her anthropological study of Fargo, North Dakota, revealed that pro-life activists identify more with the values of "domesticity," whereas pro-choice activists see women as autonomous people with an interest in pursuing self-development through careers as well); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 161, 176 (1984) (discussing a sociological study of California activists, which shows pro-life women are more committed to "traditional" views of women's roles as wives and mothers, whereas pro-choice activists are more career-oriented); Judith Blake, *Elective Abortion and Our Reluctant Citizenry: Research on Public Opinion in the United States*, in *THE ABORTION EXPERIENCE* 447 (Howard J. Osofsky & Joy D. Osofsky eds., 1973) (discussing surveys that reveal that conservative views of the family, gender roles, and sexuality explain much anti-abortion morality); SHEERAN, *supra* note 8, at 125-28, 131 (explaining that much of the difference between pro-life and pro-choice advocates is their view about women's roles and changing them); EISENSTEIN, *supra* note 40, at 126, 154, 184 (noting that differing views on the family, gender roles within the family, and sexuality, separate pro-life from pro-choice adherents); GELB & PALLEY, *supra* note 17, at 6 (noting that the threat abortion rights pose to traditional values of family and sex roles explains the opposition to them); J. Williams, *Gender Wars*, *supra* note 7, at 1580-83 (explaining how the rhetoric of pro-choice and pro-life adherents accentuates their markedly different views of women's roles in the family and the workplace); accord Siegel, *supra* note 9, at 327-28 (noting that the existence of differing views of women's role as mother is a key to the abortion debate); ROBERT GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 91 (1988) (noting that traditional views about sex roles characterize many pro-life adherents); Shannon, *supra* note 17, at 8 (explaining that critical factors in abortion positions include one's attitudes about childrearing and social practices, as well as one's education and class).

49. Women were awarded a privacy right to abort partially upon the bases of their being victimized by pregnancy and motherhood and being more closely tied to reproduction. See text accompanying notes 1 and 21, *supra*, and *Roe*, 410 U.S. at 153 (discussing how women are victimized by pregnancy).

50. 381 U.S. 479 (1965).

### B. Cases About Women and Women's Roles

The first class of cases includes cases in three arenas: 1) women in the workplace, 2) women as citizens<sup>51</sup> for both responsibilities and entitlements, and 3) women as social beings. As the following discussion demonstrates, the cases consistently view women through their reproductive capacity, examined from a distinctly male perspective. Reproduction makes woman different, unequal. It also permits law to look right through her, to see the woman not as a whole person, but as the conduit for future generations.

The Court's ability to ignore women results in two notable effects upon legal reasoning and, hence law. First, an invisible being, valued primarily as a reproductive conduit, cannot earn the respect necessary to support an award of power over important life-and-death-decisions.<sup>52</sup> Second, ignoring women permits a problem to be viewed in a vacuum, without seeing its interaction with reality.<sup>53</sup> Legal reasoning, having lost its moorings to reality, is able to incorporate conflicting responses as if they were part of an integrated whole.<sup>54</sup>

#### 1. Women and the Workplace

The workplace cases come first and recur in time. As the case reviews demonstrate, a woman in the workplace occupies the sphere carved out for males, a sphere to which she does not belong.<sup>55</sup> Her presence challenges the vision of a woman as less capable of decisionmaking and control and as inseparable from her role as mother. The image of women in the workplace reflects great difficulty in re-

51. By "citizens," I refer more generally to "political subjects or beings" rather than to citizenship responsibilities as a pure term of art. Thus, military service and welfare benefits may not depend upon citizenship in the technical sense, but do flow from recognition of political existence.

52. See CATHARINE MACKINNON, A COMMENTARY ON PORNOGRAPHY, CIVIL RIGHTS AND SPEECH, reprinted in 20 HARV. C.R.-C.L. L. REV. 1, 5 (1985) (discussing *Lochner*-era jurisprudence and its longstanding effects on women and power).

53. For instance, in upholding Congressional refusals to fund Medicaid abortions, the Court assumed that poor women would have access to abortions, despite their lack of financial resources. The Court's abstraction of women from their surroundings of poverty and of the right of choice from its context of medical treatment allows the Court to overlook the reality of societal constraints and their impact on a woman's life.

54. This phenomenon is evidenced in cases that focus on the differences between women and men. If a policy disadvantages women by treating them differently from men, it can be upheld on the basis that women are indeed different from men. But if the policy disadvantages women by treating them like men, it can be upheld because women and men are equal and thus must be treated identically. Sameness and difference fluctuate; disadvantage remains constant. EISENSTEIN, *supra* note 40, at 65-69, 107; RHODE, *supra* note 46, at 197.

55. EISENSTEIN, *supra* note 40, at 65; J. Williams, *Gender Wars*, *supra* note 7, at 1559; J. Williams, *Deconstructing Gender*, *supra* note 45.

moving the gloss of family—read: pregnancy and motherhood—from the person as worker.<sup>56</sup> It is ironic that in the male-defined sphere of the marketplace, the woman becomes inseparable from her family role. This truth is illustrated in the commonplace understanding that fatherhood and breadwinning are complementary. Fatherhood is never considered in assessing male suitability in the workplace.<sup>57</sup> Motherhood, however, is both made inseparable from the female worker *and* seen as being in conflict with her role in the marketplace. Women and work are mutually incompatible.<sup>58</sup> The workplace has been defined as a place unsuited for mothers, and women have been defined as actual or potential mothers.<sup>59</sup>

The leading “workplace” case is *Bradwell v. State*,<sup>60</sup> in which Elizabeth Bradwell unsuccessfully challenged the state of Illinois’s refusal to admit her to the bar. The case formed the modern basis for viewing gender roles.<sup>61</sup> Justice Miller’s majority opinion is devoid of ref-

56. Cf. Julie Novkov, Note, *A Deconstruction of (M)otherhood and a Reconstruction of Parenthood*, 19 N.Y.U. REV. L. & SOC. CHANGE 155 (1991) (discussing the construction and grounding of motherhood in the family/civil society split, and noting how this construction conflicts with a woman’s status as a worker in civil society).

57. Cf. *California Federal Savings and Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (noting that extended pregnancy benefits are not unequal, because they permit women to have the same access to being both parents and workers that men traditionally enjoy); Phyllis T. Bookspan, *A Delicate Imbalance: Family and Work*, 5 TEX. J. WOMEN & L. 37 (1995), at 38-40 (noting that males do not seem to experience a conflict between working and having a family), 57 (stating that men were never compelled to forego marriage and family for a career or job), 68 (noting that traditional male norms suppress the domestic, non-breadwinning responsibilities of fatherhood).

58. W. Williams, *Equality Crisis*, *supra* note 45, at 15, 22-25.

59. See generally Novkov, *supra* note 56. But see Pub.L.No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101-12213 (Supp. V 1993)) (federalizing workplace standards that prevent discrimination against pregnant women).

60. 83 U.S. 130 (1872). In *Bradwell*, the source for upholding the state’s right to exclude women was a statute stating “No person shall be permitted to practice ... without ... [a] license ... [which] shall authorize *him* to appear,” a statute no one had trouble interpreting as applying to the male gender alone (emphasis added).

In the current tussle over the necessity for gender-neutral or gender-inclusive language to refer to purportedly inclusive classes of people, many state that “he” is universal and that any substitution is barbarically awkward. Far worse, it is said, to demean the language than to exclude an entire gender. And, of course, the quintessentially non-awkward substitute—“she”—is recognized for what it is—noninclusive—and denounced for what it is not—unrealistic and demeaning to men. Why is it that the universal “he” is not used when speaking of nurses, secretaries, or elementary school teachers?

Interestingly, although noted neither by the Court nor by Justice Bradley in concurrence, the Illinois legislature had passed a statute on March 22, 1872: “[t]hat no person, shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex ... .” *Laws of 1871-72*, 578 cited by CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-1888*, at 1366 (1971) [hereinafter FAIRMAN].

61. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1555, 1559 (2d ed. 1988) (quoting from Bradley, J. and discussing *Bradwell*’s impact on state-based gender discrimination).



erences to the issue of gender discrimination in entitlement to practice law, although Mrs. Bradwell's advocate argued such a claim.<sup>62</sup> It is a classic example of abstract analysis, relying upon Miller's opinion in the *Slaughterhouse Cases*<sup>63</sup> (decided the same day) that the privileges and immunities of citizenship do not include protection of employment. By treating the case as easy, the majority denied the concrete personhood of women and treated them and their interests as invisible.<sup>64</sup> Such analysis is precisely the type of social thought that has excluded women from the "mainstream," and made it possible to treat them as distinct, as well as inferior, beings.

Justice Bradley in concurrence voiced significant concern over the plight of clients unable to hold a woman lawyer to a contract<sup>65</sup> (which the law, of course, disabled married women from forming) or to obtain "those energies and responsibilities, and that decision and firmness" needed from a lawyer.<sup>66</sup> Women shared a "natural and proper timidity and delicacy"<sup>67</sup> unsuited to a profession "demanding special skill and confidence."<sup>68</sup> Nonetheless, these same women were suited to the "duties, complications and incapacities"<sup>69</sup> thrust upon them in their "noble and benign offices of wife and

62. FAIRMAN, *supra* note 60, at 1365; *Bradwell*, 83 U.S. at 135-36 (brief of plaintiff in error). Such analysis was left unassailed by the Court. This refusal to take seriously claims of inappropriate treatment on the basis of gender is not an isolated occurrence. In *Minor v. Happersett*, 88 U.S. 162 (1874), the Court delivered a lengthy opinion supporting the status of women as citizens—one wonders that it seemed such a formidable task to deserve so much ink—but then concluded that as the states had historically limited voting rights to men, such citizenship did not entitle women to the privilege of voting, as if it were virtually self-evident. *Id.* at 176-77.

63. 83 U.S. 36, 57-83 (1872); *Bradwell*, 83 U.S. at 139.

64. The Illinois Supreme Court's opinion borrowed from *Dred Scot v. Sanford*, 60 U.S. 393 (1857), noting that Illinois citizens are not the same as Illinois *female* citizens, the latter group having no basis for claiming differential treatment as among themselves. Such reasoning has been discredited in the racial context but has persisted in the gender context. See *General Electric v. Gilbert*, 429 U.S. 125, 136-37 (1976) (noting that pregnant women were not discriminated against as women, because women too are often "nonpregnant persons").

65. At common law, a married woman was "incapable, without her husband's consent, of making contracts which [were] binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor." *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

66. "[I]n my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.* at 142.

67. *Id.* at 141.

68. *Id.* at 142.

69. *Id.* at 141. Note how negatively women's roles are viewed, echoed today in the classification of pregnancy as a *disability*.

mother."<sup>70</sup> The energies and responsibilities of raising children, the decision and firmness required to guide them to become the future, were either overlooked or invisible. Motherhood was treated as an "innate" capacity, deserving less respect than the "developed" capacities attributed to men.<sup>71</sup> The qualities needed for successful motherhood were not only not attributed to women, but were expressly found lacking in them.

The primary legacy of *Bradwell* comes from Bradley's focus upon women as mothers, capable of functioning only in that sublime destiny, unable to make important decisions, yet somehow especially endowed with the qualities necessary to be entrusted with the family and future generations. It is one thing to see this capacity in women. It is another to see women only in this capacity.

In *Bradwell's* wake come other cases in which women, now relegated to the servile occupations, have special protections thrust upon them. Although universal maximum hour legislation had been held unconstitutional,<sup>72</sup> legislation precluding women from working over ten hours a day was upheld in *Muller v. Oregon*.<sup>73</sup> *Lochner* had protected the freedom to contract out one's labor. Women, however, having no freedom of contract to secure, were deemed in need of legislative protection.

Such legislative protection was not designed to further women's economic interests, power or role in the workplace. Instead, it was designed to protect women's reproductive organs and maternal functions.<sup>74</sup> The whole woman disappeared, replaced by her func-

70. See, e.g.

It is true that many women are unmarried and are not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

*Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

71. Cf. Novkov, *supra* note 56, at 169-70 (noting that women have been limited to motherhood, constructed as a biological destiny, that motherhood is only valued if the woman is in the home, and that because motherhood is not considered "work," both it and women are devalued in the workplace).

72. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a state labor law, providing that no employees shall be required or permitted to work in bakeries more than sixty hours a week, or ten hours a day, was not a legitimate interest of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract. As such, it was in conflict with, and void under, the United States Constitution).

73. 208 U.S. 412 (1908).

74. *Muller*, 208 U.S. at 420-21; see Judith Olans Brown, Lucy A. Williams & Phyllis Tropper Baumann, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN'S L.J. 457, 472-74 (1996) [hereinafter *Mythogenesis*] (arguing that *Muller* demonstrates judicial reliance upon myths about women and motherhood, in finding it necessary to protect women but not men because of their physical "frailty" and reproductive role).

tion as family maker and child bearer/rearer. The Court's opinion relied predominately on health reasons to sustain the legislation.<sup>75</sup> Women could not be expected to spend hours on their feet daily without jeopardizing their ability to be healthy mothers. Presumably, mothers do not have such physical demands placed on them—lifting, standing, being on call for up to ten hours a day.<sup>76</sup> Yet, the *woman's* health was not the priority. Only because "healthy mothers are essential to vigorous offspring," was women's health and well-being "an *object* of public interest and care."<sup>77</sup> Women became physical chambers whose public role was to bear the next generation. Protection justified by difference enabled men to exclude women not only from professions, but also from better paying servile occupations.<sup>78</sup>

*Muller v. Oregon*<sup>79</sup> sets out the Catch-22 of rights analysis for women. Women were not given equal rights at their legal insistence, because they were incapable of "a full assertion of those rights."<sup>80</sup> The law did not trust women to know their own rights or interests—or to place them in social context. Women's rights, apparently, had to be identified *for* them by men. Men then had to assert the rights, because women would not, or more accurately, *could* not.<sup>81</sup> No one seemed to notice that this reasoning was fully in conflict with itself. Women cannot have rights unless they assert them, and therefore society keeps women from asserting those rights. Presumably, the

75. *E.g.*, *Muller*, 208 U.S. at 419-20.

76. Domestic workers, who were overwhelmingly women, and farm workers, who included women, were not "protected" by this legislation, yet were expected to work even longer hours at more physically strenuous work without concern for their personal or reproductive health. *See* Rhode, *supra* note 46.

77. 208 U.S. at 419 (emphasis added). "The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home" are accepted as valid. *Id.* at 420, n.1.

