PREGNANT MEN

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A core difficulty with using equality doctrine to protect women's rights is that the U.S. Supreme Court has ruled that pregnancy-based discrimination is not per se gender-based discrimination under the Equal Protection Clause of the U.S. Constitution. In its landmark decision, *Geduldig v. Aiello*,[1] the Court ruled that a state-run disability plan that excluded normal pregnancy from coverage did not discriminate on the basis of gender. In the Court's words:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[2]

If the first group, pregnant persons, had included both men and women, the Court would have found it easier to evaluate whether gender-based discrimination was taking place, because it then could have determined whether pregnant women were being treated with greater disfavor than pregnant men. But of course, men by definition do not get pregnant.

The fact that men do not get pregnant has therefore posed an enormous hurdle for feminist litigators trying to use the Constitution to protect women from pregnancy-based discrimination. With the erosion of privacy doctrine as a way to ensure women's reproductive freedom, it has become increasingly important to find ways to use equal protection doctrine to

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[1] 417 U.S. 484 (1974).

[2] Id. at 496–97 n.20.

protect women from pregnancy-based discrimination.[3] But equal protection doctrine is not readily available so long as feminists face the *Geduldig* hurdle.[4] We need to have ways to show that pregnant women are treated with greater disfavor by society than men would be treated if they could get pregnant.

In this Article, I will try to provide a description of how society would treat men if they could become pregnant, arguing that they would be treated far better than pregnant women. When men are situated comparably to women with respect to reproduction due to use of new reproductive technologies, men are systematically treated far better than women. These men, whom I call "pregnant men," generally win court disputes about custody and other reproductive control issues when the opposing party is female. This Article will explore how and why "pregnant men" usually win such controversies. More broadly, I will argue that our judiciary treats the significance of women's biology inconsistently in order to systematically perpetuate women's subordination in society. To achieve this ultimate end, courts often ignore entirely, or exaggerate excessively, women's biological differences from men.

My analytical approach therefore raises two key theoretical issues. First, commentators such as Cass Sunstein have argued that counterfactual questions are not helpful or relevant to legal reformers because they rely on changing one part of reality while keeping the rest the same.[5] As I will argue in part I, counterfactual discussions about "pregnant men" can be useful and are essential if feminists are to respond to *Geduldig*. Second, some feminist scholars who consider themselves to be anti-essentialists, such as Angela Harris and Catharine MacKinnon,[6] might disagree with my line

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[3] In *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2846 (1992) (Blackmun, J., concurring), Justice Blackmun invoked the first mention of gender-based equality theory in a Supreme Court reproductive freedom case, concluding: "A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality." Blackmun, however, ignored the *Geduldig* decision entirely, never dealing with the conceptual problem that men cannot get pregnant. No other member of the Court joined his concurring opinion.

[4] The Supreme Court recently reaffirmed *Geduldig* in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 760 (1993), thereby compounding the problem. Citing *Geduldig* as authoritative precedent, Justice Scalia rejected the proposition that "since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class." Id. at 760 (ruling that anti-abortion groups organizing blockades of clinics do not violate 42 U.S.C. § 1985(3)).

[5] Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 35 n.129 (1992).

[6] See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 590–601 (1990) (arguing that MacKinnon's dominance theory is flawed by essentialism); Catharine A. MacKinnon, From Practice to Theory, or What

of inquiry because it relies on the use of biological arguments to explain women's subordination in society.

I will argue in this Article that feminists can accommodate biological arguments about women's condition in society without engaging in gender essentialism. Gender essentialism is "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[7] I will argue that the litmus test for gender essentialism is whether a scholar is considering the full range of women's experiences when making generalizations, not whether a scholar uses biological arguments. Unfortunately, some theorists such as Harris and MacKinnon confuse biological arguments with essentialist arguments. This Article will repeatedly rely on biological arguments to show that society treats women unfavorably due to their capacity to become pregnant. As I will argue in part II, theorists such as Harris and MacKinnon do feminism a disservice in insisting that anti-essentialism requires that we ignore entirely the role of biology in women's lives.

In parts III through V of this Article, I will discuss the role of biology in perpetuating women's subordination in society and will speculate about the treatment men would receive if they could become pregnant. In part III, I will discuss examples in which the courts *ignore* women's biological differences from men in order to perpetuate women's subordination in society. In part IV, I will discuss examples in which the courts *exaggerate* women's biological differences from men to perpetuate women's subordination in society. Finally, in part V, I will examine cases in which the courts *try to benefit* women by respecting their reproductive capacity. Nevertheless, I will argue that these cases in fact demonstrate situations where what may seem like preferential treatment for some women results in subordinate treatment for the most disadvantaged women in our society.

The cases that I discuss in parts III through V actually reinforce rather than detract from the anti-essentialist critique, despite their emphasis on the role of biology in perpetuating women's subordination in society. They show that society does not treat women monolithically. It may ignore women's biological differences from men, it may exaggerate those differences, and it may ignore those differences for some women while exaggerating them for other women. The underlying pattern, however, is subordination. I will argue in this Article that with respect to their biology, women are treated in ways that perpetuate their subordination in society.

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is a White Woman Anyway?, 4 Yale J.L. & Feminism 13, 16 n.11 (1991) (arguing that Angela Harris wrongly applies the label anti-essentialism "to socially-based theories that observe and analyze empirical commonalities in women's condition").

[7] Harris, supra note 6, at 585.

In addition, the most disadvantaged women in society always seem to face the brunt of this mistreatment. This final insight emphasizes the importance of what I consider to be the core insight of anti-essentialism[8] — that when women are treated on the basis of their presumed characteristics, be they socially or biologically created, they are not actually being treated monolithically. Women's treatment is always socially contingent upon women's status in society vis-à-vis class, race, religion, sexual orientation, age, ethnicity and the like.

Thus, the challenge in examining cases involving women's reproductive capacity is to respect women's distinctive reproductive abilities without overstating the limitations that those abilities place on women. To oppose gender essentialism, we must examine the effects of such policies on *all* women, especially focusing our attention on the most disadvantaged women in our society. I will try to engage in such a discussion in this Article.

I. THE PROBLEM WITH COUNTERFACTUALS

Cass Sunstein has argued that the kind of counterfactual inquiry which I will be presenting in this Article is not particularly useful. He argues that asking how men would be treated if they could get pregnant "has the usual problem of counterfactuals: It can work only if one isolated part of current reality is changed and the rest held constant — an extremely artificial strategy, since the change of that one isolated part of reality changes the rest of it as well."[9] Moreover, Sunstein argues, "if men could become pregnant, they would not be men (indeed no one would be a man as we understand that term), and to ask how abortion would be treated in so fundamentally different a world is to ask a question that is not subject to meaningful evaluation."[10]

Sunstein is correct to observe that asking the counterfactual question of how men would be treated if they could become pregnant has some troubling elements. I do not expect to answer that question in this Article. However, there are situations in which men and women are equivalently positioned with respect to reproductive issues due to new reproductive technology and, interestingly, the men's reproductive concerns always seem to prevail over the women's reproductive interests. It is helpful therefore to explore these situations in which men are "almost pregnant" to see the

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[8] See Harris, supra note 6 and accompanying text (describing the core insight of anti-essentialism as the inability to describe women independently of race, class, sexual orientation and other realities of experience).

[9] Sunstein, supra note 5, at 35 n.129.

[10] Id.

systematic valuation of men's well-being over women's well-being in society. Sunstein may be overemphasizing the distinctiveness of pregnancy to make his point. By contrast, I think that we should welcome the opportunity to discuss situations in which men are "almost pregnant" in order to demonstrate how much better these men are treated than similarly situated women.

Moreover, feminists at least need to try to speculate as to how "pregnant men" would be treated in order to overcome the *Geduldig* hurdle. *Geduldig* leaves feminists with two choices — show how men would be treated if they could get pregnant or show that the legislature acted with the intent to harm women when it created a pregnancy-based category.[11] In other articles[12] and briefs,[13] I have tried to meet the second requirement; however, it is nearly impossible to meet. In light of the Court's decision in *Personnel Administrator v. Feeney*,[14] a plaintiff is required to show that a legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[15] Legislatures, however, rarely leave such evidence behind in enacting modern legislation. In fact, in my own research in Mississippi and Louisiana, I have found that many state legislatures keep virtually no record of their deliberations. Thus, as difficult as the first line of inquiry may be, we must pursue it until the Court overrules *Geduldig*.

II. THE ANTI-ESSENTIALIST CRITIQUE OF BIOLOGICAL ARGUMENTS

I consider myself to be an anti-essentialist feminist, by which I mean that I assiduously try to consider the range of women's lives when trying to understand a particular policy's impact on women in society. Because the most disadvantaged women in society — lesbians, poor women, women of color, women with disabilities and young women (to name a few) — often

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[11] In *Geduldig*, the Court made a brief reference to the fact that the plaintiffs had the option to demonstrate that "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

[12] See, e.g., Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 Duke L.J. 324.

[13] See, e.g., Brief for Black Women of Choice et al., Sojourner T. v. Buddy Roemer, (5th Cir. 1991) (No. 91-3677), reprinted in Ruth Colker, Abortion & Dialogue: Pro-Choice, Pro-Life, & American Law 163 (1992).

[14] 442 U.S. 256 (1979) (upholding the constitutionality of Massachusetts veterans preference statute despite its disparate impact on women).

[15] Id. at 279.

experience the most dramatic consequences of a policy's impact on women, I am committed to a form of analysis that discusses the lives of the most disadvantaged women. Therefore, in previous articles, I have discussed how society's rules concerning maternalization and terrorization starkly affect lesbians,[16] how society's rules concerning reproductive freedom harm young and poor women,[17] and how society's rules regarding protection of abortion clinics hurt young and poor women and women with disabilities.[18] I have learned, through these inquiries, that the impact on the most disadvantaged women in society is not necessarily a heightened version of the impact on more privileged women; sometimes, the effect is actually an opposite or a comparable one. The kinds of investigations that I have conducted, I believe, would be consistent with an anti-essentialist critique.

This Article, however, asks a somewhat different question: how men would be treated if they could get pregnant. This question arose from my difficulty in using equality doctrine to assist women in the area of reproductive freedom; however, I did not initially expect this particular Article to be directly relevant to my anti-essentialist agenda. Since I was asking how privileged men would be treated, it did not seem to me that I needed to have my anti-essentialist lens in sharp focus. What I soon learned, however, is that some feminists might argue that my current inquiry is *essentialist*, because it relies on biological arguments to explain women's subordination in society. For example, Angela Harris[19] and Catharine MacKinnon[20] both argue that feminists are "essentialists" to the extent that they rely on biological arguments to explain women's subordination. This anti-essentialist critique of biological arguments is so sweeping that one must wonder whether feminists should credit biology with having any role in explaining women's subordination in society. I therefore learned that I had been using one aspect of anti-essentialism in my previous writings — the aspect that says that we must consider the full range of women's experiences when generalizing about gender; however, I had been ignoring another aspect of anti-essentialism — that we should avoid biological arguments. Thus, I found it necessary to explore the basis of the anti-biological argument in anti-essentialism to decide whether I wished to add it to my own theoretical perspective. I have chosen not to adopt the anti-biological perspective.

