Articles

THE TRADITION OF REPRODUCTION

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"[I]f we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition."[1]

"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. And the rules of civil society must be adapted to the general constitution of things...."[2]

Law derives from tradition.[3] By tradition, woman derives from man. The biblical account of Creation has God making Eve from a rib of Adam.[4] The very name "woman" according to the Bible means "she was taken out of Man."[5] The Anglo-Saxon word "woman" is formed from the combination of "wife" and "man." Early Old English did not even know the word woman. A female adult was known merely as a "wife," devoid of any individual identity.[6] Thus, from the origins in Genesis to the legal unity of husband and wife, woman was defined by her relationship to man.

Society further circumscribed women by making the primary distinction between men and women—the biological capacity to bear children—the social justification for the imposition of cultural and legal disadvantages upon women. Reproduction by our tradition, and by law, is the story of biology as destiny. Historically women generally were banned from participation in society except as wives and mothers. This "identity" for women was deeply woven into Western culture through religious doctrine, socialization, biological theories, and, ultimately, law.

This article examines cultural traditions concerning reproduction. It examines religious, philosophical, and scientific doctrine in Western society to illuminate the cultural expectations of woman as mother and wife. It does not examine historical legal practices regarding reproduction per se but instead

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1. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
2. Bradwell v. Illinois, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring).
3. Tradition is the collective body of statements, beliefs, rules, and customs transmitted generally by word of mouth or by unwritten practices. 2 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3372 (1971).
4. *Genesis* 2:18–22 (Revised Standard).
5. *Genesis* 2:23 (Revised Standard).
6. VERN L. BULLOUGH, THE SUBORDINATE SEX: A HISTORY OF ATTITUDES TOWARD WOMEN 3 (1973).

explores the cultural and philosophical milieu that infuse legal decisionmaking.[7] The philosophical and religious tracts examined in this article represent the dominant philosophical and religious influences in Western thought.[8]

Clear patterns emerge from this examination of Western traditions. First, patriarchal cultures throughout history have been strongly pronatalist for economic and political reasons. Women in these cultures were valued primarily for their role in procreation.[9] Second, religion and philosophy have taught distrust of women and their decisionmaking ability.[10] Finally, and closely related to the aforesaid traditions, women have been perceived as achieving both social and religious redemption by serving others as wife and mother.[11] Not surprisingly, adverse social and legal status determinations evolved historically from these traditions.[12] More modernly, these three powerful traditions engender profound societal ambivalence about women in general and, more specifically, arrogating reproductive autonomy to them.

The Supreme Court has mirrored this ambivalence in its reproductive control cases. While the Court has been willing in recent decades to insist upon removal of many of the direct economic and political barriers on women which were imposed for precisely the purpose of limiting women to biological roles, the Court, even in affirming reproductive rights, has consistently expressed its ambivalence by struggling to parse the degree of control which it holds must be allocated to the woman.[13]

Reproduction has never been purely a "private" matter for women. Politics, religion, fathers, and husbands, and not women's private choices, have controlled women's reproductive behavior. The legal system legitimized this control directly, through laws specifically regulating reproduction. More commonly, the control has operated indirectly, through regulation of economic and political rights which narrowed life choices for women to ensure that women's primary social function was to bear and raise children. This ostensibly neutral legal landscape has had significant impact upon the Supreme Court's analysis of reproductive rights cases.

To date, reproductive control issues have been analyzed under the Constitution as part of the unenumerated fundamental right of privacy

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7. For a thorough analysis of reproductive laws see JAMES C. MOHR, ABORTION IN AMERICA (1978), and Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

8. Not all philosophic or religious doctrine can be considered in an article of this size. The research reflects an examination of the predominant influences upon Western philosophical and religious thought.

9. *See infra* part I.A.

10. *See infra* part I.B.

11. *See infra* part I.C.

12. *See infra* part II.

13. The Court's abortion cases are strong reflectors of the tensions and ambiguities surrounding reproductive control. *See* Roe v. Wade, 410 U.S. 113 (1973). Although abortion remains the lightning rod of reproductive control issues, the Court's ambivalence has constitutional significance for other areas of reproductive control such as forced caesareans and fetal protection laws. Not only is the legal analysis regarding respective rights and interests of the woman and the fetus similar to abortion analysis, the same assumptions about women's reproductive role apply. *See, e.g., In re* A.C., 533 A.2d 611 (D.C. App. 1987) (forced caesarean); Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991) (fetal protection policy).

protected by the Due Process Clause of the Fourteenth Amendment.[14] Recognition of unenumerated fundamental rights depends upon whether a particular practice is grounded in the traditions of this country. If a practice is "implicit in the concept of ordered liberty"[15] or a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[16] the Court declares it entitled to constitutional protection.

Historical tradition is flawed as a structure for analyzing reproductive regulation because a tradition-based analysis examines specific laws or practices devoid of sociological and political context. Unenumerated rights analysis focuses on the relationship between an historical practice and the individual without consideration of the cultural roles which may have adversely affected the evolution of rights of those individuals. While no one would suggest looking to this country's tradition of racial discrimination to analyze the validity of race-based laws, the Court, in applying privacy analysis to reproductive regulation, has been willing to view these issues through a lens distorted by historical gender discrimination. The Court has struggled within this limiting vision to apply unenumerated rights analysis to reproductive regulation without squarely confronting the distortion of the historical baseline integral to its analysis. As a result, reproductive autonomy is legitimized only by those justices who interpret unenumerated rights by reference to broad principles of personal autonomy and self-determination.[17] To those justices with a less expansive view of unenumerated rights, or tradition, reproductive control issues simply are not a matter of constitutional concern.[18]

Equal Protection analysis under the Fourteenth Amendment, applicable to legal classifications based on gender, has not been applied to reproductive regulation, in part because the Court has insisted that the Equal Protection Clause is implicated only where men and women are "similarly situated." This analytical limitation precludes consideration of classifications based on biological differences.[19]

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14. U.S. CONST. amend. XIV. Rights, as opposed to processes, protected by the Due Process Clause are identified as substantive due process. For examples of this kind of analysis of reproductive control issues, see Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Privacy analysis increasingly is criticized as an inadequate mode of analysis for capturing the gender dynamics of reproductive regulation. *See infra* note 19 and Part III.

15. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

16. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). A debate on the Court exists as to whether "tradition" is to be defined by reference purely to legal regulation or by reference to actual historical practices, whether legally controlled or not. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

17. These same justices often appear willing to consider implicitly the equality dimensions of reproductive control issues. *See infra* text accompanying notes 300–09, 316–18.

18. In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, after analyzing whether a woman's right to abort was a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" concluded that it was not. *Id.* at 2858–60 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

19. Criticism of the Court's reliance upon "similarly situated" analysis in gender discrimination, a constitutional methodology borrowed from race discrimination, is well documented. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Siegel, *supra* note 7; Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992);

Reproductive control issues need not be defined exclusively as matters of liberty or equality. They are both. Liberty is inexorably linked with equal participation in society. Without reproductive autonomy, women, as a practical matter, will never be able to take part fully in the public world. An accurate analysis of laws regulating reproduction, however, can only proceed from the recognition that a woman's ability to bear children has been the core historical rationalization for gender discrimination. Equality analysis under the Equal Protection Clause examines the biases underlying regulatory classifications. As such, equality analysis is the most principled basis upon which to analyze reproductive rights. Reproductive regulation cannot be separated from the vision of woman as mother, which is its genesis, and the context of sex discrimination, which is its legacy.

Part I of this article examines the lessons of history. There are three consistent threads of tradition that weave a complex pattern of assumptions and biases about women and reproduction. The first tradition considered is the pronatalist message of religion, philosophy, and politics and its manifestation into law. The second tradition explored in Part I is the social distrust of women's decision-making ability, particularly in matters of reproduction and sexuality, as manifested in religion, philosophy, and science. The final tradition explored is the social assignment of women to the "selfless" roles of wife and mother. Part II considers how the traditions discussed in Part I evolved into written law. Part II also analyzes how the language of Supreme Court opinions mirrors societal ambivalence about women's reproductive control. Part III analyzes the deficiencies in reproductive fundamental rights analysis flowing from historical tensions and proposes that the status issues which infuse reproductive control cases justify gender equality analysis of reproductive control cases.

I. REPRODUCTION AND TRADITION

A. Pronatalism

High fertility has been an integral part of religious, political, and economic doctrine throughout most of Western history. Because women bear children, the pronatalist tradition encourages valuation of women based on reproductive function. This valuation infuses social and legal decision making about women's reproductive rights.

1. Religion

Religion is one of the oldest sources of tradition. Although a multitude of religions have illuminated Western civilization, this article addresses the Judeo-Christian heritage because it has had the most significant impact upon our social and political constructs and the laws which evolved from these constructs.[20]

Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

20. Islam, Hindu, and Buddhist traditions also generally teach male superiority to female. *See* BULLOUGH, *supra* note 6, at 230–62; DENISE L. CARMODY, WOMEN & WORLD RELIGIONS 39–91, 137–55 (1979). Interestingly, each religious tradition involves a story of a "fall" from egalitarian harmony whereby women became subordinate. CARMODY, *supra*, at 157.

Judeo-Christian texts assert that procreation is the duty of men and women by divine command. The earliest sacred documents emphasized the responsibility to bear large families. In the Old Testament, God told Adam and Eve to "[b]e fruitful and multiply."[21] Similarly, when Noah and his sons landed on dry land, He said to Noah, "be fruitful and multiply, bring forth abundantly on the earth and multiply in it."[22] The Old Testament even identifies high fertility with political power.[23] The Talmud teaches that "[he] who does not engage in the propagation of the race is as though he sheds blood."[24] In Judaism, the duty to procreate was primarily the man's. Women were not given this duty because it was feared a "well-motivated promiscuity" might develop.[25] In fact when a man was led in for judgment in the next world he was asked "[D]id you engage in procreation?"[26] If a woman was thought to be barren, the husband was free to divorce his wife and find a wife who could bear offspring.[27]

The biblical importance of procreation required the brother of a deceased husband to go to his widow and conceive a child to carry on the deceased brother's line.[28] When God slew Er for his wickedness,[29] Er's father Judah ordered his second son, Onan, to go to Er's widow and perform the "duty" of brother-in-law to her. When Onan instead spilled his semen on the ground, God slew him also.[30] Lot's daughters lay with their father to "preserve offspring through our father."[31] Hannah, the childless wife of Elkanah, was given less food than Elkanah's fertile wife, Peninnah, and was regularly humiliated by Peninnah.[32] The story of Abraham and Sarah is probably the most famous depiction of the religious value placed on procreation. God promised Abraham many heirs. Abraham's wife, Sarah, bore no children. Sarah offered Abraham her handmaiden, Hagar, so that Sarah could "obtain" children through Hagar.[33]

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21. *Genesis* 1:28 (Revised Standard).
22. *Genesis* 9:7 (Revised Standard).
23. "In a multitude of people is the glory of a king, but without people a prince is ruined." *Proverbs* 14:28 (Revised Standard).
24. THE BABYLONIAN TALMUD, *Yebamoth* 63b (Isidore Epstein ed. & Israel W. Slotki trans., Socino Press 1948) [hereinafter TALMUD, Socino ed.].
25. DAVID FELDMAN, BIRTH CONTROL IN JEWISH LAW 54 (1968).
26. TALMUD, Socino ed., *supra* note 24, at *Shabbath* 31a (H. Freedman trans.).
27. *Id.* at *Yebamoth* 65b (Israel W. Slotki trans.). Further, even a rabbi who already had children was forbidden to marry a sterile woman, because she was "the Harlot spoken of in the Law." THE MISHNAH, *Yebamoth* 6:5 (Herbert Danby trans., Oxford University Press 1933).
28. *Deuteronomy* 25:5–6. If the brother refused his "duty," the widow was required to publicly humiliate him by taking off his sandal and spitting in his face in front of the elders. *Deuteronomy* 25:9.
29. The Talmud indicates that Er's "wickedness" involved wanting to avoid impregnating his wife, because that would make her lose her beauty. TALMUD, Socino ed., *supra* note 24, at *Yebamoth* 34b (Isidore Epstein trans.).
30. *Genesis* 38:7–10 (Revised Standard). St. Augustine relied upon this passage to condemn all intercourse where conception is prevented. NORMAN ST. JOHN-STEVAS, THE AGONISING CHOICE: BIRTH CONTROL, RELIGION AND THE LAW 64 (1971).
31. *Genesis* 19:30–36 (Revised Standard).
32. 1 *Samuel* 1:1–6 (Revised Standard). It was only after Hannah promised her child to God that she bore a son, Samuel. 1 *Samuel* 1:9–11, 19–20 (Revised Standard).
33. *Genesis* 16:1–2 (Revised Standard). "Now Sar'ai, Abram's wife, bore him no children. She had an Egyptian maid whose name was Hagar; and Sar'ai said to Abram, 'Behold now, the Lord has prevented me from bearing children; go to my maid; it may be that I shall obtain children by her.' And Abram hearkened to the voice of Sar'ai." *Id.* (Revised Standard).

In both early Christianity and Judaism, sexual intercourse was permissible only for procreative purposes.[34] Divine will was satisfied through the continuation of the species. The Talmud advises, "Woman is destined to bear every day, for it is said, *the woman conceiveth and beareth simultaneously.*"[35]

2. Philosophy and Politics

The pronatalist tradition also had deep social and economic significance. Early patriarchal societies sought to build large clans with hereditary chiefs.[36] The perpetuation of patriarchal lineage depended upon production of a male heir and the birth of many children. Polygamy arose with the patriarchy to assure multitudes of offspring.[37] The economics of family and village life necessitated large families as sources of labor and protection. On a larger scale, developing social political units also depended upon increasing population. The military, tax, and labor demands of early states necessitated pronatalist policies. In the fledgling city-states, human resources took on a "value they did not have in a social organization based on kinship and horizontally shared resources."[38] Births became a matter of state interest.[39] Herodotus wrote that in ancient Persia the king sent great riches to the men with the greatest number of sons.[40] In Babylonia, a sterile marriage was grounds for divorce.[41] In Sparta, fathers of large families were rewarded with political and economic favors, while bachelors suffered political disabilities.[42]

Aristotle wrote that the production of children is preordained by nature for the perpetuation of the species and, practically, for the sustenance of the

34. Intercourse was considered necessary but sinful. "[I]n sin did my mother conceive me." *Psalms* 51:5 (Revised Standard). It was not until the mid-twentieth century that the Catholic Church legitimized marital intercourse for purposes other than procreation. Francis X. Murphy, *Catholic Perspectives on Population Issues II*, POPULATION BULL. Feb. 1981, at 3, 19–20.

35. TALMUD, Socino ed., *supra* note 24, at *Shabbath* 30b (H. Freedman trans.).

36. MATILDA J. GAGE, WOMAN, CHURCH AND STATE 21 (Persephone Press 1980) (1893).

37. *Id.*

38. ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 68 (rev. ed. 1990).

39. Records from Confucius' time note that "'when population was too small the land was idle and taxes were not paid....'" W. Penn Handwerker, *Politics and Reproduction: A Window on Social Change*, *in* BIRTHS AND POWER: SOCIAL CHANGE AND THE POLITICS OF REPRODUCTION 1, 12 (W. Penn Handwerker ed., 1990) (quoting Nathan Keyfitz, *Population Theory and Doctrine: An Historical Survey*, *in* READINGS IN POPULATION 41 (1971)). Early Indian documents, asserting that population was a source of political, economic and military strength, instructed citizens to limit asceticism to old age, remarry widows, and keep taxes low enough to prevent emigration. *Id.* (quoting Keyfitz, *supra*, at 42).

