

# THE UNIVERSITY OF BALTIMORE LAW FORUM

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## FEMINIST LEGAL THEORY & FEMINISMS CONFERENCE MARCH 2008



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## LETTER FROM THE EDITOR-IN-CHIEF

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To the Law Forum Legal Community:

The *University of Baltimore Law Forum's* Volume 39 editorial board presents our first issue of the 2008-2009 academic year. The *Law Forum* aims to serve two purposes: 1) to provide thought provoking articles that spark dialog within the legal community; and 2) to provide recent development pieces that explore relevant, and timely, legal issues. With this in mind, the current volume is a reflection of the *Law Forum* staff's hard work and interest in providing a meaningful contribution to the legal community.

The current issue is part one of our two-part Feminist Legal Theory & Feminisms volume. The articles grew out of the School of Law's March 2008 Conference on Feminist Legal Theory & Feminisms. The Conference consisted of four panel discussions, where leading minds in feminist legal theory presented their articles and research. The day culminated with Gloria Steinem's keynote address. The *Law Forum* agreed to publish ten articles, which cover a range of issues affecting second and third-wave feminists. This issue presents five of those ten articles.

The recent development pieces examine eleven of this past year's most interesting and controversial cases decided by the Court of Appeals of Maryland and the United States Court of Appeals for the Fourth Circuit. These pieces cover the legal gamut, including cases that address de facto parentage, redefining common-law rape, permissible self-dealing in a limited partnership, and the effect of subsequent legislation on open-ended contracts.

Finally, I would like to thank the *Law Forum's* 2008-2009 editorial board and staff for their time and dedication. Additionally, I wish to thank Shannon Beamer, Levi Zaslou, and the rest of the 2007-2008 editorial board for offering to publish the Conference's articles and providing the current staff with a smooth transition. Finally, the *Law Forum* thanks its subscribers for their continued support and suggestions.

Sincerely,

George A. Perry  
Editor-in-Chief

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## FOREWORD

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### TRAVERSING 2<sup>ND</sup> AND 3<sup>RD</sup> WAVES: FEMINIST LEGAL THEORY MOVING FORWARD

Barbara Ann White\*

The difference between 2<sup>nd</sup> and 3<sup>rd</sup> wave is experiential — not chronological — *Gloria Steinem*<sup>1</sup>

As a 3<sup>rd</sup> wave feminist asking you, a 2<sup>nd</sup> wave feminist . . . where should we go from here? . . . what do you want us to accomplish? *Query to Steinem by young woman during Q & A.*

I just want you to go . . . It's up to you [what you want to accomplish . . .] — *Ms. Steinem's response.*<sup>2</sup>

When I was first asked by my colleagues to join the organizing committee for the Conference on *Feminist Legal Theory & Feminisms* here at the University of Baltimore School of Law, I did so reluctantly. As a law & economics scholar, I had published a couple of articles on the potential synergy between my field and feminist analysis for setting general social policy. “Once ‘feminist’ appears in an article, I am forever branded a feminist scholar” I thought — with some resentment towards the sexist opportunism to dismiss my work that implied. My pieces weren’t even addressing “women’s issues,” I railed silently. Adapting feminism’s analytic techniques to resolve law & economics’ failed efforts at ethical decision-making did not a feminist make! Fifteen years of scholarship in law & economics, antitrust, and international economic globalization were swept away with the flick of one word.

Little did I know then, that I was cresting on feminism’s 3<sup>rd</sup> wave.

Furthermore, I thought feminism, as a field, was finished. Though I was singularly impressed with the power of the analytic techniques

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\* Professor of Law, University of Baltimore School of Law. The author thanks Leigh Goodmark and Margaret Johnson for organizing this inspiring conference, Shannon Beamer and Levi Zaslow, former Editor-in-Chief and Managing Editor of the Law Forum, and especially George Perry and Hae Min, their successors, for working tirelessly to publish ten outstanding papers from this conference. Thanks go to Gloria Steinem, who, after forty years of advancing the feminist movement with grace and style, still commands a standing ovation from a diverse audience in excess of 700. Finally, thanks go to Robert Baum and as always, Irene Rosenberg, for their constant encouragement.

<sup>1</sup> Gloria Steinem, *Keynote Address*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>2</sup> *Id.*

feminist theorists developed to expose the peculiar brand of discrimination that women faced, I felt by the mid-90s the job was largely done. There were still practical cases of glass ceilings to break, parity of treatment in multiple spheres of life yet to address, to be sure, but as a theoretical framework, the work reached its completion.

And it was impressive! Feminist legal theory found its way into many fields — often without its name even being used. However, many feminist theorists themselves seemed no longer to emphasize that aspect of their scholarship.

“Feminism Is Dead . . . Long Live Feminism!” a title of an essay I once had in the back of my mind to write some day, with the opening sentence being “I write to praise Feminism . . . not to bury it” with the intent to point out how its principles had been now incorporated into so many areas of law that as a field itself — it had all but disappeared.

Boy! (or rather . . . Grrr!) . . . was I wrong. I hadn’t been paying attention! And it took being involved in the organizing of this conference, following the lead of my (junior) colleagues, having the good fortune to serve as liaison between this journal, the Law Forum, and the presenters causing me to be in direct and regular contact with the authors before the event and then finally, sitting through a truly uplifting conference, capped by a presentation by Gloria Steinem herself, to realize how truly wrong I was.

I hope that the readers of this Symposium Volume (issues 1 and 2) can feel through these pages how stirring the conference was — and if not, that you go to our website: <http://law.ubalt.edu/template.cfm?page=928> where the entire conference is now podcast and you can watch any part of it with a click. It won’t bring you to the exuberant interactions that went on between sessions or the excitement of the smiles and hugs that were shared. But it is the next best thing.

Even as I wrote this essay — I worried — wasn’t this a little too self-focused? “No,” a (male) colleague pointed out to me, “it is very 3<sup>rd</sup> wave . . . .”

### I. 3<sup>RD</sup> WAVE FEMINISM?

*I’ve been a feminist for a pretty long time but I [would have] never thought that the Pussycat Dolls™ and I shared the same basic ideology.<sup>3</sup>*

Leigh Goodmark, Conference Co-Chair, in her opening remarks about questions the conference might address, was commenting on an

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<sup>3</sup> Leigh Goodmark, *Opening Remarks*, PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

assertion by McG,<sup>4</sup> a Hollywood producer of the female burlesque singing group's popular (some say pornographic) reality TV show, "Pussycat Dolls Presents: The Search for the Next Doll." McG, in fending off criticisms that the Doll personas were not good role models for young girls, argued that to the contrary, the Pussycat Dolls (whose sexually-charged hit song is "Don't Cha (Wish Your Girlfriend Was Hot Like Me?!)"<sup>5</sup>) was "frankly, 3<sup>rd</sup> wave feminism."<sup>6</sup>

If the reader is a novice regarding today's feminism like me, there must be some curiosity as to what 3<sup>rd</sup> wave feminism is. Apparently, that is a question even feminist theorists are grappling with, whether they identify with the 3<sup>rd</sup> wave or not. Certainly, surveying commentary and articles such as those presented in this symposium yields a broad array of possible 3<sup>rd</sup> wave characteristics: the "next generation" feminism, the "anti-'victim' feminism," the "socio-cultural-media-focused" feminism, the "anti-essentialist" feminism, the "empowering, sexually liberating" feminism, the feminism of "autobiography" or perhaps instead, the "narcissistic" feminism, the "retrogressive" feminism, the "disintegrative" feminism and conceivably, in an unkind cut, a different, yet still, "middle-class" feminism, which moreover continues to foster "western, liberal feminist imperialism" in other parts of the world as well as at home.

This is quite a list of seemingly contradictory descriptors. But what do these 3<sup>rd</sup> wave characterizations mean? Are they inconsistent? Mutually exclusive? Or, are they integrable in some efficacious manner?

Each of the papers presented, as well as the discussions following them, focused on one or more of the above listed characteristics in some fashion. The theme that emerged — for me anyway — is that 3<sup>rd</sup> wave feminism's rise has provoked, at the very least, a dichotomization of the feminist (or "woman's") movement and potentially, a splintering of its elements so refined that the 3<sup>rd</sup> wave sensibility might lead to the movement's demise altogether.<sup>7</sup> On the other hand, and more optimistically, 3<sup>rd</sup> wave analysis also seems to be setting the stage for a reintegration and, as our other Conference Co-

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<sup>4</sup> Joseph McGinty Nichol, executive producer of numerous popular television shows as well as director of several successful movies, including the "Charlie's Angels" films.

<sup>5</sup> PUSSYCAT DOLLS, DON'T CHA (Interscope Records).

<sup>6</sup> Ed Wyatt, *Dolls Clad in Feminism, and Hardly Anything Else*, N.Y. TIMES, March 5, 2008, available at <http://www.nytimes.com/2007/03/05/arts/television/05cats.html>.

<sup>7</sup> Marley S. Weiss, *A la Recherche du Temps Perdu: A Second Waver's Reflections on Current Feminist Approaches to Employment Law*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

Chair, Margaret Johnson suggests in her closing remarks, a potential for moving forward.<sup>8</sup>

Though most readers of this symposium issue are familiar with the notion of feminist “waves,” it is interesting that as challenging as it is to define and comprehend what 3<sup>rd</sup> wave feminism is, there is pretty much a consensus today as to what constitutes 2<sup>nd</sup> wave feminism. The 2<sup>nd</sup> wave typically refers to the struggles (and considerable successes) — mostly fought during the 1960s, ‘70s, and early ‘80s — to gain economic and political gender equality as well as parity in treatment of needs unique to women just as society had already met for the needs unique to men. Equal pay with access to education, jobs, careers and the professions, entitlement to maternity leave, abortion as well as other reproductive rights, freedom from domestic violence, sexual harassment and rape, are among the major accomplishments on behalf of women identified with the 2<sup>nd</sup> wave. Notables include not only our keynote speaker, Gloria Steinem, but also Betty Friedan, Bella Abzug, Carol Gilligan, Germaine Greer, Angela Davis, Catherine MacKinnon, Alice Walker, and Andrea Dworkin.<sup>9</sup>

Also, largely unchallenged is what constitutes the 1<sup>st</sup> wave. Historically more often identified with the suffrage movement, the 1<sup>st</sup> wave refers to the collective action to gain women the right to vote, to contract and to own property, all as part of an overall struggle for women’s legal and political autonomy. Familiar names identified with the 1<sup>st</sup> wave include Jane Addams, Elizabeth Cady Stanton, Mary Wollstonecraft, Susan B. Anthony, and Virginia Woolf.<sup>10</sup> Though the women’s movement’s “first wave” spanned more than a century, the movement waned some time after the first World War (and after the passage in 1920 of the 19<sup>th</sup> Amendment to the Constitution giving women the right to vote). It did not see a rebirth until nearly half a century later, two decades after the second World War, under the rubric of the “women’s liberation movement”<sup>11</sup> and now referred to by many as the 2<sup>nd</sup> wave.

The rise of 3<sup>rd</sup> wave feminism in the 1990’s would suggest that 2<sup>nd</sup> wave feminism also waned as the 1<sup>st</sup> wave did seventy years earlier. Indeed, self-identified 3<sup>rd</sup> wave feminists often characterize 2<sup>nd</sup> wave

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<sup>8</sup> Margaret Johnson, *Closing Remarks*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 4 – CONTEMPORARY CULTURE, CLASS AND THIRD WAVE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>9</sup> See, e.g., *THE SECOND WAVE: A READER IN FEMINIST THEORY* (Linda Nicholson ed., 1997); RORY C. DICKER, *THE HISTORY OF U.S. FEMINISM* (Seal Press 2008).

<sup>10</sup> See, e.g., DICKER, *supra* note 9; Estelle Freedman, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* (Ballentine Books 2002).

<sup>11</sup> Weiss, *supra* note 7.

feminism as no longer relevant.<sup>12</sup> Panelist Mary Clark notes that 3<sup>rd</sup> wave feminists “assert the necessity of the [3<sup>rd</sup> wave] generation ‘pick[ing] up the reins’ from earlier feminists, suggesting not so subtly that the reins had been dropped.”<sup>13</sup> But to the contrary, 2<sup>nd</sup> wave feminism still exists and still exerts its presence, as exemplified by the concerns of most of our panelists, some of whom overtly identify themselves as 2<sup>nd</sup> wave, in particular: Marley Weiss, Naomi Cahn, June Carbone, and Ann Bartow. Additionally, Chih-Chieh (Carol) Lin’s paper on Regulating Pregnancy in Taiwan actually pleads for 2<sup>nd</sup> wave feminism’s influence to gain for women in Taiwan the reproductive rights that the 2<sup>nd</sup> wave achieved for women in Western society.<sup>14</sup>

In fact, the sometimes angst-filled efforts to grapple with the meaning and implication of 3<sup>rd</sup> wave feminism seem to arise because of its co-existence with 2<sup>nd</sup> wave sensibilities.<sup>15</sup> Distinguishing between the two too often seems to require accepting perspectives of questionable appeal while rejecting others that seem essential to grasp closely, regardless of where one locates one’s values within the spectrum of feminism as a whole.<sup>16</sup>

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<sup>12</sup> “We no longer live in the world that feminists of the second wave faced.” CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 10 (Dicker, Rory, and Alison Piepmeier eds. Northeastern Univ. Pr. 2003). Also, see the oft-quoted assertion that for third-wave women “[t]he . . . problem is that while on a personal level feminism is everywhere, like fluoride, on a political level the movement is more like nitrogen: ubiquitous and inert.” Bridget Crawford, *Toward a Third-wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 113 (2007) (quoting JENNIFER BAUMGARDNER & AMY RICHARDS, MANIFESTA: YOUNG WOMEN, FEMINISM AND THE FUTURE 17-18 (2000)).

<sup>13</sup> See BAUMGARDNER & RICHARD, *supra* note 12. Mary Clark & Lynda Dodd, *What Third-Wave Feminism Can (and Should) Learn from First-Wave Feminism*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>14</sup> Chih-Chieh Lin, *Regulating Pregnancy: An Analysis from an Asian Legal Feminist with Feminist Legal Theories*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 3 – THIRD WAVE – A MOVEMENT IN ACTION, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>. The Conference organizers wish to thank Professor Eric Min-Chiuauun Wang of National Chiac-Tung University, Taiwan for standing in at the last minute and presenting Professor Lin’s paper when she was not able to. See also Chih-Chieh Lin, *Regulating Pregnancy in Taiwan: An Analysis from an Asian Legal Feminist Using Feminist Legal Theories*, 39.2 U. BALT. L.F. 204 (2009).

<sup>15</sup> Astrid Henry has a very interesting analysis that the struggles between 2<sup>nd</sup> and 3<sup>rd</sup> wave feminism is really a generational “mother-daughter” struggle. ASTRID HENRY, NOT MY MOTHER’S SISTER: GENERATIONAL CONFLICT AND THIRD WAVE FEMINISM (Bloomington: Indiana Univ. Pr., 2004). She points out that 2<sup>nd</sup> wave feminists did not have to face this struggle because their “foremothers,” the 1<sup>st</sup> wave feminists, were for the most part deceased. *Id.* at 37.

<sup>16</sup> Compare Ann Bartow’s and Cyra Choudhury’s conversation, during PANEL 2 – THIRD WAVE FEMINIST LEGAL THEORY AND SOCIAL JUSTICE, expressing dismay with some 3<sup>rd</sup> wavers’ belief that overt sexual expression in itself gave women power and agency (and

Nevertheless, there appears to be some consensus as to 3<sup>rd</sup> wave's foundational principles even though their various manifestations and resulting implications are controversial not only among 3<sup>rd</sup> wave's critics (including many 2<sup>nd</sup> wave voices) but also within the 3<sup>rd</sup> wave movement itself (as exemplified by our own 3<sup>rd</sup> wave panelists<sup>17</sup>).

As a cohort, 3<sup>rd</sup> wavers are typically characterized as the "next generation" of feminists.<sup>18</sup> As children of the 2<sup>nd</sup> wavers, these young women have grown up not only with a sense of entitlement because of the battles won by the 2<sup>nd</sup> wave but also as witnesses to the growing battles within the women's movement itself.

Throughout the '80s, discord and strife among the women's movement's members arose as successes gave the movement itself an increasing sense of power. While the younger generation of women were coming of age, their mothers fractionalized over questions of feminism's essence and direction. Were feminist victories primarily meeting the needs of white, middle-class, heterosexual women, insensitive to the differing concerns of women of other races, classes, and sexual orientation? Was it necessary to give up some sex, some type of sex, or all sex with men to be a good feminist?<sup>19</sup> Was sexually seductive dress and conduct undermining women's autonomy? Ought feminism include the concerns of the transsexual and the transgendered even though they were not born biologically as women? How were the demands of family and career to be balanced? Is the "mommy track" a sell-out? What is (Western) feminism's role

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would stop rape) with Bridget Crawford's observation in PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY that 3<sup>rd</sup> wavers view 2<sup>nd</sup> wavers as "mean, male-hating, restrictive feminists who think all sex with men is rape." Note that Bartow self-identifies as 2<sup>nd</sup> wave and Choudhury's paper applies a 3<sup>rd</sup> wave principle to alter the Western view of Muslim women's religion. Moreover Crawford, though technically of the 3<sup>rd</sup> wave generation, is in fact quite critical of the 3<sup>rd</sup> wave's perspective. See CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>17</sup> Among whom are: Mary Clark, Linda Dodd, and Darren Rosenblum. Many of our panelists apply 3<sup>rd</sup> wave analysis even if they do not explicitly identify as 3<sup>rd</sup> wave. See Section II, *infra*.

<sup>18</sup> Gloria Steinem disagrees with the "generational" characterization, of the 3<sup>rd</sup> wave as the opening quote of this essay suggests. Steinem asserts that the feminist exposure that came before will impact a woman's "wave" orientation now. Steinem gives the example of a young woman raised in a very cloistered community untouched by feminist concerns. Now, as a young adult approaching feminism for the first time, she focuses on those issues that were of primary concern for 2<sup>nd</sup> wave feminists. See *generally* Steinem, *supra* note 1.

<sup>19</sup> Andrea Dworkin analyzes the (social) context of heterosexual intercourse as constituting a man's invasion of a woman's body thus rendering women as an inferior class. ANDREA DWORKIN, INTERCOURSE 122-24 (1987). Interpreted as a statement that all heterosexual intercourse was rape (which Dworkin denied was her intent while some critics find that incredulous), INTERCOURSE helped fuel what became known as the "Sex Wars" in which different feminists held conflicting views as to how harmful to women various aspects of heterosexual relations were including pornography, "alternative sex" lifestyles such as bondage and domination, sado-masochism, and prostitution.

regarding women of different cultures who live in other parts of the world? Moreover, how should feminism respond to the growing backlash not only from certain cultural and political sectors but also from substantive groups of women who reject feminism's new roles for women in society altogether and lobby against them?

These controversies became vitriolic and polarizing over time. The differing, increasingly rigid views of "acceptable" feminist positions and conduct demanded allegiance to their particular perspective. The voices that gained the most media attention became sufficiently strident and inflexible that increasingly, by the late 80s, women and in particular younger women were less willing to identify themselves as feminists, leading to a period some characterized as post-feminism.<sup>20</sup> Furthermore, many felt (as I did — a white, middle-class woman) that feminism had pretty much accomplished what it set out to do, anyway.

However, as the daughters of the women's movement came into their own, new voices emerged that reflected the sensibilities and concerns of this younger generation and so did new paradigms of what would constitute the feminism of the future. In expressing her outrage at the sexist tenor of the Hill-Thomas hearings,<sup>21</sup> twenty-two year-old Rebecca Walker (daughter of 2<sup>nd</sup> waver, Alice Walker) called for women of her generation to see that "the fight [was] far from over" and "let that move you to anger" and to rise up into political action. In her essay in *Ms. Magazine* in 1992, she most famously concluded "I am not a post-feminism feminist. I am the Third Wave."<sup>22</sup>

The perspectives this new "Third Wave" evolved are clearly in reaction to what came before. Instead of engaging in debates as to which feminist track is the "right" track, the 3<sup>rd</sup> wave chooses to transcend those discourses by recognizing the inevitability of contradictory views. Human beings by nature are complex, each person with his or her unique set of complexities. Instead of seeking to have one group's perspective prevailing over all, the 3<sup>rd</sup> wave calls for embracing the contradictions "and creating something new and empowering from them . . . leading . . . away from divisiveness and

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<sup>20</sup> Susan Faludi argued in her prize-winning book that much of the disenchantment with the women's movement in the mid to late '80s was media created, which negatively and falsely recharacterized the "liberated woman" as suffering. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (Crown, 1991).

<sup>21</sup> The Hill-Thomas hearings refer to the United States Senate Judiciary Committee's investigation into Professor Anita Hill's allegations of prior sexual harassment by Supreme Court nominee Clarence Thomas while he was head of the Equal Employment Opportunity Commission and her superior. See Anita Hill, Op-Ed., *The Smear This Time*, N.Y. TIMES, Oct. 2, 2007, at A25.

<sup>22</sup> Rebecca Walker, *Becoming the Third Wave*, MS. MAGAZINE, 1992, at 39.

dualism.”<sup>23</sup> Out of the celebration of contradictions “grows the power to choose as an end in itself, regardless of the choice made.”<sup>24</sup> “Feminism isn’t about what choice you make but the freedom to make that choice.”<sup>25</sup> Those choices, moreover, were now to include all those traditional female activities that the 2<sup>nd</sup> wave felt women were condemned to do. It is OK to dress in a sexually attractive manner, to be fashionable, to strive for a good-looking booty, to cook, to clean, and to stay home with the kids. It is also OK to be sexual, to take pleasure in sex, to make one’s own choices about sex — about with whom, about how, about how often, and with how many or none at all. We should use our diversity in thought and feelings to build alliances, not to distill commonalities as a basis for a collective force. Seeking to build on commonality will only result in the imposition of one group’s values on another’s and create divisiveness.

Finally, the 3<sup>rd</sup> wave is identified with a focus on self-discovery in the context of culture, with media as the venue of communication of self-identity and action. Recognizing the power that mainstream media has to shape people’s lives and their view of themselves, many 3<sup>rd</sup> wavers seek to infiltrate that control by drawing the media’s attention to themselves. It is through the media that many outspoken 3<sup>rd</sup> wavers communicate that feminism is good, feminism is fun, feminism is about expressing yourself and empowering you to make your own choices. The 3<sup>rd</sup> wave movement creates a new definition of girl power in which (young) women take charge of their own means of broad communication. Some assemble ‘zines — homemade pastiches of photos, cutouts, and autobiographical writings readily photocopiable for circulation, others compose internet website blogs filled with self-examining revelations fully exposed for anyone to scrutinize and comment on. Others develop internet “TV” shows to give forum to new feminist voices and, finally and most publically, there are 3<sup>rd</sup> wavers who draw attention to the new girl power through performance, performance art, and song. And this brings us to the

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<sup>23</sup> Jennifer Gilley, *Writings of the Third Wave: Young Feminists in Conversation*, 44 REF. & USER SERVICES Q. 187, 189 (2005) (quoting Rebecca Walker, *Introduction to TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM* xxxv (Rebecca Walker ed., Anchor Bks. 1995)). Among the works I draw on, in addition to Gilley’s adroit overview of 3<sup>rd</sup> wave feminism’s key perspectives, is the excellent article by our panelist, Bridget Crawford, *Toward a Third-wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007). Both articles not only provide insight into 3<sup>rd</sup> wave feminist framework but also serve as comprehensive reference sources of 3<sup>rd</sup> wave writings.

<sup>24</sup> Gilley, *supra* note 23.

<sup>25</sup> See Gilley, *supra* note 23 (quoting Jennifer Baumgardner & Amy Richards, *The Number One Question About Feminism*, 29 FEMINIST STUDIES 448, 450 (2003)).

Pussycat Dolls and the question of whether their raw, raunchy sexuality on public display are indeed manifestations of the 3<sup>rd</sup> wave.

The contrasting ethos and methodologies between the 2<sup>nd</sup> and 3<sup>rd</sup> waves were repeatedly brought up by our panelists in various contexts: the meaningful differences between the two, the lessons 3<sup>rd</sup> wavers should learn from the feminism(s) that came before, what the 3<sup>rd</sup> wave rejects about 2<sup>nd</sup> wave feminism, what 2<sup>nd</sup> wave feminists fear that the 3<sup>rd</sup> wave neglects or misperceives, how 3<sup>rd</sup> wave principles improve or build upon 2<sup>nd</sup> wave approaches and finally, whether 3<sup>rd</sup> wave is even relevant for a broad spectrum of women — the very same charge 3<sup>rd</sup> wavers, in their anti-essentialist<sup>26</sup> stance, level at the 2<sup>nd</sup> wave.

What I found surprising was the extent to which the panelists were critical of or pessimistic about the current state of consciousness in the women's movement. This was true whether the panelists adapted what they identified as 3<sup>rd</sup> wave principles for an improved handling of certain gender issues, or whether they identified with the 2<sup>nd</sup> or no wave and focused instead on 3<sup>rd</sup> wave's failure to come to grips with the implications of its most vocal proponents' posture.

One fairly consistent view, however, was that 3<sup>rd</sup> wave feminism claims (whether valid or not) a distinctive, and to some a rebellious, departure from the 2<sup>nd</sup> wave.

## II. 3<sup>RD</sup> WAVE APPLIED

Some presenters evaluate the particular issue that has drawn their attention either in the context of 3<sup>rd</sup> wave principles or by proposing methodologies that would achieve 3<sup>rd</sup> wave goals.

Justice Carol Beier and her co-author, Larkin Walsh, discuss a recent landmark decision by the Kansas Supreme Court regarding the parentage rights of a sperm donor when an unmarried mother conceives

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<sup>26</sup> Anti-essentialism “rejects that there are properties essential to women and which all women share.” Alison Stone, *Essentialism and Anti-Essentialism in Feminist Philosophy*, 1 JOURNAL OF MORAL PHILOSOPHY 135 (2004). As a political question, anti-essentialism charged 2<sup>nd</sup> wavers' “women's agenda” with being really a “white middle-class women's agenda.” However, Panelist Michele Gilman points out that though 3<sup>rd</sup> wave feminism's anti-essentialist stance avoids being dominated by a white middle-class perspective, the 3<sup>rd</sup> wave nevertheless does not offer much hope to poor women. “[Third] wave feminism . . . focuses . . . on individual self-discovery, confession, autobiography, sexual exploration and sexual freedom . . . . [Women] who are humiliated and degraded [by our government's welfare system], who lack food, shelter and other life necessities, [women] who are fearing physical abuse are not exactly the population headed for self-sufficiency and increased dignity.” Third wave feminism offers little for these women because “3<sup>rd</sup> wave feminism . . . focuses more on cultural impact than political change.” Michele Gilman, *Poor Women and the State of Surveillance*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 3 – THIRD WAVE – A MOVEMENT IN ACTION, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39.1 U. BALT. L.F. 1 (2008).

the child without intercourse.<sup>27</sup> The majority opinion (written by Justice Beier herself) rejected a biological determination of parentage rights as well as a “best interests of the child” argument to interpret, instead, its state’s statute as barring the donor’s parentage rights unless a written agreement establishes otherwise. Requiring a contract, the presenters point out, achieves the 3<sup>rd</sup> wave goal of equality of agency between the potential birth father and mother; prior to the insemination, both are in a position to come to the negotiating table with equal bargaining power.<sup>28</sup>

When considering how wartime rape should be treated in International Tribunals, Teresa Phelps also advocates for equal agency between the sexes to be the guide.<sup>29</sup> For some time, radical feminists have lobbied for wartime rape’s special treatment in international criminal prosecutions. Women’s subordinated position and their dependence on men’s opinion of them is what renders rape a tool for victors to demean the vanquished. The rape victim becomes an out-cast, being no longer “any good for a man” and therefore, radical feminists argue, rape is a particularly odious wartime crime and in a class by itself. Phelps rejects that view and argues that treating wartime rape differently from any other criminal act of wartime violence (for example, torture) actually reinforces women’s subordination by putting the stigma of the crime on the victim. Treating rape instead as equal to any other wartime violent crime shifts the stigma to the perpetrator where it belongs, leaving the victims’ honor intact and thereby putting victims who are women in parity with victims who are men.<sup>30</sup>

To truly protect women’s rights, international law and policy must focus on empowering women, asserts Lacy Carra. “We can’t protect women — we have to make sure that women have the tools to protect themselves.”<sup>31</sup> To accomplish this, Carra recommends employing the

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<sup>27</sup> Carol A. Beier & Larkin E. Walsh, *Is What We Want What We Need, and Can We Get It in Writing? The Third-Wave of Feminism Hits the Beach of Modern Parentage Presumptions*, PANEL 3 – THIRD WAVE – A MOVEMENT IN ACTION, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Carol A. Beier & Larkin E. Walsh, *Is What We Want What We Need, and Can We Get It in Writing? The Third-Wave of Feminism Hits the Beach of Modern Parentage Presumptions*, 39.1 U. BALT. L.F. 26 (2008).

<sup>28</sup> Beier & Walsh, *supra* note 27.

<sup>29</sup> Teresa Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, PANEL 2 – THIRD WAVE FEMINIST LEGAL THEORY AND SOCIAL JUSTICE, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Teresa Godwin Phelps, *Feminist Legal Theory in the Context of International Conflict*, 39.2 U. BALT. L.F. 173 (2009).

<sup>30</sup> Phelps, *supra* note 29.

<sup>31</sup> Alicia Carra, *Creating Law and Policy with Women’s Voices; Feminism in Action*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 3 – THIRD WAVE – A MOVE-

paradigms that crises hotlines found most effective in assisting an individual woman in a desperate domestic situation. Women need to be *asked* what their concerns are and need to *make the decisions* about what they want to change. Telling women what to do only perpetuates their sense of lack of agency. Asking women *how* they would like to accomplish change shifts the locus of power away from the policymaker to the women who need to assert their own control.<sup>32</sup>

The imperativeness of asking women to determine what constitutes harm and what remedy they want is made even more salient by Cyra Akila Choudhury's critique of Western feminist attitudes towards women of the Muslim cultures. The presumption by Western feminists that they "know" Muslim women are oppressed by their religion fails to recognize that many women of Islamic faith have an alternate view of flourishing, which explains their adherence to their religion. Strictures of Islam that Western feminists find oppressive, Islamic women experience as enhancing their sexuality, personhood, and autonomy. Choudhury cites to the case of a Muslim rape victim exclaiming thank goodness she had her religion to support her through the ordeal.<sup>33</sup>

"Embracing the contradictions" yields an unexpected turn when I. Bennet Capers uses cross-dressing to assist in defining what constitutes criminal activity.<sup>34</sup> The "destabilizing effect" of "imaginative acts of cross-dressing" a person in the course of their conduct can uncover prejudicial filters in determining criminal activity. Adult women, for example, often get off with a slap on the wrist for molesting young boys, Capers points out. Imagine, in any particular case, if we "crossed-dressed" the parties. Would an adult man get off with a slap on the wrist for molesting a young girl?<sup>35</sup> "Imaginative

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MENT IN ACTION, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Alicia C. Carra, *Creating Law and Policy with Women's Voices; Feminism in Action*, 39.2 U. BALT. L.F. 181 (2009).

<sup>32</sup> Carra also discusses applying concepts from environmental law, in particular, "sustainability," to ensure that the reforms lead to change for women that are sustainable and will not dissipate over time. See Carra, *supra* note 31.

<sup>33</sup> Cyra Akila Choudhury, *Empowerment or Estrangement: Liberal Feminist Legal Theory, Muslim Feminist Translations, International Human Rights, and Progressing to the Third Wave*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 2 – THIRD WAVE FEMINIST LEGAL THEORY AND SOCIAL JUSTICE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Cyra Akila Choudhury, *Empowerment or Estrangement?: Liberal Feminism's Visions of The "Progress" of Muslim Women*, 39.2 U. BALT. L.F. 153 (2009).

<sup>34</sup> I. Bennet Capers, *Cross Dressing and the Criminal*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 4 – CONTEMPORARY CULTURE, CLASS AND THIRD WAVE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>35</sup> Those of us from the older 2<sup>nd</sup> wave generation must feel a sense of relief that there is no question in Capers' mind that an adult male molesting a young girl would be severely

cross-dressing” also works the other way. Would the jurors, who apparently discussed to some extent Martha Stewart’s multi-thousand dollar handbag in the course of their deliberations as to her guilt, been influenced by it as much if Martha Stewart were “dressed as a man” and it was a similarly priced briefcase instead? Would they have even noticed it? Applying “imaginative cross-dressing” to the Kobe Bryant rape case raises the question of whether it ever would be suggested that a male victim “was asking for it” by the way he dressed. Such a suggestion was made during the Bryant case to create doubt as to Bryant’s victim’s veracity. A tabloid newspaper blared a front page headline asking “Did she really say no?” Next to the headline was an old prom-night photo of the victim following the tradition of lifting her prom dress to display the prom garter belt on her lower thigh (a custom, by the way, not only for prom night photos but wedding photos as well).<sup>36</sup>

Two noted 2<sup>nd</sup> wave scholars, in accord with 3<sup>rd</sup> wave’s attention to media’s impact on the sense of identity and perception of others, explore the ramifications of two very different current cultural phenomena. Taunya Banks reflects on the growing prevalence of reality TV judges and Ann Bartow examines the proliferation of mainstream pornography. Each presenter expresses concern for the lack of public discourse and assessment of each phenomenon’s effect on self-image and cultural sensibilities.

Banks points out that the large number of reality TV judges who are women, especially minority women, relative to the number of their male counterparts is out-of-sync with the gender and racial make-up of the real-world judiciary, which is predominately male and white.<sup>37</sup> She also calls attention to how frequently these shows distort real world judges’ roles and power and the extent to which the TV judges’ assertions, decisions, and conduct lack either a legal basis or comport with courtroom decorum.<sup>38</sup> The impact on the social psyche can only

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punished. This had not always been the case – a testament to the brave women (and men) who fought at great personal risk to change society’s view of those offenses.

<sup>36</sup> Capers, *supra* note 34. See generally Rebecca Traister, *Did Bonnie Fuller really betray women?*, SALON, Oct. 31, 2003, <http://dir.salon.com/story/mwt/feature/2003/10/31/kobe/index.html>. Though the article displays the front page in discussing the photo published by the tabloid *The Globe*, Salon obscures the victim’s face and name.

<sup>37</sup> Taunya Lovell Banks, *Here Comes the Judge: Women Judges in Contemporary Television Reality Court Shows*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 4 – CONTEMPORARY CULTURE, CLASS AND THIRD WAVE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Taunya Lovell Banks, *Here Comes the Judge! Gender Distortion on TV Reality Court Shows*, 39.1 U. BALT. L.F. 38 (2008).

<sup>38</sup> This disparity between TV and real-life court conduct occurs despite the fact that all the reality TV judges are themselves former members of the judiciary. See Banks, *supra* note 37.

be speculated, Banks says, but clearly it calls for much needed empirical evaluation.

Bartow explains how without any cultural assessment or policy considerations, a 1979 5<sup>th</sup> Circuit opinion, by extending for the first time copyright protection to a pornographic film, turned pornography into a multi-billion dollar industry.<sup>39</sup> Pornography now is not only readily available on cable, DVDs, in hotel rooms, and on the internet, but the companies earning the most profit from it are powerful and prominent mainstream firms one would not normally associate with pornography. (The ones Bartow mentions, I might add, are all Fortune 500 companies — most of which are in the top 50.<sup>40</sup>) Some 3<sup>rd</sup> wave feminists, in their pro-sex stance, dismiss pornography concerns by declaring pornography as much a women's product as a man's and is capable of expressing her agency as well. Bartow points out, however, if there were sufficient demand for "feminist" pornography then, in the interest of profits, the corporations would already be making it. But, as she also points out, they aren't.