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[16] Ruth Colker, The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug, 105 Harv. L. Rev. 1084 (1992).

[17] Colker, supra note 12, at 331–53.

[18] Ruth Colker, Abortion & Violence, Law & Social Inquiry (forthcoming 1994).

[19] Harris, supra note 6, at 602–05.

[20] See, e.g., MacKinnon, supra note 6, at 16–17.

A. Angela Harris & Robin West

Angela Harris' pathbreaking work on anti-essentialism has helped the feminist community (and myself) understand how the word "woman" has often meant middle-class white woman within feminist jurisprudence. Thus, I usually begin my articles, as I have in this one, by quoting Harris' definition of gender essentialism.[21]

Harris' work, however, also contains a strong critique of the use of biological arguments. Her critique of biological premises flows from the definition of the "self" which is integral to her scholarship. She defines the self as follows:

> It is a premise of this article that we are not born with a "self," but rather are composed of a welter of partial, sometimes contradictory, or even antithetical "selves." . . . Thus, consciousness . . . is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated. A multiple consciousness is home both to the first and the second voices, and all the voices in between.[22]

At its limits, Harris would seem to be suggesting that there is not even a biological self which would distinguish men from women. No aspect of the self is innate or given — to the extent that women share commonalities, it is because those commonalities have been constructed by themselves or others.

Harris applies her conception of the self to a critique of Robin West's scholarship. West relies on women's physical differences from men to justify her critique of what she calls the "separation thesis." West argues that women are essentially connected, not essentially separate from the rest of human life, because they get pregnant and breastfeed, but that modern legal theory rests on the separation thesis. In West's words:

> In fact, women are *in some sense* "connected" to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and "connecting" experience of heterosexual penetration; the monthly experience of menstruation which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding. Indeed, perhaps the central insight of feminist theory of the last decade has been that women are "essentially connected," not "essentially separate," from the rest of human life, both

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[21] See supra note 7 and accompanying text.

[22] Harris, supra note 6, at 584.

> materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.[23]

West's biological claims are sweeping; aside from using the phrase "in some sense," she makes no attempt to modify her argument for any subgroup of women.

Harris criticizes West's perspective by arguing that it assumes that "every self is deeply and primarily gendered . . . with its corollary that gender is more important . . . than race."[24] It thereby privileges white women's experience over the experience of black women.[25] According to Harris, "West's essential woman turns out to be white."[26] Unfortunately, however, Harris does not provide the reader with guidance as to how to talk properly about the biological aspects of gender.

I would agree with Harris that West's biological arguments suffer from gross distortions by failing to take into account the diversity of women's experiences. However, West's theory is problematic for white women as well as for black women. West's scholarship suffers from two problems. First, without citation to case law, she assumes that the courts always rely on the separation thesis to determine how women should be treated in society. As I will demonstrate in the latter parts of this Article, that is not an accurate description of the case law with respect to women's reproductive abilities. At times, the courts emphasize women's reproductive capacity; at other times, they ignore it. But, in either case, they treat women's reproductive capacity in a way that perpetuates women's subordination in society. By assuming that women's reproductive capacity has a unidimensional effect on women's lives by making them feel connected to others, West perpetuates the kind of stereotyping that we will see is the basis of many court decisions. The biological aspects of gender are not necessarily the core defining characteristics of the lives of white women or black women. Yet courts, as we will see, often make this assumption.

Second, not all women are affected in the same way by society's treatment of their reproductive biology. As we will see in the next parts of this Article, society's treatment of women's reproductive biology may benefit some women while harming others. Not surprisingly, the women who are the most harmed are also the women who are already the most disadvantaged in society. By having middle-class women in mind when creating policies, legislators often clumsily harm poor women while

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[23] Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 3 (1988) (emphasis added).

[24] Harris, supra note 6, at 604.

[25] Id.

[26] Id. at 605.

purporting to benefit middle-class women. West's unidimensional thesis does not permit an easy exploration of these multiple effects.

B. Catharine MacKinnon

Like Angela Harris, Catharine MacKinnon argues that it is inappropriate to try to make all women fit into the abstraction "woman" as "a fixed, posited female essence."[27] Whereas Harris identified MacKinnon and Robin West as having such problematic features in their scholarship,[28] MacKinnon identifies Simone DeBeauvoir and Susan Brownmiller as using essentialist arguments.[29]

DeBeauvoir, according to MacKinnon, is an essentialist because she defines women in terms of their reproductive capacity. Similarly, Brownmiller is an essentialist because she argues that the accident of women's biology makes women vulnerable to rape.[30] In both cases, their theory is subject to criticism because "[i]t is unclear exactly how any social organization of equality could change such an existential fact, far less how to argue that a social policy that institutionalized it could be sex discriminatory."[31] According to MacKinnon, feminist theory is therefore essentialist to the extent that it relies on acknowledging women's biological differences from men to explain male dominance.

I agree with MacKinnon that "[t]here is nothing biologically necessary about rape" and that society need not punish women for having a reproductive capacity.[32] In both of those examples, anti-feminist society is trying to attach an unnecessary social meaning to women's biological differences from men. That social meaning must be described for what it is — a socially constructed understanding of women's biology which is not, at all, inevitable. Thus, MacKinnon is correct to urge us to see the *social* meaning of women's biology. Nevertheless, feminist theory may need to refer to the actual facts of women's biology (rather than the social meaning) to explain some aspects of women's subordination in society. MacKinnon relies entirely on examples where society exaggerates the sex differences between women and men to harm women. We can find other examples, as I will argue below, where society *ignores* the sex differences between women and men to harm women, and yet other cases where society tries to

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[27] MacKinnon, supra note 6, at 16.

[28] Harris, supra note 6, at 591, 602.

[29] MacKinnon, supra note 6, at 16--17.

[30] Id. at 17.

[31] Id.

[32] Id.

help women by focusing on biological differences while actually harming some classes of women. MacKinnon's total critique of the use of biological arguments does not give us guidance on how to look at the full range of society's treatment of women's distinctive biology; it assumes that such treatment is one-directional.

C. Conclusion

In sum, Harris's and MacKinnon's critiques of biological essentialism and West's use of biological arguments do not leave us with much guidance about what role biology can or should play in feminist theory. West seems to be giving biology too large a role in claiming that a focus on biology is the "central insight of feminist theory of the last decade."[33] As we will see in the ensuing discussion, *anti-feminists* also often focus on women's distinctive biological capacity to perpetuate women's subordination in society. Thus, it is entirely too simplistic to say that we should construct feminist theory around women's distinctive biological abilities. By doing so, we risk creating a feminist theory which can play into the hands of people who want to use women's biology as an excuse to limit their roles in society.

Rather than abandon biological arguments entirely, I will argue that we need to make them in a much more sophisticated way than does Robin West. We need to see when society needlessly exaggerates women's biological differences to exclude women from certain roles in society as well as when society ignores women's biological differences when they are truly relevant and important. Finally, we need to be mindful of the differences among women in the meaning of their biological experiences. Pregnancy, for example, is a socially contingent experience in women's lives; we should not expect it to have the kind of universal meaning that West ascribes to it. Angela Harris and Catharine MacKinnon therefore provide us with an important starting point in suggesting that we should be critical of biological arguments. Ignoring them entirely, however, is no better than privileging them absolutely.

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[33] West, supra note 23, at 3.

III. NEW REPRODUCTIVE TECHNOLOGY

A. Introduction

Cases involving the new reproductive technology represent examples of the courts ignoring women's biological differences from men in order to perpetuate women's subordination in society. Male sperm donors are considered to have equivalent or superior claims to women who are gestational or biological mothers. Male sperm donors, I will suggest, are considered to be "pregnant persons" and, not surprisingly, these pregnant male persons are treated much better than pregnant female persons. Such a result, I will argue, occurs because the courts devalue or ignore women's experiences of pregnancy.

Due to the new reproductive technology, women can bear children through in vitro fertilization (IVF) transfer using their own eggs or those of another woman, as well as by the much older practice of artificial insemination (AI).[34] In some instances, the woman is called a "surrogate" mother; however, that terminology is not always accurate. In the famous *Baby M* case, for example, Mary Beth Whitehead was not a "surrogate" because she used her own egg to become pregnant through artificial insemination.[35] In other cases, however, the pregnant woman is more truly a surrogate because she became pregnant through IVF transfer using the egg of another woman which was combined with the sperm of a man who is typically the other woman's husband.

For the purposes of this discussion, I will put the reproductive technology cases into three categories: (1) IVF or AI using the pregnant woman's own egg and sperm of her husband; (2) IVF or AI using the pregnant woman's own egg and the sperm of a contractual stranger; and (3) IVF using another woman's egg and the sperm of a contractual stranger. In the latter two categories, a woman can be compensated to relinquish the baby to the sperm donor and his spouse. In the first category, the woman uses reproductive technology to bear a child within her own marriage. Of the three categories, the first is the most commonplace.[36] On account of

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[34] During in vitro fertilization, eggs are extracted from a woman and fertilized outside the uterus; the fertilized egg is then implanted in a woman's uterus — not necessarily the same uterus from which the egg came. During artificial insemination, a man's semen is injected into a woman's uterus. Fertilization occurs in the woman's uterus; the egg is that of the gestational mother. See Lisa Hemphill, American Abortion Law Applied to New Reproductive Technology, 32 Jurimetrics J. 361, 362 (1992).

[35] See In the Matter of Baby M., 537 A.2d 1227, 1234 (N.J. 1988) (noting that Mary Beth Whitehead, the biological mother, was inappropriately called a "surrogate mother").

[36] Artificial insemination by husband and by donor have been in use for several

the use of these new technologies, a question occasionally arises: who are the parents?

The problem of defining the family arises in all three categories. A woman, who is sometimes unmarried and sometimes a lesbian, can use the sperm of a man to whom she is not married in order to bear a child. She often intends for the man not to be considered the father with respect to his legal responsibilities and burdens; instead, a lesbian will often wish her female partner to be considered a second parent. The male sperm donor has generally donated sperm for compensation and does *not* wish to have legal responsibility or recognition. States generally protect men from having any parental obligations and protect women from having to share parental obligations with the sperm donor in that scenario where a physician facilitates the artificial insemination.[37] Further, in some localities (although too few in number), an unmarried woman can even have another woman become the second parent.[38] Nevertheless, these state statutes sometimes have a loophole — they only provide protection to the sperm donors of *married* women. Men who have donated sperm to unmarried women do sometimes seek to be recognized as the father, despite, in some cases, the parties' initial understanding that he would not seek to be recognized as the father. In such cases, sperm donors have successfully sought recognition as a parent. They have often been treated better, as we will see, than gestational or biological mothers. The cases in which male sperm donors obtain parental recognition, therefore, fit my thesis that "pregnant men" always win.