78. Note also that men are disadvantaged in this system if they are not in the upper or professional classes. Men are helped by the law to compete only with each other for positions, but they win this "prize" of excessively brutal, long, and underpaid hours to earn profits for others. This strategy resembles "divide and conquer." Placed above one group, the continuing exploitation by another group becomes less visible and more tolerable. *See* Frances Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1055-58 (1989) (noting also the effectiveness of this strategy in the context of race). *See also* U.A.W. v. Johnson Controls, 499 U.S. 187 (1991) (noting that the exclusion of women from the workplace can deflect the remaining workers from acting in their own interest to improve the conditions under which they labor). *Cf.* Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15, 27-29 (1989).

79. 208 U.S. 412 (1908).

80. *Id.* at 422.

81. *Id.* at 421-22. Women could not make their own choices to be self-reliant because they did not have "the self-reliance which enables one to assert full rights." *Id.* As long as men successfully exclude women, women will not be able to have rights.

advantage of abstract reasoning is that it is principled, consistent and logical. But for women, abstraction denied reality and transmuted itself into harm.

*Adkins v. Children's Hospital*<sup>82</sup> illustrates this concept well. In *Adkins*, the challenged legislation was designed to provide women with a "living wage": what they needed to support themselves and to rear children.<sup>83</sup> The legislature had determined that the low income of women impaired both *their* health and that of the next generation, because it led to "undernourishment, demoralizing shelter and insufficient medical care."<sup>84</sup> The subsidy of charities was "impotent amelioration rather than prevention."<sup>85</sup>

This legislation created problems in the eyes of the Court. First, its beneficiaries were women, and women alone. Women were benefiting in a most unbecoming place—the workplace. The legislature had identified the problem: women were underpaid.<sup>86</sup> Its Constitutional error was attempting to rectify the problem by requiring women to be paid an adequate wage, and defining adequacy according to value-based standards, i.e., the amount necessary to meet the costs of living, maintain good health, and protect morals.<sup>87</sup> With the legislation, women could not be utilized and paid less than the true cost of their labor. The need for such legislation reflects the success of *Bradwell's* social vision of women and *Muller's* consignment of them to noncompetitive work. Take away woman's right and power to contract, make her invisible as herself, and the business world will be able to offer her employment at less than her value. Relegate women to the jobs no one else wants and to jobs that are limited in ways men need not suffer (hours, etc.), and women will make less than a living wage and less than they are worth.<sup>88</sup>

The brief submitted in support of the legislation noted that exploitative employers created "human deterioration" and in effect enjoyed a public subsidy.<sup>89</sup> The brief recognized that abstract rights create unreal dualities—a woman's "right" to work is meaningless when an employer's "right" to pay less than value is a necessary corol-

82. 261 U.S. 525 (1923).

83. As the Court described it, the basis of payment for services rendered would be "not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure their subsistence, health and morals." *Id.* at 558.

84. *Id.* at 528.

85. *Id.* at 528-29.

86. *Id.* at 525.

87. 261 U.S. 525 (1923).

88. RHODE, *supra* note 46.

89. 261 U.S. at 532; *id.* at 567 (Holmes, J., dissenting).

lary.<sup>90</sup> With "rights" at a standoff against each other, power takes over.<sup>91</sup> The woman does not hold the power. The Court perverts rights when it recognizes women's rights only after granting the more powerful employer the right to infringe upon her humanity. Once again, abstraction leads to distortion and makes it invisible.<sup>92</sup>

After having prevented women from exercising the equal right to contract out their labor in *Muller*, the Court in *Adkins* found that these same women miraculously possessed the power to bargain effectively within their legal limitations to be treated equally.<sup>93</sup> The deception is strangely attractive in rights-based analysis. First, set the premises: remove rights and powers, make women unequal. Then, assume equality and require the disadvantaged to exercise the "rights" and powers of which they have been deprived. The law thus created a double-bind for women. Woman's difference is the ground upon which to permit legal *restrictions* of her activities. However, legal and social *support* for women in their designated role is virtually nonexistent.<sup>94</sup> *Adkins* demonstrates that such support will be found to be invalid when it does exist.

Women are isolated in their motherhood; they alone are responsible for any children they have. Yet, society is authorized to burden them for the good of society as a whole. When support for women is legislated as being in the public interest, as in *Adkins*, it proves vulnerable to attack and is struck down. The maximum hour cases "protect" women, but only by preserving their economic inferiority and institutionalizing women's work as domestic, servile, and non-intellectual. Conversely, legislation mandating that the economic reward for "women's work" approximate its social value apparently conflicts with the vision of women as economically inferior and is dangerous (even though it may contribute to healthy childrearing).

90. Rights let the government intervene to correct a wrong; if the government has no power to intervene, then the actors are free to act as they will. If their interests conflict, as here, the actor free to act as he chooses is the actor with the superior power, the one able to enforce his will against the other.

91. RHODE, *supra* note 46.

92. See generally Julia Epstein, *The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 YALE J.L. & HUMAN. 139 (1995) (exploring the historical underpinnings of criminalizing the actions of pregnant women regarding their fetuses).

93. 261 U.S. at 532.

94. See Siegel, *supra* note 9, at 261, 345-46, 366 (1992) (discussing that the coercive means leveled against women to ensure fetal protection "promote the welfare of the unborn only when it can use women's bodies ... and not when the community as a whole would have to bear the costs of its moral preferences"); Gayle Binion, *Reproductive Freedom and the Constitution: The Limits of Choice*, 4 BERKELEY W. L.J. 12, 24, *et seq.* (1988) (discussing how the government and case law have failed to restrict state incursions into parenting or to support reproductive choice with positive policies).

Denying the legislature's power to grant a "living wage" to women denies mutual social responsibility and social connection with child-rearing.

Thus, the workplace cases identify women with their reproductive capacities, and protect the white, urban, middle-class family by excluding women from other endeavors (the "traditional" workplace). Female reproduction is inextricably linked with childrearing, not simply gestation.<sup>95</sup> Reproduction not only defines women, it makes them unique, distinctive.<sup>96</sup> The cases use this "distinction"—reproductive capacity—to isolate women—from each other, from men, and from society.<sup>97</sup> Beyond this, these cases set up the dichotomy between decisionmaking capacity and reproductive and child-bearing capacity, treating them as mutually exclusive.<sup>98</sup>

Other workplace cases reflect this dichotomy. Despite their participation in the marketplace, a place where decisions are made, women are treated as children, unable to make their own decisions, in need of protection and subject to moral guidance. Thus, it is allowable to require that women who bartend be the wives and daughters of bar owners.<sup>99</sup> Women and children are even lumped together as appropriate objects of protective maximum working hours legislation, presumably because both are incapable of making the choices to protect themselves.<sup>100</sup>

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95. See Novkov, *supra* note 56, at 171-72 (noting that by placing women in the family, society associates not only pregnancy, but childbearing, with women, and assigns that role to them)."

96. Women alone become identified with reproduction; men are *not* identified with reproduction. Rather than seeing reproduction as the quintessential characteristic necessitating the involvement of *both* sexes, the Court views reproduction as a peculiar capacity unique to women.

97. Isolation denies a fundamental reality of many women, i.e., that the family and the reproductive experience form connections. The characteristic used to define women has been perverted into a weapon against her reality. See Robin West, *Jurisprudence and Gender*, in *FEMINIST LEGAL THEORY* 201 (Katherine Bartlett & Roseann Kennedy eds., 1991).

98. See *Bradwell* and *Muller* discussions *supra*, notes 60-81.

99. *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948). Justice Frankfurter's opinion is dismissive of the issue as having any serious implications. "Beguiling as the subject is it need not detain us long. To ask [the question] is in effect to answer it." *Id.* at 465. Far from being "irrational discrimination," this law is supportable "[s]ince bartending by women may ... give rise to moral and social problems," and the legislature may believe "that as to a defined group of females other factors are operating which either eliminate or reduce" those problems. "The oversight ... by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protective oversight." *Id.* at 466. Such legislative analysis deserves deference according to Frankfurter. Apparently, it is sensible to assume that women need to be under the direction and protection of "their male."

100. "The legislation is purely a police regulation intended to establish the rights of children and women, who are treated as in a certain sense dependent and under an industrial disadvantage by reason of age and sex, to regular hours of employment for limited and designated periods of time, with fixed intervals for rest and refreshment." *Riley v. Commonwealth of Mass.*, 232 U.S. 671, 677 (1914).

The ultimate workplace problem, however, occurs when women's reproductive capacity is added onto the woman in the workplace.<sup>101</sup> Sometimes the woman's pregnancy forces the society to see her as a whole woman,<sup>102</sup> rather than a diminished man, in the workplace. Other times, an employer's policy forces women to be viewed in their reproductive capacity while men are not.<sup>103</sup> In both instances, there is nothing quite so tense as seeing the whole woman as fitting into the workplace. In *General Electric v. Gilbert*, the Court held that excluding pregnancy from disability coverage and medical insurance is appropriate and not a badge of inequality.<sup>104</sup> Only women can get pregnant, but because not all women do, there is no need to provide for such a contingency to ensure equal treatment.<sup>105</sup> Pregnancy necessitates or at least justifies different treatment. Pregnancy is unique because the "worker" does not get pregnant, only the "mother" does. Because the pregnant worker can only be a woman, her image cannot comfortably be superimposed upon the workplace.<sup>106</sup> With pregnancy, we must either recognize womanhood as belonging in the workplace, or exclude it from recognition to be sure that all workers fit the mold cast from the male.<sup>107</sup>

If the employer recognizes the woman's reproductive capacity, it is likely to treat her differently. Rather than focus upon the *worker's* need for protection, modern employers have attempted to skip directly to protecting a woman's genetic material and any potential fetus.<sup>108</sup> It is not the pregnant woman alone, it is the potentially *fertile* woman who is excluded from the "dangerous" jobs which just happen to be the high-paying, preferred jobs.<sup>109</sup> The woman is not given the choice—it is made for her, whether or not she has chosen

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101. See, e.g., EISENSTEIN, *supra* note 40, at 57; J. Williams, *Deconstructing Gender*, *supra* note 45.

102. *E.g.*, *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).

103. *E.g.*, *U.A.W. v. Johnson Controls*, 499 U.S. 187, 199, 207 (1991).

104. 429 U.S. 125 (1976).

105. *Id.* at 136-37.

106. EISENSTEIN, *supra* note 40, at 57, 102-07; Christine Littleton, *Reconstructing Sexual Equality*, reprinted in *FEMINIST LEGAL THEORY*, *supra*, note 46, at 42-43; W. Williams, *Equality Crisis*, *supra* note 45, at 22-26.

107. EISENSTEIN, *supra* note 40, at 102-07; J. Williams, *Deconstructing Gender*, *supra* note 45, at 106-12.

108. *E.g.*, Jean M. Eggen, *Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers' Compensation Systems*, 60 *FORDHAM L. REV.* 843, 865 (1992).

109. See generally Mary Becker, *Reproductive Hazards After Johnson Controls*, 31 *HOUS. L. REV.* 43 (1994) (providing an overview of workplace hazards and differentiating between fetal and women's health considerations).

not to become a mother.<sup>110</sup> In support, employers note that women may prefer to be protected, insulated, and separated from men, proceeding from the premise that women should not have the choice to be protected or to risk exposure. Choice is dangerous; it gives control and requires recognition that women are capable of decision-making and deserve the consequences of that responsibility.<sup>111</sup>

Against this background of exclusion, the Court continues to have great difficulty in deciding how to treat women. Many recent issues of gender equality have sprung from the enforcement of the distinction between the male sphere of the workplace and the female sphere of dependent domesticity.<sup>112</sup> The traditional exclusion of women redounds to their disadvantage, because other entitlements are often based upon inclusion in the workplace.

When an exclusion disadvantages women, it is unlikely to be recognized. Exclusion from the military is especially problematic. For example, in *Personnel Administrator of Massachusetts v. Feeney*, the Court upheld lifetime preferential hiring policies for veterans.<sup>113</sup> Despite the necessary result that men got positions and women did not, the Court viewed the exclusion as an unintended, inevitable, and therefore appropriate result of a natural and preferred order. Women fit neither in the military nor in the workplace, so nothing is amiss.<sup>114</sup>

If the exclusion apparently disadvantages men, it is far more likely that the Court will see inequality and require correction. *Frontiero v.*

110. *U.A.W. v. Johnson Controls*, 499 U.S. 187 (1991). In *Johnson Controls*, the employer refused to assign any woman under 50 who had not been sterilized to work with lead batteries, even if she was single, planned to have no children or no more children, or gave other indications she would not get pregnant (note that the Court refused to accept the employer's differential treatment, finding it to be sex discrimination under Title VII and rejecting the employer's defense of b[ona] f[ide] o[ccupational] q[ualification]). Nsiah-Jefferson, *supra* note 78, at 15; Siegel, *supra* note 9, at 261.

111. To require employers to relieve women or any worker from jobs which are hazardous to reproductive health on each worker's request does not become legally impossible if the law forbids employers from making that choice for every woman. See *Johnson Controls*, 499 U.S. at 211 (noting that the male plaintiff who sought reassignment to protect his genetic material was denied such a request).

112. Nadine Taub & Elizabeth Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW 117* (David Kairys ed., 1982); Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW 294* (David Kairys ed., 1982); J. Williams, *Gender Wars*, *supra* note 7, at 1559, 1596-1608.

113. 442 U.S. 256 (1979).

114. See Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 360 (critiquing *Feeney* and suggesting that equal protection intent to discriminate be satisfied by proving the legislature ignored or acted without thinking about relevant groups (otherwise there is an incentive for ignorance and continued advantaging of the same group) or by showing the legislature would never have done the opposite (e.g., give women 98% of all lifetime hiring preferences). The test should prevent placing burdens on one group that would never be placed upon the other group.) This illustrates how women's disadvantages remain invisible while men's disadvantages are starkly highlighted.



*Richardson*<sup>115</sup> recognized an inequality when males were disadvantaged by the assumption that only female spouses were likely to be supported by a member of the Armed Forces.<sup>116</sup> When discrimination against women causes harm to men by differential treatment, the inequality becomes visible. The solution is to treat men similarly, despite the fact that women may still face discrimination. Rather than correcting the underlying inequality, the Court ensures that men are not visibly harmed by its continued existence.<sup>117</sup> Any remaining inequality is simply deemed to be the nature of things.