Overwhelmingly, Bartow explains the current consumer of pornography is the heterosexual male and current pornography is filled with unrestrained scenes of derogatory and often violent acts towards women, whose consent to all the acts in the films is visibly uncertain. Moreover, Bartow says, the attitudes and conduct exemplified in current pornographic images are being socially and individually internalized. For example, Playboy sells children's chairs imprinted with the Playboy Bunny insignia, inculcating the acceptability of the Playboy philosophy in the impressionable minds of the very young. Bartow also observes that, in contrast to the pro-pornography 3<sup>rd</sup> wavers, other 3<sup>rd</sup> wave young women complain that pornography is ruining sex; too often they find their images exploited sexually on the

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<sup>39</sup> Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (1979). Mitchell brothers produced one of the first pornographic films to achieve mainstream fame, *Behind the Green Door* (1972). It, along with *Deep Throat* (1972) and *the Devil in Miss Jones* (1973), ushered in a new era of "porn chic" that made pornography acceptable mainstream entertainment. Ralph Blumnehal, *Pornochic; "Hardcore" grows fashionable-and very profitable*, N.Y. TIMES, Jan. 21, 1973, at 28.

<sup>40</sup> Bartow mentions GM, Google, and Yahoo as the top three pornography profit centers. Marriott International, ATT, and HBO of Time Warner are other leading providers. Playboy, in addition to its well-known soft-core pornography division, also distributes the worst of the hardcore pornography under a separate trademark, Vivid Videos. See Ann Bartow, *Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 4 – CONTEMPORARY CULTURE, CLASS AND THIRD WAVE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Ann Bartow, *Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography*, 39.1 U. BALT. L.F. 75 (2008).

internet without their consent<sup>41</sup> or feel pressured by their dates to participate in real life acts seen on pornographic films. Though not anti-pornography per se, Bartow asserts the need for public conversation about pornography's impact on the individual and on the culture.

III. CONSCIOUSNESS-RAISING FOR THE 2<sup>ND</sup> & 3<sup>RD</sup> WAVES:  
THOUGHTS FOR RECONCILIATION AND A MOVING FORWARD

*[T]hird wave feminism is not as different as it thinks it is from 2<sup>nd</sup> wave feminism . . . . [S]econd wave feminists have many of the same ideological commitments that 3<sup>rd</sup> wave feminists do.*<sup>42</sup>

*[C]ontemporary feminist thinkers, whether they express it or not — and whether they like it or not — are ultimately expressing 3<sup>rd</sup> wave feminist ideas. So that even if the express purpose of much of what is going on as feminist theory is not explicitly 3<sup>rd</sup> wave, it is, at the very least, implicitly 3<sup>rd</sup> wave.*<sup>43</sup>

One significant distinction between 2<sup>nd</sup> and 3<sup>rd</sup> wave feminism is their different emphasis on forces for change. The 2<sup>nd</sup> wave typically looked and continues to look to political action and legal reform whereas the 3<sup>rd</sup> wave seeks progress through sexual, social, and cultural change. The 2<sup>nd</sup> wave tends to be group based whereas the 3<sup>rd</sup> wave tends to focus on the individual.<sup>44</sup> These distinctions reflect in part the polarization between the two groups.

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<sup>41</sup> Bartow, in a related paper, notes how champion pole-vaulter Allison Stokke's picture in her (university-required) skimpy uniform was plastered across the internet without her consent. Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 815 (2008). The noted high school athlete, who also happens to be a quite attractive young woman, was dismayed to find not only her image on sexually explicit sites but also a video interview of her analyzing her performance at a meet posted on YouTube with over 150,000 hits. See, e.g., Eli Zaslow, *Teen Tests Internet's Lewd Track Record: California High Schooler Allison Stokke, 18, Becomes a Victim Of Unwanted Attention After Photo Is Posted on a Sports Blog*, WASHINGTON POST, May 29, 2007, at A01.

<sup>42</sup> Bridget Crawford, *Anti-Essentialism, Sexual Agency, and Third-Wave Feminism: Approaches to Contemporary Legal Theory*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>43</sup> Darren Rosenblum, *Anti-Essentialism, Sexual Agency, and Third-Wave Feminism: Approaches to Contemporary Legal Theory*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

<sup>44</sup> See comments by panelists 3<sup>rd</sup> waver Mary Clark and 2<sup>nd</sup> waiver Marley Weiss. Both criticize the 3<sup>rd</sup> wave's focus though each has a different perspective with regard to the future. See CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

The fissure has its origins in the 1980s with the realization that feminism's successes were meeting primarily white middle-class women's interests. Equal access to education was mostly about women gaining access to law, medical, and other professional schools or training. Equal employment opportunity typically meant women rising out of the secretarial pool or leaving life as a full-time suburban homemaker and moving into positions with more economic autonomy such as managerial and professional occupations. Equal pay meant women earning the same salaries as men in those positions. Rights to maternity leave were fundamentally about protecting a woman's career while having children. Abortion rights served a similar function in addition to liberating women from enforced virginal and chaste lives. Freedom from sexual harassment also was a form of sexual liberation: women no longer had to tolerate verbal or physical groping by men in authority over them.

But women of lower socio-economic classes were not in a position even to consider going to medical school when getting through high school was the major challenge. Similarly, the opportunity for managerial or professional positions meant little without a bachelor's degree. It is important to note that in 1970 only fifty percent of the U.S. population even graduated from high school let alone college and only ten percent graduated from college.<sup>45</sup> Similarly, to exercise one's abortion rights and reproductive control required discretionary finances that the lower socio-economic classes did not have.<sup>46</sup>

Notwithstanding, the criticism of the 2<sup>nd</sup> wave (and the 1<sup>st</sup> wave, for that matter) for serving the interests of white, middle-class women is, in fact, a red herring.

First, being an activist about any gender issue is, to a large extent, a "luxury" the middle-classes can afford. As panelist Michele Gilman points out, despite the 3<sup>rd</sup> wave's anti-essentialist stance, its call for

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<sup>45</sup> Nicole S. Stoops, *A Half-century of Learning: Historical Census Statistics on Educational Attainment in the United States, 1940 to 2000*, U.S. Census Bureau, Population Division, Education & Social Stratification Branch (2003) <http://www.census.gov/population/www/socdemo/education/introphct41.html>. Though the percentage of male and female high school graduates were about equal back then, of the ten percent of the population who did graduate from college, twice as many were men as were women. Therefore, only fifty percent of all women (i.e., those who graduated high school) even had the possibility of going to college. Of those female high school graduates, only eight percent (or four percent of the entire female population) were ever going to graduate from college. Therefore, the advances in higher level career possibilities for women that the women's movement first gained in the '70s were absolutely irrelevant for 96% of all women. (Even without gender roadblocks — career possibilities were irrelevant for 94% of men.)

<sup>46</sup> Though not without considerable political battle, eventually external sources of funding for reproductive control became available to the economically disadvantaged. *See, e.g.*, the National Abortion Federation's history public funds for abortions for low income women at [http://www.prochoice.org/about\\_abortion/facts/public\\_funding.html](http://www.prochoice.org/about_abortion/facts/public_funding.html).

“individual self-discovery, autobiography, confession [and] sexual liberation” are not endeavors poor women can explore when worried about getting food, healthcare, and safety from domestic violence for their families.<sup>47</sup> Moreover, though initial 2<sup>nd</sup> wave reforms indeed did not reflect needs of women of different races and ethnicity — that was because, in 1970, the middle-class was almost exclusively white. Furthermore, the unease women felt was so inchoate, it was a struggle just to define what was wrong.<sup>48</sup> When white middle-class women were asking themselves “what changes do women want,” the answers naturally reflected white middle-class concerns.

Second, though the 3<sup>rd</sup> wave seeks to correct feminism’s initial essentialist course by being “multifaceted in its concern for intersecting racial, ethnic, class, and sexual identities,”<sup>49</sup> its focus on the individual’s social, cultural, and sexual exploration still primarily speaks to a middle-class audience. Only because the Civil Rights movement smashed racial and socio-economic barriers, concurrent with (and supported by) feminism’s 2<sup>nd</sup> wave, is there diversity in the middle-class today that allows the 3<sup>rd</sup> wave to encourage a broader spectrum of women to define who they are as women and what they want from their lives.

Finally, the freedom of choice the 3<sup>rd</sup> wave so rightfully advocates requires a social system to support it. As panelists Naomi Cahn and June Carbone demonstrate, that support is class-based. Women in the bottom quarter of the income distribution, compared with women in the top quarter, are less likely to be eligible for maternity leave, less likely to receive higher education, will have higher divorce rates and bear children at a younger age.<sup>50</sup>

Moving into or being middle-class seems almost a de facto requirement to enjoy the fruits of much of feminism’s efforts. Once there, a woman is economically and socially more free to pursue 3<sup>rd</sup> wave goals and define what being a woman means to her.

The filters both 2<sup>nd</sup> and 3<sup>rd</sup> wave feminists wear blind each of them to the insights of the other. The 2<sup>nd</sup> wave may have indeed indiscriminately condemned enjoyable elements of sexual relationships with men in its efforts to throw off the shackles of sexual objectification of women.

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<sup>47</sup> Michele Gilman, Director of the Civil Advocacy Clinic at the University of Baltimore, though of the 3<sup>rd</sup> wave generation, does not define her feminism as belonging to any particular wave. See Gilman, *supra* note 26.

<sup>48</sup> See, e.g., Weiss, *supra* note 7.

<sup>49</sup> Clark, *supra* note 13.

<sup>50</sup> Naomi Cahn & June Carbone, *Sex, Class, and Education*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 4 – CONTEMPORARY CULTURE, CLASS AND THIRD WAVE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; see also Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39.1 U. BALT. L.F. 57 (2008).

But a 3<sup>rd</sup> wave reaction to endorse indiscriminately all forms of sexual activity, including unchecked violent pornography, swings the feminist pendulum dangerously to the opposite extreme. The 2<sup>nd</sup> wave's unnuanced vision of women "having it all," marriage, motherhood, and career, may have led to the current state of women's exhaustion. The reaction, however, among young 3<sup>rd</sup> wave women to drop out of careers to raise a family for a decade or two ignores the 2<sup>nd</sup> wave's painful realizations about unrecoverable loss of agency that comes with years of economic dependency on another.<sup>51</sup>

Certainly, the criticism is justified that 2<sup>nd</sup> wave feminism developed a monolithic view of the "essential" woman, one consisting of characteristics all women supposedly shared but in fact excluded any elements not shared by white middle-class women. The 3<sup>rd</sup> wave's polar opposite of "anti-identitarianism,"<sup>52</sup> or "hyper-individuation,"<sup>53</sup> however, is equally destructive. The result of the 3<sup>rd</sup> wave's extensive multi-faceted focus on identity being based on the intersectionality of race, class, ethnicity, geography, etc., can lead a woman almost inevitably to view that, as a woman, hers is a singular individual experience. The loss to each woman of not realizing her experiences are shared by other women from whom she might draw support, is poignantly demonstrated by panelists Felice Batlan et al.'s study of Chicago-Kent law students.<sup>54</sup> In individual surveys, women students reported a number of negative law school experiences as well as a loss of self-esteem, experiences not reported by the men students. However, none of the women students identified gender as a defining law school experience (though they did identify race as one). Furthermore, three-fourths of Batlan's women seminar students, upon reading Lani Guinier et al.'s book *BECOMING GENTLEMEN*<sup>55</sup> about

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<sup>51</sup> Expectations of returning to the workforce twenty years later at the same point of departure are highly unrealistic. Climbing the career ladder and developing professional maturity requires an energy reserved for the young. The mature successful professional remains there because the wisdom accumulated from experience replaces the declining reservoirs of energy.

<sup>52</sup> Rosenblum, *supra* note 43. "Anti-identitarianism" is used to criticize an extreme version of 3<sup>rd</sup> wave's anti-essentialism, which focuses on the multiple facets of an individual's uniqueness to such an extent that identification with others is nearly impossible.

<sup>53</sup> Clark's use of "hyper-individuation" is analogous to Rosenblum's "Anti-identitarianism." Clark, *supra* note 13; *see also* Rosenblum, *supra* note 43.

<sup>54</sup> The researchers consisted of Professor Batlan and four women students from her seminar course: Kelly Hradsky, Kristen Jeschke, LaVonne Meyer, and Jill Roberts. *See* Felice Batlan et al., *Not Our Mother's Law Students?: A Feminist Study of Women's Experiences in Law School*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 1 – CROSSING THE WAVES OF FEMINIST LEGAL THEORY, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>; *see also* Felice Batlan et al., *Not Our Mother's Law Students?: A Feminist Study of Women's Experiences in Law School*, 39.2 U. BALT. L.F. 124 (2009).

<sup>55</sup> LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (Beacon Press 1997).

women law students at the University of Pennsylvania, stated they were surprised to recognize the experiences of the women law students in that book. Batlan's seminar students had each assumed their own feelings of alienation, depression and sinking confidence were their individual problems. Imagine the counter-effect a "feminist space" would have had for these women in coping with their feelings if they had realized that their female classmates shared them.

There is, however, an alternative to adopting one extreme of the "essential" woman or the other extreme of scrutinizing for every possible distinguishing characteristic so a woman fails to consider commonalities with other women. Women do share various characteristics in common with various other women — not all characteristics with all the same women — but some with some women and others with other women. The point of "consciousness-raising" is for discussion among those with common experiences to raise awareness of common problems and lead to common solutions. Feeling unique as a woman can lead to isolation and ineffectual fending for oneself.

Furthermore, integrating the 3<sup>rd</sup> wave's individual agency with the 2<sup>nd</sup> wave's collective action can only lead to greater force for change and is necessary, in particular, to bring change on behalf of those women who are not in a position to advocate for themselves. Michele Gilman notes that there is the question of who should speak for whom when referring to herself, a white middle-class woman, speaking on behalf of the poor women of all races and ethnicities she represents.<sup>56</sup> Lacy Carra, on the other hand, reminds us of the need for advocacy organizations regarding issues on which society has not yet come to a consensus.<sup>57</sup> Collective action does not require that all women share the same concerns — all that is necessary is that some women have an interest in common for some particular action.

Is there a framework that is sufficiently flexible to accommodate myriad groupings and re-groupings of women to effect change?

As potential role-models for feminism's future, panelist Kristen Kalsem points to both the federally-funded 1977 National Women's Conference in Houston, Texas, and the more recent, philanthropically-financed New Women's Movement Initiative begun in December 2003.<sup>58</sup>

Though not widely-remembered nor currently well-known, the 1977 National Women's Conference nevertheless had an attendance of over 20,000 women, men, and children. In accordance with the Congressional bill that funded it, its official 2000 delegates

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<sup>56</sup> Gilman, *supra* note 26.

<sup>57</sup> Carra, *supra* note 31.

<sup>58</sup> Kristen Kalsem, *Social Justice Feminism*, CONFERENCE ON FEMINIST LEGAL THEORY & FEMINISMS: PANEL 2 – THIRD WAVE FEMINIST LEGAL THEORY AND SOCIAL JUSTICE, March 7, 2008, <http://law.ubalt.edu/template.cfm?page=928>.

represented both urban and rural women from every U.S. state and territory, spanning all ages and ethnicities as well as all economic and educational levels. The conference's conclusion was a recommendation of a National Plan of Action to President Jimmy Carter that focused on women's equal opportunity in business, arts, education, credit, insurance, and social security; it asserted the need to address domestic violence, child abuse, the disabled, older women, minorities, rural women, and women in prison as well.<sup>59</sup>

Despite the Conference's clearly inclusive foundation and perspective (akin to later "anti-essentialist" objectives), the women's movement subsequently splintered, fractionalized and lost much of its momentum a little more than a decade later. This created a vacuum that gave rise to the current 3<sup>rd</sup> Wave.

In 2003, in an effort to heal rifts, the New Women's Movement Initiative (NWMI) brought together more than fifty women leaders for meetings over the course of thirty months to resolve "long-standing divisions . . . and to build . . . relationships, trust and analysis necessary to revitalize U.S. feminism." Diversity was reflected in the source of support as well as among the leaders invited to attend. Support came from the Ford, Ms., Astrea Lesbian, and Third Wave foundations, as well as the Center for the Advancement of Women. The leaders attending the meetings included those from national and regional organizations that "advocate, educate and organize around" women's issues as well as philanthropic organizations that fund them and scholars who research and write about them. Strong emphasis was placed on a presence of women of color as well as cross-generational representation.<sup>60</sup>

NWMI represented a return to the inclusive context created during the 1977 Conference. Probably the most pivotal debate during the NWMI was over whether to "aspire to be a women's rights movement or a social justice feminist movement" with social justice feminism ultimately prevailing. Social Justice Feminism means for NWMI, among other things, to focus on the "marginalized and vulnerable," on women's issues that integrate race, sexuality, class, age, and "other markers of inequity," to recognize issues of power and privilege both

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<sup>59</sup> See *Women March On Houston*, TIME, Nov. 28, 1977, at 12, available at <http://www.time.com/time/magazine/article/0,9171,919136,00.html>; Debbie Mauldin Cottrell, *National Women's Conference, 1977*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/NN/pwngq.html> (last visited Apr. 19, 2009); *Sisters of '77*, PBS INDEPENDENT LENS, <http://www.pbs.org/independentlens/sistersof77/conference.html> (last visited April 19, 2009); see also CAROLINE BIRD, THE SPIRIT OF HOUSTON, THE FIRST NATIONAL WOMEN'S CONFERENCE 9-12 (1978).

<sup>60</sup> See Linda Burnham, *The New Women's Movement Initiative 1* (Aug. 16, 2007), available at <http://ms.foundation.org/user.assets/PDF/Program/NWMSummationFinalDraft.pdf>.

in society and within the women's movement, and to "conceive of itself as part of broader social justice movement."<sup>61</sup>

Clearly Social Justice Feminism signifies a positive forward movement integrating 3<sup>rd</sup> wave's anti-essentialist self-affirmation with the power of the 2<sup>nd</sup> wave's group-based collective action and support. Kalsem says that what Congresswoman Barbara Jordan said was imperative for the 1977 National Women's Conference to accomplish can be the guide for Social Justice Feminism today. "It must be something 'productive, constructive and healing.'"<sup>62</sup>

Social Justice Feminism seems like a good principle to pursue — it leads us back to the concept of "Justice for All."

#### IV. CONCLUSION

Without a doubt, the presentations at the conference and the papers published in this volume bring together a broad array of stimulating topics that nevertheless coalesce to create a coherent and insightful investigation into the current state of feminism and directions for its future. Our conference Co-Chairs, Leigh Goodmark<sup>63</sup> and Margaret Johnson,<sup>64</sup> are to be commended not only for conceiving and organizing such a wonderful conference but for providing superb leadership as well. There seems no better way to conclude this essay on the *Feminist Legal Theory and Feminisms Conference* than with Margaret Johnson's concluding remarks:

"Feminism is memory . . ." (quoting Gloria Steinem who quotes Native American women activists).

"Th[ese] . . . may be . . . false question[s]: what is 3<sup>rd</sup> wave feminism? . . . [and] have we moved beyond 2<sup>nd</sup> wave feminism? . . . "

"What we have demonstrated today is [that] theory is constantly changing, evolving, being applied [and] moving forward — we have our memories but keep moving forward and making new memories along the way . . . ."

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<sup>61</sup> *Id.* at 3.

<sup>62</sup> Kalsem, *supra* note 58.

<sup>63</sup> Associate Professor of Law, University of Baltimore School of Law.

<sup>64</sup> Assistant Professor of Law, University of Baltimore School of Law.

## GLORIA STEINEM KEYNOTE ADDRESS

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*In March of 2008, the University of Baltimore School of Law hosted its first annual Feminist Legal Theory Conference. Gloria Steinem was invited to share her wisdom. Here is how she concluded our event.*

I am honored to be here in this great room full of good minds and good hearts—all trying to make sure the law has some relationship to justice. I am really looking forward to our discussion because I think, especially with all of this extraordinary talent in this room, we should not be in a hierarchal structure with you looking at each other's backs and me looking at you. Hierarchy is based on patriarchy, which does not work anywhere, anymore.

I hope that we each might leave this room with a new idea, with a new feeling of support, and a new subversive organizing tactic. To make that happen we really need to learn from each other. I can't tell you what it means to me to be with you today. Over the last thirty-five years, I have become aware of the Latin American saying, which I cannot do for you in Spanish, that people can withstand pestilence, flood, fire, but with unjust laws, they went crazy. The only way we can remedy this and make a link between lived experience in the law is to make sure that all the social justice movements, community movements, "real lived experience kind of wisdom" has access to your ability to make general principles transferable.

Today, a third-wave feminist asked me what knowledge I could impart to her and other third-wave feminists about where they should go from here—she wanted to know what I want third-wave feminists to accomplish. My answer is that I just want you to go. It's up to you. One thing we were talking about earlier and I think it's important to say that it is not all chronological. A lot of it is experiential. For instance, there is a young woman staying with me who comes from a Christian fundamentalist family in Lubbock, Texas, who had gotten radicalized on the question of sex education in the schools, became an activist, and is now going around lecturing and organizing. She is twenty-one years old. She is a second-wave feminist because she came out of an atmosphere in which feminism wasn't present. Incidentally, she and her family are not at odds. They love each other and are educating each other. It has a happy ending in every way. She resembles or is like more women who have come from families that incorporated many feminist values and go on from that or need to

differentiate themselves from that who one might call a third-wave. In some ways, I was a third-wave person myself, looking back, because I had not experienced very severe discrimination or very severe abuse. Consequently, I didn't feel endangered by sexuality or other people who had been abused as children. So I was, as I said this morning, going around in mini skirts and a button that said "cunt power" in 1973—that is a very third-wave thing to do. So it's not all chronological. I think we need to honor each other's experiences. Perhaps the least helpful thing that second-wave feminists do to third-wave feminists, in my opinion, is expect gratitude. It's a sort of 'I walked thirty miles through the snow to school' kind of thing. I keep trying to explain to my peers that gratitude never radicalized anybody. I didn't walk about saying thank you. I got mad on my behalf. I kept saying, "Wait a minute. I'm not getting paid equally. I can't get an apartment. What's going on here?" We all have to get mad on our own behalf.

We, organizers, are always confronted with the individual cases that challenge us to bring together a wide variety of people and views in a way that actually make a solution. But, when it comes to making generally transferable principles, we need to always do this through collaboration. With sexual harassment, I recall a conference at Cornell in the summer of '72 or '73 where young women, who had been interns in summer job programs, were trying to explain to the women running the program their experiences. They invented the term "sexual harassment" to describe their experiences. After more discussions and conferences, Katherine McKenna and others were able to bring sexual harassment into a place of recognition and find legal remedies. I assure you that this led many women to remain sane and not feel that they were alone in having such experiences.

I wonder sometimes what might have happened if we had this type of partnership before *Roe v. Wade*.<sup>1</sup> Perhaps we would not have ended up with a really questionable, if we can use the word, "problematic" law, as Justice Ginsburg has pointed out with trimesters and so on, because what we were originally after was the decriminalization of this procedure. The word "repeal" was in the name of all the early organizations of laws that criminalized this procedure. This was to put this procedure, like other procedures, into the hands of patients and their physicians to make a determination as to when there was a viable life—either that of the fertilized egg, the fetus, or the life, of the woman herself. We have ended up with a law

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<sup>1</sup> 410 U.S. 113 (1973).

that focuses on the fetus and not the woman. We are all reduced to wearing buttons that says 'A Woman's Life is a Human Life.' We always have the danger of the specter of the human life amendment to the Constitution, which would effectively nationalize women's bodies throughout their child-bearing years.

This is already happening to poor women, especially if they are suspected of drinking, taking drugs, or in some way damaging the fetus. The whole focus of the law came to be on the fetus and not on the woman. Maybe if we had been able to sit in this room in the early 1960s, we would not have ended up with the current dilemma.

Your wording as legal experts is important to us. I remember when Katherine McKenna, in the case of sexual harassment, talked about "welcomed sex" instead of talking about consensual sex, since consensual sex can be coerced and consent can be compelled. What a revolution is that? We need your help in more precise wording as well.

Today, I noticed a study, which I look forward to reading, by a legal scholar at Yale researching armies that do not inflict, or rarely inflict, rape as a weapon of war. The question was raised, "how is that possible?" We have on our own land, where we sit now, an example of how this is possible. After Europeans came to the North Americas, there were approximately a hundred years of off-and-on newspaper articles by Europeans remarking on how unusual it was that the seven nations of the Iroquois confederacy did not practice rape—even of their female prisoners. This seems to have been the case because female status was high, the female elders chose the male chiefs. The chiefs were always two separate chiefs—the one chief ruled by persuasion and the council method, the other chief was brought in to fight in self-defense. Women controlled their own fertility, women tended to wait until the previous child was about six before having another child. Additionally, divorce and separation, along with homosexuality were understood.

Reservations did not really take hold until the 1900s. Before that, people were more or less living together and suffrages of the era were having dinner every Sunday night with Seneca women, who were clothed in nice shammy embroidered tunics and shammy trousers, while the European women were wearing twenty pounds of skirts, tight corsets in the fashionable lentil smelling sauce and generally very restrictive clothing. Did anyone tell us this? No one ever told me this. Did anyone tell us that there was a settlement the size of London called Cohopia near St. Louis before the Europeans ever came? Did anyone tell us that two-thirds of the medicines we use now were based

in the pharmaceutical knowledge of the 500 cultures that were here or that there was vulcanized rubber? You can see I have been writing about this and I am fascinated with the truth, while being tempted severely to make a button that says, ‘the truth will set you free but first it will piss you off.’ This is what my Cherokee colleagues of the last twenty years mean by saying feminism is memory.

It was here on this land, ill egalitarian cultures, existed with almost total absence of rape. In fact, the western films about white women who suffered fates worse than death after capture by native groups turn out to have been pretty much the opposite of the truth. If you look back at the narratives of the ones who were actually interviewed, the majority wanted to stay. Women were treated better in the native cultures than the European culture. They actually wanted to stay and, as Benjamin Franklin bitterly regrets, they had to make laws against indianization because so many people wanted to leave and join a different way of life.<sup>2</sup> We have jurisprudence, conflict resolution, and kinds of behavior within history that preceded what we usually consider history. How come they don’t tell us this? Well, because 90% of these groups were eliminated, both by disease and by warfare. Yet, the Iroquois confederacy is still the longest running parliamentary body in the world. It exists in upstate New York, has its own passports, immunity from the draft, settles its own disputes, and a couple of years ago, stopped a highway from going through upstate New York based on its tribal supremacy. Obviously, there were 500 nations, each one of them was very different.

But, I think it’s interesting if we just extend our legal vision into the past to many matrilineal cultures, including the one from which we all come, in southern Africa, the Quay and the Saun.<sup>3</sup> The patriarchal European law has been in contradiction to the matrilineal—communally owned land in Africa. In this country, land was registered in male names because of the European law. This became the largest cause of land loss of female human beings in this world. The reason why females only own one percent of the land in the world is not because they did not once own it, but because of the imposition of European-based patriarchal law. I have recently been concerned about this because I have gone to the Kalahari, where the Quay and the Saun live, and to India where the Dalits or so called “untouchables”

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<sup>2</sup> See generally Vox America: Colonial Characterizations of Native Liberty, available at [http://www.ratical.org/many\\_worlds/6Nations/EoL/chp1.html](http://www.ratical.org/many_worlds/6Nations/EoL/chp1.html) (last visited October 7, 2008).

<sup>3</sup> The so-called bush people and colonial language, and many different groups in southern Africa who we now know by DNA trails migrated around the coastal region into Australia around the upper northeastern parts of Europe and down.

live. Dalits, the unbroken ones, who are also matrilineal and are the Native Americans of India, are trying to cope with the colonial law that has caused about a thousand tribal groups to lose land. All of them are dealing, not only with such problems as land loss and how to get their land back, but also trying to get back their own pharmaceutical knowledge. This pharmaceutical knowledge is quite profound in patent law, but is communally owned within tribes. However, in patent law, patentable knowledge requires an inventor. There are legal scholars grappling with how to develop some method to recompense for the many pharmaceuticals taken from these cultures from which they received little or no reward.

These cultures' systems of punishment have some wisdom from which we can learn. Take, for instance, one of the oldest cultures in Ghana. There, when someone commits an anti-social act, the individual is isolated. After all, we are communal creatures. We need each other and isolation seems to be a universal form of punishment. After the period of isolation is over, it is part of their penal system to bring the person back into society. There is a ritual and a long period of time where every person who knows the convicted tells him or her every good thing he or she ever did. This makes sense. We do it with children, right? It's called positive reinforcement. There is so much to gain from extending our research to cultures that either pre-existed or still exist in remnants. They can tell us about other kinds of jurisprudence, consensus building, and of governance systems that have worked out. This may not be possible in this culture, since the Quay and the Sauns have the goals of cooperation, not competition. These cultures have games like relay races in which you twirl around and throw a ball, while singing a song with the purpose that the next person can catch the ball, not so they cannot. Their government systems are devoted to conflict resolutions. These ideas are out there just awaiting us.

Of course, there are many ills that are very clear to us at the moment. This afternoon we were discussing a little bit of the truth of the global sex and labor trafficking. We are now seeing slave narratives like those here in the 1600s and 1700s. Our earlier slave narratives served to prove that slaves were human beings by challenging time's mythology that these people were inferior and could not take care of themselves. These narratives had an important and serious purpose. The personal narrative of the sex and labor trafficked human beings, who are now 85% women and children, also serves this purpose. We are just beginning to look at ways to revise our laws.

While there are federal laws that allow various ways for the United States to discipline countries permitting these practices, we have not instituted laws to guide our own law enforcement officials' conduct with respect to these situations as they arise state-by-state. It took three years for a coalition of about ninety women's groups to get a law against human trafficking in New York State. We just got it this year [2008]. Until now, police officers had no direction on how to treat this crime. So when an establishment devoted to sex slavery and the production of, in the case of white women from Russia and Ukraine, the production and sale of white babies, the officers could do nothing except put them in prison. The NY law, which is based on the Swedish model, gives services to rescue and rehabilitate the women and children, while punishing the traffickers and the pimps. It imposes the small dollar fine, I think it's a Class C felony, on the customers. That, you'll be surprised, was the hardest to get because it threatens exposure to people who are buying sex. This is an area of controversy, as you know, among people of good will, because there is a notion that legalizing prostitution is the way to regulate it. Yet, countries like Peru, Iceland, Nepal, and India show that actually doesn't work. The point is to decriminalize the women and to criminalize the traffickers and the pimps. This model has worked in Sweden and other places.

I think this is an example of how much we need each other. So, there are just so many ways in which we need each other's information and experience, and I hope that there will be many, many more conferences like this.

I am so grateful to the University of Baltimore School of Law for always being inclusive and having this glorious conference.

## ARTICLE

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### WELFARE, PRIVACY, AND FEMINISM

By: Michele Estrin Gilman\*

*The whole system is based on the assumption that you are trying to screw [welfare officials] over. There are constant check-ins and impossibly long lists of 'verifications' to submit to the state in order to back your story; inquisitions involving a battery of questions asked by countless supervisors behind closed doors when it appears that your story does not add up. . . [and] if you don't comply . . . your benefits can be cut.*

— *María Cristina Rangel, former welfare mother and third-wave feminist.*<sup>1</sup>

Privacy rights are in the headlines. In the wake of technological advances and post 9/11 surveillance tactics, Americans are debating the tensions between civil liberties and security; between internet consumerism and the marketing of personal data; and between improved health care and protection of patient records. Feminists have also long debated privacy and what it means for women. Second-wave feminists focused primarily on two aspects of privacy. First, they assailed the patriarchal divide between the public and the private spheres that trapped women in the home and subjected them to domestic abuse. Second, feminists argued in favor of a sphere of privacy that would allow women to make reproductive choices without state interference. These were powerful critiques of existing power structures. Through political action and legal challenges, women made significant advances in gaining decisional privacy while shedding unwanted physical privacy. Women entered new workplaces. Domestic abuse was criminalized. The Supreme Court located a right to reproductive choice in the Constitution. Despite

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<sup>1</sup> María Cristina Rangel, *Knowledge Is Power*, in LISTEN UP: VOICES FROM THE NEXT FEMINIST GENERATION 188, 192 (Barbara Findlen ed., 2001).

these advances, the second-wave critiques embodied a white, middle-class perspective and tended to overlook the experiences of poor women.<sup>2</sup>

As a historical matter, poor women have always had less privacy than other women. To begin with, they often worked outside the “sanctity” of the home, serving as a cheap form of labor.<sup>3</sup> Further, the government freely intruded into the homes of poor, single mothers, often as a surrogate for the absent male.<sup>4</sup> These intrusions continue today. As a condition of receiving welfare benefits, poor women have been subjected to drug tests, and they continue to face unannounced home inspections by government officials, fingerprinting, and restrictions on their reproductive choices. These formal welfare requirements overlay routinized surveillance of poor women, who must comply with extreme verification requirements to establish eligibility, travel to scattered offices to procure needed approvals, reappear in person at welfare offices at regular intervals to prove their ongoing eligibility and answer intrusive questions about their child rearing and intimate relationships. Thus, while many Americans are uneasy about their privacy in a time of technological transformation, the harms poor women face from privacy deprivations go far beyond unease.<sup>5</sup>

This essay discusses the relationship between feminist critiques of privacy and poor women. It explores how second-wave feminism considered privacy as experienced by poor women, and it analyzes whether third-wave feminism is up to the task of better securing privacy rights for poor women.<sup>6</sup> Part I describes how the welfare system strips poor women of privacy and the harms they suffer as a result. Part II explains how the legal system shapes and defines the

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<sup>2</sup> See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 29 (1st ed. 1988) (“To generalize from the lives of middle-class, native-born, white women to other groups of women as if no differences existed, creates distortions . . .”).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* at 313.

<sup>5</sup> Cf. Ann Bartow, Response, *A Feeling of Unease About Privacy Law*, 155 U. PA. L. REV. PENNUMBRA 52, 52 (2006), <http://www.pennumbra.com/responses/11-2006/Bartow.pdf> (criticizing a leading privacy theorist for failing to show how “privacy violations can negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease.”).

<sup>6</sup> Second-wave feminism is associated with the movement for equal rights for women during the 1960s and 1970s; while third-wave feminism is associated with women “who came into a political consciousness in the 1980s and 1990s.” See Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 108 (2007). The theoretical differences between the movements are discussed in Part III.

privacy rights of poor women. Part III discusses second-wave and third-wave feminist perspectives on privacy and how those theoretical positions relate to welfare mothers. The Conclusion suggests a feminist advocacy strategy that would include the voices of poor women within a conception of privacy that respects the dignity of poor women while providing them with the support they need to care for their families.

## I. WELFARE AND PRIVACY

The welfare system strips poor women of privacy not simply as a necessary precondition for processing applications, but also to reinforce the subjugation of the poor.<sup>7</sup> The government has historically sought to make public assistance so stingy and so unappealing that few will bother to apply.<sup>8</sup> At the same time public policy punishes women who do not fit the patriarchal norm of a married, two-parent family with a male breadwinner.<sup>9</sup> Privacy invasions are a primary tactic for stigmatizing welfare and single motherhood.<sup>10</sup>

### A. Welfare History

Since this country's founding, the poor have been categorized as either deserving, meaning they cannot be blamed for their poverty, such as children, widows, and the disabled, or undeserving, meaning they should be self-sufficient, such as able-bodied adults.<sup>11</sup> Single

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<sup>7</sup> Welfare applicants are an extremely diverse group of women with varied life experiences. This essay does not intend to devalue the individuality of those whose lives are impacted by the welfare system. Instead, this essay focuses on the shared experience of state surveillance faced by welfare mothers.

<sup>8</sup> See JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 23 (2001); see also LINDA GORDON, *PITIED BUT NOT ENTITLED, SINGLE MOTHERS AND THE HISTORY OF WELFARE* 49 (1994).

<sup>9</sup> See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106-10 (1995).

<sup>10</sup> See Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 675 (2005) ("Some state and local agencies are using verification procedures to stigmatize and embarrass claimants . . .").