Similarly, a problem in defining what is the family can occur when a woman who gives birth does *not* expect to be considered the legal mother at the time she became pregnant, because she signed a contract stating that she would turn the baby over to the sperm donor and his family. Irrespective of whether the courts consider the underlying contract to be valid or whether the pregnant woman is the "biological" mother, the sperm

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decades. See Hemphill, supra note 34, at 362.

[37] See, e.g., Jhordan C. v. Mary K., 224 Ca. Rptr. 530 (Cal. Ct. App. 1986) (enforcing California Civil Code, section 7005, which provides that "the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived"). At least twenty-four states have statutes that cover some facet of artificial insemination. Judith Areen et al., Law, Science and Medicine 1307 (1984).

[38] See, e.g., In re Petition of L.S. and V.I. for the Adoption of T. and of M., Nos. A-269-90, A-270-90, 1991 WL 219598 (D.C. Super. Aug. 30, 1991), reprinted in Judith Areen, Family Law 1565–67 (1992) (interpreting D.C. code to permit same-sex adoptive parents). But see In re Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (holding that a state statute which barred homosexuals from being adoptive parents was constitutional).

donor and his family always seem to win. The sperm donor's claim to fatherhood always seems to trump the pregnant woman's claim to motherhood irrespective of her biological connection to the child. Although the courts purport not to be using any categorical rules stating that the pregnant woman always loses and the sperm donor always wins, that seems to be the prevailing outcome. These cases, therefore, are quite problematic and I will be discussing them in this Article.

Before discussing the court's gender bias, however, it is helpful to remember the kinds of women and men who are being compared in these cases. In the latter two categories, in particular, the women have received compensation from a man to carry a child to term. By definition, the man has superior financial resources since he can afford to pay for her services. In cases where the woman's own egg is being used, the man will probably want to choose a woman who is of the same race as himself (which is typically Caucasian). However, in cases where IVF transfer is being used and the egg is not that of the gestational mother, then a Caucasian man has no incentive to try to choose a Caucasian woman. One could easily imagine Caucasian men disproportionately choosing poor women of color who have few options for productive employment in the workplace to serve as gestational mothers. The gestational mother also does not need to be living in the United States. A physician could set up a gestational mother "factory" in a third world country to import babies to the United States. Moreover, in cases where male sperm donors successfully obtain parental rights, the mother is almost always an "unmarried woman," who could also be a lesbian. Thus, it is important not to see the courts' preference for male sperm donors who have paid for their fatherhood as the product of a few isolated cases. The male privilege in these cases is often accompanied by privileges of race, class, marital status, and sexual orientation which may become even more heightened in the future as reproductive technology becomes more sophisticated. We are always moving toward a brave new world.

Finally, I should make a technical observation before proceeding to the case discussion. I have chosen to discuss only one case in each of the categories. I have made this choice for two reasons. First, there are few reported decisions in this area of the law although at least two of the cases that I will be discussing have received a high degree of publicity. Because the new reproductive technology makes these cases more likely to occur in the future, discussion of these early precedents is very important. Second, I am using these cases as much for their symbolic importance as for their precedential importance. Each case provides a strong story with a narrative that is potentially very sympathetic to the female plaintiff. Yet, the woman

loses in each case.[39] These women were not visible to the courts in terms of the depth of their experience. By telling their narratives, I hope to share these women's lives with the reader and help make them visible in their totality.

B. IVF or AI Using the Pregnant Woman's Own Egg and Sperm of Her Husband[40]

Mary Sue Davis desperately wanted to bear and raise a child. During the course of her marriage to Junior Lewis Davis, she suffered five tubal pregnancies which were extremely painful.[41] Due to reproductive health problems which were causing the tubal pregnancies, she first had one fallopian tube removed and eventually had her other tube ligated. She and Junior Lewis unsuccessfully sought to adopt a child. Eventually, they decided to try in vitro fertilization (IVF) to become parents.[42]

IVF is typically a very painful procedure for women and Mary Sue's case was no exception. On six different occasions, she received hormone injections every day for a month; on five occasions, she was anesthetized for the aspiration procedure to occur. These procedures were particularly painful for Mary Sue because of her fear of needles.[43]

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[39] It is important to recognize that the wife of the male sperm donor does *not* necessarily win in these cases. Whether she has any legal claim will depend upon whether she has donated genetic material. Thus, if a man donates sperm to another woman who uses her own egg to get pregnant, the wife of the male sperm donor has no legal standing to make a custody or visitation claim for the child. This is true even if the wife of the male sperm donor is the person who takes on major childrearing responsibilities after the child is born. See, e.g., Sonni Efron, Estranged Wife is Denied Custody of Surrogate Baby, L.A. Times, April 9, 1991, at B1 (describing a court ruling that a woman who helped raise the child born to her husband and a surrogate mother had no legal rights to the ten-month-old girl).

[40] See Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (ex-husband prevailed in "custody" dispute over disposition of frozen embryos); York v. Jones, 717 F. Supp. 421 (E.D.Va. 1989) (frozen embryo is property of biological parents so that Cryopreservation Agreement creates only a bailment relationship between the couple and the IVF clinic); Del Zio v. Columbia Presbyterian Hosp., No. 74 Civ. 3588 (S.D.N.Y. Nov. 9, 1978) (couple successfully sued hospital for destroying embryo created through in vitro fertilization without notice).

[41] Davis, 842 S.W.2d at 591.

[42] Id.

[43] Id. There is also, of course, the possibility that we will learn someday that such massive injections of hormones to prepare a woman's body for IVF injections have adverse effects on women's health, e.g., they cause cancer. I know of no such evidence at this time; however, that issue was raised by several participants at the University of Texas Women & Law Conference that I attended in March 1993.

On the last occasion on which IVF was attempted, the physician was able to extract nine ova for fertilization — more than Mary Sue would need for one attempt at pregnancy. By freezing the extra ova, Mary Sue could continue to try to get pregnant without undergoing the aspiration and hormonal stimulation procedure each time. Mary Sue, however, did not continue with the IVF process because Junior Lewis sued for divorce and the frozen embryos became the subject of a lengthy court challenge.[44]

The issue in the divorce proceeding was what should be done with the frozen embryos. Mary Sue originally wanted to have custody of the embryos to transfer them to herself, and later she wished to donate them for transfer to another woman. (During the course of the litigation, she changed her mind). Junior Lewis did not want either Mary Sue or any other woman to use the embryos. The court therefore had to determine whose wishes to honor — Mary Sue's or Junior Lewis's.[45]

Both Mary Sue and Junior Lewis made arguments about their reproductive freedom and why their desires should be honored. Mary Sue wanted the embryos to assist herself or another woman to procreate; Junior Lewis wanted the embryos to prevent himself from being compelled to be a "father." Their views were irreconcilable. Under Tennessee law, the Supreme Court of Tennessee saw its role as acting in equity to weigh the relative interests of the parties in using or not using the embryos; no specific contract or statute bore on the resolution of the issue.

Although the court did not view the case in this way, the case actually presented the court with three options: (1) transferring all of the embryos to Mary Sue, (2) transferring all of the embryos to Junior Lewis, or (3) giving half of the embryos to Mary Sue and half to Junior Lewis. Although one could argue that the third solution is really a victory for Mary Sue, that is not entirely accurate. Since IVF has a low success rate, there would be a very small chance of success if only half of the embryos were ultimately transferred to a woman's uterus. And if the embryos were donated to an "embryo bank" to be used by an anonymous woman, neither Mary Sue nor Junior Lewis would know whether they became "parents." The court, however, chose to consider the case as involving only the first two options, thereby viewing it in its most bipolar form. I would suggest that the court's exaggerated sympathy for Junior Lewis made it unable to see the middle ground available to it.

In reaching its determination, the court purported to view Mary Sue and Junior Lewis as having equivalent claims despite the greater physical burden that Mary Sue had endured to create embryos. In the words of the court:

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[44] Davis, 842 S.W.2d at 592.

[45] Id. at 589–90.

> We are not unmindful of the fact that the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men. In this sense, it is fair to say that women contribute more to the IVF process than men. Their experience, however, must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood. As they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers.[46]

In fact, this description of Mary Sue and Junior Lewis's positions understated Mary Sue's discomfort. Not only did Mary Sue experience the pain of IVF but she also experienced the pain of five tubal pregnancies. That pain is relevant because, had she not experienced the tubal pregnancies, she would not have sought IVF. Moreover, if *Davis v. Davis* takes on the weight of precedential authority, women like Mary Sue (those with similar gynecological problems who wish to continue their efforts to become pregnant), will face even further suffering. They must continue to contend with the unlikely prospect of being able to get pregnant in the future. Therefore, without having access to existing frozen embryos, these women will be forced to undergo IVF again. To such a woman, a court's denial of any custody rights in the embryos causes her certain pain in the future, in addition to the physical hardships and suffering endured previously.

Nevertheless, considering Junior Lewis's equitable arguments, the court found that he and Mary Sue had equivalent claims. Junior Lewis had argued that he did not want to be compelled to experience "fatherhood" because of his own unhappy childhood living in a home for boys and having monthly visits with his mother. This is how the court described his situation:

> In light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents. Regardless of whether he or Mary Sue had custody, he feels that the child's bond with the non-custodial parent would not be satisfactory. He testified very clearly that his concern was for the psychological obstacles a child in such a situation would face, as well as the burdens that it would impose on him. Likewise, he is opposed to donation because the recipient couple might divorce, leaving the child (which he definitely would consider his own) in a single parent setting.[47]

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[46] Id. at 601.

[47] Id. at 604.

On the one hand, the court was faced both with Mary Sue's actual pain and potential future pain. Mary Sue experienced the pain of the tubal pregnancies and the pain of the IVF procedures. If, at some later date, she chose to try to bear a child again, she would be forced to endure the additional pain of undergoing the IVF procedure all over again, were she not provided with the embryos. On the opposing side, the court was faced with Junior Lewis's speculative argument about the pain a not-then-conceived child might experience *if* the child were raised in a single-parent setting. In fact, both Mary Sue and Junior Lewis had remarried so that the child might well have had *three or four* adults who considered themselves to be the child's parents. Moreover, the scenario that an adoptive couple might ultimately divorce is a scenario that is, of course, possible for any couple. But Junior Lewis must have weighed that possibility with respect to his own marriage when he decided to participate in the IVF process, since he testified that his own marriage had problems at that time. It is hard to see how transferring the embryos to Mary Sue or another couple creates a possibility of divorce that Junior Lewis had not already agreed to accept when he participated in IVF.