40. HERODOTUS, THE HISTORIES 98 (Aubrey de Sélincourt trans., Penguin Books rev. ed. 1972) (1537).

41. BULLOUGH, *supra* note 6, at 23.

42. "[T]he father of three sons shall be exempt from military service, and he who has four from all the burdens of the state." ARISTOTLE, *Politica (Politics)*, *in* THE BASIC WORKS OF ARISTOTLE 1113, 1167 (Richard McKeon ed. & Benjamin Jowett trans., Random House 1941). Spartan men were authorized to seek out a woman to bear the finest offspring, even if that woman was other than his wife. XENOPHON, *The Constitution of the Lacedaemonians*, *in* SCRIPTA MINORA 137, 139–40 (E.C. Marchant trans., Loeb Classical Library 1925).

parents when they are old.[43] To Aristotle, "[M]ankind have a natural desire to leave behind them an image of themselves."[44] The Greeks considered the family as a dynamic entity with the power of regeneration.[45] Aristotle, in his treatise *Politics*, defined the smallest community unit as the family or household (*oikos*).[46] According to Aristotle, children were among the "fewest possible parts" of the family;[47] thus a childless marriage was not a true *oikos*[48] because it lacked the dynamic of self-renewal. Children, particularly male children, were necessary to the social order.[49] Plato asserted the chief purpose of marriage was to bear children.[50]

Early Roman writers condemned celibacy and advocated monogamy as a means of producing the greatest number of offspring. Augustus, cognizant of a declining birth rate in the aristocracy, instituted legislation penalizing childless marriages.[51] In a special address to the knights of Rome who were fathers, Augustus praised their "obedience" in "helping to replenish the fatherland:"

> 'For it is by lives so conducted that the Romans of later days will become a mighty multitude. We were at first a mere handful, you know, but when we had recourse to marriage and begot us children, we came to surpass all mankind not only in the manliness of our citizens but in the size of our populations as well.'[52]

Augustus also addressed the divine dimensions of procreation: "'It was for this cause most of all that that first and greatest god, who fashioned us, divided the race of mortals in twain...that by the young continually born he might render even mortality eternal.'"[53] Tacitus, in describing the Germanic tribes of northern Europe around 98 A.D. attested "the more relations a man has and the larger the number of his connections by marriage, the more influence has he in his age...."[54] Tacitus further noted, "[T]o limit the number of their children, to make away with any of the later children is held abominable...."[55] The earliest English legal code, Code of Aethelberht of Kent, dating from 600 A.D.,

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43. 10 ARISTOTLE, *Oeconomica*, *in* THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 1343a, 1343b (W.D. Ross ed. & E.S. Foster trans., Oxford at the Claredon Press 1920).
44. ARISTOTLE, *Politica*, *supra* note 42, at 1128.
45. WALTER K. LACEY, THE FAMILY IN CLASSICAL GREECE 15–16 (1968).
46. ARISTOTLE, *Politica*, *supra* note 42, at 1128.
47. *Id.* at 1130.
48. *See also* HOMER, THE ILIAD 102–03 (A.T. Murray trans., Loeb Classical Library 1924). Homer refers to the Achaean leader Protesilaus as leaving his "house but half established" when he died married, but without a son. *Id.*
49. *See* BULLOUGH, *supra* note 6, at 67; LACEY, *supra* note 45, at 24–25.
50. Although Plato espoused certain "equal opportunity" for women to serve the state, the importance of procreation to the state remained predominate. Plato, like Aristotle, believed the most successful societies were based on optimal population. PLATO, THE REPUBLIC 134, 138–39 (Alan Bloom trans., Basic Books Inc. 1968); PLATO, *Laws*, *in* THE COLLECTED DIALOGUES OF PLATO 1225, 1358–59 (Edith Hamilton & Huntington Cairns eds. & A.E. Taylor trans., Princeton University Press 1961). *See generally* Julia Annas, *Plato's Republic and Feminism*, *in* WOMAN IN WESTERN THOUGHT 24 (Martha Lee Osborne ed., 1979).
51. 7 DIO'S ROMAN HISTORY, BOOK LVI, 23 (Earnest Cary trans., Loeb Classical Library 1924).
52. *Id.* at 5.
53. *Id.* at 5–6.
54. TACITUS, GERMANIA 167 (M. Hutton trans., Loeb Classical Library 1914).
55. *Id.* at 161.

penalized a woman for childlessness by granting a widow a share of her husband's estate only if she had born a living child.[56]

This association of high fertility with political and economic strength pervaded philosophy and politics well into the modern era. The eighteenth century French writer Moheau condemned birth control as "a terrible and secret cause of depopulation that imperceptibly drains the nation and is deadly to the state."[57] John Locke viewed marriage as a voluntary compact between men and women for the primary purpose of the continuation of the species.[58] The common law of England viewed procreation as the primary purpose of marriage.[59] As Western society became more complex, recognition of the potential adverse economic effect of excessive population became more widespread.[60] Nonetheless, the belief that high fertility was essential to a successful government prevailed.[61]

In colonial America, increasing the size of the population was seen as the primary means of political and economic survival.[62] As society developed, population would self-regulate through an inverse association of fertility to socio-economic advancement. This analysis dominated American political and economic thought well into the twentieth century.[63]

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56. THE LAWS OF THE EARLIEST ENGLISH KINGS 15 (F.L. Attenborough ed. & trans., ANS Press 1922).

57. M. MOHEAU, RECHERCHES ET CONSIDÉRATIONS SUR LA POPULATION DE LA FRANCE 1:12, 2:102-3 (Paris, Moutard 1778), *quoted in* PETCHESKY *supra* note 38, at 68.

58. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., W.W. Norton & Co. 1960) (1698). This perception of marriage continues in modern texts.

59. Brown v. Brown, 1 Haggard's Eccl. 523, 524 (Arches Court of Chancery 1828).

60. *See* EDWARD P. HUTCHINSON, THE POPULATION DEBATE 28–68 (1967).

61. *Id.* at 67.

62. *Id.* at 259. The Preamble of the Declaration of Independence includes among its complaints against George III: "He has endeavored to prevent the population...of these states; for that purpose obstructing the laws of naturalization of foreigners." THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

63. HUTCHINSON, *supra* note 60, at 317. Quite recently, the Reagan Administration's population policy derived from self-regulation theory. *E.g.*, William A. Orme, Jr., *U.S. Sees No Crisis in Population*, WASH. POST, Aug. 9, 1984, at A1 (U.S. delegate to United Nations Population Conference in Mexico City rejected notion of population crisis, declared that "'market-oriented' economic policies" were more important than birth control programs, and opined that population growth is a neutral factor, only becoming good or bad in relation to social and economic constraints.); Richard Meislin, *U.S. Asserts Key To Curbing Births Is a Free Economy*, N.Y. TIMES, Aug. 9, 1984, at A1 (At the same conference, the delegate noted that interference in local economies keeps population from self-regulating; removal of interference would cause population levels to drop.).

Often the pronatalist message came with racist overtones. The nineteenth century American anti-abortion campaign was heavily laden with anti-immigrant, anti-Catholic appeals. "Race suicide" alarmists argued that Protestant whites were not having sufficient children to support continued political and economic control. LINDA GORDON, WOMAN'S BODY WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 137–38 (1976). An Ohio legislative committee report on a proposal to ban abortions admonished, "Do [our native women] realize that in avoiding the duties and responsibilities of married life [i.e., procreation], they are, in effect, living in a state of legalized prostitution? Shall we permit our broad and fertile prairies to be settled only by the children of aliens?" MOHR, *supra* note 7, at 207–08 (1978) (quoting JOURNAL OF THE SENATE OF THE STATE OF OHIO, APPENDIX 233-35 (1867)). On the other hand, during colonial times an "antinatalist" message was directed at women viewed as socially undesirable.

> The upper classes in colonial society considered it a part of their moral responsibility to impose...morality on the lower orders. Such legislation also served as a handy instrument of social control. Pregnancy reduced the efficiency

The late twentieth century perception of reproduction in Western society as private is undermined by traditions which value procreation as a public interest. States historically have regulated reproduction for the purposes both of controlling population and controlling the sexuality of its citizens.[64] Control of reproduction thus has been a significant aspect of public power of the state. The elements of power within the state—politicians, religion, moralists, physicians—and in the private realm—husbands and fathers—all functioned to consolidate that control.[65] Not only do births provide resources for political and economic growth, births also are mouths that must be fed and persons that must be housed, with tremendous implications for both the public and private spheres. Most societies therefore have attempted to encourage fertility while at the same time regulating both population and sexuality through marriage customs, marital taboos, and taboos on intercourse at certain times.[66]

Popular culture reinforced pronatalism. A wife had a duty to bear children not only for her husband but also for the community, "a duty tacitly promised the State."[67] Nonprocreative intercourse was viewed as illicit. It is no accident that contraception was first regulated in this country as obscenity.[68] In *The Ethics of Marriage*, well known nineteenth century moralist and author Hiram S. Pomeroy wrote, "Interference with Nature so that she may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort, for, from a physical standpoint, reproduction is the first and foremost aim and object of Nature...."[69] Edwin Hale, one of the leaders of the nineteenth century anti-abortion movement, decried abortion because "[i]t lessens the population of a State."[70]

Not surprisingly, medical "evidence" reinforced cultural expectations. Hippocrates postulated that women who had not borne children were particularly prone to disease.[71] Plato stated in *Timaeus*, "The animal within [women] is desirous of procreating children, and when remaining unfruitful long beyond its proper time...closes up the passages of the breath...causing all varieties of disease ...."[72] As late as the latter part of the nineteenth century,

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> of servant women, and it created a class of bastards that burdened...local resources. In the eighteenth century, the Chesapeake and southern colonies enacted fervently worded statutes against miscegenation based on the concern that a class of mulatto children would confound the social order.

KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 33 (1989).

64. PETCHESKY, *supra* note 38, at 67.

65. *Id.* at 69.

66. *Id.* at 27.

67. Siegel, *supra* note 7, at 297 (quoting D.H., *On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 NASHVILLE J. MED. & SURGERY 200, 201 (1876)). *See* Muller v. Oregon, 208 U.S. 412, 422–23 (1908).

68. An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use, 17 Stat. 598 (1873). This act was one of the "Comstock Laws," named for Anthony Comstock, head of the New York Society for the Prevention of Vice. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 12–14 (1976).

69. HIRAM S. POMEROY, THE ETHICS OF MARRIAGE 97 (New York, Funk & Wagnalls 1888).

70. Siegel, *supra* note 7, at 298 n.138 (quoting EDWIN M. HALE, THE GREAT CRIME OF THE NINETEENTH CENTURY 6 (Chicago, C.S. Halsey 1867)).

71. HIPPOCRATES, 7 OEUVRES COMPLÉTES 127 (E. Littré ed. & trans., Paris 1839–61), *translated in* NOT IN GOD'S IMAGE 125 (Julia O'Faolain & Lauro Martines, ed. & trans., 1973).

72. PLATO, *Timaeus*, *in* THE COLLECTED DIALOGUES 1151, 1210 (Edith Hamilton & Huntington Cairns eds. & Benjamin Jowett trans., Princeton University Press 1961). This view

physicians argued that women's health depended upon continuous reproductive activity.[73]

Medical views that lack of children resulted in physical and psychological harm to women did not disappear with the twentieth century. In 1947, Ferdinand Lundberg and psychiatrist Marynia Farnham published a book with the thesis "that contemporary women in very large numbers are psychologically disordered and that their disorder is having terrible social and personal effects...."[74] According to Ferdinand and Lundberg, a desire for no or few children stems from emotional disorder[75] and results in an inability to enjoy sex,[76] physical aches and pains,[77] a disagreeable personality,[78] divorce,[79] and nearly every social ill imaginable. Although over time these ideas may have been discredited within the medical establishment, others persist in drawing connections between avoidance of childbirth and negative consequences to women. Theologian Bernard Häring, writing in 1965, states that sterility and miscarriage often result from engaging in sex for nonprocreative purposes and from the use of contraceptives.[80] Häring also notes that "[t]otal sterilisation goes right to the heart of the personality structure of a woman."[81]

The transformation of Western society in the nineteenth century by the industrial revolution into a culture where education determined advancement made large families less necessary and less desirable. Birthrates in Western society began to decrease as large families were for the first time deemed economic burdens rather than investments.[82]

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of the female reproductive system was persistent. In the sixteenth century, Rabelais, who was also a doctor, wrote:

> Nature has placed in [women's] bodies, in a secret and intestinal place, a certain animal or member which is not in man, in which are engendered, frequently, certain humors, brackish, nitrous, boracious, acrid, mordant, shooting, and bitterly tickling, by the painful prickling and wriggling of which—for this member is extremely nervous and sensitive—the entire feminine body is shaken, all the senses ravished...and all thought thrown into confusion. To such a degree that, if Nature had not rouged their foreheads with a tint of shame, you would see them running the streets like mad women....

FRANÇOIS RABELAIS, *Pantagruel*, *in* THE PORTABLE RABELAIS 477 (Samuel Putnam, ed. & trans., Penguin Books 1955) (1546). This was a standard view of female anatomy for the time. BULLOUGH, *supra* note 6, at 225.

73. HORATIO R. STORER, IS IT I? A BOOK FOR EVERY MAN 115–16 (Boston, Lee and Shepard 1868). Dr. Storer was probably the most noted scientist in the nineteenth century anti-abortion movement. *See* Siegel, *supra* note 7, at 294.

74. FERDINAND LUNDBERG & MARYNIA F. FARNHAM, MODERN WOMAN: THE LOST SEX v (1947).

75. *Id.* at 39, 392–95.

76. *Id.* at 271.

77. *Id.* at 307.

78. *Id.*

79. *Id.* at 392.

80. BERNARD HÄRING, MARRIAGE IN THE MODERN WORLD 333 (1965).

81. *Id.*

82. Handwerker, *supra* note 39, at 22–23. *See also* G. TALBOT GRIFFITH, POPULATION PROBLEMS OF THE AGE OF MALTHUS 101–28 (2d ed. 1967). Griffith outlines the background of societal viewpoints on population in England between the time of Queen Elizabeth and the late 1700s. *Id.* at 89–90.

> To secure national strength and growth...a large and increasing population was necessary; the dependence of each country on its own resources...demanded a large population, for the larger the population the greater the production. Indeed it came to be believed, with a fervency that bordered on the fanatical, that a nation's

The moral debate about contraception and abortion began during this transformative period.[83] The debate originates in the conflict between pronatalist traditions derived from religious, political, and philosophical sources and the practical realities of economic and medical advances. In particular, although the economic dynamics may have shifted, the religious traditions remained strongly pronatalist. This conflict persists a century later. The pronatalist tradition conflicts with the sphere of privacy accorded reproductive choices under current law. This tradition is characterized by hostility to limiting reproduction grounded deeply in religious conviction. This hostility bears as its special target women, who historically have been the subject of profound distrust in matters of judgment and sexuality.

B. Distrust of Women

Woman has been judged historically as incapable of rational thought and therefore susceptible to immorality unless controlled by man, her intellectual and moral superior. The pervasiveness of this tradition throughout religion, philosophy, science, and, ultimately, law, distorts modern day cultural and legal evaluation of women's reproductive autonomy.

1. *Religion*

The fall of Adam and Eve is the origin of the Judeo-Christian view of woman as deeply flawed in judgment and the source of sexual corruption.[84] Eve committed the original sin when tempted by the snake to eat the apple from the tree of the knowledge of good and evil and deceived man (Adam) by offering the apple to him. Woman was punished for these sins: "To the woman he said,

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> strength depended entirely on the number of its inhabitants....Populousness, national wealth and popular welfare came to be regarded as entirely interdependent.

Id. at 90.

Although these views had not gone entirely unchallenged before, *see* HUTCHINSON, *supra* note 60, at 28–139, a major shift in popular thinking came only after the publication of Thomas Malthus's *Essay on Principle of Population as it affects the Future Improvement of Society* in 1798. *See id.* at 154. Malthus's controversial thesis was that the tendency of population to grow too large in relation to the means of subsistence was a large cause of human misery and an impediment to human progress. *Id.* Malthus significantly expanded the length of this work through a number of editions. In the seventh edition, he noted:

> One of the principal reasons which have prevented an assent to the doctrine of the constant tendency of population to increase beyond the means of subsistence, is a great unwillingness to believe that the Deity would by the laws of nature bring beings into existence, which by the laws of nature could not be supported in that existence.

ROBERT T. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 396 (Augustus M. Kelley Publishers 1971) (7th ed. 1872). He also clarified his position that the proper way to control population was through "moral restraint," or postponement of marriage, not contraception at any time. GRIFFITH, *supra*, at 93–94. Although recognizing the negative impact of overpopulation, Malthus believed that once marriage had occurred, children could not and should not be prevented. In fact, "[i]f it were possible for each married couple to limit by a wish their number of children, there is certainly reason to fear that the indolence of the human race would be very much increased...." MALTHUS, *supra*, at 512.

Nevertheless, Malthus's work opened the door for discussion by others of contraception as a check on population. GRIFFITH, *supra*, at 95–100.

83. *See* MOHR, *supra* note 7; Siegel, *supra* note 7.

84. Early Jewish literature identifies Lilith as the "first Eve," created from the earth at the same time as Adam. Lilith, unwilling to be subordinate to Adam, became a demon who preyed on newborn infants. GERSHOM SCHOLEM, KABBALAH 356–60 (1974).

'I will greatly multiply your pain in childbearing; in pain you shall bring forth children, yet your desire shall be for your husband, and he shall rule over you.'"[85]

The Bible is replete with ambivalence toward women. Women are exalted when fulfilling their true callings as wives and mothers, but also are repeatedly depicted as temptresses, leading men into sin: "There is nothing so bad as a bad wife...."[86] To aid in the enforcement of rigid moral codes developing during the early biblical period, man's greatest perceived "weakness," a lusting after sexual pleasure, was controlled through the depiction of women as carriers of the sin which men must forgo.[87] Jesus, in the Sermon on the Mount said, "But I say to you that every one who looks at a woman lustfully has already committed adultery with her in his heart."[88]

Potiphar's wife tried to seduce Joseph.[89] Delilah was the cause of Samson's downfall through her deceit.[90] The straying of Solomon, the "beloved of God," is blamed on women: "[H]is wives turned away his heart after other gods."[91] Jezebel led her husband, Ahab, to worship false gods.[92] The author of Ecclesiastes could not find a "righteous" woman.[93]

Rabbinical literature, although filled with positive images of woman as wife and mother, also paints woman as temptress.[94] Excessive conversation with a woman was though to be bad for a man's mental processes.[95] Women were

85. *Genesis* 3:16 (Revised Standard). The original account contained in Genesis does not rest blame on Eve as the cause of the sin, but later biblical tradition clearly blames her for the loss of immortality: "Woman is the origin of sin, and it is through her that we all die." *Ecclesiasticus* 25:24, *in* THE NEW ENGLISH BIBLE WITH THE APOCRYPHA: OXFORD STUDY EDITION (1976). *Ecclesiasticus*, although part of the apocrypha and not the officially recognized Bible, was an influential religious work. Greek mythology also had its own version of Eve, in the story of Pandora. Zeus punished men for receiving the gift of fire from Prometheus by molding from clay a woman. The god Hermes "put in her the mind of a hussy, and a treacherous nature" and named her Pandora, the vehicle from the gods of "sorrow to men." HESIOD, THE WORKS AND DAYS 25, 27 (Richmond Lattimore trans., The University of Michigan Press 1959). Hesiod, who lived in the eighth century B.C., goes on to advise, "Anyone who will trust a woman is trusting flatterers." *Id.* at 63.

86. *Ecclesiasticus* 25:19.

87. BULLOUGH, *supra* note 6, at 42.

88. *Matthew* 5:28 (Revised Standard).

89. *Genesis* 39:7–18.

90. *Judges* 16:14–21.

91. 1 *Kings* 11:4 (Revised Standard).

92. 1 *Kings* 16:31–33, 18:18. "There was none who sold himself to do what was evil in the sight of the Lord like Ahab, whom Jezebel his wife incited." 1 *Kings* 21:25 (Revised Standard).

93. *Ecclesiastes* 7:28.

94. A woman is "a pitcher full of filth and her mouth...full of blood, yet all speed after her." TALMUD, Socino ed., *supra* note 24, at *Shabbath* 152a (H. Freedman trans.). The sexual temptation presented by women was so great that men were instructed not to walk behind a woman, *id.* at *Berakoth* 61a (Maurice Simon trans.), or look at her little finger, *id.* at *Berakoth* 24a, for fear of sexual excitement.