<sup>11</sup> See generally MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 8 (1989); Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 906 (1990) ("[T]he heart of poverty policy centers on the question of who is excused from work. Those who are excused are the 'deserving poor'; those who must work are the 'undeserving.' Ultimately, this is a moral distinction."); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505 (1991) ("[This] distinction created a line running through the poor, putting the aged, infant, and disabled on one side of the line, and the able-bodied on the other side.").

mothers of children have always occupied a shifting and uneasy space between these two poles; white widows have received the most sympathy, while unmarried women of color have been the targets of approbation.<sup>12</sup> The modern welfare state arose out of the New Deal, which treated relief for white men differently than relief for minorities and women.<sup>13</sup> Social insurance programs designed for white working men, such as social security and unemployment insurance, have carried no stigma, provided generous benefits pursuant to objective criteria, and been federally administered.<sup>14</sup> By contrast, cash assistance programs for single mothers, primarily Aid to Families with Dependent Children (AFDC), have been stingy, stigmatized, state-administered, and discretionary.<sup>15</sup>

From the 1950s to the 1970s, AFDC roles grew rapidly as women of color obtained rights to welfare, family structures changed across society, and economic dislocations disproportionately impacted African-Americans.<sup>16</sup> A backlash against welfare mothers reached a frenzy in the 1980s, as the media and policymakers portrayed welfare mothers as lazy and promiscuous. President Reagan famously attacked them as “welfare queens.”<sup>17</sup> In 1996, AFDC was replaced with Temporary Assistance for Needy Families (TANF), largely due to the public perception that AFDC was encouraging dependency in welfare mothers and discouraging the formation of two-parent families. Accordingly, TANF abolished the entitlement to welfare and put a five-year lifetime limit on the receipt of welfare benefits.<sup>18</sup> Significantly, TANF requires that recipients work within two years of receiving benefits, although most states impose a shorter timeframe. Still, even though TANF recipients must now work in exchange for welfare benefits, they continue to face the same sorts of stigma and

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<sup>12</sup> See Joel F. Handler, *The Transformation of the Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE, 457, 473-78 (1987-88).

<sup>13</sup> See GORDON, *supra* note 8, at 5-6, 293-99.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 267 (1986); see also ABRAMOVITZ, *supra* note 2, at 319, 334.

<sup>17</sup> See PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES 194-99*, 239-40 (2005) (describing the roots of the backlash); see also WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 362-85 (6th ed. 1999) (describing political responses to perceived welfare crisis). President Reagan’s story about the “welfare queen” proved to be a myth. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 645 (2007).

<sup>18</sup> TANF was created by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 604(a) (2000)).

privacy deprivations that were rampant under AFDC, and the advent of new technologies has only exacerbated the situation.

*B. Privacy*

When a woman applies for and receives TANF, she faces the loss of informational, physical, and decisional privacy, each of which is considered in turn.<sup>19</sup>

*1. Informational Privacy.* — Informational privacy concerns the interest individuals have in controlling their personal data and limiting access to such information by others.<sup>20</sup> Obviously, a government program must ensure that the proper persons are receiving the appropriate levels of benefits. Further, welfare caseworkers cannot link welfare recipients to available social services without information about their needs. However, the level of information required from TANF applicants goes far beyond what is necessary to meet these goals and is often gathered through demeaning techniques.

A typical TANF applicant must undergo a multi-stage, multi-day application process consisting of screening interviews, application interviews, group orientations, and employability assessments.<sup>21</sup> She must answer questions ranging from her resources and sustenance needs to her psychological well-being.<sup>22</sup> Her own word is not enough; she must also provide independent verification of her answers to many of these questions, either through her own documentation or through information gathered from third parties,<sup>23</sup> and in some cases, caseworkers conduct investigations themselves. As part of TANF, an applicant must also comply with child support enforcement efforts by providing detailed paternity information about her children.<sup>24</sup> All of this information is electronically shared and compared with numerous federal and state databases, as well as commercial databases, to verify eligibility and to ferret out duplicate or otherwise fraudulent

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<sup>19</sup> These are the three major categories of privacy interests. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202-03 (1998).

<sup>20</sup> See DANIEL J. SOLOVE ET AL., *PRIVACY, INFORMATION, AND TECHNOLOGY* 1 (2006).

<sup>21</sup> See PAMELA A. HOLCOMB ET AL., *STUDY OF THE TANF APPLICATION PROCESS* E-3, 2-4, 3-3 (2003), available at <http://aspe.hhs.gov/hsp/app-process03> [hereinafter *Study of the TANF Application Process*]; PAMELA HOLCOMB, ET AL., *THE APPLICATION PROCESS FOR TANF, FOOD STAMPS, MEDICAID, AND SCHIP: ISSUES FOR AGENCIES AND APPLICANTS, INCLUDING IMMIGRANTS AND LIMITED ENGLISH SPEAKERS* 3-6 to 3-9 (2003), available at <http://www.urban.org/UploadedPDF/410640.pdf>; MARCIA K. MEYERS & IRENE LURIE, *THE DECLINE IN WELFARE CASELOADS: AN ORGANIZATIONAL PERSPECTIVE* 26 (2005), available at <http://www.npc.umich.edu/news/events/newdirections/Meyers1.pdf>.

<sup>22</sup> See *Study of the TANF Application Process*, *supra* note 21, at 3-7.

<sup>23</sup> See MEYERS & LURIE, *supra* note 21, at 27; HOLCOMB ET AL., *supra* note 21, at 3-16.

<sup>24</sup> 42 U.S.C. § 608(a)(2)-(3) (2000).

applicants.<sup>25</sup> After benefits are awarded, many jurisdictions monitor how welfare recipients are spending their welfare funds through electronic surveillance.<sup>26</sup>

2. *Physical Privacy.* — Physical privacy concerns the ability to keep one's bodily integrity and home free from the intrusions of others.<sup>27</sup> In the name of fraud prevention, many jurisdictions fingerprint applicants and photograph them.<sup>28</sup> As part of child support enforcement, TANF recipients must agree to DNA testing for themselves and their children if paternity is contested.<sup>29</sup> Further, several jurisdictions send investigators into the homes of welfare applicants to verify eligibility information; investigators scour the premises, including closets, medicine cabinets, and laundry baskets, looking for proof of who lives in the home.<sup>30</sup>

3. *Decisional Privacy.* — Decisional privacy is related to autonomy; it preserves an individual's ability to make personal and familial choices without external interference.<sup>31</sup> TANF permits states to invade the decisional privacy of welfare mothers in order to control their behavior in line with middle-class norms. The most controversial of these sexual regulation policies is the imposition of family caps;<sup>32</sup> typically, family caps provide no cash benefit increases for any children conceived while the mother is on welfare.<sup>33</sup> Several

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<sup>25</sup> See Allison I. Brown, *Privacy Issues Affecting Welfare Applicants*, 35 CLEARINGHOUSE REV. 421, 427 (2001); see also Samuel V. Schoomaker IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. AM. ACAD. MATRIM. LAW. 1, 10-21 (1997). Law enforcement agencies can obtain this administrative data by request, even if the TANF recipient is not the target of the criminal investigation. Kaaryn Gustafson, *To Punish the Poor: Criminalizing Trends in the Welfare System*, WOMEN OF COLOR RESOURCE CENTER WORKING PAPER NO. 3, 7 (2003).

<sup>26</sup> See Christopher D. Cook, *To Combat Welfare Fraud, States Reach for Debit Cards*, CHRISTIAN SCI. MONITOR, May 25, 1999, at 5 (describing how states monitor purchases by welfare recipients).

<sup>27</sup> See Kang, *supra* note 19, at 1202.

<sup>28</sup> See Nina Bernstein, *Experts Doubt New York Plan To Fingerprint for Medicaid*, N.Y. TIMES, Aug. 30, 2000, at B1 (listing states that fingerprint welfare recipients); see also HOLCOMB ET AL., ISSUES FOR AGENCIES AND APPLICANTS, *supra* note 21, at 3-1 to 3-25 (Dallas, TX, and New York, NY use fingerprinting and photographing).

<sup>29</sup> 42 U.S.C. § 654(29)(C) (2000).

<sup>30</sup> See Mulzer, *supra* note 10, at 675-77; *San Diego v. Sanchez*, 464 F.3d 916 (9th Cir. 2006) (upholding San Diego's conditioning of welfare benefits on consent to suspicionless home visits).

<sup>31</sup> See Kang, *supra* note 19, at 1202-03.

<sup>32</sup> See Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 173-77 (2002). Slightly less than half the states have adopted a family cap. *Id.* at 174.

<sup>33</sup> See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 165-67 (2006). In states with the

jurisdictions also offer “Norplant” bonuses, which cover the cost of implanted, long-term contraceptive devices for welfare mothers, sometimes with an additional cash award.<sup>34</sup> In addition, many states bestow upon welfare mothers unsolicited family planning advice in the form of counseling sessions, family planning classes, pamphlets, and encouragement to give their children up for adoption.<sup>35</sup>

### C. Harms

Poor women suffer tangible harms — psychological, material, and physical — as a result of the welfare system’s intrusions into their privacy. To begin with, the system of surveillance causes welfare recipients to suffer psychological injuries including stress, fear, and feelings of degradation.<sup>36</sup> Studies have shown that poor women resist welfare surveillance in subtle but widespread ways in order to care for their families, such as by earning unreported income to supplement meager welfare checks.<sup>37</sup> While this resistance to surveillance defends individual autonomy in the face of the state’s power, it also causes women even further stress due to the fear of getting caught and possibly losing benefits or being punished criminally.<sup>38</sup>

Moreover, the privacy deprivations associated with applying for welfare discourage many needy women from seeking assistance.<sup>39</sup> Without state assistance, these non-entrants to the TANF system often lack adequate resources for food, shelter, and other basic needs — even if they are working. Studies have shown that non-entrants struggle to make ends meet by juggling a shifting array of non-public

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family cap, about nine percent of the caseload has been impacted by the family cap policies, resulting in about twenty percent less in cash assistance per family. *Id.* at 170-71.

<sup>34</sup> See Rebekah Smith, *supra* note 33, at 168-69; see also Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 GENDER RACE & JUST. 401, 404-05 (2000) (Bridgewater argues that the state’s coercive use of Norplant to hinder the reproductive rights of African-American women violates the Thirteenth Amendment).

<sup>35</sup> See Anna Marie Smith, *supra* note 32, at 169, 177-81.

<sup>36</sup> See GILLIOM, *supra* note 8, at 66-67, 78, (summarizing interviews with welfare recipients in Appalachia in the early 1990s).

<sup>37</sup> See GILLIOM, *supra* note 8, at 99-106, 113.

<sup>38</sup> See GILLIOM, *supra* note 8, at 87-88.

<sup>39</sup> See Robert Moffitt, et al., *A Study of TANF Non-Entrants*, Final Report to the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Nov. 14, 2003, at 2, 14 (new welfare reform policies discourage participation). *Id.* at 19-20 (“Most non-entrants in our study felt that applying for TANF was an unpleasant, time-consuming experience that resulted in little financial benefit . . . . Many felt the application process to be overly intrusive.”).

resources and that this hardship negatively impacts their health and well-being.<sup>40</sup> One study found that:

mothers jeopardized their own health and well-being when trying to provide for their families by taking on second, third, and fourth jobs, working odd hours, or commuting long distances via public transportation. Moreover, in order to acquire and maintain affordable housing, many families were forced to live in unsafe neighborhoods. And finally, mothers with young children consistently had trouble securing stable care for their children.<sup>41</sup>

Non-entrants also tend to miss opportunities to collect other, less stigmatizing forms of public assistance, such as food stamps and medical assistance. Even TANF recipients can suffer material deprivations when they are sanctioned or terminated for failing to provide requested information or when newborns are denied assistance as a result of family cap policies.

Finally, mandatory child support cooperation policies can result in the unintentional perpetuation of domestic violence.<sup>42</sup> Battered women are overrepresented in the TANF population.<sup>43</sup> To reduce the dangers of exacerbating domestic violence through reporting requirements, TANF attempts to protect victims by allowing states to grant these victims an exemption from the cooperation requirement.<sup>44</sup> Yet many eligible women are not claiming the exemption for a variety of reasons, including caseworker failure to advise women of the exemption, a lack of training by social service workers, the public setting of the welfare office, fear that child welfare authorities may take their children, stringent requirements for independent corroboration, and feelings of humiliation and embarrassment.<sup>45</sup> The paternity disclosure required by the child support system poses a substantial risk to domestic violence victims, for very little benefit. After all, these mothers do not get any child support checks that are collected; rather, the state keeps the money to repay itself for the costs

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<sup>40</sup> *Id.* at 47-48.

<sup>41</sup> *Id.* at 48.

<sup>42</sup> See Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657, 664 (2000).

<sup>43</sup> See Anna Marie Smith, *supra* note 32, at 153-54 (although batterers come from all social classes, TANF clients are especially vulnerable because they have fewer economic supports).

<sup>44</sup> See 42 U.S.C. § 602(a)(7)(A)(iii) (2000). State implementation varies widely, and most state policies are not adequate to protect battered women. See Anna Marie Smith, *supra* note 32, at 158.

<sup>45</sup> See Anna Marie Smith, *supra* note 32, at 165-66; see also Notar and Turetsky, *supra* note 42, at 672-76.

of welfare.<sup>46</sup> Notably, TANF recipients lack the decisional autonomy of non-poor single mothers, who are “not forced to identify, marry, live with, seek support from, or interact with the biological father.”<sup>47</sup>

Welfare privacy invasions might be tolerable if there were substantial, countervailing justifications. The primary justification is fraud prevention. It is impossible to survive on welfare benefits (the average monthly benefit for a family of three is \$363),<sup>48</sup> so many welfare applicants accept support from family members or earn additional income from jobs such as babysitting or cutting hair — and suffer dire hardship nonetheless.<sup>49</sup> The state forces welfare mothers to earn unreported income to provide for their children, but declares this conduct as “fraud.” Still, fraud is grossly overstated in welfare programs, and studies suggest it is at the same levels as other government programs.<sup>50</sup> Even purveyors of electronic fraud detection systems have admitted that fraud is extremely rare.<sup>51</sup> Accordingly, the true reason for these policies is to control and stigmatize poor women.

## II. LAW

Our most disadvantaged citizens have long had less privacy than their wealthier counterparts. As a constitutional matter, the poor have fewer protections under the Fourth Amendment, which protects reasonable expectations of privacy from warrantless government searches and seizures. People who live in crowded, urban neighborhoods and who cannot afford “a freestanding home, fences,

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<sup>46</sup> See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1045 (2007).

<sup>47</sup> See Anna Marie Smith, *supra* note 32, at 140. Non-welfare families can use child support enforcement services, but they can withdraw on a voluntary basis. See Notar & Turetsky, *supra* note 42, at 671.

<sup>48</sup> DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN AND FAMILIES, SEVENTH ANNUAL REPORT TO CONGRESS, at 75 (2006).

<sup>49</sup> See GILLIOM, *supra* note 8, at 67, 100. See also KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997).

<sup>50</sup> See Mulzer, *supra* note 10, at 688-89 (“[f]ear of fraud has always played a larger role in the administration of public benefits programs than it realistically should have.”); see also Julilly Kohler Hausman, “*The Crime of Survival*”: *Fraud Prosecutions, Community Surveillance, and the Original “Welfare Queen,”* 41 J. SOC. HIST. 329, 343 (2007) (“Much of what became defined as fraud were simply attempts to supplement welfare grants with additional income from low wage work or living with another wage earner.”).

<sup>51</sup> See, e.g., Joshua Dean, *Texas Nears Rollout of Fingerprint System*, FED. COMPUTER WEEK, Aug. 5, 1999, available at [http://www.fcw.com/print/5\\_150/news/61522-1.html](http://www.fcw.com/print/5_150/news/61522-1.html) (official from private contractor states that out of 700,000 people fingerprinted for public benefits, twelve cases were referred for further investigation).

[and] laws,” have a lowered expectation of privacy and are thus more likely to suffer unregulated intrusions by government agents.<sup>52</sup> In addition to these class distinctions, welfare mothers bear the brunt of sexist and racist assumptions that courts use to justify state surveillance.

#### A. Home Visits

In 1971, the Supreme Court upheld home visits by welfare officials in *Wyman v. James*, reasoning that the visits were not searches covered by the Fourth Amendment because they were consensual.<sup>53</sup> Moreover, even if they were searches, they were reasonable, given the state’s interest in deterring fraud, the need to protect the children of welfare mothers, the rehabilitative purpose of the searches, and the lack of criminal consequences.<sup>54</sup> In finding that the privacy deprivations posed by home visits were negligible, the *Wyman* Court disregarded affidavits from twelve aid recipients alleging that the unannounced visits were not only embarrassing when guests were in the home, but also when personal questions were asked in front of children.<sup>55</sup> In silencing the voices of poor women, the Court ignored the social context in which they live and mistakenly equated forced consent with free choice.

The Court also expressed its distaste for Ms. James, the plaintiff, and how she ran her household. The Court disliked her “attitude,” “evasiveness,” and “belligerency” — all of which arose from her resistance to the state and her entirely reasonable belief that the state could verify her eligibility through personal interviews and documents.<sup>56</sup> Her request was simply to be treated the same as other beneficiaries of governmental largesse. As Justice Douglas bitterly remarked in dissent, “No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few.”<sup>57</sup> The *Wyman* Court also intimated, based on Ms. James’ social services casefile (and not evidence adduced at trial), that Ms. James’ son had been physically abused and bitten by rats, concluding that “[t]he picture is a sad and unhappy

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<sup>52</sup> Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401-05 (2003).

<sup>53</sup> 400 U.S. 309, 317-18 (1971).

<sup>54</sup> *Id.* at 318-24.

<sup>55</sup> *Id.* at 321 n.8.

<sup>56</sup> *Id.* at 322 n.9.

<sup>57</sup> *Id.* at 332 (Douglas, J., dissenting).

one.”<sup>58</sup> The Court’s clear assumption was that poor, single women are terrible mothers who warrant suspicion and distrust. The end result was that privacy is “dependent on the poverty or affluence of the beneficiary”<sup>59</sup> — a result at odds with the Fourth Amendment, or any concept of fair and equal treatment. In a post-TANF case, the Ninth Circuit upheld *Wyman*, refusing to recognize differences between AFDC and TANF or to apply post-*Wyman* jurisprudence significantly limiting suspicionless searches.<sup>60</sup> Instead, the court in *Sanchez v. San Diego* expressly lumped welfare mothers with criminals on probation and concluded that neither group has a reasonable expectation to privacy.<sup>61</sup>

### B. Drug Tests

Welfare recipients have fared better in challenging state-mandated drug testing, which is expressly authorized in TANF,<sup>62</sup> although the victory is tenuous. In *Marchwinski v. Howard*, the district court, in a controlling opinion,<sup>63</sup> struck down a Michigan law authorizing suspicionless drug testing of TANF applicants. Although the State’s professed need to address substance abuse as a barrier to employment is “laudable and understandable,” it was not a public safety issue and thus, did not justify dispensing with the ordinary Fourth Amendment requirement of individualized suspicion.<sup>64</sup> The court rejected the state’s argument that a “special need” arose from its interest in protecting children from drug abusing parents, explaining that TANF is not directed at child abuse or neglect.<sup>65</sup> Thus, the TANF program “cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the [Family Independence Program].”<sup>66</sup> In so holding, the district court refused to allow governmental assistance to become an unlimited tool for social control. The decision thus reflects a feminist understanding of the power imbalances between the state and poor women, as well as the

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<sup>58</sup> *Id.* at 322 n.9.

<sup>59</sup> *Id.* at 332 (Douglas, J., dissenting).

<sup>60</sup> *San Diego v. Sanchez*, 464 F.3d 916 (9th Cir. 2006), *reh’g denied en banc*, 483 F.3d 965 (2007).

<sup>61</sup> *Id.* at 927.

<sup>62</sup> 21 U.S.C. § 862(b) (2001).

<sup>63</sup> 113 F. Supp. 2d 1134 (E.D. Mich. 2000). The decision was overturned by the Sixth Circuit, 309 F.3d 330 (6th Cir. 2002), but subsequently an en banc panel split evenly on the issue, 319 F.3d 258 (6th Cir. 2003). Under Sixth Circuit rules, the split resulted in an affirmance of the district court’s opinion. 60 Fed. App’x 601 (6th Cir. 2003).

<sup>64</sup> 113 F. Supp. 2d at 1140.

<sup>65</sup> *Id.* at 1142.

<sup>66</sup> *Id.*

state's singling out of poor women as compared to other citizens. Still, state legislatures have expressed a renewed interest in drug testing,<sup>67</sup> and are bolstered by the Sixth Circuit's opinion that welfare mothers have a diminished expectation of privacy because "welfare assistance is a very heavily regulated area of public life."<sup>68</sup>

### C. Decisional Privacy

The Supreme Court has long held that individual decisions relating to childbearing and the raising of children are fundamental rights that cannot be abridged without a compelling state interest.<sup>69</sup> However, the Supreme Court has also held that the government has no duty to subsidize the exercise of these rights.<sup>70</sup> As the Court has explained, "[t]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."<sup>71</sup> Further, the Supreme Court has held that the poor are not a suspect class under the Equal Protection Clause, and thus, statutory classifications that fall more harshly on the poor are subject only to rational basis review.<sup>72</sup> There is an unavoidable tension between advocating for privacy along with assistance for poor women. "Choice rhetoric within the privacy doctrine can often operate in diametric opposition to the reproductive needs of poor women."<sup>73</sup>

The Court's holdings have drastic implications for poor women. Even though they have a right to an abortion, the government has no

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<sup>67</sup> See, e.g., Chris L. Jenkins, *Bill Would Require Some to Pass Drug Test to Get Aid*, WASH. POST, Feb. 19, 2008, at B5 (discussing proposed bill in Virginia, as well as efforts in Kentucky and Arizona).

<sup>68</sup> *Id.* at 337. Cf. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (hospital policy of conducting urine tests of mostly poor, pregnant women for referral to state prosecutors constituted unreasonable searches).

<sup>69</sup> See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* §§ 10.2.4, 10.3 (right to control upbringing of children and reproductive autonomy, respectively) (3rd ed. 2006).

<sup>70</sup> *Maher v. Roe*, 432 U.S. 464 (1977) (government does not violate Equal Protection by failing to fund abortions, even though it pays for childbirth); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibited the use of federal fund for performing abortions except where the mother's life was endangered or in cases of rape or incest that had been reported promptly to law enforcement).

<sup>71</sup> *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 491 (1989) (citing *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 196 (1989)).

<sup>72</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a state law that capped welfare benefits to families regardless of their size). The Court stated, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.* at 487.

<sup>73</sup> *Bridgewater*, *supra* note 34, at 407-08.

duty to provide them with financial assistance if they cannot afford to exercise this right.<sup>74</sup> Likewise, even though welfare mothers have the right to bear additional children, the government has no duty to subsidize that choice with additional welfare benefits.<sup>75</sup> Courts upholding family cap policies have blithely accepted legislative determinations that the caps give welfare mothers an incentive to work and to have fewer children — even though empirical studies have shown no basis for either assumption.<sup>76</sup>

#### *D. Privacy Laws*

The Privacy Act of 1974 is the primary statute regulating how federal government agencies manage information about individuals.<sup>77</sup> In 1998, the Act was extended to “computer matching,” which occurs when federal and state agencies compare data about individuals.<sup>78</sup> As described above, TANF applicants are subject to extensive computer matching. The Privacy Act requires, among other things, that individuals subject to matching have opportunities to receive notice and to refute adverse information when benefits are denied or terminated.<sup>79</sup> As a result, when an applicant applies for TANF, she should receive notice that the state agency may be obtaining and matching federal records to verify her eligibility information.

The Act’s protections are detailed and elaborate, but offer limited shelter for welfare applicants. To begin with, the Privacy Act is focused on protecting information from governmental misuse once it is gathered. It does not focus on the methods or forms of collection, which in the welfare system are purposefully demeaning and stigmatizing. Further, the Act’s requirements of notice and consent are generally meaningless, because on welfare applications these

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<sup>74</sup> See cases cited in n.70.

<sup>75</sup> See, e.g., *Dandridge*, 397 U.S. 471 (1970) (upholding Maryland’s maximum grant provision under AFDC against challenge that it violated Equal Protection); *C.K. v. New Jersey Dept. of Health & Hum. Servs.*, 92 F.3d 171 (1996) (upholding New Jersey’s family cap policy against arguments the policy was arbitrary and capricious and unconstitutional).

<sup>76</sup> See Rebekah Smith, *supra* note 33, at 156-62, 187-88 (debunking the myths that underlie family cap policies).

<sup>77</sup> 5 U.S.C. § 552(a) (2001). American privacy law is a complex patchwork of federal, state, and local laws that have developed in a piecemeal, rather than comprehensive, fashion, as well as constitutional provisions and common law protections. See DANIEL J. SOLOVE, *PRIVACY, INFORMATION, AND TECHNOLOGY* 225-29 (Aspen 2006).

<sup>78</sup> The Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503 amended the Privacy Act to add several new provisions. See 5 U.S.C. § 552a(a)(8)-(13), (e)(12), (o), (p), (q), (r), (u) (2000).

<sup>79</sup> See Brown, *supra* note 25, at 428-29 (describing requirements of Privacy Act as they apply to TANF applicants). Brown also discusses important privacy issues surrounding immigration status. *Id.* at 430-32.

provisions are usually jargon filled, difficult to understand, and hidden among the reams of information and questions contained in the forms.<sup>80</sup> Finally, the Privacy Act does not govern the massive amounts of personal information held by state and local agencies, and statutory protections at this level diverge widely.<sup>81</sup>

### III. FEMINISM AND PRIVACY

Second-wave feminists focused on privacy because they identified a public/private divide in society and law that perpetuated gender inequality.<sup>82</sup> By contrast, third-wave feminists do not debate privacy. To the contrary, they eagerly shed privacy in pursuit of consciousness-raising and personal liberation. Whereas second-wave feminists viewed the personal as political, third-wave feminists see the personal as public. This part explains how the two waves differ and what their perspectives on privacy mean for welfare mothers.

#### A. *Second Wave Feminism*

Second-wave feminists attacked the physical privacy and the boundary between public and private that legal systems and social norms historically upheld.<sup>83</sup> In the traditional view, the public domain was the world of work and politics, where men dominated and women were excluded.<sup>84</sup> By contrast, the private domain was that of home and family, where autonomous individuals lived free from state interference.<sup>85</sup> However, feminists made clear that autonomy within families extended only to men, who were free to dominate women and children because of their dependence on men for social goods.<sup>86</sup> In turn, this led to the abuse of women within the home and the concomitant failure of the state to intervene.<sup>87</sup> Feminists rejected the view that the government's hands-off approach was neutral, because

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<sup>80</sup> *Id.* at 428.

<sup>81</sup> *Id.*

<sup>82</sup> See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847 (2000).

<sup>83</sup> See Martha A. Ackelsberg & Mary Lyndon Shanley, *Privacy, Publicity, and Power: A Feminist Rethinking of the Public-Private Distinction*, in REVISIONING THE POLITICAL, FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 213, 217-20 (1996).

<sup>84</sup> See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 568 (2006) (summarizing the public-private dichotomy).

<sup>85</sup> *Id.* at 568-69.

<sup>86</sup> See Higgins, *supra* note 82, at 850-51.

<sup>87</sup> See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996); see also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 128-29 (1989).

the state set the legal ground rules that permitted private inequality to flourish unchecked.<sup>88</sup> Moreover, feminists argued that the idea of autonomy was a myth for women; they were enmeshed within family relationships of dependency and attachment.<sup>89</sup> Catherine MacKinnon raised a radical critique of privacy, arguing that privacy could never be a basis for claiming rights because it is a tool of gender subordination that leaves men alone to oppress women one at a time.<sup>90</sup> The feminist critique of the public/private divide had powerful repercussions. For instance, the state today criminalizes domestic violence and provides legal recourse for women demanding equal treatment in the workplace.<sup>91</sup>

The second-wave critique, however, is largely based on the experiences of white, middle-class women. It ignores differences of class and race, particularly the experiences of poor, African-American women, who have historically lacked privacy.<sup>92</sup> During slavery, society denied African-American women privacy by expropriating “their labor, sexuality, and reproductive capacity” and treating their bodies “as items of public . . . display.”<sup>93</sup> Post-slavery, the state coerced poor black women into sterilization, disproportionately removed black children from their homes through the child welfare

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<sup>88</sup> See Frances Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502, 1506-10 (1983); OKIN, *supra* note 87, at 111.

<sup>89</sup> See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* 186-89 (1995); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 84 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

<sup>90</sup> CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 194 (1989). Further, she argued that privacy obscures women's lack of choice and consent within the private realm, and, by isolating women, it obscures “women's shared experience.” *Id.*

<sup>91</sup> See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 4-5 (2000). At the same time, engagement with the state to combat domestic violence has costs; the state often reflects and enforces patriarchal norms and state enforcement limits women's autonomy. *Id.* at 181-98 (describing tensions inherent in the criminalization of domestic violence).

<sup>92</sup> See Jennifer C. Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 CARDOZO WOMEN'S L.J. 303, 319 (2005) (“because the black female body is inscribed and engraved with particular gendered and racialized cultural meanings, the black female subject has never been granted the same kind of privacy as the white female, the privacy that some feminists have argued needs to be ‘exploded.’”); see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 61 (1988) (“It is plain that in the United States domestic privacy is a virtual commodity purchased by the middle class and the well-to-do.”).

<sup>93</sup> Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 770 (1999); see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, And the Right to Privacy*, 104 HARV. L. REV. 1419, 1437-40 (1991).

system, and criminally prosecuted black, drug-addicted mothers.<sup>94</sup> Although African-Americans have always been a minority of welfare recipients, welfare has been debated in racial terms and “viewed as a program benefiting black women.”<sup>95</sup> As a result, welfare history is replete with state intrusions into the homes and bodies of the poor, such as through home raids, drug tests, and forced sterilizations. Thus, for poor, minority women, privacy in the home can offer a refuge from the oppression and racism of the outside world.<sup>96</sup>

The second-wave critique also downplayed certain positive liberal values associated with privacy. In response, liberal feminists such as Anita Allen and Linda McClain have stood up for privacy, unwilling to “toss out the baby . . . with the bath water.”<sup>97</sup> These liberal feminists acknowledge the harms done to women under cover of “privacy,”<sup>98</sup> but contend that a reconceived notion of the public/private divide can be valuable for women both as a descriptive tool and normative goal. Privacy is essential to moral personhood and self-development;<sup>99</sup> without privacy, women’s lives contain a “disproportionate burden for domestic labor, child care, and lack of leisure and time.”<sup>100</sup> Following liberal tradition, their argument is that women “should be permitted to live out their disparate, nonconforming preferences,” and that privacy is essential to achieve this good because it gives individuals space to develop and carry out their own ends.<sup>101</sup> Tracy Higgins adds that the private/public distinction can capture important differences between harms that the state inflicts versus harms inflicted by private parties. While both harms must be taken seriously, they can require different responses.<sup>102</sup> As Dorothy Roberts points out, for African-American women, the state typically poses a greater risk of oppression than does private power.<sup>103</sup>

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<sup>94</sup> See Roberts, *supra* note 93, at 1440-50.

<sup>95</sup> See PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* xvi (2005).

<sup>96</sup> Roberts, *supra* note 93, at 1470-71. Indeed, “family often provided some of the few comforts poor and working class black families could enjoy.” NADASEN, *supra* note 17, at 237.

<sup>97</sup> ALLEN, *UNEASY ACCESS*, *supra* note 92, at 71, 81; see also McClain, *supra* note 93, at 765.

<sup>98</sup> See ALLEN, *UNEASY ACCESS*, *supra* note 92, at 70; McClain, *supra* note 93, at 776.

<sup>99</sup> See ALLEN, *UNEASY ACCESS*, *supra* note 92, at 36.

<sup>100</sup> McClain, *supra* note 93, at 783.

<sup>101</sup> ALLEN, *UNEASY ACCESS*, *supra* note 92, at 86-87.

<sup>102</sup> See Higgins, *supra* note 82, at 863.

<sup>103</sup> See Roberts, *supra* note 93, at 1471.

Martha Fineman, whose influential work focuses on how law and society ignore familial relationships of dependency, has also called for reinvigorating common law notions of family privacy that would blanket single mothers and children as entities.<sup>104</sup> While traditional families are deemed private, poor mothers are treated by the state as “public,” because they are seen as deviant and dangerous for rejecting patriarchal sexual affiliation as the sole definition of family.<sup>105</sup> As a result, the state justifies “regulation, supervision, and control” of poor, single mothers.<sup>106</sup> Although most feminists have abandoned the private sphere ideology, and for good reason, Fineman notes that the ideology “nonetheless has established the concept of the desirability of a family or private space into which the state, absent compelling reasons, is not free to intrude.”<sup>107</sup> Still, she is pessimistic that we can re-imagine family privacy without “its patriarchal baggage.”<sup>108</sup>

The welfare rights movement demonstrates the intractability of this baggage. In the 1960s, a vibrant welfare rights movement flourished in which poor black women, building upon the civil rights and feminist struggles, asserted their political and economic rights.<sup>109</sup> Through organizing, political protests, and litigation, the welfare rights movement achieved many of its goals, including objective eligibility criteria rather than discretionary morals tests, higher monthly AFDC benefits, fair hearing rights to appeal adverse welfare decisions, elimination of restrictive residency laws, and a voice within public policy. The movement challenged the two-parent family as the norm and highlighted the economic and social value provided by domestic work, thus embodying feminist insights.<sup>110</sup> Most importantly, the movement empowered poor women to demand rights.

Yet despite these substantial achievements, the welfare rights movement never secured privacy for poor women,<sup>111</sup> and the movement ultimately dissolved due to financial constraints, staff conflicts, and public backlash. Welfare mothers remained the targets of public hostility and distrust, and many gains were undermined by TANF, which reinserted discretion into the welfare bureaucracy.<sup>112</sup>

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<sup>104</sup> FINEMAN, *supra* note 9, at 186-89.

<sup>105</sup> *Id.* at 106-18, 189.

<sup>106</sup> *Id.* at 190.

<sup>107</sup> *Id.* at 188.

<sup>108</sup> *Id.*

<sup>109</sup> NADASEN, *supra* note 17, at xiv.

<sup>110</sup> *Id.* at 232.

<sup>111</sup> See *Wyman v. James*, 400 U.S. 309 (1971).

<sup>112</sup> See generally Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000).

Still, the enactment of TANF has spurred new pockets of activism on the local level, which may contain the seeds for a more sustained claim to privacy.<sup>113</sup> For instance, the Mothers for Justice, an activist group of low-income women in New Haven, Connecticut organized against many TANF reforms, including fingerprinting. Through a direct action campaign, they confronted state leaders and expressed their outrage over the policy.<sup>114</sup> The policy, however, remained.

In addition to physical privacy, second-wave feminists also considered decisional privacy, in the context of reproductive rights. In *Roe v. Wade*, the Supreme Court based the constitutional right to abortion on privacy, which is “implicit in the concept of ordered liberty,” and contained within the “penumbras” of the Constitution, even if not found in the text of the Constitution itself.<sup>115</sup> Yet for poor women, this privacy “right” can be illusory if they lack the resources to exercise it. As Catharine MacKinnon has argued, the Supreme Court’s equation of privacy with state non-intervention, or privacy as a negative liberty, means that poor women can constitutionally be denied Medicaid coverage for abortions.<sup>116</sup> Further, poor women are disproportionately impacted by restrictions on abortion, such as waiting periods and hospitalization requirements, because these restrictions make the choice of abortion more expensive and time-consuming.<sup>117</sup>

Accordingly, many scholars have argued that reproductive rights should be founded on equal protection, rather than privacy, because equality analysis better captures how lack of reproductive choice permanently subordinates women, and only women, as a class.<sup>118</sup> Still, it is not clear that reproductive rights can be defended without some conception of privacy. Privacy allows women space to reflect and

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<sup>113</sup> See NADASEN, *supra* note 17, at 241; see also Mothers for Justice & Giovanna Shay, *The Phenomenal Women of Mothers for Justice*, 8 YALE J.L. & FEMINISM 193 (1996). This groundbreaking article shares the voices and experiences of welfare mothers in New Haven as they confronted TANF reforms.

<sup>114</sup> See NADASEN, *supra* note 17, at 236-38.

<sup>115</sup> 410 U.S. 113, 152 (1973). Even under *Roe*, much of the decisional power is left in the hands of the doctor, rather than the woman. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) (“A privacy right that demands that ‘the abortion decision . . . be left to the medical judgment of the pregnant woman’s attending physician,’ gives doctors undue power by falsely casting the abortion decision as primarily a medical question.”) (quoting *Roe*, 410 U.S. at 164).

<sup>116</sup> CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 190-92 (1989).

<sup>117</sup> See Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 102 (1989).