The court was therefore presented with Mary Sue's real physical pain versus Junior Lewis's speculative and somewhat illogical emotional argument about harm to a future child and himself. Viewing these two pains as equivalent, the court ruled for Junior Lewis. The court concluded that his potential lifetime pain if he were to be coerced into being a "father" was worse than the physical pain that Mary Sue had already, or might in the future, experience.[48]

The court's use of language revealed its sympathies in the case. Junior Lewis was consistently referred to as a "father" with an argument (which the court accepted) against coerced "fatherhood." Junior Lewis, however, was no more a father than a man who donates sperm to a sperm bank, never knowing whether that sperm was used to produce a child someday. Fatherhood should require an emotional bonding that it is difficult to have with one's sperm.[49] Mary Sue wanted first herself and then another

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[48] Junior Lewis based his arguments on the premise that he did not want to be "coerced" into being a father. I could appreciate such an argument if he had been tricked or coerced into donating sperm. In this case, however, he is the only party who one might say "tricked" the other party, because he apparently did not confide in Mary Sue that he thought the marriage was troubled while she was undergoing a painful IVF process. The court's sympathy for Junior Lewis's desire not to be coerced is therefore a disproportionate sympathy in that the court seems entirely oblivious to the genuine ways in which Mary Sue may have been tricked or coerced. See Davis, 842 S.W.2d at 592 n.10.

[49] When I discussed this case with my feminist jurisprudence class at Tulane Law School, I was surprised to hear how strongly some men felt about the legal entitlement

woman to use the embryos to become a mother in the genuine sense of the term — by bearing and raising a child. It is only by distorting the meaning of the word "father" that the court was able to conclude that Mary Sue and Junior Lewis had equivalent claims. It is a sad reflection on fatherhood if the mere donation of sperm makes one a father.

This case did not literally involve a "pregnant man"; however, the court treated Junior Lewis as having the equivalent childbearing capacity of a woman, Mary Sue, and easily sided with the man, Junior Lewis. One might argue that such a result was just happenstance — that he had a more appealing emotional argument in this particular case. In the future, one might argue, a woman might win such a case.

The court, however, did not treat this case like a highly subjective, contextual inquiry. Instead, it attempted to derive a rule from this case, in order to determine for the future when the woman's wishes rather than the man's wishes should be honored in an IVF transfer dispute. Thus, the court summarized its views as follows:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[50]

Junior Lewis did not win because of his unusual experience being raised in a home for boys. All men won who wanted to prevent their wives from using IVF when the particular situation was not the subject of a written contract.[51] The court ended its opinion by stating, "the rule does not

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that should flow from their donation of sperm. This conversation made me realize the ways in which society socializes men to attribute tremendous social value to their sperm — a value that I would suggest is greatly disproportionate to the availability of the supply. (As I said to my students, sperm are cheap). I suspect that men are socialized to overvalue their sperm because their sperm are their only connection to reproduction. Women, on the other hand, have to make a much greater physical sacrifice in order to bring a child into this world. The *Davis* case may therefore reflect an example of how society overvalues sperm in order to put men on an equal footing with women's gestational role in the reproductive process. This discussion with my class also made me realize that my understanding of who is a father — based on an emotional commitment to childrearing — may be inconsistent with the generally accepted understanding of who is a father — based on a genetic contribution to the child.

[50] Davis, 842 S.W.2d at 604.

[51] Under the court's decision in *Davis*, the frozen embryos are considered to be in an interim category between "persons" and "property." Id. at 597. The court

contemplate the creation of an automatic veto,"[52] but that is exactly what the court's decision does when there is a "reasonable possibility of achieving parenthood by means other than use of the preembryos in question."[53] Apparently, however, the fact that a woman would have to undergo the pain, difficulties, and even dangers of IVF to reproduce in the future is considered "reasonable" by the court. The *Davis* court expounded:

> The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means. We recognize the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood . . . .[54]

Consequently, a woman who endures the pain of IVF, acting in reliance on the fact that she will be able to have the fertilized eggs placed back in her uterus, may find her needs and interests preempted by the man who donated the sperm which have already fertilized her eggs, because he is entitled to prevent her from undergoing the final stage of embryo transfer.

The court tried to describe its rule in gender-neutral terms by referring to the affected individuals as "parties" rather than as men and women. A man, however, is not capable of transferring the embryos to his own uterus. The only person who can take advantage of the transfer is the woman. When one "party" therefore uses the power to prevent a transfer, that party will almost always be a man. The only time an injunction to *prevent* a transfer will be at issue is when a woman wants a transfer to take place and the sperm donor wishes to prevent it — that scenario is quite gender specific. The only aspect of this rule that is, in fact, gender neutral is the provision about giving the embryos to someone else. Either party could desire to make a gift of the embryos to another woman. But interestingly, by allowing either party to veto that gift, he or she would be vetoing another woman's ability to benefit from the IVF procedure. Thus, all the vetoes that are contemplated by the rule will deter a woman from using the

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determined that, had the Davises provided for the disposition of the frozen embryos in their contract with the Fertility Center of East Tennessee, the institution that stored the embryos, then the legal issue in this case would have been resolved with reference to the contract. Because there was no written agreement between the parties with respect to the issue that arose, the court had to proceed in equity to resolve the matter.

[52] Id. at 604.

[53] Id.

[54] Id.

embryos—either the biological mother or a surrogate mother. The rule therefore has far-ranging implications in giving men, and sometimes women, the power to prevent a woman from becoming pregnant through IVF transfer.

The result in this case — the particular victory for Junior Lewis and the broader rule fashioned by the court — makes sense in a society which respects men's desires and well-being over the wishes and well-being of women. Quite simply, the pregnant man always wins.[55]

C. IVF or AI Using the Pregnant Woman's Own Egg and the Sperm of a Contractual Stranger

1. Married Men Who Engage in Artificial Insemination To Parent a Child

In February 1985, Mary Beth Whitehead[56] and her husband, Richard, entered into a contract with William Stern in which Mary Beth agreed to become pregnant through artificial insemination using the sperm of William in return for compensation of $10,000.[57] Moreover, Mary Beth agreed to carry the child to term, bear it, and deliver it to William and his wife, Elizabeth; Mary Beth agreed to relinquish her parental rights and Richard

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[55] When I presented an earlier version of this paper at the University of Texas Law School, I was interested to hear that many feminists viewed this case as a victory for women, because the court concluded that the frozen embryos were not "life" that should receive a special constitutional status. Had the court taken that view, then Mary Sue Davis would have won easily since she wanted to sustain that life. Feminists argued that recognizing the frozen embryos as having a special constitutional status would undermine our abortion jurisprudence. I disagree with that argument because it confuses gestational mothers with genetic mothers. In my view, it is critical to a pro-choice perspective that the fetus lives inside the woman's body; it is not critical to that perspective that the woman has contributed the genetic material for the fetus that resides in her body. For further discussion, see Ruth Colker, supra note 13 at 108–111. Thus, a gestational mother rather than a genetic mother in the case of IVF transfer has the right to decide whether to abort a fetus. In addition, I do not see any problem with acknowledging that the frozen embryos are a form of life. A woman's right to terminate a pregnancy, in my view, is not dependent on our pretending that the fetus inside her is not "life." Instead, I would say that the termination of that life is an unintended consequence of her desire to terminate the pregnancy. If pregnancies could be terminated without the termination of the life inside her (and the procedure would not be physically more dangerous to the pregnant woman), then I believe that the woman should have the right to terminate her pregnancy but would not have the right to insist that the fetus' life also be terminated. As I have argued elsewhere, one can (and should) be both pro-choice and pro-life. See id. at xiv–xv.

[56] In the Matter of Baby M., 537 A.2d 1237 (N.J. 1988).

[57] Id. at 1234.

agreed to do all acts necessary to rebut the presumption of maternity so that Elizabeth could adopt the child.[58] (William would presumably become the father without the need to adopt the child.) In a separate contract, William Stern agreed to pay $7,500 to the Infertility Center of New York for its services in arranging the "surrogacy" contract.[59]

After several artificial inseminations, Mary Beth Whitehead became pregnant and ultimately bore a child on March 27, 1986, who has been referred to as "Baby M."[60] (The Sterns named her "Melissa"; Mary Beth Whitehead named her "Sara Elizabeth.") During the pregnancy and after the birth, Mary Beth had serious misgivings about whether she could relinquish the child to the Sterns. Nevertheless, on March 30th, she did turn the child over to the Sterns at their house.[61] Mary Beth then became quite distraught and persuaded the Sterns to allow her to have the baby for one week, after which time she agreed to return her to them.[62] In fact, she kept the child for four months until the police forcibly removed her from Mary Beth's parents' home in Florida.[63]

William Stern filed a complaint in New Jersey state court alleging that Mary Beth Whitehead had refused to comply with the surrogacy agreement and that she would flee the state if he attempted to gain custody. The Whiteheads did, in fact, flee the state with the baby, forcing William Stern to commence a supplementary proceeding in Florida state court. Mr. Stern was successful in his various state court actions and Baby M. was eventually handed over to him by the police. Pending final judgment, Mary Beth Whitehead was awarded limited visitation with Baby M.[64]

After a thirty-two day trial, the trial court issued a ruling from the bench in which it enforced the surrogacy contract and permitted Ms. Stern to adopt Melissa; the court also held that vesting custody in the Sterns was in the best interest of the child.[65] Pending the outcome of the appeal, the New Jersey Supreme Court granted very limited visitation to Mary Beth Whitehead.[66]

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[58] Id. at 1235.

[59] Id.

[60] Id. at 1236.

[61] Id.

[62] Id. at 1237.

[63] Id.

[64] Id.

[65] In the Matter of Baby M., 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

[66] Baby M., 537 A.2d at 1238.

On appeal through a grant of direct certification,[67] the New Jersey Supreme Court concluded that the surrogacy contract was not valid, because it violated the state's policy forbidding payment for adoption.[68] In addition, the court found that the statutory standards for relinquishment of parenthood had not been followed, because the trial court had made no finding of abandonment or neglect with respect to Mary Beth Whitehead.[69]

Having decided that the surrogacy contract was unenforceable, the Court then turned to the proper resolution of the custody question. Using the state's Parentage Act, the Court proceeded under a "best interests of the child" standard to determine who should be given custody of Baby M.[70] The Supreme Court had to make that determination after the Sterns had already been awarded custody for a one-and-a-half year period, following the trial court's ruling. Based on the Sterns' extensive involvement with the child, the Supreme Court concluded that the child's best interests would be served by remaining with the Sterns. In addition, the Supreme Court concluded that the Sterns offered a more favorable household in terms of emotional support and financial stability.[71]

Despite the Court's ruling, it purported to view Mary Beth Whitehead more favorably than had the lower court. This is the Court's description of her situation:

> [W]e think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there? We do not know of, and cannot conceive of, any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not. . . . Her resistance to an order that she surrender her infant, possibly forever, merits a measure of understanding . . . . And if we go beyond suffering to an evaluation of the human stakes involved in the struggle, how much weight should be given to her nine months of pregnancy, the labor of childbirth, the risk to her life, compared to the payment of money, the anticipation of a child and the donation of sperm?[72]

Moreover, the Court criticized the transfer of custody from Mary Beth to the Sterns during the pendency of this case. In the Court's words:

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[67] In the Matter of Baby M., 526 A.2d 203 (N.J. 1987).

[68] Baby M., 537 A.2d at 1240.

[69] Id. at 1242.

[70] Id. at 1256.

[71] Id. at 1258–59.