The Court is more apt to accommodate female inequality than to correct it. Thus, women in the military are permitted to take more time to achieve a promotion, because women are excluded from the combat duty which earns credits for promotion.<sup>118</sup> This result preserves from challenge women's exclusion from combat or the use of combat as an essential qualification. Rather than reformulate the workplace to put both men and women at its center, special treatment keeps women out of the workplace or on its periphery.

These workplace cases expose key assumptions about women. Women are identified as reproductive machines: "woman" is socially constructed as "potential mother."<sup>119</sup> This identification is linked to a judicially decreed incapacity for sound decisionmaking. Such incapacity provides the justification for why women need protection rather than rights, and why they are not suitable holders and enforcers of rights. Motherhood is a claim on women, made by children

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115. 411 U.S. 677 (1973).

116. Similarly, inequality was apparent when men were disadvantaged in *Califano v. Wescott*, 443 U.S. 76 (1979) and *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980). Although nominally about entitlements to government benefits, both cases were really about the vision of women in the workplace. In *Wescott*, AFDC benefits were payable to families if the male was unemployed, but not if the female was unemployed. In *Wengler*, automatic death benefits under Workers' Compensation were payable to female spouses but not to male spouses of the employee. The Court invalidated both schemes. The Court was able to recognize the inequality, because the schemes treated males poorly. Through that insight, the Court grasped that this inequality rested upon devaluing women's role in the marketplace and their contribution to the family. This second step is a giant one for the Court. Here, the Court realized that the apparent favoring of women as dependents actually demeaned and degraded women as contributors to the workplace and family. It is notable, however, that in *Wengler*, correcting this inequity may lead to taking benefits away from women. Although this may be appropriate, it fails to reflect on the remaining underlying inequalities. Likewise, it fails to insist upon their correction. For instance, if the legislature terminated death benefits to spouses because they were unlikely to be dependent upon the employee, this "equal" treatment would have severely disadvantaged women, whose dependency is expected and reinforced. In addition, even working women are more likely to be more dependent upon the salaries of their husbands than vice versa, as women's wages notoriously lag behind men's. *See, e.g.*, Siegel, *supra* note 9, at 261, 376-77.

117. Siegel, *supra* note 9, at 261, 376-77.

118. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

119. *See Mythogenesis*, *supra* note 74, at 475, 497-98.

and by society as a whole. Motherhood becomes a basis upon which to distribute social *burdens*,<sup>120</sup> but not benefits or rights.

## 2. *Women and Civic Responsibilities and Entitlements*

A second type of case deals with women as citizens, subject to civic responsibilities or entitled to civic rewards. The civic responsibilities of men include military service registration, jury duty and subjection to criminal laws.<sup>121</sup> Civic entitlements include access to government benefits, power to control private property, and access to education.<sup>122</sup> To deny women civic responsibilities treats women as unworthy and incapable of exercising responsibility and, therefore, power. The following cases demonstrate that this deprivation of responsibilities has been justified by viewing female reproductive capacity as incompatible with fulfilling civic responsibilities.<sup>123</sup> Those who do not fulfill responsibilities are often treated as undeserving of entitlements.

### a. *Responsibilities*

One way of depriving women of equal responsibility is to treat responsibility as a male burden, or disadvantage. Military service is indeed a sacrifice, one which is recognized, respected and rewarded.<sup>124</sup> In *Rostker v. Goldberg*,<sup>125</sup> the Court sanctioned male-only registration because female registration would be inconvenient and essentially worthless. Women were excluded to ensure that soldiers

120. Siegel, *supra* note 9, at 261, 345-47, 365-66.

121. Those responsibilities also include voting rights, which women earned only through U.S. CONST. amend. XIX in 1920, after they were explicitly rejected by the Supreme Court in 1874 in *Minor v. Happersett*, 88 U.S. 162 (1874). See *supra* note 62 (discussing women's voting rights).

122. See *infra* text accompanying notes 156-78 (discussing entitlements).

123. Notably, even when women's exclusion from jury duty was successfully challenged, the Court reasoned that the peculiar "domestic" qualities of women belonged on juries. See *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (stating that Florida's statute exempting women from jury duty unless they voluntarily register for service is valid due to women's "special responsibilities"). Women remained practically exempted or excluded from jury responsibility, even under this scheme.

124. Interestingly, many men attribute their willingness to serve as being necessary "to protect our women." COONTZ, *supra* note 46, at 51. Military rank can also be a privilege, one traditionally shared by the powerful of this generation with the next generation of the potentially powerful.

125. See 453 U.S. 57, 77 (1981) (stating that the purpose of Selective Service was to draft and develop combat troops. Since women are precluded from combat service, female registration is unnecessary).

had the necessary skill, strength, and intellect for combat.<sup>126</sup> Women belonged not in combat, but in the home, as mothers and peacemakers.<sup>127</sup>

Women were also excluded from jury duty for reasons related to

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126. *See id.* at 81-82 (arguing that employing women for emergency non-combat positions would be burdensome for a number of "administrative" reasons, including housing, physical standards, dependency, and military flexibility). In addition, apparently some believe that if the sexes mix in the Armed Forces, there will be sexuality problems in the front lines. *Id.* If the sexes cannot work together without sexuality, what are the underlying premises of this society, and who has created them? Is combat really sexually exciting? What construct of sexuality makes it so? What of other options, ones not dependent upon restructuring the military's personnel preferences? What of using the draft to fill all military positions (as it does) and still placing only men on the front lines? Or what about sex-segregated units? Total exclusion is hardly the only—or even the best—answer to these concerns, were we to ascribe legitimacy to them. *See id.* (arguing that these approaches are not worthwhile, as women are prohibited from combat duty. Emergency troops need to be flexible for military purposes. Female conscripts would not meet this military demand).

127. What better reason to put them into the front lines and the command posts? Putting women onto the combat front lines might make the powerful consider the lives at stake. If we do not want our daughters to fight and die, do we want our sons to? *See W. Williams, Equality Crisis, supra* note 45, at 19, 21. Also, the Selective Service exempts males who are breadwinner fathers. If military service would wrench a needed parent from the family, a gender-neutral exemption would protect those families. Thus, the argument about tearing mothers away from their families is specious and makeweight. More to the point, it displays the rampant inability or refusal to see "women," rather than "mothers."

Wendy Williams suggests that women disserve the cause of equality in being willing to exempt themselves from military service. First, it absolves women from personal responsibility. Second, it weakens women's claim to their "share" of social benefits. *Id.* at 21. With one's own life at risk, resistance for peace might be more meaningful.

However, it strikes me that the ultimate sacrifice for women—motherhood—is interestingly parallel to the ultimate sacrifice for men. To be a soldier—to kill and risk death—requires a person to be able to detach himself, to deal with self and other abstractly. To be a mother—to wholly give one's self to give life to another—requires a person to be able to attach herself, to lose ego boundaries and be subsumed in the other on a routine and concrete level. *See COONTZ, supra* note 46, at 42-67. The near total sacrifice of self is common, although it manifests quite differently. The social consequences are reward, gratitude, and a sense of debt to the soldier. But for the mother, we have only a somewhat fulfilled sense of expectation and entitlement to her services. The soldier bears *our* burdens. The mother, if she is even considered to be burdened, bears her "own." *Cf. Siegel, supra* note 9, at 261, 366 (stating that for other social benefits bestowed by individuals, society offers reward, support and/or compensation). The failure to accept women's contributions enables society to believe that women not subject to the draft shirk personal responsibility and fail to bear their full share of society's burdens.

Another very interesting anthropological finding reveals the harm in the dichotomizing of male and female roles. Societies with males significantly involved in the nurturing of infants and children are societies with no tradition of the aggressive, warrior male. KAREN JOHNSON & TOM FERGUSON, *TRUSTING OURSELVES: THE SOURCEBOOK ON PSYCHOLOGY FOR WOMEN* 86-87 (1990).

[In societies] [w]here women's work other than childcare is considered essential and important, men's investment in parenting increases. And in cultures where men are closely involved with young children, there is little warfare. In societies where warfare is important, fathers tend to be distant. And, in societies where war is an important occupation for men, women's role is generally not considered to be of high importance.

*Id.* at 87 citing Katz and Kooner, *The Role of the Father: An Anthropological Perspective*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 166-80 (M. Lamb, ed. 1981).

their role in the family and the home. Initially, the Court approved of this.<sup>128</sup> The jury, embodiment of community conscience and justice, had no room for women. It was not just that women should be able to remain at home; it was that the *home* had to be protected by excluding women.<sup>129</sup> Even when the Court struck down the exclusion of women, it did so because a *universal* rule of needing to stay home was overbroad.<sup>130</sup> The negative social effects were deemed to flow from the exclusion of women's "unique" maternal compassion,<sup>131</sup> not from the discriminatory exclusion of important and contributing members from full participation.<sup>132</sup>

The most telling case is *Michael M. v. Sonoma County*,<sup>133</sup> where the plaintiff attacked California's statutory rape law for including only males as potential violators. Key to the decision upholding the law was the Court's belief that males had to be deterred from teenage sex by the criminal law, whereas females were deterred by always being the victims of intercourse and pregnancy.<sup>134</sup> Dealing explicitly with social responses to sexuality,<sup>135</sup> the Court revealed its view of women as reproducers but not as moral agents in all its manifestations.

The United States Supreme Court adopted the California Supreme Court's language in rejecting the challenge, finding that because the classification was based upon "the immutable physiological fact" that females exclusively become pregnant, it was nondiscrimi-

128. *Contra, cf.*, *Ballard v. United States*, 329 U.S. 187, 193 (1946) (stating that the unilateral exclusion of women was a deviation from normal jury selection and may be remedied by the court).

129. *See Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (stating that a woman should be allowed to relieve herself from jury duty due to her household responsibilities as the "center of the home and family life.").

130. *Id.* at 68-69; *See Duren v. Missouri*, 439 U.S. 357, 369-70 (1979) (stating that the universal exclusion of all women due to the domestic responsibilities of some was an improper justification for the exemption).

131. *Hoyt*, 368 U.S. at 62. Although satirizing this reasoning as "mystical incantations" and "transcendental notions," Justice Rehnquist could see no basis for *women* to claim a wrong to them from an automatic exemption, betraying his failure to see harm to women due to exclusion from participation. 439 U.S. at 370, 372 (Rehnquist, J., dissenting).

132. The dissent in *Duren* actually opined that family protection is a valid reason to treat women differently, especially as we do not need women as jurors. *See* 439 U.S. at 372-75 (stating that women, as centers of the home, would be burdened if treated exactly as men) (Rehnquist, J. dissenting). Contrast with *Batson v. Kentucky*, 476 U.S. 79, 89-90 (1986), in which the Court held that the exclusion from jury service on the basis of *race* was a harm to the *excluded jurors*, as discrimination on the basis of race.

133. *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464 (1981).

134. *Id.* at 473.

135. *See id.* at 468-76 (stating that because the physical effects and consequences of intercourse are different for young men and women, with the burden of childbirth on women, the statute's sex-based standard did not violate the Constitution).

natory.<sup>136</sup> A statute aimed at the joint activity of intercourse was thus viewed through the lens of female difference. Notably, it was both because females become pregnant and because "males alone can physiologically cause the result" of pregnancy<sup>137</sup> that males needed to be deterred. Because teenage pregnancy is such a tragic burden on females this "gender classification was readily justified as a means of identifying offender and victim."<sup>138</sup>

Thus the male alone is the actor and the causer; the female is the acted upon and the victim. Males, who are responsible for their conduct and exercise choice, are subjected to societal legal standards. But females are not responsible for making moral and practical decisions and are not held socially accountable for them. Instead, females are "naturally" penalized by pregnancy and childbirth, and therefore excused from legal responsibility for their choices and conduct.<sup>139</sup> The Court decides the legislature legitimately "attack[ed] the problem ... *directly* by prohibiting a male from having intercourse with a minor female."<sup>140</sup> Note that the female's acceptance of the responsibility of childrearing is here invisible. It is her "lot," her burden, not a manifestation of her active participation and seizing of responsibility in her life. Endowing females with moral agency and legal responsibility is at best considered an "indirect" means of achieving a social policy of responsibility.<sup>141</sup>

Despite propounding this view of women, the Court asserts that upholding the law based upon this view does not "demean the ability or social status" of females, but instead is merely sensible.<sup>142</sup> The Court's premise is that males and females not only have distinct roles in procreation, but that those roles reflect different responsibility for the resulting offspring.<sup>143</sup> There is no physiological fact which renders childrearing a female function, and females passive victims of procreation. These "social, medical, and economic conse-

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136. *Id.* at 471-73.

137. *Id.* at 467. As Wendy Williams points out, this is a distinctly unscientific description of human reproduction. W. Williams, *Equality Crisis*, *supra* note 45, at 20.

138. *See Michael M.*, 450 U.S. at 467 (stating that the male is the only actor, the aggressor, the causer—in a crime defined as voluntary and consensual intercourse).

139. *See id.* at 473 (stating that it is reasonable to punish only males, as they suffer fewer consequences, whereas females suffer almost all of the consequences of sex, i.e. pregnancy).

140. *Id.* at 472-73 (emphasis added).

141. *Id.*

142. *Id.* at 469.

143. The Court betrays this faulty premise when it notes that the consequences of teenage pregnancy fall upon "the mother, her child, and the State." *Michael M.*, 450 U.S. at 470.

quences"<sup>144</sup> are imposed from without by society, not generated from within by female reproduction.

By making the males the only moral agents with responsibility, the Court enshrined and perpetuated male control and female passivity in reproduction. Such male control then entitled females to protection.<sup>145</sup> While the Court was beginning to recognize female "equality" in the workplace and outside world, it was unable to treat females with equality in the intimate world of family, relationships and reproduction.<sup>146</sup> By focusing upon women as gestators and reproducers, the Court justified differential treatment that is ultimately disrespectful of women. It used the second-class status of women as the premise for differential treatment.<sup>147</sup> In any other context, this would amount to intent to discriminate. Here, it became proof of what is "proper." In spite of women's differences, we must treat women differently precisely because of these differences.<sup>148</sup>

A society that did not consider sex to be male and childbirth to be female would visit the same natural, social and legal consequences on *both* partners in procreation. Essentially, the Court sanctioned the social discrimination that leads to the *usual* consequence of pregnancy being a wholly female burden. By apparently exempted women from responsibility for the decision to have intercourse, the Court really exempts men from the responsibility for the decision to create, bear, and raise a child.

Looking at the issue as female pregnancy isolates the female. Of course women look different from men if the result of sexual intercourse is pregnancy. Men and women look the same if the result is *procreation*, a collaborative effort that does not cease to be collabora-

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144. *Id.* Interestingly, the father, the "sole cause" of pregnancy, has no social role in its consequences.

145. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, in *FEMINIST LEGAL THEORY*, *supra* note 45, at 305, 306.

146. "Equality" in the outside world merely allows females to have access to the things that males want, in a structure created and based in a male-centered universe. But equality within family and relationships would require recognizing that women's attributes are as valuable as men's, and to account for women as persons beyond their "sex roles." See EISENSTEIN, *supra* note 40, at 55, 63-75.

147. This culminated in the assertion that the conscious decision of the California legislature to overturn a gender-neutral statutory rape decision actually *proved* lack of discrimination, because the legislature is a good source of "deciding what is 'current' and what is 'outmoded' in the perception of women." 450 U.S. at 471 n.6.

148. The "because of" / "in spite of" dichotomy exposes its absurd underbelly. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 258 (1979). In *Michael M.*, principled analysis would expose the fact that differential treatment in statutory rape reinforces the stereotype of women as passive, nonresponsible victims. Instead, the Court perverts analysis to uphold the stereotype. See *W. Williams*, *supra* note 45, at 21 (stating that "[d]riven by the stereotype of male as aggressor/offender and woman as passive victim, even the facts of conception are transformed to fit the image").

tive after intercourse is over.<sup>149</sup> In a world dominated by male assumptions, the female stands out on the basis of her reproductive capacity *not* because she procreates but because she does so differently from the male.<sup>150</sup>

In concurrence, Justice Blackmun recognized that the legislation exerted social "control and direction of young people's sexual activities,"<sup>151</sup> but missed the point that the control is exercised by removing only the minor female's ability to make her own choices and control her own sexuality.<sup>152</sup> In essence, both he and the Court accept that women belong in the role of *being acted upon*—before, during, and after—rather than *participating* in procreation. Once again, rights analysis fails to recognize that women deserve control because they are moral agents responsible for their own decisions and consequences.

Justice Brennan's dissent noted that the law "protects" females from their own uninformed decisionmaking, but presumed that males are "capable of making such decisions themselves."<sup>153</sup> In contrast to Brennan's recognition of gender stereotyping, Justice Stevens' dissent treated the capacity to become pregnant as an ultimate justification for differential treatment.<sup>154</sup> However, if females need protection because they cannot make good decisions, it is oxymoronic to assume they will be deterred by the risk of pregnancy, i.e., that they will decide not to have sex.<sup>155</sup> The argument assumes that

149. It is very hard to see invidious discrimination from the perspective of the one defining the differences and its consequences. Minow, *supra* note 45.

150. EISENSTEIN, *supra* note 40, at 55-57, 65, 102-05.

151. 450 U.S. at 482 (Blackmun, J., concurring). Justice Brennan also noted the contradiction inherent in the Court's stance: "Common sense ... suggests that gender-neutral statutory rape law is potentially a greater deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus has a deterrent effect in twice as many potential violations." 450 U.S. at 493-94 (Brennan, J., dissenting). Justice Blackmun noted that to uphold discriminatory treatment in statutory rape laws, the Court opened its eyes to the significant consequences this society heaps only upon women who have children as teenagers. *Id.* at 481-82. But the Court is conveniently blind to this disproportionate responsibility when those same teenagers seek to exercise it by aborting.

152. See Olsen, *supra* note 145, at 486.

153. 450 U.S. at 495-96 (Brennan, J., dissenting). Brennan attributed this distortion to the morals-based early laws. *Id.* This is too superficial. Control over female sexuality maintains control over female exclusion from the public sphere, relegating reproduction to the female and the private sphere. However, once reproduction is relegated to the female, males must control female sexuality in order to control the "propagation of the species." Colb, *supra* note 40, at 101. In 1981, the year the Court decided *Michael M.*, the underlying premises of female capacity seem no different than they were in 1908. *Muller v. Oregon*, 208 U.S. 412 (1908).

154. *Michael M. v. Sonoma County*, 450 U.S. 464, 499-500 (Stevens, J., dissenting).

155. The fact that "a female confronts a greater risk of harm than a male is a reason for applying the problem to her—not a reason for granting her a license to use her own judgment on whether or not to assume the risk." *Id.* at 499 (Stevens, J., dissenting).

the risk of pregnancy creates an instinctual, thoughtless deterrence to which females can respond, whereas the decisionmaking exercise mandated by considering legal ramifications of behavior is beyond female capacity. Unfortunately, neither dissenter was able to see and expose this fallacy.

### b. Entitlements

Because women are not allowed to share the responsibilities of citizenship, they are not welcomed to participate in its privileges or entitlements. The privilege of responsibility is power: power to decide, respect for the decision and accountability for consequences.<sup>156</sup> Power is a source to create equality. One qualifies for entitlements but earns privileges. Entitlements are the largess of the privileged to the underprivileged. Thus, it is only consistent that we see women deprived of responsibilities but given entitlements. Entitlements are not dangerous. They are the gifts of the protectors.

Most entitlements are economic and appear to be compensatory, responsive to women's exclusion from full economic rights and opportunities.<sup>157</sup> But, when the entitlement is *social*, it is not seen as

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156. This connection between power and responsibility is illustrated in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), which struck down a Louisiana law giving husbands the unilateral power to dispose of community property. Despite the fact that a wife had the ability to challenge the property disposition, the Court determined she was not responsible for such disposition because she faced an obstacle imposed solely upon the basis of gender. "By granting the husband exclusive control over the disposition of community property, [the Louisiana statute] clearly embodies the type of express gender-based discrimination that [the Court has] found unconstitutional absent a showing that the classification is tailored to further an important governmental interest." 450 U.S. at 459-60.

157. The entitlement cases again involve men challenging schemes which automatically entitle women but not men. As noted earlier, such challenges enable the Court to see unequal treatment, because men are disadvantaged. When women are disadvantaged, nothing seems amiss. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (recognizing discrimination on the basis of gender and requiring the Armed Services to treat men and women equally in granting dependent benefits. The Services had automatically treated female, but not male, spouses as dependents.). See also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (overturning a scheme of automatic death benefits only to workers' female spouses); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (requiring Social Security death benefits to be payable to males as well as to females and children).

Both *Wengler* and *Weinberger* recognized that the schemes which disadvantaged male survivors were premised upon traditional and inappropriate notions of women's role as being in the home, dependent, rather than in the workplace, supporting self and others. Such insights are possible here not because the Court sees discrimination against women in the workplace, but because the differential in entitlements apparently harm men who also want benefits. Until men complained, the Court could not see inequality in women's place in the workplace. Entitlements such as those at stake in these cases are socially responsive to the problems created by the underlying inequities in women's economic position, inequities reinforced by earlier Court decisions that women could be selectively excluded from the workplace and by the social expectations that middle-class women would not participate in the marketplace. See also COONTZ, *supra* note 46, at 84-86 (stating that entitlements, such as AFDC, appear to subsidize women; "male" subsidies, such as Medicare, Social Security, Workers' Compensation and unemployment appear to be *earned*, not bestowed).



merely equalizing the positions of men and women. Instead, it is seen as preferring women to men, an inequality.<sup>158</sup> Equality looks unequal to those used to privileges. The privileged feel deprived, or perceive the relative change in their status. Therefore, equality is quite threatening to those who now hold the power.

A key social entitlement case is *Mississippi University for Women v. Hogan*,<sup>159</sup> brought by a man challenging an all-female nursing college. Mississippi University for Women was a compensatory institution, designed to offer women the education denied them in "real" colleges. Its charter is a pantheon to traditional values and roles for women and women's education.<sup>160</sup> The state defended its admissions policy as 1) giving women opportunities in a practical range of education and 2) providing the advantages of single gender education.<sup>161</sup> This institution existed only because social limitations had excluded women from participation in the mainstream. Ironically, a male now claimed discrimination because he was excluded from participating in the limited arena to which women had been confined.<sup>162</sup>

The Court found that the traditionally female occupation of nursing could not justifiably be reserved for compensatory uses.<sup>163</sup> But it used a definition of gender classification which could only come from a regime of gender inequality. The key, the Court said, was to ascertain if the State's objective "reflects archaic and stereotypic notions ... to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior..."<sup>164</sup> An attempt to overcome just such "notions" was inappropriate without a history of disadvantage specific to the rem-

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158. Justice Stevens, for example, cannot see how a statute could discriminate against both men and women, or how a statute granting women benefits could discriminate against women. Three types of marriages are examined by Justice Stevens: "(1) those in which the husband is dependent on the wife, (2) those in which the wife is dependent on the husband, and (3) those in which neither spouse is dependent on the other." Under the first two situations, "the surviving male, unlike the surviving female, must undergo the inconvenience of proving dependency. That surely is not a discrimination against females. In the third situation, if one spouse dies benefits are payable to a surviving female but not to a surviving male. In my view, that is rather blatant discrimination against males." *Wengler*, 446 U.S. at 154 (Stevens, J., concurring).

159. 458 U.S. 718 (1982).

160. *Id.* at 720 n.1.

161. *Id.* at 721. These advantages were freedom from sexual distraction and freedom from males intimidating and overwhelming female students. *Id.* at 727-28.

162. This sounds like a claim that it is discriminatory to exclude wealthy white landowners from Native American reservations or from the "projects." Such claims expose the underlying power play as the objective of the complaint.

163. *Hogan*, 458 U.S. at 727.

164. *Id.* at 725.

edy.<sup>165</sup> Thus, women's low wages and less advantageous military positions justified wage protection<sup>166</sup> and extra time for military promotion.<sup>167</sup> But women *are* nurses, and therefore do not need to be helped to *be* nurses. Far from having erected barriers to women, the nursing profession is historically virtually all female, creating barriers for men which "tend[ ] to perpetuate the stereotyped view of nursing as an exclusively woman's job."<sup>168</sup> In a burst of generosity toward women, the Court struck down the all-female school, striking a blow against giving credibility to the old view and self-fulfilling prophecy that nursing is a woman's job (for woman's lower pay).<sup>169</sup>

This view is troubling. It accepts a premise of "equality" in educational and professional access which is built upon a status quo whose premise is anything *but* equality. Therefore, it takes a compensatory entitlement (admittedly a problematic concept anyway), and rather than attacking the system of unfairness and power imbalance that created the need for "gifts," it spreads the entitlement around. The consequence is that equalizing entitlements leaves the original inequality operating with full—and unmitigated—force. Although a system which *relegates* women to the underpaid and undervalued nursing profession is invalid, the solution is not to inject enough men into the profession to change its character and "earn" it social and marketplace respect. There is nothing *wrong* with being a "woman's profession." The problem is deeper. It is that women are not respected and therefore a woman's profession is not respected.<sup>170</sup>

An equal society provides meaningful opportunities through in-

165. *Id.*

166. *Id.* at 728, *citing* Califano v. Webster, 430 U.S. 313 (1977).

167. The Court "recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated [women] for other statutory barriers to advancement." *Hogan*, 458 U.S. at 728-29, *citing* Schlesinger v. Ballard, 419 U.S. 498 (1975).

168. *Hogan*, 458 U.S. at 729.

169. *Id.* at 729-30.

170. Having taught in both day care and law school, I am quite aware that one of the most meaningful differences between that woman's profession and this "man's" profession are the status and salary. That this reflects gender composition and gender role identity more than any other factor is my inescapable conclusion. Yes, I have three years of legal education invested to explain the difference. But I had about fifteen years of "on-the-job" training for day care as the oldest of twelve children and a much-sought-after babysitter. Today, many day care teachers are very highly trained.

The gendered nature of child rearing in this culture also explains the gendered composition of the day care profession. Siegel, *supra* note 9, at 376. Given the historically nurturing role of the nursing profession, and its subordination to the medical profession, it is not hard to figure out why nursing is devalued in status as well as pay. Nurses (and day care professionals) look like "mothers."

clusive options. Currently, meaningful options appear to include single-gender educational opportunities. All-female schools<sup>171</sup> are *inclusive* options (they do not deny equal access to the opportunities beyond them, but tend to increase that access), whereas all-male schools tend to be *exclusive* options (they distort access to opportunities beyond them due to the disproportionate power their status commands).<sup>172</sup> By neglecting to consider the impact of society on women, college and the workplace, the Supreme Court effectively isolated the Mississippi University for Women from reality and then imposed the ideal outcome on an anything but ideal world. Furthermore, the Court equated distinction and difference (used to enhance women's education and opportunities) with discrimination and inferiority. Gone is the search for invidious motive, usually required. To anyone with experience in reading equal protection cases, especially those involving women, this is astounding.

In dissent, Justice Blackmun illuminated the underlying conflict between respect for choice and imposed "pictures."<sup>173</sup> Ultimately, rules come from the powerful, and embody value choices. Rules imposed to deny non-mainstream options can destroy "values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice."<sup>174</sup> As we lose options, those who lose are not the powerful, whose preferred options remain. Thus, the destruction of choice inherently disadvantages women and people of color, an observation brought home in the abortion cases with ringing clarity.<sup>175</sup>

Justice Powell's dissent found no basis for limiting women's choices because no deprivation of men's choices existed, and the challenge was one based on personal convenience.<sup>176</sup> The addi-

171. And perhaps all African-American schools.

172. This insight flows from Ronald Dworkin's depiction of the two types of equality: to be treated equally (i.e. the same) or to be treated as an equal (and therefore potentially differently). See EISENSTEIN, *supra* note 40, at 185 (describing Dworkin's ideas of equality). Focusing upon the *consequences* of the proposed policy would enable us to see whether or not all-female schools perpetuate female disadvantage or correct for it, or contribute to male disadvantage *measured against* female advantage (not measured against usual male privilege).

For an interesting example of the effectiveness of all-female schools, see Judith H. Dobrzynski, *How to Succeed? Go to Wellesley*, N.Y. TIMES, Oct. 29, 1995, at C1 (chronicling the unparalleled success of Wellesley graduates in breaking through the "glass ceiling").

173. 458 U.S. at 734 (Blackmun, J., dissenting).

174. *Id.*

175. EISENSTEIN, *supra* note 40, at 112-13 (stating that "[c]hoice is structured, limited, and in some sense predetermined; this is exactly what discrimination is about in the first place, the limiting of a person's options."); J. Williams, *Gender Wars*, *supra* note 7, at 1564, 1631-33; Nsiah-Jefferson, *supra* note 78, at 16.