<sup>118</sup> See generally Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

deliberate on moral choices.<sup>119</sup> This sort of deliberation “is necessary to the development and expression of personhood and personality, including the freedom to exercise moral responsibility.”<sup>120</sup> Moreover, reproductive choice is not only a matter of decisional privacy, but also leads to more spatial privacy, because women who choose to limit childbearing do not face the privacy losses associated with motherhood.<sup>121</sup>

In sum, second-wave feminists established that women have had too much unwanted privacy, but can greatly benefit from certain forms of privacy.<sup>122</sup> However, in their focus on domestic violence, workplace equality, and reproductive choice, second-wave feminists did not address the unique privacy intrusions faced by welfare mothers, which continue unabated — even now that welfare recipients are working. Nor did the second-wave acknowledge that poor women have less privacy than other women and that this shortfall results largely from the intersection of gender with class and race. In advocating for decisional privacy, the feminist agenda did not confront other reproductive choice issues that particularly impacted low-income, black women, such as forced sterilization.<sup>123</sup>

Moreover, the second-wave emphasis on autonomy and individual self-control may have intensified public animosity against welfare mothers, because it reinforced perceptions that welfare mothers make irresponsible choices not to work and to bear too many children.<sup>124</sup> Mainstream feminists have not mobilized against this privatization of poverty, i.e., the idea that individual choices alone cause poverty. Indeed, feminists were largely ineffective during the passage of TANF.<sup>125</sup> TANF’s emphasis on personal responsibility privatizes the causes of poverty by blaming women for their economic status, rather than acknowledging the complex intersection of the economic, social, and demographic forces that produce poverty.<sup>126</sup> As a result, TANF’s

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<sup>119</sup> See Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 932-34 (1991).

<sup>120</sup> Linda C. McClain, *The Poverty of Privacy*, 3 COLUM. J. GENDER & L. 119, 126 (1992).

<sup>121</sup> See ALLEN, *UNEASY ACCESS*, *supra* note 92, at 100 (“Lives spent bearing and rearing children and without adequate solitude and seclusion from others are stunted lives.”).

<sup>122</sup> See ALLEN, *UNEASY ACCESS*, *supra* note 92, at 37. There are other critiques of the second-wave view of privacy. For instance, Robin West offers an alternate view of privacy that considers women’s experience, including connection, dependence, and caring.

<sup>123</sup> See NADASEN, *supra* note 17, at 213-19.

<sup>124</sup> *Id.* at 196.

<sup>125</sup> *Id.* at 219-22.

<sup>126</sup> See Michele Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 745-50 (2005).

emphasis on work makes poor relief a matter of personal initiative, but the law fails to provide adequate supports that make life above the poverty line possible, such as child care, transportation, training and education, and a living wage.<sup>127</sup> Further, TANF's emphasis on "personal responsibility" rejects communal accountability or collective solutions for income inequality. The end result is ironic. The state has deemed poverty a matter of private choice, but has simultaneously denied the poor the privacy and concomitant dignity that could actually lead to increased self-sufficiency. Women who are materially deprived, psychologically damaged, or physically abused are unlikely to gain a footing for self-sufficiency. Is third-wave feminism better situated to defend privacy?

### *B. Third-Wave Feminism*

Third-wave feminism is not a uniform movement, but rather an emerging and evolving assemblage of feminist voices defining themselves against the second-wave movement. It began as a dialogue by a generation of "daughters" who grew up with the benefits of second-wave feminism, reacting to the feminism of their "mothers."<sup>128</sup> Third-wave feminists have particularly criticized the second-wave for failing to recognize the diversity in the lives of women and for linking sex to oppression.<sup>129</sup> The third-wave is generally marked by its confessional, narrative approach; its emphasis on sexual empowerment and liberation; its anti-essentialist perspective; and its embrace of technology as a tool of the movement.<sup>130</sup> Whereas second-wave feminists fought patriarchy from a unified political front, third-wave feminists are not overtly political.<sup>131</sup> They are focused less on

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<sup>127</sup> *Id.* at 742-44 (describing lack of work supports under TANF).

<sup>128</sup> It is rooted in criticism by women of color of the white women's feminist movement. See LESLIE HEYWOOD & JENNIFER DRAKE, *Introduction*, to *THIRD-WAVE AGENDA: BEING FEMINIST, DOING FEMINISM* 8 (Leslie Heywood and Jennifer Drake eds. 1997). Bell hooks has stated that "the focus on feminism as a way to develop shared identity and community has little appeal to women who experience community, who seek ways to end exploitation and oppression in the context of their lives." *Id.* at 12 (quoting BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 28 (1984)).

<sup>129</sup> Second-wave feminists reject this characterization of their movement. See Gloria Steinem, *Forward* to REBECCA WALKER, *TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM* (1995). Steinem writes, "[I] want to remind readers who are younger or otherwise new to feminism that some tactical and theoretical wheels don't have to be reinvented." *Id.* at xix.

<sup>130</sup> The third-wave movement is summarized in Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 *MICH. J. GENDER & L.* 99, 116, 122-24 (2007).

<sup>131</sup> See HEYWOOD & DRAKE, *supra* note 128, at 3 ("[W]e define feminism's third-wave as a movement that contains elements of second wave critique of beauty culture, sexual abuse,

collective revolution, and more on personal evolution.<sup>132</sup> Third-wave feminism offers both promise and peril for the privacy rights of poor women.

The potential of third-wave feminism lies primarily in its anti-essentialist approach. Second-wave feminists tended to adopt an essentialist perspective that viewed inequity through a gender prism that assumed a white, middle-class viewpoint. By contrast, third-wave feminists are inclusive and celebratory of the diversity among women — race, culture, class, sexual orientation, disability, geography, and religion — and the multiple identities women bear.<sup>133</sup> They invite new voices to join feminist debates, and they seek to raise the feminist consciousness of all women.

One former Chicana welfare mother, Maria Cristina Rangel, writes movingly in a third-wave anthology of her harried and stressful attempts to work, care for her children, and attend college on a scholarship from Smith.<sup>134</sup> She ruefully counts herself lucky to have applied for public assistance in the waning days of AFDC, because TANF does not allow college attendance to count as a work activity.<sup>135</sup> She describes how, at each recertification meeting, “I had to explain myself over and over again, always living with the fear that I would not be believed and my benefits would be cut as a result.”<sup>136</sup> Then, “[a]fter each humiliating, intimidating interrogation,” she would have to make her way out through the waiting room with its patronizing posters exhorting, “Mommy, will we always be on Welfare?” and “Work Works!”<sup>137</sup> Frustrated by the abuses of the welfare system, Rangel formed an Association of Low Income Students to address issues surrounding poverty and class on campus and beyond.<sup>138</sup> Hers is a rare voice in any wave of feminist writing.<sup>139</sup> As she notes, she had advantages that other welfare mothers often lack, she spoke English

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and power structures while it also acknowledges and makes use of the pleasure, danger, and defining power of those structures.”)

<sup>132</sup> Alternatively, their idea of revolution is a non-political one. As one writer states, “My body is . . . beautiful, and every time I look in the mirror and acknowledge that, I am contributing to the revolution.” Nony Lamm, *It’s a Big Fat Revolution*, in LISTEN UP, *supra* note 1, at 133.

<sup>133</sup> See, e.g., the collected essays in LISTEN UP, *supra* note 1. For instance, Sonja D. Curry-Johnson writes, “As an educated, married, monogamous, feminist, Christian, African-American mother, I suffer from an acute case of multiplicity.” *Id.* at 51-52.

<sup>134</sup> See Rangel, *supra* note 1, at 188-96.

<sup>135</sup> *Id.* at 190.

<sup>136</sup> *Id.* at 191.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 193.

<sup>139</sup> But see Mothers for Justice & Shay, *supra* note 113.

and had access to a four year college education. As a result, “I think about all the other stories that are not heard, all the other injustices that remain unresolved.”<sup>140</sup>

Those stories remain largely untold. Despite the open arms of the third-wavers, most welfare mothers will not receive the invitation. Third-wave feminist thought is widely disseminated through online sources such as webzines, videos, alternative music, and blogs,<sup>141</sup> but these fora are not easily accessible if a woman does not have a computer or technological know-how. Even with access to technology, welfare mothers might find that the middle-class concerns that permeate most third-wave writing does not speak to them. Further, in popular culture, third-wave feminism manifests in images of sexually liberated women such as the Pussycat Dolls and the professional quartet frolicking in *Sex and the City*. These are women who link their sexuality to power and who do not have to fight the battles of earlier feminists. While these glamorous commercial images do not reflect real life for any women, they are particularly removed from the messages the welfare system sends to its beneficiaries.

Moreover, third-wave feminism is not yet about political activism.<sup>142</sup> The movement has produced a 13-point *Manifesta* that contains some goals that relate to poor women, including safeguarding the right to bear or not to bear children regardless of impoverishment; equal access to health care; and a living wage that would bring workers over the poverty line.<sup>143</sup> However, activism among third-wave feminists is oriented more towards community action and engagement with non-profits than political activism and social reform. For instance, *Manifesta* highlights the efforts of Dressed for Success, a non-profit that provides professional clothes for welfare women who are transitioning to work.<sup>144</sup> This is a valuable initiative, but it reinforces, rather than challenges, the norms of the welfare system.

At bottom, the current third-wave movement is not about privacy. It is about public confession and open expression. Third-wavers assume that throwing off the mantle of privacy is a freely directed choice by a liberated woman, or at least a positive step toward claiming autonomy. If anything, the pendulum has swung so far away

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<sup>140</sup> See Rangel, *supra* note 1, at 194.

<sup>141</sup> See Crawford, *supra* note 6, at 127-29.

<sup>142</sup> The “[k]ey sites of struggle” are cultural production and sexual politics. See Heywood & Drake, *supra* note 128, at 4.

<sup>143</sup> JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 278-81 (2000).

<sup>144</sup> *Id.* at 292.

from valuing privacy, that Anita Allen has suggested a possible need to coerce privacy to retain liberal values of “human dignity, personhood, moral autonomy, workable community life, and tolerant democratic political and legal institutions.”<sup>145</sup> Describing the phenomenon of the Jenni cam, in which a young woman voluntarily broadcast her entire life over the internet, Allen reflects, “women first reconstructed privacy by rejecting outmoded conceptions of domesticity, modesty, reserve, and subordination to men; now they reconstruct privacy by exploiting it for income, celebrity, or both.”<sup>146</sup> She claims that while she is “not suggesting that Jenni should turn off her camera and sweep floors for her boyfriend,” she should, “turn off her camera so that, free from the gaze of others, she can live a more genuinely expressive and independent life.”<sup>147</sup> By contrast, welfare mothers have not chosen to give up privacy as do the Jennis of the third-wave; it is stolen from them. While Jennis’ sexual freedom is celebrated; the sexuality of welfare mothers is demonized. Jenni can exploit the private in public without any state regulation; welfare mothers live under the gaze of the state. In sum, the third-wave welcomes the diverse stories and experiences of welfare mothers, but lacks the theoretical framework to deal with privacy deprivations.

#### IV. CONCLUSION

Despite inadequate economic or social support, welfare mothers have moved into the workplace and accomplished what society has asked of them. Nevertheless, they face the same level of privacy intrusions that have historically been used against them. A rights-based litigation tactic has staved off drug testing by the narrowest of margins, but leaves untouched the larger administrative apparatus of investigation and surveillance. The welfare system continues to use privacy intrusions as a method for imposing stigma and judgment on vulnerable women. This failure raises the issue of strategy. Second-wave feminists disagreed over whether rights-based rhetoric is an appropriate scaffold for achieving justice.<sup>148</sup> On the one hand, many feminists feel that fighting for rights, such as a “right to privacy,” forces women to advocate within a male framework that is

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<sup>145</sup> Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739 (1999).

<sup>146</sup> *Id.* at 750-51.

<sup>147</sup> *Id.* at 752-53.

<sup>148</sup> This debate is summarized in Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 318-32 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

individualistic and liberal, resulting only in marginal gains within a patriarchal system. Furthermore, in many ways, welfare mothers are so oppressed by the welfare bureaucracy that they “are almost the inverse of the rights-bearing individual who would rise up against surveillance with a legal challenge.”<sup>149</sup> On the other hand, some feminists contend that obtaining rights can lead to tangible improvements in women’s lives and serve as a starting point for changing societal expectations of women’s potential and reality.<sup>150</sup> The welfare rights movement reveals truths for both perspectives.<sup>151</sup>

Given the entrenched nature of welfare’s privacy-stripping practices, a multi-faceted approach is needed to enhance the privacy of poor women. Some important rights are already on the books, such as the exemption for domestic violence victims within the child support enforcement program, and these laws need better enforcement and caseworker training. Other laws and regulations, such as those requiring home visits, should be the subject of legal reform through both courts and lawmaking bodies. Advocates need to change the rhetoric surrounding welfare and move it away from individual blame towards collective responsibility. Welfare recipients are working, and thus embody mainstream American values. Certainly, middle-class Americans would recoil in horror if the government put them through similar scrutiny as a condition of receiving valuable governmental subsidies, such as tax deductions for mortgages and retirement plans, and childcare tax credits.<sup>152</sup> Accordingly, advocates can make equality-based arguments, which can enhance the privacy framework by putting a communal gloss on issues of individual dignity. While all Americans face deteriorating privacy as a result of new technologies, no other group of Americans suffers the same forms of stigma when receiving governmental assistance. Still other welfare practices are matters of bureaucratic compulsion, and thus advocates and welfare clients need to make the case to welfare administrators that stripping welfare clients of their dignity is contrary to the goals of self-sufficiency mandated by TANF.

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<sup>149</sup> GILLIOM, *supra* note 8, at 91.

<sup>150</sup> SCHNEIDER, *supra* note 91, at 40-41 (discussing the benefits and limits of rights claims).

<sup>151</sup> See *supra* notes 106 to 111 and accompanying text (discussing the welfare rights movement).

<sup>152</sup> See FINEMAN, *supra* note 9, at 191 (middle-class families “benefit from extensive entitlement programs, be they FHA or VA loans at below mortgage market rates or employer health and life insurance. These families receive untaxed benefits as direct subsidies.”).

This symposium asks, *Can You Hear Us Now?* The idea of being heard presumes a conscious choice to throw off privacy to shout into the public square. Welfare mothers do not have a meaningful choice to keep the personal private. Their private lives are public fodder for social control tactics that tout self-sufficiency while undermining actual opportunities for independence. Moreover, feminism has not included poor women within the “Us,” that is presumed in this question. Too often, the voices of poor women, including their perspectives on how the intersectionality of gender, class, and race shapes their lives — have been muted in both second-wave and third-wave feminism. Further, a third-wave feminist might rightly take issue with the notion of an “Us” voicing a unified message. There is no monolithic feminist movement; we are united only in our shared commitment to defeat inequality. At the same time, the multiplicity of feminist identities should not become so splintering that we cannot find common grounds for a shared fight. Welfare mothers need each other, as well as concerned feminists everywhere, to fight for economic justice and insulation from state surveillance. Thus, this paper asks a different question, “Can You Hear Us Fight For The Privacy and Dignity of All Women?”

## ARTICLE

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### IS WHAT WE WANT WHAT WE NEED, AND CAN WE GET IT IN WRITING? THE THIRD-WAVE OF FEMINISM HITS THE BEACH OF MODERN PARENTAGE PRESUMPTIONS

By: Justice Carol A. Beier and Larkin E. Walsh

*Modern statutes on parentage regarding artificial insemination and the cases that have interpreted them reflect the explosion of family gender roles by second-wave feminism. Although a natural father now is generally expected to share the rights and obligations of parentage with a natural mother, this is not so if he is a mere contributor of biological material. Are the modern presumptions underlying such statutes, what we used to want, what we have come to need? Or, is current law too much a reflection of the essentialism for which the second-wave is sometimes justly criticized?*

*Third-wave individualism and resistance to inflexible doctrine supply interesting lenses for an examination of the developing law in this area. Particularly, a recent Kansas case, *In the Interest of K.M.H.*,<sup>1</sup> is the first to evaluate a statute designed to give power to individual choice by making a parentage presumption secondary to an agreement between a woman and a sperm donor that the donor will be treated as a parent.*

*This paper explores the context and outcome of this case and whether we have exhausted the limits of legal reform that can be achieved through the creation of — even progressive — presumptions about parentage. Given the changes wrought under the influence of the second-wave, do such presumptions retain vitality and usefulness? Or, do they produce only a different, but not necessarily better, set of obstacles to formation and preservation of individual families and their informed choices?*

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<sup>1</sup> 169 P.3d 1025 (Kan. 2007).

THE SETTING FOR *K.M.H.*

The primary parentage presumption common in American law before the advent of second-wave feminism in the 1960s was based on Victorian separate spheres ideology and concurrent relative ignorance of the science of human reproduction.<sup>2</sup> Separate spheres mandated that women and men occupy distinct cultural sectors: women — at least those of a certain race and class — were destined by biology to keep house and bear and rear children. Men were likewise destined by biology; but their lot was to control everything extrafamilial, *i.e.*, all other social, political, and commercial human interactions.<sup>3</sup>

The nuclear family on which this ideology was built received reinforcement from law while science developed. Motherhood was an observable, verifiable fact. Fatherhood was not. Discriminating blood typing and DNA tests that would make a man's responsibility for a pregnancy certain were many years in the future. In the meantime, identification of fathers must be accomplished in another way.

Lord Mansfield's rule fit the bill nicely.<sup>4</sup> The rule established a legal presumption that a woman's husband was the father of any child born during the couple's marriage, regardless of evidence to the contrary, and guaranteed the child's legitimacy.<sup>5</sup> This met polite society's demand for legal certainty when no biological certainty was yet possible. Like all legal fictions, the presumption relied on the unspoken premises that pattern what was possible and desirable and that its general usefulness and predictability trumped any specific and potentially messy inaccuracy. True enough or often enough would be good enough.

The second-wave of the American feminist movement — and the legal reform designed to undermine and further it — had its inadequacies and sometimes painful internal divisions, but it succeeded in at least one dramatic and overdue way: it identified the rigid gender roles of separate spheres ideology as the potential — and choice-throttling oppressions they were. As it happened, it did so at roughly the same time that scientific advances rendered traditional

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<sup>2</sup> See, e.g., Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 117, 118 (David Kairys ed., 1982).

<sup>3</sup> See, e.g., *id.* at 117-24.

<sup>4</sup> Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1 *UTAH L. REV.* 93, 117 n.86 (1996).

<sup>5</sup> See *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777) (neither spouse's testimony can be admitted to "bastardize the issue born after marriage"); see also Brashier, *supra* note 4, at 117 nn.85-87.

sexual intercourse unnecessary for human procreation.<sup>6</sup> One of those advances, artificial insemination, initially used almost exclusively to treat infertility in married heterosexual couples,<sup>7</sup> has now moved far beyond that limitation. Of course, the law has had to move with it.

One of the earliest of those moves came from the National Conference of Commissioners on Uniform State Laws when, in 1973, it promulgated the Uniform Parentage Act (UPA).<sup>8</sup> Containing a provision specifically designed to address the parentage of children born through artificial insemination, 1973 UPA incorporated two rigid presumptions, one old and one new: paternity of a husband and non-paternity of a sperm donor. Section 5 read:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.<sup>9</sup>

The majority of states that have adopted similar legislation have based their language directly on 1973 UPA and its two presumptions.<sup>10</sup> The husband of an artificially inseminated married woman bears all rights and obligations of paternity as to any child conceived, regardless of whether the sperm used was his own or a donor's.<sup>11</sup>

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<sup>6</sup> See Brashier, *supra* note 4, at 181 n.288 and accompanying text (citing WILFRED J. FEINGOLD, *ARTIFICIAL INSEMINATION* 59, 63 (2d ed. 1976)); Vern L. Bullough, *Artificial Insemination* (2004), [http://www.glbtq.com/socialsciences/artificial\\_insemination.html](http://www.glbtq.com/socialsciences/artificial_insemination.html).

<sup>7</sup> Bullough, *supra* note 6.

<sup>8</sup> See UNIF. PARENTAGE ACT § 5, (amended 2000), 9B U.L.A. 407, 407-08 (2001).

<sup>9</sup> *Id.*

<sup>10</sup> See ALA. CODE § 26-17-21 (1992) (identical); MINN. STAT. ANN. § 257.56 (West 2007) (same); MO. ANN. STAT. § 210.824 (West 2004) (same); MONT. CODE ANN. § 40-6-106 (2007) (same); NEV. REV. STAT. ANN. § 126.061 (LexisNexis 2004) (same); see also OR. REV. STAT. § 109.239 (2007). Other states still have no legislation in this area, including Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia.

<sup>11</sup> ALASKA STAT. § 25.20.045 (2006); ARK. CODE ANN. §§ 28-9-201, 202, 209 (2004); FLA. STAT. ANN. § 742.11 (West 2005); GA. CODE ANN. § 19-7-21 (2004) (requires husband's consent); LA. CIV. CODE ANN. art. 188 (2007) (prevents husband's disavowal); MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2001); MASS. GEN. LAWS ANN. ch. 46, § 4B (West

Meanwhile, a sperm donor for artificial insemination of a married woman will not be treated in law as if he were the father of her child, if he is not the woman's husband.<sup>12</sup> This design, according to 1973 UPA's drafters, was intended to protect the expectations of married couples, the expectations of sperm donors, and the best interests of any children conceived.<sup>13</sup> Conspicuously absent from 1973 UPA's language and the drafters' concerns were unmarried women.

The earliest case to address this gap, although post-1973 UPA, arose in a state with, at the time, no legislation regarding artificial insemination. In that case, *C.M. v. C.C.*,<sup>14</sup> a known donor brought an action to obtain visitation with the child that resulted when an unmarried woman artificially inseminated herself with his sperm. The court ruled in his favor, effectively extending Lord Mansfield's rule to this new type of unmarried "couple." In its view, the donor was the "natural father" of the "illegitimate child," because evidence established that the donor and the woman had intended to act as parents together.

The National Conference ultimately undertook revision of its model statute, resulting in the 2000 UPA. The revised version of 1973 UPA's § 5, now denominated § 702, states simply: "A donor is not a parent of a child conceived by means of assisted reproduction."<sup>15</sup> The influence of second-wave feminism can be seen in at least two of four policy choices — actually, implicit presumptions — underlying the 2000 UPA language. First, the language reflects relaxation of previously harsh societal judgment of single motherhood by choice; § 702 no longer differentiates between married and unmarried women who undergo artificial insemination. Second, the statute is silent on the biological sex of the donor, meaning it may be applied to a donor of eggs as well as sperm; this gender neutrality, although the subject of no small amount of criticism, is the calling card of one branch of second-wave feminism and law reform. The second and third policy choices are inherent in the statute's absence of a legal distinction

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1994); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. ANN. § 49A-1 (West 2007) (requires husband's consent); OKLA. STAT. ANN. tit. 10, §§ 551-56 (West 2007) (does not contemplate unmarried recipient); TENN. CODE ANN. § 68-3-306 (2006) (requires husband's consent). *But see* *Hernandez v. Robles*, 805 N.Y.S.2d 354, 390 (2005); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 587 (2005).

<sup>12</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-771 (West 2004); IDAHO CODE ANN. § 39-5405 (2002); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2003); OR. REV. STAT. § 109.239 (2007).

<sup>13</sup> *See, e.g.*, UNIF. PARENTAGE ACT, *supra* note 8, cmt.; Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 301-04, 321-22 (1991).

<sup>14</sup> 377 A.2d 821 (N.J. 1977).

<sup>15</sup> *See* UNIF. PARENTAGE ACT, *supra* note 8, § 702.

between known and anonymous donors and its lack of an escape clause to enable an agreement to share parenting rights and responsibilities.<sup>16</sup>

Even before the 2000 UPA amendment, the states had begun to catch on to the presumption's failure to account for unmarried women. Several modified their statutes to remove the requirement that an artificially inseminated woman be married to someone other than the sperm donor before the presumption of donor non-paternity would apply.<sup>17</sup>

In addition, courts in four states decided cases interpreting artificial insemination statutes containing absolute bars to donor paternity. Each of these cases arose after a known donor alleged that he had agreed to share parenting with the unmarried woman who conceived through insemination with his sperm.

In the first of these cases, *Jhordan C. v. Mary K.*,<sup>18</sup> a California donor provided semen to a woman who planned to raise any child conceived with a female partner. The statute required involvement by a physician in the procedure, but the woman did not use one. The court relied on this deviation from statutory procedure to rule that the presumption of donor non-fatherhood would not apply and awarded the donor visitation rights. The court also held that the physician involvement requirement did not infringe on the woman's rights, and it concluded it was not necessary to reach the donor's constitutional claims.

The Court of Appeals of Oregon and the Supreme Court of Colorado each decided an artificial insemination case in 1989. In the Oregon case, *McIntyre v. Crouch*,<sup>19</sup> the donor sought to establish paternity based on an agreement with the woman inseminated, but she argued that any agreement between them was irrelevant because of the statute's absolute bar to donor paternity. The court ruled in the donor's favor. In its view, the statute raised no equal protection problem but would violate due process as applied to the donor if he could establish the existence of an agreement to share in parenting.

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<sup>16</sup> As of March 2008, four states have adopted the 2000 UPA language. See DEL. CODE ANN. tit. 13, § 8-702 (2006); N.D. CENT. CODE § 14-20-60 (2007); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); UTAH CODE ANN. § 78B-15-702 (2008).

<sup>17</sup> See, e.g., CAL. FAM. CODE § 7613(b) (West 2004); 750 ILL. COMP. STAT. ANN. 40/3(b) (LexisNexis 1999); WIS. STAT. ANN. § 891.40(2) (West 1997) (same); see also COLO. REV. STAT. ANN. § 19-4-106(2) (West 2005) (substantially similar); CONN. GEN. STAT. ANN. § 45a-775 (West 2007) (similar); IDAHO CODE ANN. § 39-5405 (2002) (similar); OHIO REV. CODE ANN. § 3111.95(B) (LexisNexis 2003) (same); VA. CODE ANN. § 20-158(A)(3) (West 2004) (substantially similar).

<sup>18</sup> 224 Cal. Rptr. 530 (1986).

<sup>19</sup> 780 P.2d 239, rev. denied, 308 Or. 593, cert. denied 495 U.S. 905 (1989).

In the Colorado decision, *In the Interest of R.C.*,<sup>20</sup> the court was less specific about the theory underlying its ruling, but it also held that an absolute bar statute could not apply constitutionally if a known donor had reached an agreement to parent with the woman to be inseminated. It remanded for evidence on whether such an agreement existed in that case.

The fourth case arising before the 2000 UPA amendment, *C.O. v. W.S.*,<sup>21</sup> out of Ohio, also resulted in a holding that an artificial insemination statute absolutely barring donor paternity would be unconstitutional if applied to a situation in which the donor and the artificially inseminated woman agreed he would act as a parent.<sup>22</sup>

The last case to enrich the setting for *K.M.H.* arose after the 2000 amendment to UPA in California. That case, *Steven S. v. Deborah D.*,<sup>23</sup> involved an unmarried woman and a known donor married to another woman. The woman and the donor were unsuccessful at their first effort at artificial insemination. They then attempted to conceive through sexual intercourse, again unsuccessfully. A second artificial insemination was successful. There was no evidence of an agreement between the woman and the donor concerning the donor's role in the resulting child's life. The court rejected the donor's equitable estoppel argument and did not reach his equal protection and due process challenges, applying the absolute bar of the statute, fully engaging the presumption of donor non-paternity.

As the law shifted, so did feminism. The emergence of a third, distinct feminist "wave" is frequently associated temporally with the fall 1991 spectacle of now-Associate Justice Clarence Thomas' confirmation hearings before the United States Senate, which examined Professor Anita Hill's allegations of sexual harassment. The tone of the hearings made it painfully clear that the second-wave had yet to make the workplace generally, or Capitol Hill in particular, places where equal treatment was assured.<sup>24</sup> This was a shock to

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<sup>20</sup> 775 P.2d 27 (Colo. 1989).

<sup>21</sup> 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994).

<sup>22</sup> Since the 2000 UPA amendment, one state has decided two more cases addressing a statute with an absolute bar to donor paternity; but the cases added little to the legal landscape because their resolutions hinged only on standing. See *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. 2006) (known donor lacked standing to pursue parentage adjudication; child conceived through assisted reproduction by unmarried donor's sister's same-sex partner using donor's sperm); see also *In re Sullivan*, 157 S.W.3d 911 (Tex. App. 2005) (known donor had standing to maintain paternity action; parties had signed preinsemination agreement stating donor would be treated as if he and the child's mother were married).

<sup>23</sup> 25 Cal. Rptr. 3d 482 (2005).

<sup>24</sup> DEBORAH SEIGEL, *SISTERHOOD, INTERRUPTED: FROM RADICAL WOMEN TO GRRLS GONE WILD* 110-15, 127-28 (2007); see also ASTRID HENRY, *NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM* 16-23 (2004).

young women who had grown up with feminism “in the water.”<sup>25</sup> With all of the work of the second-wave, and many of its initiatives in place, it was clear there was more to be done. Rebecca Walker’s 1992 *Ms.* essay discussing the Thomas-Hill events, narrated the disconnect. She declared, “I am not a post-feminism feminist; I am the third-wave.”<sup>26</sup>

Academic and other discourse from without and within the women’s movement, always lively and sometimes sharply critical,<sup>27</sup> became so pointed as to qualify as incendiary. Some argued that feminists of the second-wave had betrayed women.<sup>28</sup> From their perspective, the movement had become too abstract, too intellectual, too removed from real life struggles and everyday concerns.<sup>29</sup> It had assumed and perpetuated essentialist views of women and their concerns, a new but nevertheless destructive set of stereotypes. A woman who truly and fundamentally embraced the notion of equality, should not align herself with this reformulated institution of “feminism — the f-word.” As a classification, it was ultimately damaging, undermining, artificial, unnecessary, unhelpful<sup>30</sup> and psychologically, at least, oppressive.<sup>31</sup> The daughters of the second-wave — this third-wave — balked at being ushered across any threshold based on their gender alone.<sup>32</sup> The ushering felt more like a push, regardless of their desire to move in the direction mapped by their mothers. They rejected any assumption that their sex or their identity as feminists

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<sup>25</sup> SEIGEL, *supra* note 24, at 98; JENNIFER BAUMGARDNER & AMY RICHARDS, MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE 83 (2000) (referring to Marlo Thomas’ 1973 album, video, and book, *Free to Be . . . You and Me*).

<sup>26</sup> See HENRY, *supra* note 24, at 23. Other significant events raised cultural awareness of the persistent and pervasive problem of domestic violence, marital rape, forced abortion, such as the 1993 trial and acquittal of Lorena Bobbitt, who in 1993, severed her husband’s penis after he raped her; the 1991 confession of serial killer Aileen Wuornos; and Mike Tyson’s 1991 arrest for the rape of Miss Black America.

<sup>27</sup> See, e.g., Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965, 965-69 (1990).

<sup>28</sup> See generally KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993) (accusing second-wave rape-crisis activists of perpetuating an ideology of women as passive, victimized, helpless innocents); see also NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21<sup>ST</sup> CENTURY (1993) (rejecting “victim feminism”); RENE DENFELD, THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER (1995) (rejecting Victorian notions advocating political helplessness); CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN (1994); SEIGEL, *supra* note 24, at 100-01, 121, 130; BAUMGARDNER, *supra* note 25, at 236-54; HENRY, *supra* note 24, at 28, 50, 102-05.

<sup>29</sup> DENFELD, *supra* note 28, at 5.

<sup>30</sup> SEIGEL, *supra* note 24, at 114-16.

<sup>31</sup> *Id.* at 119.

<sup>32</sup> *Id.* at 7, 105.

meant they automatically agreed with some preconceived set of values or goals.<sup>33</sup>

This individualism poses an interesting conundrum for law reform. Third-wave feminists shrewdly discern that it has limits for achieving feminist goals of transformation and autonomy for individual, real women;<sup>34</sup> because much of the law is structured on presumptions, generalizations about the desires of individuals, and the patterns most helpful to achieving them.

Bridget Crawford posits that the third-wave's reclamation of feminism through engagement with the media is powerful "cultural work" that may be a necessary pre-condition to an evolution in the law,<sup>35</sup> and she predicts that "third-wave engagement with culture may be a precursor to the law's adoption of some third-wave feminist ideas."<sup>36</sup> In essence, the thesis is that the media are tools to produce cultural infrastructure, without which even the best intentioned and artfully designed legal reforms are ineffective. For example, women may now have the legal right to enter into contracts, but exercise of that right requires extralegal recognition that women, in fact, have power to bargain and to control something worth bargaining for.

*IN THE INTEREST OF K.M.H.*

Kansas adopted certain portions of 1973 UPA in 1985<sup>37</sup> but did not legislate on artificial insemination until 1994.<sup>38</sup> At that point, drafters departed from the UPA design in two respects: (1) they made no distinction between married and unmarried women undergoing the procedure, and (2) they specifically provided that a woman and a sperm donor could agree in writing to escape the legal presumption of donor non-paternity. The statute, Kansas Statute Annotated § 38-1114(f), thus reads:

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

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<sup>33</sup> See Ann Ferguson, *Moral Responsibility and Social Change: A New Theory of Self*, 12 HYPATIA 116, 133 (Summer 1997).

<sup>34</sup> Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 159 (2007) (applauding the *Manifesta*'s authors' demand we "make explicit that the fight for reproductive rights must include birth control," but critiquing their failure to evaluate "the existing state of the law and how the current jurisprudential framework may or may not be adequate for achieving this goal").

<sup>35</sup> *Id.* at 162.

<sup>36</sup> *Id.* at 162-63.

<sup>37</sup> See H.B. 2012, 1985 Leg., ch. 114 (Kan. 1985).

<sup>38</sup> See H.B. 2583, 1994 Leg., ch. 292 (Kan. 1994) (now codified at KAN. STAT. ANN. § 38-1114(f) (2000)).

he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.<sup>39</sup>

The second drafting difference would eventually tell the tale in the Kansas Supreme Court's 2007 decision in *K.M.H.*, which involved an unmarried woman, S.H., who desired to become a mother through artificial insemination by a known donor.<sup>40</sup> She approached a friend, D.H., who agreed to participate.<sup>41</sup> S.H. and D.H. entered into no written agreement on the donation, the insemination, or their expectations with regard to D.H.'s parental rights or lack thereof.<sup>42</sup>

S.H. gave birth to twins, K.M.H. and K.C.H.<sup>43</sup> The day after their delivery, S.H. filed an action to terminate D.H.'s parental rights.<sup>44</sup> D.H. responded in the case initiated by S.H. and filed a separate action to establish his paternity; he acknowledged financial responsibility and sought joint custody and visitation.<sup>45</sup> After the actions were consolidated, S.H. moved to dismiss the paternity action, relying on the absence of a written agreement under the statute.<sup>46</sup> D.H. asserted that he and S.H. had an oral agreement that he would be a father to the twins.<sup>47</sup>

D.H. challenged the constitutionality of the statute on both equal protection and due process grounds, citing the California, Oregon, and Ohio cases interpreting absolute bar statutes.<sup>48</sup> A majority of the court distinguished those cases because of the Kansas statute's provision permitting participants in artificial insemination to opt out of the donor non-paternity presumption through a written agreement.<sup>49</sup> Such a statute had not yet been "subjected . . . to a constitutional crucible"<sup>50</sup> in any state.

On equal protection, the majority opinion echoed the debate of equal-treatment and special-treatment feminist legal scholars of the second-wave,<sup>51</sup> acknowledging that:

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<sup>39</sup> KAN. STAT. ANN. § 38-1114(f) (2000).

<sup>40</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1083 (citing ARK. CODE ANN. § 9-10-201 (2002); FLA. STAT. § 742.14 (2005); N.H. REV. STAT. ANN. § 168-B:3(I)(e) (2002); N.J. STAT. ANN. § 9:17-44(b) (2002); N.M. STAT. ANN. § 40-11-6(B) (2006)).

<sup>51</sup> See, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 194-196 (1982).