[72] Id. at 1259.

> The probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father — all counsel against temporary custody in the father. A substantial showing that the mother's continued custody would threaten the child's health or welfare would seem to be required.[73]

Thus, the Court seemed to be very sympathetic to Mary Beth Whitehead — noting her substantial risk and discomfort during pregnancy and her strong bond with the child as her mother. Nevertheless, under the standard articulated by the Court — best interests of the child — none of those factors were relevant to the custody dispute. They only became relevant to a minor degree in the Court's consideration of the visitation issue. Although it did not dictate that the lower court order visitation for Mary Beth, it did suggest that the *five-year delay* in visitation which was suggested by the child's guardian would seem to be in error.[74]

The result in this case was that William Stern achieved sole custody of the baby, Melissa, and Mary Beth Whitehead was granted some weekend and visitation rights with Melissa. The father's rights, which arose out of his donation of sperm, trumped those of the mother who donated the egg and actually bore the child.

The Court does not purport to view this case in gender terms nor does it suggest that it is issuing a rule for the future. Nevertheless, it is easy to see an implicit rule. Significant factors in the case were the greater financial and emotional stability of the Sterns. Such financial discrepancy will almost always exist in a "surrogate mother" case given the large amount of money that such cases cost. As for the differing emotional stability, that is also to be expected in such cases. A court is always likely to view a woman as emotionally "unstable" when she has refused to abide by the terms of a contract to which she initially agreed.

It is true that this case presented an unusual element whereby the father obtained custody for a one-and-a-half year period while the case was pending — a factor that certainly weighed in his favor and a factor that the Court cautioned should not occur readily in the future. But interestingly, continuity of custody did not play heavily in the Court's analysis; financial and emotional stability played more heavily. Although emotional support and nurturance need not be a function of wealth,[75] the court nevertheless seemed to make that assumption. In the future, one would not expect such

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[73] Id. at 1261.

[74] Id. at 1262.

[75] See Martha Albertson Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727 (1988).

a case to drag on for such a long period of time since the validity of the underlying contract would not be arguable. Hence, assumptions about the relationship between emotional support, nurturance, and financial wealth may therefore play more heavily in future cases.

The bottom line is that the man's claim to fatherhood based on his donation of sperm trumped the woman's claim to motherhood based on her donation of the egg and her role as bearer of the child. The man did not need to be pregnant to win; even when a man has a much weaker equitable argument than the mother in terms of his contribution to the child who is conceived, the man will prevail. The "best interests of the child" analysis pretends to be gender neutral by ignoring parental physical investment in childbirth; ignoring that contribution, however, achieves the gender specific result of favoring men due to their disproportionate access to financial resources.

2. Unmarried Women Who Use Artificial Insemination To Bear and Parent a Child

In sharp contrast to the successful claims of married men who donate sperm for the purpose of becoming fathers, unmarried women who seek artificial insemination to become mothers do not fare as well. As discussed above, state statutes typically protect the interests of both men and women when a married woman seeks to use artificial insemination to bear a child that she wants to parent and which the sperm donor does not wish to parent. In that case, she is considered to be the legal mother, her husband is considered to be the legal father, and the sperm donor has neither rights nor obligations.

Unmarried women, who are sometimes lesbians, are not treated as favorably by state statutes. Typically, the male sperm donor does have the right, if he so chooses, to seek to become a legal parent when he has donated sperm to an unmarried woman. When male sperm donors have sought to be recognized as the legal parent in cases where the woman is unmarried, they have generally prevailed, irrespective of the parties' understanding at the time that he donated sperm.[76]

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[76] See In the Interest of R.C., 775 P.2d 27 (Colo. 1989) (court determined that the parental rights of a known donor of semen were not extinguished by a Colorado statute, where the donor gave his semen to an unmarried woman who artificially inseminated herself without the assistance of a licensed physician); In C.M. v. C.C., 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977) (court found that a known donor of semen was entitled to visitation rights with respect to the resulting child, where the known donor of semen gave semen to an unmarried woman who artificially inseminated herself without the aid of a licensed physician); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986)

The way that I understand the development of the law in this area is as follows: men who are compensated for donating sperm to unmarried women do not want to have to worry about parental obligations and responsibilities. By passing statutes which eliminate their parental rights, states are protecting men's ability to receive compensation for participating in reproductive activity while avoiding legal liability. These statutes may incidentally protect lesbians and other unmarried women; however, the purpose of these statutes is to protect male sperm donors. When male sperm donors who donate sperm to unmarried women wish to be recognized as parents, however, the loophole in state statutes that by their terms only cover married women, gives them that opportunity. Their act of donating sperm appears to carry much more legal weight than a woman's act of donating an egg and acting as the gestational mother.

Of course, in theory, it is true that an unmarried woman who had received sperm from a man, could sue him for child support and he would not be protected by the state statutes described above. I have not, however, found any such case. I do not know if that is because women tend to be honest in complying with their initial desire not to have the man recognized as a parent, because women's lawyers tell them that state statutes will probably not be interpreted to accord men parental obligations under such circumstances, because women are simply less litigious for cultural or economic reasons, or for some other reason.

One important factor, of course, in distinguishing cases like *Baby M.* from cases in which an unmarried woman unsuccessfully seeks to prevent the sperm donor from being recognized as a parent, is marital status. The man is almost always married in the *Baby M.* scenario, and the woman is rarely married in the second scenario. (The woman may also be unmarried in the *Baby M.* scenario although Mary Beth Whitehead was married; being unmarried would certainly not help her claim under the "best interests of the child" doctrine.) Thus, one might say that married "pregnant" men are treated better than unmarried pregnant women. True to the anti-essentialist thesis, a factor other than gender — marital status — is relevant to understanding the result in these cases.

(court determined that the parental rights of a known donor of semen were not extinguished by a California statute, where the donor gave his semen to an unmarried woman who artificially inseminated herself without the assistance of a licensed physician). In arriving at these determinations, the courts naturally did not acknowledge any understanding between the parties at the time of the sperm donation; instead the courts reasoned that there was no clear understanding between the parties at that time. See, e.g., Jhordan C., 224 Cal. Rptr. at 536.

D. IVF Using Another Woman's Egg and the Sperm of a Contractual Stranger[77]

Mark and Crispina[78] are a married couple who desired to have a child but were unable to because Crispina had had a hysterectomy.[79] In January 1990, Mark, Crispina, and Anna signed a contract whereby Anna agreed to carry an embryo to term that was created through Mark's sperm and Crispina's egg.[80]

Both parties appeared not to live up to the conditions of the contract. Mark and Crispina did not obtain an insurance policy for Anna that they had promised to acquire; in addition, they were not sufficiently helpful when she had premature labor during her pregnancy.[81] For her part, Anna had not disclosed her history of stillbirths and miscarriages; before the baby was to be born, she demanded full payment under the contract.[82] She wrote a letter to Mark and Crispina stating that she urgently needed the remaining $5,000 because of housing and health problems that she was experiencing; if she did not receive full payment immediately, she threatened that she would keep the baby because they would be in breach of the contract.[83] The situation deteriorated sufficiently so that both Mark and Anna filed lawsuits before the baby was born to establish parentage. When the child was born a couple of months later, blood samples confirmed what each of the parties knew — that the baby was the product of the sperm of Mark and the egg of Crispina.[84]

As in the *Baby M.* case, the court ordered that the baby live with the father and his spouse (Mark and Crispina) pending the outcome of the case. It stated that Anna had no parental rights and permitted her visitation only.[85] Unlike the *Baby M.* case, however, Mark's spouse had a biological claim to the child. As in the *Baby M.* case, the trial court ultimately

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[77] See Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991); Surrogate Parenting Assoc. v. Commonwealth ex. rel. Armstrong, 704 S.W.2d 209 (Ky. 1986) (upheld surrogacy service's right to arrange surrogacy adoptions).

[78] Anna J., 286 Cal. Rptr. at 372.

[79] Id.

[80] Id.

[81] Id.

[82] Id.

[83] Id. at 373 n.11.

[84] Technically, the blood test results removed the possibility that Anna was the "genetic mother" of the baby. Id. at 373 n.12. In addition, Anna stipulated that Crispina was the biological mother. Id. at 376.

[85] Id. at 373.

determined that the contract was legal and enforceable against Anna's claim; the court also terminated the order permitting visitation to Anna.[86]
The appeals court upheld the custody award and visitation decision, but based its reasoning on California law rather than the terms of the contract; it did not determine whether the contract was valid.[87]

The appeals court tried to apply California law in a gender-neutral way. Since a man can demonstrate paternity only by proving that his sperm was used to produce the embryo, a woman can only demonstrate maternity by proving that her egg was used to create the embryo. The problem with this analysis is that it significantly underestimates the substantial contributions a woman makes in the reproductive process, apart from any donation of genetic material. The court did generally note the contribution that a gestational mother makes to her fetus:

> While the woman is pregnant, she shares most of her major bodily functions with the child. For some time after birth the child retains and uses the woman's life-preserving tissue, cells, blood, nutrients and antibodies. The woman protects and nourishes the child during pregnancy, and, for good or ill, can permanently affect the child by what she ingests. The contribution to the child's development by the woman who gave it birth is indeed, as amicus curiae points out, profound.[88]

The court's description, however, was quite incomplete. It ignored the pain and discomfort of embryo implantation, as well as the physical difficulties of pregnancy. Like Mary Sue Davis, Anna had to undergo IVF transfer with hormone injections and had to endure the invasiveness of that procedure. Unlike Mary Sue Davis, she also experienced pregnancy and childbirth. The court described the contribution of Anna in entirely impersonal terms, however. Despite the ample evidence in the record relating Anna's specific physical problems during pregnancy and the toll that pregnancy took on her body, the court only generically referred to her contribution as "a woman."[89] There was no reason for the court to use a generic woman in its description. Anna's personal situation was amply described in the record. The court's reasoning in effect depersonalized

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[86] Id.

[87] Id. at 381. The court did not have to reach this question because the result the court reached under California law was identical to the result dictated by the contract. Id. By relying on California law rather than the contract, the court avoided determining whether the contract was invalid under California law, as a form of "baby selling."

[88] Id. at 378.

[89] For example, Anna's letter to Mark and Crispina described in some detail the physical, financial, and emotional problems that she experienced during pregnancy. Id. at 372 n.11.

Anna's situation by failing to acknowledge the actual facts contained in the record.

