2003

Women's Rights: Reframing the Issues for the Future

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WOMEN'S RIGHTS: REFRAMING THE ISSUES FOR THE FUTURE*

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Kathy Rodgers:

Good morning and welcome, everyone, to our panel on Women's Rights: Reframing the Issues for the Future. I am Kathy Rodgers. I'm from the class of 1973 of Columbia Law School, and I'm looking around this room—this is not what room A and B looked like back then! Everybody has a microphone, which is great, because we hope to have some good interactive discussion with all of you this morning.

I am also, in addition to being a Columbia Law alum, the president of NOW Legal Defense and Education Fund here in New York. For over thirty-two years, NOW Legal Defense has used the power of the law to define and defend women's rights. I am particularly pleased to be here today with Columbia Law School alumnae because Columbia women have been a substantial part of our team throughout these thirty-two years as members of our staff, as academic partners, as student interns (including some young men), as part of our volunteer leadership, as pro bono attorneys, and as supporters. So with all of these connections, it really is a matter of personal pride to be back here celebrating the women of Columbia Law School.

And with all of these brains, from within the Columbia community and without, working on women's rights, we have made good progress over the years. It took seventy-two years from the Seneca Falls Convention to having the right to vote in the United States Constitution[1] (from 1848 to 1920), but since the 1960s, the latter half of the twentieth century, we have seen the legal framework for women's rights expand rapidly. Just to tick off a few things: the Equal Pay Act of 1963;[2] Title VII of the Civil Rights Act of 1964,[3] which prohibits employment discrimination; Title IX of the Education Amendments of 1972,[4] which prohibits sex discrimination in

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* Panel held at Columbia Law School on October 19, 2002. *See* Editor's Note, Introduction to Remarks from the 75th Anniversary of Women at Columbia Law School, 12 Colum. J. Gender & L. 310 (2003).

[1] U.S. Const. amend. XIX (ratification completed Aug. 26, 1920).

[2] 29 U.S.C. § 206d (1988).

[3] 42 U.S.C. § 2000e (1981).

[4] 20 U.S.C. § 1681(a) (2000).

education; the Roe v. Wade[5] decision in 1973 affirming our constitutional right to choice; the Pregnancy Discrimination Act;[6] the Freedom of Access to Clinic Entrances Act;[7] a series of Supreme Court decisions affirming that sexual harassment is sex discrimination on the job and in school; the Family and Medical Leave Act;[8] and the Violence Against Women Act of 1994.[9] All of these have made a tremendous contribution to the expansion of women's rights, and certainly the world of our daughters and granddaughters today offers many, many more choices and opportunities than I had back in the early '70s, let alone what the pioneers who came to Columbia Law School seventy-five years ago had.

Nonetheless, despite all this wonderful progress, I feel compelled to say that *progress is not success*, and women today are still far from equal in American society. We are not equal in terms of jobs and economic opportunity. We are not equal in terms of power in politics and government. We are not equal, I don't think, in any other major institution that impacts our lives every day. Think about it: the judiciary, corporations, religions, the military, the media. I could give you reams and reams of data to underscore this point. I am going to spare you that, but I have to give you a few. Just think about the fact that, I think, as of last week there were seven female CEOs of Fortune 500 companies, which comes out to something like 1.4 percent.[10] At the same time, it is true that ninety percent of the adults on welfare are women, and most of them are raising children.[11] Today, in the

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[5] 410 U.S. 113 (1973).

[6] 42 U.S.C. § 2000e-(k) (1981).

[7] 18 U.S.C. § 248(a) (2001).

[8] Pub. L. No. 103-3 (1993) (codified at 29 U.S.C. §§ 2601-2654 (2003)).

[9] Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.). *See* Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 Fordham L. Rev. 57, 147 n.31 (2002):

> The Violence Against Women Act was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Subsequently, Congress amended, reauthorized, and expanded some of its provisions in 1996 and 2000. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000); Pub. L. No. 104-201, 110 Stat. 2655 (1996) (codified as amended at 18 U.S.C. § 2261A). The 1996 and 2000 amendments did not affect the civil rights provision. Apart from the civil rights provision, which was struck down in Morrison, all the other provisions of the 1994 legislation remain in effect, as amended.

[10] Catalyst, 2002 Catalyst Census of Women Corporate Officers and Top Earners in the Fortune 500 1 (2002).

[11] DHHS, Administration for Children and Families Temporary Assistance for Needy Families Program, Fourth Annual Report to Congress (Apr. 2002).

trades, where a woman, or anybody, can earn a very good living, women are 1.7 percent of the carpenters;[12] they are 1.3 percent of the plumbers.[13] And that's notwithstanding the fact that it was thirty-seven years ago that the Office of Federal Contract Compliance Programs, affectionately known as the OFCCP, set a goal of 6.9 percent for women in the trades in federally-funded construction projects.[14] So in thirty-seven years we haven't come close to the minimal—miniscule—6.9% goal!

Closer to home, here in New York twenty years ago, now-Captain Brenda Berkman sued—used the legal system—to become a firefighter.[15] She, along with thirty-nine other women, became the first women firefighters in New York City in 1982, and we all celebrated then. We thought that was real progress, and we looked forward to more growth in the future. Today there are some twenty-five women in the New York City Fire Department out of more than 11,000 firefighters.[16] So we have twenty-five out of more than 11,000 in a city of eight million. Nationwide, it is not much better: less than three percent of firefighters are women.[17] Looking at a bigger picture, we still don't have access to adequate child care and early education in this country for families, no matter what their economic standing.

What about government and politics, where the decisions are made? Well, we are twenty-two percent of the Supreme Court,[18] we are 13.5% of Congress,[19] and we are zero percent of the United States Presidents.

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[12] NOW Legal Defense and Education Fund, Nontraditional Occupations For Women: 1972-2000 (on file with Kathy Rodgers).

[13] *Id.*

[14] OFCCP Compliance Manual, Chapter 4, *available at* http://www.dol.gov/esa/regs/compliance/ofccp/how2/ofcpch4.htm (last visited Apr. 5, 2003) (goal was originally published in the Federal Register of April 7, 1978, 43 FR 14899, 14900, as Appendix A. Pursuant to a Notice published in the Federal Register of December 30, 1980, 45 FR 85750, 85751, the 6.9% goal was extended indefinitely).

[15] Berkman v. New York, 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd* Berkman v. New York, 705 F.2d 584 (2d Cir. 1983) (Berkman's original suit challenging entrance examination; later proceedings regarding retaliatory termination and further examinations).

[16] There are twenty-nine women out of a total of 11, 344 total firefighters in New York according to a study by Public Advocate Mark Green issued May 2001. Jane Latour, Looking for a Fire Department that Looks like New York, Gotham Gazette.com, *at* http://www.gothamgazette.com/iotw/firedepartment/doc1.shtml (Dec. 3, 2001).

[17] In 1999, women were 2.3% of firefighters nationwide. Happy Mother's Day *at* http://www.riverdeep.net/current/2000/05/front.120500.mother.jhtml (last visited June 22, 2003).

[18] There are two women out of nine Justices on the Supreme Court.

[19] Women comprise seventy-three out of 535 Congress members, or 13.6%. There are currently fourteen women in the Senate and fifty-nine in the House.

These facts have to make you ask the question, "Do our original frameworks still serve us well in expanding women's rights?" This question becomes even more critical in light of the current movement which we call the "new" Federalism, which is a nice, benign rubric covering what is in fact a radically-conservative legal movement by which our Constitution is literally being rewritten to strip Congress of its powers to create and preserve civil rights, and also is limiting access to the courts for redress of what rights survive. Its leaders include members of the federal judiciary, Justice Department attorneys, congressmen, and corporate CEOs. I can tell you that right now, every one of those hard-won statutes that I just listed for you a minute ago is under challenge in the courts, and conservative legal theories are having a serious impact. So we do need to construct a new framework, a framework for the twenty-first century that will serve both to preserve what we have already won, and help us expand the rights of women, the rights of minorities, and the rights of all of those groups who do not have a secure foothold in our society right now. These new frameworks need to encompass cultural change, they need to encompass substantive law change, and they also need to encompass procedural law change to move us to the next frontier.

