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Honor Thy Mother: The Supreme Court's Jurisprudence of Motherhood

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The United States Supreme Court has spoken more directly about what it means to be a father,[1] than about what it means to be a mother. It has considered issues relating to women's physical and social reproductive roles in four major areas: comparative family relationships (unwed mothers versus unwed fathers), dependent mothers, mothers in the workplace, and the right to choose or refuse to become a mother. In the first set of cases, the Court has come a long way since the 1970s toward recognizing the rights of unwed *fathers* to establish or protect family relationships, but it still differentiates between them and mothers.[2] In this arena, the Court equates motherhood with automatic "caring," in contrast to fatherhood. As much as this sounds like valuing motherhood, it is simply another way to say that biology equals destiny. The positive stereotypes, moreover, swiftly give way in the second area.[3] When the Court considers *dependent* unmarried motherhood, it assumes that *poor* women cannot be trusted to care for their children properly. Thus, all kinds of coercive and manipulative measures imposed on poor women in the name of public policy are acceptable. In the third sphere, the Court clearly affords working mothers more respect today than it did before the 1970s.[4]

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This Article is dedicated to my mother, Grace Oren, and to my spouse, Bruce Palmer, who has made it possible for me to care for her.

1. *See generally* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships: Biology Alone Safeguards the Public Fisc.* 11 WM. & MARY J. WOMEN & L. 47 (2004). [hereinafter Oren, *Paradox*].

2. *See infra* Part I.

3. *See infra* Part II.

4. *See infra* Part III.

The Court has rejected older eugenicist ideas about the "mother of the race" in favor of accepting women in the work place on equal terms. This view, however, also has its problems. With the exception of a case upholding the Family and Medical Leave Act,[5] it is founded on the assumption that motherhood is acceptable only when it does not interfere or can be treated as a neutral factor in the work place. Finally, with respect to the right to refuse or to choose motherhood, the Court recognized this as a fundamental right in 1973.[6] Almost immediately thereafter, however, it also ruled that government need not equip women with the resources necessary to make the choice in good health. That combination of rulings did not honor motherhood by choice. Moreover, even the underlying liberty interest may be at risk today.

Instead of offering a coherent legal analysis of these selective aspects of motherhood, the Court has treated them as unrelated. Instead of grappling with women's complex experience of motherhood or acknowledging how sex, class and race matter in this regard, the Court too often has reduced its analysis to simple assumptions about generic "Motherhood." Despite some positive developments and much lip service, the Court's jurisprudence of motherhood fails to follow one of the fundamental precepts of our culture, "Honor Thy Mother."[7]

5. Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 728-32 (2003) (ruling that state employees may receive money damages for violations of the Family and Medical Leave Act because it was enacted in valid reliance on Congressional power to enforce the Fourteenth Amendment to ban gender-based discrimination in the workplace).

6. *See infra* Part IV.

7. The Judeo-Christian Bible provides in the Fifth Commandment, "Honor thy father and thy mother; that thy days may be long in the land which the Lord thy God giveth thee." Exodus 20:12. In post-revolutionary times, honoring motherhood became an important political precept. The ideals of "Republican Motherhood," a term coined by historian LINDA KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980), meant that women played an important role in educating their sons in the civic virtue necessary for the survival and success of the new nation. As a result, women's education became an important issue at this time. Thereafter, many famous Americans attributed their success to their mothers. For example, the following quotation has been attributed to George Washington (1732-1799): "My mother was the most beautiful woman I ever saw. All I am I owe to my mother. I attribute all my success in life to the moral, intellectual and physical education I received from her." – George Washington (1732-1799). Abraham Lincoln (1809-1865) echoed the sentiment: "All that I am or ever hope to be, I owe to my angel Mother." Stock Solution, Tribute to Motherhood, http://www.xmission.com/~tssphoto/mom/trib.html (last visited February 9, 2006). The celebration of Mother's Day is the commercial apotheosis of this precept. Anna Jarvis was the influence behind the version of mother's day that we celebrate today. (Julia Ward Howe previously had proposed a version dedicated to world peace.) In 1905, Jarvis reputedly swore at the graveside of her mother Anna Reeves Jarvis, that she would dedicate herself to accomplishing her mother's project to establish a Mother's Day to honor mothers living and dead. The ceremonies spread to virtually all the states before World War I, and an official day was first recognized by a congressional resolution in 1914. Jone Johnson Lewis, Anna Jarvis and Mother's Day — Mother's Day History, http://womenshistory.about .com/od/mothersday/a/anna_jarvis.htm (last visited Feb. 9, 2006); National Women's History Project, Events: The History of Mother's Day, http://www.nwhp.org/events/moms-

I. UNMARRIED MOTHERS VERSUS UNWED FATHERS: MOTHERHOOD "IN THE BIOLOGICAL AND SPIRITUAL SENSE" ("CARING" PER SE?)

With the rise of what has been called the "newer equal protection," in the late 1960s and early 1970s, the Court upset some laws because of invidious distinctions based on the birth status of children ("illegitimacy"), the marital status of biological mothers or fathers, or legal differentiation between women and men in the treatment of non-marital families. Similarly, the Justices found a number of provisions touching on these relationships offended due process.[8] Although the overwhelming majority of these cases concerned children and their putative fathers, there were a few that explicitly involved claims by unmarried mothers or their children. Insofar as the Justices writing the father opinions felt obliged to establish that unmarried parents of either gender were or were not similarly situated, moreover, they too reflected on "motherhood."

The law of "bastardy," as it was called at English common-law, was harsh. The nonmarital child was "*filius nullius*," i.e., child and heir of no one.[9] By 1900, however, the American "republican modification" of traditional law generally recognized a legal unit consisting of children and their unmarried mothers, with consequences affecting custody, support, and inheritance.[10] Non-marital paternity, however, gave rise to only limited rights and responsibilities, mostly designed to protect the public purse from having to support children born outside of marriage.[11] By 1968, when the Court considered two unmarried *mother* laws from Louisiana, the majority was willing to find constitutional fault with what it saw as a remaining anomaly in that state's approach to "sanctions against illegitimacy."[12] In *Levy v. Louisiana*,[13] five "illegitimate children" sued a doctor and insurance company for damages for the wrongful death[14] of their mother and to

day/history-of-moms-day.html (last visited Feb. 9, 2006).

8. For discussion of many of these cases, see generally Oren, *Paradox*, *supra* note 1.

9. Michael Grossberg, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 197 (1985).

10. Grossberg, *supra* note 9, at 208-212, 224. *See also,* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960 102 (1988) (while illegitimacy was considered a problem, by the 1890s critics believed that it was best to keep mother and child together. "This belief represented a victory for the sentimental cult of motherhood.").

11. Grossberg, *supra* note 9, at 215-217.

12. Glona v. American Guarantee & Liability Insur. Co., 391 U.S. 73, 74 (1968).

13. *Id*. at 68.

14. Wrongful death actions compensate surviving beneficiaries for the loss of their decedents. Wrongful death actions did not exist at common law, but are solely the creation of statutes. The dissent in *Glona* emphasized this distinction, and claimed that a recent survey of American law showed that the statutes using the word "child" or "children" defined those beneficiaries as legitimate children only. Glona, 391 U.S. at 76, *citing* S. Speiser, RECOVERY FOR WRONGFUL DEATH 587 (1966).

recover as her survivors for the pain and suffering she experienced.[15] In a companion case, *Glona v. American Guarantee & Liability Insurance Co.,*[16] an unmarried mother sought recovery for the wrongful death of her child, who was killed in an automobile accident.[17] Louisiana, however, refused recovery under these two circumstances on the grounds of avoiding incentives for immorality, and punishing sin, respectively.[18] In two short opinions, Justice Douglas dismissed this reasoning as irrational.[19] Louise Levy

> gave birth to [the five children that sued for her death] and . . . they lived with her; . . . she treated them as a parent would treat any other child; and . . . she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense in a parochial school.[20]

The rights at issue concerned the "intimate, familial relationship between a child and his own mother."[21] Justice Douglas decried letting the wrongdoer go free because of the legal status of the children's birth.[22] He defended Louise Levy's motherhood: "These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."[23] In *Glona,* the Supreme Court's conclusion was the same: a biological mother is a mother, even where she never married the father.[24] Thus "where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock."[25]

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15. *Levy*, 391 U.S. at 69. Louisiana law provided that the deceased's right to recover for all non-property damages he suffered survived for one year after the death and could be inherited and recovered by certain named survivors.

16. 391 U.S. 73 (1968).

17. *Glona*, 391 U.S. at 74.

18. *See* Levy, 391 U.S. at 70; Glona, 391 U.S. at 75. The two cases posed somewhat different problems, because in *Levy* it was the innocent child who was denied recovery, while in *Glona*, it was the "sin" of the mother that was being punished by refusing her a remedy.

19. *Levy*, 391 U.S. at 71; Glona 391 U.S. at 75.

20. *Levy*, 391 U.S. at 70.

21. *Id.* at 71.

22. *Id*.

23. *Id*. at 72.

24. *Glona*, 391 U.S. at 75-6.

25. *Id*. at 76. *Compare* Califano v. Boles, 443 U.S. 282 (1979), upholding a Social Security provision of "mother's insurance benefits" for persons dependent on a wage earner who became widowed or divorced that excluded the mother of a non-marital child. Justice Rehnquist wrote for a divided Court that there was a "rational relationship" to the government's desire to ease the economic dislocation that occurs when a wage earner dies, forcing the surviving parent to choose between working or staying home to take care of the children. Congress could assume that this dislocation occurred in a marital, but not typically

By contrast to the brevity and bold assertion of irrationality in the majority opinions of *Levy* and *Glona*, the Court splintered in *Parham v. Hughes*,[26] which involved Georgia's wrongful death statute. Georgia prohibited a father who failed to legitimate his child from recovering for his son's wrongful death, while an unmarried mother was entitled to do so.[27] The plurality, the concurring opinion, and the dissent did not even agree whether the pertinent classifications to be examined were based on gender. Because "mothers and fathers of illegitimate children are not similarly situated," the plurality was convinced that the statute was not based on any invidious "overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child."[28] The classification therefore is not men versus women, mothers versus fathers, but "fathers who have legitimated their children" versus those who have not. As a result, the plurality found it unnecessary to apply the heightened (intermediate) scrutiny that the Court had come to apply to gender-based distinctions, and consequently decided it was easy to uphold the law.[29]

Like the dissent, concurring Justice Lewis F. Powell recognized gender classifications when he saw them, but unlike them, he thought that the statutory differences were justified because fathers of illegitimate children are not similarly situated to mothers.[30] The identity of mothers is clear, but it can be difficult to establish the father of an illegitimate child: "The marginally greater burden placed upon fathers [to legitimate] is no more

in a non-marital family. Using a low level of scrutiny for the discrimination between classifications of mothers, the Court also dismissed the "incidental and speculative impact" on classifications of children (marital versus nonmarital). Therefore, there was no discrimination against them either. By contrast to this result, the Court had previously invalidated the exclusion of fathers from these benefits. *See,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). In that case, the Court reasoned that despite any empirical basis for the belief that fathers are generally wage-earners, while mothers stay at home to care for children, the one-sided statute constituted a prohibited generalization that violated the rights of women workers who received less coverage for their families. *Id.* at 645. The Court rejected the argument that the preference for "'mothers" over fathers was benign and designed to compensate stay at home mothers for the financial difficulties they faced if they were forced to support their families. Rather, the Court concluded that the congressional purpose was to allow a child who had lost one parent to have the benefit of the personal attention of the other parent, who would not be forced to go out to work. *Id.* at 648-49. Distinguishing between mothers and fathers on that basis was wholly irrational, as each "parent" enjoyed the same constitutional right to the care, custody and companionship of his or her children. *Id.* at 651-52.

26. 441 U.S. 347 (1979). Justice Stewart, who dissented in *Levy* and *Glona*, wrote the plurality opinion, 441 U.S. at 348. Justice Powell concurred in the judgment, *id*. at 359. Justice White wrote for the four dissenters. *Id.* at 361.

27. *Id*. at 348-349.

28. *Id.* at 356.

29. *Id*. at 353-54, (citing Reed v. Reed, 404 U.S. 71 (1971); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973), and Craig v. Boren, 429 U.S. 190 (1976)).