The court discounted the specific facts regarding Anna's physical discomfort and physical contribution, because Anna did not fall into a category of "traditionally protected" biological mothers. Moreover, state law was not seen as infringing her liberty interests since she voluntarily created her own predicament.[90] In sum, the court was not willing to use statutory or constitutional arguments on behalf of Anna to deprive Mark and Crispina of the "traditional parental relationship which they might otherwise be able to enjoy."[91]

The court never defined exactly what it meant by "traditionally protected" parental relationships. Its definition of a traditional family, however, served the interests of a middle-class white man, and accordingly his Asian-American wife, over that of an African-American woman.[92] As Charlotte Rutherford has noted, Anna's situation unfortunately is *traditional* for African-American women harkening back memories "of slavery and the days of the breeder woman whose feelings for her child, whether born out of love or out of rape, were disregarded when men with power over her made decisions about the child."[93] Although the court rendered its holding in race and class-neutral terms, it is not difficult to see the implications of this decision for many poor women of color.[94] IVF transfer permitted a middle-class couple to compensate a poor woman of color to bear a baby that would be of the same race as themselves rather than the gestational mother. If a court were to grant custody or visitation rights to the gestational mother in such a case, it would be doing the following: granting a cross-racial custody award to a woman who, by definition, has fewer economic resources than a contracting couple who share the race of the baby. A court that sees its role as preserving the "traditional family" is unlikely to grant such an award to the gestational mother. In fact, one might even advise a middle-class couple to seek gestational services from a woman who is of a different race than either the husband or wife because that fact alone might make it difficult for a court to grant custody to the gestational mother. Given the racial implications of economic disparity in

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[90] Id. at 379.

[91] Id.

[92] I presume their social class based on the financial terms of the contract. Anna's financial problems were part of the reason that led her to conclude that Mark and Crispina were not fulfilling their contractual obligations. See supra text accompanying note 83.

[93] Charlotte Rutherford, Reproductive Freedoms and African American Women, 4 Yale J.L. & Feminism 255, 272 (1992).

[94] See id. at 268–73.

the United States, the precedent established in this case is most likely to favor white couples over surrogates who are women of color.[95]

Although the court did not consider the broader implications of its decision, they are quite dramatic for surrogate mothers. The court's result did not require that Anna actually be compensated for her services since the case was not decided on the basis of the contract. If Mark and Crispina had wanted to do so, they could have sued Anna for custody as soon as the child was born and withheld all compensation. Thus, Anna could have delivered the child, lost custody, lost visitation rights, *and* not have been compensated. (In this particular case, Anna was to be paid six installments with the last to be paid six weeks after the child was born. She had apparently been paid $5,000 and had another $5,000 payment forthcoming. In the *Baby M.* case, Mary Beth Whitehead was not to be paid until after the child's birth.) In other words, the court's ruling creates a unilateral contract with the gestational mother having no enforceable rights after giving birth.

E. Conclusion

An underlying question in two of these cases is "what is in the best interest of the child?" Absent clear statutory directives regarding alternative reproductive technology, that question dominates the courts' analyses. These analyses always favor the more prosperous and mainstream party which is invariably the man. Not recognized by any of the courts are the assumptions underlying the best interest of the child analysis. For example, Anna J. loses because she supposedly does not bring a "traditional" family to the child whereas Mark C. does represent such a family. But what is so traditional about a couple who contracts with another woman to carry their "child" to term rather than to adopt one of the many children available for adoption? Why is Anna as a "surrogate" less traditional than Mark and Crispina who contract for the use of the services of a surrogate? In fact, this case represents a common double standard whereby a woman is blamed

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[95] Although it is true that Crispina, an Asian-American woman, benefitted from this particular court decision, that fact is more likely explained through reference to class. Mark and Crispina's ability to afford the expenses of a paid surrogate agreement demonstrates that they were, at least, middle-class. Poor Asian-American women, however, may be used as surrogates in future cases involving white couples seeking a surrogate arrangement. Those poor Asian-American women will face the same difficulties experienced by Anna. It is the combination of race and poverty that causes Anna to have no legal claim, just as it is the combination of race, poverty and gender that has historically caused African-American women to serve as "wet nurses" for wealthy white women. (Similarly, the fact that white women benefitted from African-American women being wet nurses does not lessen the fact that gender was and is an aspect of the oppression experienced by African-American women.)

for sexual conduct when a man is equally blameworthy. If such a double standard were not employed under the guise of "the best interest of the child" standard, women's claims in these cases would seem to be more meritorious. The courts' decisions perpetuate the double standard by defining the man's behavior as traditional and the woman's behavior as nontraditional. This standard is then passed to the next generation through the courts' custody decisions. Imagine the day when a child goes to school and explains that her "mother" was her gestational mother because another couple donated the egg and sperm. When she can make that statement without fear of ridicule, pregnant women will have gained increased respect in society.

These cases — particularly the latter category in which the pregnant woman is a gestational but not a biological mother — also present enormous risk of upper-middle class white men's race and class privilege being vehicles for them to make superior claims over poor women of color. Men are therefore able to purchase their reproductive freedom; they can use their financial resources to insulate themselves from the risks and discomforts of pregnancy and childrearing. Elsewhere, I have criticized the class-based privilege found in privacy doctrine when it is applied to women who are seeking reproductive freedom.[96] Poor women, for example, do not truly have the choice to "choose" abortion so long as privacy doctrine does not compel the state to pay for abortion services. Middle-class women are granted far more reproductive choices through privacy doctrine. The parallel experience as reflected in these cases is that upper-class men can choose to utilize extremely expensive reproductive technology, including compensation for women to serve as gestational mothers, in order to pursue their reproductive freedom. Poor women have few choices about the societal and economic conditions under which they become gestational mothers or the contractual choices that are available to them as gestational mothers. Pregnant men, to the extent that they are privileged by class, are therefore the paradigm of favorable treatment under the law.

IV. WOMEN'S EXCLUSION FROM EMPLOYMENT BASED ON BIOLOGY

In the previous cases, we saw how the courts' refusal to consider the distinctive burdens that fall on women due to their reproductive capacity caused these women to lose arguments for the custody of the child which they had borne. Nevertheless, we should not generalize from those cases

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[96] See Colker, supra note 13 at 58–80.

that courts or society always ignore women's distinctive reproductive capacity when deciding cases or social policy. That same reproductive capacity is often emphasized when it is in fact *not* truly relevant in order to exclude women from jobs that are also sought by men. In this section, I will examine four such examples — women's exclusion from the practice of law, women's exclusion from the military draft, women's exclusion from contact guard positions in a maximum-security penitentiary for men, and women's exclusion from jobs that purportedly create a health risk for the fetus that a woman might be carrying. Despite the fact that these biological arguments were overstated by government policy makers, they were generally accepted by the courts.

A. *Bradwell v. Illinois*[97]

Although numerous cases preceding the 1970s reflect the use of biological arguments to justify women's exclusion from employment, one of the most famous is *Bradwell v. Illinois*.[98] In that case, the Supreme Court upheld Myra Bradwell's exclusion from the bar by the state of Illinois in a brief opinion in 1873. In a more lengthy concurrence, Justice Bradley explained why that exclusion was appropriate referring explicitly to women's "natural" biological condition. In Justice Bradley's words:

> [T]he civil law, *as well as nature herself*, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . *The natural and proper timidity and delicacy which belongs to the female sex* evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, *as well as in the nature of things*, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[99]

By contemporary standards, it is easy to see that Justice Bradley's concurrence is filled with exaggerated notions about the physical differences between women and men. In the context of the case, however, that exaggeration is particularly repugnant because Justice Bradley had before him the example of a woman who clearly did not fit the description that he provided. She had gone to law school, passed the bar exam, and edited a legal periodical.[100] She did not limit herself to the domestic sphere and

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[97] 83 U.S. (16 Wall.) 130 (1873).

[98] Id.

[99] Id. at 141 (emphasis added).

[100] Her lawyer noted that Mrs. Bradwell had been admitted to the bar and that

apparently prospered in the so-called male sphere. Thus, Justice Bradley in reality could offer no explanation for why Myra Bradwell should be excluded from the practice of law; even by Justice Bradley's own yardstick, she possessed none of the so-called limitations of her sex.

Myra Bradwell was not pregnant nor was there any indication that she planned to become pregnant soon. The *Bradwell* case, therefore, demonstrates how *all* white women were viewed as frail during the Victorian era, on account of their potential to become pregnant. (As Sojourner Truth reminded us with her famous statement, "And Ain't I a Woman,"[101] stereotypes concerning women's frailty have been applied to white women and not to African-American women.) What I take from this example is that all white women (certainly in late-nineteenth century America) were pregnant persons in the eyes of the law irrespective of whether or not they were actually pregnant. *Nonpregnant* white women were therefore not compared to nonpregnant white men. Pregnancy was an excuse for the treatment of women, not a genuine concern with women's physical condition.

The *Bradwell* case is, in many ways, no different than modern cases arising out of women's exclusion from employment; it rests upon the need to exaggerate the sex differences between women and men even when the record is full of facts which contradict that exaggeration. Unlike the 1908 decision in *Muller v. Oregon*,[102] where the Court upheld a restriction on women's working conditions because it was deliberately misled into believing that all women possessed a scientifically demonstrable frailty, the Court in *Bradwell* upheld a restriction on women's working conditions despite the fact that the plaintiff's life was testimony to the inaccuracy of the stereotypes that justified the law. Some members of the *Bradwell* Court, however, chose to articulate a stereotype about women rather than deal responsibly with the facts in the record about the plaintiff. In such cases, one can see that the Court has helped to perpetuate stereotypes about the biological differences between women and men. If men could get pregnant, stereotypes about women would not be so dependent on their perceived biological frailty.

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coverture had been abandoned in the state of Illinois. Id. at 136–37.

[101] Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought 14 (1988) (quoting Sojourner Truth).

[102] 208 U.S. 412 (1908) (upholding exclusion of women from more than ten hours of employment in factories or bakeries per day).

B. *Rostker v. Goldberg*[103]

In this case, the Court and Congress' consideration of the physical differences between men and women was much more subtle. The issue in the case was the constitutionality of Congress requiring men but not women to register for the draft — a policy that was adopted during President Carter's administration. The justification for excluding women was that women and men were not similarly situated due to another level of discrimination — that only men were eligible for "combat" positions. The military therefore argued that it need only draft those people who were "combat-ready," which included a class comprised entirely of men. Due to women's intrinsic unavailability for combat, they could therefore be excluded from the draft entirely.

Assumptions about women's capabilities exist at two levels in the Court's opinion. First, the Court had to assume the validity of the combat exclusion — an exclusion that is historically justified in physical terms. The appellee-plaintiffs did not concede the constitutional validity of these restrictions, although this assumption was not challenged by them because they viewed it as irrelevant to the case.[104] Second, the Court had to conclude that people who are drafted must also be people who are "combat-ready."

It is easy to see how the first assumption relied on an exaggerated sense of the physical differences between men and women. Since the military does individualized testing for military service during which it excludes many men from eligibility, it would not be particularly onerous to do the same testing for women to determine who is fit for military service. The combat exclusion allows the military to use a blanket rule for fitness through a gender proxy although that proxy is not accurate.

The second assumption, however, also relied on an exaggerated sense of the physical differences between men and women. Assuming (as did the Court) that women are not qualified to serve in combat (or, more accurately, that Congress is constitutionally allowed to disqualify women from combat roles), it does not necessarily follow that every draftee in the military be "combat-ready." In fact, draftees work alongside volunteers who include many women who are, by definition, not combat-ready. The image that is evoked by the Court's opinion is that the dominant character of the military must be combat-ready even if particular jobs contain no combat role. Somehow, the military's machismo would be softened if women became a large portion of the non-combat members of the armed forces. What is

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[103] 453 U.S. 57 (1981).