95. Conversation with women was discouraged both because it led to sex, TALMUD, Socino ed., *supra* note 24, at *Nedarim* 20a (H. Freedman trans.), and because it diverted men from studying the Torah. THE MISHNAH, *supra* note 27, at *Aboth* 1:5. Although a husband was instructed to avoid excessive conversation with his wife, an exception was made for conversation directed toward having sex with her. TALMUD, Socino ed., *supra* note 24, at *Hagigah* 5b (Israel Abrahams trans.).

thought to be inclined toward witchcraft.[96] The traditional Talmudist's Daily Prayer contained a prayer thanking God "who hast not made me a woman."[97]

Complex interweavings of patriarchy, Platonic, Hellenistic, and Gnostic philosophy and social patterns gave both Christianity and Judaism strongly misogynist elements.[98] The philosophers at the time of early Christianity favored sexual abstinence and redemption of the soul by detachment from corporeal and material enticements.[99] Both Christianity and Judaism were heavily influenced by contemporary philosophy. Christianity, in particular, as a relatively new religion, was competing with other philosophies of human redemption.[100] To those men writing the great religious works, women were the source of sexual urges and therefore deviant behavior.[101]

The Talmud labels a daughter as a "vain treasure" who "costs her father sleep: in youth, lest she be seduced; in maidenhood, lest she not find a husband; in marriage, lest she prove barren; in older age, lest she practice witchcraft."[102] The Talmud's significant attention to menstrual taboos eventually led to the association of women with religious uncleanliness.[103] Women also were considered property rather than individuals. During the Biblical period, a male adulterer could be put to death if he committed adultery because he violated the property rights either of the woman's husband or her father (if she was single).[104] Included among the covenants given by God is a prohibition on

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96. *See* THE MISHNAH, *supra* note 27, at *Aboth* 2:7.

97. JOSEPH H. HERTZ, THE AUTHORISED DAILY PRAYER BOOK 21 (rev. ed. 1959). At this point in the Daily Prayer, women were directed to thank God "who has made me according to thy will." *Id.*

98. *See* CARMODY, *supra* note 20, at 117; BULLOUGH, *supra* note 6, at 101–20. It appears that Jesus was not known to have spoken of women as derogatory or inferior but that early Christianity soon resorted to traditional masculine interpretations of women. BULLOUGH, *supra* note 6, at 100–01; CARMODY, *supra* note 20, at 113–17.

99. The neo-Pythagoreans and neo-Platonists of the time advocated sexual relations only for the purpose of procreation but insisted that true salvation could only occur if man refrained from sexual and material pleasures and sought divine ecstasy of the soul. Two influential philosophers, Numenius of Apamea, second century A.D., and Plotinus, third century A.D., advocated sexual abstinence. BULLOUGH, *supra* note 6, at 107–11.

100. *Id.* at 111. The Gnostics represented the most serious competition to early Christianity. Gnostics advocated sexual abstinence. Many Gnostic leaders saw women as evil. Women could not become Christian unless they became male: "For every woman who makes herself male will enter the Kingdom of Heaven." THE GOSPEL ACCORDING TO THOMAS 57 (A. Guillaumont et al. trans., 1959). Women could achieve this state if they remained virgins. BULLOUGH, *supra* note 6, at 113.

101. BULLOUGH, *supra* note 6, at 98. Dichotomies between mind and body were prevalent in pagan beliefs. Early Christianity undoubtedly both responded to and incorporated many of these "flesh" and "spirit" dualisms. *Id.* at 106–07.

102. TALMUD, Socino ed., *supra* note 24, at *Baba Bathra* 16b (Maurice Simon trans.).

103. An entire book of the TALMUD, entitled *Niddah*, which is over 500 pages long in the Socino edition, details the uncleanliness of menstruation and childbirth. The ritual impurity of the menstruant developed from *Leviticus* 15:19–30 and 20:18. *See generally* LEONARD SWIDLER, WOMEN IN JUDAISM: THE STATUS OF WOMEN IN FORMATIVE JUDAISM 130–39 (1976). Swidler notes that ritual impurity is considered displeasing to God and keeps the impure away from Him. *Id.* at 130. Women are unclean for seven days after beginning to menstruate, for thirty-three days after giving birth to a boy, and for sixty-six days after giving birth to a girl. *Id.* at 131–32. A menstruous woman could not enter a synagogue, nor could her husband if he had been "defiled" by her, for example by coming into contact with the dust under her feet. *Id.* at 138.

104. A married man who committed adultery was not considered to have committed a crime against his own wife. However, if the woman involved was married, or if the woman was betrothed and the incident happened in town, both parties were executed. (A betrothed woman in

coveting a neighbor's house, wife, ox, or servant, with women listed among the items of property.[105] Under traditional Jewish law, women, like "idiots," were "protected," a code-word even then for absence of rights. Women were prohibited from appearing in court[106] and could not be counted in a "minyan," the quorum necessary for a prayer service.[107] Women did not have equal inheritance,[108] marriage,[109] or divorce rights.[110] At the traditional marriage ceremony, the bride is silent, symbolizing humility and non-identity.[111]

Many passages in the Bible and Talmud illustrate the dichotomy between the virtuous and evil woman. The virtuous woman covers her head, does not speak in the House of the Lord, submits to her husband as her master, bears children, and keeps a clean and well-appointed household.[112] Men were warned however that "women are evil, my children, and by reason of their lacking authority or power over man, they scheme treacherously how they might entice him to themselves by means of their looks. And whomever they cannot enchant by their appearance they conquer by stratagem."[113]

Women were not allowed to be independent thinkers: "Let a woman learn in silence with all submissiveness. I permit no woman to teach or to have authority over men; she is to keep silent. For Adam was formed first, then Eve;

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the country was excused because of a presumption that no one could have come to her aid if she screamed.) SWIDLER, *supra* note 103, at 148–50; CARMODY, *supra* note 20, at 93. These practices were derived from *Deuteronomy* 22:22-28.

105. *Exodus* 20:17. For rabbinical views that marriage consisted in the woman becoming the man's property, see SWIDLER, *supra* note 103, at 141–42. *See also* TALMUD, Socino ed., *supra* note 24 at *Kiddushin* 2a–22b (H. Freedman trans.) (explaining why women are "acquired" when they become engaged, while men are "betrothed.") The TALMUD also analogizes a woman to a "lost article" to show why men go looking for wives, rather than the reverse. *Id.* at 2b.

106. *See* THE MISHNAH, *supra* note 27, at *Rosh Ha-Shanah* 1:8; TALMUD, Socino ed., *supra* note 24, at *Baba Kamma* 88a (E.W. Kirzner trans.).

107. SWIDLER, *supra* note 103, at 92. This restriction was not removed as to Conservative Judaism until 1973. ISSAC KLEIN, A GUIDE TO JEWISH PRACTICE 14 (1979). At that time the decision whether women could count toward a minyan was left with each congregation. *Id.*

108. THE BABYLONIAN TALMUD, *Kethuboth* 52b (S. Daiches trans., The Rebecca Bennet Publications Inc., 1959) [hereinafter TALMUD, Bennet ed.] (sons inherited property from their father's estate, while daughters were only entitled to maintenance until they married); *id.* at 65b (a husband received the interest on any property his wife inherited from another relative).

109. *See* SWIDLER, *supra* note 103, at 141. (Girls were typically betrothed between age twelve and twelve and a half. Prior to reaching age twelve and a half, the girl had no say in the matter.) TALMUD, Bennet ed., *supra* note 108, at *Kethuboth* 46b (S. Daiches trans.) ("A father has authority over his daughter in respect of her betrothal...he is entitled to anything she finds and to her handiwork....").

110. TALMUD, Socino ed., *supra* note 24, at *Yebamoth* 113b (Israel Slotki trans.) (a woman could be divorced without her consent, while a man could not).

111. CARMODY, *supra* note 20, at 103, 109. *See also* KLEIN, *supra* note 107, at 408; HERTZ, *supra* note 97, at 1009–13. The only words required to be said by either the bride or groom is the brief "marriage formula" or "declaration" pronounced by the groom, informing the bride and the world that she is consecrated to him. KLEIN, *supra*, at 408; HERTZ, *supra*, at 1011. Hertz notes that it is permissible to add responsive vows taken by both bride and groom to the ceremony. HERTZ, *supra*, at 1010.

112. *See* 1 *Corinthians* 11:3–13 (Revised Standard).

113. *Testaments of the Twelve Patriarchs, Testament of Reuben* 5:1–3, *in* 1 THE OLD TESTAMENT PSEUDEPIGRAPHA 776, 784 (James H. Charlesworth ed. & H.C. Kee trans., Doubleday & Co., Inc. 1983) (second century A.D.). The PSEUDEPIGRAPHA are ancient Jewish and Jewish-Christian writings that have never been accepted into the official canon of either religion. *Id.* at 1. The *Testaments of the Twelve Patriarchs* are presented as the death bed utterances of Jacob's twelve sons. *Id.* at 775.

and Adam was not deceived, but the woman was deceived and became a transgressor."[114] Women could not teach because "[t]he woman [Eve] taught once, and ruined all."[115] For the same reasons, women's authority is "nil," and she must in all things be subject to the rule of man.[116] These religious teachings became the source of canon-law, and later common-law, disabilities of women as legal persons.[117]

The evil woman strays beyond the bounds of her duties. If a woman did not follow the established path of wife and mother, she could be accused of sorcery which was "an abomination to the Lord."[118] In Judaism, women were not trusted with the reading or teaching of the Torah or with any activities other than the upkeep of home and family.[119] The Talmud deemed the education of women an obscenity.[120] Thus women were kept from full participation in religion and society. The Talmud authorized a man to divorce his wife without her consent, while a man could be divorced only with his consent.[121] Talmudic stereotypes of women described them as "gluttonous, eavesdroppers, lazy and jealous."[122]

Women fared no better during the early development of Christianity. Although Christian theory was egalitarian in granting men and women divine souls, the early church leaders reflected the cultural milieu of their time, which borrowed heavily from Judaism's tradition of religious and legal incapacity of women.[123] St. John Chrysostom, during the time of Constantine, wrote that marriage was a concession to sin on earth and permissible only for procreation.[124] He blamed women for David and Solomon's sins and described women as physically disgusting.[125] Chrysostom based his homily outlining the

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114. 1 *Timothy* 2:11–15 (Revised Standard).

115. ST. JOHN CHRYSOSTOM, *Homilies on Timothy IX*, *in* 13 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 435, 436 (Philip Schaff ed. & James Tweed trans., Charles Scribner's Sons 1914) (circa 381–398 A.D.).

116. 1 CORPUS IURIUS CANONICI Pt. II, C. 33, q. 5, c. 12, 13, 17, 18 (A. Friedberg ed., Leipzig, 1879-81) (circa 1130), *translated in* NOT IN GOD'S IMAGE, *supra* note 71, at 130.

117. GAGE, *supra* note 36, at 52–56.

118. *Deuteronomy* 18:12 (Revised Standard). The few learned or independent women in rabbinical literature are subject to strong criticism. Beruriah, the sole woman described in the Talmud as knowledgeable in Jewish law, is described in later works as an adulteress and a suicide. Judith Baskin, *The Separation of Women in Rabbinic Judaism*, *in* WOMEN, RELIGION, AND SOCIAL CHANGE 6 (Yvonne Yazbeck Haddad & Ellison Banks Findly eds., 1985). The Biblical judge Deborah is compared with a wasp, while the prophetess Huldah is described as a weasel. *Id.*

119. *See* Baskin, *supra* note 118, at 3–18.

120. "If any man gives his daughter a knowledge of the Law it is as though he taught her lechery." THE MISHNAH, *supra* note 27, at *Sotah* 3:4. *See also* Baskin, *supra* note 118, at 10–11. Jewish scholars derived the prohibition against teaching the Torah to women from *Deuteronomy* 6:7, which directs teaching sons, but is silent as to daughters. *Id.* One such scholar opined that it was better to burn the Torah than to teach it to women. *Id.*

121. TALMUD, Socino ed., *supra* note 24, at *Yebamoth* 113b (Israel W. Slotki trans.).

122. Baskin, *supra* note 118, at 6.

123. NOT IN GOD'S IMAGE, *supra* note 71, at 128.

124. ST. JOHN CHRYSOSTOM, *Homilies on First Corinthians XIX*, *in* 12 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 105, 105–11 (Philip Schaff ed. & Talbot W. Chambers trans., Charles Scribner's Sons 1905) (circa 381–398 A.D.).

125. ST. JOHN CHRYSOSTOM, *An Exhortation to Theodore After His Fall*, *in* 9 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 91, 103–105 (Philip Schaff ed. & W.R.W. Stephens trans., Charles Scribner's Sons 1908) (circa 374–381 A.D.).

proper relationship between husband and wife on Paul's statement that man is the head of the woman just as Christ is the head of the church.[126] Chrysostom describes the duty of the husband to train his wife, to "regulate and direct her as being wanting in wisdom."[127] He describes the time immediately after marriage, when the woman is "still timid, and still shy,"[128] as being a particularly appropriate time to "form and mould [sic] her carefully."[129]

Around the third century A.D., the church's emphasis on celibacy increased. Celibacy was reinforced in part through misogynistic doctrine. Christianity stressed the advice in the New Testament that "he who marries his betrothed does well; and he who refrains from marriage will do better."[130] Advising men to avoid marriage, St. Augustine wrote, "I perceive that nothing more saps the citadel of manly strength, whether of mind or body, than female blandishments and familiarities."[131] Augustine, although allowing that women could have spirituality equal to men, also wrote of women "embodying" nature and therefore inferior, as flesh is inferior to spirit.[132] The ideal woman was the virgin, absorbed with spiritual matters and devoid of temptation.[133]

St. Thomas Aquinas, one of the most influential theologians in Western history, represented the official doctrine of the medieval church. He melded Greek science and philosophy into principles palatable to Christian doctrine.[134] Aquinas insisted that man was the active, rational being made in the image of God.[135] Woman was "passive," physically "defective and misbegotten," and naturally servile to man because "in man the discretion of reason predominates."[136] Woman cannot have authority over man or Eve would have been made from Adam's head rather than his rib.[137] Aquinas believed women could perform baptism but only in an emergency if no man was available, for

126. "Wives, be subject to your husbands, as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body....As the Church is subject to Christ, so let wives also be subject in everything to their husbands." *Ephesians* 5:22–24 (Revised Standard).

127. ST. JOHN CHRYSOSTOM, *Homilies on Ephesians XX*, *in* 13 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 143, 149 (Philip Schaff ed. & Gross Alexander trans., Charles Scribner's Sons 1914) (circa 381–398 A.D.).

128. *Id.* at 150.

129. *Id.* This philosophy is reminiscent of the Talmud's view that a woman before marriage is a shapeless "golem" to be transformed by her husband into a finished vessel. *See infra* note 195 and accompanying text.

130. 1 *Corinthians* 7:38 (Revised Standard).

131. ST. AUGUSTINE, *Soliloquies*, *in* 1 THE BASIC WRITINGS OF ST. AUGUSTINE 257, 269 (Whitney J. Oates ed. & C.C. Starbuck trans., Random House 1948) (387 A.D.).

132. ST. AUGUSTINE, *On Continence*, *in* 3 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 377, 388–89 (Philip Schaff ed. & C.L. Cornish trans., Charles Scribner's Sons 1905).

133. *See* ST. AUGUSTINE, *Of Holy Virginity*, *in* 3 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 415 (Philip Schaff ed. & C.L. Cornish trans., Charles Scribner's Sons 1905) (401 A.D.).

134. *See* BULLOUGH, *supra* note 6, at 174–75.

135. ST. THOMAS AQUINAS, SUMMA THEOLOGICA 466 (Part 1, Question 92) (Fathers of the English Dominican Province trans., Benziger Brothers, Inc. 1947) (circa 1267).

136. *Id.*

137. *Id.* at 468. Nor is she to be his slave or she would have been made from Adam's foot. *Id.*

"the head of the woman is the man."[138] A woman could not, however, receive orders because she was incapable of eminence due to her divine subjection.[139]

Women's susceptibility to Satan and witchcraft was due to their baser natures and their feebleness "in mind and body."[140] The medieval, church-led witch hunts were directed mainly at women,[141] and a careful reading of the popular *Witches Hammer*,[142] a guide to identifying and trying suspected witches written by monks, supports the view that the obsession with witches was at least in part motivated by misogyny. Women were deemed inherently wicked—all the more so because men desire them.[143] The authors judge a woman as "more bitter than death"[144] (1) because Adam, whose sin brought death to soul and body, was tempted by Eve, not by the devil; (2) because physical death only destroys the body, while the sin arising from women can destroy the soul; and (3) because "bodily death is an open and terrible enemy, but woman is a wheedling and secret enemy."[145]

Most of the leaders of the Protestant Reformation believed man's physical strength was a divine indicator of man's moral superiority.[146] Martin Luther wrote that a woman "does not have complete mastery over herself" because "God so created her body that she should be with a man and bear and raise children."[147] Although the Calvinists accepted a marital partnership between men and women, subjugation of women was God's law.[148] Calvin likens the

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138. *Id.* at 2394 (Part 3, Question 67).

139. *Id.* at 2698 (Part 3 (Supplement), Question 39). Similarly, Aquinas based the subjection of woman to man in this life on woman's "frailty of nature, as regards both vigor of soul and strength of body." *Id.* at 2903 (Part 3 (Supplement), Question 81).

140. HEINRICH KRAMER & JAMES SPRENGER, MALLEUS MALEFICARUM (THE WITCH HAMMER) 44 (Montague Summers trans., The Pushkin Press 1928) (circa 1496).

141. NOT IN GOD'S IMAGE, *supra* note 71, at 207.

142. KRAMER & SPRENGER, *supra* note 140. This book went through at least fourteen editions between 1486 and 1520. NOT IN GOD'S IMAGE, *supra* note 71, at 208.