30. *Id*. at 359-60 (Powell, J., concurring in judgment).

severe than is required by the marked difference between proving paternity and proving maternity — a difference we have recognized repeatedly."[31] Lemeul Parham's father had given his son his name, signed his birth certificate, visited him, and contributed to his support before the child's death.[32] But the unmarried Mr. Parham had never taken the additional step available to him under Georgia law of legitimizing his son. The father had it in his own hands to answer the State's concerns about proof of paternity, but he failed to do so. Thus, Justice Powell reasoned that the distinction between mothers and fathers satisfied the demands of a standard that required means that substantially related to an important governmental objective.[33]

The dissent agreed with Justice Powell that the Georgia statute treated fathers differently than mothers by requiring a certain kind of proof of paternity from unmarried men.[34] They were amazed, however, at a circular reasoning that justified this distinction based on still another discriminatory difference: fathers had to legitimate their children; mothers did not.[35] None of the interests proffered by the State of Georgia justified the discrimination between mothers and fathers. The dissent rejected any notion that the statute helped the State promote "a legitimate family unit" or set a standard of morality, as much too tenuous a connection to satisfy heightened scrutiny.[36] Why would this be true for a rule that created obstacles for fathers, when unmarried mothers were not similarly burdened? As to proof problems, the dissent was not convinced of their urgency in this context. While the Court's intestacy cases displayed sensitivity to the need to resolve quickly the claims of heirs to property and to settle estates, there was "no comparable interest in protecting a tortfeasor from having his liability litigated and determined in the usual way."[37]

Finally, the dissent objected to a stereotype that painted all unmarried fathers who failed to legitimate their children as "suffer[ing] no real loss from the child's wrongful death."[38] Maybe it was true of "certain" of those parents, but this kind of blanket presumption that unmarried fathers never maintain as close a relationship to their children as unmarried mothers was unacceptable.[39] The dissent reiterated the Court's message of *Caban v. Mohammed*[40] that no "broad, gender-based distinction . . . is required by

31. *Id*. at 360 (citing Lalli v. Lalli, 439 U.S. at 268-69).
32. *Id*. at 349.
33. *Id*. at 360.
34. *Id*. at 361 (White, J., dissenting).
35. *Id*.
36. *Id*. at 362-63.
37. *Id*. at 364. For the checkered path of the father cases, *see generally* Oren, *Paradox*, *supra* note 1.
38. *Parham*, 441 U.S. at 366.
39. *Id*.
40. 441 U.S. 380 (1979).

any universal difference between maternal and paternal relations at every phase of a child's development."[41] The footnote to this statement is very interesting. The dissent cites statistics reflecting that in "1977, 15.5% of all children and 51.7% of the black children born in the United States had unmarried parents."[42] It continued, "[t]he suggestion that anything approaching a majority of the fathers of these children would 'suffer no real loss from the child's wrongful death' is incredible."[43] The footnote facts, cited without a context in this case, imply a distinct racial point: Can the Court accept without constitutional cavil a blanket generalization that denigrates the caring and attachment of so many black fathers?

According to the *Parham* dissenters, the stereotypes incorporated into Georgia's statutory scheme went beyond the assumptions about *unmarried* fathers. Indeed, by state law, even for a legitimate child, the father "was absolutely prohibited from bringing a wrongful-death action if the mother is still alive, even if the mother does not desire to bring suit and even if the parents are separated or divorced. The incredible presumption that fathers, but not mothers, of illegitimate children suffer no injury when they lose their children is thus only a more extreme version of the underlying and equally untenable presumption that fathers are less deserving of recovery than are mothers."[44] While the dissenters and the plurality in *Parham* debated the quality of fatherhood and what assumptions state law may make about it, neither had to strain to accept the quality of *motherhood* embraced in the Georgia statute: mothers cared and suffered when they lost their children, whether they were married to the fathers or not; the only question was whether fathers, or enough of them, shared this characteristic.

I have written elsewhere about the full line of constitutional cases in which unmarried fathers attempted to establish or protect personal relationships with their children.[45] Those decisions also provoked debate among the Justices about just how much fathers cared in comparison to mothers. Were unmarried fathers really similarly situated to unmarried

41. *Parham*, 441 U.S. at 367 (citing Caban, 441 U.S. at 380).

42. *Id*. (citing U.S. Dept. of HEW, National Center for Health Statistics, 27 Vital Statistics Report, No. 11, p. 19 (1979)).

43. *Id*. at 367, n.14.

44. *Id*. at 368. Wrongful death recoveries were initially limited to pecuniary loss. Subjected to great criticism, this restriction gave way (through legislative action and judicial interpretation) to the idea that the loss of companionship of a child was a compensable injury, just like the loss of consortium of a spouse. For example, in 1983 the Texas Supreme Court ruled that a parent's recovery under the wrongful death statute includes the loss of companionship and society and damages for mental anguish suffered as a result of the child's wrongful death. Sanchez v. Schindler, 651 S.W.2d 249, 253 (Tex. 1983). The destruction of the parent-child relationship results in mental anguish, and it would be unrealistic to separate injury to the familial relationship from emotional injury. *Id.* "The real loss sustained by the parent . . . is the loss of love, advice, comfort, companionship, and society." *Id.* at 251.

45. *See* Oren, *Paradox*, *supra* note 1, at 50-70.

mothers, who could be presumed to have a truly familial relationship with their children by virtue of birth alone? Or, was more required from these men? The Court decided in a series of cases where mothers apparently wanted their husbands to adopt or otherwise legally step into the shoes of the child's biological father that in order to establish constitutionally protected rights, unmarried fathers had to demonstrate "biology 'plus,'" i.e., that they actually had some kind of developed relationship to their children.[46] The disputes between majority and dissenting opinions in these cases illuminate the presumptions that the jurists themselves made about motherhood and fatherhood, at least of the unmarried variety. So, for example, the Court quite properly decided in *Stanley v. Illinois*,[47] that the State of Illinois could not presume that the unmarried father of three non-marital children was unfit to raise them after the death of their mother, removing them from his legal custody without any kind of a hearing.[48] He had "sired and raised" them for 18 years, giving rise to a clearly protected constitutional interest in his continued family relationships. Mothers could not be treated this way, and the Court concluded that a father like Mr. Stanley also could not.[49] However, the State of Illinois argued, and the dissent agreed, that unwed fathers were different than unwed mothers. Not only was it easier to prove motherhood, but also mothers in general cared about their children, while nonmarital fathers typically did not.[50] If they did care, they could either marry the mother, or, at the least, legitimate the child.[51] Following a case in which a biological father failed to show that he had enough of a relationship to block the adoption of his child by the mother's husband,[52] the Court again returned to a debate about the differences between motherhood and fatherhood. In *Caban v. Mohammed*,[53] the majority was impressed with the quality of Mr. Caban's relationship to his older non-marital children: his name was on their birth certificates; he had lived with them; and he continued to visit and contribute to their support even after his separation from their mother and the marriages each parent contracted with someone else. Having "come forward to participate in the rearing of his child" in this fashion, Mr. Caban earned the perquisites of true fatherhood and could block adoption by another man.[54]

46. *Id*. at 118.
47. 405 U.S. 645 (1972).
48. *Id*. at 649.
49. *Id*. at 650-58.
50. *Id*. at 666 (Burger, J., dissenting).
51. *Id*. at 664.
52. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978). The plaintiff based his equal protection claim on distinctions between married and unmarried fathers, but did not raise a gender challenge. *Id.* at 253 & 254 n.13.
53. 441 U.S. 380 (1979).
54. *Id*. at 392.

The *Caban* dissenters, however, insisted that unwed motherhood and fatherhood were different.[55] Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. Moreover, while the mother's identity is obvious, the father's may never be known. While unwed motherhood meant having to make decisions about the child's future, such as adoption, unwed fathers might float in the wind. If they were allowed to intervene later, they could upset the whole scenario of secure newborn adoption.[56]

The debate over mothers and fathers subsequently was reprised in *Lehr v. Robertson,*[57] which involved a challenge to New York State's "putative father registry" law. Because he was the wrong kind of unmarried father, Mr. Lehr lost out. He had failed to "demonstrat[e] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,"[58] and he had not even managed to send a postcard to the putative father registry to inform the state of his interest in his offspring.[59] As a result, he lost the opportunity presented by his biological link, to ripen it into a relationship protected by the Constitution. This was a Due Process, not an Equal Protection argument, but the majority also insisted that a reluctant unmarried father was not similarly situated with the unmarried mother.[60] Therefore, any gender distinction was easy to justify. Dissenters White, Marshall, and Blackmun, however, were not convinced that the mere biological relationship was of such little weight, especially where the issue at stake was the simple right to a hearing.[61]

In 2001, a divided Court once again considered the differences between unwed motherhood and fatherhood. *Nguyen v. INS*[62] was a case in which an American non-marital father, who had raised the now-adult child that he sired by a non-citizen mother, unsuccessfully challenged a gender-based provision of immigration law. Children born abroad to an unmarried American citizen mother (and alien father) were eligible for United States citizenship upon simple proof of the biological relationship, without much more.[63] Reverse the circumstances, however, and the children of unmarried American men faced substantially greater obstacles to derivative citizenship.[64] In this case, the majority equated biology to destiny for both

55. *Id*. at 404 (Stevens, J., dissenting).
56. *Id*. at 404-05.
57. Lehr v. Robertson, 463 U.S. 248 (1983).
58. *Id*. at 261.
59. *Id*. at 251.
60. *Id*. at 267-68.
61. *Id*. at 271 (White, J., dissenting).
62. Nguyen v. INS, 533 U.S. 53 (2001).
63. 8 U.S.C. § 1409(c) (1988) (there was also a residency requirement for the citizen parent 8 U.S.C. § 1409(a), incorporating by reference, 8 U.S.C. § 1401(g)).
64. 8 U.S.C. § 1409(a) (the unmarried citizen father had to demonstrate proof of the biological relationship by clear and convincing evidence and, *inter alia*, that he agreed in writing to support the child until the age of 18; *and* that *before the child reached 18,* he did

mothers and fathers. Congress was allowed to differentiate based on the "incontrovertible" fact that mothers and fathers are not similarly situated.[65] While the majority held that a woman who gives birth to a child is clearly her biological mother, they ruled that even in this day of DNA testing, the proof of paternity is less secure.[66]

The second "important governmental interest" the Court said was furthered by the statute is even more telling about the *Nguyen* majority's view of the differences between unwed motherhood and fatherhood. The Court insisted that Congress recognized that the "opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship."[67] Unmarried citizen fathers, however, who may be stationed around the world spreading their progeny with little regard for the consequences, lack this birth-given opportunity.[68] As a result, even though in the case before the Court there was an absent alien mother and an American father with a developed relationship to his child,[69] opportunity apparently could trump reality. Rather than relying on forbidden generalizations or stereotypes, the majority held that Congress permissibly constructed its scheme with the "enduring physical differences" between women and men (mothers and fathers) in mind.[70]

The Court's use of an important decision written by Justice Ginsburg to trumpet its point about the physical differences between men and women, however, is misleading, and very disturbing from the point of view of feminist jurisprudence. Immediately after the quoted words, the Virginia Military Institute v. U.S. ("*VMI*")[71] opinion continues. Justice Ginsburg

one of several things to legally establish his paternity or to legitimate the child. Joseph Boulais, the father in the *Nyguen* case had in fact brought his young son back from Vietnam and raised him. He did not recognize the importance of taking the additional formal steps until efforts were made to deport his 22-year-old son, who had been convicted of serious criminal offenses. The father's subsequent proof of biological paternity and adjudication in a Texas court was rejected for citizenship purposes as occurring too late under the statutory scheme); *Nguyen*, 533 U.S. at 57.

65. *Nguyen*, 533 U.S. at 63.

66. *Id*. at 54.

67. *Id*. at 65.

68. *Id*. at 64-65.

69. *Id*. at 57 (Joseph Boulais was a civilian employee in Vietnam who fathered a son out of wedlock with a Vietnamese woman in 1969. After his relationship with the mother ended, the family of the father's new girlfriend cared for the boy, until his father brought him to Texas at the age of 6, thereafter raising him to adulthood).

70. *Id*. at 68 (*citing* Virginia Military Institute v. U.S. (VMI), 518 U.S. 515, 533 (1996)).

71. U.S. v. Virginia, 518 U.S. 515 (1996) (holding that Virginia's male-only military and leadership academy, coupled with a female only institution that lacked comparable prestige and resources, violated the equal protection of the laws).

explained: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' . . . to 'promot[e] equal employment opportunity,'. . . to advance full development of the talent and capacities of our Nation's people." The *Nguyen* biology-is-destiny holding, however, fits none of these categories. It is ironic, and perhaps dangerous, that the Court uses *VMI*, a case with one of the strongest rulings against gender bias, to justify the *Nguyen* result with its tepid application of intermediate scrutiny. This is not good for women in any sense. By reducing parentage to the opportunity to be present at birth, the Court denies respect to a man who was a true father to his son, but it also limits the sphere of motherhood as well (to mere presence at birth).

Justice Sandra Day O'Connor's dissent in *Nguyen* reminded the majority that laws were to be examined quite closely for invidious "overbroad sex-based classifications."[72] Hypothetical government purposes loosely connected to such categories do not pass muster under gender-based Equal Protection jurisprudence. Thus, the dissent found it easy to dismiss the first purported goal of the statute — ensuring the existence of a biological relationship.[73] While mothers suffered no extra burdens in proving the biological relationship, even with the help of modern DNA testing fathers faced insurmountable obstacles if they failed to make their proof before the child turned age 18 and in the prescribed manner.[74]

The dissent's second criticism is even more persuasive: How can the mere "opportunity" to develop a parent-child relationship be more important than the reality?[75] Even if opportunity counts, Congress could choose a sex-neutral alternative that required that a parent be present at birth or have knowledge of the birth.[76] Instead, it adopted a rule that only crudely fit the means to the purported ends, something that may be acceptable in ordinary constitutional review, but which is banned when a classification meriting heightened scrutiny, such as gender, is at issue. Stereotypes, not physical differences between men and women, underlay the statute and therefore the dissent would find it invalid.[77] The dissenting Justices were unconvinced that the sex-based difference in the law "substantially relate[d] to the achievement of the goal of a 'real, practical

72. *Nguyen*, 533 U.S. at 75 (O'Connor, J., dissenting, joined by Justices Ginsburg, Souter, and Breyer).