That is exactly what we are going to explore today. We have three marvelous panelists who reflect a broad array of experience and approaches to these questions. They are going to look at women's rights and legal protections with a general focus on family issues. These are everyday issues; they are familiar to every one of you in some way or another, no matter what your legal expertise or personal background. We are looking at the familiar, and we hope to shake you up a little bit on these issues and see what you think ought to be done. Our panelists will make some suggestions, but we really want to leave time for questions and answers from you. The way we are going to proceed is: I will introduce the panelists and they will each talk briefly, we'll have a short dialogue among the panelists, and then open it up to questions and answers with the audience.

First up is going to be Ariela Dubler, who is on my left, an Associate Professor of Law here at Columbia, although she went to Yale Law School. Before going to law school, she spent a year in Bangkok, Thailand. She was already involved in women's rights then, teaching safe sex to prostitutes—not only teaching it, but teaching it in the Thai language! After law school, she clerked for Judge José A. Cabranes of the United States Court of Appeals for the Second Circuit. Her research interests include feminist legal theory and the history of marriage and its alternatives. She is going to give us some historical context on reframing women's rights issues, and then talk about marriage, an institution which is probably both a little bit more and a little bit less, than what we bargained for.

Anika Rahman will be second. She is a 1990 Columbia Law graduate, and was awarded a certificate with honors in international and foreign law by the Parker School of Foreign and Comparative Law. She

reminded me that when she entered the law school in 1987, then-Dean Black announced that this was the first class coming into the law school that had roughly equal numbers of women and men, so she was here at an historic moment.[20] She worked in international law for a while at Cleary, Gottlieb, Steen & Hamilton, and then went to the Center for Reproductive Law and Policy,[21] where she founded the international program and expanded it to twenty employees. She is an advocate for placing reproductive rights within the context of international human rights. Our thesis here today, I think, is that international principles of human rights do not apply just outside the boundaries of the United States, and that we have to do something to bring human rights home.

Our third speaker is Jane Spinak, who is also on the Columbia Law School faculty. She actually started her career as a history teacher in a small town in Massachusetts. She came to Columbia Law in 1982 and was the founder of the Child Advocacy Clinic. She also took a few years to serve as the attorney in charge at the Juvenile Rights Division of the Legal Aid Society of New York. She has served on numerous task forces and committees addressing the needs and rights of children and families. She writes on many topics related to child welfare including the family court system. I think she may have some suggestions about how we break out of the box of relying too heavily on procedural reform in the courts to address some of the critical issues that we face. With that, I am going to turn it over to Ariela.

Ariela Dubler:

As a relative newcomer to Columbia Law School, it is a real pleasure to be a part of this event, and so I just want to thank you all for making this event possible. For those of us here, we very much appreciate it.

Our task here today—reframing the questions surrounding women's rights for the future—has rich historical antecedents. As the historian on the panel, I want to situate our discussion in the context of *past* women's efforts to strategize about the *future* of women's rights. I think that the history of women's struggles for legal rights might actually help us in crafting a contemporary agenda by making visible some of the deeply entrenched ways that we have come to think about women's legal identities, ways that we often take for granted because they have become so natural. Specifically, as Kathy mentioned, I want to tell a story about how the legal

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[20] Women comprised forty-five percent of the class entering in the fall of 1987. Whitney S. Bagnall, A Brief History of Women at Columbia Law School, *at* http://www.law.columbia.edu/law_school/communications/reports/Fall2002?#736 (last visited May 29, 2003).

[21] Now the Center for Reproductive Rights. Center for Reproductive Rights, About Us, *at* http://www.crlp.org/about.html#name (last visited June 9, 2003).

rights of women have often been understood within the framework of marriage, in other words, by locating women as wives within the family. I want to suggest that our act of reframing women's rights might begin by stepping outside of that framework to ensure that the meaning of women's citizenship and women's equality is not necessarily legally mediated through the institution of marriage.

So, for some quick history, before we look forward to the future, let me take us back to the nineteenth century. We can plausibly date the beginning of an organized American women's movement for legal rights to the first women's rights convention in 1848 in Seneca Falls, New York, where Elizabeth Cady Stanton read the now-celebrated Declaration of Sentiments.[22] The Declaration's indictment of men's legal treatment of women notably located its core grievances within the law of marriage and family relations. In so doing, Stanton and other members of the nineteenth century women's rights movement attacked the law of coverture, the common law of husband-wife relations, which prohibited married women from, for example, entering into contracts, holding property, and many other things, because a married woman's legal identity was "covered"—that is the image at the center of coverture—by her husband's legal identity.[23] I don't have time to go into the various ways in which coverture law changed and marriage law was modernized throughout the late nineteenth century and into the twentieth century.[24] I will just say that, even as the law was modernized in different ways, married women's legal identities remained deeply linked with their status as wives.[25]

Of course, as a doctrinal matter, only *married* women's legal rights were defined by marriage law. Into the twentieth century, though, *women* as a group were understood in public discussions to be married. So, for example, in the suffrage context, lawmakers argued that women did not need the vote because their husbands voted for them.[26] Query where single women fit into this vision. Moreover, when judges and legislators were

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[22] 1848 Seneca Falls, Declaration of Sentiments, *reprinted in* Joan Hoff, Law, Gender & Injustice: A Legal History of U.S. Women 383 app. 2 (1991).

[23] *See* Hendrik Hartog, Man and Wife in America: A History 115-22 (2000).

[24] *See, e.g.*, Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985); Nancy F. Cott, Marriage and Women's Citizenship in the United States, 1830-1934, 103 Am. Hist. Rev. 1440 (1998); Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 82 Geo. L.J. 2127 (1994).

[25] *See, e.g.*, Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 156-79 (2000); Siegel, *supra* note 24.

[26] *See, e.g.*, Aileen S. Kraditor, The Ideas of the Woman Suffrage Movement, 1890-1920 24 (1965); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947 (2002).

forced to confront women living outside of marriage, they often found ways to define unmarried women's rights in what I call "the shadow of marriage." By this I mean that single women's rights were regulated by the normative framework of marriage, even as single women formally inhabited the legal terrain outside of marriage's borders. So, when confronted with an unmarried woman's legal claims, the law often judged her legal rights by putting her into a proximate relationship with marriage. She was on her way to marriage, or acting married, or formerly married.

Let me give one quick example to make this a little more concrete. Into the twentieth century, most states recognized the doctrine of common law marriage,[27] which allowed a court to look at a couple that had never married and essentially say "presto change-o, because you have acted in certain ways over time, you are now legally married." The ideological genius of this doctrine was that it transformed non-marital relationships—relationships that were potentially subversive from a legal perspective—into the most traditional of relationships: that is, into marriages. In so doing, it took single women, a category the law never wanted to acknowledge, and it transformed them into wives.

Why should we, thinking about the future of women's rights, care about the history of what I am calling marriage's shadow? I think that the appeal of locating unmarried women within marriage might actually have something to teach us today. From the perspective of nineteenth- and early twentieth-century lawmakers and judges, the appeal of what I am calling marriage's shadow starts to become clear when you consider that almost all cases that were brought by single women were brought by women who needed financial support.[28] They were seeking money from either a male partner who had disappeared or from the estate of a male partner who had died.[29] So, in a time when a woman only had the legal right to support if her relationship had been in some way marital,[30] by labeling a single woman a wife, lawmakers could ensure that a particular man would be responsible for her financial support. In other words, by bringing women within the framework of marriage, the law shielded the state from having to meet these women's financial needs, and in so doing it reinforced the idea that all women's relationships to the state were mediated through the legal

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[27] Ariela R. Dubler, Wifely Behavior: A Legal History of Acting Married, 100 Colum. L. Rev. 957, 996-97 (2000) [hereinafter Wifely Behavior].