143. "What else is woman but a foe to friendship, an unescapable punishment, a necessary evil, a natural temptation, a desirable calamity, a domestic danger, a delectable detriment, an evil of nature painted with fair colours!" KRAMER & SPRENGER, *supra* note 140, at 43.

144. *Id.* at 47.

145. *Id.*

146. BULLOUGH, *supra* note 6, at 195. The potential ascendance of Mary Tudor and Mary Guise, Catholics, to the thrones of England and Scotland brought forth a vicious attack by Protestant John Knox. *Id.* at 201.

> For who can denie but it [is] repugneth to nature, that the blind shal be appointed to leade and conduct such as do see? That the weake, the sicke, and impotent persones shall norishe and kepe the hole and strong, and finallie, that the foolishe, madde and phrenetike shal gouerne the discrete, and giue counsel to such as be sober of mind?

JOHN KNOX, THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN 9 (Da Capo Press 1972) (1558).

147. Letter from Martin Luther to Three Nuns (Aug. 6, 1524), *in* LUTHER: LETTERS OF SPIRITUAL COUNSEL 270, 271 (Theodore G. Tappert ed. & trans., The Westminster Press 1955).

148. JOHN CALVIN, *Commentary on the First and Second Epistles of Paul the Apostle to Timothy*, *in* 10 CALVIN'S NEW TESTAMENT COMMENTARIES 217 (David W. Torrance & Thomas F. Torrance eds. & T.A. Smail trans., Wm. B. Eerdmans Publishing Co. 1964) (1556) [hereinafter CALVIN, *Commentary on Timothy*]. Calvin interprets the writings of the Apostle Paul, where Paul teaches "in Christ...there is no male or female" (*Galatians* 3:28) (Revised Standard) to refer to spirituality in the Kingdom of Christ, whereas in the tangible external world woman derives from man is therefore inferior. CALVIN, *Commentary on the First Epistle of Paul the Apostle to the Corinthians*, *in* 9 CALVIN'S NEW TESTAMENT COMMENTARIES 230 (David

marital relationship to the human body, with the man serving as the head and the woman the body.[149] John Calvin interpreted the account of Adam and Eve as a seduction by Eve. Woman was subjugated both by God's law and as punishment for her seduction of Adam.[150] Calvin considered authority held by women to be an "unnatural monstrosity."[151]

The male orientation of Christianity and Judaism reflected prevailing cultural norms and frequently infused religious doctrine with strongly misogynist tendencies. Both Judaism and Christianity evinced varying degrees of hostility to sex. These dynamics combined to culminate in a strong suspicion of women and a judgment that women were morally untrustworthy or evil. Woman is repeatedly depicted as the temptress, incapable of rational thought or moral decisions, particularly in matters of sexuality. Women needed to be controlled, not only to protect them from falling victim to their own passions, but also to protect men from being led from the righteous path of virtue and intellect. These attitudes permeated not only religious doctrine but mainstream Western philosophy.[152] Women, who were dependent on men from cradle to grave and already deemed legally and socially inferior, also were perceived as morally inferior to men.[153]

2. Philosophy

The biological differences between men and women have been a source of philosophical interest from the earliest writings. Difference too often became a basis for hierarchy, with the woman as "other" or inferior. Plato, although advocating a sexual egalitarianism unfathomable to the social context in which he lived, asserted that men and women had the same virtues but that in women these virtues were weaker.[154]

Plato's pupil, Aristotle, displayed no such ambivalence in his attitude toward women. To Aristotle can be attributed the first "scientific" proof that women are inferior. The biological differences between men and women provided the scientific basis for concluding that differences in mental competence were equally grounded in nature.[155] Male was viewed as the active, life assertive force in reproduction; female as the passive "receptor." By nature, women were therefore passive and subject to domination. Man was, by nature,

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W. Torrance & Thomas F. Torrance eds. & John W. Fraser trans., Wm. B. Eerdmans Publishing Co. 1960) (1546) [hereinafter CALVIN, *Commentary on Corinthians*].

149. CALVIN, *Commentary on Corinthians*, *supra* note 148, at 234.

150. CALVIN, *Commentary on Timothy*, *supra* note 148, at 217–18.

151. *Id.* at 217. Women were precluded from teaching because such autonomy was incompatible with their subjective status. *Id.* at 217. He explains the biblical leadership by Deborah as an "extraordinary act" by God which does not regulate the "ordinary rules" of God. *Id.* at 217–18.

152. BULLOUGH, *supra* note 6, at 119.

153. *Id.* at 120.

154. PLATO, THE REPUBLIC, *supra* note 54, at 134. In Plato's time, women lived sequestered from public life, confined to women's quarters, uneducated, and unable to control their own property. Annas, *supra* note 50, at 22. Plato, while arguing that men's and women's natures were different, also insisted that men and women both had similar virtues of temperance and justice to serve the state, but that women were inferior in the exercise of these virtues. PLATO, THE REPUBLIC, *supra*, at 134.

155. ARISTOTLE, *Historia Animalium*, *in* THE BASIC WORKS OF ARISTOTLE 633, 636 (Richard McKeon ed. & D'Arcy Wentworth Thompson trans., Random House 1941) (circa 340–320 B.C.).

suited to command by "constitutional rule, over women and children, although more so over women because, with women, "the inequality is permanent."[156] Women, although capable of some deliberative faculties, were "without authority" to exercise judgment because:

> [T]he courage and justice of a man and of a woman, are not, as Socrates maintained, the same; the courage of a man is shown in commanding, of a woman in obeying....All classes must be deemed to have their special attributes; as the poet says of women, 'Silence is a woman's glory.'[157]

Naturally deficient, women could never achieve the same virtue as men.[158]

Aristotle's theories have set the context for much of Western philosophical thought.[159] John Locke, in his *Two Treatises of Government*, analyzes the relationship between Adam and Eve, and men and women. Locke argued that Adam had an "accidental" superiority over Eve because God ordained subjection as part of Eve's punishment. Adam, also culpable in sin, would not have been given the honor of monarchy over all others. Nonetheless, women were relegated to "subjection" by divine will and, as Locke noted, "generally the laws of mankind and customs have nations have ordered it so, and there is, I grant, a foundation in Nature for it."[160] Locke's "foundation" was biological: man's greater physical strength.[161]

Descartes embodied the philosophical struggle of the soul, equated with intellect, continually struggling against the body, with its compulsion to sensuality and materialism. Women were, by nature, assigned the role of caretaker of the material world so that men could free themselves through study into the liberation of pure reason.[162]

To Rousseau, all the differences between men and women could be traced to their biological differences. Man, as active and strong, has the power and the will, whereas woman, as passive and weak, offers no resistance to the will of man: "By the very law of nature women are at the mercy of men's judgments for both themselves and for their children."[163] Woman also must be restrained because, with liberty, she will readily fall victim to every sort of vice and indulgence.[164] Woman's reasoning ability is limited; it is to be exercised only for the understanding of the performance of her duties, and her opinions must always yield to those of men or society.[165] Rousseau saw liberty as man's sphere for to "renounce our liberty is to renounce our quality of man, and with it all the rights and duties of humanity."[166] Women, however, "should be kept under control from an early age....All their lives they will be under the hard,

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156. With male children, a relationship may change as the child reaches maturity. ARISTOTLE, *Politica*, *supra* note 42, at 1143.
157. *Id.* at 1144–45.
158. *Id.* at 1144.
159. *See* BULLOUGH, *supra* note 6, at 61.
160. LOCKE, *supra* note 58, at 207–12.
161. *Id.* at 364.
162. GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY 46–50 (1984).
163. JEAN JACQUES ROUSSEAU, ÉMILE 134 (William Boyd ed. & trans., Teachers College Press 1956) (1762).
164. *Id.* at 140.
165. *Id.* at 147–48.
166. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 10 (Charles Frankel ed. & trans., Hafner Publishing Co. 1947) (1762).

unceasing constraints of the proprieties. They must...learn to overcome caprice and bow to authority."[167]

Immanuel Kant, who shared many of the same views of women as Rousseau, wrote extensively of the distinctions between the "fair" sex of women and the "noble" sex of men. Women are born with innate understanding and appreciation of all that is beautiful. Men's knowledge, by contrast, is of the sublime.[168] An older woman, prey to "age, the great destroyer of beauty" should beware of seeking knowledge to replace lost charms, and any intellectual pursuits should be taken under the guidance of her husband.[169] More particularly, women lack the characteristic of rational moral judgment which is critical to enlightened human behavior.[170]

Hegel, the most prominent of the German idealists, also integrated traditional views of women into his philosophy. While Hegel allowed women some aptitude for learning, they were not capable of the "higher" endeavors, such as philosophy, because they lacked an understanding of the "ideal." Hegel in fact compared women to plants for their passiveness, as men are compared to animals for their assertion. Women learned through experience and intuition but lacked the ability to acquire true knowledge, which requires rational thinking and "numerous technical exertions."[171]

Even those philosophers grounded in liberty, will, and determinism saw these spheres as available only to men. Schopenhauer viewed women as intellectually shortsighted, "in a word big children, their whole lives long: a kind of intermediate stage between the child and the man, who is the actual human being....[F]undamentally, women exist solely for the propagation of the race...."[172] Nietzsche, writing in the era of a feminist movement in Germany, echoed Schopenhauer and saw women as stupid, weak, and suitable only for bearing children.[173]

The message of these philosophical tracts is clear. Women for centuries have been considered intellectually and morally deficient. Patriarchal society is

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167. ROUSSEAU, ÉMILE, *supra* note 163, at 139.

168. IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 77–78 (John T. Goldthwait trans., University of California Press 1960) (1764).

169. *Id.* at 92.

170. *Id.* at 78–79. Kant wrote that "[w]omen will avoid the wicked not because it is unright, but because it is ugly....I hardly believe that the fair sex is capable of principles...." *Id.* at 81.

171. GEORG W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 207 (Allen W. Wood ed. & Hugh B. Nisbet trans., Cambridge University Press 1991) (1821).

172. ARTHUR SCHOPENHAUER, *On Women, in* ESSAYS AND APHORISMS 80, 81, 84 (R.J. Hollingdale trans., Penguin Books 1970) (originally published in PARERGA AND PARALIPOMENA 1851). Schopenhauer found women to be defective in reasoning ability and without a sense of justice. Lacking physical or moral strength, women depend upon deception and cunning to survive. *See id.* John Stuart Mill, distinguished from these philosophers by his advocacy of women's rights, answered Schopenhauer in his work, *The Subjection of Women*, where he harshly criticized the perversion of social justice which occurs by the moral superiority granted men. Mill in fact questions how men, who value independence and judgment so highly, could so withhold these values from women's lives. JOHN STUART MILL, THE SUBJECTION OF WOMEN 146–47, 179 (New York, D. Appleton and Co. 1869).

173. FRIEDRICH NIETZSCHE, *Beyond Good and Evil, in* THE PHILOSOPHY OF NIETZSCHE 369, 539–48 (Helen Zimmern trans. Modern Library 1927) (1885).

built on a "deep and primitive kind of suspicion of women, solely on account of their sex."[174]

The philosophy of science reflected similar interpretations of men and women. Hippocrates postulated that men and women both produce male and female seed. Male seed was stronger than female seed. Fertilization occurred by a mixing of the seeds, the dominant seed quantitatively determined gender.[175] Aristotle saw a distinctly lesser role for the female in reproduction. Aristotle's thesis about the superiority of man over woman was grounded in his biological interpretation of reproduction. The man alone supplied the regenerative force; woman supplied the "matter" to be shaped.[176]

Galen, a biologist of the second century A.D., postulated that women have small genital testicles capable of making inferior seed incapable of regeneration. Men, due to their warmer body temperatures, carried the strong perfect seed.[177]

Pythagoras divided the world into opposites. The Limited, represented by all that was male, light, right and good; the Unlimited, by contrast, with the forces of chaos, female, dark and evil.[178] The female was the very manifestation of anti-reason.

Sir Francis Bacon carried many of the philosophical characterizations of male and female into scientific theory. He defined nature as feminine, a force to be controlled through the rational power of men: "I am come in very truth, leading to you Nature with all her children to bind her to your service and make her your slave."[179] Bacon in fact uses the metaphor of marriage to describe the relationship between man and nature.[180] His "chaste and lawful marriage" is consummated through reason rather than feeling.[181]

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174. JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 82 (1970). *See also* EVA CANTARELLA, PANDORA'S DAUGHTERS: THE ROLE AND STATUS OF WOMEN IN GREEK AND ROMAN ANTIQUITY 27, 32–33 (Maureen B. Fant trans., The Johns Hopkins University Press 1987) (presenting evidence that Homeric era Greek misogyny and subordination of women arose from distrust of women).

175. HIPPOCRATES, *Regimen 1*, *in* 4 HIPPOCRATES 263–71 (W.H.S. Jones trans., Loeb Classical Library 1931). Both men and women could produce "secretions" of either gender. For example, a woman's male secretion, if combined with a man's female secretion, would produce a hermaphrodite, not a "brave" man, as in the case where the man's secretion is male and the woman's is female. *Id.* at 267–69.

176. ARISTOTLE, GENERATION OF ANIMALS 11 (A.L. Peck trans., Loeb Classical Library 1942). "Thus, if the male is the active partner, the one which originates the movement, and the female *qua* female is the passive one, surely what the female contributes to the semen of the male will not be semen but material." *Id.* at 111.

177. 2 GALEN, ON THE USEFULNESS OF THE PARTS OF THE BODY 631–32 (Margaret Tallmadge May trans., 1968) (circa 165 A.D.). Galen's full theory was that every female organ was a version of a male organ and that women were inverted, imperfect men. *Id.* at 628–29. Galen's theory was influential until at least the sixteenth century. THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 63 (1990).

178. LLOYD, *supra* note 162, at 3.

179. Francis Bacon, *The Masculine Birth of Time* (1653), *reprinted in* BENJAMIN FARRINGTON, THE PHILOSOPHY OF FRANCIS BACON: AN ESSAY ON ITS DEVELOPMENT FROM 1603 TO 1609 WITH NEW TRANSLATIONS OF FUNDAMENTAL TEXTS 59, 62 (1964).

180. *Id.* at 72.

181. EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE 79 (1985). The evolving "scientist" of the seventeenth century sought legitimacy by distinguishing himself from the alchemists, who equated nature with knowledge. *Id.* at 59.

Transformations both of science and politics during the eighteenth and nineteenth centuries ushered in a construct of women dependent solely on biological distinctions. The interpretation of reproductive organs changed from a hierarchy where women were deemed to have similar but inferior organs, to a construct of unfathomable difference.[182] Biological difference became the basis for continuing subordination of women. The work of Charles Darwin led some to challenge the "divine hierarchy" originating in Genesis.[183] Similarly, democracy and significant enlargement of the public sphere weakened the rationale for patriarchy.[184] Tocqueville in fact concluded that in the United States democracy had eliminated the justification for patriarchy, and therefore it was necessary to delineate "two clearly distinct lines of action for the two sexes...."[185] Women were relegated to subordinate roles in the new social order for reasons grounded in nature.[186]

The association between woman and nature is deeply grounded in Western thought.[187] Plato said that women imitate the earth.[188] Women's childbearing capacity is the source of women's alignment with nature. Rational thought, associated almost exclusively with man throughout the history of philosophical discourse, transforms or transcends body and nature to allow spiritual or intellectual achievement. Women are assigned the realm transcended by reason—chaos, emotions and materialism. In religion, woman's closeness to nature is a barrier to spiritual or intellectual enlightenment and is a source of danger and disintegration for men. Once woman is defined as close to nature because of childbearing capacity, it is a small step to conclude that nature ordains women for childbearing.

C. Redemption Through Service

Women have been valued historically almost exclusively for their fulfillment of the roles of wife and mother, roles which demand devotion to others' needs. This tradition creates a powerful subtext for the analysis of reproductive autonomy for women which obscures the extremity of the demands the law may allow society to impose upon women.

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182. LAQUEUR, *supra* note 177, at 149.

183. BULLOUGH, *supra* note 6, at 6.

184. LAQUEUR, *supra* note 177, at 152

185. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 192–96, 212 (Phillips Bradley ed. & Henry Reeve & Francis Bowen trans., Alfred A. Knopf, Inc. 1945) (1840).

186. *Id.* at 212. Social contract theory and other doctrines of the Enlightenment did not inherently exclude women. *See* LAQUEUR, *supra* note 177, at 194.

187. *See* Sherry B. Ortner, *Is Female to Male as Nature Is to Culture?*, *in* WOMAN, CULTURE, AND SOCIETY 67 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974) (reviewing sociological ubiquity of association of women and nature and outlining possible sources of this association); CANTARELLA, *supra* note 174, at 51 (noting that the Greeks justified subordination of women by using the Aristotelian classification of men with "spirit" and women with "matter").

188. PLATO, *Menexenus*, *in* THE COLLECTED DIALOGUES 186, 190 (Edith Hamilton & Huntington Cairns eds. & Benjamin Jowett trans., Princeton University Press 1961).

1. *Religion*

Women are saved from Eve's original transgression by bearing children.[189] The women in the Old Testament were ruled by their wombs.[190] The source of female happiness was in bearing many children for one's husband.[191] Rearing sons, in particular, was the path to serving God and husband.[192] God was thought to control women's wombs for reward or retribution.[193] Women gained the approval of both God and husband through reproduction: "And Leah conceived again, and she bore Jacob a sixth son. Then Leah said, 'God has endowed me with a good dowry; now my husband will honor me because I have borne him six sons.'"[194] The Talmud defines a woman before marriage as a "golem," a shapeless lump awaiting transformation by her husband into a finished vessel through procreation.[195] A woman who was barren was pitied or abhorred as one in disfavor with God. After Hagar conceived, she treated her mistress, Sarah, with contempt.[196] The evolution from patriarchal polygamy to monogamy worsened the plight of the childless woman as barrenness became a basis for divorce.[197]

The power of self-sacrifice associated with the mother image was both a literal and metaphorical theme in biblical literature. The story of King Solomon and the mother who is willing to relinquish her baby rather than see it harmed exemplifies the loving selfless image of mother.[198]

The ideal wife was both virtuous and productive, who does her husband "good, and not harm" and "all the days of her life...works with willing hands" while her husband "sits among the elders of the land."[199] Talmudic Judaism echoed the biblical teachings. Women acquired status only by being good wives and mothers.[200] The Judaic emphasis on home and children allowed women to

189. "Yet woman will be saved through bearing children, if she continues in faith and love and holiness, with modesty." 1 *Timothy* 2:15 (Revised Standard).