[104] Id. at 87 n.2 (Marshall, J., dissenting).

therefore exaggerated through the second assumption is the usefulness of combat-ready draftees. This exaggeration serves to further the importance ascribed to men in society.

As noted by the dissent, the record contained little to support the second assumption:

> I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled with combat-ready men. Common sense and experience in recent wars, where women volunteers were employed in substantial numbers, belie this view of reality.[105]

Yet, out of deference to Congress in matters of national defense, the Court proceeded under an absurd assumption — that the military would not benefit from having women drafted who would not be eligible for combat duty even though, in the dissent's language, "the serious view of the Executive Branch, including the responsible military services, is to the contrary."[106] Deference to national security interests therefore becomes a way to undermine the level of scrutiny that the courts would ordinarily utilize to question Congress' actions. In this case, such deference protected outmoded stereotypes about women's abilities in society.

Although Congress has expanded the number of job classifications for which women are currently eligible in the military, only men are still required to register for the draft. If a challenge to male-only registration is brought again, the Court will probably have to contend with what I believe to be the true justification for women's exclusion from mandatory registration — the public's distaste for *women* (and particularly, potentially or actually *pregnant* women) being killed during war[107] and the exaggerated privacy concerns that currently foster the exclusion of gays and lesbians from the military.[108] Hiding behind biological arguments permits

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[105] Id. at 83 (White, J., dissenting).

[106] Id.

[107] I always find it interesting, when listening to the news, to hear how news commentators often talk — with great horror — about how many "women and children" have been killed during a military skirmish. What I think they mean by these reports is that *unarmed civilians* have been killed with the assumption that all women and children are unarmed civilians. If women served in combat then news commentators would have to develop new linguistic ways of describing when "innocent" people are killed during war.

[108] I believe that sexual relations are crucial to understanding the exclusion of heterosexual women as well as lesbians from the military. Heterosexual women need to be excluded from the military because they might get pregnant (through the acts of men in the military). Lesbians need to be excluded from the military because they refuse to make themselves available to men sexually. No woman is therefore sexually

the military to avoid putting their stereotypes about women's role in society on the table for discussion.

C. *Dothard v. Rawlinson*[109]

The plaintiffs in *Dothard v. Rawlinson* challenged an Alabama prison's policy of hiring only men to be contact prison guards in a men's maximum security prison. Again, biology came to the surface to justify this exclusionary practice.

The defendants made numerous biological arguments: (1) the inherent danger to women working as guards; (2) the special problem of women being raped by prisoners; and (3) women's inherent physical weakness. Of these three arguments, the Supreme Court accepted the second. The possibility of female guards being raped was found to create genuine security risks at the prison, because twenty percent of the male prisoners were estimated to be sex offenders and because prison conditions could cause aggressive behavior.[110] Thus, in this case, the Court used women's "rapability," rather than women's ability to get pregnant, to justify the discrimination: "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility."[111]

To arrive at this conclusion, the Court greatly exaggerated sexual differences. Although the Court mentioned that twenty percent of the inmates were sex offenders, it did not specify whether their sex offenses were against women or against men. The victims of sex offenses are not limited to women. In addition, irrespective of the sex of the victims of sex offenses outside prison, men are routinely raped in prisons. Rape is not a sex-specific offense. A male prisoner could just as easily rape a male guard as a female guard, but more likely, a male prisoner would rape another male prisoner given their accessibility and the greater tolerance for the crime.

At its core, the *Dothard* decision reflects unfounded stereotypes about women and their "essence." As the dissent noted, there was no evidence in the record concerning the likelihood that inmates would assault a woman

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appropriate for military service; hence, all women are excluded. But the military will not refer to sex to justify the exclusion; instead, they stand behind biological arguments. For an excellent discussion of women in the military, see Michelle M. Benecke & Kirstin S. Dodge, Recent Development, Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals, 13 Harv. Women's L.J. 215 (1990).

[109] 433 U.S. 321 (1977).

[110] Id. at 335.

[111] Id. at 336.

because she was a woman.[112] In the words of Justice Marshall, "this rationale regrettably perpetuates one of the most insidious of the old myths about women — that women, wittingly or not, are seductive sexual objects."[113] Society and employers, rather than women, are therefore allowed to control women's decisions about their bodies; men can decide to expose themselves to risks through combat military service or through work as a prison guard, but not women.

D. *Johnson Controls*[114]

The plaintiffs in *UAW v. Johnson Controls, Inc.*, challenged a company policy of excluding women with childbearing capacity from jobs that might cause lead exposure. Johnson Controls won in both the trial court[115] and the court of appeals[116] despite evidence disputing the sex-based justification for the policy.

Plaintiffs offered several arguments to challenge Johnson Controls' rationale for barring women from employment. First, they argued that there was no strong correlation between exposure to lead at the plant and women bearing children with defects. Second, they argued that to the extent that any risk to reproductive health does exist, men are as vulnerable to those risks as women. Finally, they argued that individual women rather than Johnson Controls should determine whether they want to attempt to bear children despite their exposure to lead. They argued that Johnson Controls' responsibility was to make the workplace safe for all of its employees by following the standards set forth by OSHA[117] rather than to bar certain employees from the workforce.[118]

The trial court used a distorted analysis of the phrase "as a woman" in order to conclude that the policy of excluding women from the workplace was not facially discriminatory. First, the court observed that there is a presumption that the policy was facially discriminatory because it applied

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[112] Id. at 345 (Marshall, J., concurring in part, dissenting in part).

[113] Id.

[114] UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (reversing trial court and court of appeals decisions that upheld Johnson's policy of exclusion of women with child-bearing capacity from employment at certain jobs due to the potential risk to the fetus were they to become pregnant).

[115] UAW v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wisc. 1988).

[116] UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989).

[117] Occupational Safety and Health Administration.

[118] Johnson Controls, 680 F. Supp. at 315.

only to women.[119] It noted, however, that such a presumption could be rebutted by a showing that there are:

> significant risks of harm to the unborn children of women workers from their exposure during pregnancy to toxic hazards in the workplace [which] make [it] necessary, for the safety of the unborn children, that fertile women workers though not men workers, be appropriately restricted from exposure to those hazards and that its program of restriction is effective for the purpose.[120]

In other words, a facially discriminatory policy becomes nondiscriminatory if one can show that the employer only treated a woman in that particular way due to her distinctive reproductive capacity. Despite the language of the 1978 Pregnancy Discrimination Act (the "PDA") — which states explicitly that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"[121] — the court defined gender discrimination as only including those aspects of women's lives which do *not* relate to their reproductive capacity. The court's reasoning turns the PDA on its head by allowing the employer to defend his treatment by saying that he was genuinely concerned about how women handled their reproductive capability. Amazingly, the trial court, writing in 1988, never once mentioned the PDA. Similarly, the court of appeals largely ignored the explicit language of the PDA.[122]

The lower courts were therefore using a male model of person (taking women's reproductive capacity out of their definition of womanhood) to engage in the inquiry of determining what it means to be treated as a woman. Thus, women were women only so far as they were *not* being treated on the basis of their distinctiveness as women — a rather odd and illogical definition of womanhood!

Somewhat surprisingly (given the previous cases discussed), the Supreme Court found in favor of the plaintiffs relying heavily on the PDA. Citing *Muller v. Oregon*,[123] it noted that concern for a woman's ability to

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[119] Id.

[120] Id. at 315 (citing Wright v. Olin Corp., 697 F.2d 1172, 1190 (4th Cir. 1982)).

[121] Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k)(1993).

[122] Although the court of appeals used a test that ostensibly incorporated the requirements concerning pregnancy found in the Pregnancy Discrimination Act, the Act itself received mention only once, without quotation. See Johnson Controls, 886 F.2d at 893.

[123] 208 U.S. 412 (1908).

become pregnant has historically been an excuse for denying women equal employment opportunity.[124] By passing the PDA, Congress changed that result. The Court therefore concluded: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[125]

Before concluding that the Supreme Court "finally got it," we need to look at this case in historical context. Congress passed a very strong and explicit Pregnancy Discrimination Act in 1978 *after* the Supreme Court had ruled that pregnancy-based discrimination did *not* constitute sex-based discrimination in *General Electric Co. v. Gilbert.*[126] Had Congress not spoken so forcefully on the issue of pregnancy and women's employability, it is clear that the Supreme Court would have ruled otherwise (as it did in *Gilbert*). And remarkably, despite the strong language of the PDA, the lower courts had all ruled *against* the plaintiffs. Even a vigilant Congress cannot insure that women will be expeditiously protected by the courts; the plaintiffs only won *Johnson Controls* after a lengthy court battle which ended in the Supreme Court.

E. Conclusion

Since the nineteenth century, courts have exaggerated white women's physical differences from men in order to justify women's exclusion from traditionally male occupations. (Women of color have always been permitted to perform the most arduous work under the most arduous circumstances with no concern at all for the toll on their reproductive capacity.) In the nineteenth century, women were excluded from the practice of law; in the twentieth century they are still excluded from contact prison guard positions and mandatory registration for the military draft. With the passage of the Pregnancy Discrimination Amendment to Title VII, it is increasingly difficult for employers to use stereotypes about women's reproductive capacity to exclude women from employment; nevertheless, it still takes lengthy court suits to get those rules enforced. Thus, the true physical hardships on poor women of color are ignored while the physical hardships on middle-class white women are exaggerated. Both invisibility and exaggeration serve to perpetuate women's subordination in society.

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[124] Johnson Controls, 499 U.S. at 211.

[125] Id.

[126] 429 U.S. 125 (1976).

V. COUNTER-NARRATIVES?

In the preceding discussion, I have argued that society and the courts either ignore women's biological differences or exaggerate them to perpetuate women's subordination in society. Sometimes, one might argue that the courts "get it right" in that they seem to acknowledge women's biological differences from men in order to benefit women in society. In this section, however, I will argue that close examination of those cases reveals that seeming victories for women were in fact not victories for the most disadvantaged women in our society. Although the minority of middle-class women who worked outside the home and could afford to work less than ten hours per day may have benefitted in some of these cases, poor women were the victims of a statute which left them underemployed or unemployed. These cases suggest that when the legislatures or courts try to give preferential treatment to women on the basis of their reproductive capacity, they have middle-class rather than poor women in mind. Gender essentialism, when rooted in biology, therefore strikes hardest at the most disadvantaged women in society.

A. *Muller v. Oregon*[127]

Muller v. Oregon is the classic case of judicial paternalism. The state of Oregon had passed a statute forbidding the employment of women "in any mechanical establishment, or factory, or laundry" for more than ten hours during any one day.[128] The Supreme Court upheld this statute through the arguments made in Louis D. Brandeis' infamous "Brandeis" brief in which he argued that the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[129]

Although the Court reached its decision in order to protect women from stressful work, the effect of its decision was to further impoverish women who needed to work more than ten hours per day to support themselves and their families. While middle-class women may have benefitted from the improvement in their working conditions, poor women were hurt. By having a middle-class image of women in mind, the Court could ratify such treatment.