176. See 458 U.S. at 742 nn.10-11 (Powell, J., dissenting) (stating that Hogan could attend other nursing schools, even though they were not as close to where he wanted to be).

tional choice given women was unobjectionable in itself. Further, single-gender education might help free women from the very limits society has placed on them such as silence, passivity,<sup>177</sup> and mating behavior.<sup>178</sup> Justice Powell appears to understand that the problem with limiting choices is a problem of *exclusion*, not a problem of difference. The Court's ruling does not ensure equality on the basis of difference. Rather, by the forced inclusion of men in one context, it perpetuates the societal exclusion of women, while purporting to disrupt it.

### *c. Summary*

Women have been denied the civic responsibilities that might earn them respect on the basis that their reproductive capacity and supposed moral and intellectual incapacities make them unsuitable for fulfilling those responsibilities without risking the future of the family and the society. Part of women's incapacity to fulfill responsibilities is created by the very refusal to view them as worthy of rights and power. To have and fulfill responsibility, one needs power. Rights can be a source of power.

Denying rights or responsibilities to women has effectively kept women insulated from power and from respect. In the guise of protecting women from responsibility for decisions, the Court actually kept women from power and helped ensure their subjugation. Ignoring women's contributions makes it look like women do not bear their fair share of societal responsibilities, and that they are thus not entitled to power and respect. Returning the power of decision to women would upset the scheme of female inferiority. Thus, the privilege and entitlement cases persist in seeing women as nonpowerful beings, and contribute to restricting women's access to meaningful power and choice.

### *3. Women as Social Beings*

The last type of case involving women explicitly deals with women's social roles. These cases illuminate the untenable relationship between our views of women and our views of equality.<sup>179</sup>

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177. *Id.* at 737-39 (referring to studies which indicate that single-sex education programs encourage women to speak in class and free them from the role of the "pursued sex") (Powell, J., dissenting).

178. *Id.*

179. The rules challenged in these cases are premised upon the nineteenth century notion of the separate, inferior sphere of domesticity as women's, the superior sphere of public life and service as men's. In these cases, the rules assist in governing the sphere of women and their roles within it, rather than in governing the public sphere. The pattern of recognizing inequality only when it apparently disadvantages men repeats itself in this context.

The social role of males and females in reproduction is well-illustrated in two contrasting cases. In *Skinner v. Oklahoma*,<sup>180</sup> the Court struck down a state law which decreed that male "career criminals" were subject to sterilization. In so doing, the Court was far more concerned with preserving Skinner's control over his own fertility and procreative capacity than with protecting marriage, the family, or the society. Thus, male fertility was protected for its own importance to the male.<sup>181</sup> Conversely, female control of fertility is either subject to state control,<sup>182</sup> or viewed as protected within the context of marriage, family, and to a lesser extent, heterosexual relations.<sup>183</sup> In *Buck v. Bell*, the Supreme Court upheld a law permitting sterilization of a female of allegedly diminished mental capacity, with Justice Holmes's ringing endorsement that "three generations of imbeciles is enough."<sup>184</sup>

The Court treats male fertility as of primary and overriding importance to the individual male, while treating female fertility as a subject of concern to others, including society, and thus more appropriately subject to external controls. The significant problem of sterilization abuse among women—primarily African-American, Native American, and Latina<sup>185</sup>—is testament to this belief that female fertility should not be within the private control of a woman, but under the control of society.

Less dramatically, women's social roles in the family are intimately connected with the need for the institution of alimony. Yet, in *Orr v. Orr*, a law requiring alimony only from husband to wife was struck down because the male "bears a burden he would not bear were he female," and thus the law "expressly discriminates against men rather than women."<sup>186</sup> Although prompted, the Court dismissed the fact that such a scheme ultimately rested upon devaluing and harming women, not men.<sup>187</sup> The Court relegated such realities to history, asserting that women no longer face removal from the world of work,

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180. 316 U.S. 535, 536 (1942) (finding that the statute deprived certain individuals of a "right which is basic to the perpetuation of a race—the right to have offspring").

181. *Id.*

182. *Buck v. Bell*, 274 U.S. 200 (1927).

183. See section III C *infra*.

184. 274 U.S. at 207.

185. See ANGELA DAVIS, *WOMEN, RACE AND CLASS* (1981); HARTMANN, *supra* note 3, at 254-55; ROSALIND PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 178-82 (rev. ed. 1990).

186. 440 U.S. 268, 279 (1979).

187. *Id.*

and thus society need not make "their designated place 'secure.'"<sup>188</sup> Yet, the opinion fails to portray women's roles as co-equal, vital and legitimate. The reasoning and language is devoid of recognizing interdependence. The male role of breadwinner (now opened to females) is still identified as the benchmark of success and superiority.<sup>189</sup> Alimony is an adjunct to a male world. The Court never sheds those boundaries in addressing its equal distribution.<sup>190</sup> Indeed, the harm done to males by the challenged system is that of unfairness to those who are dependent—functionally female—and thus are left unaided.<sup>191</sup> Alimony remains a payment to victims from non-victims.<sup>192</sup>

Confronted with schemes based upon gender stereotypes, the Court frequently reaches a good result on a path of stereotyped reasoning about the dependence and victimization of those in a wifely role. Rather than respecting women and women's social roles, it compensates the men who share in women's traditional economic degradation. Three of the most famous gender equality cases, *Reed v. Reed*,<sup>193</sup> *Frontiero v. Richardson*,<sup>194</sup> and *Craig v. Boren*,<sup>195</sup> follow suit.

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188. *Id.* at 280 n.9. The Court's discussion consistently refers to the dichotomies of independence and dependence, workplace-salaried and domestic-undervalued, and uses male and female roles to explain these dichotomies. Nonetheless, it treats them as rhetorical only, and denies their real-life impact.

Interestingly, the women most likely to have matched the profile of the separate spheres ideal are those most likely to have husbands whose income could support alimony. Blindness to differing social realities persists in this rhetoric and in the decision and its consequences.

189. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory*, 86 COLUM. L. REV. 1118, 1118 (1986) (stating that while society views males in the role of worker and breadwinner, it views females in the role of childbearer and rearer); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 672 n.172 (1992).

190. EISENSTEIN, *supra* note 40, at 71.

191. *Orr*, 440 U.S. at 282.

192. Having clarified that alimony is either protection for victims or victimizes its payors, the Court patronizingly observes that alimony's "compensatory purpose may be effectuated without placing *burdens* solely on husbands." *Id.* (emphasis added). Fairness becomes a "burden" here; alimony is a "gift," not earned by the spouse who fulfilled her role and supported the family's earning power and potential. *Cf.* SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY*, 170, 176, 180-81 (1989) (arguing that women fulfilling their domestic roles are integral to men being able to function in the workplace and maximize their earnings; thus, both women and men should be considered as having mutually earned the marital income).

193. 404 U.S. 71 (1971).

194. 411 U.S. 677 (1973).

195. 429 U.S. 190 (1976).

Supportive of the abstract principle of gender equality,<sup>196</sup> each gives short shrift to women and their value as social participants. Despite repeated opportunities, the Court remains insensitive to disrespect for women, and unable to infuse a premise of respect for women into the equal protection analysis of gender discrimination.

#### 4. Summary

Supreme Court rhetoric shows disrespect for women and their ability to make choices for themselves or others. Disrespect generates the felt need to preserve women's designated reproductive, family and social roles by protecting them out of rights and responsibilities. Childbearing becomes inseparable from being a "woman," and childbearing and decisionmaking are considered mutually exclusive capacities. Women who fill the role of mother are viewed as passive participants in sex, reproduction, childbearing and childrearing. They confer no benefits, bear no burdens, and deserve no support for fulfilling these roles. They simply fulfill their "destiny." Women

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196. *Reed v. Reed*, 404 U.S. 71 (1979) (striking down automatic preferences for males as administrators of estates). The Court treated this case as an abstract problem of gender-based distinctions with no reasons to support them. *Fronteiro v. Richardson*, 441 U.S. 677 (1973), also escaped emotional content when the Court set up separate sphere ideology as a "straw man" easily disposed of. The Court's analysis remained stuck at the superficial level of cages and pedestals, breadwinners and dependents. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court concentrated upon explicating its "intermediate scrutiny" standard in assessing the legitimacy of the reasons the State offered for having differing ages (21 for male, 18 for female) for drinking beer. But the very marginality of the discrimination to the core reasons for enforced gender differences made the case easy. The Court did not need to confront the internal, value-laden structures of gender role distinctions, which allowed those structures to remain invisible and unsusceptible to challenge and rejection. In fact, the Court overlooked one likely impetus behind the law, i.e., matching younger females to older males, assisting in perpetuating female subordination. Contrary to Justice Stevens' belief that the law treated males as inferior, 429 U.S. at 213-14, it helped perpetuate male superiority.

Similar to *Craig*, *Stanton v. Stanton*, 421 U.S. 7 (1975), challenged a divorce agreement that provided for support to cease at age 18, despite a Utah statute making females adult at 18, but males adult at 21. The Court saw that the age distinction was a proxy for a social scheme in which females were destined to marry young, pursue domestic responsibilities, need no higher education, and, unspoken, to move quickly into being dependent upon their husbands rather than their fathers. *Id.* at 10. The scheme helped insure women's continuing dependence, by expecting it and withdrawing the parental support that might aid in obtaining the education necessary to function in the marketplace and the world of ideas. This role-typing was deemed illegitimate, especially because women's "adulthood" conferred no advantages (e.g., voting, jury duty), but only disadvantages (e.g., earlier marriage and lack of parental support). *Stanton*, 421 U.S. at 15-16.

Yet, the Court still missed the fact that these roles and stereotypes had more to do with men's roles and the *supporting* nature of the roles carved out for women. Thus, to preserve the traditional roles, it is less important that women are expected to be dependent than it is that men who want dependent women be able to get them younger and with fewer skills and options. See Catharine MacKinnon, *Difference and Dominance*, in *FEMINIST LEGAL THEORY*, *supra* note 45, at 81 (explicating the theory that gender inequality is a result of gender subordination, and that an analysis accepting the premise that difference and sameness will balance inequality is inherently flawed and incapable of changing women's inferior status to men).

who attempt to fill other roles, however, defy their own natures and threaten the moral and social structure. Defining women through their reproductive capacity, the Court then uses it to isolate them, authorizing special rules that disadvantage women, but seldom upholding schemes that assist women in achieving equality in an unequal world.

Women's "diminished capacities" also preclude them from being viewed as appropriate holders of rights and power. Women are "protected" out of responsibilities, then deemed unworthy recipients of benefits and support. Gender equality is achieved by ensuring that males suffer no disadvantage to females, but disadvantageous treatment of females appears to be "neutral," and is upheld as reflecting the natural differences incorporated into social structures, especially the military and the family.

The Court treats women in inconsistent ways. What remains vital and consistent however is the underlying attitude: disrespect. It is this vision of women that the Court carries into its deliberations and pronouncements on privacy and abortion rights.

### III. THE PRIVACY CASES: THE BATTLE BETWEEN STATE AND INDIVIDUAL CONTROL

#### *A. Introduction*

Women's right to decide upon abortion as a reproductive choice has rested upon the Supreme Court's recognition of a more general "right of privacy."<sup>197</sup> The Court did not use explicit Constitutional language to name this right, e.g., "right to liberty." Such a powerful linguistic statement reflects the marginalized status that the interests of family relationships, interests the Court (and society) has explicitly assigned to women, hold.<sup>198</sup> I believe this accounts for (1) the marginal Constitutional status accorded to the area of reproductive choice, (2) the discomfort with which the Court confronts and resolves these issues, (3) the exclusion and isolation of women enforced and reinforced by the Court's decisions, and (4) the fragility of the commitment to and understanding of the place of such interests in society and Constitutional doctrine.

Re-reading the privacy and abortion cases reveals why the process

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197. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973).

198. *E.g.*, *Taub & Schneider*, *supra* note 112, at 117; *Polan*, *supra* note 112, at 294; *J. Williams, Gender Wars*, *supra* note 7, at 1565 (contending that where men were expected to be active participants in society, feminine virtue was reserved for the private sphere of the home); *Siegel*, *supra* note 9, at 335 (proposing that the law imposes the role of parenting upon women).



of withholding pragmatic availability and withdrawing constitutional succor for women's reproductive choices is being accomplished with such ease and alacrity. Simply stated, constitutional succor for reproductive choice was never a commitment. As demonstrated below, the right of privacy always contained within itself the distrust of women and their decisions evident in recent Supreme Court decisions.<sup>199</sup>

As the following analysis demonstrates, privacy grew up protecting existing power in the family sphere.<sup>200</sup> The principle extended itself to the length of its logic—to cover intimate relational choices including reproduction and procreation: first for men,<sup>201</sup> then for married couples,<sup>202</sup> and finally for unmarried women.<sup>203</sup> But reproductive choice gave women the power to make and effectuate significant moral decisions.<sup>204</sup> Because privacy was never intended to empower women or respect women's moral capacity to make decisions, the reality that women have the power to make and implement reproductive decisions has proven unsettling. It has thus become necessary to attack this power of women by removing any vestiges of power and respect from the right. It has become more important to withdraw

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199. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding a "gag rule" preventing federally-funded physicians from informing pregnant women of the availability of abortion as one option); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (expressing a fear that women will use abortion as a means of birth control).

200. *See* *Taub & Schneider*, *supra* note 112, at 117; *Polan*, *supra* note 112, at 294; and *infra* discussing *Meyer* and *Pierce*.

201. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that marriage and procreation are fundamental rights in the context of the attempted forced sterilization of a male prisoner); *contra* *Buck v. Bell*, 274 U.S. 200 (1927) (holding that mentally retarded women may be forcibly sterilized).

202. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the privacy of a marriage includes the right to use contraception).

203. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that contraception must be available to single women as a matter of equal protection).