K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female.<sup>52</sup>

This statutory distinction survived the intermediate equal protection scrutiny applied to such gender classifications, the majority held, because sex difference transcended mere societal construction: “[G]iven the biological differences between females and males and the immutable role those differences play in conceiving and bearing a child, regardless of whether conception is achieved through sexual intercourse or artificial insemination,” it was unlikely that S.H. and D.H. were truly similarly situated.<sup>53</sup>

Even if that analytical hurdle could have been overcome, the majority stated, several legitimate legislative purposes or important governmental objectives were served by Kansas Statute Annotated § 38-1114(f).<sup>54</sup> The statute facilitated an individual married or unmarried woman’s choice to become a parent without engaging in sexual intercourse, either because of personal choice or because a husband or partner was infertile, impotent, or ill.<sup>55</sup> It encouraged

able and willing men to donate sperm to such women by protecting them from later unwanted claims for support from the mothers or the children. The statute protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability . . . . Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.<sup>56</sup>

The majority then addressed D.H.’s due process claim.<sup>57</sup> D.H. had conceded that the statute’s provision for lifting the statutory presumption of donor non-paternity through written agreement meant it would survive due process scrutiny as applied to an anonymous sperm donor.<sup>58</sup> However, he asserted it could not be constitutionally applied to him, a known donor, because it deprived a biological father

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<sup>52</sup> *In re K.M.H.*, at 1039.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

<sup>58</sup> *Id.*

of his parental rights without notice and a meaningful opportunity to be heard.<sup>59</sup>

The majority agreed that an absolute-bar statute such as those at issue in the earlier California, Oregon, Colorado, and Ohio cases would lead to due process concerns.<sup>60</sup> But it upheld the Kansas statute and its application to D.H., ruling that the requirement of a writing to memorialize any agreement between a woman and a sperm donor denied D.H. no procedural right.<sup>61</sup> Rather, his own inaction before donating merely set up a burden of proof that he was unable to meet.<sup>62</sup>

The court also rejected D.H.'s argument that the statute inevitably made the woman who is inseminated the sole arbiter of whether a donor can become a father to a child his sperm helps conceive.<sup>63</sup> While this may be true after a donation has been made, up until that point, a prospective donor would retain complete autonomy; he could refuse to facilitate the procedure unless the woman agreed to paternity on his terms.<sup>64</sup>

The majority also rejected D.H.'s due process claim to the extent it rested upon substantive rather than procedural grounds.<sup>65</sup> It held:

We simply are not persuaded that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive due process rights. Although we agree . . . that one goal of the Kansas Parentage Act as a whole is to encourage fathers to voluntarily acknowledge paternity and child support obligations, the obvious impact of the plain language of this particular provision in the Act is to prevent the creation of parental status where it is not desired or expected . . . . [The statute] ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not cut *off* rights that have already arisen and attached.

We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors . . . . To the extent it does not realize the expectation of a known sperm donor, the statute tells him exactly how to opt out, how to become and remain a father.<sup>66</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

<sup>64</sup> *Id.* at 1041.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1040-41 (emphasis in original). Two Kansas Court of Appeals judges, sitting by designation, dissented in *In re K.M.H.* They would have ruled that the statute violated due process as applied to D.H., because of his allegation that an oral agreement existed. They assumed that D.H. had a fundamental right to be a father arising out of his biological connection to the twins and could not be deprived of it without an active waiver. *Id.* at 1047-50 (Caplinger, J., dissenting, joined by Hill, J.). One of the judges also wrote separately, arguing the majority's interpretation of KAN. STAT. ANN. § 38-1114(f) did violence to half of the twins' heritage. *Id.* at 1051 (Hill, J., dissenting).

*K.M.H.* AND FEMINISM

The sensibility that animates third-wave feminism is evident in both the Kansas statute applied in *K.M.H.* and the reasoning of the decision. Although certain aspects of both may continue to rely on patterns and presumptions, in our view, they are consistent with the positive power and individualism that are hallmarks of feminism's third-wave.

Both the statute and majority opinion operate from a position of comfort with a contract model for formation and preservation of parental rights. Under this model, the parties are free to elect, in writing, the family structure they desire.

This freedom would not be possible but for the deconstruction of Victorian separate spheres family life accomplished during the second-wave. The gender determinism from that ideology had to be attacked and destroyed. But we note that the statute and *K.M.H.* avoid any second-wave trap of essentialist insistence on what any person, female or male, should want or must have as a replacement.

This freedom also rests upon a characteristically third-wave expectation of gender-neutral bargaining power or, perhaps, more accurately in the artificial insemination context, biological sex-driven sharing of it. The statute as drawn and enforced by the majority aims to facilitate not only what a given individual wants but what she or he needs to maximize family or non-family potential.

The upshot: under a statute such as that operating in Kansas, any woman or donor choosing to participate or not to participate in an artificial insemination procedure is not controlled by gender-based presumptions of parentage or any other person's estimation of the one, true set of "feminist 'values.'"<sup>67</sup> This means that certain types of law reform may be consistent with and conducive to further development of third-wave feminist ideals. We are reminded of Gloria Steinem's famous vision: "We are talking about a society in which there will be no roles other than those chosen or those earned; we are really talking about humanism."

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<sup>67</sup> See Ferguson, *supra* note 33, at 133.

## ARTICLE

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### IS WHAT WE WANT WHAT WE NEED, AND CAN WE GET IT IN WRITING? THE THIRD-WAVE OF FEMINISM HITS THE BEACH OF MODERN PARENTAGE PRESUMPTIONS

By: Justice Carol A. Beier and Larkin E. Walsh

*Modern statutes on parentage regarding artificial insemination and the cases that have interpreted them reflect the explosion of family gender roles by second-wave feminism. Although a natural father now is generally expected to share the rights and obligations of parentage with a natural mother, this is not so if he is a mere contributor of biological material. Are the modern presumptions underlying such statutes, what we used to want, what we have come to need? Or, is current law too much a reflection of the essentialism for which the second-wave is sometimes justly criticized?*

*Third-wave individualism and resistance to inflexible doctrine supply interesting lenses for an examination of the developing law in this area. Particularly, a recent Kansas case, *In the Interest of K.M.H.*,<sup>1</sup> is the first to evaluate a statute designed to give power to individual choice by making a parentage presumption secondary to an agreement between a woman and a sperm donor that the donor will be treated as a parent.*

*This paper explores the context and outcome of this case and whether we have exhausted the limits of legal reform that can be achieved through the creation of — even progressive — presumptions about parentage. Given the changes wrought under the influence of the second-wave, do such presumptions retain vitality and usefulness? Or, do they produce only a different, but not necessarily better, set of obstacles to formation and preservation of individual families and their informed choices?*

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<sup>1</sup> 169 P.3d 1025 (Kan. 2007).

THE SETTING FOR *K.M.H.*

The primary parentage presumption common in American law before the advent of second-wave feminism in the 1960s was based on Victorian separate spheres ideology and concurrent relative ignorance of the science of human reproduction.<sup>2</sup> Separate spheres mandated that women and men occupy distinct cultural sectors: women — at least those of a certain race and class — were destined by biology to keep house and bear and rear children. Men were likewise destined by biology; but their lot was to control everything extrafamilial, *i.e.*, all other social, political, and commercial human interactions.<sup>3</sup>

The nuclear family on which this ideology was built received reinforcement from law while science developed. Motherhood was an observable, verifiable fact. Fatherhood was not. Discriminating blood typing and DNA tests that would make a man's responsibility for a pregnancy certain were many years in the future. In the meantime, identification of fathers must be accomplished in another way.

Lord Mansfield's rule fit the bill nicely.<sup>4</sup> The rule established a legal presumption that a woman's husband was the father of any child born during the couple's marriage, regardless of evidence to the contrary, and guaranteed the child's legitimacy.<sup>5</sup> This met polite society's demand for legal certainty when no biological certainty was yet possible. Like all legal fictions, the presumption relied on the unspoken premises that pattern what was possible and desirable and that its general usefulness and predictability trumped any specific and potentially messy inaccuracy. True enough or often enough would be good enough.

The second-wave of the American feminist movement — and the legal reform designed to undermine and further it — had its inadequacies and sometimes painful internal divisions, but it succeeded in at least one dramatic and overdue way: it identified the rigid gender roles of separate spheres ideology as the potential — and

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<sup>2</sup> See, e.g., Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 117, 118 (David Kairys ed., 1982).

<sup>3</sup> See, e.g., *id.* at 117-24.

<sup>4</sup> Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1 *UTAH L. REV.* 93, 117 n.86 (1996).

<sup>5</sup> See *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777) (neither spouse's testimony can be admitted to "bastardize the issue born after marriage"); see also Brashier, *supra* note 4, at 117 nn.85-87.

choice-throttling oppressions they were. As it happened, it did so at roughly the same time that scientific advances rendered traditional sexual intercourse unnecessary for human procreation.<sup>6</sup> One of those advances, artificial insemination, initially used almost exclusively to treat infertility in married heterosexual couples,<sup>7</sup> has now moved far beyond that limitation. Of course, the law has had to move with it.

One of the earliest of those moves came from the National Conference of Commissioners on Uniform State Laws when, in 1973, it promulgated the Uniform Parentage Act (UPA).<sup>8</sup> Containing a provision specifically designed to address the parentage of children born through artificial insemination, 1973 UPA incorporated two rigid presumptions, one old and one new: paternity of a husband and non-paternity of a sperm donor. Section 5 read:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.<sup>9</sup>

The majority of states that have adopted similar legislation have based their language directly on 1973 UPA and its two presumptions.<sup>10</sup> The husband of an artificially inseminated married woman bears all rights and obligations of paternity as to any child conceived,

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<sup>6</sup> See Brashier, *supra* note 4, at 181 n.288 and accompanying text (citing WILFRED J. FEINGOLD, *ARTIFICIAL INSEMINATION* 59, 63 (2d ed. 1976)); Vern L. Bullough, *Artificial Insemination* (2004), [http://www.glbtc.com/socialsciences/artificial\\_insemination.html](http://www.glbtc.com/socialsciences/artificial_insemination.html).

<sup>7</sup> Bullough, *supra* note 6.

<sup>8</sup> See UNIF. PARENTAGE ACT § 5, (amended 2000), 9B U.L.A. 407, 407-08 (2001).

<sup>9</sup> *Id.*

<sup>10</sup> See ALA. CODE § 26-17-21 (1992) (identical); MINN. STAT. ANN. § 257.56 (West 2007) (same); MO. ANN. STAT. § 210.824 (West 2004) (same); MONT. CODE ANN. § 40-6-106 (2007) (same); NEV. REV. STAT. ANN. § 126.061 (LexisNexis 2004) (same); see also OR. REV. STAT. § 109.239 (2007). Other states still have no legislation in this area, including Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia.

regardless of whether the sperm used was his own or a donor's.<sup>11</sup> Meanwhile, a sperm donor for artificial insemination of a married woman will not be treated in law as if he were the father of her child, if he is not the woman's husband.<sup>12</sup> This design, according to 1973 UPA's drafters, was intended to protect the expectations of married couples, the expectations of sperm donors, and the best interests of any children conceived.<sup>13</sup> Conspicuously absent from 1973 UPA's language and the drafters' concerns were unmarried women.

The earliest case to address this gap, although post-1973 UPA, arose in a state with, at the time, no legislation regarding artificial insemination. In that case, *C.M. v. C.C.*,<sup>14</sup> a known donor brought an action to obtain visitation with the child that resulted when an unmarried woman artificially inseminated herself with his sperm. The court ruled in his favor, effectively extending Lord Mansfield's rule to this new type of unmarried "couple." In its view, the donor was the "natural father" of the "illegitimate child," because evidence established that the donor and the woman had intended to act as parents together.

The National Conference ultimately undertook revision of its model statute, resulting in the 2000 UPA. The revised version of 1973 UPA's § 5, now denominated § 702, states simply: "A donor is not a parent of a child conceived by means of assisted reproduction."<sup>15</sup> The influence of second-wave feminism can be seen in at least two of four policy choices — actually, implicit presumptions — underlying the 2000 UPA language. First, the language reflects relaxation of previously harsh societal judgment of single motherhood by choice; § 702 no longer differentiates between married and unmarried women

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<sup>11</sup> ALASKA STAT. § 25.20.045 (2006); ARK. CODE ANN. §§ 28-9-201, 202, 209 (2004); FLA. STAT. ANN. § 742.11 (West 2005); GA. CODE ANN. § 19-7-21 (2004) (requires husband's consent); LA. CIV. CODE ANN. art. 188 (2007) (prevents husband's disavowal); MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2001); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1994); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. ANN. § 49A-1 (West 2007) (requires husband's consent); OKLA. STAT. ANN. tit. 10, §§ 551-56 (West 2007) (does not contemplate unmarried recipient); TENN. CODE ANN. § 68-3-306 (2006) (requires husband's consent). *But see* *Hernandez v. Robles*, 805 N.Y.S.2d 354, 390 (2005); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 587 (2005).

<sup>12</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-771 (West 2004); IDAHO CODE ANN. § 39-5405 (2002); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2003); OR. REV. STAT. § 109.239 (2007).

<sup>13</sup> *See, e.g.*, UNIF. PARENTAGE ACT, *supra* note 8, cmt.; Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 301-04, 321-22 (1991).

<sup>14</sup> 377 A.2d 821 (N.J. 1977).

<sup>15</sup> *See* UNIF. PARENTAGE ACT, *supra* note 8, § 702.

who undergo artificial insemination. Second, the statute is silent on the biological sex of the donor, meaning it may be applied to a donor of eggs as well as sperm; this gender neutrality, although the subject of no small amount of criticism, is the calling card of one branch of second-wave feminism and law reform. The second and third policy choices are inherent in the statute's absence of a legal distinction between known and anonymous donors and its lack of an escape clause to enable an agreement to share parenting rights and responsibilities.<sup>16</sup>

Even before the 2000 UPA amendment, the states had begun to catch on to the presumption's failure to account for unmarried women. Several modified their statutes to remove the requirement that an artificially inseminated woman be married to someone other than the sperm donor before the presumption of donor non-paternity would apply.<sup>17</sup>

In addition, courts in four states decided cases interpreting artificial insemination statutes containing absolute bars to donor paternity. Each of these cases arose after a known donor alleged that he had agreed to share parenting with the unmarried woman who conceived through insemination with his sperm.

In the first of these cases, *Jhordan C. v. Mary K.*,<sup>18</sup> a California donor provided semen to a woman who planned to raise any child conceived with a female partner. The statute required involvement by a physician in the procedure, but the woman did not use one. The court relied on this deviation from statutory procedure to rule that the presumption of donor non-fatherhood would not apply and awarded the donor visitation rights. The court also held that the physician involvement requirement did not infringe on the woman's rights, and it concluded it was not necessary to reach the donor's constitutional claims.

The Court of Appeals of Oregon and the Supreme Court of Colorado each decided an artificial insemination case in 1989. In the

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<sup>16</sup> As of March 2008, four states have adopted the 2000 UPA language. *See* DEL. CODE ANN. tit. 13, § 8-702 (2006); N.D. CENT. CODE § 14-20-60 (2007); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); UTAH CODE ANN. § 78B-15-702 (2008).

<sup>17</sup> *See, e.g.*, CAL. FAM. CODE § 7613(b) (West 2004); 750 ILL. COMP. STAT. ANN. 40/3(b) (LexisNexis 1999); WIS. STAT. ANN. § 891.40(2) (West 1997) (same); *see also* COLO. REV. STAT. ANN. § 19-4-106(2) (West 2005) (substantially similar); CONN. GEN. STAT. ANN. § 45a-775 (West 2007) (similar); IDAHO CODE ANN. § 39-5405 (2002) (similar); OHIO REV. CODE ANN. § 3111.95(B) (LexisNexis 2003) (same); VA. CODE ANN. § 20-158(A)(3) (West 2004) (substantially similar).

<sup>18</sup> 224 Cal. Rptr. 530 (1986).

Oregon case, *McIntyre v. Crouch*,<sup>19</sup> the donor sought to establish paternity based on an agreement with the woman inseminated, but she argued that any agreement between them was irrelevant because of the statute's absolute bar to donor paternity. The court ruled in the donor's favor. In its view, the statute raised no equal protection problem but would violate due process as applied to the donor if he could establish the existence of an agreement to share in parenting.

In the Colorado decision, *In the Interest of R.C.*,<sup>20</sup> the court was less specific about the theory underlying its ruling, but it also held that an absolute bar statute could not apply constitutionally if a known donor had reached an agreement to parent with the woman to be inseminated. It remanded for evidence on whether such an agreement existed in that case.

The fourth case arising before the 2000 UPA amendment, *C.O. v. W.S.*,<sup>21</sup> out of Ohio, also resulted in a holding that an artificial insemination statute absolutely barring donor paternity would be unconstitutional if applied to a situation in which the donor and the artificially inseminated woman agreed he would act as a parent.<sup>22</sup>

The last case to enrich the setting for *K.M.H.* arose after the 2000 amendment to UPA in California. That case, *Steven S. v. Deborah D.*,<sup>23</sup> involved an unmarried woman and a known donor married to another woman. The woman and the donor were unsuccessful at their first effort at artificial insemination. They then attempted to conceive through sexual intercourse, again unsuccessfully. A second artificial insemination was successful. There was no evidence of an agreement between the woman and the donor concerning the donor's role in the resulting child's life. The court rejected the donor's equitable estoppel argument and did not reach his equal protection and due process challenges, applying the absolute bar of the statute, fully engaging the presumption of donor non-paternity.

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<sup>19</sup> 780 P.2d 239, *rev. denied*, 308 Or. 593, *cert. denied* 495 U.S. 905 (1989).

<sup>20</sup> 775 P.2d 27 (Colo. 1989).

<sup>21</sup> 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994).

<sup>22</sup> Since the 2000 UPA amendment, one state has decided two more cases addressing a statute with an absolute bar to donor paternity; but the cases added little to the legal landscape because their resolutions hinged only on standing. See *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. 2006) (known donor lacked standing to pursue parentage adjudication; child conceived through assisted reproduction by unmarried donor's sister's same-sex partner using donor's sperm); see also *In re Sullivan*, 157 S.W.3d 911 (Tex. App. 2005) (known donor had standing to maintain paternity action; parties had signed preinsemination agreement stating donor would be treated as if he and the child's mother were married).

<sup>23</sup> 25 Cal. Rptr. 3d 482 (2005).

As the law shifted, so did feminism. The emergence of a third, distinct feminist “wave” is frequently associated temporally with the fall 1991 spectacle of now-Associate Justice Clarence Thomas’ confirmation hearings before the United States Senate, which examined Professor Anita Hill’s allegations of sexual harrassment. The tone of the hearings made it painfully clear that the second-wave had yet to make the workplace generally, or Capitol Hill in particular, places where equal treatment was assured.<sup>24</sup> This was a shock to young women who had grown up with feminism “in the water.”<sup>25</sup> With all of the work of the second-wave, and many of its initiatives in place, it was clear there was more to be done. Rebecca Walker’s 1992 *Ms.* essay discussing the Thomas-Hill events, narrated the disconnect. She declared, “I am not a post-feminism feminist; I am the third-wave.”<sup>26</sup>

Academic and other discourse from without and within the women’s movement, always lively and sometimes sharply critical,<sup>27</sup> became so pointed as to qualify as incendiary. Some argued that feminists of the second-wave had betrayed women.<sup>28</sup> From their perspective, the movement had become too abstract, too intellectual, too removed from real life struggles and everyday concerns.<sup>29</sup> It had assumed and perpetuated essentialist views of women and their concerns, a new but nevertheless destructive set of stereotypes. A

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<sup>24</sup> DEBORAH SEIGEL, *SISTERHOOD, INTERRUPTED: FROM RADICAL WOMEN TO GRRLS GONE WILD* 110-15, 127-28 (2007); see also ASTRID HENRY, *NOT MY MOTHER’S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM* 16-23 (2004).

<sup>25</sup> SEIGEL, *supra* note 24, at 98; JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 83 (2000) (referring to Marlo Thomas’ 1973 album, video, and book, *Free to Be . . . You and Me*).

<sup>26</sup> See HENRY, *supra* note 24, at 23. Other significant events raised cultural awareness of the persistent and pervasive problem of domestic violence, marital rape, forced abortion, such as the 1993 trial and acquittal of Lorena Bobbitt, who in 1993, severed her husband’s penis after he raped her; the 1991 confession of serial killer Aileen Wuornos; and Mike Tyson’s 1991 arrest for the rape of Miss Black America.

<sup>27</sup> See, e.g., Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965, 965-69 (1990).

<sup>28</sup> See generally KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993) (accusing second-wave rape-crisis activists of perpetuating an ideology of women as passive, victimized, helpless innocents); see also NAOMI WOLF, *FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21<sup>ST</sup> CENTURY* (1993) (rejecting “victim feminism”); RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER* (1995) (rejecting Victorian notions advocating political helplessness); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* (1994); SEIGEL, *supra* note 24, at 100-01, 121, 130; BAUMGARDNER, *supra* note 25, at 236-54; HENRY, *supra* note 24, at 28, 50, 102-05.

<sup>29</sup> DENFELD, *supra* note 28, at 5.

woman who truly and fundamentally embraced the notion of equality, should not align herself with this reformulated institution of “feminism — the f-word.” As a classification, it was ultimately damaging, undermining, artificial, unnecessary, unhelpful<sup>30</sup> and psychologically, at least, oppressive.<sup>31</sup> The daughters of the second-wave — this third-wave — balked at being ushered across any threshold based on their gender alone.<sup>32</sup> The ushering felt more like a push, regardless of their desire to move in the direction mapped by their mothers. They rejected any assumption that their sex or their identity as feminists meant they automatically agreed with some preconceived set of values or goals.<sup>33</sup>

This individualism poses an interesting conundrum for law reform. Third-wave feminists shrewdly discern that it has limits for achieving feminist goals of transformation and autonomy for individual, real women;<sup>34</sup> because much of the law is structured on presumptions, generalizations about the desires of individuals, and the patterns most helpful to achieving them.

Bridget Crawford posits that the third-wave’s reclamation of feminism through engagement with the media is powerful “cultural work” that may be a necessary pre-condition to an evolution in the law,<sup>35</sup> and she predicts that “third-wave engagement with culture may be a precursor to the law’s adoption of some third-wave feminist ideas.”<sup>36</sup> In essence, the thesis is that the media are tools to produce cultural infrastructure, without which even the best intentioned and artfully designed legal reforms are ineffective. For example, women may now have the legal right to enter into contracts, but exercise of that right requires extralegal recognition that women, in fact, have power to bargain and to control something worth bargaining for.

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<sup>30</sup> SEIGEL, *supra* note 24, at 114-16.

<sup>31</sup> *Id.* at 119.

<sup>32</sup> *Id.* at 7, 105.

<sup>33</sup> See Ann Ferguson, *Moral Responsibility and Social Change: A New Theory of Self*, 12 HYPATIA 116, 133 (Summer 1997).

<sup>34</sup> Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 159 (2007) (applauding the *Manifesta*’s authors’ demand we “make explicit that the fight for reproductive rights must include birth control,” but critiquing their failure to evaluate “the existing state of the law and how the current jurisprudential framework may or may not be adequate for achieving this goal”).

<sup>35</sup> *Id.* at 162.

<sup>36</sup> *Id.* at 162-63.

*IN THE INTEREST OF K.M.H.*

Kansas adopted certain portions of 1973 UPA in 1985<sup>37</sup> but did not legislate on artificial insemination until 1994.<sup>38</sup> At that point, drafters departed from the UPA design in two respects: (1) they made no distinction between married and unmarried women undergoing the procedure, and (2) they specifically provided that a woman and a sperm donor could agree in writing to escape the legal presumption of donor non-paternity. The statute, Kansas Statute Annotated § 38-1114(f), thus reads:

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 birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.<sup>39</sup>

The second drafting difference would eventually tell the tale in the Kansas Supreme Court's 2007 decision in *K.M.H.*, which involved an unmarried woman, S.H., who desired to become a mother through artificial insemination by a known donor.<sup>40</sup> She approached a friend, D.H., who agreed to participate.<sup>41</sup> S.H. and D.H. entered into no written agreement on the donation, the insemination, or their expectations with regard to D.H.'s parental rights or lack thereof.<sup>42</sup>

S.H. gave birth to twins, K.M.H. and K.C.H.<sup>43</sup> The day after their delivery, S.H. filed an action to terminate D.H.'s parental rights.<sup>44</sup> D.H. responded in the case initiated by S.H. and filed a separate action to establish his paternity; he acknowledged financial responsibility and sought joint custody and visitation.<sup>45</sup> After the actions were consolidated, S.H. moved to dismiss the paternity action, relying on the absence of a written agreement under the statute.<sup>46</sup> D.H. asserted that he and S.H. had an oral agreement that he would be a father to the twins.<sup>47</sup>

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<sup>37</sup> See H.B. 2012, 1985 Leg., ch. 114 (Kan. 1985).

<sup>38</sup> See H.B. 2583, 1994 Leg., ch. 292 (Kan. 1994) (now codified at KAN. STAT. ANN. § 38-1114(f) (2000)).

<sup>39</sup> KAN. STAT. ANN. § 38-1114(f) (2000).

<sup>40</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

D.H. challenged the constitutionality of the statute on both equal protection and due process grounds, citing the California, Oregon, and Ohio cases interpreting absolute bar statutes.<sup>48</sup> A majority of the court distinguished those cases because of the Kansas statute's provision permitting participants in artificial insemination to opt out of the donor non-paternity presumption through a written agreement.<sup>49</sup> Such a statute had not yet been "subjected . . . to a constitutional crucible"<sup>50</sup> in any state.

On equal protection, the majority opinion echoed the debate of equal-treatment and special-treatment feminist legal scholars of the second-wave,<sup>51</sup> acknowledging that:

K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female.<sup>52</sup>

This statutory distinction survived the intermediate equal protection scrutiny applied to such gender classifications, the majority held, because sex difference transcended mere societal construction: "[G]iven the biological differences between females and males and the immutable role those differences play in conceiving and bearing a child, regardless of whether conception is achieved through sexual intercourse or artificial insemination," it was unlikely that S.H. and D.H. were truly similarly situated.<sup>53</sup>

Even if that analytical hurdle could have been overcome, the majority stated, several legitimate legislative purposes or important governmental objectives were served by Kansas Statute Annotated § 38-1114(f).<sup>54</sup> The statute facilitated an individual married or unmarried woman's choice to become a parent without engaging in sexual intercourse, either because of personal choice or because a husband or partner was infertile, impotent, or ill.<sup>55</sup> It encouraged

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1083 (citing ARK. CODE ANN. § 9-10-201 (2002); FLA. STAT. § 742.14 (2005); N.H. REV. STAT. ANN. § 168-B:3(I)(e) (2002); N.J. STAT. ANN. § 9:17-44(b) (2002); N.M. STAT. ANN. § 40-11-6(B) (2006)).

<sup>51</sup> See, e.g., Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 194-196 (1982).

<sup>52</sup> *In re K.M.H.*, at 1039.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

able and willing men to donate sperm to such women by protecting them from later unwanted claims for support from the mothers or the children. The statute protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability . . . . Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.<sup>56</sup>

The majority then addressed D.H.'s due process claim.<sup>57</sup> D.H. had conceded that the statute's provision for lifting the statutory presumption of donor non-paternity through written agreement meant it would survive due process scrutiny as applied to an anonymous sperm donor.<sup>58</sup> However, he asserted it could not be constitutionally applied to him, a known donor, because it deprived a biological father of his parental rights without notice and a meaningful opportunity to be heard.<sup>59</sup>

The majority agreed that an absolute-bar statute such as those at issue in the earlier California, Oregon, Colorado, and Ohio cases would lead to due process concerns.<sup>60</sup> But it upheld the Kansas statute and its application to D.H., ruling that the requirement of a writing to memorialize any agreement between a woman and a sperm donor denied D.H. no procedural right.<sup>61</sup> Rather, his own inaction before donating merely set up a burden of proof that he was unable to meet.<sup>62</sup>

The court also rejected D.H.'s argument that the statute inevitably made the woman who is inseminated the sole arbiter of whether a donor can become a father to a child his sperm helps conceive.<sup>63</sup> While this may be true after a donation has been made, up until that point, a prospective donor would retain complete autonomy; he could refuse to facilitate the procedure unless the woman agreed to paternity on his terms.<sup>64</sup>

The majority also rejected D.H.'s due process claim to the extent it rested upon substantive rather than procedural grounds.<sup>65</sup> It held:

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<sup>56</sup> *Id.*

<sup>57</sup> *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

<sup>64</sup> *Id.* at 1041.

<sup>65</sup> *Id.*

We simply are not persuaded that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive due process rights. Although we agree . . . that one goal of the Kansas Parentage Act as a whole is to encourage fathers to voluntarily acknowledge paternity and child support obligations, the obvious impact of the plain language of this particular provision in the Act is to prevent the creation of parental status where it is not desired or expected . . . . [The statute] ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not cut *off* rights that have already arisen and attached.

We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors . . . . To the extent it does not realize the expectation of a known sperm donor, the statute tells him exactly how to opt out, how to become and remain a father.<sup>66</sup>

#### K.M.H. AND FEMINISM

The sensibility that animates third-wave feminism is evident in both the Kansas statute applied in *K.M.H.* and the reasoning of the decision. Although certain aspects of both may continue to rely on patterns and presumptions, in our view, they are consistent with the positive power and individualism that are hallmarks of feminism's third-wave.

Both the statute and majority opinion operate from a position of comfort with a contract model for formation and preservation of parental rights. Under this model, the parties are free to elect, in writing, the family structure they desire.

This freedom would not be possible but for the deconstruction of Victorian separate spheres family life accomplished during the second-wave. The gender determinism from that ideology had to be attacked and destroyed. But we note that the statute and *K.M.H.* avoid any second-wave trap of essentialist insistence on what any person, female or male, should want or must have as a replacement.

This freedom also rests upon a characteristically third-wave expectation of gender-neutral bargaining power or, perhaps, more accurately in the artificial insemination context, biological sex-driven

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<sup>66</sup> *Id.* at 1040-41 (emphasis in original). Two Kansas Court of Appeals judges, sitting by designation, dissented in *In re K.M.H.* They would have ruled that the statute violated due process as applied to D.H., because of his allegation that an oral agreement existed. They assumed that D.H. had a fundamental right to be a father arising out of his biological connection to the twins and could not be deprived of it without an active waiver. *Id.* at 1047-50 (Caplinger, J., dissenting, joined by Hill, J.). One of the judges also wrote separately, arguing the majority's interpretation of KAN. STAT. ANN. § 38-1114(f) did violence to half of the twins' heritage. *Id.* at 1051 (Hill, J., dissenting).

sharing of it. The statute as drawn and enforced by the majority aims to facilitate not only what a given individual wants but what she or he needs to maximize family or non-family potential.

The upshot: under a statute such as that operating in Kansas, any woman or donor choosing to participate or not to participate in an artificial insemination procedure is not controlled by gender-based presumptions of parentage or any other person's estimation of the one, true set of "feminist 'values.'"<sup>67</sup> This means that certain types of law reform may be consistent with and conducive to further development of third-wave feminist ideals. We are reminded of Gloria Steinem's famous vision: "We are talking about a society in which there will be no roles other than those chosen or those earned; we are really talking about humanism."

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<sup>67</sup> See Ferguson, *supra* note 33, at 133.

## ARTICLE

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### HERE COMES THE JUDGE! GENDER DISTORTION ON TV REALITY COURT SHOWS

By: Taunya Lovell Banks\*

*[W]e are seeing a shift from . . . the failed representation of the real . . . to . . . the impenetrable commingling of fiction and reality . . . representations no longer need to be rooted in reality. It is sufficient for images simply to reflect other images.*<sup>1</sup>

*Law has become ... entertainment law.*<sup>2</sup>

#### I. INTRODUCTION

In 2000, television reality court shows replaced soap operas as the top daytime viewing genre. Unlike the prototype reality court show, *The People's Court* presided over by the patriarch Judge Wapner, a majority of reality court judges are female and non-white. A judicial world where women constitute a majority of the judges and where non-white women and men dominate is amazing. In real life most judges are *white* and *male*.

During that break-through 2000-2001 television viewing season, seven of the ten reality court judges were male — three white and four black. Of the three women judges, only one Judy Sheindlin of *Judge Judy* was white. The others, Glenda Hatchett of *Judge Hatchett*, and Mablean Ephraim of *Divorce Court*, were black. At the beginning of the 2007-2008 viewing season there were still ten shows but women judges outnumbered men, and only two judges, Judy Sheindlin and David Young, were white. Five of the six women judges are non-white — three Latinas and two black Americans as are three of the four males — two black and one Latino. Judicial diversity, however,

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<sup>1</sup> RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 128 (2000).

<sup>2</sup> Lisa Scottoline, *Get Off the Screen*, 24 NOVA L. REV. 655, 656 (2000).

does not apply to Asian-Americans who remain absent from the benches of reality daytime television court shows.

Despite the integrated television reality court judiciary, many daytime viewers might be surprised to learn that women judges, especially black and other non-white women judges, are still the exception in real courts. Despite an almost equal percentage of women and men enrolled in American laws schools, women tend to be concentrated in less prestigious legal jobs after graduation.<sup>3</sup> They currently comprise 18.67% of federal judges and twenty percent of state judges; the percentage of black judges, female *and* male, is around six to eight percent (8.6% federal, 5.9% state) and even lower for Latinas/os and Asian Americans.<sup>4</sup> Thus the overrepresentation of white and non-white women on the television reality court show benches warrants closer examination.

Prior scholarship on reality TV court shows tends to focus on the shows' impact on public knowledge and perception about the justice system.<sup>5</sup> There has not been a meaningful feminist critique of these

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<sup>3</sup> See generally Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law School and Law Firms*, 26 CHICANO-LATINO L. REV. 169 (2006); Mary C. Noonan et al., *Pay Differences Among the Highly Trained: Cohort Differences in the Sex Gap in Lawyers' Earnings*, 84 SOC. FORCES 853 (2005) (comparing "the sex gap in earnings 15 years after graduation for two cohorts of lawyers and find that it has remained constant over time.").

<sup>4</sup> See Lynn Hecht Schafran, *The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 955 (2005) (estimating the number of women state judges at "a little over" 20%); ABA National Database on Judicial Diversity in the State Courts, <http://www.abanet.org/judind/diversity/national.html> (last visited Mar. 25, 2008) (5.9% African American, 1.1% Asian/Pacific Islander, 2.8% Latina/o, 0.1% Native American); Federal Judicial Center, *Judges of the United States Courts*, available at <http://www.fjc.gov/public/home.nsf/hisj> (searchable database providing statistics of sitting federal judges confirmed through Sept. 7, 2007) (18.6% women, 8.6% African American, 0.8% Asian American, 5.4% Hispanic, and 1 Native American judge, or 0.08%).

<sup>5</sup> See, e.g., Lawrence M. Friedman, *The One-Way Mirror: Law, Privacy, and the Media*, 82 WASH. U.L.Q. 319, 340 (2003); Steven A. Kohm, *The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 LAW & SOC'Y REV. 693, 694 (2006) (comparing two models of law and justice embodied in two daytime reality court shows; and noting that "American television programming focusing on the law forms a significant part of the cultural legal landscape for many Americans. . . . The result of this can be unrealistic expectations about the nature of future careers in law and a more simplistic outlook on legal ethics."); Erika Lane, *The Reality of Courtroom Television Shows: Should the Model Code of Judicial Conduct Apply to T.V. Judges?*, 20 GEO. J. LEGAL ETHICS 779, 780-85 (2007); David Ray Papke, *From Flat to Round: Changing Portrayals of the Judges in American Popular Culture*, 31 J. LEGAL PROF. 127, 147-48 (2007); Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1 (2001) (discussing impact of the shows on juror attitudes); Kimberlianne Podlas, *The Monster in the Television: The Media's Contribution to the Consumer Litigation Boogeyman*, 34 GOLDEN GATE U. L. REV. 239, 260-69 (2004); Bruce Zucker and Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of*

shows. By “feminist critique,” I do not mean mere comparisons of female and male TV judges, but rather a more nuanced critique that considers the shifting gender and racial composition of the judges, the absence of white men and overrepresentation of non-whites females and males.

Uninformed television viewers might assume that judges on reality television court shows resemble and perform the same work as real life judges. If this is the case, then the prevalence of and preference for women judges on television may suggest that the viewing public believes women, especially non-white women, are as good or even better judges than men. But it also is possible that the prevalence of TV women judges may indicate just the opposite. During the late 1980s and early 1990s there were many films produced with women lawyers as main characters, yet women lawyers were not portrayed in as positive a light as their male counterparts.<sup>6</sup>

Thus it is important to more closely examine TV reality court judges to determine what messages the predominately non-white women judges on these shows transmit to audiences and why some judges are more popular than others. This essay looks at the gender and racial composition and demeanor of these television reality judges. What follows is not an empirical exercise, but rather a critical analysis by an observant daytime viewer who viewed these shows through a third-wave feminist legal lens<sup>7</sup> mindful of the messages conveyed to the viewer about courts and judges.