[28] Ariela R. Dubler, Governing Through Contract: Common Law Marriage in the Nineteenth Century, 107 Yale L.J. 1885, 1919 (1998); Wifely Behavior, *supra* note 27, at 964.

[29] Wifely Behavior, *supra* note 27, at 964.

[30] Ariela R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 Yale L.J. 1641, 1654-58 (2003) [hereinafter In the Shadow of Marriage].

institution of marriage, which in turn was based on a family wage model with a male provider and a female dependent.

A lot has changed since the turn of the last century, and the law in a whole variety of contexts now recognizes the rights of women living outside of marriage.[31] That said, I think that history makes visible an ongoing relationship between marriage's shadow and women's rights. To give just one example, we need to look no further than contemporary approaches to so-called welfare reform to see the legacy of what I am thinking of as marriage's shadow. Recent welfare legislation has embraced the promotion of healthy marriages as a public goal.[32] The reason underlying this approach deserves full articulation, although it is rarely articulated this clearly. If marriage were only properly constructed, the argument runs, it would do an enormous amount of economic work. Specifically, it would bring the financial needs of women within the family, thus tethering poor dependent women to particular provider men—that is, their new husbands—and thereby alleviating the state of its burden of supporting unmarried women.

I don't want to say that this is all that is going on in contemporary welfare reform, and there is obviously tremendous class- and race-specificity that differentiates this discussion of marriage and the relationship to the state from some of the historical discussions that we could root back to Seneca Falls. I do want to point out that even as there is obviously a dramatic story of change to be told about women's rights from Seneca Falls to our anniversary celebration today, this strain in contemporary public policy—this stress on getting women into marriage as a form of public policy and a form of government welfare—suggests that there is also a story of continuity to be told across history, insofar as public approaches to female poverty continue to envision marriage as a way to meet women's financial needs, without rethinking the basic relationships among women, work, poverty, and the state. So, from a historian's perspective, my hope is that in reframing the issues of women's rights today we can step outside of marriage's shadow and define women's rights without imagining marriage as necessarily the primary locus of women's citizenship or as necessarily a mediating institution between women and the state.

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[31] *Id.* at 1709.

[32] *See, e.g.*, Personal Responsibility, Work, and Family Promotion Act of 2002, H.R. 4737, 107th Cong. §§ 4(4), 103(b)(2)(C) (2002); Linda C. McClain, Care as a Public Value: Linking Responsibility, Resources, and Republicanism, 76 Chi.-Kent L. Rev. 1673, 1718-19 (2001); Robin Toner, Welfare Chief is Hoping to Promote Marriage, N.Y. Times, Feb. 19, 2002, at A1.

Anika Rahman:

I am going to try and focus my six minutes on trying to reframe reproductive rights. This is quite a challenge! I am just going to begin by giving you a very brief sense of what I view as an important background to the struggles in reproductive rights, both in the United States and globally.

I think that probably it would be a massive understatement to say that reproductive rights are under enormous siege in the United States right now. Clearly, the focus of reproductive rights advocacy and the movement in the United States has been on the issue of abortion. I don't think I need to tell you that we have a current administration in the White House that is extremely, extremely hostile to the issue of abortion rights, extremely hostile to women's equality, and of course a whole host of social justice issues.[33] But I won't go down that road. In terms of the Supreme Court, there has been a substantial diminution in the jurisprudence protecting abortion rights in the last two decades,[34] and now the Supreme Court hangs

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[33] This administration's war on women began on President Bush's first business day in office. On January 22, 2001, President Bush re-imposed a foreign policy restriction known as the Global Gag Rule (or the "Mexico City Policy"). 66 Fed. Reg. 17303 (Mar. 29, 2001). This policy restricts foreign non-governmental organizations that receive funds from the United States Agency for International Development's family planning funds from using their own, non-U.S. funds to provide legal abortion services, lobby their governments for abortion law reform, or provide accurate medical counseling or medical referrals for abortion. President Bush took this further anti-woman step even though a 1973 legislative provision, popularly known as the Helms Amendment, already restricts United States funds from being used for these activities. President Bush has also sought to undermine the legal foundations for the landmark abortion rights case, Roe v. Wade, 410 U.S. 113 (1973), by elevating the status of the fetus. Not only has the Administration prohibited funding for research on new embryonic stem cell lines (for recent reference to the Bush Administration's limit on embryonic cell lines, see Nicholas Wade, Specter Asks Bush to Permit More Embryonic Cell Lines, N.Y. Times, Apr. 23, 2003, at A22), but the Department of Health and Human Services (HHS) has also made changes to the State Child Health Insurance Program (SCHIP) that are detrimental to pregnant women. HHS Press Office, HHS Release – SCHIP Coverage for Prenatal Care, Sept. 27, 2002, *available at* http://www.hhs.gov/news. HHS has amended SCHIP to extend the plan to cover the "fetus," and the term "child" has accordingly been expanded to cover an individual below the age of nineteen and in the "period of time from conception to birth up to the age of 19." Department of Health and Human Services, Centers for Medicare and Medicaid Services, 42 C.F.R. Part 457, Federal Register, Vol. 67, No. 191 (Oct. 2, 2002). Soon after HHS issued this regulation, the Bush Administration withdrew its support for bipartisan legislation that added pregnant women to SCHIP on the basis that such legislation was no longer needed now that coverage was being provided directly to the fetus. International Women's Health Coalition, Factsheet: Bush's Other War: The Assault on Women's Reproductive and Sexual Health and Rights 2 (2003). The conservative records of the Bush Administration's federal judicial candidates provides additional evidence of this administration's hostility to progressive social justice causes.

[34] In the years since Roe v. Wade there have been gradual cutbacks in the scope of protection for a woman's right to choose an abortion. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reducing level of judicial scrutiny on laws that restrict abortion to the "undue burden" standard, eliminating Roe's trimester framework, and permitting states to enact regulations that limit women's ability to seek abortions so long as such regulations do not present a "substantial obstacle" to a woman seeking an abortion); Rust v. Sullivan, 500

in the balance on abortion rights. I don't need to tell you that the last decision rendered by this Court was a 5-4 decision.[35] Abortion rights remains one of the most contentious social and political issues in this country. Given that reality, I am sure it will come as no surprise to all of you that the key legal issues in this arena in the United States have obviously been laws attempting to limit abortion rights. This onslaught of laws has been directed both at what I would call the provider, or "supply," side, and what I would call the woman's side, or "demand," including issues such as mandatory delay and biased information requirements.[36] Of course, domestically there are a number of non-abortion related issues at play.[37] These include restrictions on pregnant women, abstinence-only until

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U.S. 173 (1990) (upholding HHS regulations which prohibited Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (holding that a statutory ban on the use of public employees and facilities for the performance or assistance of non-therapeutic abortions did not contravene the Constitution); Harris v. McRae, 448 U.S. 297 (1980) (finding denial of Medicaid funding did not "interfere" with women's rights to make reproductive decisions and the state could promote fetal life through pregnancy by discriminatory funding); Belotti v. Baird, 428 U.S. 132 (1979) (upholding state law that required either parental consent or court order for minors seeking access to abortion services).

[35] Stenberg v. Carhart, 530 U.S. 914 (2000) (finding that a state law banning "partial birth abortion" violates the Constitution because it lacks any exception for preservation of health of the mother and because it imposes an undue burden on a woman's ability to choose a more common abortion procedure, thereby unduly burdening the right to choose abortion itself).

[36] Numerous state laws aim to limit or restrict the ability of medical professionals to provide abortion services. For example, laws known as Targeted Regulation of Abortion Providers (TRAP) attempt to regulate the medical practice or facilities of doctors who provide abortion by imposing burdensome requirements and stringent regulations. Sixteen states and Puerto Rico have TRAP laws. Center for Reproductive Rights, TRAP: Avoiding the TRAP 1 (2003). However, twenty-five states have enforceable TRAP laws. NARAL Pro-Choice America, Who Decides? A State-by-State Review of Abortion and Reproductive Rights 2003 220 (2003) [hereinafter "Who Decides?"]. In addition, forty-five jurisdictions have a "physician-only law" that makes abortion a crime unless a licensed physician performs it. Center for Reproductive Rights, Laws and Regulations Affecting Medical Abortion (2001). Laws seek to impose extra burdens on women seeking abortion services by imposing mandatory waiting periods and biased counseling requirements. Such laws were particularly popular in 2002, when states considered a total of sixty-six waiting period and biased counseling measures. Who Decides?, supra at viii. A total of seventeen states have mandatory waiting periods for abortions. *Id.* at 211. Moreover, thirty-two states enforce laws requiring the involvement of an adult, typically a parent, before a minor may obtain an abortion. *Id.* at 216.