73. *Id*. at 79 (O'Connor, J., dissenting).

74. *Id*. at 80.

75. *Id*. at 84.

76. *Id*. at 86.

77. *Id*. at 87.

relationship'" between citizen parent and child.[78] Instead, they saw a stereotype in action — "the generalization that mothers are significantly more likely than fathers. . . to develop caring relationships with their children."[79] This sentiment brings us back to the heart of the debate over unmarried motherhood versus unwed fatherhood: are mothers parents in the "biological and in the spiritual sense," while fathers who do not marry the mothers or timely legitimate their children are different?

Unwed fatherhood is problematic for the Court, provoking sharp dissent, and even some comments that suggest fatherhood is not the same in all communities or cultures. On the other hand, it seems that the Court equates giving birth, to motherhood, to a per se caring relationship with those biological children. In other words, biological motherhood *is* motherhood in the spiritual sense. One should not assume however, that this essentialist view of motherhood ("mothers are caring")[80] means that the Court honors mothers in a deeper sense that would provide social support for mothers in this society. The next set of decisions amply illustrates how apparently beneficent assumptions about motherhood can take a nasty turn in a different context, where the mothers in question are dependent, unmarried, and perhaps women of color.

II. DEPENDENT UNMARRIED MOTHERHOOD

Based on various state and local "Mother's Aid" program models,[81] the 1935 federal enactment of "Aid to Dependent Children" (later "Aid to Families with Dependent Children" or "AFDC") was gendered from its conception.[82] It was designed to facilitate "the care of dependent children in their own home."[83] In other words, at the outset, the federal program

78. *Id*. at 88-89.

79. *Nguyen*, 533 U.S. at 89 (the dissent condemned this generalization even where there was some empirical evidence in support, and it was not disrespectful to women as a class).

80. Any criticism of the essentialist view that mothers are automatically caring, is not meant to deny the empirical fact that mothers do most of the "caring" work in society at present, whether unpaid for children and the elderly, or in the paid labor market in the health services industries. *See, e.g.,* ANN CRITTENDEN, THE PRICE OF MOTHERHOOD; WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 7 (2002) (citing economist SHIRLEY P. BURGGRAF, THE FEMININE ECONOMY AND ECONOMIC MAN (1997) on caring for children and, increasingly, for the elderly).

81. Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions From Welfare 'Reform,' Family, and Criminal Law*, 83 CORNELL L. REV. 688, 733 n.236 (1998).

82. GORDON, *supra* note 10, at 105-107. Although Boston's Society for the Prevention of Cruelty to Children was established by middle-class progressive reformers and reflected their agenda, by 1920, even those social workers had come to support "mothers' pensions." Their embrace of this policy was driven in significant part by client demand from single or deserted women who needed to support their children and wanted to keep their families intact. Gordon also argues that the reformers' gender assumptions and desire to hold men responsible and to preserve filial ties, were in tension with the mothers' pension benefit. Nonetheless, that reform caught on anyway. *Id.* at 104.

83. Murphy, *supra* note 81, at 733 (citing 42 U.S.C. § 601 (1964)).

apparently acknowledged the value of caring stay-at-home mothers.[84] AFDC became the chief form of assistance to mothers and their children who were dependent on public largesse.[85] The 1960s, however, saw a sharp rise in the welfare rolls, provocatively and inaccurately blamed by some on alleged deficiencies in the "Negro family."[86] Critics have described a progression of work requirements imposed on dependent mothers that reflected notions about what is appropriate work for what kind of mother. Black mothers in the South were expected to work as domestics or farmhands in the 1960s. By the end of the decade, various kinds of incentives to enter the workforce were built into AFDC for dependent mothers, sometimes requiring participation in job training programs. In the early 1970s, the government required mothers of school-age children to register for work and training in order to be eligible to receive benefits. The 1988 Family Support Act also added mothers of 3-year-olds to the work requirement. Finally, when AFDC was replaced by Temporary Assistance for Needy Families (TANF) in the PRWORA in 1996, the work expectations became universal. That "reform" imposed maximum periods for receipt of benefits before turning mothers of children out into the work force along with everyone else. [87]

As a consequence of the fall-out from the increases in assistance rolls, along with other economic, social, and political developments, the public policy of dependency began to impose greater restrictions and personal indignities on the mothers and children on welfare.[88] Some states imposed "substitute father"[89] and stepfather and "male person assuming the role of spouse" even though not legally married to the mother ("MARS")[90]

84. Murphy, *supra* note 81, at 733. It is not clear, however, that the payments were seen as compensation for labor beneficial to society, i.e., the raising and caring for children. *See, e.g.,* Linda Gordon, *supra* note 10, at 107 (noting that nineteenth century preference to institutionalize children rather than aid the mother to keep them, meant that most of the children in institutions were only "half-orphans," with mothers who might have been able to care for them with assistance). For the history of mothers' pension welfare programs, *see* King, v. Smith, 392 U.S. 309, 320-21 (1968) (citing J. Brown, PUBLIC RELIEF 1929-1939, at 26-32 (1940)).

85. Murphy, *supra* note 81, at 733 & 732, n.235 (noting that "[w]omen — typically mothers who are divorced or separated from, or have never been married to, the fathers of their children — represent almost all of the adult Aid to Families with Dependent Children ("AFDC") recipients in this country.") (citing Jeffrey Lehman & Sheldon Danziger, "Ending Welfare, Leaving the Poor to Face New Risk, Forum Applied Res. & Pub. Pol'y Winter 1997, at 43-44 n.4 (Of the 4.8 million families that received AFDC benefits in a typical month in fy 1993, almost 90 percent were fatherless)).

86. *See* Oren, *Paradox*, *supra* note 1, at 94-95 (citing Frances Fox Piven & Richard A. Cloward, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 198 (2d ed. 1993)).

87. Murphy, *supra* note 81, at 735-36.

88. Oren, *Paradox*, *supra* note 1, at 96-97; Murphy, *supra* note 81, at 733-34.

89. *See* King v. Smith, 392 U.S. 309, 311 (1968) (invalidating these regulations on a statutory basis in the final days of the Warren Court).

90. *See* Lewis v. Martin, 397 U.S. 552, 553 (1970) (invalidating MARS regulations

regulations that denied benefits to children where the mother "cohabited" with, or lived together with a man in a spouse-type relationship, even if he was not a "parent" with an obligation of support to those children.[91] Some states staged unannounced home "visits," and terminated benefits to mothers who refused them.[92] The Social Security Amendments of 1974, moreover, directed all states to demand that mothers receiving AFDC cooperate in establishing the identity of the fathers of their children.[93] The enactment of the Family Support Act of 1988 required states to achieve the establishment of paternity in a certain number of AFDC cases, and subsidized those efforts with federal funds.[94] The 1984 Deficit Reduction Act ("DFRA") imposed "deemed income" rules that treated a household as a single filing unit, regardless of the fact that the fathers of some of the children included were supporting them independently.[95] In 1996, these developments culminated in a thorough-going overhaul which abolished AFDC in favor of Temporary Assistance to Needy Families (or "TANF"), premised on the notion of a time limit for assistance, after which virtually all family heads, including single mothers, would be expected to move into the private workforce.[96]

Commentators have debated whether the replacement of AFDC by TANF represented a departure from the view of motherhood as valuable that was allegedly once recognized by public policy; or was merely the apotheosis of long-term attitudes toward the "deviance" of single and dependent mothers.[97] For their part, after the Warren Court gave way to the Burger Court, the Justices generally deferred to these policies with their

as a matter of statutory interpretation).

91. *King*, 392 U.S. at 313-14 (by Alabama law a "substitute father" included any man who lived in the mother's home or visited it frequently in order to have sex with her, or had sex with her elsewhere, whether or not the children were his or he had any obligation of support to them).

92. *See* Wyman v. James, 400 U.S. 309, 310 (1971) (upholding New York State's unannounced visits).

93. *See* Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); S. REP. NO. 93-1356 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8154-55 (cooperation requirement for AFDC). *Cf.* 45 CFR § 232.12(b), 233.10(a)(1)(B); 42 U.S.C. § 608(a)(2), (requirement of cooperation for Medicaid); 42 U.S.C. § 1396k. (Cooperation requirement for Food Stamps). *But see* 7 U.S.C. §§ 2011-2030 (waiver of cooperation requirement for good cause); 42 U.S.C. § 602(a)(7)(A)(iii) (good cause waiver of cooperation requirement in domestic violence situations).

94. *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2348-50 (1988).

95. Deficit Reduction Act of 1984, 98 Stat. 494; 89 Stat. 1145; amended Section 402(a)(38) of the Social Security Act, 42 U.S.C. § 602(a)(38) (1982 ed. Supp. III).

96. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 1305 (2000)). *See* Oren, *Paradox*, *supra* note 1, at 97-98.

97. *See, e.g.,* Murphy, *supra* note 81, at 735-36 (noting the debate between Carol Sanger, who finds a policy shift that devalued mothers; and Martha Minow, who thinks that the latest changes marked no real departure from a class and race-ridden view of the "deviance" of unmarried mothers).

rigid and coercive views of proper family relationships. For example, federal law provided that a state agency that had "reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child . . . shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State."[98] Unobjectionable as this concern for children is, New York State chose to implement it through periodic, unannounced, and warrantless home visits.[99] Benefits were terminated if a recipient refused these conditions.[100] If viewed as an ordinary "search," these visits invaded the very core of privacy in the home protected by the Fourth Amendment.[101] However, the majority of the Court found them not to be "searches" in the usual meaning of the term, and "reasonable" in any case.[102] The Court argued that any "rights" claimed by the mother had to yield to the "needs" of the child.[103] Moreover, this was a question of public money, where the State has a "paramount" interest in seeing that it is spent as intended.[104] The Court even cast aspersions on the woman who challenged the State in the case before them.

> "The record is revealing as to Mrs. James' failure ever really to satisfy the requirements for eligibility; as to constant and repeated demands; as to attitude towards the caseworkers; as to reluctance to cooperate; as to evasiveness; and as to occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one."[105]

At the same time, it insisted, even in the face of disturbing information about qualifications, that the caseworker "is not a sleuth but rather, we trust is a friend to one in need."[106]

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98. *Wyman*, 400 U.S. at 315, (*citing* Section 402, 42 U.S.C. § 602 (1964 ed. Supp. V)) (In addition, if a state had reason to think that the payments of aid were not being used in the best interests of the child, it could counsel the recipient, and, in the absence of improvement, seek appointment of a guardian, protective payments, or imposition of civil or criminal penalties).

99. *Id*. at 319-20.

100. *Id*.

101. *See id*. at 327-28 (Douglas, J., dissenting).

102. *Id*. at 317 (finding it consistent with Camara v. Municipal Court, 387 U.S. 523 (1967) and City of Seattle, 387 U.S. 541 (1967) in which divided Courts found that administrative inspections by city housing inspector for violation of building's occupancy permit; and a fire department's fire code inspection, respectively, required a warrant).

103. *Id*. at 318.

104. *Id*. at 319.

105. *Id*. at 322, n.9 (this tainting of Mrs. James occurred without any indication that her treatment of her child had been of concern to the state through an abuse and neglect action).

106. *Id*. at 323, n.11 (the Court maintained this optimistic slant on the role of the caseworker in the face of a grim amicus brief from AFSCME, the union bargaining for the

In this beneficent world, in which any possible criminal prosecution would be merely a fortuitous by-product, "the warrant argument is out of place."[107] The "only consequence" of refusal to countenance the home invasion by an untrained social worker was that "payment of benefits ceases."[108] This apparently was just too bad in light of the administrative needs of the program.[109]

Justice Marshall dissented pointedly. He found it odd that caseworkers needed no warrant to enter the homes of poor mothers, and while there to look for evidence of welfare fraud or child abuse, although they clearly could not do this across the board. "Yes, abuse and exploitation of children is terrible, but why only in poor homes – why not go into all American homes? . . . Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she poor, is substantially more likely to injure or exploit children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy."[110]

The visitation regulations cut deeply into the dependent mother's control over the privacy of her home. The Court later found it similarly easy to approve AFDC regulations that cut as deeply into the organization of the personal relationships of her family.[111] The 1984 Deficit Reduction Act (DRA) required states to "take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home" for purposes of eligibility for benefits.[112] This meant that a woman who had some children whose fathers supported them, and some whose fathers did not, had to treat them all as a family unit in her

caseworkers, that noted that they were often badly trained or untrained, young and inexperienced. "Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty").