190. CARMODY, *supra* note 20, at 95.

191. Leah sought to win Jacob's love by bearing him sons. When Leah bore Jacob a sixth son, she proclaimed "God has endowed me with a good dowry; now my husband will honor me because I have borne him six sons." *Genesis* 30:19–20 (Revised Standard). Rachel, envying her sister Leah, said to Jacob "Give me children, or I shall die!" *Genesis* 30:1 (Revised Standard).

192. CARMODY, *supra* note 20, at 96. "[H]appy is he whose children are males, and alas for him whose children are females." TALMUD, Socino ed., *supra* note 24, at *Baba Bathra* 16b (Maurice Simon trans).

193. God "opened" Leah's womb to help her win Jacob's favor. *Genesis* 29:31. Rachel, who was "barren," finally conceived Joseph when God "hearkened to her and opened her womb." Rachel proclaimed, "God has taken away my reproach." *Genesis* 30:22–24 (Revised Standard). Isaac successfully prayed to God to allow Rebekah, who was barren, to conceive. *Genesis* 25:21.

194. *Genesis* 30:19–20 (Revised Standard).

195. *See* TALMUD, Bennet ed., *supra* note 108, at *Sanhedrin* 22b (Jacob Shachter trans.); FELDMAN, *supra* note 25, at 34.

196. *Genesis* 16:4–10. *See supra* note 33 and accompanying text.

197. THE MISHNAH, *supra* note 27, at *Yebamoth* 6:6. *See also* CARMODY, *supra* note 20, at 95.

198. 1 *Kings* 3:16–27. *See also* 2 *Kings* 4:18–37 where a mother's love and devotion to God helps bring her dead child back to life; 2 *Samuel* 21:10 where Rizpah mourns for the death of her sons.

199. *Proverbs* 31:12–23 (Revised Standard).

200. TALMUD, Socino ed., *supra* note 24, at *Berakoth* 17a (Maurice Simon trans.). A childless woman not only was seen as failing to please her husband but may also have faced a future of poverty since there were no offspring to care for her when her husband died. *See* Carmody, *supra* note 20, at 95.

be esteemed for domestic and maternal virtues. This role also disguised the erotic temptress perceived by man and helped assure rigid sexual morality within the community.[201]

Throughout the Bible, the message of female subordination to male is clear:

> But I want you to understand that the head of every man is Christ, the head of a woman is her husband, and the head of Christ is God....For a man ought not to cover his head, since he is the image and glory of God; but woman is the glory of man. (For man was not made from woman, but woman from man.)[202]

Genesis provides the earliest biblical message of male dominion over women, when part of Eve's punishment is that "your desire shall be for your husband, and he shall rule over you."[203] Throughout the Bible wives are advised, "[B]e subject to your husbands, as to the Lord."[204]

The New Testament proclaims that woman was created for man and is bound to serve him.[205] This is both because woman is not made in the image of God, as is man, and is therefore inferior to man, and also as punishment for Eve's transgression so that woman may not have the power to lead man astray again.[206]

Women in early Christian culture had two respectable choices: to serve God through chastity and devotion or to serve man through marriage. In the Bible, Paul constantly admonishes women to obey their husbands.[207] The distrust of women documented earlier coupled with the belief they are inferior, common to patriarchal culture, inevitably leads to a subservient role.

St. Augustine believed that woman was created to be the help-mate of man solely for the task of procreation, for which she is indispensable.[208] Marriage was not valid without motherhood.[209] However, women were not to

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201. *See* BULLOUGH, *supra* note 6, at 42–49.

202. 1 *Corinthians* 11:3–8 (Revised Standard).

203. *Genesis* 3:16 (Revised Standard).

204. *Ephesians* 5:22 (Revised Standard). *See also* St. Peter's admonishment: "Likewise you wives, be submissive to your husbands, so that some, though they do not obey the word, may be won without a word by the behavior of their wives, when they see your reverent and chaste behavior....So once the holy women who...were submissive to their husbands, as Sarah obeyed Abraham, calling him lord." 1 *Peter* 3:1–6 (Revised Standard).

205. *See* 1 *Corinthians* 11:7–9; *Ephesians* 5:22–23. 1 *Corinthians* 14:33-35 (Revised Standard): "As in all the churches of the saints, the women should keep silence in the churches. For they are not permitted to speak, but should be subordinate, as even the law says. If there is anything they desire to know, let them ask their husbands at home." *See also* 1 *Timothy* 2:11–15, and TALMUD, Bennet ed., *supra* note 108, at *Sanhedrin* 22b (Jacob Shachter trans.). The Koran also teaches that "men are placed in charge of...women, since God has endowed them with the necessary qualities, and made them the bread earners. Thus, the righteous women will accept this arrangement obediently, and will honor their husbands....As for the women who show rebellion, you shall first enlighten them, then desert them in bed, and you may beat them as a last resort." QURAN: THE FINAL SCRIPTURE 55 (*Sura 4:34*) (Rashad Khalifa trans., Islamic Productions 1981).

206. 1 CORPUS IURIUS CANONICI, *supra* note 116, *translated in* NOT IN GOD'S IMAGE, *supra* note 71, at 130.

207. *See e.g.*, *Colossians* 3:18–19; *Ephesians* 5:22–25; 1 *Peter* 3:1.

208. Rosemary R. Ruether, *Misogynism and Virginal Feminism in the Fathers of the Church*, *in* WOMAN IN WESTERN THOUGHT 62, 63 (Martha L. Osborne ed., 1979).

209. St. Augustine, *On the Morals of the Manichees*, *in* 4 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH (First Series) 65, 86 (Philip Schaff ed. & Richard Stothert trans., Charles Scribner's Sons 1909) (388 A.D.).

control this function, for he noted that women were to be subject to men in matters of "bodily sex."[210] Augustine did declare that in paradise women will be equal to men for there will be no lust or childbearing.[211]

St. Thomas Aquinas followed Aristotle in his view that the male is the representation of spirit and intellect whereas the woman, although possessing a soul, was created solely for her body to function in reproduction. Aquinas, who viewed women as "misbegotten" males and therefore defective as spiritual beings, nonetheless found them part of the "universal" nature as necessary helpers to men in the work of generation.[212] In any endeavors other than reproduction and child-rearing, men are better served by other men.[213] Even in performing her sole ordained function, woman is inferior, for it is the male seed which provides the active force to woman's passive receptors. If the active force is functioning appropriately, a perfect male likeness will be produced. Only through a defect in the force or in interference by external forces is a female produced.[214]

More modern papal statements have reinforced this role of service in Catholicism. Pope Pius XI declared the wife is the "heart" of the home, naming the husband as the "head" of the home.[215] Pius XII expounded on this division of labor by stating that "the primary function and the sublime mission of woman is motherhood..."[216] and "[e]very woman is called to be a mother, mother in the physical sense, or mother in a sense more spiritual and more exalted...."[217] Pius XII also admonished women to be subordinate to their husbands: "Many voices will suggest rather a proud autonomy; they will repeat that you are in every respect the equal of your husband, and in many respects his superior. Do not react like Eve to these lying, tempting, deceitful voices."[218]

Motherhood is "absolute dedication" by woman to her role. The Catholic theologian Bernard Häring believed a woman should sacrifice her own life to save the life of a fetus, otherwise "[i]f it were to become an accepted principle of moral teaching on motherhood to permit a mother whose life was endangered simply to 'sacrifice' the life of her child in order to save her own, motherhood would no longer mean absolute dedication to each and every child."[219]

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210. ST. AUGUSTINE, THE CONFESSIONS OF ST. AUGUSTINE 367 (John K. Ryan trans., Image Books 1960) (circa 397-400 A.D.). Augustine advised men to avoid women even for this purpose, if possible. While admitting that a man who married only because of a desire for offspring was to be admired, St. Augustine advised not imitating him. ST. AUGUSTINE, *Soliloquies*, *supra* note 131, at 543.

211. ST. AUGUSTINE, THE CITY OF GOD 839–40 (Whitney J. Oates ed. & M. Dods trans., Random House 1950) (426 A.D.). Augustine disagreed with many of his contemporaries who believed that women would become men in Paradise. *Id.* at 636–37.

212. ST. THOMAS AQUINAS, *supra* note 135, at 466 (Part 1, Question 92).

213. *Id.*

214. *Id.*

215. Pius XI, *Encyclical* Casti Connubii, *in* THE WOMAN IN THE MODERN WORLD 35, 36 (The Monks of Solesmes eds., 1959) (1930).

216. Radio Message of Pius XII to the Federation of Italian Women on Pilgrimage to Loreto (Oct. 14, 1956), *in id.* at 268, 273.

217. Allocution of Pius XII to All Italian Women (Oct. 21, 1945), *in id.* at 127, 131.

218. Allocution of Pius XII to Newlyweds (Sept. 10, 1941), *in id.* 62, 68.

219. 3 BERNARD HÄRING, THE LAW OF CHRIST 209 (1966). *See, e.g.*, *In re* A.C., 597 A.2d 611 (D.C. 1987), discussed *infra* note 362.

The ultimate woman in the Catholic faith is the Virgin Mary. She was able to fulfill her duties of bearing and mothering a child and still refrain from the sinful act of intercourse.[220] Woman as virgin or woman as Eve—this tension between the good and evil woman resounds through Christianity as it does through Judaism. The devotion to the ideal of the Virgin in fact may have adversely affected the status of ordinary women with ordinary physical and sexual attributes.

The leaders of the Protestant movement believed women were meant to serve man as atonement for Eve's sins. Martin Luther believed that women's "narrow shoulders and broad hips" biologically equipped them to stay home and sit, keep house, and rear children.[221] Luther rejected celibacy and believed that marriage was sanctioned by God.[222] For women, this meant that salvation came through bearing children.[223] To Luther, motherhood was the primary feature of women: "Here you have the ornament that distinguishes woman, namely, that she is the fount of all living beings."[224] To Calvin, redemption for a woman lay in willingly submitting to her husband and bearing children as her "calling."[225] In fact, such service pleases God only when it is done with faith and love.[226] John Calvin allowed woman other functions: "splendid adornment to the man's life" and "man's companion and helper."[227] Woman was "by nature (that is, by the ordinary law of God)...born to obey."[228]

2. Philosophy

The same philosophers who defined women as rationally deficient invariably concluded women were destined to serve men through marriage and childbearing.

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220. BULLOUGH, *supra* note 6, at 171. The exaltation of the Virgin Mary reached significant intensity during the Middle Ages, when women were treated with little respect. Mary's infinite love and devotion as mother were less intimidating than the sublimity of Christ. Interestingly, the devotion to Mary did little to improve the status of women. Mary's image of sublime virginity and purity only strengthened the impression that ordinary women were sources of temptation and evil. The eminence of Virgin worship dominated the thirteenth century which was also the same time when celibacy became the rule of the church. *Id.* at 169–174.

221. MARTIN LUTHER, *Table Talk Recorded by Veit Dietrich: The Difference Between Men and Women* (Summer or Fall 1531), *in* 54 LUTHER'S WORKS 7, 8 (Theodore G. Tappert ed. & trans., Fortress Press 1967).

222. MARTIN LUTHER, 2 *The Christian in Society* (1522), *in* 45 LUTHER'S WORKS 36–37 (Walter I. Brandt ed. & trans., Fortress Press 1967).

223. MARTIN LUTHER, *Table Talk Recorded by Anthony Lauterbach and Jerome Weller: In Praise of Women and Marriage* (between Jan. 14 and 31, 1537), *in* 54 LUTHER'S WORKS 222, 223 (Theodore G. Tappert ed. & trans., Fortress Press 1967).

224. *Id.*

225. CALVIN, *Commentaries on Timothy*, *supra* note 148, at 219.

226. *Id.* at 220.

227. CALVIN, *Commentary on Corinthians*, *supra* note 148, at 232. Other Protestant sects, such as Baptists, Quakers, and Brownites (predecessors to Congregationalists) recognized greater equality for women, including women preachers, although man was still head of the household. CARMODY, *supra* note 20, at 130–31.

228. CALVIN, *Commentary on Timothy*, *supra* note 148, at 217. "[T]he eternal law of God...has made the female sex subject to the authority of men. Therefore all women are born to submit to the pre-eminence of the male sex." CALVIN, *Commentary on Corinthians*, *supra* note 148, at 233. It was not her evil however which prevented her from serving in the ministry of the church. Woman's ministry was motherhood, which necessarily precluded her participation in public life. BULLOUGH, *supra* note 6, at 200.

Aristotle's emphasis on sexual differentiation as the source of women's inferiority to men placed man as ruler over woman. Marriage and domestic life were necessary for the survival of the species. Man, by virtue of his superior reason, was totalitarian head of the home. Aristotle defined the components of a household as man and property. Man first has need of the house, necessary for survival, then a wife, "the proper possession of all freemen."[229] Woman's role in raising children is nurturing, man's is educating.[230] The "courage" of a woman was demonstrated by the extent to which she obeyed.[231]

Aristotle's assessment of women in fourth century B.C. resounded throughout subsequent philosophical discourse until the modern era. John Locke, who urged better treatment of women and argued for reallocating some of the husband's totalitarian power over the woman to the state, nonetheless concluded that man, as "the abler and stronger" naturally should rule the marriage relation.[232] To Locke, marriage was a compact between man and woman for the purposes of procreation and rearing of children for the continuation of the species.[233] Rousseau saw woman as made to please man. She is to be resplendent with patience, good-humor, and affection. Women could be educated, not in the same way as men, but to learn skills which make them pleasant and useful to men: "to train them in their childhood, to care for them when they grow up, to give them counsel and consolation, to make life sweet and agreeable for them: these are the tasks of women in all times...."[234] Even Hegel, who recognized individuality in woman, declared that "the law of the family is her inherent implicit inward nature..." which ties her to domestic life while her husband is out in the community.[235]

Schopenhauer also believed woman's "nature" ordained her for motherhood and submission to her husband. To Schopenhauer, women's childishness, frivolity, and shortsightedness, all the product of limited mental faculties, particularly designated them for the care of children.[236] Nietzsche believed that woman's "first and last function" was bearing "robust" children, and any attempts to educate or "cultivate" woman would be destructive to man, woman, and society.[237]

Even many philosophers who wrote in favor of women's individuality or abilities tended to view women's strengths as those of nurturance. Auguste Comte saw woman as the positive moral force in evolving society precisely because of her nurturing abilities.[238] However, despite man's "inferiority in

229. ARISTOTLE, *Oeconomica*, *supra* note 43, at 1343a.
230. *Id.* at 1344a.
231. ARISTOTLE, *Politica*, *supra* note 42, at 1144.
232. LOCKE, *supra* note 58, at 364.
233. *Id.* at 362.
234. ROUSSEAU, ÉMILE, *supra* note 163, at 135.
235. GEORG W.F. HEGEL, PHENOMENOLOGY OF MIND 476, 478 (J.B. Baille trans., 2d ed. George Allen & Unwin Ltd. 1931) (1807).
236. SCHOPENHAUER, *supra* note 172, at 86. John Stuart Mill, one of the few philosophers who passionately argued for equality for women, contested the allegations of Schopenhauer in great detail in THE SUBJECTION OF WOMEN, *supra* note 172.
237. NIETZSCHE, *supra* note 173, at 547.
238. COMTE, A GENERAL VIEW OF POSITIVISM 253, 268–71 (J.H. Bridges trans., Academic Reprints n.d.) (1848). "The peculiar fitness of women for inculcating these elementary principles of morality is a truth which every true philosopher will fully recognize. Women, having stronger sympathies than men, must be better able to call out sympathies in others." *Id.* at 269.

goodness," Comte wrote that "[i]n all kinds of force, whether physical, intellectual, or practical, it is certain that Man surpasses Woman, in accordance with a general law which prevails throughout the animal kingdom."[239] John Stuart Mill, writing passionately for equal opportunities for women, recognized that society offered women only the role of wife and mother and argued that one of women's most positive moral influences upon culture would be a "softening influence" upon the violent tendencies of man.[240]

The dramatic decline in family size triggered by increased industrialization and education during the nineteenth century led to a new definition of motherhood. Woman became the "mother of civilization," relegated by the "cult of domesticity" to the private sphere and charged with the responsibility of developing educated citizens and productive members of society.[241] Thus even as Western society, particularly the United States, was experiencing economic incentives to reduce fertility, these changes in economic factors had little impact upon a tradition which defined woman's sole function in society as procreative.[242] The focus of motherhood merely shifted from raising large families to mother as molder of future citizens.[243] At the same time, the change in demographic trends exacerbated societal ambivalence about women exercising reproductive choice. Women who actively sought to control fertility were castigated by society as "domestic subversives" whose self-indulgence endangered the "very foundations of society" by rejecting their "natural" role as mother.[244]

II. CULTURAL AND LEGAL METAPHORS

A. *Effects of Tradition on Culture and Law*

Society has consistently placed a high value on the control of sexuality and reproduction. The primary means of control has been to deny women liberty. Thousands of years of social discourse have conjured a tradition of woman as ordained by Divine Will, biology, and temperament, for the sustenance and nurturance of others. To assure such servile behavior, tradition rendered women dependent on men by deeming women incapable of rational thought or behavior. Since both religion and philosophy asserted strongly pronatalist values, these stereotypes were reinforced by a legal and cultural milieu which left women few functional alternatives to marriage and motherhood. Fertility, in fact, was the one source of power available to women. Stereotypes become the norm; the norm becomes "nature." Society attaches great significance to behavior deemed inherent or "natural." That judgment is not one which a culture will readily revise.[245]

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239. *Id.* at 234.
240. MILL, *supra* note 172, at 156.
241. PETCHESKY, *supra* note 38, at 74.
242. *See infra* Section II B.
243. This model was predominantly one for the middle and upper classes. Nineteenth century women factory workers experienced a 30% higher mortality rate than men. States began to limit the work hours of women, in part out of concern that ill health caused women to bear unhealthy children. *See* Rose Jones, *The Politics of Reproductive Biology: Exclusionary Policies in the United States*, *in* BIRTHS AND POWER, *supra* note 39, at 39, 46.
244. MOHR, *supra* note 7, at 108.
245. Sunstein, *supra* note 19, at 35–37.