[37] Examples and discussions of the range of domestic reproductive rights issues can be seen on the websites of major reproductive rights organizations. *See, e.g.*, NARAL Pro-Choice America, *at* http://www.naral.org; Center for Reproductive Rights, *at* http://www.reproductiverights.org; The Alan Guttmacher Institute, *at* http://www.agi-usa.org; National Family Planning & Reproductive Health Association, *at* http://www.nfprha.org; Planned Parenthood Federation of America, *at* http://www.ppfa.org.

marriage programs—I think that goes back to some of what Ariela was talking about—and emergency contraception. But there is simply no doubt that the focus of reproductive rights has been on abortion rights in the United States.

Turning now to the global scene, we have a very different set of facts and situations. For the last three decades, the international community has been thinking more in terms of population stabilization, and about its linkage to economic development and the environment.[38] The discussion regarding what we would call reproductive health concerns has generally *not* been in terms of women's rights or reproductive rights. In fact, it was only in 1994 that the international community recognized the term "reproductive rights" and defined it very broadly to include what we would call reproductive self-determination as well as access to reproductive health care.[39] Nonetheless, internationally, abortion remains a highly contested issue even in discussions of reproductive rights.[40] Equally, an important political challenge in the global arena has been to move institutions and governments to think about issues in terms of rights, particularly in terms of women's rights and empowerment. Despite the growth of a strong international women's and women's health movement, the tendency of many mainstream institutions has been to think in terms of population dynamics and economic development.[41]

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[38] *See* Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September, 1994, *in* Report of the International Conference on Population and Development, U.N. Doc.A/CONF.171/13/Rev.1 (1995); Rio Declaration, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-19 June 1992, *in* Earth Summit: Agenda 21: The United Nations Programme of Action from Rio, U.N. Doc. DPI/1344, (1994); Ruth Dixon-Mueller, Population Policy & Women's Rights: Transforming Reproductive Choice (1993) (especially chapter 2, at 32-53, and chapter 3, pp. 55-78); Lynn P. Freedman & Stephen L. Isaacs, Human Rights and Reproductive Choice, 24 Stud. Fam. Plan. 18, 21-23 (1993).

[39] The term is first used in paragraph 7.3 of the Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September, 1994, *in* Report of the International Conference on Population and Development, U.N. Doc.A/CONF.171/13/Rev.1 (1995).

[40] Center for Reproductive Law and Policy, Promoting Reproductive Rights: A Global Mandate 22 (1997). One of the most recent examples of how abortion remains politically contested occurred in 2002 at the Fifth Asian and Pacific Population Conference. There, the Bush Administration sought to block re-affirmation of the 1994 Programme of Action of the International Conference on Population and Development. The United States objected to the use of the terms "reproductive health services" and "reproductive rights" and stated that the United States "supports the sanctity of life from conception to natural death." Vijay Joshi, U.S. Stance on Abortion and Condom Use Rejected at Population Conference, Associated Press, Dec. 17, 2002; International Women's Health Coalition, Factsheet: Bush's Other War 2, *available at* http://www.iwhc.org/index.cfm?fuseaction=page&pageID=468 (last updated May 19, 2003).

[41] Gita Sen, Development, Population and the Environment: A Search for Balance, *in* Population Policies Reconsidered: Health, Empowerment and Rights 63 (Gita Sen et al. eds., 1994); United Nations, Report of the International Conference on Population, 1984,

My own background and understanding of reproductive rights in two very different scenarios has shaped my thinking about how to reframe reproductive rights for the future. What I like about the global perspective about reproductive rights is its breadth. The international view of the term includes both reproductive self-determination and the right of access to health care. This breadth reflects the needs of women all over the world—women of different classes, races, and socio-economic backgrounds. However, the problem with the global definition is that it has really stemmed from a concern, as I said, with population dynamics and with controlling population, or perhaps increasing it in some countries. The global perspective has not been based clearly within the framework of women's rights. When you look at the domestic context, one of its greatest strengths, from my perspective, is that reproductive rights and abortion rights are seen clearly as women's issues.[42] There is no question really about this socio-political reality, and, to some extent, it is a testament to the great strength of the women's movement in this country. However, I think one fundamental weakness of the domestic scene has been its excessive concern with the issue of abortion. This concern for abortion may have been a response to the fact that the Right Wing in the United States has focused its attention on abortion and has come up with numerous assaults on this one issue. But, when you sit back and you look at women's lives, the reality is that abortion, sex education, sexuality counseling, education about HIV/AIDS, protection from all sexually transmissible infections, and infertility are all equally important. They are all critical components of reproductive health care. There is an important linkage between abortion and all of those issues, not just conceptually, but also from the perspective of the needs of women and their lives, whether they be adolescents or older women.[43] Therefore, I would propose redefining reproductive rights as a women's issue, but moving beyond a civil liberties framework.

I propose thinking of reproductive rights in two fundamentally different ways. First, the term reproductive rights should be understood to

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E/Conf.76/19 (1984); United Nations, Report of the United Nations World Population Conference, A/Conf.60/19 (1974).

[42] Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom (Northeastern Univ. Press 1990) (1984); Janet Benshoof, The Truth About Women's Rights, 6 Wm. & Mary J. Women & L. 423, 424 (2000); Lisa Pruitt, A Survey of Feminist Jurisprudence, 16 U. Ark. Little Rock L. Rev. 183, 191 (1994); Elizabeth Warren, What is a Women's Issue? Bankruptcy, Commercial Law and Other Gender-Neutral Topics, 25 Harv. Women's L.J. 19, 23 (2002).

[43] The terms "reproductive health" and "reproductive health care" are defined in paragraph 7.2 of the Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September 1994, *supra* note 39. In addition, paragraph 7.6 of this document specifically sets forth the different components of reproductive health care and includes most of the issues set forth in the text. *Id.* at ¶ 7.6.

cover the full range of reproductive decision-making, particularly the decision about if and when to have a child, as well as whether or not to have a child. This conception of reproductive rights includes not only the right to decide when to become pregnant and to terminate a pregnancy, but also the right to carry a healthy child to term. It is crucial to maintain the neutrality of reproductive rights to include the ability to have *and* to not have a child. The second element of my proposed redefinition would be to ensure that reproductive rights addresses the full range of reproductive health concerns that women and men actually face. As I said, this starts with sexuality education and includes contraception, sexually transmissible infections (including HIV/AIDS), and issues of sexual violence. So I would propose a redefinition of reproductive rights to refer to the constellation of rights that enable individuals, particularly women, to control their bodies and to go through childbearing safely.

What follows from this redefinition of reproductive rights is that such a right has two fundamental components. The first is the right to reproductive health care. I think the promise of reproductive self-determination rings hollow if you cannot access services. What does it mean to have the right to abortion or HIV counseling if you don't have the services that enable you to exercise that right? I propose that reproductive health care be defined to include family planning, abortion, safe motherhood, HIV/AIDS and other sexually transmissible infections, infertility, and issues relating to gender violence and sexuality. An equally fundamental component of reproductive rights is the right to reproductive self-determination. This is a term that I think many people are familiar with, and that can be used to encapsulate the principle that individuals must control their reproductive and sexual life. It translates into a right to plan one's family, the right to freedom from interference in reproductive decision-making, and the right to be free from all forms of violence and coercion.

I have a lot more to say on this subject, but I am told that I need to wrap up, so I will wrap up and I look forward to questions.