204. *See* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (emphasizing the moral nature of the choice). Abortion is "unique" because it is "fraught with consequences to others." *Id.* at 874.

the power than to overturn the right.<sup>205</sup>

Rights are generally accompanied by legal respect and are usually effective in empowering individual actors. In a legal world without respect for women's moral judgments, rights can disempower women. Rights analysis contains two different components. The first is the substantive *recognition* of the right. The second is the *process* of determining if the right has been improperly restricted by the State's action in light of the State's valid goals. The process of rights-based analysis is hierarchical, abstract and isolationist.<sup>206</sup> The power of connection, context and relationship, necessary for mature peo-

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205. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In both cases, the Court "reaffirms" the right announced in *Roe v. Wade*, while allowing virtually every state-devised inroad upon its exercise. By withholding the power to decide and to control the decision from women, and vesting it in the State, the Court has effectively undermined women's power while rhetorically preserving women's right. See also GOLDSTEIN, *supra* note 48, at 27 (saying that with an "undue burden" test, the Court has preserved a right for "the well-to-do, rationally calculating, iron-willed woman"). While the right of privacy remains, the ability of women to exercise that right by choosing to terminate a pregnancy becomes more and more illusory. Physician training in abortion has declined to the point where some abortion providers fear the medical service may become functionally unavailable. Abortion services are not provided in many hospitals supported by public funds or by the Catholic Church, and such hospitals comprise a huge percentage of hospitals nationwide. The majority of rural counties in the United States have no abortion providers; some states have but one or two. The available providers are subject to anti-choice activities ranging from protests staged near them to clinic-blocking, patient harassment, worker harassment (including death threats and residential protests), bomb threats, bombs, sniper fire, and murder (of clinic workers and volunteers). See *supra*, notes 3, 5 and accompanying text.

Thus, the legal right coexists with a practical inaccessibility for many desiring the services and a growing lack of close, accessibly priced, private and safe (from external violence and harassment) services. The removal of financial assistance to patients complicates such limited access. At this point, most women have limited power to make and effectuate a choice with respect to their pregnancies, despite the Supreme Court's rhetorically powerful defense of their "right" in the *Casey* joint opinion and despite some legal commentators' high opinion of the joint opinion and its effectiveness in laying to rest the issue of whether the Constitution will continue to protect liberty/privacy by preserving women's "right" to choose abortion. See *supra* note 2.

206. The hierarchical, abstract, and isolationist quality of modern rights-based analysis has been pointed out by many commentators. GLENDON, *supra* note 9 (arguing that the discourse of rights encourages isolated individualism and exclusion of multiplicitous interests); GOLDSTEIN, *supra* note 48, at 27 (proposing that rights analysis separates the interested parties from each other and places them into conflict); Larry R. Churchill & José J. Simán, *Abortion and the Rhetoric of Individual Rights*, 12 HASTINGS CENTER REP. 9 (Feb. 1982) (arguing that legal rights analysis is too narrow and simplistic for ethical decisionmaking, as it focuses too much on atomistic analysis); Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171 (1992) (claiming that the modern liberalism of Rawls and Dworkin are not purely atomistic models, but recognize human interconnections as essential to justice reasoning; noting, however, that rights create isolation to protect space for individuals); Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J. L. REF. 933 (1985) (explaining that rights analysis establishes an abstract conflict which obscures ambiguity and allows arguments devoid of context, creating isolation); Elizabeth Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 154, 166, 172 (1988) (describing rights as a "trump" to keep society out, which reduce factual complexity to a two-sided conflict); West, *supra* note 32, at 43 (stating that rights analysis is based upon a thesis of individualism, that people are insulated from society; that it creates hierarchies that remain unchallenged; and that it uses abstract rather than contextual reasoning).

ple to make individual moral judgments, can also be negated by this process of rights analysis.<sup>207</sup> Therefore, the power of a woman's right can easily be trumped by explicitly recognizing the woman's low position in any hierarchy of moral being. This hierarchy includes the State, parents (father),<sup>208</sup> male mate (husband and "father-to-be"), the fetus, and even the community. Thus, the failure to respect women leads to a devaluing of the *substantive* right they seek to enforce, permitting the apparently neutral process of rights analysis to disempower women.

### B. *The Beginnings of Privacy: Meyer and Pierce*

The right to privacy as a liberty interest was first recognized in *Meyer v. Nebraska*<sup>209</sup> and *Pierce v. Society of Sisters*.<sup>210</sup> These cases developed privacy within the context of the family and parental control over the upbringing of children.

The *Meyer* opinion cast its protection of liberty in terms that are of critical importance to understanding the right of privacy as it now exists. Privacy was a right of *control* and *dominion*: "the *power* of parents to *control* the education of their *own*."<sup>211</sup> Despite recognizing a link between liberty and intimate choice, the Court chose power, control and the dominion of ownership to define the essence of the

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207. See GILLIGAN, *supra* note 38 (arguing that mature moral judgment requires the use of both "justice" based (rights) reasoning and "care" based (responsibility) reasoning); GLENDON, *supra* note 11; Churchill & Simán, *supra* note 206, at 9; Minow, *supra* note 206, at 933 (demonstrating how the State's protection of rights may intervene in the sphere of family decisionmaking); West, *supra* note 32, at 61 (proposing that modern republicanism, as a combination of communal morality and a rejection of civic homogeneity, is better suited for resolving such issues as those involved in reproductive choice).

208. Current legislative attempts to require that both parents of a minor consent to an abortion seem fairly explained as ensuring male input into the decision, input not guaranteed by a single parent's consent, as that parent is likely female.

209. 262 U.S. 390 (1923). In *Meyer*, the plaintiff challenged a state law prohibiting the teaching of modern languages in school. The state defended the law because of the importance of the "mother tongue" to the hearts of children in transmitting American ideals. The plaintiff's argument largely rested upon *teacher's* rights, those more readily associated with the previously recognized liberties of "freedom from bodily restraint, to contract, to engage in the occupations of life, [and] to acquire useful knowledge." *Meyer*, 262 U.S. at 399. The Court, however, while recognizing teachers' rights, *id.* at 400-01, focused strongly upon parental (and to a much lesser extent children's) rights: "to marry, establish a home and bring up children." *Id.* at 399. Importantly, this list continued, recognizing the more intimate right of the choice "to worship God according to the dictates of *his* own conscience ... essential to the orderly pursuit of happiness." *Id.* (emphasis added). The Court relied upon explicit language from the Constitution as well—in due process liberty. *Id.*

210. 268 U.S. 510 (1925) (striking down a state law that prohibited private schooling of children).

211. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (emphasis added).

right.<sup>212</sup> Privacy is thus allied more with property analysis than with fundamental tenets of human dignity.

The *Pierce* litigation challenged a law against private schooling.<sup>213</sup> The plaintiff sought to base the right in the "essence of personal liberty and freedom" which made "the child of *man* ... *his* parents' child and not the state's."<sup>214</sup> In this argument, "rights" is synonymous with "control," and "privacy" means simply "parental power." The state itself characterized the issue as being about the "superior right to control" citizens and children.<sup>215</sup>

Interestingly, the state argued that it needed to use its power to achieve a very connective and communitarian goal of breaking down the barriers of race, sect, class and ethnicity by educating all children together.<sup>216</sup> The Court chose to pursue the values of separation and control.<sup>217</sup> Parents were empowered not because of respect for intimate decisionmaking but because of deference to "direct[ing]" those "under their control."<sup>218</sup> The connection argument was rejected as a threat to "standardize ... the child [as] the mere creature of the state."<sup>219</sup> Parental direction was good because it separated children into their "station in life"<sup>220</sup> and taught them their "additional obligations."<sup>221</sup>

Liberty inevitably involves allocating power between the State and

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212. *Id.* at 400-01. In recognizing family power, the Court accepted the *existing* power structure as inviolate. However one would prefer to view the "individual" power accorded within the family, that power was exercised by the male "head" of the household. See Taub & Schneider, *supra* note 112, at 117; Polan, *supra* note 112, at 294.

213. *Pierce*, 268 U.S. at 530.

214. *Id.* at 518 (emphasis added).

215. *Id.* at 524.

216. *Id.* at 525.

217. Although I agree with the result in *Pierce*, I am critiquing the basis upon which the Court chose to reach that result. The Court could have recognized and fostered the goals of personal liberty in decisions affecting intimates, and thus recognized the value of connections, while deciding that private schooling (which shared with public schooling the responsibility for transmitting civic values) did not threaten community because it supported pluralism. Such recognition would also have helped to solve the current conundrum of assimilation or multiculturalism. Pluralistic liberty does not enforce assimilation, it recognizes the importance of family and heritage to the formation of the individual identity which liberty is designed to protect. A focus upon pluralistic and intimate liberty, rather than upon control in the domestic sphere, would have provided a sounder basis for recognizing the constitutional necessity of liberty for personal choices.

218. *Pierce*, 268 U.S. at 534-35.

219. *Id.* at 535.

220. *Meyer*, 262 U.S. at 400.

221. *Pierce*, 268 U.S. at 535.

the individual.<sup>222</sup> The Court's concern about power is not objectionable in and of itself. The *sole* focus upon power, and the equation of power with control, i.e., with the ability and permission to *coerce*, is problematic.<sup>223</sup> So too is the Court's inability to merge the concerns about power with the values of intimacy and choice. *Meyer* and *Pierce* reveal a Court that *contrasts* the idea of power with that of protection for intimate decisions, a Court that perceives its task as *choosing between* protecting control and protecting intimate connections.<sup>224</sup> Allocating power to individuals as a *vehicle* for achieving protection of pluralistic personal choices is much different from the path the Court chose. The Court allocated power—manifested as control—as an end in itself.

Unsurprisingly, power identified as control over decisions of social consequence is perceived as a threat to the very idea of the State.<sup>225</sup> Thus, at least one critic characterizes the right of privacy as "greedy" and virtually unlimited, amounting to an anarchic claim: "the right to be let alone is ultimately the right not to be governed."<sup>226</sup> Privacy as power and control may be susceptible to this criticism, but privacy as intimate liberty is not.<sup>227</sup> To the extent that privacy as control is anarchic, it is also a dangerous right. It is not surprising that there is little respect for or trust in such a right. But privacy for intimate liberty has an important claim to respect. To adopt this vision would allow respect to form one of the premises of privacy law, replacing the distrust evident in Carl Schneider's attitude<sup>228</sup> (and that of several Supreme Court justices) toward it.

Using power to *protect* liberty, rather than as synonymous with liberty, would enhance the values of intimacy and personal choice as constitutive of true liberty. If the end is liberty, protecting power is a

222. Whenever the Court examines a claim that a state action infringes upon a right, it necessarily engages in delineating the boundary between the State's power to coerce or prohibit an individual action and the individual's power to decide how to act on his or her own.

223. Such a focus is quite limited, and perceives power almost solely in physical terms, ignoring the importance to liberty of the human dimensions of having and exercising a positive power to create one's self and influence one's world (a power of vast internal and psychological importance to one's development as a free person).

224. *See supra* text accompanying notes 211-21, demonstrating how, in the end, the Court ignored the impact of intimate decisionmaking when making its decision and explaining its basis for those decisions.

225. Carl E. Schneider, *State Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 *LAW & CONTEMP. PROBS.* 79 (1988).

226. *Id.* at 87.

227. Whereas the idea of the State may well be to exert social control over individuals to the end that government may exist [Hobbes], the idea of the liberal democratic state includes establishing an environment in which individuals are accorded liberties in order to achieve the selfhood and fulfillment that justifies forming a government at all. *Cf. McClain, supra* note 206.

228. *See Schneider, supra* note 225.

means, but not the essence of the constitutional guarantee.<sup>229</sup>

Rather than relying upon power and control within the private sphere of the family, the Court could have relied upon the need for individualized choices in the intimate sphere of training or becoming a person. *Meyer* and *Pierce* involved educating children in their ethnic or religious heritage, without preventing the children from receiving the common education for civic responsibility given to all children. Thus, the Court could have protected pluralism within citizenship, as well as protecting personal decisions about family upbringing which are important to the development of personality but which do not threaten isolation and removal from the larger society.

Given the choice to recognize that liberty values connection, intimate relationships, and core personal choices, the Court instead used a model of confrontation and isolation. "Liberty" was reduced to "privacy," and this privacy interest became entangled in a rhetoric of power, control, and conflict.<sup>230</sup> By choosing this vision of privacy, the Court laid a foundation that fosters distrust for privacy and its exercise, rather than respect for privacy as fundamental to liberty. The stage had been well set.

### C. *Privacy in the Bedroom*

The second strand of privacy precedent deals explicitly with intimate choices. However, rather than centering its decisions upon the protection liberty requires for *moral* choice, the Court has chosen to organize its thoughts around the social status of the decisionmakers and the place in which the decisions are manifested.<sup>231</sup> Thus, the Court chose to extend its protection of the family by protecting the marital bedroom from undue state invasion in *Griswold v. Connecticut*.<sup>232</sup> Both the Court's reasoning and its protection of privacy were

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229. The essence of liberty is what it means to the selfhood and fulfillment of the individuals who comprise a free society, and therefore what it means to the society itself. "Liberty" is a defining characteristic of how Americans view our political system. It may be that to protect such liberty, we need to accord the power to pursue it to individuals. But that power then becomes the *means* to achieving the *end* of liberty, rather than being synonymous with liberty itself.

230. This conflict was both between adopting mainstream or minority ideas and choices and between designating superior versus inferior decisionmakers to make those choices.

231. By choosing social status and place (home/family) as its organizing principles, the Court incorporates thought patterns and premises harmful and disrespectful to women as equals. See Taub & Schneider, *supra* note 112, at 117 (arguing that "privacy" protects the status which already exists in the family, i.e., that of the dominant male and subordinate female. By shielding the place of home/family from legal scrutiny, the Court's privacy precedents have effectively sanctioned this power relationship and inequality.); Polan, *supra* note 112, at 294 (noting that the use of the public/private dichotomy in the privacy decisions such as *Roe* and *Griswold* has permitted law to shun the domain in which female subjugation is socially reproduced).

232. 381 U.S. 479 (1965).

initially confined to marital decisionmaking with respect to sexuality in the bedroom.

This strand of privacy jurisprudence, like the first strand, did not develop to protect liberty and intimate relationships. In the bedroom cases, the Court delicately closes its eyes from mutually embarrassing intrusions into what it was unwilling to see, but *was* willing to allow fairly mainstream sexual activity.<sup>233</sup> Respect for personal activities and choices never grounded the analysis. The Court merely condemned the State's role as a Peeping Tom and professed its own distaste for playing voyeur.<sup>234</sup> Once again, the core logic revolves around power,<sup>235</sup> not intimacy or moral agency. *Bowers v. Hardwick*<sup>236</sup> clarified this fundamental truth about privacy doctrine by shunning the idea that intimate personal relationships are protected by privacy doctrine<sup>237</sup> and sanctioning intrusions into bedrooms and sexual relationships within them that do not conform to the mainstream. The Court insisted that there was "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other."<sup>238</sup>

The Court, as in *Meyer* and *Pierce*, is protecting accepted power relations, not intimacy. Sexuality and reproduction are not seen as private choices deserving of legal respect and room. Constitutional

233. The Court showed no compunction when upholding prohibitions against homosexual sexual activity, discovered by actual physical intrusion into the bedroom during the sexual act, *Bowers v. Hardwick*, 478 U.S. 186 (1986), in contrast to the delicacy displayed when the intrusion might involve imagining what occurred in marital bedrooms. *Griswold*, 381 U.S. at 485.