Not all cultural traditions become legal norms. When tradition is transformed into legal constructs, however, the legal structure itself tends to perpetuate and reinforce the cultural norms. For women, legal norms have contributed to the continuation of social disadvantages derived from biological difference.

The legal disadvantages imposed upon women throughout history have been well documented.[246] Until the mid-nineteenth century women could not hold, manage or inherit property,[247] and lacked the legal capacity to sue[248] or legal competence even to be considered a person.[249] Many early legal codes and common-law principles were heavily influenced by ecclesiastical codes, or canon law, where the ability of women to participate in religious life was severely limited.[250] While canon law in some ways enhanced women's status, it also asserted divine justification for the subordination of women.[251] One of the earliest compilations of church law decreed that "[w]omen should be subject to their men. The natural order for mankind is that women should serve men...for it is just that the lesser serve the greater."[252] Extensive legal disabilities were imposed upon a woman at the time of marriage. Coverture, the common law fiction that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage," is just one example.[253] A late sixteenth century English lawyer described a "Feme Covert," or married woman, as "a sort of infant....It is seldom, almost never that a married woman can have any action to use her wit only in her own name: her husband is her stern, her prime mover, without whom she cannot do much at home, and less abroad...."[254] Under English

246. *See e.g.*, NOT IN GOD'S IMAGE *supra* note 71, at 144–53, 220–33; Barbara K. Cavanagh, Note, *"A Little Dearer Than His Horse:" Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260 (1971); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 957 n.11 (1984); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 176–77 (1982).

247. 2 WILLIAM BLACKSTONE, COMMENTARIES *212–14 (inheritance by women was limited by the rule of primogeniture, which favored succession by the eldest son). Upon marriage, a woman lost the ability to control and manage her property, as a result of the doctrine of coverture. LEO KANOWITZ, WOMEN AND THE LAW 361 (1969). *See also* NOT IN GOD'S IMAGE, *supra* note 71, at 147–51; *infra* note 253 on coverture generally. This doctrine was incorporated into U.S. law, with vestiges remaining well into this century. *See, e.g.*, CAL. CIV. CODE §§ 5105, 5125 (although husband and wife have an equal interest in community property, it is under the "management and control" of the husband).

248. 1 WILLIAM BLACKSTONE, COMMENTARIES *431 (an injured woman cannot sue without her husband's agreement and in both their names). *See also* NOT IN GOD'S IMAGE, *supra* note 71, at 144–45.

249. Blackstone notes that a man cannot enter into a contract with his wife, for this "would be to suppose her separate existence." 1 WILLIAM BLACKSTONE, COMMENTARIES *430. Women were not allowed to vote in this country until 1920. U.S. CONST. amend. XIX.

250. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 86–87, 114, 292–93, 457 (1983) (speaking to the relationship between canon and secular law); R.C. MORTIMER, WESTERN CANON LAW 76–77 (photo. reprint 1966) (1953) (speaking to the inability of women to participate in religious life under canon law).

251. Canon law required the consent of both parties to marriage and required dowry in all marriages to protect widows. BERMAN, *supra* note 250, at 168, 229.

252. 1 CORPUS IURIUS CANONICI, *supra* note 116, *translated in* NOT IN GOD'S IMAGE, *supra* note 71, at 130.

253. 1 WILLIAM BLACKSTONE, COMMENTARIES *430. Others included deprivation of use of name, domicile and ability to contract or hold property. *See* Cavanagh, *supra* note 246, at 260.

common law, women were considered unqualified to serve as jurors because of the doctrine of *propter defectum sexus* or "defect of sex."[255] As late as twentieth century America, married women who wished to participate in the public sphere had to do so with their husband's written permission or "prove" their competence in court.[256] These laws were intended to assure that property and inheritance rights remained within the patriarchal structure.[257] At the same time these laws both reflected and perpetuated cultural norms and traditions concerning women. A woman, particularly a married woman, was deemed to have no interest in property or personal identity separate from family where she was expected to "produce" heirs and tend to the needs of husband and children.

Women's long-standing legal incompetence reflected the traditional view that women were incapable of rational judgment or participation in public life. In England, where a husband could alienate his wife's dower if he received her consent, critics of this law complained that women would be "barred and forever excluded from a great many acres of ground, for a few kisses and a gay gown."[258] When Connecticut passed its anti-abortion law in 1860, its chief purpose was for "protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others. The criminal intent and moral turpitude involved in the violation, by a woman, of the restraint put upon her control over her own person, is widely different from that which attends the man...."[259]

The legal system also reinforced the cultural vision of woman as wife and mother. The protective labor laws arising from the industrial revolution were intended in part to protect women's child-rearing capabilities from stress. These laws also were intended to protect a cultural image of the proper married woman as one who did not work in the public sphere and made motherhood her life's calling.[260] The first significant anti-abortion movement of the late nineteenth century which resulted in restrictive abortion laws in many states was in substantial part motivated by cultural concerns that white, middle class women were rejecting their "roles" as childbearers and raisers.[261] As late as 1947, an educated woman was considered highly prone to "sexual disorder"

254. T.E., THE LAWES RESOLUTIONS OF WOMENS RIGHTS 141, 204 (Theatrum Orbis Terrarum, Ltd. 1979) (1632) (translated into Modern English).

255. 3 WILLIAM BLACKSTONE, COMMENTARIES *362. This common law rule was codified by Parliament in 1870 and not rejected until 1919. The Juries Act, 1879, 33 & 34 Vict., ch. 77, § 5 (Eng.); Sex Disqualification (Removal) Act, 1919, 9 & 10 Geo. 5, ch. 71, § 1 (Eng.). Women in this country were disqualified from jury service by all states until 1898 when Utah authorized service. UTAH REV. STAT. ANN., Tit. 35, § 1297 (1898), *cited in* Taylor v. Louisiana, 419 U.S. 522, 533 n.13 (1976). Excluding women from juries if they did not actively express a desire to serve was held to be "rational" as late as 1961. *Hoyt v. Florida*, 368 U.S. 57 (1961).

256. *See, e.g.*, FLA. STAT. ANN. § 62.021 (West 1968 Cumulative Pocket Part) (Permitting removal of disability of married woman to control and manage her estate and property) (Repealed 1970).

257. NOT IN GOD'S IMAGE, *supra* note 71, at 144.

258. THE LAWES RESOLUTIONS OF WOMENS RIGHTS, *supra* note 254, at 180.

259. State v. Carey, 76 Conn. 342, 352–53 (1904).

260. *See* BULLOUGH, *supra* note 6, at 278–90.

261. MOHR, *supra* note 7, at 104–108.

which adversely affected the desire to have children and the number of children borne.[262]

The advent of safe and effective contraception complicated societal norms. The legal and cultural debates about the extent to which the woman or the state should control reproductive decisions are truly modern history. Prior to modern contraception, women had few reproductive "choices." Laws regulating abortion reflect a profound societal disquiet about the separation of sex from procreation. Statutory exemptions from restrictive abortion laws for victims of rape and incest are testimonies to societal convictions that women may be excused from bearing unwanted children only when it appears their participation in the procreative act was not voluntary.

Neither law nor society has been able to reconcile the image of woman with the tenet of reproductive choice. The essence of reproductive autonomy centers on the principles of moral right and moral responsibility—the moral right to make individual choices about one's reproductive life and the moral responsibility to make independent, principled decisions. These moral attributes have been denied women by cultural traditions which have deemed these traits inconsistent with the "nature" of women. Women also have always been expected to put the needs of others before their own needs. These dynamics create a powerful dissonance in the application of fundamental rights to an issue which deeply impacts women. When the Court in *Roe v. Wade* opined that "a pregnant woman is not alone in her privacy,"[263] it incorporated an assumption of historical tradition that legitimized reproductive control of women by others.[264] Before safe contraception and abortion were available, reproduction was primarily the concern of the private sphere, where women were controlled by fathers or husbands. In this country, it was only when middle class women of the late nineteenth century increasingly availed themselves of medical advances in contraception and abortion procedures that the state exerted direct control over reproduction by restricting the availability of legal reproductive controls.[265]

In *Bradwell v. Illinois*,[266] the Supreme Court legitimized state efforts to restrict women to domestic roles when it held a woman was incompetent to practice law. Justice Bradley elaborated in a concurring opinion:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman....The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. 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

262. *See* LUNDBERG & FARNHAM, *supra* note 74, at 270–71.
263. 410 U.S. 113, 159 (1973).
264. This incorporation is akin to Justice Scalia's suggestion that in deciding whether a liberty interest is fundamental the Court should, as part of that process, consider the state's interest: "We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body." Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (Scalia, J., dissenting, joined by Rehnquist, O'Connor and Kennedy).
265. *See* Siegel, *supra* note 7, at 293–304.
266. 83 U.S. 130 (1872).

> functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head....The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[267]

In one passage, this dicta illustrates both the inter-relation between law and religious doctrine and the religiously derived cultural judgment that women are foreordained to serve as procreators and nurturers. This view is also reflected by *Muller v. Oregon*,[268] in which the Supreme Court in 1908 upheld legislation restricting women's employment. The Court concluded that a woman's "physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man."[269]

The Court in *Muller* also approved a legal and cultural pronatalist tradition which not only defines women by their procreative function but also claims that function for the public interest: "[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[270] The Court goes on to justify restrictive legislation by concluding, "The limitations...are not imposed solely for her benefit, but also largely for the benefit of all."[271] The identification of women's reproductive function with the public interest serves to legitimize public control. This tradition is one of the reasons both law and culture reflect significant ambivalence about full reproductive autonomy for women.

B. *Tradition and Reproductive Regulation*

Significant cultural and legal changes have affected the status and perception of women since *Bradwell* and *Muller*.[272] The courts have removed most barriers of discrimination against women in employment, benefits, and legal status.[273] The tradition of valuing women primarily as mothers and wives

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267. *Id.* at 141–42.
268. 208 U.S. 412 (1908).
269. *Id.* at 422.
270. *Id.* at 421.
271. *Id.* at 422.
272. *E.g,* passage of the Nineteenth Amendment, granting women the right to vote, application of the 14th Amendment to classifications based on gender (Reed v. Reed, 404 U.S. 71 (1971)) and passage of the Civil Rights Act (42 U.S.C. §§ 2000e–15 (1964)), preventing discrimination on the basis of gender are some of the legal reforms which have occurred.
273. Employment: Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970) (different hiring policies for men and women with school age children violates Title VII of the Civil Rights Act); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (requiring women to contribute more to retirement plan because women, as a group, live longer than men violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (a hostile work environment may constitute sexual harassment, which is discrimination on the basis of sex under Title VII). Benefits: Frontiero v. Richardson, 411 U.S. 677 (1973) (automatic spousal benefits for male

however remains deeply entwined in modern cultural expectations and many current religious doctrines. Tradition of this depth and breadth continues to permeate societal and legal milieux.[274] The great majority of anti-abortion activists in this country today derive their beliefs from religious and moral doctrines which define women by their procreative and nurturing abilities.[275] Contemporary culture often depicts a woman who chooses abortion as unjustifiably selfish about her own life, someone who inappropriately values independence more than responsibility.[276]

The Supreme Court, while recognizing economic and status disadvantages imposed upon women historically, has yet to acknowledge that the tradition of female procreative destiny is the source of gender discrimination. As late as 1961, the Court still espoused the legal and cultural limitations on "woman...as the center of home and family life" with "special responsibilities" precluding full independence under the Constitution.[277] The economic and status barriers which developed throughout Western law originated in the societal judgment that women were destined by God, or nature, to be mothers and wives and should be restricted by law and culture to that role.

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members of armed forces, but not female members, violates equal protection component of the Fifth Amendment's Due Process Clause) (*cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975) (different standards for maximum time men and women could serve in military before mandatory discharge does not violate the due process clause because women were restricted from combat and other duties leading to faster promotion)); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (different bases for Social Security benefits of widows and widowers violates due process clause). Status: Stanton v. Stanton, 421 U.S. 7 (1975) (state statute providing for different ages of majority for male and female children for purposes of determining the end of a divorced parent's child support obligations violated equal protection clause).

274. Women who work outside the home still are expected by their husbands to perform most of the childcare and homemaking functions for the family. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 271–79 (1989); Catharine E. Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816, 830 (1987) (76% of the women who are employed outside the home do the majority of the housework). The relevance of traditions as they affect current attitudes towards reproduction is reflected in a case like Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991), where the Court held that Johnson Controls' policy of excluding fertile female employees from hazardous work environments to protect potential offspring violated the Pregnancy Discrimination Act. *Id.* at 206, 211. The Seventh Circuit had upheld the policy despite evidence that excessive lead exposure could pose risks for the offspring of men exposed. 886 F.2d 871, 886, 889 (7th Cir. 1989) (en banc).

275. Sociologist Kristin Luker in her study of the anti-abortion movement, concluded that for many people, reproductive choice is incompatible with certain religious and moral tenets. First, abortion (and contraception for many) not only takes human life, it is more abhorrent that a woman, whose special ability is the creation and nurturance of life, is the perpetrator of this act. Second, according women reproductive control upsets the balance of social relationships defined by a traditional family life. Finally, reproductive choice functions to undermine the strength and value of the female as nurturer as more women move into the public sphere. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158–75 (1984). Correlated with these findings was a strong consensus that procreation is the intended purpose of sexual intercourse. *Id.* at 164. Almost 80% of the women active in the anti-abortion movement at the time of Luker's survey were Catholic. *Id.* at 196. Luker concludes the overwhelming majority of women in the anti-abortion movement have chosen the traditional roles of wife and mother and believed motherhood to be a full-time job incompatible with any career outside the home. *Id.* at 204.

276. See the study of prime time television in CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC 123–42 (1990); *see also* LUKER, *supra* note 275, at 203–04.

277. Hoyt v. Florida, 368 U.S. 57, 62 (1961) (rejecting equal protection challenge to Florida statute prohibiting a woman from serving on a jury unless she specifically requested service). Effectively overruled by Taylor v. Louisiana, 419 U.S. 522 (1975).

In a culture wrestling with whether motherhood is the primary identity of women, discourse, both legal and societal, has transformed this societal ambivalence into an adversarial relation between woman and fetus. Although the Court has held the fetus is not a "person" within the meaning of the Fourteenth Amendment, the state's compelling interest in protecting fetal life has become a metaphor for the cultural debate over women's roles and responsibilities.[278] The Court's attempts to define women's reproductive rights by reliance on fundamental rights analysis has contributed to this debate by emphasizing the tension between reproductive choice and fetal life. Fundamental rights analysis, with its focus on individual rights rather than group roles, necessarily juxtaposes the individual woman against an isolated fetus. This spotlight creates a deceptively simple image of a battle of "rights" analogous to the cultural depiction of the abortion debate. The language in the Court's reproductive rights cases in fact mirrors much of the more general societal ambivalence and confusion surrounding women's roles and reproductive choice.

In *Roe v. Wade*, the Court recognized the significant burdens an unwanted pregnancy may impose upon a woman.[279] At the same time the Court never questioned the authority of the state to control at some point the woman's decision whether to carry the fetus to term.[280] The Court found the "pregnant woman cannot be isolated in her privacy."[281] At no point in the opinion did the Court consider why the state's generalized interest in protecting potential life justified compelling an individual to carry and give birth to a child. At the bottom of this non-discussion is an assumption that the discomfort, pain, and medical risks often associated with carrying and giving birth to a child are not too great a burden for the state to compel. This assumption is in turn grounded in a perception that pregnancy and childbirth are "natural" functions for women. While this assumption is physiologically accurate, it is the cultural expectation of woman as mother that allows the state, and the Court, to accept the imposition of substantial physical stress upon a woman without her consent.

Roe begins a trend common in most abortion decisions where the woman, even in the context of a woman who wishes to terminate a pregnancy, is repeatedly described as "the mother."[282] It is unlikely that a woman experiencing an unwanted pregnancy thinks of herself as "mother." Yet the Court and the culture have already defined the relationship as mother and child.[283] The definition of this relationship itself suggests a cultural judgment on abortion—what kind of "mother" would do such harm to a "child?" The use of mother and child language throughout the abortion decisions has illuminated the subtext of the abortion cases as a debate about the traditional roles of

278. Roe v. Wade, 410 U.S. 113, 158 (1973).

279. The Court noted that in addition to medical risks, "[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care." *Id.* at 153.

280. The Court authorized the state to prohibit abortion after viability in the interest of protecting potential life (except where the life or health of the mother was at risk). *Id.* at 163.

281. *Id.* at 159.

282. *Id.* at 130, 134, 137, 139, 142, 148, 151, 158–60; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 58, 61, 62 n.2, 63, 68 n.9 (1976); Doe v. Bolton, 410 U.S. 179, 190 (1973).

283. Roe v. Wade, 410 U.S. 113, 142, 153, 162 (1973); *Danforth*, 428 U.S. at 71; *Bolton*, 410 U.S. at 184, 185, 190.

women in modern society. As such, abortion tends to be depicted as a form of rebellion against time-cherished values. The woman, pitted against the state and the fetus, is the only one who views the pregnancy as unwanted, reinforcing cultural stereotypes about women's lack of moral or intellectual judgment.[284]

As further evidence of the tradition that women lack judgmental capacity, *Roe* focuses on the physician's judgment and autonomy vis-a-vis the state in making the abortion decision rather than the woman's:

> The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to these points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[285]

This emphasis minimizes the judgment power accorded the woman.