Jane Spinak:

Yesterday, Commissioner Robinson spoke about international women's rights,[44] and what I was struck with was her concern that women's voices are not being heard. This morning, I went to the panel that the scholars had and it was fascinating to hear how each of them was concerned with women's voices not being heard, which is certainly a theme that has gone on in legal feminism for a long time. Katherine Franke mentioned that she was particularly worried that legal feminists don't look at the intra-psychic issues that women present. Carol Sanger talked about work she is

[44] Mary Robinson, Barbara Black Lecture Series, 12 Colum. J. Gender & L. 319 (2003).

doing that makes her worry about law as humiliation for women, particularly girls in abortion bypass proceedings. Regina Austin talked about women's voices being stereotyped. And so, I am going to try to put a very concrete face on this concern when I talk this morning about women and dignity in family court, and how I don't believe that unless we change the way in which women's voices are heard in family court, and other litigants' voices are heard in family court, we will not succeed in reforming family court.

I teach a class in which students represent children in family court proceedings, a clinical course. One thing I do about a third of the way into the semester is invite mothers who have had children in foster care, and who now serve as parents' advocates, to come and talk to the class about their experiences. This is at a point where the students have been introduced to family court, but have not really had an interaction with the litigants. They are shocked to hear what these women have to say. They begin, of course, by talking about how they frequently are not given counsel, or, if they have counsel, they don't have much access to that counsel. The law students can understand that because they have begun to work with lawyers in family court and realize that there are not sufficient numbers of lawyers there. The mothers also talk about the delays and their waits, and the students also understand that because they have begun to see that themselves. But it is what the mothers next say that I think has the most impact. The mothers say that they are invisible in these proceedings, that no one respects them, that they have no dignity in the courtroom, that everyone speaks around them but not to them, and that generally they are not spoken to except to be yelled at for having failed to do something or to be told that they have done something wrong. This is a shock for the students, because they themselves feel, as they are beginning their careers, that they don't have much of a place there. But they don't realize the extent to which the clients feel that way.

Who are these clients? Who are these mothers and children? Family court is a poor people's court, disproportionately poor people of color and poor women and children.[45] Just this last month, the Journal of the American Medical Society issued a study of injuries to children under three at a Philadelphia hospital between 1994 and 2000.[46] Minority children of at least a year old were three times as likely to be reported for suspected child abuse than white children, and they also have more x-rays done as a result.[47] So, the danger is both the over-reporting of minority children and the under-

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[45] Sarah H. Ramsey, The United States Child Protective System—A Triangle of Tensions, 13 Child. & Fam. L.Q. 25, 27 (2001).

[46] Wendy G. Lane et al., Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse, 288 JAMA 1603-09 (2002) (studying children with particular kinds of fractures).

[47] *Id.*

reporting of white children. While this study is consistent with earlier reports about the disproportionality of minorities in the child welfare system, it is important to remember that most of the cases that the judges deal with are about neglect and not abuse.[48] Poverty and its consequences continue to be the single greatest predictor of whether a child will enter the foster care system and be subject to family court jurisdiction.[49]

Family court has been in existence for about 100 years,[50] and, unfortunately, for about that period of time, there has actually been a constant effort at reform.[51] But that reform will continue to fail without the recognition of two things. One is the constitutional rights of parents, and, of equal importance, their human dignity. Reformers have predominantly focused on procedural changes to achieve efficiency.[52] They have tried to address this under-resourced institution, which is plagued by high volume, delay, and congestion, mostly through procedural or administrative remedies. What we know from looking at the history of family court generally and of general court reform is that these procedural changes have rarely made a difference in changing the way in which the court works.[53] So that leaves most of us feeling very stuck in terms of how we think about reform.

We might think about two interlocking approaches to reform that have the potential for success. One is requiring a strict adherence to the constitutional mandates of family integrity, and the second is to structure the court differently so that judges have sufficient information to be able to

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[48] Health and Human Services, Highlights of Findings of 1999 National Child Abuse and Neglect Reporting System, *at* http://www.acf.dhhs.gov/programs/cb/publications/cm99/high.htm (Apr. 25, 2001).

[49] Martin Guggenheim, The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Entering Foster Care?, 2 U. Pa. J. Const. L. 141, 145 (1999).

[50] The first Juvenile Court was established in Illinois in 1899. *See* Douglas E. Abrams & Sarah H. Ramsey, Children and the Law: Doctrine, Policy and Practice 1038 (2000).

[51] Alfred J. Kahn, A Court for Children: A Study of the New York City Children's Court (1953); Barbara A. Babb, Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court, 71 S. Cal. L. Rev. 469 (1998).

[52] Edward P. Mulvey, Family Courts: The Issue of Reasonable Goals, 6 Law & Hum. Behav. 49, 52 (1982); Jane M. Spinak, Adding Value to Families: The Potential of Model Family Courts, 2002 Wis. L. Rev. 331, 364. See, for example, New York State's most recent Family Court reform proposals. Judith S. Kaye & Jonathon Lippman, N.Y. Unified Court System, Family Justice Program Initiative I (1997), II (1998), and III (2001).

[53] Mulvey, *supra* note 52; *see also* Harry N. Scheiber, Innovation, Resistance, and Change: A History of Judicial Reform and The California Courts, 1960-1990, 66 S. Cal. L. Rev. 2049, 2052 (1993) ("[T]he evidence suggests that the reforms have seldom been truly successful.").

determine when a family can remain together or be reunified. Family courts have routinely been reluctant to ensure the constitutional rights of parents separated from their children, for some obvious reasons.[54] One is they are worried about the nature of the charges themselves. Second, they have a sense that the child welfare system will not protect these children. Third, the judges are afraid of being blamed for sending children home and having them harmed. Fourth, they don't feel that they have enough information. And five, they don't know what the outcomes of their decisions will be when they do keep children together with their families.

There is a current system of trying to reform family court called the model court system, which relies on a number of key elements that I think can help achieve systemic reform.[55] Most importantly in the context of human dignity is that model courts have given parents a voice in the court proceeding. There is a greater reliance on court conferencing.[56] There is a greater reliance on listening to what the parents have to say in order to determine what should happen for this family. But there are two other essential elements: the court is given much greater information by all the players in the system, and the case is brought back to court far more frequently. So, if the judge makes a decision that allows children to remain with parents or is trying to decide whether a child can remain with their parents, he or she quickly hears what the result of that decision is because there is a continuous monitoring of the cases.

This model has begun in a number of places around the country, including here in New York.[57] In its initial stages, it has had some amazing consequences,[58] the first being that children are going into foster care less and are staying for much shorter periods of time.[59] But, what may be more important, and which ties back to what I began with, is that the parents who are involved in these model courts feel as if they are respected, as if they

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[54] Peggy Cooper Davis & Gautam Barua, Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law, 2 U. Chi. L. Sch. Roundtable 139 (1995).

[55] Spinak, *supra* note 52, at 332. Model courts share some common features: an activist judge who helps to fashion, and then closely monitor, dispositions; a "team" of lawyers, social workers, and court personnel who try to identify and then work toward common goals with the family; and frequent and meaningful court appearances by relevant parties.

[56] For a detailed description of court conferencing, see Sara P. Schechter, Family Court Case Conferencing and Post-Dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System, 70 Fordham L. Rev. 427, 431 (2001).

[57] Spinak, *supra* note 52, at 361, 368.

[58] Schechter, *supra* note 56, at 428, 430.

[59] *Id. See also* Robert Victor Wolf, Fixing Families: The Story of the Manhattan Family Treatment Court, J. Center for Fams., Child. & Cts., at 19 (2000).

have dignity, as if what they say matters.[60] Even when the court decides that their children cannot live with them, they know the reasons. They understand because the court explains things in a way that is rarely seen in the general family court system. This combination of acting differently procedurally in the court, but also giving women their voices in that court, seems to be having a real effect.

Kathy Rodgers:

I thank you all for being, in fact, brief. The problem is that each one of the panelists could take up the whole hour and a quarter—so this has been a real challenge. But let me start a dialogue among the panelists on what we would call practical questions. We need theoretical frameworks, but we also need to know how things work in the real world.