107. *Wyman*, 400 U.S. at 324. By contrast, the Court recently rejected the so-called "special needs doctrine" for administrative searches in Ferguson v. City of Charleston, 532 U.S. 637 (2001). Charleston's plan for reporting to the police the drug test results of pregnant women who came for help to the public hospital came under fire and was struck down by the Supreme Court. *See generally,* Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Pregnant Addicted Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299 (2002).

108. *Id.* at 325.

109. *Id*. at 326.

110. *Id*. at 338-40, 341-43 (Marshall, J., dissenting) (Justice Marshall characterized the social workers as sleuths, as well as case managers, who were required to report evidence of the felonies of welfare fraud and child abuse. Justice Marshall was unimpressed by the rehabilitative and helpful posture of the home invasion: "[a] paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy.") (*citing* Olmstead v. US, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.")).

111. *See* Bowen v. Gilliard, 483 U.S. 587 (1987).

112. Deficit Reduction Act of 1984, 98 Stat. 494; 98 Stat. 1145; amended Section 402(a)(38) of the SSA, 42 U.S.C. § 602(a)(38) (1982 ed., Supp. III).

application for assistance. The income the supporting father provided for his child was then counted against the needs of all. This was enforced even if it meant a net loss of income to the whole family, or that the child with an active father was penalized financially or emotionally. One of the plaintiff mothers in *Bowen v. Gilliard* testified that her child's father was so upset about his son being forced onto welfare that he ceased making support payments voluntarily, and even stopped coming around to see his son.[113]

The Court announced that, like evaluation of other parts of the Social Security Act, its review must be "deferential."[114] Be that as it may, however, it is hard to miss the satisfied tone in the Court's review of welfare policy. The deference afforded to congressional efforts to save "huge sums of money meant" that the regulation only had to be "rational" to be upheld by the Court.[115] In light of the contention that the regulations intruded onto constitutionally protected family relationships,[116] however, the Court engaged in a rather longer explanation of current policy, with its clever money-saving features. The State was paying the costs; there was nothing wrong with its trying to recoup some of them through assignment of child support claims against fathers; and, happily, millions of these orders, to the tune of saving $6.8 billion dollars had been established and enforced.[117]

Once again, the dissent had a very different take: Justices Brennan and Marshall noted the changing demographics of an American society in which the percentage of households headed by a single parent increased twofold from 1970 to 1984, to 26 percent.[118] For black families, this figure approached 60 percent.[119] "Almost 90 percent of single-parent households are headed by women,"[120] often living under difficult economic circumstances. The dissent argued that in their precarious lives, these children had as much of an interest in maintaining contact with their

113. The child frequently asked why his father did not see him anymore; he wet his bed; and was more disruptive and less successful in school. *Bowen*, 483 U.S. at 621-22 (Brennan, J., dissenting).

114. *Bowen*, 483 U.S. at 598. *See also,* Dandridge v. Williams, 397 U.S. 471, 484-85 ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). Deferential review, however, yields where the classification involved merits heightened scrutiny, such as in explicitly gendered provisions of the SSA. *See, e.g.,* Weinberger, 420 U.S. at 636 ("Mother's" insurance benefits, that excluded fathers whose insured wives' died leaving them to care for children alone, violated equal protection).

115. *Id*. at 598.

116. *Id.* at 601.

117. *Id.* at 603.

118. *Id.* at 613 (Brennan, J., dissenting) (citing U.S. Dept of Commerce, Bureau of the Census, Current Population Reports, Household and Family Characteristics: March 1984, p. 1 (1985) (Current Population Reports)).

119. *Id*. at n.5.

120. *Id.* at 613.

fathers, as with the mothers with whom they lived.[121] If the relationship with the mother was nurtured by every day care and contact, the "bond" to the father was also sustained through his ability to support his child.[122] Thus, the dissenters were concerned about the adverse effects on the father-child relationship of the income-deeming rules, as illustrated by Sherrod's father's reaction. The only viable economic alternative for the boy would have been to move out of his mother's household. He was between a rock and a hard place – the child could either have his mother's custodial care or his father's economic support, but not both.[123]

It is impossible to separate the Court's view of poor motherhood from its attitude toward poverty in general (or the "right" to social services, or rather, lack thereof).[124] Although there have been a handful of cases that suggested that under certain circumstances indigency is a disfavored classification meriting a closer look from the Court,[125] the prevailing principle is that poverty gets no special treatment.[126] Equal Protection jurisprudence, moreover, generally does not consider the disparate impact on a group of people. Only intentional differential treatment violates the Fourteenth Amendment,[127] so it does not matter *constitutionally* that 90% of all single parents are mothers; or that black families may be disproportionately affected by government regulations. When evaluating the Court's views on dependent unmarried motherhood, however, those facts seem quite salient indeed. As discussed in Part I of this Article, the Court seemingly made some assumptions about mothers versus fathers: even unmarried mothers are caring, but unwed fathers may not meet that standard. In these AFDC cases, however, motherhood comes under suspicion itself. The dependent mother (who is poor and perhaps not so coincidentally may be black) cannot be trusted to be autonomously caring. Therefore, she is subject to manipulation by the State, which may drop in on the privacy of her home at any time to make sure she is not wasting money or abusing her children. She also cannot choose how to organize

121. *Id.* at 614-15.

122. *Bowen*, 483 U.S. at 617.

123. *Id.* at 626.

124. *See, e.g.,* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (child known to be in danger had no constitutional right to protective services); Town of Castle Rock, Colorado v. Gonzalez, 125 S.Ct. 2796 (2005) (woman with state-granted protective order has no procedural due process right to its enforcement).

125. Boddie v. Connecticut, 401 U.S. 371 (1971) (state cannot prevent access to courts for a divorce due to indigency); Lindsey v. Normet, 405 U.S. 56 (1972) (state's double bond requirement for tenant actions violates Equal Protection); Little v. Streater, 452 U.S. 1 (1982) (state must pay for blood tests necessary for indigent man to disprove his paternity); MLB v. SLJ, 519 U.S. 102 (1996) (state must pay for trial transcripts necessary for indigent woman to appeal termination of her parental rights).

126. *See, e.g.,* San Antonio v. Rodriguez, 411 U.S. 1, 18, 24 (1973) (holding that educational differences due to disparities in school district wealth does not violate the Equal Protection clause).

127. Washington v. Davis, 426 U.S. 229 (1976).

her household: if she wants to live with all of her children, she has to suffer a loss of resources to support them. She cannot frame her relationships with the men who fathered her children. She has to "cooperate" in identifying and suing them, and she cannot have a separate agreement with a supportive father of one of them. The insult is offered to the poor men and children, as much as to the women in this scenario. Nonetheless, it tells us something uncomfortable about the "motherhood" of dependent single women.

III. MOTHERHOOD AND WORKING WOMEN

At first blush, the United States Supreme Court appears to have made giant progressive strides in its attitudes in the next set of cases, i.e., those about working mothers. There is no question that compared to the dependent unmarried mother, the working mother has garnered more words of praise and respect in the Court's opinions, especially since the mid-1970s. However, even from this angle, there are some ironic limits – motherhood seems to be honored primarily by neutralizing its significance.[128]

The Court clearly began with gendered notions of women in the work place, most famously expressed in *Muller v. The State of Oregon*,[129] which upheld a maximum 10-hour working day for women in 1908. This case, together with *Adkins v. Children's Hosp.*,[130] (which involved a minimum wage statute), arose out of the important campaign by "social feminists" at the turn of the nineteenth century to gain approval for protective labor legislation for women.[131] These cases were litigated in a judicial environment that was hostile to any kind of intrusion on so-called "liberty of contract" between employers and employees.[132] Reformers in the

128. Contemporary analysts identify motherhood as responsible for most of the wage gap between working women and working men. *See, e.g.,* CRITTENDEN, *supra* note 80, at 88, 94-98 (2002) (discussing reduced earnings of mothers or "mommy tax"). It is only those working women who are more like a man, i.e., without child-caring responsibilities in their early working careers, whose earnings closely approach those of men's. *Id.* at 87 (women between the ages of 27 and 33 who have never had children make up the narrow slice of women in the work force whose wages constitute 98 cents to a man's dollar). Studies have been done for educated women who seemingly have the most potential income to lose from the "mommy tax." *Id.* at 96. However, "working-class women are also heavily penalized for job interruptions, although these are the very women who allegedly 'choose' less demanding occupations that enable them to move in and out of the job market without undue wage penalties." *Id.*

129. 208 U.S. 412 (1908).

130. 261 U.S. 525 (1923).

131. *See* Sybil Lipschultz, *Social Feminism and Legal Discourse*, 1908-1923, 2 YALE J.L. & FEMINISM 131 (1989); KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900 (1995); ALICE KESSLER-HARRIS; OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 186-87 (1982).

132. *See*, *e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down limits to

National Women's Trade Union League, the General Federal of Women's Clubs, and especially, the National Consumers' League (NCL), believed that gender-specific protective labor legislation was justified to improve the lot of women in the workforce, but also for the inroads it made for all workers on the rigid philosophy of laissez-faire. The NCL developed the strategy behind the extensive brief co-written by Josephine Goldmarck and her brother-in-law Louis Brandeis (later to be on the Supreme Court). In this first-ever "Brandeis brief," the authors asked the Court to take judicial notice of the social science studies and facts they cited.[133] The reformers of the 1920s shared a vision of "industrial equality" between women and men, to be achieved by recognizing and valuing difference, as exemplified by Molly Dewson's brief in *Adkins*, that their male lawyers, including Brandeis, did not understand fully, and that the Court misused to justify approving inequality.[134] The social feminists understood the complexities of the causes of women's inferior position in the market place.[135]

The Court, however, did not share the social feminist vision. Although the NCL briefs asked the Court to take account of the physical and social differences between men and women in the workforce, the form that the acknowledgement took in Justice Brewer's opinion in *Muller* was a far cry from the intent of the reformers. Instead, he proclaimed that women's physical structure and maternal functions meant that they must be treated differently because of the "inherent" differences ordained by nature and by

bakery workers' hours because such legislation is arbitrary interference with "the right and liberty of the individual to contract in relation to his labor"). Before he ascended to the Court, Felix Frankfurter explained how *Muller* was significant because it started the judicial progress from "empty theorizing about liberty of contract to realism" in constitutional law. *See* Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

133. *Muller*, 208 U.S. at 421.

134. *See* Lipschultz, *supra* note 131.

135. For example, Alice Hamilton, who was the first occupational physician in the United States, had studied lead poisoning in women who worked in the New Jersey and Ohio potteries. She found that although the New Jersey women seemed worse off than men who worked with lead, this was not true in Ohio. She attributed this to the difference in the economic and social position of women in the two states. In New Jersey, the men were unionized, but the women were not. Female potteries workers were poor and disadvantaged. In the Ohio tile works and potteries, by contrast, both sexes were organized and the rate of lead poisoning was actually slightly higher in men. This seemed to substantiate the German view that female susceptibility was not due to their sex but to being poorer and having to perform double duty at the workplace and at home. As a result of these studies, Alice Hamilton supported gender – specific protective legislation. She was associated with the NCL campaign and she also opposed passage of the Equal Rights Amendment (ERA) for many years because she feared it would jeopardize protective legislation. Finally, in 1942 , after other progressive social legislation had created safety and health rules for all workers, she wrote to the *New York Times* to withdraw her opposition to the ERA. *See* Vilma Hunt, *Overview in Reproductive Health Policies in the Workplace*, Proceedings of Symposium Held on May 10 and 11, 1982 in Pittsburg, PA.7-11, Seabrook, Enny C. & David K. Parkinson eds., (1983).

God.[136] Thus, even if they could do nothing for men, legislatures could act to protect women, who were the "mother[s] of the race."[137]

The limits of the Court's view of the special needs of working mothers quickly became clear in the next part of the social feminist campaign. In *Adkins*, the campaign sought to defend minimum wage legislation for women. The Court,[138] however, denied that *Muller* controlled, because "the ancient inequality of the sexes, otherwise than physical . . . has continued 'with diminishing intensity'" in the wake of "revolutionary" changes in the "contractual, political, and civil status of women, culminating in the Nineteenth Amendment."[139] Therefore, liberty of contract applied and women still had to make their own wage bargain with their employers. Even though by 1923, "liberty of contract" actually was on its way out as a constitutional doctrine,[140] the justifications for gender-based distinctions in the law that were re-entrenched by *Muller* unfortunately persisted until the 1970s.[141] The campaign for protection divided feminists: the social feminists and their labor allies versus radical feminists like Alice Paul and her National Women's Party, who supported a platform of "equal treatment" across the board, and the passage of a national Equal Rights Amendment.[142] Even today scholars and activists continue to debate the wisdom of the special treatment argument of the Brandeis brief in *Muller*.[143]

In the 1960s and 1970s, the "second wave" of feminism stirred debates about new issues such as abortion and domestic violence, but also about correct strategies.[144] Moreover, the passage of the Civil Rights Act of

136. *Muller*, 208 U.S. at 422-23.