234. *Griswold*, 381 U.S. at 485.

235. That power is the existing power relation within marriage (*Griswold* recognized contraceptive control as a married interest) and in male/female bedrooms, or "appropriately" male bedrooms. See *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting the possession and use of pornography in a bedroom). See also MacKinnon, *supra* note 45, at 163; Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U.L. REV. 793 (1991); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981) (asserting the role of pornography in perpetuating male dominance over women).

236. 478 U.S. 186 (1986).

237. *Id.* at 191 (stating that "[a]ny claim that [the privacy] cases ... stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." [Indeed, Mr. Hardwick was physically intruded upon in his bedroom during police attempts to "serve" a no-longer-outstanding warrant for failing to appear in court on a citation. See Leslie Bender & Dan Braverman, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 320-21 (1995) (discussing PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* (1990))].

*Cf.* *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (refusing to recognize intimate family relationships as a basis for empowering choice in the more "public" setting of the provision of medical care to a dying patient).

238. *Bowers*, 478 U.S. at 191. See also *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973) (stating that *Stanley* was decided by holding that "[a] man's home is his castle"). Apparently, this holds true only if the man is acting "like a man" by fulfilling a social role of heading a household which contains a female as a sexual partner.

protection, rather, is for traditional social roles. When sexual or reproductive choices threaten social roles, the Court resists or fails to protect those decisions. Indeed, the choice to discard traditional social roles is treated as a basis for questioning the decisionmaker's moral capacity to make respected choices.<sup>239</sup> Thus, even committed<sup>240</sup> homosexual lovers have no status or place deserving protection, because the Court refuses to allow them to exercise power and completely mistrusts them. Their social role and status identifies them as immoral, anti-social actors, thus incapable of commanding respect as moral agents exerting decisionmaking capacity.<sup>241</sup>

By protecting the married couple's right to obtain contraception in consultation with their physician, the Court did expand the privacy concept of *Pierce* to include more than tangibly social decisions about childrearing. Justice Douglas referred to the intangibles of ideas and beliefs as expressed in the intimate marital relation.<sup>242</sup> This confluence supported reading *Griswold* as protecting the *choice* of relationship and of reproductive conduct in that relationship. Side by side with this analysis, however, is an analysis that carries the seeds of destruction, questioning private choices that do not adhere to social expectations.

*Griswold* emphasizes the social role and value of the marital relationship.<sup>243</sup> It shuts the State out of the bedroom, rather than out of the choice to reproduce. The alarming spectre of physical intrusion to observe contraception in action motivates the sense of pri-

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239. For instance, minor women's choices to engage in premarital sex, while apparently suiting them for motherhood (they can obtain prenatal care on their own), disqualify them from making an unsupervised moral decision to have an abortion (which would relieve them of their natural role of motherhood). See, e.g., *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding that a Utah statute requiring a physician to notify, if possible, the parents of a minor seeking an abortion). Indigent women on Medicaid, generally stereotyped as young, single mothers—"welfare queens"—are also deemed incapable of making good moral decisions without "assistance" from the state in asserting the morally preferable option of childbirth and reinforcing it by withholding funding for abortions, but not for childbirth. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1976) (holding that a state may choose not to pay an indigent woman's expenses associated with a nontherapeutic abortion, while choosing to fund expenses associated with childbirth as a matter of policy).

240. *Bowers* itself involved a casual sexual encounter. However, the Court declared that no homosexual relationships were entitled to constitutional protection.

241. See *Bowers*, 478 U.S. at 192 (upholding the use of a sodomy statute enforced against homosexuals alone by detailing the traditional legal repulsion toward and moral reprehensibility of homosexual conduct. "Proscriptions against [homosexual] conduct have ancient roots" and are valid even when "based on notions of morality"). See also *id.* at 196-97 (Burger, J., concurring) (stating that "[c]ondemnation of [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards." English law recognized it as an "'infamous crime against nature' ... an offense of 'deeper malignity' than rape"); *id.* at 197 (Burger, J., concurring) (refusing to "cast aside millenia of moral teaching" to recognize Mr. Hardwick's liberty interest).

242. *Griswold*, 381 U.S. at 488.

243. *Id.* at 483-88.



vacy.<sup>244</sup> The evil of the state law is its "destructive impact upon [the marital] relationship."<sup>245</sup> That relationship is worthy of protection because of its primacy in the social order as well as in the accepted moral order: "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life ... a harmony in living ... a bilateral loyalty ... for as noble a purpose as any ..."<sup>246</sup> The Court protects a social construct, the "sacred precinct of the marital bedroom."<sup>247</sup> Intimate moral choices or respect for them are peripheral in *Griswold*; at its core, it conserves the social role of marriage and excludes the State from intruding into bedrooms, not into choices.<sup>248</sup> Importantly, *Griswold* did not vest power in the moral decisionmaker, it simply divested the State of power and left it to the status quo.

In fact, Justice Goldberg's concurrence concedes that the State has the power to make certain, otherwise moral, choices (e.g., about marital fidelity) for people. He considers the ultimate goal of privacy protection (evidenced by allowing a compelling state interest to override it) to be preservation of traditional social roles, in this case, marriage.<sup>249</sup>

The dissenters in *Griswold* ignore the issue of private decisionmaking, and concentrate on using judicial power to override the legislative choice barring the use of contraceptives.<sup>250</sup> This reveals that the debate is not over recognizing the need to respect moral decisions, but is about power. Rules of power and social control decided the entire case. *Griswold* limited State power on the basis of protecting the status of marriage.<sup>251</sup> A privacy jurisprudence based upon re-

244. *Id.* at 485.

245. *Id.*

246. *Id.*

247. *Griswold*, 381 U.S. at 485.

248. William Liu, *Abortion and the Social System*, in *ABORTION: NEW DIRECTIONS FOR POLICY STUDIES* 137, 150 (Edward Manier, William Liu, & David Solomon eds., 1977) (noting that privacy rhetoric, based in the marital relationship, is a very limited and exclusive rhetoric, ignoring the communal dimensions of moral values).

Justice Goldberg concurring in *Griswold* also emphasized social roles and the *place* of marital relations—"the important and sensitive area of privacy ... the marital relation and the marital home ... the private realm of family life ... the traditional relation of the family." *Griswold*, 381 U.S. at 495-98 (Goldberg, J., concurring). He, too, was concerned more with excluding the state from the bedroom than with preserving individual moral agency.

249. *Id.* at 498 (Goldberg, J., concurring). See also David M. Smolin, *Why Abortion Rights Are Not Justified By Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621 (1990) (claiming that because privacy law only protects traditional family values, restrictions on abortion are consistent with it).

250. *Griswold*, 381 U.S. at 507-08 (Black, J., dissenting).

251. *Id.* at 491.

spect would find that the State has no power to intrude into intimacy, personhood, or moral agency. It would affirmatively support individuals making moral choices, recognizing this power out of respect for its value.

The protection of the bedroom was also a key factor in *Stanley v. Georgia*.<sup>252</sup> Interestingly, the Court determined in this case that privacy protected space, feelings, ideas, and possessions,<sup>253</sup> but the essence of that privacy was limiting State intrusion into the bedroom, where one *owned* one's own thoughts and activities.<sup>254</sup> Power to exclude, rather than power to decide in matters of intimacy and morality, thus remained critical to privacy jurisprudence, as did property concepts.

A crucial challenge to privacy protection arose when unmarried, and even minor, persons sought the right to use contraceptives in *Eisenstadt v. Baird*.<sup>255</sup> The sacred precincts of family and marriage, the only acknowledged status for private reproductive decisionmaking,<sup>256</sup> were no longer at stake. Prior privacy analysis provided little foundation for such a right, because moral choices about forming familial relationships, intimacy, and sexuality<sup>257</sup> had not been recognized. The decision to protect contraceptive choice outside of the marital bedroom could have been based upon privacy analysis if the Court had recognized that privacy necessarily leaves to the person (not the State) the decisions as to with whom one will share an intimate relationship. Contraception merely effectuates intimate choices as to both sharing sexuality with another and creating the intense personal relationship of parent/child. However, privacy analysis had not recognized the core of intimacy and moral respect, leaving singles vulnerable to State intrusion because their unmarried status had no inherent power.

The Court finessed this muddle by concentrating on the sexual activity of singles as being functionally similar to the sexual activity of

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252. 394 U.S. 557 (1969). Citing the right to be let alone, Justice Marshall for the majority decided criminalizing private—i.e., in the home, in the bedroom—possession of pornography. *Id.* at 559, 561. The First Amendment protection for ideas and expression protected the home from invasion, especially because it was being used in ways that the Court deemed had no public repercussions.

253. *Id.* at 564.

254. *Id.* at 568.

255. 405 U.S. 438 (1972). *See* *Carey v. Population Services*, 431 U.S. 678 (1977) (striking down a law which criminalized the sale or distribution of contraceptives).

256. But see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Court was more interested in preserving Skinner's control over his own fertility and procreative capacity than in protecting a marriage or a family.

257. In the author's opinion, sexuality includes control over fertility.

married couples.<sup>258</sup> This abstraction allowed equal protection to perform the constitutional task of invalidating the restriction; privacy doctrine need not be used to explain why unmarried couples were entitled to liberty.<sup>259</sup> Thus, the Court did not need to attack the law for failing to value personal moral choices and intimate relations. Traditional values were accepted. Status, not intimacy, remained as the foundation for the protection of reproductive decisionmaking.<sup>260</sup>

The end of Justice Brennan's opinion, however, sought to widen the privacy base to include personal choices about reproduction and spirituality.<sup>261</sup> This could have made personal moral agency and spiritual direction basic to the reasoning behind privacy rights. Unfortunately, little in the premises of privacy law has changed since this opinion,<sup>262</sup> despite Justice Douglas' concurrence:

Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he [or she] is fully apprised of the merits of a controversy.<sup>263</sup>

This call for spiritual personhood, moral agency, and respect has gone unheeded.<sup>264</sup> Privacy law has been propelled forward by an emphasis upon power, control, autonomy as state-exclusion, and family.

Now, the Court questions whether any status is functionally similar

258. *Eisenstadt*, 405 U.S. at 450.

259. The asserted state bases for outlawing contraception—preserving health and morals by discouraging non-marital intercourse—were seen as either farcical (why was fornication a 90-day misdemeanor and contraceptive distribution a 5-year felony), *id.* at 449, or wildly unsuited to those goals: an unwanted child is questionable punishment for premarital sex. *Id.* at 452-53. (Unwanted pregnancy visits the "punishment" upon the female, indicating the social disapproval of her conduct and that the fertility control is more importantly exercised against the female rather than the male.) Adultery was possible with contraceptives available. *Id.* at 449.

260. *Id.* at 466.

261. 405 U.S. at 453.

[T]he marital couple is not an independent entity ... but an association of two individuals with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual* ... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453.

262. However, the Joint Opinion of Justices O'Connor, Kennedy, and Souter in *Casey* does address the moral and spiritual nature of the woman's decision to abort, perhaps signaling a reemergence of these themes. What is disturbing in *Casey* is that the recognition that abortion poses a moral choice is not accompanied by a recognition that moral reasoning supports choosing to abort as well as not to abort. *Casey* also fails to recognize that the range of moral choice involved in procreation should be within a protected enclave for liberty.

263. 405 U.S. at 457 (Douglas, J., concurring).

264. Contrast this reasoning with that in *Rust v. Sullivan*, 500 U.S. 173 (1991), which held that Congress could compel health care providers *not* to provide information that abortion is an option for an unwanted pregnancy.

to being "married." With *Bowers v. Hardwick*,<sup>265</sup> the Court successfully separated reproduction, marriage and family from sexuality, intimacy, and private choices. Being let alone<sup>266</sup> does not protect one from invasion into nonmarital bedrooms. In *Bowers*, a homosexual male sought privacy protection from criminal prosecution for his moral choice to engage in an individual, intimate, consensual, and sexual relationship within his own bedroom.<sup>267</sup> The Justices' opinions are a daring exposé of what privacy law was really all about. For the Court, Justice White painstakingly details that privacy is about family and children, and thus, of course, *not* about sexuality.<sup>268</sup> The reversion to status is complete. Social roles which do not fit the model of the marital family are not only unprotected, they are rightly the subject of "ancient" and universal prejudice.<sup>269</sup>

The opinion explicitly elevates the power of majoritarian morality over personal moral choice.<sup>270</sup> It is filled with disrespect for the intimate choices and relationships that fail to meet the dominant paradigm, equating homosexual relationships with the violences of incest and sex crimes carried out in the shelter of the bedroom.<sup>271</sup> Chief Justice Burger goes further in concurrence, citing "ancient" attitudes treating homosexuality as a "deeper malignity" than rape.<sup>272</sup> He admits that the real issue is one not just of moral tradition, but of *authority*.<sup>273</sup> Violence against women and children is not as upsetting as homosexuality because it does not threaten authority,

265. 478 U.S. 186 (1986).

266. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (asserting that being let alone is the right most valued by civilized men); accord *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that private possession of illegal pornographic materials cannot be prohibited); accord *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing the right to privacy as it pertains to contraception).

267. 478 U.S. at 189. Even if one believes Mr. Hardwick made an immoral choice, the question of how to act was one involving a moral choice. One cannot protect moral choice without protecting differing decisions.

268. *Id.* at 191.

269. *Id.* at 192.

270. *Id.* at 194-95.

271. *Id.* at 195-98.

272. *Bowers*, 478 U.S. at 197 (Burger, J., concurring). What this says about choice in sexual encounters, especially female choice, is not encouraging. Clearly, choice is less important than gender role conformity. Indeed, Georgia punished sodomy as a crime short only of murder, ranking it as worse than most violence and enforcing it against gays only. *Id.* at 196. What violence does homosexual conduct cause, other than challenging existing social roles? That is apparently the ultimate violence, as it substitutes intimate relationship for majoritarian power and control. *Id.* at 196-97 (Burger, J., concurring).