In my organization, we have been working for a long time on the issue of the promotion of marriage in welfare reform. It is touted as a means out of poverty for women, but we see it as being about forcing poor women to get married and controlling their choices about their lives. The argument we confront all the time is reflected in this quote from Robert Rector of the Heritage Foundation, which is a foundation that provides a lot of advice and counsel to the current administration and conservative policy makers. He said,

> Marriage is a very, very successful road out of poverty for women. From what I see in the research, the best thing a young woman can do is to graduate from high school, get married and have children. Then if her marriage runs into trouble, she can use one of these programs—meaning welfare programs—to save it, to save the marriage.[61]

Ariela, help me out here. We want to get women out of poverty. What is the answer to this thinking?

Ariela Dubler:

Legal historians love being asked practical questions! Having given you six minutes of what I think, it will surprise you not at all to discover that the Heritage Foundation and I are not always on the same page with respect to marriage. I don't know if I have the answer, but I can try to offer

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[60] These observations are based on conversations with parents, judges, and lawyers working in some of the model courts. *See also* Spinak, *supra* note 52, at 366, n.181; Special Child Welfare Advisory Panel, Advisory Report On Front Line And Supervisory Practice 48-49 (2000), *available at* http://www.aecf.org/child/pdf (last visited Apr. 30, 2003). There has yet to be any sustained evaluation of this cultural shift.

[61] *See, e.g.*, Betty Holcomb, Conservatives Push for Marriage Promotion Programs, WEnews (Oct. 15, 2002), *at* http://www.womensenews.org/article.cfm/dyn/aid/1073.

another way to think about it. I think that when the press reports on the current Bush administration's approach to welfare, they report it as something very new: a new way to look at things, the novel approach. Part of what I am trying to make clear today is that this is far from new; this is in fact deeply intertwined about ways we have thought about marriage and poor women since the founding. I would not try to argue that women should not have the choice to marry, obviously, nor that there is anything inherently wrong about women making the choice to marry. What I am trying to find a new way to think about, particularly in response to the kind of approaches the Heritage Foundation is offering—which has become a very prominent approach in politics today—is the view of what might be lost if we only think of poor women's options in that way. There is an element of coercion—what, I think, Kathy is getting at—such that, given the legal incentives that are set up, perhaps poor women do not have the ability to make choices about their private, intimate lives in the way that wealthier women do. There is also a question about the relationship between women citizens and the state that this view of marriage necessarily, if very quietly, embodies: a relationship of the citizen, of women's citizenship, that inserts marriage as a boundary, as a necessary part of women's public legal identities.

To historicize this again, there is an 1872, now very well known, decision called Bradwell v. State[62] which had to do with whether a woman had a right to be admitted to the bar to practice as a lawyer. The most well-known part of this decision is a concurring opinion by Justice Bradley who said that women have no right to be lawyers because women are mothers, and they are married, and this is in contradiction with being a lawyer. The point that I think is relevant here is the language he uses—that this is not a right of women because of the "constitution of the family."[63] There is an interesting kind of linguistic slip here between what kind of constitutional rights a woman has in the public order and the so-called constitution of the family. He is very explicit that single women, although they might exist on the margins, are an exception to the rules of the constitution of the family. So, we have a lengthy history of the ways in which the constitution of the family intersects with women's rights under the Constitution of our country. I certainly don't have a clear answer to how we should solve all of these problems. I wish any of us did. But I think one important tool to have in thinking through these problems is that kind of perspective.

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[62] Bradwell v. Illinois, 83 U.S. 130 (1872).

[63] *Id.* at 141. Justice Bradley says: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood." *Id.*

Anika Rahman:

Well, I was just wondering, Ariela, what do you think about viewing this focus on marriage as attempting to privatize responsibility—taking responsibility away from the state and saying, "You go get married and your marriage will take care of you"? To what extent does this view play into the notions of a limited role of government in people's lives and the privatization of responsibility as opposed to taking it into the public domain? What would you think about that?

Ariela Dubler:

I think that is absolutely right, and again I think that is something we have seen since the founding—the idea that if men take care of women, the state doesn't have to take care of women. I think that is explicitly what is going on in marriage promotion and that is often what underlies the attempt to situate women as wives as opposed to independent actors.

Kathy Rodgers:

Let's pick up that point and let me ask you a question, Anika. We are a country that has stressed individual rights, we value individual effort and we expect the state to have a limited role. In the era of the 60s and the 70s, in the twentieth century, we looked to the state or the government to help the poor, prevent discrimination, and provide more social services. You are talking about international rights and the reframing of rights. What do you think the practical effects would be of your way of reframing, in this case, the context of reproductive rights? Is it moving it out of the private sphere to the public sphere, or is it something different?

Anika Rahman:

I think it is. In terms of the role of the state, I see that there is a fundamental need to redefine that role. I am not just thinking of the state not interfering in reproductive decision-making, but I am talking of a state which actually is neutral on the issue of reproductive choice, of the individual's choice. In other words, the state should support the choice the individual makes, whether to terminate a pregnancy or to carry it to term. And, there should be no financial incentives either way, so you don't fund pregnancy services and de-fund abortion services. That would be one quick answer to your question.

The other thing that I am talking about is a fundamental redefinition of the role of the state. If you think about reproductive health care as a fundamental aspect of reproductive rights, the state has a responsibility to provide such services. That is, we are not talking about privatizing medical services. We are talking about thinking of health as a right, a view that is not currently supported politically or legally in this country. I am not sure there are too many countries that are at that point, by the way. I think that probably Western Europe, particularly Scandinavian countries, and Canada

are much more progressive on their political perspectives on this issue.[64] But I don't think the United States is isolated on this one. I do think that if you think of reproductive rights as including services, we are talking about a very different view of what the state should be doing, and, of course, we are talking of spending a lot more money on health. The moment you think of health as a right, the role of the state is a fundamentally different one and it has to provide these services to everybody, particularly, as we know, to lower income women and communities of color. It's a big challenge.

Kathy Rodgers:

I see some hands going up. Do you mind, Jane, if we go straight to the questions because I am sure you will get some?

Audience Member One:

Anika, I agree 100% with your vision, as you know, from our many late nights discussing such issues, while roommates in law school, instead of studying! I think about some of the statistics and political issues that we are facing as a country now, and it is a little hard not to get discouraged about the ability to achieve your vision. I am thinking specifically of the statistics that I read fairly recently that the states in this country that have the most restrictive abortion laws also have the lowest level of social services for mothers. For example, you think about the debate in Washington now, over the extension of the child health insurance program to fetuses, where you have essentially the effort to promote healthy motherhood, healthy childhood consigned to the political right and the women's rights advocates on the other side. In trying to think about some of Ariela's comments, I don't think that healthy childhood consigned to the political right has always been historically true and, correct me if I am wrong, but I seem to remember that there might have been a mother's insurance movement in the 1920s or 30s that was promoting a similar vision, but from a feminist point of view. It just struck me that perhaps the shadow of marriage has fallen over not just the social policies directed at women over time, but over the goals of the women's rights movement itself, in kind of an invisible way; the answer to getting out of marital oppression, if you will, was just so oppositional to the kinds of initiatives that Anika was talking about—in other words, the way of being autonomous through having your own career and not being economically dependent. I am certainly a proponent of that. I guess my point is that I agree with your vision. It seems very, very difficult, for the reasons that all of you have addressed, to actually achieve it; and right now, it seems to be,

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[64] *See, e.g.*, Jason B. Saunders, Note: International Health Care: Will the United States Ever Adopt Health Care For All?: A Comparison Between Proposed United States Approaches to Health Care and the Single-Source Financing Systems Of Denmark and the Netherlands, 18 Suffolk Transnat'l L. Rev. 711 (1995).

in this country, that that part of the debate belongs to the side that is in opposition to women's rights advocates.

Anika Rahman:

Anybody have a comment on this?