137. *Id*.

138. Louis Brandeis was on the Court by this time, but took no part in the decision. *Adkins*, 261 U.S. at 562 (Taft, J., dissenting), 567 (Holmes, J., dissenting).

139. *Id*. at 552-53.

140. In 1937, the Court overruled the specific holding in *Adkins*. *See* West Coast Hotel Co v. Parrish, 300 U.S. 379 (1937). By 1941, it was clear that general labor law regulation was constitutionally acceptable. *See* U.S. v. Darby, 312 U.S. 100 (1941) (upholding The Fair Labor Standards Act (FLSA)).

141. *See* Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893 (1971) (listing the many gendered laws still in existence in 1971).

142. *See* KESSLER-HARRIS, OUT TO WORK, *supra* note 131, at 206-12. Even as late as 1968, women from the progressive United Auto Workers' Women's Bureau who were among the founding members of N.O.W. were forced to withdraw temporarily, until the union could be persuaded to end its opposition to the ERA. SARA EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 230, 257-58, 277-78 (1989).

143. *See*, *e.g.*, Nancy S. Erikson**,** *Muller v. Oregon Reconsidered: The Origins of a Sex-Based Doctrine of Liberty of Contract*, 30 LAB. HIST. 228 (1989); Mary Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1219-25 (1986); Lipschultz, *supra* note 131.

144. *See* EVANS, *supra* note 142, at 274-84. Two groups of largely middle-class women were both inspired by the civil rights movement. There were the more established and moderate professional women who founded the National Organization for Women (N.O.W.) and the younger group of radical activists in the "women's liberation" movement,

1964, and more effective enforcement of Title VII in the 1970s,[145] plus the development of an "intermediate" heightened standard of constitutional review for classifications based on gender,[146] provided a brand-new context for motherhood in the workplace. The new context for working mothers created by these legal changes, with some significant exceptions, aspires toward evenhanded or neutral treatment, rather than the type of "industrial equality" propounded by some of the social feminists. It remains to be seen, however, whether this view is all gain and no pain. The decisions revolve around issues of pregnancy and maternity leave, exposure of fertile women to dangerous substances in the workplace, and equal benefits earned by working women.

The first two cases that required neutral treatment of working mothers were a Title VII employment discrimination, and a constitutional case, respectively. In *Phillips v. Martin-Marietta Corp.,*[147] the company had a policy of refusing work applications from women with pre-school age children.[148] The workforce was predominantly female, so this was an instance of what has been called "sex-plus" discrimination.[149] Although the brief *per curiam* opinion of the Court seemed to suggest that if the employer could show that "conflicting family responsibilities were more relevant for a woman than for a man," it might be able to meet the defense of a bona fide occupational qualification ("BFOQ") under the statute,[150] Justice Marshall's concurrence was having none of that: "When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only be employment criteria that are neutral as to the sex of the applicant."[151] *Phillips* clearly came out the right way. It would have been devastating to the early interpretations of Title VII if employers were allowed to make assumptions about women with children and use them to deny them employment on an equal basis with men. This would be no different than all the years of so-called protective labor legislation that protected women

who cut their political teeth on the civil rights and anti-war movements.

145. *See* Laura Oren, *Protection, Patriarchy, and Capitalism: The Politics and Theory of Gender-Specific Regulation in the Workplace*, 6 UCLA WOMEN'S L.J. 321, 342-43 nn.114-17 [hereinafter Oren, *Protection*].

146. *See Reed*, 404 U.S. 71 (holding that preference of male administrator over similarly situated female administratrix does not have a rational basis); *Frontiero*, 411 U.S. 677 (plurality would have adopted strict scrutiny for gender-based classifications); *Craig*, 429 U.S. 190 (Court adopted intermediate scrutiny under the Equal Protection Clause for gender-based classifications).

147. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).

148. *Id*. at 543. *Cf.* Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) (airline had policy of grounding all flight attendants who became mothers, but not fathers).

149. *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166, 1171 (1971).

150. *Phillips*, 400 U.S. at 544.

151. *Id*. at 545 (Marshall, J. concurring).

right out of their jobs.[152] On the other hand, the impact of women's greater responsibilities for child and elder care remains significant even today[153] and pure neutrality does not provide the solution to the larger problem.

Pregnancy raises particularly troublesome challenges, for which neutrality is a necessary, but partial, answer. The Cleveland Board of Education had a policy of compulsory unpaid leave for all female teachers, starting with their fourth month of pregnancy.[154] In addition, mothers could not return to work until the beginning of the regular school semester after their infants turned 3 months old.[155] Even then, the mothers had to show a doctor's certificate of fitness to work, and there was no guarantee that their job had been held for them in the meantime.[156] The Court was hard pressed to see any rationality in the presumptions about physical capacity behind these particular time-lines.[157] Instead, it held that the overbroad rules "employ[ed] irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."[158] This is not exactly a principle of neutrality. Only women, after all, have to combine pregnancy with work. Nor did the Court argue that different treatment on the grounds of pregnancy was "sex discrimination," a significant omission in light of later cases.[159]

In two subsequent cases, the Court evinced its strange belief that pregnancy-related rules generally have nothing to do with sex discrimination. California's disability insurance program exempted from coverage work losses resulting from pregnancy.[160] The Court had no difficulty distinguishing this kind of rule from those subjected to a higher standard of review in the gender-based equal protection cases. After all, the program merely divided the insured into two groups — "pregnant women and nonpregnant persons." "While the first group is exclusively

152. *See*, *e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (holding that a state may deny all women opportunities to tend bar in light of moral and social problems).

153. *See* CRITTENDEN, *supra* note 80.

154. Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 634 (1974).

155. *Id*.

156. *Id*. at 635. One of the schools also required that the teacher assure them that she had child care which would not interfere with her school duties. *Id*. at 650. The compulsory leave policy was instituted in 1952, which raises some interesting questions about post-war economic and social pressures to conform to a domestic ideology that rejected the gains of women in the industrial labor force during World War II, and promoted the establishment of nuclear families with women firmly ensconced in their primary roles as wives and mothers, even if they did work outside the home as well. For the climate of the 1950s, *see generally* EVANS, *supra* note 142, Chapter 11; *see also* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

157. *Id*. at 642.

158. *Id*. at 648. This is a due process analysis rather than an equal protection analysis. *Id*. at 644.

159. *Id*. at 651. Justice Powell, who concurred in the result, stated that even though most teachers are women, the Court was not reaching the question of whether these are sex-based classifications. *Id.* at 653.

160. Geduldig v. Aiello, 417 U.S. 484, 489 (1974).

female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[161] The Court then surprised observers with its follow-up Title VII case. Despite an authoritative interpretation of the law by the Equal Employment Opportunity Commission, the Court decided that Congress did not intend any different result under the statute than the Court itself had reached using its own constitutional analysis.[162] Unless a plaintiff could show that exclusion of pregnancy was a mere pretext for sex discrimination, the classifications were pregnant versus non-pregnant persons.[163] The Court also disavowed any notion that employers must accommodate one sex more than the other just because of "their differing roles in 'the scheme of human existence.'"[164]

G.E. v. Gilbert mobilized the opposition. In short order, California reversed itself to amend its own Fair Employment and Housing Act[165] to require employers to provide female employees with an unpaid pregnancy disability leave of up to four months.[166] Meanwhile, a broad-based national coalition swiftly secured the passage of the Pregnancy Discrimination Amendment ("PDA") to Title VII, which altered the definition of "sex discrimination" in the statute to include pregnancy too.[167] The consensus fell apart, however, when the California's new statute came before the Court in *California Federal Savings and Loan v. Guerra*.[168]

Pregnancy burdens women employees uniquely, making mere non-discrimination or neutrality problematic. Even feminist advocates have found it difficult to conceptualize the proper legal approach: How can it be neutrality or sameness, when only women become pregnant? How can it be special treatment when the lessons of history demonstrate the traps of protection?[169] Although all agreeing that the new California disability

161. *Id*. at 496 n.20.

162. General Electric Co. v. Gilbert, 429 U.S. 125, 134, 140 (1976).

163. *But see* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (holding that employer's policy of denying accumulated seniority to female employees returning from pregnancy leave, although neutral on its face, imposed a more substantial burden on women than men, and therefore constituted an illegal employment practice in the absence of proof of a "business necessity" defense; also holding that the sick leave pay claim had to be remanded).

164. *Gilbert*, 429 U.S. at 139.

165. CAL. GOV'T CODE ANN. § 12945(b)(2) (West 2000).

166. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 275 (1987). The State's Fair Employment and Housing Commission also interpreted the law to mean that employers must reinstate women returning from pregnancy leave, unless the job was no longer available due to business necessity. *Id.*

167. *Id*. at 277 (addition of subsection (k) to s. 701, definitional section of Title VII). For the campaign to amend Title VII, see Oren, *Protection*, *supra* note 145, at 356 n.194.

168. 479 U.S. 272 (1987).

169. *See, e.g.,* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 168-72 (1992) (discussing the split among feminists about statutes like the Montana one in *Miller-Wohl* that treated pregnancy specially, and why she still thought the equality approach was best). *See also*

leave provision should be upheld (unlike a Montana statute also being challenged),[170] feminist ranks split over philosophy and tactics: In its *amici* (friend of court) briefs, the ACLU argued that the PDA was a strict formal equality guarantee that did not allow special treatment by virtue of pregnancy. They concluded from *Muller* that biologically based different treatment had harmed women in the long run, confining them to a separate and lesser sphere of employment. The ACLU also declined to support special treatment for pregnancy in the workplace as a kind of affirmative action measure. This neutrality posture, however, did not mean that the PDA necessarily conflicted with or "preempted" the state law. If the bank offered no disability leave to men, but favored women in this way, there would be a problem. However, since men also benefited from the general disability policy, the two statutes could be reconciled. In fact, the state law effectively challenged the stereotype that disability leave for women, even including for pregnancy, differed in its essentials from disability leave for men.[171]

The National Organization for Women ("NOW") made a different argument: taken together, the two statutes could be read as "imposing mutual and complementary obligations upon California employers to provide up to four months unpaid disability leave to all disabled employees." In that view, there was no necessary conflict, and therefore no preemption. The net result was that the benefits were extended to both women and men, with all employees guaranteed disability leave.[172] Labor's brief took still another position. It justified special treatment in the form of maternity leaves because without that accommodation women's procreative choices were burdened, while men were free to reproduce without paying any penalty in work force participation. In other words, in

Donna Lehnoff, *Beyond Maternity Leave; America Needs a Family Policy*, Legal Times, Oct. 27, 1986, at 11 (calling "legal approval of special treatment for women based on pregnancy and childbirth" "the top of a 'slippery slope,' the bottom of which is a system of law that permits or requires discrimination against women based on their perceived or real biological differences from men.") (Donna Lehnoff is associate director for legal policy and programs at Women's Legal Defense Fund).

170. The Montana statute provided that employers must grant unpaid maternity disability leave even if they had no other leave policy at all. *See* Miller-Wohl Co. Inc. v. Commr. of Labor & Indus., 479 U.S. 1050 (1987) (vacating and remanding 692 P.2d 1243, for consideration in light of *Guerra*). The Montana Supreme Court reinstated its opinion upon remand, 744 P.2d 871 (Mont. 1987).

171. California Federal Sav. & Loan v. Guerra, Brief of the American Civil Liberties Union, the League of Women Voters of the U.S., the League of Women Voters of Cal., the National Women's Political Caucus, and the Coal Employment Project, as Amici Curiae, Cal. Fed. Sav. & Loan Assoc. v. Mark Guerra, 1986 WL 728369 (April 4, 1986) (No. 85-494).

172. California Federal Sav. & Loan v. Guerra, Brief of the National Organization for Women, NOW Legal Defense and Education Fund, National Bar Ass'n, Women Lawyers Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and Women's Legal Defense Fund in Support of Neither Party Amici Curiae 1986 WL 728368 (Apr. 04, 1986) (No. 85-494).

other to prevent a particular form of sex discrimination, this affirmative program was necessary. According to the labor brief, that did not transform the California law into the kind of protectionism long since disavowed by labor along with the rest of society.[173]

A divided Court reflected the confusion inherent in the pregnancy debate: Three dissenters adamantly insisted that the plain language of the PDA requires that employers treat pregnant employees the same as anyone else, no worse, but also no better.[174] Justice Scalia, on the other hand, was willing to uphold the state law, but only on the basis of other "plain language" in the civil rights statute that limits the preemptive effect of federal law.[175] The majority of the Court pressed two alternative arguments, either of which they found sufficient. The first was the "floor not a ceiling" interpretation, i.e., that the congressional purpose behind the PDA was to prohibit discrimination in the workplace against pregnant women, and not to ban preferential treatment for those employees.[176] The PDA was a rejection of the majority position in *Gilbert*, and therefore was entirely consistent with the dissent in that case. As Justice Brennan stated therein, "a realistic understanding of conditions found in today's labor environment warrants *taking pregnancy into account* in fashioning disability policies."[177]

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173. California Federal Sav. & Loan v. Guerra, Brief of the American Federation of Labor and Congress of Industrial Organizations as Amici Curiae1985 WL 670262 (Oct. Term 1985) (No. 85-494).