Justice White, in his dissent in *Doe v. Bolton*,[286] implies that women fail to judge seriously the moral dimensions of an abortion decision when he suggests that women seek abortions for "convenience, whim, or caprice."[287] At several points in his opinion Justice White denounces women who seek abortions as opting for "convenience" rather than moral judgment.[288] This condemnation contrasts with Justice White's language which increasingly personalizes the fetus. In *Doe*, Justice White refers to the fetus as "potential life."[289] In *Thornburgh v. American College of Obstetricians and Gynecologists*, that language becomes "fetal life"[290] and "those who will be citizens."[291] The woman in contrast is someone who frivolously seeks to terminate a pregnancy for "convenience, whim or caprice"[292] and who is a "mother" with a "desire to kill the fetus."[293]

When the emphasis on the fetus and the protection of fetal life dominates the legal rhetoric, the impact of the abortion decision upon the woman becomes secondary. In *Webster v. Reproductive Health Services*,[294] the missing person is the woman, who is barely mentioned throughout the entire plurality opinion, as if the interest of the state rendered the rights of the woman irrelevant.[295]

The Court's validation of a state-mandated waiting period prior to an abortion is another example of how the traditional distrust of women's

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284. In fact the state's interest in life rarely is manifested in public programs providing comprehensive child-care, post-natal programs, etc., which would provide real support for women trying to decide whether to have a child.

285. *Roe*, 410 U.S. at 165–66.

286. 410 U.S. 179, 221 (1973) (White, J., dissenting).

287. *Id.*

288. *Id.* at 222.

289. *Id.*

290. 476 U.S. 747, 794 (1986) (White, J., dissenting).

291. *Id.* at 795.

292. Doe v. Bolton, 410 U.S. at 221 (White, J., dissenting).

293. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 100 (1976) (White, J., concurring in part, dissenting in part).

294. 492 U.S. 490 (1989).

295. *Id.* at 499–522. Justice Blackmun pointedly notes that a woman's right to terminate a pregnancy "receives no meaningful recognition in the plurality's written opinion." *Id.* at 555. Blackmun also asserts that "[i]n a Nation that cherishes liberty, the ability of a woman to control the biological operation of her body...must fall within that limited sphere of individual autonomy that lies beyond the will or the power of any transient majority." *Id.* at 557 n. 11.

judgment infuses modern doctrine. When Justice O'Connor argues the reasonableness of a waiting period prior to abortion, she approves the paternalism of the state in "ensuring that a woman does not make this serious decision in undue haste."[296] While many medical procedures are life-threatening, and decisions by parents and guardians may affect the life of another person, no waiting periods exist prior to other medical procedures.[297] In *Planned Parenthood v. Casey*, the Court, in upholding a twenty-four hour waiting period, repeatedly stresses the State's entitlement to "ensure that a woman apprehend the full consequences of her decision" to avoid "devastating psychological consequences."[298] Justice Stevens recognizes that the "mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women."[299]

At the same time, a number of justices have, over time, come to use the language of equality in abortion cases, even if equal protection theory has not found overt acceptance.[300] In *Roe*, Justice Blackmun briefly mentions how maternity may cause a woman a "distressful life and future."[301] In *Thornburgh*, Justice Blackmun specifically notes that individual liberty extends to "women as well as men" and that few decisions implicate liberty concerns for a woman as much as her decision to terminate a pregnancy.[302] In *Webster*, Justice Blackmun recognizes the "unique" ability of women to bear children.[303] In language reminiscent of early equal protection cases, Justice Blackmun asserts that "millions of women...have ordered their lives around the right to reproductive choice, and that this right has become *vital to the full participation of women in the economic and political walks of American life.*"[304] Blackmun also concludes that the plurality's toothless degree of review of abortion restrictions authorizes the "State to conscript a woman's body."[305]

Casey represents a significant emergence of the equality issues underlying reproductive rights cases. The joint opinion of Justices O'Connor, Souter, and

296. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 474 (1983) (O'Connor, J., dissenting).

297. While numerous states require a waiting period prior to abortion, mandatory delays are not required prior to other medical procedures. *See, e.g.*, KY. REV. STAT. ANN. § 311.726 (Michie/Bobbs-Merrill 1994) (two hour waiting period); TENN. CODE ANN. § 39–15–202 (1994) (two day waiting period); KAN. STAT. ANN. § 65–6706(b) (1994) (eight hour waiting period); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1994) (twenty-four hour waiting period); MISS. CODE ANN. § 41–41–33 (1993) (same); NEB. REV. STAT. § 28–327(1) (1994 Supp.) (same); 18 PA. CONS. STAT. ANN. § 3205(a)(1) (1994) (same); S.D. CODIFIED LAWS ANN. § 34–23A–10.1 (1994) (same).

298. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823 (1992) (joint opinion). *See also id.* at 2825 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable....") *and* at 2818 ("[T]he State is [not] prohibited from taking steps to ensure that this choice is thoughtful and informed.").

299. *Id.* at 2841–42 (Stevens, J., concurring in part, dissenting in part).

300. *But see* then Judge Ginsburg's advocacy of equality analysis for abortion issues in Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

301. Roe v. Wade, 410 U.S. 113, 153 (1973).

302. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

303. Webster v. Reproductive Health Servs., 492 U.S. 490, 557 (1989) (opinion of Blackmun, J.).

304. *Id.* (emphasis added).

305. *Id.*

Kennedy repeatedly recognizes the vestiges of gender stereotyping which so completely infuse reproductive issues. The Court recognizes that the "liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[306] The uniqueness of this liberty interest to women is the basis for scrutiny of reproductive regulation as a gender equality issue.[307] The Court also acknowledges that the anxieties, physical risks, and pain associated with pregnancy are significant and borne only by the woman.[308] Most importantly the Court recognizes that society has always defined women by their childbearing role: "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[309]

The joint opinion in *Casey,* while analyzing whether *Roe* should be overruled, considered, among other factors, whether women's reliance upon *Roe* would result in "special hardship" and inequity if *Roe* was overruled.[310] The Court admitted that women's reliance on availability of abortion was not typical reliance as exemplified in commercial cases; nor could specific reliance be claimed because people could immediately adjust reproductive behavior if abortion was prohibited. The Court instead found reliance firmly grounded in equal protection anti-subordination theory:

> But to do this [deny reliance] would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion....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.[311]

At the same time, the *Casey* joint opinion struggles with the meaning of liberty and equality in modern reproductive law. By recognizing a compelling state interest in potential life from conception, the Court reaffirms the State's authority to use all available means to "persuade" the woman to choose childbirth over abortion, including a twenty-four hour waiting period and excruciatingly detailed informed consent provisions filled with descriptions of the developmental stages of the fetus.[312] This paternalism undermines the independence of women as decisionmakers and furthers the stereotype that women are emotional and irrational decisionmakers, easily swayed by authority figures. At the same time, the Court rejects a spousal consent provision, concluding that the threat of abuse poses an "undue burden" on abortion and observing that spousal provisions are grounded in outmoded views of a husband's dominion over his wife.[313] Thus when faced with the more subtle forms of coercion and distrust of judgment embodied in the waiting period and informed consent provisions, the Court fails to recognize the anomaly in these

306. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992).

307. The Court's recognition of the "uniqueness" highlights the internal inconsistency of the Court's analysis of reproduction. For it is this uniqueness that makes women *not* similarly situated to men and therefore ineligible for equality analysis under current doctrine. *See infra* discussion accompanying note 345.

308. *Casey,* 112 S. Ct. at 2807.

309. *Id.*

310. *Id.* at 2808.

311. *Id.* at 2809.

312. *Id.* at 2823.

313. *Id.* at 2830–31.

provisions compared to regulation of other medical procedures and the value judgment inherent in authorizing the state to aggressively "persuade" women to change their minds about the abortion decision. Justice Stevens recognizes this irregularity in his opinion where he describes the "traumatic and yet empowering" nature of the abortion decision and rejects the State's power to "inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments."[314]

Justice Blackmun's opinion in *Casey* evinces an evolution in reproductive analysis. His thoughtful description of the rights at issue in abortion cases shows significant development from his conclusory assessment in *Roe* that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[315] Justice Blackmun acknowledges the practical impact motherhood has upon a woman's educational and employment opportunities and recognizes that the abortion decision-making process is critical to a woman's self-determination.[316] Blackmun concludes that restrictive abortion laws deprive a woman of "basic control over her life."[317] Justice Blackmun also concludes, however, that restrictive abortion laws implicate gender equality issues by

> forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.[318]

By contrast, Chief Justice Rehnquist's opinion in *Casey*[319] has changed little from his dissent in *Roe*. In both cases, his reliance upon legal tradition as the basis for fundamental rights leads him down a narrow path. In his dissent in *Roe*, Justice Rehnquist cites restrictive abortion laws enacted in the late nineteenth century as evidence that the right to abortion is not "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[320] Justice Scalia also criticizes the *Casey* joint opinion for its failure to rely upon legal tradition in assessing fundamental rights.[321] Scalia asserts abortion is not constitutionally protected "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American

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314. *Id.* at 2840–41 (Stevens, J., concurring in part, dissenting in part).
315. Roe v. Wade, 410 U.S. 113, 153 (1973).
316. *Casey*, 112 S. Ct. at 2846 (Blackmun, J., concurring in the judgment in part, dissenting in part).
317. *Id.*
318. *Id.* at 2846–47.
319. 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part).
320. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
321. *Casey*, 112 S. Ct. at 2873 (Scalia, J., concurring in the judgment in part, dissenting in part). Scalia criticizes the "utter bankruptcy" of constitutional analysis devoid of consideration of tradition. *Id.* at 2874 n.1.

society have permitted it to be legally proscribed."[322] This conclusion exemplifies the analytical weakness of strict reliance upon historical legal practices in the interpretation of fundamental rights. A principled historical analysis of reproductive regulation at the very least must consider the historical status of women. Otherwise, tradition becomes a validator of past inequities.

III. TRADITION AND FUNDAMENTAL RIGHTS

The Supreme Court has defined unenumerated fundamental rights by reference to the "'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there]...as to be ranked as fundamental.'"[323] The absence of explicit constitutional text, other than the broad principle of liberty contained in the Due Process Clause, has led the Court to search retrospectively for historic anchors of collective consensus as a means of restricting unenumerated rights.[324] Fervent legal debate has focused not only on the Court's authority to legitimize unenumerated rights, but also on the interpretive scope of the Court's inquiry into tradition.[325] The specificity position, represented by Justice Scalia, asserts that in determining whether an interest is a fundamental right, the court should consider "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[326] Therefore in defining liberty interests, the court may not disregard a specific "relevant tradition protecting, or denying protection to the asserted right."[327] Justice's Scalia's concern is to decrease the possibilities of a countermajoritarian stampede inappropriate to the institutional mission of the Court.

The generalist position is perhaps best represented by one of its earliest proponents, Justice Harlan, who defines tradition as a "living thing."[328] To Justice Harlan, due process is a balance that develops with "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[329] "This liberty is not a series of isolated

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322. *Id.* at 2874.

323. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The reference to tradition occurs throughout substantive due process cases. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (the due process clause protects rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

324. Justice Scalia asserts that tradition "giv[es] content" only in the interpretation of "*ambiguous* constitutional text." Rutan v. Republican Party of Illinois, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (emphasis added).

325. *See, e.g.*, Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992).

326. Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (plurality opinion).

327. *Id.* at 127 n.6.

328. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

329. *Id.*

points pricked out....It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...."[330]

Tradition has been a legal source both of expansion and limitation of rights.[331] But tradition is an analytical chameleon, susceptible to multiple interpretations. Where the generalist may find a tradition of bodily autonomy and individual choice in private matters supporting reproductive choice, the specifist need look no further than the anti-abortion laws of the late nineteenth century to conclude that no tradition of reproductive choice exists. The absence of historical context in either of these perspectives is troubling. The Court in *Roe* examined at great length the legal history of abortion.[332] The Court found the historical analysis inconclusive in resolving whether the right to choose an abortion was grounded in the traditions of our society.[333] This conclusion is hardly surprising since abortion did not become a significant social issue until the end of the nineteenth century when medical advances made it a feasible procedure for middle-class women.

The anti-abortion laws of the late nineteenth century were passed when women were unable to vote on issues affecting their own bodies. Although many of these laws remained on the books after women were granted the franchise, women still had no meaningful political power to effectuate change. Similarly, although recognition of bodily autonomy and personal privacy as legal and cultural traditions legitimizes protection of reproductive choice, the reality that women's lives and women's reproduction have until recently been controlled by others is problematic. Privacy for women has invariably meant control by others in the domestic arena, from the context of "domestic disputes" to the judgment that a "pregnant woman cannot be isolated in her privacy."[334]

The most troubling aspect of the analysis of tradition is that it is not a morally neutral exercise. Tradition is in fact a proxy for normative, majoritarian judgments. Society tends to grant inherent authority to tradition unless the dominant culture has specifically rejected a tradition. Legal precedent is, of course, the law's validation and preservation of tradition.[335] Both tradition and precedent often serve, therefore, to advance cultural stereotyping. To ignore the cultural judgments from which traditions derive is, in many instances, to belie the constitutional values of liberty and equality sought to be interpreted.

The Court appropriately seeks articulation of those unenumerated rights historically validated by the political process. The Court should also properly

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330. *Id.* at 543.

331. *E.g., compare* Cruzan v. Director, Missouri Dept of Health, 110 S. Ct. 2841, 2863 (1990) (Brennan, J., dissenting) (where Justice Brennan found the right to refuse life support grounded in the common law tradition of medical self-determination) *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (where the Court upheld a law criminalizing sodomy as applied to homosexuals. Chief Justice Burger concluded that "[T]he proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of the practice is firmly rooted in Judeo-Christian [sic] moral and ethical standards." *Id.* at 196–97.).

332. Roe v. Wade, 410 U.S. 113, 129–41 (1973).

333. *Id.* at 141–54.

334. *Id.* at 159.

335. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1044 (1990).

recognize fundamental interests historically marginalized by the majoritarian process because of lack of political power of the persons most directly impacted. In these cases, the Court should appropriately exercise its corrective function by recognizing the limits of tradition.

The moral and legal authority of tradition must be called into question, therefore, where the tradition is one of disadvantage and the legislation in question regulates the very characteristic which is the source of disadvantage. Tradition thus becomes a suspect guideline for analyzing reproductive rights. The legal tradition of restrictive contraception and abortion laws arising in the late nineteenth century cannot be considered a principled basis for analysis because women were unable to participate in the political debate. If one analyzes our cultural tradition of personal liberty and bodily autonomy, it is difficult to ignore the impact of older traditions which suggest that individual liberty in our society has in the past, never been about reproductive autonomy for women. As a consequence, the tradition-based right of privacy is not the optimal constitutional basis for analysis of reproductive rights. Whereas the interests in autonomy and self-determination inherent in reproductive issues are classically liberty interests and philosophically grounded in our cultural tradition, the historical reality is that autonomy and self-determination for women have no grounding in tradition. Liberty of choice and self-determination are recent legal rights granted to women and still are evolving culturally.

Reproductive regulation therefore cannot be evaluated simply as neutral legislation because of the distortions rendered by the traditions that accompany such laws. These traditions make it unreasonable to conclude there are no gender-based assumptions about the naturalness of women's role inherent in reproductive regulation. These assumptions in fact take on the appearance of neutrality precisely because the cultural stereotypes of women are so deeply ingrained.

The Court's analysis of reproductive regulation has ignored the historical relationship between reproductive regulation and gender roles. In fact one of the criticisms of *Roe* has rested on the Court's failure to clearly articulate *why* abortion was part of the privacy right.[336] Unenumerated fundamental rights analysis focuses on the history of "individuals" without regard to the historical roles assigned to those individuals by their culture. This approach works only where cultural stereotyping has not distorted the development of rights.[337] Application of this analysis to reproductive regulation fails to capture the full historical relationship between reproduction and gender disadvantages.

In contrast, the Equal Protection Clause functions to invalidate traditions which perpetuate stereotyping by examining the relationship between legislation and the group impacted by the legislation.[338] Only equality theory is able to

336. *Cf.* MICHAEL PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 144 (1982); *see also supra* note 319 and accompanying text.

337. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (right to vote).

338. The depth of discrimination against women originating from the characteristic of reproductive capacity provides strong argument that laws based on women's reproductive capacity should be considered suspect classifications under the Equal Protection Clause. The Court's unwillingness to recognize new suspect classifications makes this evolution more

address adequately the historical subordination of women as a class through disabilities based on reproductive capacity.[339] The essence of equal protection analysis is the search for inappropriate stereotyping by class. The Court has described its scrutiny of gender classifications as intended "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[340]

Grounding reproductive regulation in equal protection helps remove the analysis from its adversarial context, pitting the individual woman against the individual fetus, so prevalent in the language and imagery of the abortion debate. Privacy analysis accentuates the moral tensions inherent within reproductive regulation by highlighting woman's autonomy, which remains morally controversial. While equal protection analysis does not avoid the question of the value of fetal life, nor should it, it does allow the Court to examine reproductive regulation in terms not only of individual choice but also of group roles.

The traditions examined in this article *make it clear* that regulation of reproduction has been primarily about women's roles and only secondarily about biology. The essence of reproductive rights analysis, therefore, must address the significant cultural stereotyping of woman as morally and intellectually inferior, destined to fulfill the role of mother and wife. Disadvantages associated with events in women's reproductive lives, such as menstruation, pregnancy, and childbirth, originated with ancient social taboos and evolved into significant social, legal, political, and economic discrimination. If woman's reproductive capacity is examined as to how it has affected the status and power of the sexes, reproductive capacity emerges as the primary source of inequality between the sexes. Reproductive issues are complex because they are both private and public sphere issues—intimate personal decisions with significant public ramifications for the individual and collectively for women as a group in society.

In the public sphere, the Court has established a firm basis for equal citizenship for women through application of the Equal Protection Clause.[341] The Court has been relatively diligent about rejecting historical patterning of women in the economic and political arenas.[342] It has repeatedly required equal protection analysis to scrutinize legislative purpose to determine "whether the

unlikely in the near future than consideration of reproductive regulation as gender discrimination since a number of members of the Court have expressed sympathy to the latter analysis.