This analysis asks whether women TV reality judges behave differently from their male counterparts and whether women’s increased visibility as judges on daytime reality court shows reinforces or diminishes traditional negative stereotypes about women, especially

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*the Small Claims Court System*, 37 U.S.F.L. REV. 315, 322-24 (2003); Taunya Lovell Banks, *Will the Real Judge Stand-Up: Virtual Integration on TV Reality Court Shows*, PICTURING JUSTICE: THE ONLINE J. OF LAW & POPULAR CULTURE, (Jan. 2003), available at [http://www.usfca.edu/pj/realjudge\\_banks.htm](http://www.usfca.edu/pj/realjudge_banks.htm).

<sup>6</sup> See Stacy Caplow, “Still in the Dark: Disappointing Images of Women Lawyers in the Movies”, 20 WOMEN’S RTS. L. REP. 55, 69 (1999); Cynthia Lucia, *Women on Trial: The Female Lawyer in the Hollywood Courtroom*, in FEMINISM, MEDIA, AND THE LAW, 146, 147 (Martha A. Fineman & Martha T. McCluskey eds., 1997); Louise Everett Graham & Geraldine Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 KY. L.J. 1027, 1067 (1996).

<sup>7</sup> Early feminists focused first on removing legal barriers to full equality for women, they were followed by so-called second wave feminists who focused on substantive equality but who tended to adopt an essentialist approach to feminism ignoring the heterogeneity among women based on socio-economic status, sexuality, age, race, ethnicity, disability, religion and citizenship status, among many other aspects of identity. Third-wave feminist seek to approach gender equality from a more comprehensive perspective looking at various forms of subordination that disproportionately impact women.

non-white women. These are important questions because public perceptions of law and legal institutions influence the practice of law and societal perceptions about the legitimacy of law and legal institutions.<sup>8</sup> These perceptions may affect whether more women are elected or appointed as judges in the United States and which women get selected. Thus perceptions about the competence of black and Latina women jurists in particular, whether true or false, have serious implications for the legal system and any quest for a more representative judiciary in the United States.

## II. DAYTIME “REALITY” COURT SHOWS: APPEARANCE VS. *REAL* REALITY

Most of the new court shows and judges bear little resemblance to Judge Joseph A. Wapner, the retired Los Angeles County judge on *The People’s Court* in the mid 1980s. Contemporary reality television courts “essentially . . . exploit law and [the] trial process to . . . air dirty laundry,”<sup>9</sup> something that rarely occurred on Wapner’s *The People’s Court*. The new court shows also grossly distort public notions about acceptable judicial behavior as well as the demographics of the American judiciary.

Some people dismiss the influence of reality court shows by labeling them low-brow and assume that most people do not take them seriously. But as Georgia State Supreme Court Justice Leah Ward Sears writes:

Because the sets are dressed to look like courts of law and are presided over by lawyers in black robes who at least used to be judges, and involve people who have agreed by contract to have their real court cases settled on television, people tend to take these shows very seriously. As they should. But this poses some serious problems.<sup>10</sup>

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<sup>8</sup> Erika Lane reports: “the State of California Commission on Judicial Performance, a state organization that investigates judicial misconduct, frequently receives complaints from California citizens about disappointment because judges were entirely different than what was expected, based on viewers’ perception from syndicated-shows.” Lane, *supra* note 5, at 784 (citing Lawrence M. Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539, 552 (2000)). Zucker and Herr report: “Television courtroom dramas have had such an effect on the public that in some cases, winning parties in judicial actions have reported that they are actually upset with the outcome of their case because the judge ‘has not humiliated their opponent.’” Zucker and Herr, *supra* note 5, at 323-24.

<sup>9</sup> Michael M. Epstein, *Judging Judy, Mablean and Mills: How Courtroom Programs Use Law to Parade Private Lives to Mass Audiences*, 8 UCLA ENT. L. REV. 129, 129-31 (2001).

<sup>10</sup> Leah Ward Sears, *Those Low-Brow TV Court Shows*, CHRISTIAN SCIENCE MONITOR, July 10, 2001, available at <http://csmonitor.com/durable/2001/07/10/p11s1.htm>.

Even if most television viewers know better, the least educated viewers are more likely to rely disproportionately on television as their primary source of information about the legal system,<sup>11</sup> and these viewers constitute a substantial portion of the daytime viewing audience.<sup>12</sup>

Television critic David Zurawik writes: “Television is supposed to help viewers get the kind of information they need to act as responsible citizens in a democracy — not confuse them. But how are we to expect clarity in a genre that is built on making the artificial seem real?”<sup>13</sup> Despite their entertainment value, the impact of reality court shows on viewer’s perceptions of the legal system, including attitudes about the judiciary, should not be underestimated. The next section focuses on the contemporary prototype reality court show, *Judge Judy*, identifying those aspects of this show that make it the most popular daytime syndicated series.

### III. *JUDGE JUDY*: THE PROTOTYPE TELEVISION REALITY COURT JUDGE

Judy Sheindlin, a former New York City Family Court Judge, is largely responsible for the current resurgence in the popularity of

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<sup>11</sup> Valerie Karno, *Remote Justice: Tuning in to Small Claims, Race, and the Reinvigoration of Civic Judgment*, in PUNISHMENT, POLITICS, AND CULTURE 261, 264 (Austin Serat & Patricia Ewick eds., 2004) (noting that the advertisements on televised small claims court shows “seem to be targeting the unemployed, uneducated sector of the U.S. population”); Kohm, *supra* note 5, at 696 (noting “The final reason it is important to grapple analytically with the reality court TV phenomenon is related to the presumed audience to which the programs are marketed. Daytime television has traditionally been directed toward housebound female audiences, and the recent crop of daytime reality judging programs clearly follows this trend. The preponderance of female judges — and to a lesser extent African American male judges — at the center of the reality-based courtroom genre is strong evidence of a presumed female and indeed racialized audience.”) (citation and footnote omitted). Kohm continues, “The strategy of using judges drawn from racial minority groups seems to be an effective tool in attracting minority viewers. A recent Nielsen Media analysis of African American audiences in 2004 shows that the audience of Judge Mathis is 51% African American — the highest proportion of African American viewers of any daytime reality courtroom program.” *Id.* at 97 (footnotes omitted).

<sup>12</sup> Consider the following example. In 2001 after watching *Judge Judy* and *Judge Joe Brown*, the two most popular reality court shows, thirty-five year old Anthony Widgeon thought he knew how the U.S. court system worked. He knew about “suppressing the evidence and all that good stuff.” Confident, Widgeon appeared in a Virginia circuit court, without a lawyer, on a domestic matter, thinking he could delay the case by moving for a continuance. Shocked when the judge preceded anyway, Widgeon, after being quickly locked up, learned the hard way that real court is not like *Judge Judy* or *Judge Joe Brown*. Mike Saewitz, *Many Judge U.S. Justice System By TV Courtroom Shows*, THE VIRGINIAN PILOT, Oct. 3, 2001, at E1. Over the years lawyers and judges have told me similar stories.

<sup>13</sup> David Zurawik, *Beware — Reality TV Has Escaped From the Set*, BALT. SUN, Dec. 14, 2003, at 8F.

reality court television shows. Her show, *Judge Judy*, consistently ranks among the top twenty daytime television shows. Unlike the fatherly Judge Wapner, Sheindlin is “a no-nonsense mother with little patience for squabbling litigants.”<sup>14</sup> “To sustain her reputation as a stern judge . . . she is given to shrill, sudden shouts of ‘Quiet!’ when interrupted.”<sup>15</sup> Nevertheless, the trials portrayed on *Judge Judy* are not totally lacking in reality and “[t]he frustration that Judge Judy exhibits and acts on is realistic. Litigants [in *pro se* courts] can be unpleasant, rude to the judge and to the opposing party, painfully repetitious, and unprepared, and judges can find that frustrating.”<sup>16</sup> But in actual small claims court judges are more vigilant in controlling poor behavior and limiting arguing between the litigants because real judges have no desire to entertain onlookers.

In contrast to Sheindlin, the focus of black women reality court judges seems slightly different. Mablean Ephriam and Glenda Hatchett, the first black women judges, presented themselves differently and, as a result, may be perceived differently by viewers because of negative stereotypes about blacks and black women in particular.<sup>17</sup> The next section discusses this point in more detail.

#### IV. BLACK WOMEN DAYTIME TELEVISION REALITY COURT JUDGES

##### A. Mablean Ephriam: *Divorce Court*

The original *Divorce Court* actually predates Wapner’s *The People’s Court* airing initially from 1957-1969 and again from 1985-1992, but the disputes in the two earlier versions were fictional.<sup>18</sup> In August 1999 a revived and revamped version of *Divorce Court* aired becoming a popular reality judge show.<sup>19</sup> The “judge” was Mablean

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<sup>14</sup>Dirk Smillie, *Legal Eagles Fly High Through TV Airwaves*, THE CHRISTIAN SCIENCE MONITOR, Oct. 2, 1997, at 12.

<sup>15</sup> Reuven Frank, *Courting the Viewers*, THE NEW LEADER, Feb. 24, 1997 at 20.

<sup>16</sup>Jennifer Cromwell, *Small Claims Court and Judge Judy: Is Life Imitating Art?* Video project prepared for my *Law in Film* class at Washington College of Law, American University, April 24, 2001, 6. (manuscript and video on file with author).

<sup>17</sup> Black women are often stereotyped in negative and often conflicting ways as bad mothers and simultaneously emasculating matriarchs, promiscuous red-hot mamas or asexual Mammies, superwomen and dependent welfare mothers. Literature and film portrays black women as Mammy or Prissy, Jezebel, Topsy, Eliza or Sapphire. Adele Alexander, *She’s No Lady, She’s a Nigger: Abuses, Stereotypes and Realities from the Middle Passage to Capitol (and Anita) Hill*, in RACE, GENDER, AND POWER IN AMERICA 3, 18 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (discussing common stereotypes attributed to black women).

<sup>18</sup> Thus technically only the latest version of *Divorce Court* qualifies as a daytime reality court show. Scottoline, *supra* note 2, at 656-57.

<sup>19</sup>*Id.*

Ephriam, a Mississippi-born Los Angeles lawyer, who practiced family law but never was a judge. Despite the show's name, Ephriam is not empowered to grant divorces. Instead, she acts as a mediator for petty domestic claims growing out of litigants' dissolved or dissolving marriages. While purporting to adopt the no nonsense style of her role model, Judge Judy,<sup>20</sup> Ephriam seems more concerned with the well-being of the litigants than application of the law to their disputes, intermingling personal counseling with her rulings.

In a dispute between an estranged black couple over reimbursement for a weight loss program, it becomes clear that the plaintiff (the wife) still loves her husband and has not gotten over the break-up of their marriage. The plaintiff who expected her husband to support her financially is outraged that she has to pay spousal support. In response Ephriam lectures the woman that "we are all equal now," referring to the push by feminists and, one assumes, black civil rights activists for equality before the law. The result, Ephriam notes, is that wives, like husbands, have an equal obligation to support their former spouses. Then Ephriam, a divorced mother with children, continues to lecture the woman plaintiff, making a personal reference about the difficulty of moving on with one's life when you still love someone. In chambers following this trial, she continues this discussion with her bailiff, clearly lecturing the audience not about resolving legal issues, but about resolving painful personal issues. This is moralizing not impartial decision-making, it is "therapeutic justice."<sup>21</sup>

On one level, there is a certain irony about a black woman telling another black woman that we are all equal now, at least in the eyes of the law. Given continuing evidence of anti-black bias, many commentators would disagree with Ephriam's statement. Yet, her comment carries incredible power when she is positioned as a *real* judge in a *real* court proceeding. Thus, her comments about equality may call into question the beliefs and experiences of some viewers, especially other black women. But on another level many viewers may applaud Ephriam for adopting a more humane approach to legal disputes. Unlike most real-life judges she seems genuinely concerned about the parties' well-being, not just about how their dispute should

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<sup>20</sup> Reuven, *supra* note 15, at 20.

<sup>21</sup> Some commentators view the operation and application of the law as resulting in anti-therapeutic consequences and call for the development of a more therapeutic jurisprudence. For a discussion of therapeutic justice in the context of mediation proceedings see Ellen A. Waldman, *The Evaluative Facilities Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 158-60 (1998).

be resolved by applying legal principles. She makes judges seem more human.

To another set of television viewers, Ephriam is a discomfoting image. Dark skinned, and until recently physically large, she is prone to roll her eyes, and may remind some viewers of the stern Mammy figure in the provocative film classics like *Birth of a Nation* or *Gone with the Wind*. The Mammy figure in these films protects and upholds the honor and beliefs of her white masters, even after emancipation. Mammy “acquiesce[s] to and support[s] White supremacy.”<sup>22</sup>

According to Pamela Smith, many whites today still “search for the Mammy in all Black women.”<sup>23</sup> Black working women continue to be perceived as either Sapphire (the angry black woman) or Mammy.<sup>24</sup> But the Mammy character is Sapphire’s stereotypical opposite. The modern or reworked Mammy, best typified according to Smith by Oprah Winfrey, works outside the home and may even be portrayed as occupying a position of power.<sup>25</sup> Because the image of black women as Mammy is so pervasive, it becomes, consciously or unconsciously, the expected and preferred behavior for some black working women.<sup>26</sup> Thus, it is possible for a black woman judge to be perceived by some viewers as a modern-day Mammy.

While other viewers might argue that Ephriam is more of a modernized Sapphire than Mammy, Smith sees a clear distinction between these two stereotypical images, writing:

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<sup>22</sup> Pamela J. Smith, *Part II – Romantic Paternalism — The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women and Men*, 3 J. GENDER RACE & JUST. 181, 197 (1999). Pamela Smith also writes that Mammy is “typically portrayed as overweight, dark, and with characteristically African features.” Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. OF WOMEN & L. 53, 120 (1999). Regina Austin describes “Mammy ... [as] ‘the perfect slave — a loyal, faithful, contented, efficient, conscientious member of the family who always knew her place; and she gave the slaves a white-approved standard of black behavior!’” Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 570 (1989).

<sup>23</sup> Smith, *Teaching the Retrenchment Generation*, *supra* note 22, at 118.

<sup>24</sup> Regina Austin describes the stereotypical Sapphire, a character on *Amos ‘N’ Andy*, a radio and then later a television show, as a “tough, domineering, emasculating, strident and shrill” black woman. Austin, *supra* note 22, at 539-40.

<sup>25</sup> Smith, *Teaching the Retrenchment Generation*, *supra* note 22, at 121. A brown-skinned woman, Winfrey rose to popularity as an overweight talk show host. Despite her wealth and power Winfrey still comes across to her audience as a nurturing mother surrogate. In a footnote Smith cites examples of other modernized television mummies, two full-figure talk show hosts, Star Jones of *The View* and Mother Love of *Forgive or Forget*, along with Whoopi Goldberg who one newspaper’s readers voted best suited to Mammy in a modern version of *Gone With The Wind*. *Id.* at 120 n.255.

<sup>26</sup> Smith, *Part II - Romantic Paternalism*, *supra* note 22, at 197-98.

What separates Sapphire from Mammy is who benefits from the Black woman's efforts. . . . Mammy's acceptability is grounded in the fact that she uses her assets (and liabilities) for the benefit of her white charges. . . . not for her . . . aggrandizement or the aggrandizement of her people. . . . her every effort is designed to further white supremacy and Black acquiescence. In contrast, Sapphire's efforts are not intended to benefit whites and instead are for her own aggrandizement.<sup>27</sup>

Ephriam as the upholder of the law benefits the dominant culture.

Perhaps, characterizing Ephriam as a modern Mammy may be too harsh an indictment. Nevertheless, her bugging or rolling eyes and other gestures on the bench are reminiscent of minstrel clowning and undoubtedly invoke those images in the minds of some viewers. Then again, negative stereotypes also might attach to Judy Sheindlin's behavior. She is Jewish, and unlike the mild waspish Judge Wapner, her tart tongue may be seen by some audiences as stereotypical behavior for a Jewess. But I may simply be buying into the power of the stereotype.<sup>28</sup>

When the seventh season began Judge Ephriam appeared without her trademark glasses and showing off her new figure.<sup>29</sup> Although her behavior did not change, Ephriam, with her new glamorized image, looks less like a traditional Mammy. Her changed physical appearance had an impact. In March 2006 Fox Television Network fired Ephriam when she asked for an increase in salary<sup>30</sup> and replaced her with a light skinned "more conventionally attractive" black woman, Lynn Toler, a former administrative judge from Ohio.<sup>31</sup> The

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<sup>27</sup> Smith, *Teaching the Retrenchment Generation*, *supra* note 22, at 128 n.286.

<sup>28</sup> Perhaps it is our own stereotypical images of black women as Mammies, reinforced by both film and television that are deeply embedded in even the most progressive minds. Visual images, especially images projected through the intimacy of television, have the power to subvert *all* viewers and even television judges. Yet still other viewers may see little difference in the behaviors of Ephriam, Judge Judy and many real-life judges. Like real-life judges, both judges uphold the status quo and apply middle-class societal values.

<sup>29</sup> Between seasons she lost a significant amount of weight on another television reality show, VH1's *Celebrity Fit Club*. Don Kaplan, *Lighter Scales of Justice – Celebrity Judge Drops Lbs.*, N.Y. POST, Aug. 25, 2005, at 83 (noting that Ephriam lost "about 70 pounds . . . over the summer . . . Ephriam also doesn't need her trademark glasses anymore. As part of her own personal celebrity makeover, the judge underwent Lasik eye surgery.").

<sup>30</sup> R.D. Heldenfels, *Dennis the Missing*, TULSA WORLD, Oct. 29, 2006, at 46 ("Mablean Ephriam left the [Divorce Court] series after seven seasons when she and the show could not agree on a new contract. Issues reportedly included money (with Ephriam saying she was getting paid less than other TV judges), workload and Ephriam's hairstyle. She was replaced by Lynn Toler, who was also a judge in real life.").

<sup>31</sup> DivorceCourt.com, Meet Judge Toler, [http://www.divorcecourt.com/text.asp?category\\_id=50](http://www.divorcecourt.com/text.asp?category_id=50) (last visited Sept. 29, 2008).

ratings dropped twenty percent!<sup>32</sup> Perhaps some viewers missed seeing a black woman in authority that looked like them.

*B. Glenda Hatchett: Judge Hatchett*

By incorporating periodic counseling of litigants, Judge Ephriam deviates somewhat from the traditional style of television reality court show judges. A more openly therapeutic version of Ephriam's successful formula was adopted by Glenda Hatchett, whose show, *Judge Hatchett* premiered in fall 2000. Columbia TriStar unveiled *Judge Hatchett*, and characterized Hatchett, a black woman and a former Juvenile Court judge, as someone who "reportedly punishes litigants beyond the small-claims court threshold, and the ensuing punishment is documented via videotape."<sup>33</sup> The publicity for the show also characterized Hatchett as a "very tough but very compassionate [judge who] . . . doesn't take any grief from anybody. . . ."<sup>34</sup> In an interview with the black-owned Amsterdam News, she described her show as "a forum where I can reach beyond the young people that I impacted in my courtroom . . . . It won't be enough to hit the gavel and make a judgment. It's more important that they understand the life lessons after the judgment ends."<sup>35</sup>

During the first season the show opened by touting Hatchett's prior judicial experience, saying that she offers an "unconventional brand of justice" and "will do whatever it takes to make a difference." This description of her judicial role does not squarely fit with any stereotypical depictions of black women, except, perhaps the more general racial stereotype of black Americans as lawless and disrespectful of conventional justice. Her actions on the show during the first season reflected this new kind of justice.

In one episode a mother sued her daughter for ruining the mother's credit by defaulting on rental payments for an apartment secured by the mother. Judge Hatchett not only ordered the daughter to repay the

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<sup>32</sup> Marc Berman, *Mr. Television: Syndication Nation*, MEDIA WEEK, June 11, 2007, at 34 ("You have to wonder why Lynn Toler replaced slimmed-down Mablean Ephriam on Divorce Court. Without Ephriam, ratings have crashed and the show is not nearly as compelling."); Marc Berman, *Syndication Report: Part 1/2006-07 Season*, 16 MEDIA WEEK 45, Dec. 11, 2006, at 14 ("Twentieth Television's veteran Divorce Court (with Judge Lynn Toler in place of Judge Mablean Ephriam) has suffered dropoff. Comparably, Divorce Court is down by 20 percent in households (to 2.0 from 2.5), 15 percent in women 18-49 (to 1.1 from 1.3) and 14 percent in women 25-54 (to 1.2 from 1.4).").

<sup>33</sup> Chris Pursell, *Judge Hatchett Upgraded*, 19:36 ELECTRONIC MEDIA p8, 1/7p, 1c (09/04/2000).

<sup>34</sup> *Id.*

<sup>35</sup> *On Sept. 11, Here Comes The Judge: Hatchett*, N.Y. AMSTERDAM NEWS, Sept. 13, 2000 at 22.

money, but also arranged for the daughter (a twenty-eight year old unmarried mother of five children who was expecting twins) to get counseling and job training. Hatchett also expressed a desire to help the mother repair her credit. All of these solutions go beyond traditional judicial remedies. Thus, Hatchett's court seems more like a social service office than a traditional court of law.

Surprisingly, her unconventional approach in the courtroom failed to garner high ratings, so when the next viewing season debuted gone were the references to Hatchett's unconventional form of justice. Instead, she reemerged in the court's opening as a tough talking berating judge, much like the stereotypical emasculating Mammy or Judge Judy. The show's new introduction is a series of contradictory video clips. The first clip looks and sounds like the old Hatchett. She is shown embracing a child and saying "I did it to save your life." The next clip looks like the introduction to other popular reality court shows. Hatchett asks two sets of litigants "who threw the first blow" and both parties respond simultaneously by pointing to the other side. Her demeanor changes abruptly in the final two clips. Both clips show her grimacing face saying "there is going to be hell to pay" and "do you want me to come off this bench!"

The revamped *Judge Hatchett* sends confusing messages to the viewers. On one hand, Hatchett seems like a compassionate caring judge who is willing to go outside the traditional legal parameters to resolve disputes, but her conciliatory approach is uneven. Sometimes she calls in counselors for the parties and other times she does not. At other times, she is more aggressive using strong threatening language uncommon for even the toughest real life judge. Her modified style is reflected in the cases she hears. Some are family court cases, involving wayward children or paternity questions, but increasingly the show solicits more salacious or contentious cases with little real legal content. In these cases rather than dispensing with irrelevant factual details, Hatchett often lets the disputing parties go on at length with irrelevant descriptions of each party's bad behavior returning briefly at the end to apply the law in resolving the legal aspect of the dispute. Thus the show often sounds like a soap opera that takes place in a courtroom.

The show's ratings improved slightly after the revised format allowing Hatchett to survive for five seasons, but *Judge Hatchett* remained in the ratings basement for reality court shows. Original

production ended in spring 2008.<sup>36</sup> The fate of *Judge Hatchett* suggests that television ratings strongly influence show format and judicial behavior of television judges. Hatchett's original demeanor as a caring judge willing to go outside the law did not fit neatly with the audience's expectation or preference for a more hard-nosed judge. Initially Judge Hatchett, her open robe worn like a jacket, was interested in doing what was best for the litigants, not necessarily what was dictated by the legal system.<sup>37</sup> When low ratings threatened the show Hatchett adopted a format similar to more successful women television reality court judges. Rather than present a positive image of a black woman judge to counter contemporary televised stereotypes, she was forced by the market to conform to a more Mammy-like model as the bossy black woman upholding the law.

#### V. LATINA/O REALITY COURT JUDGES

Like black women judges, the preferred television court room behavior for some Latina judges may be influenced by racially or ethnically tinged stereotypes. During the 2007-2008 viewing season, there were three female and one male Latina/o judges on daytime television reality court shows. Except for Judge Marilyn Milian on *The People's Court*, Latina/o judges are a recent addition to daytime courtrooms.

##### A. Marilyn Milian: *The People's Court*

Marilyn Milian, a former Miami-Dade Circuit Court judge, was the first Latina judge on a daytime reality court show.<sup>38</sup> Prior to *The People's Court* judges had persistently low ratings and a revolving door of white male judges.<sup>39</sup> The ratings improved when Milian took

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<sup>36</sup> Paige Albiniak, *Syndication Ratings: Judge Judy Strong in Courtroom, Resilient in Ratings*, BROADCASTING & CABLE, Mar. 11, 2008, available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6540146>.

<sup>37</sup> Her actual personal philosophy is reflected in a book she co-authored in 2003. GLENDA HATCHETT & DANIEL PAISNER, SAY WHAT YOU MEAN AND MEAN WHAT YOU SAY!: 7 SIMPLE STRATEGIES TO HELP OUR CHILDREN ALONG THE PATH TO PURPOSE AND POSSIBILITY (2003).

<sup>38</sup> Lynda Richardson, *From the Bench, Judgment and Sass*, N.Y. TIMES, Mar. 27, 2001, at A25. An article discussing Milian's presence on *The People's Court* starts: "As the glamorous new judge wielding the television gavel on 'The People's Court,' Marilyn Milian wears crimson lipstick and matching fingernails." It is highly unlikely that a male judge would be described in such physical terms. So Judge Milian's gender even more than her ethnicity is the focus of the article. Only three paragraphs later does the article mention that she is both the first female judge on *The People's Court* and the first "Hispanic" judge. *Id.*

<sup>39</sup> After Judge Joseph A. Wapner left the show in 1994 the show ended only to be revived in 1997 with Edward Koch, the former mayor of New York City as the "judge" (1997-99)

the bench.<sup>40</sup> Most of the time, she focuses on the legal issues and minimizes irrelevant personal details. There are infrequent outbursts directed at disrespectful or disruptive litigants causing some viewers to wonder whether Milian, a “white-looking” Cuban-American, is really a closeted stereotypical Latin spitfire.<sup>41</sup> It is unclear, however, whether Milian’s popularity stems from her personality or ethnicity.

Judge Steven Kohm argues that *The People’s Court* has a law-focused format unlike *Judge Judy* whose format is personality-focused.<sup>42</sup> Thus on *The People’s Court* “[l]aw is a symbolic resource for the program, legitimating not only the decision making of the judge, but also the very authority the judge relies on for authenticity.”<sup>43</sup> So *The People’s Court* differs from the other television reality court shows. Any moralizing or commentary occurs outside the court room when Harvey Levin, characterized as the “host and legal reporter,” periodically interviews spectators in Times Square during the show.<sup>44</sup> The different format may explain why Milian can be a ratings success without resorting to the theatrics of Sheindlin, Ephraim, or Hatchett.

Personality-focused reality court shows like *Judge Judy* tend to reflect the personal ideology of the judge — the “charismatic lawgiver” or “ultimate truth machine,”<sup>45</sup> a situation Kohm argues represents “a distinctly anti-democratic vision of law.”<sup>46</sup> More than the personality-focused Sheindlin, Ephraim, or Hatchett, Milian’s demeanor mimics conduct deemed judicial by most of real-life judges. Undoubtedly influenced by Milian’s success, and the growing Latina/o

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followed by former New York State Supreme Court Judge Jerry Sheindlin, the husband of Judge Judy (1999-2001). Kohm, *supra* note 5, at 701.

<sup>40</sup> Lola Ogunnaike, *Don’t Mess with the People’s Judge*, N.Y. TIMES, July 2, 2006, § 2, at 24 (“She is the show’s first Hispanic judge and its first woman; and, at 45, she is significantly younger than the three men who wielded the gavel before her, all of which appears to be a good thing. Under her brash, no-nonsense watch, the show’s ratings have increased 72 percent.”).

<sup>41</sup> See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993) (Latina women stereotyped as “hot-blooded” and very sexual).

<sup>42</sup> Kohm, *supra* note 5, at 700-01.

<sup>43</sup> *Id.* Kohm continues, the law “reinforces the rational-legal nature of judicial authority... by placing the law firmly in the hands of the citizens.” *Id.* at 701.

<sup>44</sup> *Id.* at 702. Kohm writes: “[T]he narrator advocates a more participatory process. Judges may come and go, but the court remains ‘our’ collective property.” *Id.* at 701. “What separates *Judge Judy* from *People’s Court* is its insistence on viewing Judge Judy as the sole location where law and justice reside . . . . If we revere Judge Judy, it is because she evidences a unique ability to solve problems where others are incapable, like a modern-day Solomon. This is markedly different from the rational-legal authority embodied in *People’s Court* . . . .” *Id.* at 704-05.

<sup>45</sup> *Id.* at 704.

<sup>46</sup> *Id.* at 703.

daytime viewing audience,<sup>47</sup> more Latina judges entered daytime television. Television advertisers as well as media corporations are ever mindful of changing viewer demographics.

*B. Christina Perez: Christina's Court*

Christina Perez, the judge on *Christina's Court*, is a former Los Angeles judge. Previously she hosted *La Corte de Familia* (Family Court) on Telemundo Television Network/NBC which aired internationally in fifteen countries.<sup>48</sup> Her addition to the syndicated English language reality court show line-up probably reflects an attempt to draw Latina/o audiences from Spanish language channels like Telemundo.<sup>49</sup>

The show's website highlights the immigrant background of American-born Perez's Columbia-born parents:

Growing up, Cristina was exposed to all walks of life, cultures, and differing problems facing each community. She watched her parents struggle with racism, finances, and adapting to the U.S. culture with a foreign language. Cristina learned to speak English around the age of 10 and today has mastered both languages. With her unique and well-rounded background, Cristina credits her family's example and desire to remain close to her heritage and culture for all of her personal and professional achievements.<sup>50</sup>

The introduction to her show touts Perez as "direct and fair-minded with a deep passion for the law and ordinary people." This passion leads her to "take the law into her heart." But this promised passion for the law is missing from the show since there was virtually no discussion of law on three recently viewed programs. Instead, during a case about the failure to repay a personal loan, Perez questioned the plaintiff, a former Miss India, at length about her experiences as a beauty queen, showing photographs and video clips of the plaintiff at various events. Then she ruled on the legal issue without explanation. During another case viewers got a detailed description of the plaintiff's modeling career and business dealings, information totally unrelated to the legal claim.

Perez's style is similar to real judges except that she asks litigants totally irrelevant questions designed to draw out parties' stories. As a

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<sup>47</sup> Jeff Zbar, *Law and Disorder Are Hot: English-language Telenovelas, Court Shows Are on the Rise as Syndicators Reach for Hispanics*, ADVERTISING AGE, Mar. 27, 2006, at S13.

<sup>48</sup> CristinasCourt.com, [http://cristinascourt.com/inside.asp?category\\_id=27](http://cristinascourt.com/inside.asp?category_id=27) (last visited Sept. 29, 2008).

<sup>49</sup> Her website cites her as "a fine-tuned example of a successful Spanish to English market crossover." *Id.*

<sup>50</sup> *Id.*

result she seems more like an interview show host sitting on an elevated perch. Perez's personal style seems better suited for a law-focused show like *The People's Court* rather than the show's personality-focused format. The seeming disconnect between Perez's judicial style and the show's format may explain the low ratings.<sup>51</sup>

C. Maria Lopez: *Judge Maria Lopez*

Maria Lopez of *Judge Maria Lopez* is the stereotypical "feisty" Latina judge, yet ironically her show has the lowest ratings.<sup>52</sup> In the show's opening she is shown saying that "there is only one person who decides the truth here, me." In the background the words "passionate," "strong," "experienced," "fair," "tough," and "pioneer" appear on the screen as Lopez recounts her arrival as a young child in the United States as a Cuban refugee. After speaking a few words in Spanish, Lopez ends the introduction to the show with "You talk about the American dream, I *am* the American Dream."

Lopez, a former judge with fifteen years of experience, was the first Latina named to the Massachusetts Supreme Court.<sup>53</sup> Her televised judicial image and courtroom behavior is consistent with the personality-focused reality court show, thus her lack of success is puzzling. Lopez attempts to incorporate more legal lessons into each show than most reality court judges, yet fails to connect with the daytime viewing audience. Perhaps her feistiness may remind viewers more of the stereotypical Latin spitfire than the hardnosed Judy Sheindlin, and this difference may explain why her show is less popular than *Christina's Court*. In addition, the immigrant story when advanced by a Latina as opposed to a European may have less currency with poor and working-class viewers today given the rise of anti-immigrant sentiment in the United States. There even may be some ethnic or cultural factors since most Latina/o viewers are Mexican Americans and Lopez is Cuban American, but this is mere speculation.

Among the Latina/o television judges, only Judge Milian has been successful in this venue. Both *Christina's Court* and *Judge Maria Lopez* rank at the bottom of the syndicated TV reality court show ratings. In the February 2008 sweeps, *Christina's Court* tied with the soon to be discontinued *Judge Hatchett*, just above *Judge Maria*

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<sup>51</sup> Albiniak, *supra* note 36.

<sup>52</sup> *Id.*

<sup>53</sup> Roger Catlin, TV Eye: *Back in the Court*, Sept. 18, 2006, available at [http://blogs.courant.com/roger\\_catlin\\_tv\\_eye/2006/09/back\\_in\\_court.html](http://blogs.courant.com/roger_catlin_tv_eye/2006/09/back_in_court.html).

*Lopez*. All three women were beaten out, but just barely, by Alex Ferrer of *Judge Alex*, the lone male Latino judge.<sup>54</sup>

Perhaps Latina/o judges fare better on law focused rather than personality-focused reality court shows because the former rely less on stereotypical behavior to drive the show than the latter. On the other hand, the lack of ratings success of most Latina/o judges may have more to do with the individual personalities of Perez, Lopez and Ferrer than with show format or audience receptiveness. This is a topic worthy of further study, assuming the latest group of Latina/o reality court judges survive. In the meantime, *Judge Judy* continues to reign over daytime syndicated court rooms with an audience that has grown steadily. In February 2008, *Judge Judy* was the top rated daytime show, beating out Oprah.<sup>55</sup>

#### VI. REFLECTIONS ON GENDER OVERREPRESENTATION

Overall, there are some distinctive gender differences between female and male reality television judges. To achieve successful ratings, women judges on personality-focused daytime reality court shows must adopt a style that is tart and aggressive. Thus they are more likely to scream and berate litigants, whereas male judges are more likely to use sarcasm. This behavior when adopted by black women television judges, who are no more likely to scream and berate litigants than other women judges, may be judged more harshly by viewers because of pre-existing negative stereotypes about black women. But the same behavior may be totally ineffective when adopted by Latina women judges. Overall, viewers prefer shows where the judge acts like viewers expect real-life judges and dislike non-traditional judges.

There is some research suggesting that daytime reality court television viewers' perceptions about real-life judges are influenced by these shows. In 2000, Kimberlianne Podlas conducted a small study of jurors in the District of Columbia, Manhattan and Hackensack, New Jersey and found that reality television court shows "cultivate in frequent viewers' beliefs that judges are (and should be) . . . aggressive, expressive, opinionated, inquisitive; [and] should indicate their opinion about . . . evidence or witnesses."<sup>56</sup> But Podlas's study did not control for gender or race differences, so it is unclear whether a

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<sup>54</sup> Albinia, *supra* note 36.

<sup>55</sup> *Id.*

<sup>56</sup> Kimberlianne Podlas, *Blame Judge Judy: The Effects of Syndicated Television Courtrooms on Jurors*, 25 AM. J. TRIAL ADVOC. 557, 570 (2002).

judge's television style, rather than the judge's gender or race, is a greater influence on a show's popularity or whether the type of show, law-focused versus personality-focused, is a factor.

Finally, there is another, albeit smaller consequence of television reality court shows' popularity. The judges on these shows earn much more money as television judges than they did as real-life judges.<sup>57</sup> Many women TV judges had prominent judicial careers. Glenda Hatchett, for example, "one of the youngest and most distinguished African-American women ever to serve as the presiding judge of a state court,"<sup>58</sup> left her position as Chief Judge of the Juvenile Court in Fulton County, Georgia for the lure of a more lucrative career as a television judge.<sup>59</sup> This development is troubling, given the low number of non-white women in the American judiciary.