While initially skeptical, organized labor had embraced protectionism at the turn of the nineteenth century, in alliance with the social feminists. *See* Kessler-Harris, *supra* note 131, at 201-05. Feminist ranks, however, were split over this strategy, with the National Women's Party, supporting the "blanket amendment" drafted by Alice Paul (the Equal Rights Amendment), even though reformers feared it would jeopardize the improvements in working conditions. *Id.* at 207. These tensions persisted into the middle of the twentieth century. For example, the progressive United Auto Workers (UAW) had established a "Women's Bureau" during WWII, that condemned the effects of sex-specific protective labor legislation as early as the 1950s, seeing such laws as excuses for discrimination against women workers. UAW Women's Bureau members even were among the founding members of N.O.W. in 1968. However, they were forced to withdraw from that organization for two years before they could persuade their union to support the Equal Rights Amendment. Sara Evans, *supra* note 142, at 230, 257-58, 277-78. *See also* Alice Kessler-Harris, *Protection for Women: Trade Unions and Labor Laws,* in DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME (Wendy Chavkin, M.D., ed., 1984).

By the 1970s, the argument about protective labor legislation and sex discrimination was essentially moot, and the courts had declared that Title VII preempted the remaining sex specific laws. *See, e.g.,* Weeks v. So. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld v. So. Pac. Co., 444 F.2d 1219 (9th Cir. 1971). Thus, the older protectionism was removed as an issue between labor and the women's movement.

174. *California Fed. Sav. & L.*, 479 U.S. at 297 (White, J., dissenting).

175. *Id*. at 295 (Scalia, J., concurring in judgment only).

176. *Id*. at 284-86.

177. *Id*. at 289 (citing G.E. v. Gilbert, 429 U.S. at 159 (Brennan, J., dissenting) (emphasis added)). *See also* Newport News v. EEOC, 462 U.S. 669, 678-79 n.17 (1973) (acknowledging that the PDA incorporated the position of the dissent in *Gilbert*).

In an alternative holding (or perhaps *dicta*), the Court also seemingly adopted the NOW position: Even if preferential policies were not permitted, the PDA still did not preempt California's law.[178] The state did not compel employers to treat women workers better than men. Rather, it established the standard for pregnancy disability leaves. Employers were free to match that with comparable disability benefits for all, thus simultaneously satisfying the state and the federal statutes. Without any necessary conflict between the mandates of the two laws, there also would be no preemption by the PDA.[179]

The same women's, civil rights, and labor interests that supported the result in *Guerra,* quickly united in a major legislative campaign to finesse the pregnancy and special treatment conundrum, through a gender neutral solution called the Family and Medical Leave Act ("FMLA"). Introduced in April of 1986, the proposal "sped through hearings" in the House, where it garnered more than 100 co-sponsors. As Donna Lenhoff, Associate Director of the Women's Legal Defense Fund, explained, the proposal was intended to be "a significant first step toward a national policy to encourage the accommodation of workplaces to employees' family responsibilities."[180] Since women bore the brunt of that burden in most families, they had the most to lose from the absence of such accommodations, and the most to gain from a new approach.[181] Despite the broad-based support, however, the FMLA was not enacted until 1993.[182] The legislation was passed by Congress twice, only to be vetoed by the first President Bush.[183] With the election of President William J. Clinton (in part based on a noted "gender gap" in voting patterns),[184] however, the threat of veto was removed, and the FMLA of 1993 passed.[185] It requires

178. *Cal. Fed. Sav. & Loan Ass'n.*, 479 U.S. at 290-92.

179. *Id*.

180. Lehnoff, *supra* note 169. The FMLA was originally introduced in Congress in 1985 by Patricia Schroeder. *See*, Judith Elder, *Pregnant in the Marketplace: Legal Rights of Pregnant Women, Mothers and Fathers*," Mothering, Sept. 22, 1989, 53 at 86.

181. Lenhoff, *supra* note 169.

182. In 1988 a different version of the bill died when supporters could not break an "election-eve" filibuster; the legislation was reintroduced in 1989 with the support of 130 House co-sponsors; and 150 national children's family, health, labor and business groups. Tamara Henry, *Family leave bill reintroduced*, United Press International Feb. 2, 1989. Among the major industrialized nations at the time, only the United States and South Africa lacked nationally mandated maternity-leave benefits. France, Canada, West Germany, Italy and Japan, all mandated paid parental or maternity leave at 60 percent to 100 percent normal salary. Andrea Herman, *ABA Backs Parental Leave Bill*, 75 A.B.J. 123 (1989).

183. Michelle Ruess, *Family-Leave Details Uncertain for '93*, Plain Dealer, Nov. 28, 1992 at 4a. In an election speech in 1992, Bush said that he believed it would lead to discrimination against women; *Bush and Family Leave: Makes Pitch to Working Women*, The Hotline, Sept. 21, 1992.

184. *See, e.g.,* Katha Pollitt, *Women's Day, 1992 Election,* 255 THE NATION 17, 17 (Nov. 1992) (celebrating the 11 point gender gap in voting in favor of Bill Clinton, and the accession of four new women Senators and a near doubling of female Representatives).

185. After the second election of George W. Bush,, however, new threats to the

covered employers to give all employees up to 12 weeks unpaid leave after the birth or adoption of a child, or for their own or a family member's (spouse, child, parent) serious health condition.[186]

The neutrality approach of the FMLA was subsequently upheld in *Nevada v. Hibbs*[187] by a divided Supreme Court as an exercise of Congress's power to enforce the Fourteenth Amendment in order to prevent discrimination on the grounds of sex. Interestingly, Justice Rehnquist, who has never been happy with heightened judicial scrutiny for sex based classifications,[188] nonetheless wrote an opinion for the majority relying on that framework.[189] He cited the findings of Congress that "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."[190] Conversely, Congress found that stereotypes about men's "lack of domestic responsibilities" help close the "self-fulfilling cycle of discrimination that forced stereotypical views about women's commitment to work and their value as employees." By virtue of its neutrality, the statutory remedy attacked both unfortunate stereotypes: since all employees enjoyed the benefit, employers could no longer single out women as "an inordinate drain on the workplace," that can be avoided by hiring only men.[191]

By contrast to the *Phillips* Title VII result, the FMLA incorporates a

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FMLA have emerged. The United States Chamber of Commerce wants significant revisions in light of what it insists is havoc in the workplace. *See* Bradford Plumer, *Business Groups are trying to restrict the Family and Medical Leave Act. That's precisely the wrong approach,* MOTHER JONES, June 7, 2005, http://www.motherjones.com/commentary/columns/2005/06/FMLA.html. Meanwhile, proponents seek expansion of FMLA provisions, either through collective bargaining or revisions in the law.

186. Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(c) (2005). In the 18 months between 1999-2000, nearly 24 million Americans took leave for FMLA covered reasons. Employees often had to resort to unpaid FMLA leave because their employers do not offer sick leave or disability pay. *See* Stephanie Armour, *Family Medical Leave Act at Center of Hot Debate*, USA TODAY, May 26, 2005, at 1B.

187. Nevada v. Hibbs, 538 U.S. 721 (2003).

188. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 217-217 (1976) (Rehnquist, J., dissenting) (questioning the appropriateness of the "substantially motivated by an important governmental purpose" intermediate standard for gender-based classifications).

189. *Hibbs*, 538 U.S at 724. Justices Scalia, Kennedy, and Thomas dissented. *Id.* at 743 (Scalia, J., dissenting), & at 744 (Kennedy, J., dissenting).

190. *Id*. at 736. The appeal to the history of sex discrimination was pursued in an amicus brief by a virtual honor roll of women's historians. *See,* Brief for Women's History Scholars Alice Kessler, Harris, Linda Kerber, et al. Supporting Respondents, Nevada v. Hibbs, 538 U.S. 721 (2003) (No. 01-1368). The amici demonstrated a long history of gender stereotyping that "family care is primarily women's work and is women's primary responsibility" and of intentional discrimination by the state in leave policies for its own employees and in legislation that restricted women's employment opportunities. *Id*. at pp. 1-2.

191. *Hibbs*, 538 U.S. at 736-37.

different kind of neutrality. It provides an affirmative remedy that does not single women out and thus in theory does not penalize them for their greater caring responsibilities. In the absence of a cultural change that would encourage men to utilize the FMLA in significant numbers, however, women still will bear the brunt of the disruptions in work force participation along with the resulting economic penalties.

The same concern about lopsided incentives that fueled the FMLA proposal, and an additional fear of spillover effects on health and safety in the workplace, had already sparked a campaign by women's and labor organizations in opposition to corporate "fetal protection" exclusionary policies.[192] In the late 1970s, lead and chemical companies, which had recently come under pressure to open higher-paid jobs on the shop floor to women, suddenly discovered a concern for the potential fetuses of their female employees. They promulgated policies that banned all women who could not demonstrate that they were surgically sterile from working in departments where they would be exposed to lead or other dangerous substances.[193] One of the five women who agreed to sterilization in order to retain higher-paying jobs at American Cyanamid's Willow Island plant later said "[b]ut I don't think it's right that a company can tell you to do a thing like this to keep your job. I did it because I was scared and I had to have the income."[194]

Having failed in initial efforts to use OSHA law or joint agency regulations to address the problem,[195] the coalition turned to Title VII and sex discrimination law. Ultimately, the issue came before the Supreme Court in a case called *UAW v. Johnson Controls*.[196] The result was a significant victory for neutrality principles, as a bulwark against both sex discrimination and degradation of the work environment. The Court ruled that the exclusionary policies were not justified because the safety of third persons, i.e. the potential fetuses, did not constitute a BFOQ sufficient to excuse policies that were based on sex discrimination on their face. There was no BFOQ because the ability to become pregnant has nothing to do with an employee's ability to perform the essence of the job.[197] Therefore, Justice Blackmun opined, the woman herself must decide the relative importance of her economic and reproductive roles, and therefore what risks she is willing to take in the workplace.[198]

192. *See* Oren, *Protection*, *supra* note 145, at 351 (discussing establishment of the Coalition for Reproductive Rights of Workers (CRROW) after story of coerced sterilizations to keep jobs at American Cyanamid's Willow Island Plant broke).

193. *Id*. at 340-42.

194. *Id*. at 349 (citing Bill Richards, "Women Say They Had to be Sterilized to Hold Jobs," WASH. POST, Jan. 1, 1979, at A1).

195. *Id*. at 352-62.

196. 499 U.S. 187 (1991).

197. *Id*. at 206.

198. *Id*.

Some critics decried the result in *Johnson Controls* as an ironic instance of women winning the right to work in an equally dangerous workplace as men.[199] Whatever the practical results may have been, especially in an increasingly conservative political and regulatory climate after the 1980s, the decision was necessary, both for sex discrimination and for occupational health and safety law. Without it, the BFOQ defense to sex discrimination in Title VII would have been diluted beyond a narrow focus on a quality that cut to the essence of the business, such as wet-nursing. Such a ruling would have reopened an enormous gap in civil rights protection against discriminatory treatment of women in the work place in the name of protection of their capacity for motherhood. Furthermore, the labor agenda of changing the workplace, not the worker,[200] also would be compromised. Instead of adhering to stricter lead standards and environmental controls, companies could simply remove those workers they claimed to be more vulnerable,[201] and let poor working conditions ride. Understood properly, through a double lens of sex and class, even if it did not guarantee success, the *Johnson Controls* neutrality decision was critical to progress on either front.[202]

From *Muller v. Oregon* in 1908 to *Nevada v. Hibbs* in 2003, the story of motherhood in the work place reads like "progress" toward neutrality and the acknowledgement of the value of women workers.[203] In today's world, moms clearly are in the work force to stay. In 2002, about three-fifths of women were paid wage-earners. This included 72 percent of women with children under 18, and 61 percent of women with children under the age of 3.[204] It is legally unacceptable to exclude women workers

199. *See, e.g.,* Ruth Rosen, *What Feminist Victory in the Court?* N.Y. TIMES, Mar. 21, 1991, at A17. *See also, Linda Greenhouse, "*Court Backs Right of Women to Jobs With Health Risks," N.Y. TIMES, Mar. 21, 1991, at A1, B12.

200. *See* Oren, *Protection*, *supra* note 145, at 346-47 (citing, "Informal Public Hearing on Proposed Standard for Exposure to Lead, United States Department of Labor, Occupational Safety and Health Administration," Mar. 16, 1977, at 679 [Lead Standard Hearings] at 1144 (testimony of Olga Madar).

201. The companies seemed unconcerned about the reproductive vulnerabilities of male workers, and even male union officials had to be persuaded to think outside of the fetus-equals-motherhood box and to consider the role of men in reproduction. *See,* Oren, *Protection*, *supra* note 145, at 345.