339. In Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), the Court was certainly aware of the entire system of segregation permeating Southern society even though the Court confined its discussion to education.

340. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725–26 (1982).

341. Equal Protection jurisprudence reflects two overriding principles: anti-discrimination and anti-subordination. The anti-discrimination principle prohibits the state from establishing classifications reflecting bias. The anti-subordination principle prohibits the imposition of disabilities upon groups. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982). "Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality," whereas some "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Id.* at 216 n.14.

342. *E.g.*, Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (jury service); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (administration of decedent's estate).

statutory objective itself reflects archaic and stereotypic notions"[343] about women, including the assumption that "'the female [is] destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas.'"[344] Tradition tells us that the raison d'être of these historical disadvantages—reproductive capacity—also is a suspect basis for regulation.

The Court to date has been unwilling to consider reproductive regulation as gender based discrimination under the Equal Protection Clause. In part this is because the Court's equal protection doctrine requires women be "similarly situated" to men to be entitled to enter a claim of discriminatory conduct.[345] This analysis was applied in 1908 in *Muller v. Oregon*: "The two sexes differ in structure of body, in the functions to be performed by each....This difference justifies a difference in legislation...to compensate for some of the burdens which rest upon her."[346] The application of similarly situated analysis works in the educational, economic, and political arenas where for all relevant purposes, men and women may be treated similarly. Equality also must be relevant, however, when considering biological capacity where women are not like men. To deny that discrimination can occur where there is difference not only denies the historical tradition associated with women and reproduction, but also denies that it is the very factor of difference which is most often the source of discriminatory conduct by one group against another.[347] The Court's application of "similarly situated" analysis reflects a cramped interpretation of equality. True equality is the acceptance and accommodation of differences without disadvantage. At bottom, the Court's analysis of gender-based classifications is permeated by some of the same inappropriate assumptions reflected in the legislative action it is asked to scrutinize.[348]

The Court's struggle with how to treat reproductive difference has focused to date primarily on its characterization of pregnancy. In *Geduldig v.*

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343. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

344. *Id.* at 726 n.11 (quoting Stanton v. Stanton, 421 U.S. 7, 14–15 (1975)).

345. *See, e.g.*, Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981); Reed v. Reed, 404 U.S. 71, 77 (1971); Parham v. Hughes, 441 U.S. 347, 354 (1979). "In cases where men and women are not similarly situated...and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity." *Id.*

346. Muller v. Oregon, 208 U.S. 412, 422–23 (1908). *See also* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 471 (1981). "But we have recognized that in certain narrow circumstances men and women are *not* similarly situated...and a legislative classification realistically based upon differences is not unconstitutional." *Id.* at 478 (Stewart, J., concurring) (emphasis added).

347. The Canadian Supreme Court, in rejecting the similarly situated theory of equality, concluded the theory "is seriously deficient in that it excludes any consideration of the nature of the law." Law Society of British Columbia v. Andrews, 1 S.C.R. 143, 166 (Can. 1989). As the Court noted, "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights." *Id.* at 167. The Court instead adopted an equality analysis focusing on state imposed disadvantage, whether intentional or not, based on personal characteristics of the group. *Id.* at 144.

348. As late as 1973, the Court explicitly approved the special reproductive capacity of women exalted in *Muller* as a basis for gender classifications. Kahn v. Shevin, 416 U.S. 351 (1974). ("[T]he special physical structure of women has a bearing on the 'conditions under which she should be permitted to toil.'" *Id.* at 356 n.10.) *See also* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); Geduldig v. Aiello, 417 U.S. 484 (1974); Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981). In these cases, the Court states that regulation based on pregnancy or the possibility of pregnancy cannot discriminate because it reflects real differences between the sexes.

Aiello,[349] the Court upheld the exclusion of pregnancy from a state disability insurance plan, rejecting the claim that a classification based on pregnancy was sex-based. The Court found that no gender classification was created because "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[350] The Court insisted that the pregnancy exclusion was merely a physiological distinction, and not a "pretext[] designed to effect an invidious discrimination against the members of one sex...."[351] In reaching this conclusion, the Court overlooked the significance of reproductive capacity in the physical as well as the cultural definition of woman.[352] This reasoning is an example of the way the Court, as well as the culture at large, reflects the deeply entrenched assumptions about women and reproduction. The state, by concluding that pregnancy cannot be a disability, reinforces cultural stereotypes that pregnancy is a "natural" status for women, unlike injuries or diseases designated as disabling, and presumes that women will have no need of financial support should pregnancy render them incapable of working. The Court's analysis validated these stereotypes.[353]

One of the obstacles for the Court in considering reproductive regulation as gender discrimination is precisely the deeply embedded cultural assumptions defining women by their reproductive function. Since society no longer condones overt gender discrimination, the Court must come to terms increasingly not only with less overt discrimination but also the unconscious perpetuation of stereotypes which may occur where tradition has given those stereotypes the perception of neutrality. As in *Bradwell*, reproductive regulation is not about overt hostility towards women but about stereotyping women's roles. This form of discrimination is perhaps more invidious than overt hostility. The deeper the tradition, the more the inequality is perceived as a "natural" difference. In a 1993 case, *Bray v. Alexandria Women's Health Clinic*,[354] the Court's opinion rejects the assertion that a gender-based class is established by virtue of anti-abortion protesters' blockade of abortion clinics. The Court, in reaffirming *Geduldig*, finds that "opposition to voluntary abortion cannot possibly be considered...an irrational surrogate for opposition to (or paternalism towards) women."[355] The Court here makes the same mistake as in *Geduldig*. Whereas there are certainly other reasons for opposing abortion than hatred or condescension towards women, the fact that the protesters happen to disapprove abortion for moral or religious reasons in no way changes the fact that only women are the subject of their protests. The Court certainly has never suggested that opposition to desegregation for

349. 417 U.S. 484 (1974).

350. *Id.* at 497 n.20. Certainly, the Court should be no less concerned about legislation which potentially may affect all women but could never affect men. In other equal protection cases, the Court has not required a showing that *all* women have to be affected by the state action, only that women potentially may be affected. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1973).

351. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

352. *See* Siegel, *supra* note 7, at 269.

353. *See also* General Electric Co. v. Gilbert, 429 U.S. 125 (1976) for similar analysis. Congress in response passed the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1988)), which provides that distinctions on the basis of pregnancy are sex-based for purposes of application of the Civil Rights Act.

354. 113 S. Ct. 753 (1993).

355. *Id.* at 760.

religious or moral reasons lost its race-based characterization because no specific animus towards African-Americans was evidenced.

Justice Stevens, in dissent, rejects Justice Scalia's analysis requiring evidence of animus towards women. Citing *Bradwell* as an example of how stereotyping can be as "invidiously discriminatory"[356] as hostility, Justice Stevens concludes that because the victims of the demonstrators are solely women, the conduct may "reasonably be presumed to reflect a sex-based intent."[357] It is precisely because only women become pregnant that they are targeted. Since only women can have abortions, it was clear that the demonstrators' "immediate purpose was to affect the conduct of women."[358] Stevens concludes that because the capacity to become pregnant is associated only with one sex, pregnancy-based regulation should be analyzed as gender-based regulation uniquely targeted at women involving the primary characteristic distinguishing women from men.[359]

The treatment of difference is a profound societal question as well as a complex legal problem. The fact of difference too readily becomes a justification for disadvantage. The capacity to become pregnant is uniquely women's. Regulation of pregnancy, which focuses on a characteristic unique to women, should be considered as much a facial regulation of gender as if the regulation specifically identified women as the designated class.[360] Inquiry should focus on whether the legislative objective and means are in fact infused with assumptions about women and reproduction.

The state's interest in protecting unborn life initially may appear to justify reproductive regulation.[361] The impact of tradition however is significant in evaluating the state's interest in controlling pregnancy. With pregnancy and motherhood perceived as the "natural" functions of women, the state merely appears to be mandating that "nature" be allowed to take its course. If one also considers the legal history of control of women by others and the cultural expectations that women serve others needs at the expense of their own, it becomes easy to see how both society and law may deem it justified to compel women to bear children, even when their own lives are at risk.[362] Finally, if one considers the historic distrust of women's decision-making ability, it is but

356. *Id.* at 786 (Stevens, J., dissenting).
357. *Id.* at 787.
358. *Id.*
359. *Id.* Justice O'Connor expressed similar reasoning in her dissent. *Id.* at 801 (O'Connor, J., dissenting).
360. Professor Sunstein argues that abortion regulation should be viewed as de jure discrimination and that it is inappropriate to consider it as a gender neutral law with discriminatory impact because women are the sole targets of the regulation. Sunstein, *supra* note 19, at 33 (1992).
361. The Supreme Court requires that gender based classifications bear a substantial relation to an important state interest. Craig v. Boren, 429 U.S. 190, 197 (1976). As part of this inquiry, the Court must consider "whether the statutory objective itself reflects archaic and stereotypic notions" about women. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
362. *See In re* A.C., 533 A.2d 611 (D.C. 1987) where the court declined to stay a lower court's order that a terminally ill woman be forced to undergo a caesarean section when her wishes were unclear. *Id.* at 612–13. The woman and the child both died shortly thereafter. *Id.* at 612. For an account of the facts of this case that argues that the woman's wishes *were* clear and that she did not wish to undergo the surgery, see CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 31–32 (1993).

a small step to validate regulations intended to pressure women into bearing children.[363] The state truly may be interested in preserving life. This interest does not preclude however additional assumptions about women which make it seem reasonable to compel childbearing. These assumptions take on more dramatic dimension when one considers the legal system has otherwise scrupulously protected individuals from compelled medical assistance or intrusion.[364] The state has the same generalized interest in preserving life when a competent adult refuses medical treatment, or when a person refuses to submit to bone marrow harvesting to save a relative's life.[365] In none of these cases does the state's interest in protection of life override the individual choice. Only when the issue becomes pregnancy, whether it be abortion, forced caesarean, or fetal protection, does it become acceptable to compel persons to use their bodies for the protection of another, as determined by the state.[366] The traditions from which these assumptions derive make the means of achieving the state's interest impermissible. The drastic dimensions of the state's choice of means—bodily compulsion—can be appreciated only if one is able to separate the extent and nature of the compulsion from the subtext of tradition which

363. *See supra* notes 307–10 and accompanying text. In the abortion funding cases, the Court has recognized and approved legislation intended to pressure economically disadvantaged women to bear children by prohibiting public financing of abortions while funding childbirth. *See* Harris v. McRae, 448 U.S. 297, 325–26 (1980) (upholding Hyde Amendment restricting government funding of Medicaid abortions); Maher v. Roe, 432 U.S. 464, 478–79 (1977).

364. *See, e.g.*, McFall v. Shrimp, 10 Pa. D. & C.3d 90 (1978). The court, in holding it had no authority to compel a relative to submit to a bone marrow transplant necessary to save plaintiff's life, stated, "Our society, contrary to many others, has as its first principle, the respect for the individual....For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence." *Id.* at 91–92. Compare this language with the language in *In re* A.C., 533 A.2d 611 (D.C. 1987). The court, in ordering a caesarean section against the dying mother's wishes, found that "[w]ith a viable fetus, a balancing of interests must replace the single interest of the mother...." *Id.* at 614–15. *See also* Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990) where the court refused to compel twins to submit to bone marrow harvesting to save their terminally ill half-brother, and *In re* Richardson, 284 So. 2d 185 (La. Ct. App. 1973) where court refused to order a boy to donate a kidney to his sister.

The only time the court compels medical procedures is when a parent withholds life-saving treatment from a child because of religious beliefs. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); Jehovah's Witnesses v. King County Hospital Unit No. 1, 278 F. Supp 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968). Reproductive autonomy issues are more analogous to the refusal to aid cases than the parental consent cases. First, the parental consent cases do not involve medical intrusion into the parent's bodies. Second, children are clearly "persons" within meaning of the Constitution, whereas fetuses are not. Roe v. Wade, 410 U.S. 113, 158 (1973). However, some lower courts have applied the parental consent doctrine to unborn fetuses. *See, e.g.*, Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (1981) (custody of fetus of woman who refused caesarean granted to state so court could order caesarean for interest of fetus); Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964) (court appointed guardian for fetus and ordered guardian to consent to blood transfusion over mother's objection). *But see, In re* Steven S. 178 Cal. Rptr. 525 (Ct. App. 1981) where court held unborn fetus was not a "person" under statute authorizing adjudication of dependency.

Although abortion involves more than a refusal to aid since it requires physical expulsion of the fetus, it at essence is a refusal by the woman to allow her body to be used by others.

365. *E.g., In re* Karen Quinlan, 355 A. 2d 647 (N.J. 1976); *In re* Conroy, 486 A.2d 1209 (1985); McFall v. Shrimp, 10 Pa. D. & C.3d 90 (1978).

366. One distinction between the draft, a state compulsion visited solely on males at this point, and compelled pregnancy is the compensation offered by the state for the sacrifice requested. Another distinction of course is that the draft does not have to be male only. Pregnancy does not provide a gender option.

correlates women with childbearing. At bottom the state's interest in the protection of potential life is bought by compelling women to bear children.[367] The state must demonstrate that this interest does not derive from impermissible presumptions about or from discriminatory devaluing of women.[368] The traditions examined in this article make it unlikely that regulations which compel pregnant women to use their bodies in opposition to their own choices will easily withstand constitutional scrutiny.[369] It is the very nature of the compulsion which makes such regulation suspect for it reinforces the tradition-rendered stereotyping of women. So the harm of coercive reproductive regulation is two-fold: the sacrifice of bodily integrity to the state and the perpetuation of impermissible attitudes regarding women.

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367. States' willingness to authorize exemptions from abortion restrictions based on incest, rape, severe birth defects, physical harm to woman, etc., strongly suggests that the legislative goal of protection of potential life is fraught with assumptions about women's behavior as it relates to reproductive function. Exemptions for rape and incest establish a "fault" standard whereby women who involuntarily engage in intercourse are excused. The exemptions for severe birth defects reflect a state conclusion that the protection of potential life does not prevail in all circumstances. An exemption based on physical harm to the woman suggests that a woman's only legitimate interest in not carrying a pregnancy to term must be grounded in physical damage. Siegel, *supra* note 7, at 365.

Attempts to restrict abortion when these mitigating factors are not present convey the strong messages of societal distrust of woman's moral judgment and belief that woman should sacrifice her own interests to her reproductive function, messages grounded in the traditions examined in this article. *See, e.g.*, An Act Relating to Abortion; Prohibiting Abortion Except Under Specified Circumstances, S. Bill 23, 1991 Utah ALS 23 (amended by S. Bill 4, 1991 Utah ALS) (providing that a pregnant woman's liberty interests may outweigh an "unborn child's" right to protection in the limited circumstances when an abortion is necessary to protect the woman's life or to prevent "life-threatening" damage to her health or in cases of rape or incest; allowing for abortions when the "child" would be born with "grave and irremediable physical or mental defects that are incompatible with sustained survival"); H. Bill 112, 1991 Louisiana ALS 26 (providing that termination of pregnancy is unlawful except (1) to preserve life or health of "unborn child;" (2) to save the life of the "mother;" (3) the pregnancy resulted from rape or incest (the rape or incest must have been reported to police)).

After the U.S. Supreme Court decided Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the Utah statute was declared to be an unconstitutional infringement on a woman's liberty interest with regard to pre-viability abortions before 21 weeks gestational age. Jane L. v. Bangerter, 809 F. Supp. 865, 870 (D. Utah 1992). The Louisiana statute was similarly found to be unconstitutional under *Casey*. Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1414 (1993).

368. *See, e.g.*, Mississippi Univ. for Women v. Hogan 458 U.S. 718 (1982). "[T]he party seeking to uphold a [gender classification] must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

369. The state's choice of means—physical and psychological coercion—is what is most suspect. The state's interest in protecting potential life could be advanced through more benign means, such as financial incentives to have children, development of programs to assist women with childcare and healthcare, or educational and employment opportunities to make it feasible and desirable for economically disadvantaged women to complete their pregnancies. These means surely would be more common "but for" improper assumptions about women's responsibilities to bear and care for children. The absence of such incentives in state programs suggests the state's interest in protecting life is improperly focused on compelling women to fulfill certain roles rather than genuinely advancing the protection of life.

In some areas, such as forced caesareans, the state has no less intrusive means available, except perhaps where better prenatal health care would reduce the incidence. In these cases, the choice of the woman should prevail in the same way that the choice of the person withholding aid prevails in medical refusal to aid cases. *See supra* refusal to aid cases cited in note 364 and accompanying text.

IV. CONCLUSION

In *Roe v. Wade*, the plaintiffs sought, and the Court accepted, an analysis of reproductive regulation grounded in tradition-based unenumerated rights.[370] The seeds of disruption of this analysis lie in the dissonance created by looking for traditions "so deeply rooted in our history as to be deemed fundamental" that protect women's reproductive autonomy. Our traditions concerning women and their reproductive capacity lie far outside the realm of individual liberty. Instead, tradition has ordained women as mothers and wives and condemned their powers of reason and intellect. The Court has struggled to define traditions of liberty broadly enough to include women and reproduction, ignoring the weight of a tradition of discrimination imposed upon women because of their ability to bear children. The result has been a jurisprudence of half-truths. Certainly liberty is the theoretical essence of reproductive autonomy. But the historical reality of culturally embedded assumptions about women creates significant societal ambivalence about ceding the awesome power to bear children to the full control of women. The tradition of state control of women makes it too easy for discriminatory assumptions about women and their reproductive functions to seem reasonable. It is time for the Court to acknowledge the significant impact these traditions have upon reproductive control issues and analyze these issues within the context of discrimination engendered by the cultural judgment that "biology is destiny."

370. 410 U.S. 113, 129, 164 (1973). The assertion of privacy theory as a basis for abortion rights was supported by a broad coalition of interest groups, including physicians, family planners, some feminists, and libertarians. The success of *Griswold* and the legal precedent supporting non-interference in family and marital matters made substantive due process an attractive basis for argument, although many feminists at that time also saw abortion as a gender equality issue. *See* Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 40–44 (1990–91).