Almost a decade ago Sherrilyn Ifill worried that the overrepresentation of black judges on television shows generally sends an erroneous message about the extent of black representation in the real life judiciary. This distortion may actually "undermine popular support for increased racial diversity on the bench by suggesting that our nation's benches are already racially diverse or that blacks have 'taken over' the courts."<sup>60</sup> Her fears may not be unfounded. Leonard Steinhorn and Barbara Diggs-Brown, write that the intimacy of television "creates a bond between actor and viewer, between a character and the public . . . [that] offers . . . 'synthetic experience,' a substitute for reality that feels very real . . . a television lawyer [or judge] becomes our model for the real thing."<sup>61</sup>

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<sup>57</sup> Tom Dorsey, *TV News and Reviews: TV judges happy to settle for huge salaries, popularity*, THE COURIER-JOURNAL (Louisville, Kentucky), Sept. 5, 2007 at E5 (noting that the salary of an associate justice on the U.S. Supreme Court earns \$194,000 per year substantially less than most reality court judges; Judy Sheindlin, the highest paid TV reality judge, earns approximately \$30 million per year). Glenda Hatchett earns more on television than the \$111,000 she earned as Chief Judge of Fulton County Georgia's Juvenile Court. Lyle V. Harris, *Hatchett's justice*, THE ATLANTA JOURNAL-CONSTITUTION, Sept. 7, 2000, at D1.

<sup>58</sup> Albinak, *supra* note 36, at 22.

<sup>59</sup> Jamie Vacca, *Raising the Bar*, ATLANTA, Mar. 2001 at 94.

<sup>60</sup> Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 480 n.362 (2000) (citing Patricia J. Williams, *SEEING COLORBLIND FUTURE: THE PARADOX OF RACE* 29 (1st ed., The Noonday Press 1997) (1997)).

<sup>61</sup> Leonard Steinhorn & Barbara Diggs-Brown, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* 144 (1999). *See also*, Benjamin DeMott, *Put on a Happy Face: Masking the Differences Between Blacks and Whites*, HARPER'S MAG., Sept. 1995 at 31-38 (discussing film portrayals of friendships between blacks and whites and comparing the low level of integrated friendships in reality). Michael Winston, writing in 1982 opined that television of the 1960s and 1970s created "'two black realities' — the synthetic reality of the sitcoms [shows like *The Jeffersons* and *Good Times*] and the one broadcast by the news programs — which for a decade, though juxtaposed

Ifill's concern about race distortion in television court rooms may also apply generally to all women and especially to non-white, particularly black women, who more often than the "white-looking" Latina women judges currently on television, wear their race on their faces. Steinhorn and Diggs-Brown remind us that "the average white American family. . . sees more blacks beamed into their living room on a typical evening than they have seen at any other time or place during the day. . . creating the impression that the world is more integrated than it truly is."<sup>62</sup> They call this phenomenon *virtual integration*, the sensation white Americans get from television "of having meaningful, repeated contact with blacks without actually having it."<sup>63</sup> This visual sensation of integration stands in stark contrast to reality, even the reality of television.

It is possible that the increased presence of black women as judges on television may contribute to whites' misconceptions about the socio-economic status of most black Americans.<sup>64</sup> Less educated and affluent whites have the greatest misperceptions about blacks' socio-economic status.<sup>65</sup> These are the same people who may be regular viewers of daytime television.

## VII. CONCLUSION

The overrepresentation of women and non-white male judges on court shows may simply reflect the demographics of the daytime viewing audience — predominately non-white working class women. Steven Kohm writes:

Not since the days of Judge Joseph Wapner of the original People's Court of the early 1980s has a white male judge on a reality courtroom program enjoyed the mass popularity of the female and African American daytime judges of today.

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strangely, could never be reconciled." Michael R. Winston, *Racial Consciousness and the Evolution of Mass Communications in the United States*, 111 DAEDALUS 171, 178 (Fall 1982).

<sup>62</sup> STEINHORN AND DIGGS-BROWN, *supra* note 61, at 145.

<sup>63</sup> *Id.* at 146.

<sup>64</sup> A 2001 telephone survey on racial attitudes conducted by the *Washington Post*, the Henry J. Kaiser Family Foundation, and Harvard University, found that large numbers of white Americans "incorrectly believe that blacks are as well off as whites in terms of their jobs, incomes, schooling, and health care." Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1. Although the employment gap between whites and blacks has narrowed, blacks "continue to lag significantly behind whites in employment, income, education and access to health care." *Id.* The survey results suggest that a significant percentage of white Americans believe that black Americans "already have achieved economic and social parity," a conclusion that defies "conventional wisdom." *Id.*

<sup>65</sup> *Id.*

As a consequence of their orientation toward female and marginalized viewers, these programs speak not so much to the American population as a whole but to a segment of the population that has traditionally been denied a powerful role in civic and legal affairs. However, messages contained in these programs about the role of the law in the lives of women and other marginalized groups are becoming less and less about participation and democracy. Instead, we are witnessing an evolution in the way daytime reality courtroom television addresses its presumed audience: an evolution that places little emphasis on formal legal intervention by the state and instead stresses personal responsibility in the management of one's own disputes and legal affairs.<sup>66</sup>

Given the relatively small number of women, especially non-white women judges proportionate to the general population in real life, most litigants and jurors in the United States may *never* be exposed to an actual non-white woman judge. This reality means that television judges are the closest most litigants and jurors will get to non-white women judges. Therefore, it is important to closely examine the messages sent out by television reality court judges, even if we cannot draw any firm conclusions about the impact of their presence on public notions about the U.S. court system.

The overrepresentation of women judges on television is not entirely negative. Women viewers, watching images of themselves on TV as judges wielding power, using a common sense approach to decide issues that the audience knows about from everyday life may be empowering to viewers relatively powerless in real life. For these women TV reality court shows represent a true people's court. They are disorderly, the litigants' stories are funny, sad and outrageous unlike most decorous courts of film and night-time TV. Further, the women judges on these shows are not passive actors, they take charge, meting out their version of justice!

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<sup>66</sup> Kohm, *supra* note 5, at 696-97.

## ARTICLE

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### LIFTING THE FLOOR: SEX, CLASS, AND EDUCATION

By: Naomi Cahn and June Carbone\*

Third-wave feminism emphasizes the possibilities that come with choice. Women can choose to be wives, mothers, employees, bosses, hobos, harlots, veiled Islamists, semi-observant Catholics, provocateurs of any stripe, in mix or match settings in which no role necessarily excludes any other, or permanently defines the women occupying it. As third-wave feminists celebrate the possibility of choice, however, it is critical to ground this option in the class perspective that is an integral part of the third-wave itself; otherwise, third-wave feminism risks diminishing the prospects for solidarity with a working class that might happily trade the illusion of choice for more rigidly defined structures that offer the prospect of greater support. Third-wave feminism recognizes the importance of “raising the floor,”<sup>1</sup> and this paper — from two second-wave feminists — helps in developing an agenda for achieving that goal.

Integrating a class analysis into feminism is not new, of course; many second-wave feminists, while concerned with male/female equality, also sought to ensure that feminism did not exclude poor and working-class women. Barbara Ehrenreich, for example, has written eloquently about “making ends meet.”<sup>2</sup> Theda Skocpol, Frances Fox Piven, and Gwendolyn Mink have called our attention to the impact of welfare on women.<sup>3</sup>

In this paper, we approach class issues through the lens of family law, examining how a state’s approach to issues of family leave and contraception affects class mobility. Indeed, the “culture wars,” as they play out in high profile Supreme Court decisions and legislative

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<sup>1</sup> JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 82 (Farrar, Straus and Giroux 2000).

<sup>2</sup> BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 220-21 (Henry Holt and Co., LLC 2001).

<sup>3</sup> GWENDOLYN MINK, *WELFARE’S ENDS* 8 (Cornell University Press 1998); FRANCES FOX PIVEN, *Welfare and Work, in WHOSE WELFARE?* 97 (Gwendolyn Mink ed., Cornell University Press 1999); THEDA SKOCPOL, *THE MISSING MIDDLE: WORKING FAMILIES AND THE FUTURE OF AMERICA* SOCIAL POLICY 13 (W.W. Norton & Co. 2000).

fight over abortion and same-sex marriage, are first and foremost about family values. Family values in the United States are not unitary; different families in different parts of the country are leading different lives. A new family culture has emerged among middle class men and women that is geared for the post-industrial economy. With fertility rates dropping and the average age of marriage moving into the late twenties, states deregulate sexuality, identify responsibility with financial independence, respect equality and autonomy, and safeguard access to contraception and abortion for teens and adults. Middle class men and women reap the benefits.

This new culture, in both its feminist and non-feminist iterations, fetishizes choice. It does so because it is grounded in a socialization that makes the exercise of autonomy — and the transfer of responsibility for investment in human capital from institutions to individuals — foundational to middle-class life. The centerpiece of the cultural reorganization is the emergence of the twenties as a period of exploration of jobs, career possibilities, relationships, and gender roles and attributes, with the deferral of irrevocable choices and permanent responsibilities until the far more mature — and financially independent — thirties.

With greater autonomy and fewer unacceptable pathways, however, comes less societal support for any course of action. Traditionalists, who bemoan loss of the insistence on societally approved pathways emphasizing abstinence, marriage, and the gender roles that made early marriage universal and enduring, have launched something of a counterattack. Rooted in more religious, rural and conservative communities, they play on feelings of moral crisis to promote a “values” agenda that celebrates chastity and pumps government money into marriage promotion programs. Largely invisible in the political reaction to their efforts, however, is the fact that their embrace of more traditional values — one more acceptable choice among many — in fact dramatically restricts the avenues open to the most disadvantaged Americans, and further blocks any hope of progress into the increasingly hard to attain status of middle-class life.

The critical moral issues that divide the two systems of family law — issues such as abstinence education, abortion, and gay relationships — center on control of sexuality, particularly female sexuality. If, as Professor Bridget Crawford notes, one of the challenges of third-wave feminism, is “to develop an account of the law’s ability to enhance

women's autonomy and well-being,"<sup>4</sup> then the blue state model is radical because it allows women to control their own sexuality. On the other hand, the emphasis in third-wave feminism on autonomy and choice may obscure the restriction of choice for those without the means to secure autonomy. Indeed, the very acceptance of traditional values as within the ambit of permissible options may have muted political opposition to abstinence and marriage programs, obscuring their role in making contraception and abortion less available to poor women. The resulting increase in teen births and single mothers, all within the realm of permissible practices, then becomes identified only with conservative concerns. The role of moralistic restrictions and government budget cuts in engineering the increase in unplanned pregnancies disappears from view. Yet, genuine autonomy and choice for both men and women depend on the ability to secure educational opportunities and control fertility. Early births to impoverished women, who are disproportionately likely to be victims of sexual coercion and to lack support from family or mates, derail education, and lock single mothers into marginal positions unlikely to provide opportunities for the work-life balance available to more highly educated women.

After a brief exploration of these two models, this paper makes two critical points: (1) it correlates the different models to the varying approaches to parental leave laws; and (2) expands our discussion of women and care beyond the workplace and child care, exploring what contributes to women's ability to care for their children and others: education, an outcome that is associated with deferred childbearing and higher income in the newer family model. It is in looking at the impact of education that we can get at some of the variations within each model based on class and race. Our conversation about third-wave feminism must examine women's means of moving between classes and being able to provide better care to themselves and to others (whether it be children or parents or significant others). Moreover, educating women serves to challenge gendered stereotypes and is another means for putting pressure on others to help with the care-work.

### I. DIFFERENT FAMILY MODELS

Third-wave feminism's most pressing challenge may be the effort to combine its celebration of "choice" — the ideal of elites — with renewed attention to economic inequality and the construction of class.

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<sup>4</sup> Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 168 (2007).

The first part of the challenge comes from the fact that an insistence on autonomy may reflect the needs of the new information economy as much as an authentic feminist perspective. The second is the risk that the new middle class model that makes women's greater autonomy realistic may simultaneously undermine the ability of working class women to realize the promises of middle class life. These contradictions may lay the groundwork for something that may ultimately define the third-wave, *viz.*, a renewed political and legal consciousness.

Underlying these contradictions is tension in the United States between the two different family systems that guide the transition from adolescence to adulthood. In the older, more traditional system, the entry into adulthood corresponded with the assumption of adult roles — marriage, childbearing, and employment. The new system, which we have termed “the new middle class morality,” identifies adulthood with financial independence and emotional maturity. This system corresponds to the needs of the information economy. Employment has become less secure. With greater turnover, employers invest less in training new workers. The new pathway to the middle class emphasizes adaptability; too early an assumption of permanent commitments may derail better opportunities later. The twenties have accordingly become a time of education, internships, skill acquisition, job transitions, and serial relationships.<sup>5</sup> The results pay off handsomely for family formation in the thirties. Dual career families earn more and enjoy more of a cushion that allows them to weather financial adversity. Moreover, the new patterns produce more independent women, who can more successfully demand and find companionate mates.<sup>6</sup> College educated women are the only group in society whose marriage rates have increased, and the marriages they enter are as stable as the unions of the mid-1960s, the period before no-fault divorce, the legalization of abortion, or widespread use of the pill.

A distinguishing feature of the new middle class model is delay in childbearing. The average age of first birth for the country as a whole has risen from 21.4 in 1970 to 25.2 in 2004, what Elizabeth Gregory terms “an enormous change.”<sup>7</sup> For college-educated women, the average age of first birth is 30.1.<sup>8</sup> Within such a model, “responsible”

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<sup>5</sup> See June Carbone, *Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901, 954, 958 (2008).

<sup>6</sup> ELIZABETH GREGORY, *READY: WHY WOMEN ARE EMBRACING THE NEW, LATER MOTHERHOOD* 8-9 (Basic Books 2007).

<sup>7</sup> *Id.* at 2-3.

<sup>8</sup> *Id.*

reproduction follows financial independence and emotional maturity. Contraception is accordingly an imperative, and abortion an important, if regrettable, backup.

The legal correlates of this model — greater access to contraception and abortion, equality and autonomy for women, tolerance for sexuality — have been most widely accepted in the wealthier areas of the country — urban areas, the Northeast and the West Coast, the upper mid-west. They are also deeply threatening to the more traditional and more religious areas of the country, identified with the core of Bush's support in the 2004 election. These "red states," or more accurately, the politically active Republicans who have pushed a "moral values" agenda, reject the new culture. They continue to emphasize religious teachings that celebrate the unity of sex, marriage, and reproduction. As a result of the emphasis on chastity and abstinence education for teenagers and the lesser availability of contraception and abortion, however, red states have higher teen pregnancy rates, more shotgun marriages, and lower average ages of marriage and first births. Not only are these, in turn, associated with lower income, but early marriage and shotgun weddings also correlate with higher divorce rates. Both divorce and the cognitive dissonance that comes from the lengthening period of time between the beginning of sexual activity and marriage in all states produces a sense of moral crisis that in turn fuels political support for abstinence education, marriage promotion, and further restrictions on access not only to abortion, but contraception. The result increases the likelihood of early pregnancy for the working class — teen birth rates increased in 2006 for the first time since 1991 — and makes support for the workforce participation of young mothers that much more critical.

The lack of agreement about acceptable paths to adulthood, and the diverging needs of the middle and working classes, complicate an effective political response. Welfare reform illustrates the tensions. The legislation and subsequent implementation efforts reflect an emphasis on marriage, associated with a more traditional and red state approach — but less than 1% of welfare leavers did so for marriage. A second aspect of welfare reform, however, reflects blue state values: there is a strong emphasis on work. Yet welfare reform does not provide the necessary support for either marriage or work. It lacks the necessary support for helping men find employment, and it does not provide adequate attention for either training women for better jobs nor for facilitating mothers' participation in a family unfriendly labor market.

## II. THE IMPACT ON CARE

The need to balance work and family affects men and women regardless of class. Through the Federal Family and Medical Leave Act (“FMLA”), all workers who satisfy certain criteria, such as size of employer and length of time at employment, are guaranteed at least twelve weeks of unpaid family and medical leave.<sup>9</sup> This section addresses patterns of the FMLA usage as well as the various ways in which states have supplemented the federal leave guarantees. As this discussion shows, not only are poor women less likely to have access to leave and related balancing benefits, but also, blue states are far more likely to have enacted legislation that protects the work family balance.

*A. Class and Care:*

The care picture is complicated by limits in FMLA coverage, the inability to take unpaid leave, and access to paid leave. First, almost 40% of employees are not at worksites subject to the FMLA,<sup>10</sup> and because not all of those employees have satisfied the prerequisites, only 54% of the workforce is eligible to take FMLA leave.<sup>11</sup> Second, even among those workers who are covered, many (according to one study, more than three-quarters) cannot take the leave because they cannot afford to take unpaid leave.<sup>12</sup>

Third, although FMLA leave is unpaid, some employees do have access to paid leave. Approximately 40% of working parents earning less than 200% of the federal poverty level have no access to paid leave at all (no paid sick days, vacation, nor personal days).<sup>13</sup> Among

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<sup>9</sup> An employee eligible for leave under the FMLA must be employed for at least “12 months by the employer with respect to whom leave is requested under section 2612 of this title; and for at least 1,250 hours of service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2) (2008). The FMLA only applies to employers who employ “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.” *Id.* at § 2611(4). Assuming an employee is eligible for leave under the FMLA and works for an employer covered by the FMLA, the employee shall be entitled to twelve weeks of unpaid leave. *Id.* at § 2612(a)-(c).

<sup>10</sup> JODI GRANT, TAYLOR HATCHER & NIRALI PATEL, *EXPECTING BETTER: A STATE BY STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS* 7 (2005) [hereinafter *Expecting Better*], available at <http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.

<sup>11</sup> Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35550, 35622 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007Report/2007FinalReport.pdf>.

<sup>12</sup> *Expecting Better*, *supra* note 10, at 7.

<sup>13</sup> *Id.* at 8.

low wage workers, 76% do not have access to paid sick leave.<sup>14</sup> Indeed, as a general matter, *low wage* workers are less likely than *higher-income* workers to be covered by family leave policies, to be eligible to take even unpaid family leave, or, much less, to receive paid family leave.<sup>15</sup> They are also less likely to have access to flexible scheduling.<sup>16</sup>

While highly educated and higher income women are more likely to have access to paid leave than women with less education and lower incomes, still one-third of those highly educated and higher income women lack access to any form of paid maternity leave. In fact, 35% of highly educated women are forced to take unpaid maternity leave, compared to 47% of women who have less than a high school education who must take unpaid maternity leave.<sup>17</sup> Women with a college degree were three times more likely to take paid leave following the birth of their first child (58.7%) than women with less than a high school education (17.8%); while 56.4% of women with less than a high school education took unpaid leave, only 38.6% of women with a college degree used unpaid leave.<sup>18</sup> Moreover, women in blue states have better health care coverage. The five states with the lowest rate of uninsured women are all blue — Hawaii (11.2%), Minnesota (11.5%), Massachusetts (11.9%), Maine (12.1%), and Iowa (12.9%).<sup>19</sup>

### B. Who Cares?

The work and family balance that makes it possible for women to remain in the workplace is more critical to the newer model — and to

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<sup>14</sup> *Id.* at 8.

<sup>15</sup> “In March 2005, 54% of workers who made more than \$15 per hour had access to a short-term disability policy, while only 28% of workers earning less than \$15 per hour had access to a short-term disability policy. Similarly, 46% of workers who made over \$15 per hour had access to long-term disability leave, while only 16% of workers making less than \$15 per hour had access to long-term disability leave. There are similar disparities in access to paid sick leave and paid holidays. Eighty-eight percent of workers making more than \$15 per hour had access to paid holidays, and 75% of these workers had access to paid sick leave. Meanwhile, 68% of workers earning less than \$15 per hour had access to paid holidays, and only 47% had access to paid sick leave.” Ann O’Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007) (internal citations omitted).

<sup>16</sup> Joan C. Williams, *One Sick Child Away from Being Fired: When “Opting Out” is Not an Option* 8 (2006), [http://www.uchastings.edu/site\\_files/WLL/onesickchild.pdf](http://www.uchastings.edu/site_files/WLL/onesickchild.pdf).

<sup>17</sup> *Expecting Better*, *supra* note 10, at 7-8.

<sup>18</sup> JULIA O. JOHNSON & BARBARA DOWNS, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT OF FIRST-TIME MOTHERS: 1961-2000, 11 tbl.7 (2005), *available at* <http://www.census.gov/prod/2005pubs/p70-103.pdf>.

<sup>19</sup> KAISER FOUNDATION, MEDICAID’S ROLE IN FAMILY PLANNING 2 (2007), *available at* [http://www.kff.org/womenshealth/upload/7064\\_03.pdf](http://www.kff.org/womenshealth/upload/7064_03.pdf).

the autonomy of poorer women. Through a series of different laws — ranging from domestic violence protection in the workplace to paid leave — some states (typically, those that voted Democratic in the 2004 election and are viewed as “blue states”) are generally more hospitable to working women who have families. The National Partnership on Women and Families examined a series of different laws in developing a state by state scorecard of parental leave programs. Several states — California, Minnesota, and Washington (all blue) — have enacted paid family leave legislation, and a series of others — all blue — have considered it.<sup>20</sup> More generally, with respect to a series of parental leave, maternity benefits, and job protection for both state and private sector employees, the top states are: California, Hawaii, Oregon, Connecticut, New Jersey, Washington, Maine, Vermont, Minnesota, Rhode Island; the bottom states of the bottom nineteen, only three (Delaware, Maryland, and Pennsylvania) are blue.<sup>21</sup> Those states that have most consistently embraced the new family model really do support care.

### III. CLASS, EDUCATION, AND CARE

Given the class variations in access to needed care, how do we, in the words of *Manifesta*,<sup>22</sup> move up the floor? It is important to recognize here that care consists not just of spending time with children; it also means how you care for children — are your children going to get a good education, experience abuse, live in stable housing, etc.

Education and teen birth matter when it comes to resources for caring for children even outside of the workplace. Not that poverty is necessarily bad for children — moms can be caring and poor. However, life is much harder. In the international development literature, it is well-known that every dollar spent on a woman’s education benefits her and her children, while every dollar spent on a man does not.<sup>23</sup>

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<sup>20</sup> See NAT’L P’SHIP FOR WOMEN AND CHILDREN, STATE FAMILY MEDICAL LEAVE LAWS (2006), <http://www.ncsl.org/programs/employ/fmlachart.htm>.

<sup>21</sup> *Expecting Better*, *supra* note 10, at 5, 15-43, 48-49. The Report evaluated states based on a variety of programs, including family leave benefits, medical/maternity leave benefits, flexible sick days. *Id.* at 12-14.

<sup>22</sup> BAUMGARDNER & RICHARDS, *supra* note 1.

<sup>23</sup> See Franz Brotzen, *Economist Backs Recommitment to World Development Goals*, RICE NEWS, Nov. 2, 2007, <http://www.media.rice.edu/media/NewsBot.asp?MODE=VIEW&ID=10207>; INT’L FUND FOR AGRIC. DEV., WOMEN *available at* [http://www.ifad.org/pub/factsheet/women/women\\_e.pdf](http://www.ifad.org/pub/factsheet/women/women_e.pdf) (“The imbalance between the essential roles of women and their limited opportunities is undermining efforts to reduce poverty.”); U.N. DEVELOPMENT PROGRAMME, TASK FORCE ON EDUC. AND GENDER EQUALITY, *Toward Universal Primary Educ.:*

Let's look at women's education and poverty and the class of their children. First, only 36% of women with less than a high school degree worked during their first pregnancies, while 83% of women with a college degree were in the workforce.<sup>24</sup> Second, education allows parents to provide more resources for children. While the resources available for the average child have decreased, they have increased dramatically for those who are living the life of the new middle class morality.<sup>25</sup> According to Princeton professor Sara McLanahan,

Children who were born to mothers from the most-advantaged backgrounds are making substantial gains in resources. Relative to their counterparts 40 years ago, their mothers are more mature and more likely to be working at well-paying jobs. These children were born into stable unions and are spending more time with their fathers. In contrast, children born to mothers from the most disadvantaged backgrounds are making smaller gains and, in some instances, even losing parental resources. Their mothers are working at low-paying jobs. Their parents' relationships are unstable, and for many, support from their biological fathers is minimal.<sup>26</sup>

Women without a college degree are almost twice as likely to get divorced as women with a college degree.<sup>27</sup>

In 2004, women with a college degree earned an average monthly income of \$2,851.00, while women with a high school education earned less than half — \$1,357.00. More highly educated women earned even more — \$4,837.00.<sup>28</sup> Men with comparable degrees of education exhibited the same pattern, although their earnings were higher. Access to college is an important commodity for middle class earning potential. Among mothers, the more highly educated women have higher labor force participation rates.<sup>29</sup> In 2004, the labor force

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*Investments, Incentives, and Institutions*, at 5 (2005), available at <http://www.unmillenniumproject.org/documents/Education-part1.pdf>.

<sup>24</sup> JOHNSON & DOWNS, *supra* note 18, at 5 fig. 1.

<sup>25</sup> See June Carbone, *Is Fertility the Unspoken Issue in the Debate Between Liberal and Conservative Family Values?*, 32 LAW & SOC. INQUIRY 809, 822 (2007) (reviewing LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (The Harvard President and Fellows 2006)).

<sup>26</sup> SARA MCLANAHAN, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition* 41 DEMOGRAPHY 607, 608 (2004).

<sup>27</sup> See *id.* at 613 fig.4.

<sup>28</sup> U.S. CENSUS BUREAU, AVERAGE MONTHLY INCOME BY EDUCATION, SEX, AGE, AND RACE AND HISPANIC ORIGIN, 2004, SURVEY OF INCOME AND PROGRAM PARTICIPATION, tbl.2B (released January 29, 2008), <http://www.census.gov/population/www/socdemo/education/sipp2004w2.html>.

<sup>29</sup> HEATHER BOUSHEY, ARE WOMEN OPTING OUT? DEBUNKING THE MYTH, CENTRE FOR ECON. POLICY RESEARCH 10 (2005), available at [http://www.cepr.net/documents/publications/opt\\_out\\_2005\\_11\\_2.pdf](http://www.cepr.net/documents/publications/opt_out_2005_11_2.pdf).

participation rate for mothers with less than a high school education was 28.8%; for women with graduate degrees, it was 77%. These differences held true even for mothers of children under the age of six; 18.2% of women with less than a high school education were in the labor force, compared to 73.2% of women with graduate degrees. Perhaps even more significantly, economist Heather Boushey found that the “child penalty,” the effect of having a child on labor force participation rates, is negligible for highly educated women, while it is considerable for women with less education. Employment rates for women with less education who had children at home were 21.7% less than for those women with the same education who did not have children at home, while for women with a graduate degree, the “penalty” rate was 1.3%.<sup>30</sup>

So how do race and class play out? We hypothesize that blue laws reinforce the blue family lifestyle, and red laws reinforce the red family lifestyle; and that, at least in blue states, the blue lifestyle is associated with the middle class. This, in turn, is associated with education. According to Sara McLanahan, women with higher education levels have much higher incomes: in 2000, for example, their median family incomes were close to \$80,000 per year, while women with less education had median family incomes of about \$25,000 per year;<sup>31</sup> and mothers with high levels of education are more than two times as likely to be employed as are mothers with low education (62% versus 30%). Women with low education levels were more than twice as likely to become single mothers than women with higher education; women with a four-year degree had a divorce rate of about 17% in 2000, while women without a four-year degree had a divorce rate almost double, at about 32%. Moreover, earlier childbearing is associated with less education. Almost 60% of teens with a school-age pregnancy drop out of high school, while only 25% of teens who do not have a child before they turn eighteen drop out of school.<sup>32</sup> Only 2% of teen mothers will graduate from college, while four times that number of women who do not have children until twenty or twenty-one will graduate. Eighty-two percent of children whose parents do not have a high school diploma live in poverty. Seventy-five percent of unmarried teen mothers begin to receive welfare within five years of their first child. Children of teen mothers

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<sup>30</sup> See *id.* at 11-12 tbls.5 & 6.

<sup>31</sup> McLANAHAN, *supra* note 26, at 614.

<sup>32</sup> THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, WHY IT MATTERS: TEEN PREGNANCY AND EDUCATION, available at <http://www.thenationalcampaign.org/why-it-matters/pdf/education.pdf>.

do not perform as well in school as children of older mothers; for example, they are 50% more likely to repeat a grade. The daughters of teen mothers are three times more likely to become teenage mothers themselves as compared to daughters of mothers ages twenty and twenty-one.

The blue states are beginning to learn this lesson. The five states<sup>33</sup> with the lowest rates of teen births are all concentrated in the Northeast and all voted for Kerry: New Hampshire,<sup>34</sup> Vermont, Massachusetts, Connecticut, and Maine. In contrast, the five states with the highest teen birth rates are all red and are all in the South or the Southwest: Texas, New Mexico, Mississippi, Arizona, and Arkansas.<sup>35</sup> As the statistics on education and teen pregnancy show, teen pregnancy is associated with class and can provide a significant barrier to finishing high school and pursuing additional educational opportunities.<sup>36</sup> Contraception and abortion availability would help in providing teens with the choices they need.

There are, of course, complicating factors of wealth, religion, and ethnic diversity in reinforcing or undercutting family formation practices. Nonetheless, however, the fact of different cultural understandings in itself is a significant issue underlying family law decisions.

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<sup>33</sup> To make the analysis more cogent, we focus on the highest and lowest five states in each category.

<sup>34</sup> New Hampshire, unlike the others, however, was so close that it could be more accurately described as “purple.” See The Washington Post, U.S. President — New Hampshire (2004), available at <http://www.washingtonpost.com/wpsrv/elections/2004/page/295035> (demonstrating the 2004 presidential election in New Hampshire was so close that it could more accurately be described as a “purple” state).

<sup>35</sup> CHILD TRENDS DATABANK, TEEN BIRTH RATES RANKED LOWEST TO HIGHEST (2003) [http://www.childtrendsdatbank.org/pdf/13\\_PDF.pdf](http://www.childtrendsdatbank.org/pdf/13_PDF.pdf). In 1988, by contrast, the lowest teen birth rates would have in Minnesota, North Dakota, Massachusetts, Iowa, New Hampshire, and Vermont while the highest rates would have been in Mississippi, New Mexico, Arkansas, Texas, and Arizona. The relative changes involve a steady decline in teen birth rates in New England compared to stable rates in the upper Midwest. Abortion ratios, defined as the number of abortions for every 1000 births, complement the picture of regional variation. The states with the five highest ratios for teens are New Jersey, New York, Massachusetts, Connecticut, and Maryland, all blue states from the New England or mid-Atlantic regions. The states with the lowest teen abortion ratios are Kentucky, Louisiana, Arkansas, South Dakota, Oklahoma, and West Virginia. With the exception of South Dakota, they are all Southern or border states. See GUTTMACHER INSTIT., U.S. TEEN PREGNANCY STATISTICS, NATIONAL AND STATE TRENDS BY RACE AND ETHNICITY 11 (2006). If we were to measure abortion rates as opposed to ratios, New Jersey, New York, and Maryland would remain in the top five, but Massachusetts and Connecticut would be replaced by Nevada and California. *Id.* The lowest abortion rates would change more with the five lowest states: Utah, South Dakota, North Dakota, Kentucky, and West Virginia. Utah, North Dakota, and South Dakota also have relatively low teen pregnancy rates compared with Kentucky and West Virginia or the states with higher abortion ratios.

<sup>36</sup> McLANAHAN, *supra* note 26, at 614.

Turning to race, Black and Latino teens are still two to four times as likely as whites to become teen mothers.<sup>37</sup> Once they do, statistically speaking, women who became teen mothers are likely to stay out of the middle class.<sup>38</sup> The November 2007 Pew Study asked middle and lower-class blacks what they think about each other in terms of values, or, the “things that people view as important or their general way of thinking.”<sup>39</sup> By a two-to-one ratio, blacks said that the values of poor and middle class blacks have grown more dissimilar over the past decade; at the same time, most blacks say that the values of blacks and whites have grown more alike during this same time period. On a similar question, only about a quarter of all blacks (23%) said that middle class and poor blacks share “a lot” of values in common, while a plurality (42%) says they share some values in common; 22% say they share only a little in common and 9% say they share almost no values in common. Well-educated blacks are more likely than blacks with less education to say that a values gap within the black community has widened during the past decade. At the same time, however, it is blacks with lower incomes and less education who are most inclined to see few shared values between middle class and poor blacks — suggesting that the perception of differences over values and identity within the African American community is felt most strongly by those blacks at the lower end of the socio-economic spectrum.<sup>40</sup>

### III. THE FUTURE?

Lifting up the floor requires structural supports. So far, the attention in third-wave feminism has been on structural supports for equality and reproductive rights, but not on the more basic forms of structural support that enable women to hold jobs where equality matters and to exercise reproductive rights in a context where choice is meaningful. While many women will not choose the middle class model that we have articulated, and while the trend towards later childbearing is problematic in its acceptance of women living “ideal worker” lives, this choice should be available.

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<sup>37</sup> B.E. HAMILTON, J.A. MARTIN & S.J. VENTURA, BIRTHS: PRELIMINARY DATA FOR 2006, 56 NAT'L VITAL STATISTICS REPORT 7, 9 tbl.3 (2007), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_07.pdf).

<sup>38</sup> CHILD TRENDS DATA BANK, TEEN BIRTHS 11 (2003), available at [http://www.childtrendsdatabank.org/pdf/13\\_PDF.pdf](http://www.childtrendsdatabank.org/pdf/13_PDF.pdf).

<sup>39</sup> PEW RESEARCH CENTER, BLACKS SEE GROWING VALUE GAP BETWEEN POOR AND MIDDLE CLASS 3 (2007), available at <http://pewsocialtrends.org/assets/pdf/Race.pdf>.

<sup>40</sup> *Id.*

These more basic supports involve education and training, healthcare that includes, but is not centered on, reproductive health, and support for balance in the workplace. Part of the problem may be that, in their reliance on individual narratives, third-wave feminists may not have access to the narratives of women unable to adequately articulate their needs.<sup>41</sup>

Listening to individual narratives may make it more difficult to engage with the larger, systemic, and more fundamental group problems. Indeed, third-wave feminists offer their own challenges to the emphasis on individual narrative, and even on the terminology “third-wave” and its suggested differentiation from other forms of feminism. Some suggest that the term itself is no longer useful;<sup>42</sup> others suggest that the debate is useful in attempting

to determine if there’s enough of a generational divide between older and younger feminists to warrant a whole new label. The question seems to be, have we moved far enough from the social issues that propelled the women’s movement in the 1960s and ‘70s to be able to suggest that there’s a new wave?<sup>43</sup>

Such questions help third-wave feminism define itself and its goals.

Indeed, there are some self-identified third-wave feminist agendas that strive to make the goals of gender equality more concrete.<sup>44</sup> For example, in their thirteen-point *Manifesta*, Baumgardner and Richards include a comprehensive goal about women’s involvement in the armed forces, calling for women who wish to do so:

to participate in all reaches of the military, including combat, and to enjoy all the benefits (loans, health care, pensions) offered to its members for as long as we continue to have an active military. The largest expenditure of

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<sup>41</sup> See Crawford, *supra* note 4, at 166 (noting that “the only autobiographical account that will make it into a book of third-wave feminist writing is one told by the person with enough education, authority, and mental and cultural resources to write it.”).

<sup>42</sup> E.g., Lisa Jervis, *The End of Feminism’s Third-wave*, MS. MAGAZINE, 2004, available at <http://www.msmagazine.com/winter2004/thirdwave.asp>.

<sup>43</sup> Alison Piepmeier, *Postfeminism vs. the Third-wave*, Mar. 17, 2006, <http://www.electronicbookreview.com/thread/writingpostfeminism/reconfiguredrip2>. Piepmeier is the author of *Catching a Wave: Reclaiming Feminism for the 21st Century* (Rory Dicker & Alison Piepmeier, eds., Northeastern University Press 2003).