202. *But see* Elaine Draper, *Reproductive Hazards and Fetal Exclusion Policies After Johnson Controls*, 12 STAN. L. & POL'Y REV. 117, 120-25 (2001) (arguing that corporate exclusion policies changed less after the Supreme Court's decision than would be expected).

203. *See, e.g., Weinberger*, 420 U.S. at 636 ("mother's insurance benefits" for surviving wives of insured men, but none for surviving husbands of deceased women workers who were raising children, violated equal protection); Califano, 443 U.S. at 76 (state law permitting AFDC payments to dependent children whose fathers were unemployed, but denying those benefits if their mothers were unemployed is unconstitutional).

204. *Women at Work: A Visual Essay,* MONTHLY LABOR REVIEW, Oct. 2003, at 45, http://www.bls.gov/opub/mlr/2003/10/ressum3.pdf.

because they are mothers, or have the capacity to become mothers. That certainly is a positive development. The Court, however, has not said that it *requires* an accommodation to women's "differing roles in the scheme of human existence."[205] For example, it upheld a Missouri statute which even-handedly excluded from unemployment benefits all claimants who "voluntarily" leave their jobs "for a reason not causally connected to their work," including pregnancy.[206] Neutrality alone, moreover, cannot provide a true social solution for women who wish to combine motherhood with employment. We are still left largely to our own devices. FMLA leave is unpaid,[207] and it is unlikely that women workers, who are typically lower paid than men,[208] will stay in the workforce while fathers stay home. Unlike in other western industrialized countries, there is no corporate crèche system or tax-supported quality day care that shifts some of the burden to society as a whole instead of resting it on individual families.[209]

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205. *Cf.* G.E. v. Gilbert, 429 U.S. at 139 (pre-PDA ruling that Title VII does not *require* employers to accommodate a pregnant worker and that the classification was not gender-based). *But see* Cal. Fed. Sav. & Loan, 479 U.S. 272 (1987) (post-PDA case *permitting* state to require maternity leave policies without finding pre-emption by Title VII). For a similar debate over New Jersey's anti-discrimination statute, see Gerety v. Atlantic City Hilton Casino Resort, 184 N.J. 391, 877 A.2d 1233 (N.J. 2005) (upholding 26-week disability policy even though it did not cover the full term of a pregnancy related disability). The New Jersey Supreme Court held that even though "it goes without saying that only women get pregnant" and that discrimination because of pregnancy is unlawful, no special accommodation is required, so long as there is any uniquely male disability that potentially lasts more than 26 weeks and also would not be fully covered. *Id*. at 403-04.

206. Wimberly v. Labor and Industrial Relations Comm'n of Mo., 479 U.S. 511, 512 (1987).

207. Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(c) (2005). Even in its current form, the FMLA is under attack. *See Congresswoman Tubbs Jones Signs Letter Urging Bush Administration Against Changes to Family Medical Leave Act,* PR NEWSWIRE, Apr. 4, 2005 (Tubbs and other Democrats sent letter to Department of Labor which is currently considering proposals to roll back many of the protections of the FMLA, by changing the definition of a "serious health condition" and restricting the use of intermittent leave to care for a family member.) Congresswoman Tubbs is also an original co-sponsor of a bill to extend coverage of the FMLA to more categories of family members.

Critics have stated that 45 percent of American workers are not covered by family leave laws. More than half of workers who need leave do not take it because they cannot afford it. Only 2 percent of private sector employees are eligible for paid family leave. Meanwhile, more and more mothers of young children are in the workforce, and responsibilities for older family members are growing. Steve Idemoto, *Family Leave Insurance: A Proposal for Washington Workers*, http://www.econop.org/FLI-PolicyBrief2000-IntroContextProblem.htm#Context (last visited Feb. 9, 2006).

208. Although there were significant variations by age and racial category, median weekly earnings for full time U.S. women workers in 2003 were 80 percent of men's, up from 78 percent in 2002, and from 63 percent in 1979. HIGHLIGHTS OF WOMEN'S EARNINGS IN 2003, U.S. DEPARTMENT OF LABOR STATISTICS 2004, http://www.bls.gov/cps/cpswom 2003.pdf (last visited Feb. 9, 2006). Serious occupational segregation, which contribute to earnings disparities, persists.

209. *See* Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 379 (2004), (citing Janet C. Gornick & Marcia K. Meyers, Families That Work: Policies for Reconciling Parenthood and Employment (2004) (describing policy differences between Europe and the U.S.). "France, for example, makes

Moreover, employment decisions can never be "neutral" in the absence of a universal health care system.[210] The extraordinary growth of women's employment has taken place predominantly in the service sector that is notorious for its lack of benefits.[211] Again, this makes it more likely that women have a tenuous hold on the workforce, especially when they become mothers. On top of these considerations, employers, and perhaps families themselves, have to be convinced that it is as legitimate for a father to require accommodation of his family role as it is for a mother.[212]

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one-stop education, medical care, and psychiatric care available through a subsidized system of neighborhood child care centers. These programs are viewed as so important for children's social development that parents fight to get their children into them." Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood,* 6 U. PA. J. CONST. L. 818, 829 (2004). *See also* Harry Gee, *New Paradigms of Criminal Justice for the Twenty-First Century*, 27 OHIO N.U. L. REV. 29, 55 (2000) (citing Elliott Currie, CRIME AND PUNISHMENT IN AMERICA (1998) at 158 (describing how child care for 3- to 5-year-olds is nearly universal in Europe; and Sweden has subsidized pre-school day care at child care centers).

210. Although European social health programs have undergone some recent changes, they still remain cornerstones of the welfare state. *See, e.g.,* Hans Maarse, Aggie Paulus, *Has Solidarity Survived? A Comparative Analysis of the Effect of Social Health Insurance Reform in Four European Countries*, 28 J. HEALTH POL. POL'Y & L. 585 (2003); Robert F. Rich, *Health Policy, Health Insurance And The Social Contract*, 21 COMP. LAB. L. & POL'Y J. 397 (2000).

211. Bill Moyers, *Politics and Economy, Downward Mobility; Questions and Answers with Beth Shulman*, Oct. 24, 2003, http://www.pbs.org/now/politics /wagesqanda. html (stating that the largest projected growth in the United States economy over the next ten year is in low wage industries where women predominate and that women often accept sacrifices in wages and benefits in order to gain flexibility to fulfill family responsibilities). Shulman is the author of THE BETRAYAL OF WORK: HOW LOW-WAGE JOBS FAIL 30 MILLION AMERICANS. *See also* Jay M. Berman, *Industry Output & Employment Projections to 2012*, 127 MONTHLY. LAB. REV. 58 (2004) (predicting that almost all the projected growth through 2012 will be in the service economy).

212. As the daughter of a mother who needs care, I recognize that stereotyped expectations are deeply embedded in all our family relationships (including my own) and are practically unavoidable. If you want to see the doctor, you must be available at all hours, on their schedule. If you have an elderly mother who cannot reliably report her history, what choice is there but to accede? If you want to avoid the inevitable mishaps of communication and care of a seriously ill individual that occur with each change of shift or change of facility, you must be personally present to protect someone who is unable to defend herself. It is an unusual son indeed who takes personal responsibility; and an elderly mother even may prefer help from her daughter. As my mother says, "thank god for a daughter." When I say, "you could rent one," teasingly, she says seriously, "no, no one would do this except a daughter," and there are times that she only responds to the comfort of her daughter. I can read to her or talk about family and sometimes break the cycle of preoccupation with physical suffering that has her begging for someone to help. Am I supposed to turn my back on that? What kind of institutionalized social support is there when one is 60, working full-time, and taking care of an elderly mother (and has responsibilities for other family members)? Section 661.201 of the Texas Government Code provides for accumulated paid sick leave, but it may only be used to care for someone who both resides in the same household and is related by kinship, adoption, marriage, or is in foster care. An employee's use of sick leave for family members who do not live in the household "is strictly limited to the time necessary to provide care and assistance to a spouse, child, or parent of the employee who needs such assistance as a direct result of a

While some mothers are presumed to care, and others apparently must be coerced to care satisfactorily, working mothers are welcome to remain in the workforce, but only so long as they keep their caring from interfering too much.

IV. NON-MOTHERHOOD: THE RIGHT TO REFUSE OR CHOOSE TO BE A MOTHER

The abortion cases constitute the last aspect of "motherhood" contemplated by the Supreme Court. In the late 1960s, feminists active in women's liberation groups identified the personal as political and began to demand the right to refuse the significant physical risks and personal consequences of carrying a pregnancy to term. In 1969, for example, a radical feminist group called the Redstockings stormed legislative hearings considering abortion law reform proposals in New York State.[213] The hearings had scheduled testimony from 14 male professionals and one nun. Excluded from the hearings, the Redstockings held their own public proceedings, claiming, "We are the experts, the only experts, we who've had abortions." After this speak-out, attorneys Florynce Kennedy and Diane Schulder, supported by a coalition of women's liberation organizations, brought a federal case challenging New York's existing laws, and prepared to put on what they called "the women's case" in addition to the "doctors' case" and the "experts' case."[214] The lawsuit was declared moot after the New York legislature passed the nation's first reformed abortion law, which went into effect July 1, 1970.[215] That timid measure, however, did not satisfy the likes of Kennedy and Schulder, who saw the abortion issue "as the vanguard of attack against the oppressive police and government actions, for a declaration of women's rights to control their own bodies and destinies."[216] The activist attorneys were also well aware of the economic barriers to women's health, and the racism that

documented medical condition. For the purpose of this policy, parent does not cover parents-in-law of the employee." University of Houston, Vacation and Sick Leave (Oct. 8, 2004), http://www.uhsa.uh.edu/sam/AM/Am_02d01.htm.

213. DIANA SCHULDER & FLORYNCE KENNEDY, ABORTION RAP: TESTIMONY BY WOMEN WHO HAVE SUFFERED THE CONSEQUENCES OF RESTRICTIVE ABORTION LAWS 3-4 (1971).

214. The case was styled Abramowicz v. Lefkowitz, (consolidated with three other cases). *Id*. at 91-95. The litigation planning was coordinated with women's liberation activists, including the Women's Health Collective; the Women's Abortion Project and other members of a coalition. *Id*.

215. *Id*. at 178. The statute still outlawed abortions after 24 weeks of pregnancy, unless they were necessary to preserve the life of the pregnant woman. *Id.* After enactment of the law, from mid-1970 through 1972, nearly 350,000 women left their home states to get safe and legal abortions in New York. SARAH WEDDINGTON, A QUESTION OF CHOICE 15 (1992).

216. SCHULDER & KENNEDY, *supra* note 213, at 186.

characterized some components of the abortion rights movement.[217]

Meanwhile, in Austin, Texas, Sarah Weddington joined a group at the University of Texas interested in women's health issues,[218] that later began to make abortion referrals.[219] The members were concerned about their legal position, leading Weddington to file the famous *Roe v. Wad*e lawsuit in 1970 when she was a young lawyer.[220] Since 1973, when *Roe*'s somewhat startling victory was pronounced, the course of the right to refuse to be a mother has not run smoothly, either in Court, or in the streets. It is beyond the scope of this paper to explore all the ins and outs of the vast body of abortion jurisprudence. But it is worth looking at a few critical cases to see what the Court had to say specifically about motherhood and its physical and social implications. In *Roe v. Wade*,[221] for example, the anonymous Norma McCorvey alleged "that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions."[222]

The case, and the abortion controversy that persists until today, focused in part on the history of abortion in the common law, and the philosophy of the derivation of constitutionally protected interests such as "the right to privacy." Justice Blackmun's opinion, however, also has something to say about the physical and social consequences of motherhood. He wrote that motherhood by virtue of a state law that denied choice could involve "[s]pecific and direct harm medically diagnosable even in early pregnancy."[223]

Maternity, or additional offspring, may force upon the woman a

217. *Id*. at 153-61. The Right to Choose coalition in Rochester New York in the years immediately preceding the 1973 Supreme Court decision in *Roe v. Wade* included the local chapter of Zero Population Growth. ZPG later became associated nationally with a right-wing anti-immigrant platform.

218. The Austin self-help group was inspired by the now-classic OUR BODIES OURSELVES, which the Boston Women's Health Book Collective published and which sold a phenomenal 200,000 copies in a newsprint edition put out by a nonprofit press in 1971, before being published by a commercial press in 1973. Between 1971 and 1976 it sold more than 850,000 copies. CSAH, *An Outline of American History*, http://www.americanhistory.or.kr/book/files/etwelve06.html#1212, (2002).

219. WEDDINGTON, *supra* note 215, at 28–34.

220. *Id*. at 44-56. Norma McCorvey, who was the anonymous plaintiff "Roe," subsequently became an anti-choice activist. In February of 2005, her effort to have the Supreme Court reopen the case named for her was rejected. *Supreme Court declines to reopen abortion decision, McCorvey v. Hill*, No. 04-967 (U.S. Feb. 22, 2005), HOSPITAL LITIGATION RPTR., Mar. 2005, at p.5.

221. 410 U.S. 113 (1973).

222. *Id*. at 120.