Audience Member Two:

I just wanted to applaud the panel as well for the many perspectives, but Anika raised a question about a country that actually has thought about these questions differently. I have just come back from South Africa, where in fact these questions are incorporated in a much broader constitutional framework, including one sort of economic right, the right to health. We just saw the Constitutional Court force the government to provide Nevirapine to pregnant HIV-positive women.[65] I guess the question really is how to move out of this very narrow constitutional framework, within which you find yourself an individual civil liberties context, and that is a very difficult question to answer.

What I see in South Africa—and I certainly don't want to use South Africa as a model because there are severe problems with respect to women's rights and so on—but, what has happened is something that I think women have fought for in this country about connections between other social movements. You really do begin to see, I think, a change. It is a continuous problem. I was in the public interest panel this morning and I think that part of the way of dealing with this is trying to connect women's rights to other questions. You can't talk about women's rights without talking about poverty, for example. The way to possibly overcome some of these perennial problems is to continue the question about not just contextualizing women's rights, but working with other organizations who confront the myriad of problems that poor people confront and who also happen to be disproportionately women.

Anika Rahman:

I did want to respond, to some extent, to what I think of as my portion of both of those comments. I think it is true that the vision that we are talking about is very difficult, particularly in the current political climate in the United States. There is no doubt about that. I think that it has to be, however, a long-term vision that one has, and there are short-term battles to be fought. I also think on the specific issue—when you were talking about the insurance SCHIP[66] program—the reproductive rights movement has

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[65] Minister of Health v. Treatment Action Campaign (1) 2002 (10) BCLR 1033 (CC) (mandating that the government must permit and facilitate access and use of drug that reduces risk of HIV transmission from mother to child).

[66] State Children's Health Insurance Program under Title XXI of the Social Security Act, 42 U.S.C.S. § 1397aa (1997).

allowed the Religious Right to talk about them as being the defenders of pregnant women's rights and, to some extent, of seeing women have children.[67] I think that is highly problematic politically. We need to regain that ground, not because the Religious Right has taken it over, but because it is a reality of our lives. I think we have to have a reproductive rights movement that says vocally, "Yes, of course, we support pregnant women's rights also." In this case, you are taking a back door step, undermining reproductive rights, while purporting to be interested in the rights of women having children. I think that is a fair point. But, we shouldn't have even gotten to that point. I think if you propose a framework broadly, and say that we are also interested in those issues such as that of the maternal mortality rate among African Americans in this country, which is at least triple that of White women,[68] you have to ask the question: "Why?" And, thinking of this more broadly also brings new political constituencies to the table like communities of color that have traditionally been marginalized from the mainstream reproductive rights movement for a whole host of reasons.[69] To bring them to the table, to bring a more progressive voice, and to reflect the concerns about women, I think one needs to broaden the framework. We shouldn't be on the defensive about SCHIPs. You need to say it's a backdoor way, but we need to have been more up front in saying that we were concerned also about women's ability to carry children to term.

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[67] For examples of organizations that hold such views, see Concerned Women of America, *at* http://www.cwfa.org; the Family Research Council, *at* http://www.frc.org; the Eagle Forum, *at* http://www.eagleforum.org; and Focus on the Family, *at* http://www.family.org.

[68] Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, Vital Statistics of the United States, vol 1, natality and vol 2, mortality, part A, for data years 1950-1993. Public Health Service, Washington: U.S. Government Printing Office, for 1994-2000 (unpublished data), *available at* http://www.cdc.gov/nchs/data/hus/tables/2002/02hus044.pdf (African American maternal mortality rate is at least triple that of non-Hispanic white women).

[69] Darci Burrell, The Norplant Solution: Norplant and the Control of African-American Motherhood, 5 UCLA Women's L.J. 401, 406 (1995); June Inuzuka, Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law: Women of Color and Public Policy: A Case Study of the Women's Business Ownership Act, 43 Stan. L. Rev. 1215, 1223 (1991); Melanie Lee, Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination, 6 Race & Ethnic Anc. L.J. 87, 93 (2000); Dorothy Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy, 104 Harv. L. Rev. 1419, 1461 (1991). *See also* Angela Davis, Outcast Mothers and Surrogates: Racism and Reproductive Politics in the Nineties, *in* American Feminist Thought at Century's End: A Reader 355 (Linda S. Kauffman ed., 1993); Stephen Trombley, The Right to Reproduce: A History of Coercive Sterilization (1998).

Audience Member Three:

In response to your question, Kathy, on the Heritage Foundation, the question that I would raise is: what happens to women when the marriage falls apart? Particularly, we know that the people who tend to suffer in divorce, often economically, are women. And it has nothing to do with simply being a woman; it is because the wife becomes dependent on the husband financially, has not developed a career, and there is no way to divide the money to give the woman, and oftentimes the children, the same standard of living that they had during the marriage. Then, of course, there is the additional problem of the husband providing the support that he is ordered to provide. Given that, and given the fact that there is a fifty percent divorce rate, it really shows that marriage is hardly the answer to economic security for women.

Another issue that came to my mind, Jane, in terms of family court. As a judge not in family court, it seems to me that groups that are concerned, particularly in New York, about judges not always being responsive to allowing children to remain with parents when it is an appropriate approach to take, could be to be supportive when judges are attacked in the press for doing that very same thing and then are accused if something terrible happens to the child. I know that some of the bar associations have started to make this effort. I have seen it more on the criminal side, but it would be something to think about as a way of encouraging judges perhaps to think a little differently.

Jane Spinak:

It is a really important issue, because in family court the media has had a huge impact on judges making decisions.[70] They have significantly shied away, if they believe there is any question of safety, from allowing children to remain at home. I think part of the reason is, as I said, in most cases there is such little monitoring and so little reporting back to the court about what is going on that the judges feel they have no control if they do it. On the other hand, the media has been relentless in going after judges when something has happened to a child at home.[71] Actually, a study was done about judges making decisions, essentially risk decisions, and found that they often made the wrong decision because they were afraid of deciding to allow a child to remain home.[72] So, part of it is shifting the system so that the system provides sufficient information such that a judge can feel comfortable making that kind of decision. But your suggestion is very helpful. There was a recent family court judge who faced a lot of objection to her being reappointed. It wasn't talked about very much in terms of one

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[70] Davis & Barua, *supra* note 54, at 152.

[71] Spinak, *supra* note 52, at 349, n.76.

[72] Davis & Barua, *supra* note 54, at 152.

of the reasons why she was being challenged, but those of us who work within that system know that it was because she was willing to take seriously children staying at home with their parents, if they could stay home safely. There was a lot of objection to her being reappointed.

Ariela Dubler:

I would like to add one comment on the first part of your comment about whether marriages can be the solution when we all know that marriages end all of the time, so it is a short term solution at best, if it is a solution at all. One of the interesting things about the ways that public policy tries to bring women within marriage, is that it is in extending marriage's reach that legislators and courts really try to define what marriage means. There are all too few opportunities for lawmakers to actually say, "This is what marriage means." One of the sites at which I think that happens is precisely in the area that I am thinking of as marriage's shadow. And so, I think that the very denial of the fact that such a high number of marriages end in divorce is precisely one of the points of legislating in this way. This is actually the opportunity to publicly redefine marriage as, again, life-long, in kind of an active denial of the social reality that we all know, that, statistically, marriages are not life-long. So I actually think that that perverse, deliberate ignorance is one of the appeals of this way of thinking about marriage.

Audience Member Four:

Kathy, can you just speak a little bit about federalism? I think that one of the mistakes that we made about human rights issues is the reproductive rights isolation. I think one of the things you talked about before was that federalism is a very cohesive movement having a broad structure of interest that many diverse civil and women's rights groups may not understand that they are plagued by a common enemy.

Kathy Rodgers:

Well I think you just said it pretty well. The question is what is happening with this federalism movement, and most people, I believe, think of it as a state's rights issue. The "sovereignty" of the states, the "dignity" of the states, are favorite words in the courts. They don't talk of it in terms of its impact on civil rights or on women's rights. It's true that this federalism movement is dealing in a whole array of subject areas, but the legal principles they are developing are then used to attack civil rights. So, for example, we have federal civil rights statutes such as the Americans With Disability Act[73] and the Age Discrimination in Employment Act,[74]

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[73] 42 U.S.C.S. § 12101 (1990).