273. *Id.* at 197 (Burger, J., concurring).

existing power relations, or gender roles.<sup>274</sup> Morality becomes simply a matter for authoritarian choice, given to society instead of to the individual.<sup>275</sup> In *Bowers*, moral autonomy and autonomy as freedom from state interference diverge from each other and from sexuality, leaving autonomy, reproduction, and moral agency in a notably uncomfortable relationship with each other.<sup>276</sup>

A privacy that protects reproduction but not sexuality is peculiar. A privacy that protects reproduction but not non-majoritarian moral choice is illusory. Such a privacy enforces a split between meaningful moral autonomy<sup>277</sup> and protection from State coercion.<sup>278</sup> It recognizes no claim to power or respect for private decisions of which the State does not approve. It fails to protect relationships and denies room for personal choice. Privacy and disrespect for private moral choice coexist in *Bowers*, just as privacy and preservation of traditional power and control in family relationships coexist in *Meyer* and its progeny.

Justice Blackmun's dissent painfully acknowledges that the Court is bowing to an obsession<sup>279</sup> to control different moral choices and exerting social power in lieu of recognizing the "moral fact a person belongs to [him or her]self."<sup>280</sup> In this context, he sees that privacy should truly rest upon intimacy: self-definition individually, as well as

274. Cf. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 187 (1988) (arguing that those who oppose homosexuality see it as a violation of gender norms, and favor traditional concepts and structures of male/female relations).

275. Indeed, this is a peculiar construct, assigning the role of moral agency to society and law as institutions rather than to individuals. As several ethics theorists have noted, only persons, and not institutions, can be moral agents. E.g., NODDINGS, *supra* note 34, at 103; Edmund Pincoffs, *Membership Decisions and the Limits of Moral Obligation*, in ABORTION: NEW DIRECTIONS FOR POLICY STUDIES 31, 34-35 (Edward Manier, William Liu & David Solomon eds., 1977). Assigning moral agency to law is simply another way of exerting control and power over what would otherwise be moral decisions. David A.J. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, 51 LAW & CONTEMP. PROBS. 123, 130 (1988); Stephen Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 IND. L.J. 101, 104-06, 124 (1992); cf. Churchill & Simán, *supra* note 206, at 9. Legally requiring certain conduct makes the choice one of law, not morals. See generally Salbu, *supra* (contrasting questions of law with questions of ethics).

276. *Bowers*, 478 U.S. at 186.

277. That is, moral autonomy to choose conduct and beliefs that are not consistent with a pre-designated and traditional definition of what is socially accepted as normal and moral.

278. Homosexuality blatantly challenges sexuality as male-female. Given the refusal to recognize it as protected within privacy, homosexuality must challenge power as well. If so, male-female sexuality appears to be based upon male domination and power, just as MacKinnon has claimed, to uproarious dismay. See Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (analyzing social power between men and women).

279. *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

280. *Id.* at 204 (Blackmun, J., dissenting) (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 (1986)).

within chosen relationships and group affiliations. His opinion recognizes that the Court uses rights analysis to isolate and minimize persons and their interests,<sup>281</sup> and to view people in a vacuum, isolated from the bonds created with others in forming their identities, their lives, and their pursuit of happiness through "emotional enrichment from close ties with others."<sup>282</sup> Only after understanding the core necessity of these chosen relationships can it make much sense to view the individual in his or her relationship with and obligations to society as a whole.

The Court's privacy jurisprudence both isolates the individual and pits his or her moral choices against those of the society. The Court had already failed to put "the significance of [humanity's] spiritual nature ... feelings and ... intellect"<sup>283</sup> at the core of privacy rights. With *Bowers*, it abandoned the alternative core it had developed—protection in the bedroom.<sup>284</sup> As Justice Stevens noted in his dissent, the source of the privacy right in the *Bowers* analysis is control: control exercised over people to "produce legitimate offspring."<sup>285</sup>

This control, this power to disrespect personal moral choice and to destroy intimate<sup>286</sup> relationships, is exercised in the name of privacy analysis. Privacy analysis, developed upon a foundation of coercive power and control, has left pre-existing power relations within the family untouched. Those relations have been viewed as sacrosanct, because the act of "normal" sex could mystically cause the condition which enabled a woman to fulfill her destiny by becoming an actual, not just a potential, mother.

#### IV. CONCLUSION

##### PRIVACY WITH DISRESPECT: WOMEN AS REPRODUCERS BUT NOT MORAL AGENTS

In the abortion cases, these themes of women as reproducers and noncompetent moral decisionmakers<sup>287</sup> converge with those of state

281. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

282. *Id.* at 205 (Blackmun, J., dissenting). Blackmun observes that liberalism's rights, as interpreted by the Court, are atomistic and self-regarding. Thus, Linda McClain's defense of modern liberalism as theorized by Rawls and Dworkin is inapt, failing to evaluate the effect that Supreme Court privacy doctrine has had upon the characterization and popular perception of those rights and their holders. Cf. McClain, *supra* note 206, at 1171.

283. *Bowers*, 478 U.S. at 207 (Blackmun, J., dissenting).

284. *Id.* at 187; see text *supra*.

285. *Id.* at 215 (Stevens, J., dissenting).

286. *Id.* at 214 (Blackmun, J., dissenting).

287. See discussion *supra* Part II.

power and personal dominion.<sup>288</sup> The lack of respect for both women and individual moral choice<sup>289</sup> merge and are incorporated into abortion jurisprudence. These themes serve as foundations and emerge in forms reflective of the explicit roles of female reproduction and decisionmaking in procreative choice.

The privacy cases form the legal foundation, while the attitude towards women affects the application of the law of privacy. The law of privacy controls the use of State power within accepted parameters rather than giving power to individuals in matters of personal and relational intimacy. Thus reproduction is protected not because of its special quality as a moral choice within intimate relationships, but because of its connection to traditional social roles, which are "let alone" to be self-generating.<sup>290</sup> When the choices fit socially acceptable roles, they may be protected, but when those intimate relational choices challenge social roles, they are vituperously rejected.<sup>291</sup> Coupled with an underlying attitude that women should be mothers and cannot be trusted to make significant decisions, protecting a woman's choice to terminate a pregnancy as a core privacy interest becomes oxymoronic.

In privacy law, when a choice does not match societal standards, the choice is labeled as immoral. By so choosing, the decisionmaker has demonstrated his or her incapacity to choose or to be trusted to choose. Thus, what should be a constitutional protection of *means*—the making of a deeply personal decision—becomes a legal rejection because the *ends* are socially unacceptable. We have a constitutional protection of liberty that protects each person's right to choose what the society wants him or her to choose. Privacy is bought at the price of conformity.

The privacy principle was also based upon a social and legal embarrassment as an effort to avert our collective gaze from male-female sexuality and its reproductive consequences. In addition, there was a belief that those consequences created a natural social order in which women fulfilled a predestined maternal function.<sup>292</sup> The law coped with this embarrassment and social predetermination by applying an abstract principle of State noninterference in these

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288. See *supra* Part III (discussing privacy cases).

289. Individual moral choice exercised in contravention to traditional social expectations or majoritarian beliefs is particularly susceptible to disrespect. Coupled with the distrust in privacy, this disrespect can be fatal to according rights to people to act in ways that offend traditional views of women and the family.

290. See *supra* notes 156-230 and accompanying text.

291. See, e.g., *Bowers*, 478 U.S. at 193-94.

292. E.g., Siegel, *supra* note 9, at 274, 291-92, 300-04, 331.

arenas. To describe the principle, the Court formulated the *Meyer*<sup>293</sup> and *Griswold* lists.<sup>294</sup> As an abstract principle, privacy could then be extended to its logical limits and used to prohibit state interference into the "most basic decisions about family and parenthood ... as well as bodily integrity."<sup>295</sup> As *Roe* pointed out, the principle clearly extended to "marriage, procreation, contraception, family relationships, and child rearing and education [and] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>296</sup>

While the extension makes sense, covering as it does decisions flowing from sex and reproduction, its application to abortion violated two of its hidden premises: the premise that women have assigned social roles (especially in reproduction) and the premise that privacy protects existing norms and power, not individual choice. The extension has thus proven fragile. By freeing women to make the very decisions that the culture had made for them, *Roe* transferred the power from the culture to the woman. The law of privacy had formed a protected enclave for the exercise of power.<sup>297</sup> But after *Roe*, the power holder became the woman, who could use it to alter the traditional power structure in the private sphere. A system that protected traditional distributions of power became a system within which power can be exercised in ways that will fundamentally

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293. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

294. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

295. *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992).

296. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citations omitted).

297. *Taub & Schneider*, *supra* note 112, at 117; *Polan*, *supra* note 112, at 294.



affect the structure of the family, society and the "public" world.<sup>298</sup> This consequence is diametrically opposed to the initial justification for state noninterference, i.e., the preservation of the traditional family and protection of the power of control over children.

Using such a privacy doctrine to define the legal response to the issues of reproduction creates an unsuitable environment for protecting moral decisionmaking. The doctrine forms a basis for nourishing traditional social and sexual roles.<sup>299</sup> Its focus upon authorizing control to foster those values provides little helpful framework for optimizing moral decisionmaking along the entire continuum of available alternatives. To foster moral decisionmaking, we should eschew a framework that relies upon the physical dimensions of authority and control (analogized to property interests) as political constructs. Instead, we need a framework with the spiritual dimension of intimacy and respect to create an ethical domain in which responsibility (not control) will be exercised. We need to protect *decisions*, not *dominion*.

In abstract legal terms, the extension of a right of privacy that encompasses decisions about marriage and family<sup>300</sup> to an obviously reproductive decision such as abortion is not surprising or difficult. But the use of that right to provide the very mechanism—female control over a particular reproductive event—that undercuts pri-

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298. The *Casey* joint opinion recognized just this effect of *Roe*. The fact that women have always endured the constraints of childbirth and childrearing is not alone "grounds for the state to insist ... upon its own vision of the woman's role, however dominant that version has been in the course of our history and our culture." *Casey*, 505 U.S. at 852. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 855. See also EISENSTEIN, *supra* note 40, at 183-84 (stating that *Roe* gave women power over their bodies, making them less "different" with respect to sexual freedom and wage-earning; this upset "a complicated set of assumptions about who women were, what their roles in life should be, what kinds of jobs they should take in the paid labor force, and how those jobs should be awarded.") (citing KRISTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)); J. Williams, *Gender Wars*, *supra* note 7, at 1559, 1587 (noting that the equality women gained with the abortion right is seen as a threat to the social order in the sex role context); Hern, *supra* note 17, at 127; cf. GELB & PALLEY, *supra* note 17, at 35, 129 (observing that political change benefiting women is least acceptable when it alters women's core social roles; abortion changed such roles and placed power relations at stake, thus explaining the continued opposition to that policy); Schnably, *supra* note 8, at 715, 839-40 (noting that much of the social reaction to women's control over their fertility has been to develop ways which remove that control, for example, with contraceptive methods such as Norplant and with forced sterilization); Schnably, *supra* note 8, at 845 (remarking that the struggle over reproductive rights comes down to disagreements over sex roles and family structures, over the vision of women in control versus women as natural mothers).

299. Indeed, one pro-life scholar opines that the only acceptable liberty rights are those which derive from traditional sex roles and family structures. Smolin, *supra* note 250, at 621. See also Schnably, *supra* note 10, at 875.

300. These decisions include *Carey v. Population Services*, 431 U.S. 678, 684-86 (1977) (begetting and bearing children), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (raising children).

vacy's premise of the female as a passive performer of a maternal role without economic or political power is likely to produce great confusion, upheaval, and continuous attempts to remove it or alter its effectiveness.<sup>301</sup> It is the principle and its anachronistic premises which are on collision courses with each other.<sup>302</sup> The primary problems of abortion jurisprudence are attributable more to this reality than they are to an alleged lack of legal or moral premises to explain why the decisions about procreation are properly placed in a zone free of state interference.

Once we see the unacceptable premises that infect the jurisprudence of reproductive choice, we can recognize them at work in the abortion cases, and identify the problems and errors they have created in abortion doctrine and discourse. These are the first steps toward eliminating the premises of disrespect for women, the assumptions that women are morally responsible only when fulfilling traditional expectations of the mother-role, and the beliefs that women cannot and do not make trustworthy decisions of significant moral import. When these faulty premises are purged, we face the opportunity to use better premises in formulating our jurisprudence of liberty and choice. With those premises, we can imagine and con-

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301. Many scholarly studies of the members of the pro-choice and pro-life movements establish that at its core, a great deal of the disagreement arises from attitudes about women, women's roles, and family structure. It is important to note that these attitudes are not universal, and not strictly divided according to identity with either side of the debate. They are also not the only reasons behind a person's position with respect to abortion. GINSBURG, *supra* note 48, at 139-45, 169-70, 194-97 (reporting that her anthropological study in Fargo, North Dakota, of members of both camps reveals that pro-life activists identify more with the values of "domesticity," whereas pro-choice activists see women as autonomous people with an interest in pursuing self-development through careers as well); LUKER, *supra* note 48, at 176 (detailing a sociological study of California activists that shows pro-life women as committed to "traditional" views of women's roles as wives and mothers, whereas pro-choice activists are more career-oriented); Blake, *supra* note 48, at 447 (noting how conservative views of the family, gender roles, and sexuality explain much anti-abortion morality); SHEERAN, *supra* note 8, at 125-28, 131 (asserting that much of the difference between pro-life and pro-choice advocates is their view about women's roles and changing them); EISENSTEIN, *supra* note 40, at 126, 154, 184 (explaining that views on the family, gender roles within the family, and sexuality separate pro-life from pro-choice adherents); GELB & PALLEY, *supra* note 17, at 6 (noting that the threat abortion rights pose to traditional values of family and sex roles explains the opposition to them); J. Williams, *Gender Wars*, *supra* note 7, at 1580-83 (stating that the rhetoric of pro-choice and pro-life adherents accentuates that they differ markedly in their views of women's roles in the family and the workplace); Siegel, *supra* note 9, at 328 (stating that the differing views of women's role as "mothers" is a key to the abortion debate); GOLDSTEIN, *supra* note 48, at 91 (discussing that traditional views about sex roles characterize many pro-life adherents); Shannon, *supra* note 17, at 3, 8 (noting that critical factors in abortion positions are attitudes about childrearing and social practices, as well as one's education and class).

302. Cf. Justice O'Connor's contention that medical technology stretching the time of fetal viability back further into gestation puts the *Roe* trimester framework (setting viability as the point where State interest in fetal life can outweigh the woman's choice) on a "collision course with itself." *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

struct a doctrine of liberty and a mode of discourse that will move us closer to solutions. Our work has begun. Let it continue.