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[127] 208 U.S. 412 (1908).

[128] Id. at 416.

[129] Id. at 420. For further discussion, see Kenneth Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75 (1960).

For the purposes of the present discussion, the important point about *Muller* is two-fold. First, the Court exaggerated the physical differences between women and men. Second, that exaggeration furthered the subordination of the most disadvantaged women by leaving them further impoverished by limitations on the hours they could work. Unfortunately, *Muller* does not represent the last occasion in which the Court acted in such a paternalistic way.

B. *Michael M. v. Superior Court of Sonoma County*[130]

The plaintiff in this case challenged California's statutory rape law under which he had been convicted for having intercourse with a sixteen-and-one-half-year-old female, Sharon. The plaintiff, Michael, was a seventeen-and-one-half-year-old male. Under California law, only the male could be convicted of statutory rape.

To justify the statute, the Court relied on its exaggerated notions about the sex differences between men and women. In the Court's words:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.[131]

Of course, one does not need to be a medical doctor to know that only women can become pregnant. But the consequences that the Court spoke about do not flow inevitably from that fact. First, women only become pregnant when they have unprotected intercourse or experience contraceptive failure. Nevertheless, a male who has sex with an underage female who is using contraceptives is criminally liable for his conduct. Second, many of the consequences of pregnancy are socially created rather than inherent. The reason, for example, that the consequences are "particularly severe" for underage females is social rather than physical. For females between fifteen and eighteen, pregnancy is no more dangerous than for older women. Poverty, poor educational opportunities, lack of prenatal care, lack of publicly-funded day care, and for the most part, a lack of male involvement

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[130] 450 U.S. 464 (1981).

[131] Id. at 471.

in childrearing, make the pregnancies of underage females particularly problematic.[132] These conditions are socially created rather than physical.

The fact that these differences are socially rather than physically created is important, because Court decisions can influence those differences. Were the Court, for example, to insist that abortions be funded under Medicaid, poor teenagers would find it much easier to obtain abortions, thereby avoiding the consequences of childbirth.[133] Similarly, adolescent females would find abortions easier to obtain were the Court to invalidate parental notification and waiting period restrictions.[134] When faced with those restrictions, however, the Court does not choose to point out the "fact" that childbirth is particularly problematic for those age groups; instead, it allows the state to use policies which favor childbirth over abortion for teenagers.

Looking at all of the cases involving female adolescents and pregnancy, one sees a distinct pattern: society's efforts to *control* young female adolescent's lives. *Michael M.* fits into that pattern because the underage female has no authority to determine whether a statutory rape prosecution should be brought. Statutory rape laws do not empower her; they make her the pawn of the state if it decides to bring a prosecution against her male companion.[135]

Of course, not all sexual activity by an underage female is voluntary. The facts in the *Michael M.* case suggest, for example, that Sharon did not voluntarily have intercourse, because Michael hit her several times before they had intercourse.[136] If California, however, truly wanted to protect *and empower* females, it would have required that the female consent to the prosecution in order for it to occur. In criminal cases, however, the state rather than the victim of the crime decides whether a prosecution should take place.

Some people might argue that *Michael M.* represents a situation where men are treated more coercively than women with respect to their role in the reproductive process, thereby undermining my "pregnant men" thesis. There are several problems, however, with that conclusion. First, it ignores the reality that statutory rape prosecutions rarely occur when the sexual activity

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[132] See Colker, supra note 12.

[133] See Harris v. McRae, 448 U.S. 297 (1980).

[134] See Hodgson v. Minnesota, 497 U.S. 417 (1990) (holding that a forty-eight hour waiting period requirement for adolescents for the purpose of parental notification is constitutional).

[135] See Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387, 401–13 (1984).

[136] Michael M., 450 U.S. at 483–88 (Blackmun, J., concurring) (providing excerpts of the court transcript in which Sharon testified that Michael "slugged" her in the face several times before she "agreed" to have intercourse).

was consensual.[137] Statutory rape offers the prosecution a convenience—not having to prove force or lack of consent. As in the case of *Michael M.*, there is often evidence of coercive sexual activity that may not be sufficient to meet the standards of proof for rape. By contrast, there will almost never be evidence that the female forced herself upon the man. (That is why virtually no women have ever been convicted of raping a man.[138]) The male and female are therefore not similarly situated; however, their dissimilar situations are far different from that described by Justice Rehnquist. The difference is not women's ability to become pregnant; the problem is the likelihood of women being raped. A second and related difficulty, however, is that the woman does not have to consent to the statutory rape prosecution. She does not have to acknowledge that there was something problematic about the sexual activity. Thus, it is possible that men will be prosecuted who did not coerce underage females into having sex with them. I would suggest, however, that the solution is to empower women by making them consent to prosecution rather than to free men from the responsibilities of their conduct.

Nevertheless, I must acknowledge that some men will be disadvantaged through California's statutory rape scheme. That disadvantage, however, makes sense in light of my anti-essentialist perspective if one asks: which men are likely to be disadvantaged? I would suggest that poor, disadvantaged men are most likely to face prosecution. The class-based dimension of *Michael M.* is present although subtle. To see the class-based dimension, one must ask who needs to have sex in public view? (Sharon and Michael had sex in a public park.) Poor people are most likely to live in crowded conditions where sexual activity cannot easily occur in privacy, and certainly cannot afford to purchase a room in a hotel or motel for a few hours. In addition, poor people are more likely than middle-class people to be victims of prosecutorial decisions because they have less power to bargain about the conditions of their lives. Thus, the coercive aspects of statutory rape convictions are most likely to strike the groups in society with the least amount of power. I therefore suspect that Sharon and Michael will rarely be rich white kids from the suburbs.[139]

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[137] See Lawrence Friedman, A History of American Law 588 (1985) (noting that laws against morality were enforced only sporadically, on the occasion of a "crackdown" or to "get" an unusually flagrant or unlucky offender).

[138] See Sourcebook of Criminal Justice Statistics 1991 442, 544 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) (reporting that 98.9% of persons arrested for "forcible rape" are male and that 99% of persons convicted for "rape" are male).

[139] The Justice Department does not appear to collect separate statistics on statutory rape. It includes statutory rape under the generic category "sex offenses (except forcible rape and prostitution)." Nearly three times as many people are arrested for "sex

That analysis is very important to help us refine the pregnant man thesis. White, middle-class, heterosexual pregnant men are likely to be treated very well by the law. We have seen that pattern in all of the cases involving married white men who purchased gestational services from women. Poor, young, unmarried men, like Michael M., however, do not fare as well under our system of law. Thus, if there were such an entity as poor, young, unmarried "pregnant" men, they might not be treated much better than poor, young, unmarried pregnant women. The class, race, and sexual orientation biases of our legal system will operate here as well as elsewhere.

C. *Johnson Controls* Re-visited

The one case in which the Supreme Court seemed to "get it right" was the *Johnson Controls* case, discussed above.[140] It is true that the Supreme Court correctly interpreted Congress' intent — that employers are not permitted to decide what reproductive risks individual women wish to make at the workplace by precluding them from employment.

Nevertheless, it is difficult to see *Johnson Controls* as a victory for the most disadvantaged women in society. Recognizing that African-American women and men are over-represented in jobs that involve exposure to toxic substances, the NAACP Legal Defense Fund had argued in *Johnson Controls* that "employers should be required to reduce hazardous exposures to safe levels for all workers or to find product substitutes."[141] Although the Supreme Court recognized the dangers that toxins pose to women's reproductive capacity, its decision did not require Johnson Controls to change its work behavior except to allow women to work at the plant. Poor women were therefore free to make the "choice" of working in an unsafe environment or foregoing employment. Neither of those options were true choices.

In many ways, *Johnson Controls* is a modern day *Muller* decision. In *Muller*, the legislature protected women but not men from the physical toil of working ten hours per day. Rather than make the workplace tolerable for all workers, it was made tolerable for women. In *Johnson Controls*, the legislature also protected women by guaranteeing them access to jobs that

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offenses" as for "forcible rape" so that it is impossible to learn anything about statutory rape from the general statistics on sex offenses. See id. at 442.

[140] See discussion, supra, part IV.D.

[141] See Rutherford, supra note 93, at 277 (discussing Brief for the NAACP Legal Defense and Educational Fund, Inc., and the National Black Women's Health Project, Johnson Controls, 499 U.S. 187 (1991) (No. 89-1215)).

might injure their reproductive capacity but not that of men. Rather than make the workplace safe for all workers, it was made safe only for men.[142] Both *Muller* and *Johnson Controls* left poor women with unacceptable options — unemployment in *Muller* and poor reproductive health in *Johnson Controls*. When, one must wonder, will poor women be able to have employment *and* safe working conditions? The courts' and legislatures' focus on middle-class women makes that day seem unlikely anytime soon.

VII. CONCLUSION

These cases show that society does not treat women monolithically. It may ignore women's biological differences from men, it may exaggerate those differences, and it may ignore those differences for some women while exaggerating them for other women. The prevailing pattern, however, is that women are treated with respect to their biology in ways that perpetuate their subordination in society. In addition, the most disadvantaged women in society always seem to face the brunt of this mistreatment. This final insight emphasizes the importance of what I consider to be the core insight of anti-essentialism — that when women are treated on the basis of their presumed characteristics, be they socially or biologically created, they are not actually being treated monolithically. Women's treatment is always socially contingent upon women's status in society vis-à-vis class, race, religion, sexual orientation, etc.

These cases demonstrate that courts systematically discount the pain and experience of childbirth in order to find that men's reproductive claims are equivalent, or superior, to those of women. The theoretical issue that emerges from these cases is what to make of the biological differences between men and women. When anti-essentialists equate gender essentialism with biological essentialism, they do us a disservice because they make it difficult to explain why it is wrong for the courts to ignore women's biological role in the reproductive process.

By taking a historical view of the courts' treatment of women's reproductive capacity, we can get a much sharper understanding of these cases. When it suits society to emphasize women's frailty due to women's reproductive capacity in order to disqualify women from certain roles in society, it does so. On the other hand, when it suits society to discount women's reproductive capacity so that men can be considered to have equivalent or superior reproductive claims, it also does so. Moreover, either

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[142] In fact, it is not clear that the workplace in *Johnson Controls* was safe for men. If, in fact, the workplace did harm men's reproductive capacity, I would suggest that the case represents a devaluation of the reproductive health of working class men.

emphasizing or ignoring women's biological differences from men can have a disproportionate effect on certain groups of women; such policies need not act monolithically on women's lives. By considering both phenomena simultaneously, one can improve on the anti-essentialist critique of biological essentialism. Ignoring women's reproductive capacity when it is relevant, is as misguided as exaggerating women's reproductive capacity when it is irrelevant. The challenge for feminists is to get society to view women's reproductive capacity *accurately and compassionately* rather than to insist that it is irrelevant in women's lives.