[74] 29 U.S.C.S. § 621 (1967).

both of which the Supreme Court has said do not apply to state employers.[75] While framed as a state's rights, state's dignity issue, it takes millions of people out from coverage of those acts. They are now challenging things like the Equal Pay Act[76] and family care leave under the Family and Medical Leave Act,[77] specifically women's rights issues.[78] The issues of access to the courts are coming up in contexts like patent law or others totally unrelated to civil rights,[79] but there is a very clear pattern of seeing that these same theories are next going to be applied to civil rights cases. So, we can't just wait until the right women's rights case comes down the pipe to try to preserve the law. We have to be watching all of those cases. Getting out of a silo mentality is very important in our own domestic law situation and it is directly relevant to what Anika is saying, which is that we have to get out of our silos when we are talking about movements or domestic rights and international rights; we have to be able to think much more broadly, both to preserve what we've already got and to expand beyond what we've got.

Audience Member Five:

In discussing this whole issue about the support of women—I guess I am addressing Ariela—it seems that you were focusing a lot on women, but the real bottom line agenda is having to support children. The men and women without children who get divorced have to support themselves, and they can manage, but it is the children that really have to be supported by somebody. This focus on marriage in the welfare context is really because we don't see the health and welfare of children as a communal responsibility. It seems to me that universal health care and universal child care for children would change this debate enormously. The notion that society has to have children, has to have children be born, has to have them be educated because twenty years from now, those children are going to be answering our inquiries when we call the phone company and we call the computer company and we go to the supermarket and all these things. I know there is a huge conflict about resources between people that have children and people who don't have children, and conflict about the notion

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[75] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

[76] 29 U.S.C. § 206(d) (1998) (Equal Pay Act of 1963).

[77] 29 U.S.C. § 2612(a)(1)(c) (1993).

[78] *See, e.g.*, Nevada Dep't of Human Res. v. Hibbs, No. 01-1368 (U.S. Sup. Ct., argued Jan. 15, 2003).

[79] *See, e.g.*, Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection remedy Clarification Act may not be applied to the states); College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that the Trademark Remedy Clarification Act may not be applied to the states).

that having children is a private choice and welfare mothers shouldn't have children because they don't have the money, such as, "I am a rich woman and I waited to have my children until I had enough money." But I just feel like it would change the debate a lot if people saw and recognized that society has to have children, and those children are going to be born, and they are going to grow up, and they are going to be badly educated, and badly nourished, and badly schooled. They are going to run society if they are well educated and healthy and have good upbringings, et cetera. The notion of de-privatizing support of children would change this whole notion about marriage and welfare. I say this as a person who grew up not wanting to have children. My mother was very anti-marriage and anti-children, but I have been married for twenty-seven years and I have three children, so I am in a very different spot than I expected to be. But after having gone through a complete change in my view of myself, I see children as being a communal good, not just a private good—sounds like a funny thing to say, but something along those lines.

Audience Member Six:

Well, that just leads amazingly well into what I was going to say, because I have been just really reacting to the comment about the importance of connecting women's rights to other contexts and getting out of our silos. I graduated in 1992, but the last year I have spent out of law producing a television show called "Keeping Kids Healthy" (which, by the way, runs on channel thirteen at 2:30 on Friday afternoon). I thought I was coming here completely separate from that, but, especially listening to Jane, I heard two things that struck me so deeply in terms of the interconnectedness of all the issues. One was just, not surprisingly, the general discussions about the supposedly negative consequences of single parenting. Our show is for adults. It is about how to keep your kids healthy and we get into psycho-social issues. We have been discussing the issue of whether we should be doing a segment on single parenting, but I have been keeping it at arm's length until I had a chance to really, really get a sense of what the pros and cons are because of the obvious marriage-related questions about it. The other thing that struck me was when you started talking about women's voices not being heard. We had a show about body image and self-esteem that we produced last week. We had everybody from a little kid who started eating paper at five years old because she thought it was a really good way to keep from becoming fat, to a group of pre-teens in middle school who were discussing, "Gee, I don't think that's an important word," but while they all mouthed the right things you wanted them to say, they all had pictures on their walls of these incredibly skinny models. One of the points that the advisor made is that this whole concept of girls having to be very small shrinks not only their bodies, but she said it shrinks their selves, and it shrinks their voices. They feel that they are required to take up a very small space physically and psychologically and that their voice

doesn't have the right to be heard. It just struck me in what you are saying, how body image and having to be thin contributes in some way to the failure of women's voices to be heard. It's just something else we have to pay attention to.

Audience Member Seven:

Thank you. Going back to this historical context, in considering the Heritage Foundation premise that marriage will do it all, Elizabeth Cady Stanton and her womenfolk didn't come up with the idea of "We should have rights" in an abstract way. The origin of their movement was the abandonment of wives by their dissolute, drunk husbands. That is why they needed to protect their property. When you think about it, they figured it out then that women needed rights apart from their spouses. You know it is hard to believe that we are going back that far.

Kathy Rodgers:

It is hard to believe. I've got time for one more back there.

Audience Member Eight:

I was so struck by that quote from the Heritage Foundation, having attended several conferences and meetings about the disparate impact of the changes of social security on the lives of elderly women as opposed to elderly men, another issue we don't have time to explore today. But the greatest single predictor of poverty in old age is having children. If we stop to think about that, I am wondering if it wouldn't help Anika think out of the box, because that bill is coming due as the population ages. There is a whole cohort of people who are coming into their aged years. Do we want them to be totally dependent on society for their sustenance, or ought there be a way in which having children does not directly lead into a poverty-stricken old age? I am wondering if that might be another way of looking at this issue of child care and supporting women who might not be married, but have had children.

Kathy Rodgers:

There are a lot of ways of looking at that. I am going to take the last word, if nobody minds, on this whole issue of children and childcare and what happens to women: poverty. Why? Because women move in and out of the workplace, but most of the benefits that they get are tied to work. Social security pension is either tied to your job or, if you were married, your husband's job.[80] General pension benefits stem from work. Health care relies on your relationship to work. And yet, there is this view that women shouldn't work; we should be home in the family, taking care of the

[80] 42 U.S.C.S. §§ 402 et seq. (1935). For an explanation of the Social Security Act, see http://www.ssa.gov.

children. This is something that many, many of us don't live in real life, but it is a dominating theory. To me, it seems that getting to the issue of valuing the care of children and providing benefits for that could come in the form of direct money to women who stay home for some period of time—and we can argue endlessly whether that's six weeks, six months, or six years (whether you are employed or not). It could be by according pension benefits for time you spend taking care of children, which is something that society needs. It can also go to having a child care system which provides the whole array of diverse services that people want for children of different ages, for women in different situations, and for families, allowing them to choose what it is that they want to do. I can invite you to join our national child care and early education campaign; we'll be launching in early 2003.[81]

It really is an issue of not thinking so much about limited, specific legal rights in the context of the legal system that we have now, a complaint-based system where somebody has to do something bad to you before you can go to court to get it rectified. It means we redefine the rights that people should be entitled to and the nature of the claims they can make through the legal system.

I am going to end by saying that clearly we have a lot of work to do. I want to thank the panelists who were just wonderful. I want to thank the audience who were equally wonderful in your comments. I hope this has provoked you to think about these issues in some new ways, and to think about some new ideas. I really want you to act on them. It does matter who is on the bench. It does matter who is in Congress and who is in the legislature. It does matter that you support your law school and create a whole new generation of lawyers. It does matter that you support organizations like the Center for Reproductive Rights, Children's Rights Organization, or other organizations. It does matter what you do, so go out and act on your beliefs. Thank you very much.

[81] For more information about the NOW Legal Defense and Education Fund campaign, see Family Initiative: Better Child Care, Preschool and Afterschool, *at* www.familyinitiative.org (last visited May 29, 2003).