223. *Id*. at 153.

distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[224]

On its part, the State possessed important interests in safeguarding the health of the pregnant woman "in maintaining medical standards, and in protecting potential life."[225] In other words, women had their interest in making choices about a condition with potentially serious physical and social sequellae. The State had its interest in regulating those choices up to a point. The trimester approach of *Roe*, since repudiated by the Supreme Court, gave more weight to the State's interest in protecting maternal health in the second trimester; and only allowed its interest in potential life to trump the woman's choices in the last trimester of pregnancy.[226]

Justice Blackmun's framework came under attack and finally fell apart in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[227] In a decision notable for its length and dueling opinions, Justices O'Connor, Kennedy, and Souter held the balance of power that prevented a total debacle for the right to refuse to continue a pregnancy.[228] While rejecting the trimester approach as unworkable, the joint opinion acknowledged that women enjoy a liberty interest in the decision to terminate a pregnancy.[229] The Justices saw abortion as a unique act "fraught with consequences" for all concerned, including the woman "who must live with the implications of her decision." The State, however, had a limited ability to regulate the conduct "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. 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

224. *Id*.
225. *Id*. at 154.
226. *Id*. at 163-64.
227. 505 U.S. 833 (1992).
228. *Id*. at 843-44 (O'Connor, Kennedy, and Souter, JJ., announcing the judgment of the Court, and delivering an opinion with respect to Parts I, II, III, V-A, V-C, and VI, and an opinion with respect to Part V-E, in which Justice Stevens joins, and an opinion with respect to Parts IV, V-B, and V-D).
229. *Id*. at 852 (Joint Opinion).

that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[230]

The State's interests, however, were not insubstantial, and the *Casey* swing opinion drew the line at a new place called "viability." Pre-viability, the State could enact all kinds of regulations, so long as they did not have the purpose or effect of imposing an "undue burden" on the woman's autonomous choice.[231] Post-viability, the State's interest in protecting potential life could actually prevail over the woman's interests, unless there was a threat to her life or health.[232]

Interestingly, the new conservative-moderate team of Justices balked at Pennsylvania's laws of spousal notification. The Court was very impressed

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230. *Id*.

231. *Id*. at 877-78.

232. *Id*. at 879. The landscape of abortion jurisprudence changed with *Casey*, with many more regulations passing muster. *See* Brent Weinstein, *The State's Constitutional Power to Regulate Abortion*, 14 J. CONTEMP. LEGAL ISSUES 229 (2004); Lisa Shaw Roy, *Roe and the New Frontier*, 27 HARV. J.L. & PUB. POL'Y 339 (2003).

The Allan Guttmacher Institute tracks legislation introduced in all the states and by Congress. The restrictions it reports include the following: mandatory counseling and waiting periods for abortion in at least 22 states (found at http://www.guttmacher.org /statecenter/spibs/spib_MWRA.pdf.); 32 states which require some parental involvement in a minor's decision to have an abortion (http://www.guttmacher.org/statecenter/spibs/ spib_PIMA.pdf); 46 states which require hospitals, facilities and physicians providing abortions to submit regular and confidential reports to the state (http://www.guttmacher.org/ statecenter/spibs/spib_ARR.pdf). A variety of "conscience clauses" permit health care providers in 46 states to refuse to provide abortion services; in 12 states providers may refuse contraceptive services too; and in 17 states they may decline to provide sterilization services. The Guttmacher Institute, State Policies in Brief, Refusing To Provide Health Services 1 (Feb. 1, 2005), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

The sad necessity for post-viability abortions inspired heated controversy over what has inaccurately been called the "partial-birth" abortion technique. The Supreme Court invalidated a Nebraska law because it lacked an exception for preserving the pregnant woman's health. S*ee* Stenberg v. Carhart, 530 U.S. 914 (2000). However, many other such bans, with varying conditions which may or may not be constitutional, remain on the books. S*ee* The Guttmacher Institute, State Policies in Brief, Bans On Partial-Birth Abortion (Feb. 1, 2005), http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf. There are 5 states with a post-viability ban, but the two of them which lack a health exception are unenforceable in light of *Stenberg*. Of four states with a health exception, two are broad and two are very narrow. Nineteen states and the District of Columbia limit post-viability abortions, but include the health exception required by Supreme Court jurisprudence. The Guttmacher Institute, State Policies in Brief, Restrictions on Postviability Abortions (Feb. 1, 2005), http://www.guttmacher.org/statecenter/spibs/spib_RPA.

Congress has passed a federal ban on partial birth abortions (also with no health exception) (the Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2005)), which the Eighth Circuit held unconstitutional in July of 2005. *See* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005). Certiorari has been granted by the United States Supreme Court, Gonzales v. Carhart, 2006 WL 385614 (2006), which will hear it in its reconfigured shape. The late Chief Justice William Rehnquist and the retired Justice Sandra Day O'Connor have been replaced by Chief Justice John Roberts and Associate Justice Samuel Alito, respectively. Justice O'Connor provided a critical swing vote on abortion cases, while Justice Alito is widely feared to have a much less open mind.

with the evidence of serious domestic violence in families, and wished to repudiate an outdated gender-determined view of the proper roles in homes and families. It cited everything from *Bradwell v. State*, in which a married woman was unable to gain admission to the state bar of Illinois, to other decisions insisting "woman is still regarded as the center of home and family life, with attendant 'special responsibilities that precluded full and independent legal status under the Constitution.'"[233] But this common law notion of a "woman's role within the family" was no longer acceptable, and consequently a husband had no right to interfere in his wife's exercise of her constitutionally protected liberty interest.[234]

Contrast to the above, Justice Blackmun's impassioned defense of his original decision.[235] His argument was more explicit in dissent in *Casey* than it had been in the original *Roe* opinion, about what was at stake for women if they lost the right to refuse to continue a pregnancy. The risks included infringement "upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands."[236] In other words, continuation of pregnancy meant serious intrusion on the bodily integrity of the woman. The woman denied the right to refuse also lost the ability to make her own autonomous decisions about reproduction and family planning — "critical life choices that that Court long has deemed central to the right to privacy."[237] Motherhood affects "woman's educational prospects, employment opportunities, and self-determination," so to deny her choice in this sphere is to "deprive her of basic control over her life."[238] Moreover, forced motherhood has gender implications: "The State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care, "all without compensation from the State for their services. Instead, the dissent continued, it is assumed that motherhood is "natural" for women.[239] Justice Blackmun also questioned the bona fides of the asserted State interest in "maternal health," which it seemed to him to focus only on making women feel maternal.[240]

Motherhood as risk and burden justified a woman's claim to make her own decisions whether to be or not to be a mother. The state's interest in

233. *Id*. at 897.
234. *Id*. at 897-98.
235. *Id*. at 922 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).
236. *Id*. at 927.
237. *Id*.
238. *Id*. at 928.
239. *Id*.
240. *Id*. at 941.

compelling the completion of the pregnancy, by contrast, focused on the fetus, on the "potential life" that would be snuffed out by the woman's choice not to be a mother. A funny thing happened on the way to the Court's abortion decisions. The Women's Liberation demand for promotion of women's health seems to have taken a back seat, except as a paradoxical justification to impose deliberately discouraging restrictions on women's choices. Thus, when it came to coverage by public programs for safe, healthy abortions for indigent women, the Court simply was not interested. First, it ruled that Medicaid had no obligation to finance non-therapeutic abortions for indigent women, even though it did provide benefits for childbirth.[241] Then it upheld a very restrictive version of the Hyde Amendment, in which Congress prohibited the use of any federal funds to reimburse the cost of even medically-indicated abortions under the joint federal/state Medicaid program, except for very narrow circumstances.[242] Both of these decisions were based on the jurisprudential position that while government may not actively prohibit choices, it has no obligation to affirmatively support them. In other words, the interest of a poor woman wishing to protect her health during an unwanted pregnancy is not of equal constitutional weight with her theoretical "freedom of choice." She was poor before she got pregnant; she remains poor; and, if the public authorities prefer to spend their money on childbirth rather than abortions, she is left to her own devices. This strict "you're on your own" approach extended not just to elective non-therapeutic abortions, but even to those that were "medically necessary" (so long as the woman's life itself was not at risk).[243]

There are many reasons that the abortion finance cases were decided as they were, but they also demonstrate the limits of the Court's views of motherhood. Majorities on the Court admitted that motherhood that was not freely chosen was an enormous imposition on the physical integrity and life opportunities of the women who were deprived of the ability to choose or refuse. They also acknowledged that poverty could deprive women of their choices as effectively as any state law did. But the support for healthy motherhood, or healthy non-motherhood, is as absent from the Court's decisions as it often is in public policy. While the state may "favor" childbirth with its policies, it is not required by virtue of the Constitution to

241. Maher v. Roe, 432 U.S. 464 (1977).

242. Harris v. McRae, 448 U.S. 297 (1980).

243. For a survey of funding restrictions see The Guttmacher Institute, State Policies in Brief, State Funding of Abortion Under Medicaid, http://www.guttmacher.org/statecenter /spibs/spib_SFAM.pdf; restrictions on state family planning funding for abortion counseling and referral, The Guttmacher Institute, State Policies in Brief, State Family Planning Funding Restrictions, http://www.guttmacher.org/statecenter/spibs/spib_SFPFR.pdf. Some states even prohibit private insurers from covering abortion services except in cases of life endangerment. The Guttmacher Institute, State Policies in Brief, Restricting Insurance Coverage of Abortion, http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

provide resources to support healthful autonomous choices about motherhood.

V. CONCLUSION: HONOR THY MOTHER?

The Court's views about "motherhood" must be teased out from holdings in four apparently disconnected areas and from decisions that may be oblique or obscure. Worse still, the Court relies on generic assumptions that fail to reflect how complicated an undertaking it is to be a mother in this society, and how much that experience is shaped by all facets of a woman's life, including her age, her class, her race, her marital status and familial resources, and the expectations of others and of herself. Despite some decided improvements, like the FMLA, and in the face of the pro-family and pro-marriage rhetoric of the Bush administration, there is in fact very little social support either for motherhood, or for its complement, refusing motherhood.

When compared to unmarried fathers, biology is destiny for mothers, who are presumed to be "caring" in a way that fathers have to establish by "stepping forward." But for those mothers who become dependent on the largesse of the state, the presumption shifts: it is no longer acceptable for them to be paid to stay at home and raise children. Rather, they are objects of suspicion and coercion who must be pushed into the labor force in short order. Working mothers, on the other hand, are respectable. They earn this status, however, largely insofar as they can conform to a neutral role in the workplace. The Court was not even willing to recognize pregnancy discrimination in employment as a species of illegal treatment on the grounds of sex until it was reversed by Congress in the PDA. The Court approved California's maternity leave policy, but subsequent gender neutral federal legislation mooted that divisive opinion. It has never clearly ruled that accommodations may be necessary in order for women to participate in the normal scheme of workplace activities. Finally, in its abortion decisions, the Court has significantly retreated from its pioneering *Roe v. Wade* decision about the right to refuse to become a mother. Indeed, with the retirement of Justice O'Connor who so often provided a critical swing vote and her replacement by Justice Samuel Alito, women's liberties in this area hang by a thread. In any case, the abortion rights cases never included a real dedication to the promotion of women's health, either as mothers or as non-mothers, respectively. Indigent women are on their own in procuring the resources necessary to make a safe decision.

When Shulamith Firestone first published "The Dialectic of Sex" in 1970, she offered a shocking argument: Just as the struggle over the means of production was the key to class inequality, women must seize control over the means of *re*production if they wanted to be free of sex discrimination. This included the potential for entirely artificial reproduction whereby children would not have to be produced in the

physical wombs of their biological mothers, or of any other woman. Firestone argued that only in this way would female dependence on males be avoided and "the tyranny of the biological family . . . be broken," along with the "psychology of power." She warned, however, that the "new technology, especially fertility control, may be used against them to reinforce the entrenched system of exploitation."

Firestone's Orwellian vision has come true in part, as there is a new technology that separates the biology of fertilization and genetics entirely from gestation in a particular womb mother's body. However, it does not remove the necessity of pregnancy or really change the experience of motherhood for most women. Even if women wished to be, they are not "free" of the "tyranny of the biological family." More importantly, they are not free of the tyranny of the social attitudes and stereotypes that under gird the Supreme Court's views on "motherhood." The Court has constructed "Motherhood" with a capital "M," but without Honor. It remains enormously difficult to be a mother in our society. Ask any mother who has no choice about doing most of the caring; ask any dependent mother who has to swallow the insults of the State in order to feed her children; ask any working mother who is underpaid and who has to pretend not to be a mother in order to succeed in the workplace, or, alternatively, has to compromise her working life; ask any woman who is subjected to harassment by society instead of support for her choices in making a healthy abortion decision. The current political and legal environment makes it hard to believe in the potential for radical change, so let us at least get back to basics: "Honor Thy Mother." Honor the right of every woman to be an autonomous, self-directing, healthy individual who enjoys physical and social support for choosing a very valuable role, or for refusing it safely and with dignity and respect.