<sup>44</sup> *Id.* (noting that third-wave feminism “grapples with women’s intersectional identities and demands an end to all the forms of oppression that keep women from achieving their full humanity.”). See also Deborah Siegel, *Women: What Next for the Sexual Revolution?*, THE GUARDIAN (United Kingdom), Aug. 16, 2007, at 16 (suggesting that the stripping pole is to third-wave feminism what bra-burning was to second-wave feminists, and that third-wave feminists are concerned with activism on a series of gender equality issues), available at <http://www.guardian.co.uk/world/2007/aug/31/gender.uk>.

our national budget goes toward maintaining this welfare system, and feminists have a duty to make sure women have access to very echelon.<sup>45</sup>

Notwithstanding their approach to equity in the military, and their critique of it as a “welfare system,” there is no comparable goal with respect to other forms of public welfare. Indeed they make the following two somewhat more modest demands concerning health care:

3. To make explicit that the fight for reproductive rights must include birth control; the right for poor women and lesbians to have children . . . subsidized fertility treatments for all women who choose them; and freedom from sterilization abuse. Furthermore, to support the idea that sex can be — and usually is — for pleasure, not procreation . . .

8. To have equal access to health care, regardless of income, which includes coverage equivalent to men’s and keeping in mind that women use the system more often than men do because of our reproductive capacity.<sup>46</sup>

While gender equity in health care and in the military are important signposts on the road to equality, these markers do not provide the basic structural supports that women need to achieve the potential that is so celebrated.

Instead, as we have argued elsewhere, women need to be trained and educated to assume their roles in the economic future. Our examination of how demographic differences correspond to differences in understandings about values (such as views on the regulation of sexuality or “family values”), and not just on hot button issues, such as same-sex marriage or parental notification of abortion, have resulted in our conclusion that the newer family culture is the system that is better geared for the post-industrial economy. The fundamentally religious and other “conservative” influences are distracting the country from developing a family law system that promotes economic growth and stronger families. In terms of macro and micro economic and social stability, the family culture (of both laws and life patterns) that is more typical in blue states provides a model for the future. Policies that promote early marriage and higher fertility produce less investment in each child, which in turn promotes a less skilled labor force, which in turn attracts a less skilled industry, which in turn keeps wage levels down and makes employers less likely to offer paid leave and other benefits.

The conservative take on this is to re-impose values that tie marriage and childbearing together, pushing a solution that depends on

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<sup>45</sup> BAUMGARDNER & RICHARDS, *supra* note 1, at 280.

<sup>46</sup> *Id.* at 279-80.

low income women getting married.<sup>47</sup> David Blankenhorn flatly states, “there is something specifically about *marriage* that tends to boost earnings and reduce poverty.”<sup>48</sup> Federal marriage promotion efforts emphasize responsibility on the parts of both men and women, presuming that it is because both men and women are acting irresponsibly that the non-marital childbirth has increased so dramatically. If irresponsible sexual behavior is the problem, then enforcing marriage is the solution that not only privatizes dependence (solving welfare) but also benefits children. It is true that the overwhelming majority of public welfare recipients (69.6%) are single, while only 10.5% are married, and that approximately 90% of the recipients are female.<sup>49</sup> On the other hand, only 0.1% of welfare recipients stop receiving it because they married, while 20.9% leave because of employment.<sup>50</sup>

While we support adult commitment, forcing people to marry is not the answer. Indeed, most people have a positive view of marriage, and want to be married.<sup>51</sup> The state can help couples remain in marriage, albeit without coercion or forcing one fixed idea of marriage on all relationships — but that should not be the sole focus of changing patterns of dependency.<sup>52</sup> The problems that cause most single welfare recipients to receive aid will not be solved through

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<sup>47</sup> See KAY HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE 30* (Ivan R. Dee 2006), available at [http://www.city-journal.org/html/16\\_1\\_marriage\\_gap.html](http://www.city-journal.org/html/16_1_marriage_gap.html).

<sup>48</sup> DAVID J. BLANKENHORN, *THE FUTURE OF MARRIAGE* 243 (2007). See also Amy Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567 (2007) (providing an extremely thoughtful discussion of potential reasons for the disparity in marriage rates by class).

<sup>49</sup> ADMIN. FOR CHILDREN AND FAMILIES, *Temporary Assistance for Needy Families – Active Cases*, <http://www.acf.dhhs.gov/programs/ofa/character/FY2006/tab22.htm>, tbl.22 (last visited Aug. 29, 2008) (noting that from October 2005 until September 2006, 98,436 recipients of temporary assistance were male, while 897,876 were women).

<sup>50</sup> ADMIN. FOR CHILDREN AND FAMILIES, *Temporary Assistance for Needy Families – Closed Cases*, <http://www.acf.dhhs.gov/programs/ofa/character/FY2006/tab46.htm>, tbl.46 (last visited Aug. 29, 2008).

<sup>51</sup> See Alison Stein Wellner, *The Marriage Habit: Baby Boomers May Have Believed in Free Love, But Now They're Hooked on Matrimony*, *AMERICAN DEMOGRAPHIC FORECAST*, March 2002, available at [http://acuriousmind.typepad.com/a\\_curious\\_mind/files/Forecast BoomMarriage.pdf](http://acuriousmind.typepad.com/a_curious_mind/files/Forecast BoomMarriage.pdf).

<sup>52</sup> See generally, Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 *VA. J. SOC. POL'Y & L.* 163, 177-90 (2001) (suggesting five ways for the federal government to promote marriage without imposing it, including improved data collection on divorce, and removing the marriage penalty in the income tax code). See also Elizabeth Scott, *Marriage, Cohabitation, and the Collective Responsibility for Dependency*, 2004 *U. CHI. LEGAL F.* 225, 252-58 (arguing that marriage deserves “special” treatment, but that contracts within cohabitating relationships merit enforcement as well).

marriage.<sup>53</sup> Instead, education appears as a more feasible solution. Lack of education is highly correlated with welfare receipt: more than 95% of all welfare recipients have twelve years of education or less, compared to 50% of the general population. While education does not guarantee that an individual will not receive public aid, it becomes statistically less likely with each year of post-secondary education.<sup>54</sup>

Consequently, a more comprehensive approach to the third-wave vision of moving up the floor suggests a series of different approaches that are designed to increase the economic independence of women and the financial resources available to children. Marriage is not, as the famous article goes, the panacea — but increasing education for women and resources for children together with facilitating the lives of parents who seek to be good parents and good workers are panaceas. So is allowing girls access to contraceptives, comprehensive sex education, and abortion.

First, the concept of choice, that is so important in third-wave feminism, must be reconstructed. Regardless of issues concerning choice and false consciousness,<sup>55</sup> one choice generally forecloses other future options. Thus, while the “choice” to become sexually active must be protected, of course, the choice of girls who become pregnant at sixteen may foreclose them from moving towards more autonomy because they are then statistically much less likely to have other choices concerning work and family.

While cultural norms are integral to structuring women’s choices, the law can support expanding those choices. Ultimately, policies must support practices that train for the autonomy that will allow women to decide for themselves when to have children and where to work.<sup>56</sup> This means: (1) cushioning the consequences of bad early decisions so they are not permanently derailing to women; (2) deterring early childbirth through comprehensive sex education (encouraging responsibility and autonomy); and (3) enforcing laws against domestic violence and coercive sex (more autonomy).

A second goal of third-wave feminism is gender equity. In addition to enacting the ERA and allowing equal access to the

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<sup>53</sup> See generally, Vivian Hamilton, *Will Marriage Promotion Work?*, 11 J. GENDER, RACE & JUST. 1 (2007).

<sup>54</sup> ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 49, at tbl.25.

<sup>55</sup> See Crawford, *supra* note 4, at 166; see also JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (Oxford Univ. Press 2000).

<sup>56</sup> One important question at the conference concerned which women’s lives should be reproduced. We are not advocating one lifestyle over another; what we are advocating is that women have the education and support to understand their choices.

military,<sup>57</sup> this involves: (1) conceptualizing mothers' role as combining workforce participation and parenthood by making the workplace more family friendly; (2) re-conceiving the safety net to provide the things low income jobs are unlikely to provide including health care, assistance with child care (probably through universal preschool), and real unemployment assistance in a world where jobs have become less permanent, and retraining may be critical; and (3) improving education, specifically for low income children.

Achieving this goal requires specific laws that, for example, mandate Medicaid funding for family planning (perhaps even a return to funding for abortion, if this becomes politically feasible). It means single parenthood with support — education, retraining, cycling in and out of the workforce. Ensuring that employment is feasible for single mothers involves the recognition that employers of poor women cannot realistically subsidize family leave or health benefits. Ann O'Leary suggests, for example, that Congress provide funding for family leave for newly employed welfare recipients.<sup>58</sup> Similar funding could also be extended to health benefits to ensure that former welfare recipients have adequate access without employers assuming the full responsibility. Even more radically, laws could detach medical care from employment.

In terms of family leave, as both second and third-wave feminists argue, there must be meaningful access for both men and women, which means requiring smaller workplaces to be covered and shortening the waiting period for employee eligibility — and ensuring that working class men buy into these roles. As third-wave feminism (and second-wave feminists as well) remind us, men's roles are critical to this enterprise, so this involves paying attention to the needs and futures of unemployed and working class men. Otherwise, not only will employers continue to hire men over women, but also women's domestic roles will not change. When an employer does invest in the individual, then the employer will also be more willing to provide additional benefits to get them to stay. Mandating parental leave makes individual jobs more expensive for employers, making them less likely to hire poorly educated or unskilled workers. For poor women, it is critical to prevent them either from being railroaded out of employment permanently by helping them acquire the education and skills necessary to move into jobs with more benefits.

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<sup>57</sup> See BAUMGARDNER & RICHARDS, *supra* note 1.

<sup>58</sup> See O'Leary, *supra* note 15, at 60-61.

Ultimately, all women need training for the realization of their own autonomy and for gender equity. Enhancing women's workforce opportunities through better education will strengthen them economically as well as in their personal lives. The middle class already trains for autonomy by putting in place the necessary conditions for this status, including access to birth control, education, and delay in family formation. Middle class women who then have the capital to be worth more to employers can better negotiate employment situations that are family friendly enough to keep them in the workforce.

By contrast, poorer women are not trained for autonomy and do not experience it; they have less access to contraception, which produces unplanned pregnancies that derail education and the kind of workforce participation that builds skills that contribute to long term marketability. To change this cycle, there are a series of steps that enhance choice and result in gender equity: more contraception, more abortion, more support for single parents, and the creation of pathways that provide for workforce participation and education after the birth of the first child.

## ARTICLE

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### COPYRIGHT LAW AND PORNOGRAPHY: RECONSIDERING INCENTIVES TO CREATE AND DISTRIBUTE PORNOGRAPHY

By: Ann Bartow\*

*As it moved into the mainstream in the 1970s and early 1980s, pornography obtained copyright protections through judicial fiat, rather than as a result of legislative action. This essay explains how pornography came to be eligible for copyright protections, discusses the social and legal effects of this change, and raises questions about the propriety of according pornography the full benefits of copyright law without taking into account the harms that pornography production can inflict on subordinated or coerced “performers.”*

#### I. PORNOGRAPHY AS ENTERTAINMENT PRODUCT

Libertarian organizations with a financial interest in doing so like to pretend that pornography is under relentless attack by the government,<sup>1</sup> but this is clearly not the case. For going on two decades, the consistent response of the U.S. government has been to ignore pornography production, as long as the performers were eighteen years old or over. In *California v. Freeman*,<sup>2</sup> the Supreme Court effectively curtailed states’ ability to regulate the production of pornography. By the 1990s, mainstream non-child pornography prosecutions on obscenity grounds by the federal government effectively stopped, and they remain rare.<sup>3</sup>

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<sup>1</sup> See, e.g., Mark Cromer, *Porn’s Compassionate Conservatism*, THE NATION, Feb. 26, 2001, at 25; Peter Eisler, *Military’s Porn Ban Questioned*, USA TODAY, Nov. 5, 2007, [http://www.usatoday.com/news/washington/2007-11-04-Militaryporn\\_N.htm](http://www.usatoday.com/news/washington/2007-11-04-Militaryporn_N.htm); Electronic Frontier Foundation, EFF “*Censorship – Martin Rimm/CMU/Time & Related Anti-Porn Hysteria*” Archive, [http://w2.eff.org/Censorship/Rimm\\_CMU\\_Time/](http://w2.eff.org/Censorship/Rimm_CMU_Time/); Letter from Laura W. Murphy, Director ACLU and Marvin J. Johnson, Legislative Counsel, to Reps. Smith and Scott on H.R. 4632, the “Child Obscenity and Pornography Prevention Act of 2002” (May 8, 2002) (on file with author), available at <http://www.aclu.org/privacy/speech/14793leg20020508.html>.

<sup>2</sup> 488 U.S. 1311 (1989).

<sup>3</sup> See generally Andy Sullivan, *FBI Reluctance Stalls Bush Anti-Pornography Push*, REUTERS, Sept. 19, 2007, <http://www.reuters.com/article/domesticNews/idUSN1845908320070919?feedType=RSS&feedName=domesticNews>. But see Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005) (arguing that

Law professor Tim Wu recently observed that “George W. Bush is perhaps the most religiously conservative U.S. president in history. Yet his administration, despite its rhetoric, is looser on mainstream porn than Jimmy Carter or John F. Kennedy was.”<sup>4</sup> A recent New York Times article entitled *Federal Effort on Web Obscenity Shows Few Results*<sup>5</sup> reported on a Justice Department grant to a conservative religious group called “Morality in Media” that pays people to review “sexual websites and other internet traffic to see whether they qualify as obscene material whose purveyors should be prosecuted by the Justice Department.” The article noted that “[t]he number of prosecutions resulting from those referrals is zero.” Another observer recently noted that contemporary pornographers are far more likely to go to jail for spamming than for the content of the pornographic works they distribute.<sup>6</sup> In a recent issue of the ABA Journal one self-credited pornography specialist complained that he had to handle copyright infringement cases to pay the bills, because so little First Amendment work related to pornography was available.<sup>7</sup>

Anti-pornography rhetoric is instrumentally deployed to promote an illusion of entrepreneurial morality. But there has never been a focused attempt to remove pornography from the internet, or even to regulate it in any meaningful way. The Communications Decency Act of 1996 contained ridiculously overbroad content restricting provisions that anyone of reasonable intelligence would have expected the courts to find unconstitutional, and indeed they did.<sup>8</sup> At the end of the sound

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obscurity law is unworkable and unable to effectively address any moral harm related to obscene content); Elizabeth M. Glazer, *When Obscenity Discriminates*, NW. U. L. REV. (forthcoming); Press Release, U.S. Department of Justice, Federal Grand Jury in Salt Lake City Charges Cleveland Men with Obscenity Violations, June 28, 2007, [http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_471.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html); Grant Cross, *WebWeb-Based Business Charged with Distributing Obscenity*, PCWORLD, June 15, 2007, available at <http://pcworld.about.com/od/internetlegalissues/WebWeb-based-business-charged-wit.htm>.

<sup>4</sup> Tim Wu, *American Lawbreaking: How Laws Die*, SLATE, Oct. 15, 2007, available at <http://www.slate.com/id/2175730/entry/2175743> (last visited Sept. 23, 2008).

<sup>5</sup> Neil A. Lewis, *Federal Effort on WebWeb Obscenity Shows Few Results*, N.Y. TIMES, Aug. 10, 2007, at A13.

<sup>6</sup> Thomas Claburn, *Two Men Get Five Years for Sending Pornographic Spam*, INFORMATION WEEK, Oct. 15, 2007, available at <http://www.informationweek.com/news/showArticle.jhtml?articleID=202402908>.

<sup>7</sup> Jason Krause, *The End of the Net Porn Wars*, A.B.A. J., Feb. 2008, at 55.

<sup>8</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997). See generally *Communications Decency Act*, ELECTRONIC PRIVACY INFORMATION CENTER, Feb. 2, 2002, [http://epic.org/free\\_speech/cda/](http://epic.org/free_speech/cda/) (last visited Sept. 23, 2008); *EFF, ACLU, et al. v. Dept. of Justice (ACLU v. Reno)*, Electronic Frontier Foundation, [http://w2.eff.org/legal/cases/EFF\\_ACLU\\_v\\_DoJ/](http://w2.eff.org/legal/cases/EFF_ACLU_v_DoJ/) (last visited Sept. 23, 2008); *Supreme Court Rules CDA Unconstitutional*, CNN, June 26, 1997, <http://www.cnn.com/US/9706/26/cda.overturned.hfr/index.html> (last visited Sept. 26, 2008). See *Mukasey v. ACLU, et al.*, No. 08-565, 2009 WL 129119 (Jan. 21, 2009); see also *The end*

and fury surrounding this Trojan statute, the internet was a far safer place for pornography than it had ever been before, thanks to surviving Section 230, which gives broad immunity against prosecution to internet service providers,<sup>9</sup> encouraging the unrestricted online distribution of content regardless of whether it was defamatory or obscene, or otherwise harmful or injurious.

Because it is socially acceptable and relatively risk free, large mainstream corporations have entered the market, and earn enormous revenue from the production and distribution of pornography. The New York Times reported in 2000 that “the General Motors Corporation, the world’s largest company, now sells more graphic sex films every year than does Larry Flynt, owner of the Hustler empire.”<sup>10</sup> News Corp, the holding company for Fox News among other media properties, derives an enormous revenue stream from the pornography broadcast by its subsidiary, Direct TV.<sup>11</sup> Search engines such as Yahoo! and Google derive ad revenues through their copious advertising of pornography. Pornography producers broadcast hardcore movies on TV screens across America through hotel chains like Marriott and Hilton and satellite and cable operators Comcast, DirecTV, and AOL Time Warner.<sup>12</sup> A Frontline documentary about pornography that aired on BS noted:

The corporate giant AT&T is reaping huge financial benefits through ownership of its cable network AT&T Broadband, which shows explicit porn on channels such as the Hot Network. General Motors, which owns Direct-TV, receives big profits every time an adult movie is purchased by viewers across America. Now, it seems, there are infinitely more ways to sell a dirty picture, and pornography has become associated with some big American brand names. Hotel chains are part of the association, too. As an

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*of the COPA saga*, BALKINIZATION, Jan. 21, 2009, <http://balkin.blogspot.com/2009/01/end-of-copa-saga.html> (last visited Jan. 25, 2009).

<sup>9</sup> “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2000). Effectively, this section immunizes ISPs and other service providers from torts committed by users over their systems, unless the provider fails to take action after actual notice or is itself involved in the process of creation or development of the content.

<sup>10</sup> Timothy Egan, *Erotica, Inc. — A Special Report; Technology Sent Wall Street Into Market For Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1.

<sup>11</sup> See *Murdoch gets heat for mogul’s porn channels*, WORLD NET DAILY, May 10, 2007, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=55616](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=55616) (last visited Jan. 25, 2009); *Critics hide Warren, ‘pastor’ of Murdoch, over porn channels*, CHRISTIAN CENTURY, May 29, 2007, [http://findarticles.com/p/articles/mi\\_m1058/is\\_/ai\\_n19328530](http://findarticles.com/p/articles/mi_m1058/is_/ai_n19328530) (last visited Jan. 25, 2009); *Rupert Murdoch’s growing porn empire*, THE NEW AMERICAN, March 20, 2006, <http://www.highbeam.com/doc/1G1-143720355.html>.

<sup>12</sup> Paul Keegan, *Prime-Time Porn Borrowing Tactics From the Old Hollywood Studios*, BUSINESS MAGAZINE 2.0, June 1, 2003, [http://money.cnn.com/magazines/business2/business2\\_archive/2003/06/01/343376/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm).

amenity in large hotel chains, pay-per-view adult films are made available by one of two major distribution companies — Lodgenet or On-Command Video. Even internet companies such as Yahoo!, a search engine used in millions of American households, make money by selling ads and links to porn websites. Both sides of the business equation are satisfied: the mainstream companies receive large profits and the porn industry gets the stamp of approval by legitimate businesses.<sup>13</sup>

Like pornography generally, entities that focus primarily or even exclusively on producing pornography have sought, and in many cases found, widespread social acceptance. Playboy Inc., for example, markets its brand as one of wholesome, patriotic entertainment in contexts like the television show *The Girls Next Door*.<sup>14</sup> An associated online store, The Bunny Shop, offers clothing, jewelry, and work out videos. The Playboy Corporation adorns household goods and children's toys with its bunny logo,<sup>15</sup> and unobservant (or possibly dishonest) commentators tout the mildness and relative innocence of the naked photos in the company's magazine.<sup>16</sup> On a superficial level, Playboy appears to function much as any other entertainment conglomerate, such as Disney.

The Playboy Corporation also produces and distributes large quantities of hardcore pornography chock full of violent and degrading acts, but they do so under subsidiary trademarks. According to Playboy CEO Christy Hefner, "the racier fare 'is a complementary and separate business from the Playboy business,'" one in which the Playboy logo and brand is obfuscated.<sup>17</sup> Playboy also owns hardcore pornography cable channels such as The Hot Network, Vivid TV, and The Hot Zone.<sup>18</sup> The movies on these channels are advertised with descriptions like, "a comical adventure with 10 of the nastiest sex scenes ever filmed!"<sup>19</sup> It is through the production and distribution of

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<sup>13</sup> *Frontline: American Porn* (PBS television broadcast, Feb. 7, 2002).

<sup>14</sup> *The Girls Next Door* (E! television broadcast).

<sup>15</sup> See Posting of Ann Bartow to Marketing the Playboy Brand to Children, <http://feministlawprofs.law.sc.edu/?p=493> (Apr. 29, 2006, 14:21 EST) (last visited Sept. 23, 2008); see also Posting of Ann Bartow to Excerpt from an Email from a Friend Who is Teaching in a Foreign Country, <http://feministlawprofs.law.sc.edu/?p=1597> (Mar. 14, 2007, 8:16 EST) (last visited Sept. 23, 2008).

<sup>16</sup> Forbes.com, How Big is Porn?, [http://www.forbes.com/2001/05/25/0524\\_porn.html](http://www.forbes.com/2001/05/25/0524_porn.html) (last visited Sept. 23, 2008) (providing that Playboy calls itself a "men's magazine" and lost money last year); see also Posting of Ren Reynolds to Legs Wide Shut, [http://terranova.blogs.com/terra\\_nova/2007/07/legs-wide-shut.html](http://terranova.blogs.com/terra_nova/2007/07/legs-wide-shut.html) (July 24, 2007) (last visited Sept. 23, 2008).

<sup>17</sup> Bernard Weinraub, *Reviving an Aging Playboy Is a Father-Daughter Project*, N.Y. TIMES, Feb. 4, 2002, at C7.

<sup>18</sup> Keegan, *supra* note 11; see also Playboy Enters. Inc., Annual Report (Form 8-K/A), at P-1 (Apr. 15, 2002).

<sup>19</sup> Keegan, *supra* note 11.

hardcore pornography that Playboy generates the majority of its revenue.<sup>20</sup>

The patina of respectability and integration of pornography and mainstream corporate revenue streams ensures pornography a visible, stable, and lasting presence on the Internet and in society.<sup>21</sup> Pornographic works are monetarily valuable works that are in most contexts treated like other entertainment products.

## II. PORNOGRAPHY AND COPYRIGHT LAW

For much of this nation's history, the government has been unwilling to give its imprimatur to creative or innovative works that were deemed contrary to public morality.<sup>22</sup> For example, the patentability of sex toys was once contestable, as the Patent and Trademark Office refused to issue patents for products or processes deemed immoral. Eventually, however, courts adopted the view that it did not make sense to have unelected patent examiners make decisions about the morality of inventions that could always be regulated or banned by acts of legislatures if they posed dangers to society.<sup>23</sup>

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<sup>20</sup> See generally Annual Report, *supra* note 17.

<sup>21</sup> See generally GAIL DINES ET AL., *PORNOGRAPHY, THE PRODUCTION AND CONSUMPTION OF INEQUALITY* 37-38 (Routledge 1998).

<sup>22</sup> This is still the case to some extent under trademark law; see 15 U.S.C. § 1052(a) (2006) (No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it consists of or comprises immoral, deceptive, or scandalous matter.).

<sup>23</sup> See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 155-58 (rev. 4th ed. 2007) (stating that until Congress declares certain inventions unpatentable, there is no basis to find inventions unpatentable for lack of utility because they have the capacity to fool members of the public); Thomas A. Magnani, *The Patentability of Human-Animal Chimeras*, 14 *BERKELEY TECH. L.J.* 443, 452-53 (1999) ("Since 1977, at least one court appears to have rejected the moral utility doctrine outright. In *Whistler Corp. v. Autotronics, Inc.*, a district court upheld a patent on a radar detector, rejecting claims that the device lacked moral utility because its sole purpose was to circumvent attempts to enforce the speed limit. In so doing, the court noted: 'the matter is one for the legislatures of the states, or for the Congress, to decide. Stated another way, only two states have seen fit to prohibit such devices. Unless and until detectors are banned outright, or Congress acts to withdraw patent protection for them, radar detector patentees are entitled to the protection of the patent laws.' Given the attitude of the district courts towards the moral utility requirement, one might assume that the requirement is now defunct. There are at least two reasons to believe it may be making a comeback, however. First, in a recent decision, *Tol-o-Matic, Inc. v. Proma Produkt-Und Marketing Gesellschaft*, the Federal Circuit declared that a patent on a rodless piston-cylinder was not invalid for lack of utility. In discussing the standard of utility under which the invention should be judged, the court noted that 35 U.S.C. § 101 'has been interpreted to exclude inventions deemed immoral.' The court continued by quoting the *Lowell* opinion extensively. The willingness of the Federal Circuit to embrace such a controversial doctrine in a seemingly unnecessary situation (certainly the cylinder could not be thought of as immoral in any way) suggests that the court may be attempting to lay the groundwork for invoking the doctrine in the future. Second, the moral utility requirement

The legality of sex toys can be uncertain in some jurisdictions, however, and the U.S. Supreme Court has effectively declared laws restricting or banning them outright to be constitutional.<sup>24</sup> In contrast, pornography has been construed as speech, and is therefore less readily controllable by government actors than dildos or vibrators are, as a matter of First Amendment principles. This leads to an odd situation in restrictive jurisdictions in which movies explicitly depicting vibrators being used in sex acts are legal but the vibrators themselves are not.

Until 1979, copyright protection was effectively unavailable for pornography, though it was unambiguously available for other photographic and audiovisual works.<sup>25</sup> In 1979, in *Mitchell Brothers Film Group v. Cinema Adult Theater*,<sup>26</sup> the Fifth Circuit held that obscenity was not a defense to copyright infringement because nothing in the Copyright Act<sup>27</sup> precluded the copyrighting of obscene materials. The court specifically used the term “obscenity” rather than “pornography,” and concluded that holding obscene materials copyrightable furthered the pro-creativity purposes of the Copyright Act and of congressional copyright power generally. The opinion waxes rhapsodically about the importance of “freedom to explore into the gray areas, to the cutting edge, and even beyond” without governmentally imposed restraints. It mentions nothing about the

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should not be dismissed out of hand because it has been widely utilized in other countries, particularly in Europe”); Thomas W. McEnerney, Recent Development, *Fraudulent Material is Entitled to Copyright Protection in Action for Injunctive Relief and Damages*, 44 HOUS. L. REV. 901, 933 (2007) (“Similarly, the U.S. Court of Appeals for the Federal Circuit has largely confined the ‘moral utility’ doctrine, which at one time prevented the patenting of immoral or fraudulent inventions, to oblivion, see *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1366-67 (Fed. Cir. 1999), though it may retain some vitality with respect to a small class of inventions the practice of which would violate fundamental public policy”). See generally RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM* (The Johns Hopkins Univ. Press 1999); Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 469-70 (2003); Thomas F. Cotter, Article, *Misuse*, 74 COLUM. L. REV. 1351, 1354 (1974).

<sup>24</sup> *Williams v. Morgan*, 478 F.3d 1316, 1322-24 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 77 (U.S. 2007) (N. 06-1501); see also Posting of Rachel to Supreme Court Refuses to Hear Sex Toy Case, Sales Effectively Banned in Alabama, <http://womenshealthnews.wordpress.com/2007/10/03/supreme-court-refuses-to-hear-sex-toy-case/> (Oct. 3, 2007, 9:10 EST) (last visited Sept. 24, 2008).

<sup>25</sup> See generally Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

<sup>26</sup> 604 F.2d 852, 863 (5th Cir. 1979) (holding that “obscenity is not an appropriate defense in an infringement action”), *cert. denied*, 445 U.S. 917 (U.S. Mar. 3, 1980) (No. 79-1088).

<sup>27</sup> Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C §§ 101-122 (2005)).

destructive impact that this “exploration” could potentially have upon actual human beings.

The *Mitchell Brothers* court also asserted that the First Amendment and copyrights are “mutually supportive,” writing that “[t]he financial incentive provided by copyright encourages the development and exchange of ideas which furthers the First Amendment’s purpose of promoting the ‘exposition of ideas.’”<sup>28</sup> The court linked this to a right to reach an audience or readership that is economically facilitated by copyright protections.<sup>29</sup>

What is fairly remarkable about the case is the court’s enthusiastic support for increasing incentives for the production and distribution of pornography by declaring obscene works eligible for copyright protection, with little apparent concern for any negative consequences. Proper copyright jurisprudence usually requires weighing and balancing competing interests and concerns.<sup>30</sup> In the years after the *Mitchell Brothers* decision, courts agonized over whether copyright protections legitimately extended to works such as computer game interfaces, where any harm from an overly expansive construction of copyright was likely to be strictly economic in nature.<sup>31</sup> Yet the *Mitchell Brothers* court could not seem to recognize that there was any potential cost to society by affording copyright protection to pornographic works without reservation.

Three years later in *Jartech, Inc. v. Clancy*,<sup>32</sup> the Ninth Circuit adopted the *Mitchell Brothers* reasoning unquestioningly, relying on an endorsement by Nimmer on Copyright, which it referred to as “the leading treatise on copyright.”<sup>33</sup> Although *Mitchell Brothers* was the only case on point at that time, the *Jartech* court observed that “Nimmer . . . considers *Mitchell Brothers* to represent the prevailing

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<sup>28</sup> *Mitchell Bros.*, 604 F.2d at 857; see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (“The author’s control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing.”).

<sup>29</sup> *Mitchell Bros.*, 604 F.2d at 857 n.8.

<sup>30</sup> Cf. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 894 (2002).

<sup>31</sup> E.g., *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992); *Midway Mfg. Co. v. Artic Int’l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982), *Capcom U.S.A., Inc. v. Data E. Corp.*, 1994 WL 1751482 (N.D. Cal. 1994).

<sup>32</sup> 666 F.2d 403 (9th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982).

<sup>33</sup> *Id.* at 406.

view on this issue”<sup>34</sup> and apparently outsourced its analytical thinking about the topic to a copyright treatise.<sup>35</sup>

Courts are not in complete accord on this issue. In 1998, Judge Martin of the Southern District of New York refused to grant a copyright infringement grounded preliminary injunction or pretrial impoundment and seizure order for movies he believed to be obscene. He concluded “[g]iven the clearly criminal nature of plaintiff’s operations, it is self-evident that the Court should not use its equitable powers to come to the aid of plaintiffs and should invoke the doctrine of clean hands and leave the parties where it finds them,” refusing to commit the resources of the United States Marshal’s Service “to support the operation of plaintiff’s pornography business.”<sup>36</sup>

However, in 2004, another federal judge in the same district reached a contrary conclusion in a similar case, *Nova Products, Inc. v. Kisma Video, Inc.*<sup>37</sup> Judge Baer decided to follow *Mitchell Brothers*, writing:

In its well-reasoned and scholarly opinion, the Fifth Circuit reviewed the history of the copyright legislation and found that all-inclusive language of the Copyright Act of 1909, 17 U.S.C. § 34 (1970) (repealed), which encompassed “all the writings of an author,” did not bespeak of an obscenity exception to copyright protection.<sup>38</sup>

Congress has never addressed this issue in legislative hearings, nor in any amendment to the Copyright Act. Copyright law scholars have not had much to say about pornography specifically either, even though many high profile copyright cases involve pornographic content, including very early cases about Internet content distribution such as *Playboy v. Frena*<sup>39</sup> and *Playboy v. Webworld*,<sup>40</sup> much more recent cases about search engine liability such as *Perfect 10 v. Google* and *Perfect 10 v. Amazon.com*,<sup>41</sup> and various contemporary allegations of online reproduction rights infringement.<sup>42</sup> Copyright suits by pornographers are likely to increase, as reportedly, “the ease of posting porn online is causing a panic among some adult film producers, who

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<sup>34</sup> *Id.*

<sup>35</sup> See Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581 (2004) (Providing a critique of over-reliance on the Nimmer treatise by courts).

<sup>36</sup> *Devils Films, Inc. v. Nectar Video Corp.*, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998).

<sup>37</sup> 2004 U.S. Dist. LEXIS 24171 (S.D.N.Y. Dec. 1, 2004).

<sup>38</sup> *Id.* at \*10.

<sup>39</sup> 839 F. Supp. 1552 (M.D. Fla. 1993).

<sup>40</sup> 991 F. Supp. 543 (N.D. Tex. 1997).

<sup>41</sup> 487 F.3d 701 (9th Cir. 2007).

<sup>42</sup> *E.g.*, *Io Group, Inc. v. Veoh Networks*, No. C06-03926 HRL, 2007 U.S. Dist. LEXIS 31639 (N.D. Cal. Apr. 13, 2007).

spend big budgets on big stars, only to have those posted and viewed for free, or only to see viewers turn to free, amateur porn instead.<sup>43</sup>

Because the Intellectual Property Clause of the U.S. Constitution<sup>44</sup> authorizes copyright protections only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime. That policy makers and legal scholars choose to ignore these issues gives pornography a privileged position with respect to more interrogated categories of creative, copyrightable and highly commercialized works such as mainstream music and non-pornographic movies.

Though copyright protection was effectively unavailable for pornographic movies until 1979, as explained above, people created and distributed pornographic works anyway, and presumably did so profitably. One consequence of initial judicial determinations that even obscene works were entitled to copyright protection may well have been to spark the production of more of them. Another likely effect was to provide incentives for even broader distribution of pornographic works, because copyright protections offer mechanisms to profit from doing so. Paralleling the music industry in some ways, commercial pornography producers currently police free porn Web 2.0 sites such as YouPorn, XTube, and PornoTube and others for unauthorized uses of pornographic content they produced, and pursue piracy actions against accused infringers.<sup>45</sup> Facilitating the enforcement of copyright-based limitations on distribution of pornography may have created incentives for increasing production of pornography, and that may have increased the harms associated with pornography production. But no court addressing the copyrightability of pornography addressed this possibility.

### III. COPYRIGHT LAW, MORALITY AND HARM

The subject of morality is raised in the context of copyright law in several ways. For example, there are many accounts of musicians whose culture and creative works have been unscrupulously

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<sup>43</sup> Sunny Freeman, *The Tye, Porn 2.0: What Happens When Free Porn Meets Social Networking*, July 10, 2007, <http://www.alternet.org/sex/56414/?page=entire> (last visited Sept. 23, 2008).

<sup>44</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>45</sup> See Freeman, *supra* note 42.

appropriated, and copyright law has been a handy tool for this sort of chicanery and theft.<sup>46</sup> This is part of a broader literature about how intellectual property laws intersect with, and facilitate the exploitation of cultural heritage, often to the detriment of its human creators.<sup>47</sup>

The morality of making non-permissive uses of copyrighted works is also a subject of pitched debate. The unauthorized downloading of music has been framed as theft and piracy by copyright holders,<sup>48</sup> but is considered legitimate sharing by others.<sup>49</sup> The morality of borrowing pieces of existing works to use in the creation of new ones is also hotly contested, often framed as a debate about the appropriate scope of fair use.<sup>50</sup>

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<sup>46</sup> See Olufunmilayo Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 281 (No. 2, Winter 2006); Olufunmilayo Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights* (Northwestern Public Law Research Paper No. 07-13, Apr. 2007), available at [http://ssrn.com/abstract\\_id=981423](http://ssrn.com/abstract_id=981423); Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 569-71 (2006); Olufunmilayo Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property* (Case Legal Studies Research Paper No. 04-19, Mar. 2006), available at [http://ssrn.com/abstract\\_id=596921](http://ssrn.com/abstract_id=596921); Olufunmilayo Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks (TRIPS Symposium)*, MARQ. INTELL. PROP. L. REV. 156, 177-78 (2006); Kevin J. Greene, *Stealing the Blues: Does Intellectual Property Appropriation Belong in the Debate over African-American Reparations?* (Thomas Jefferson School of Law Public Law Research Paper No. 05-03, Dec. 2004), available at [http://ssrn.com/abstract\\_id=655424](http://ssrn.com/abstract_id=655424).

<sup>47</sup> E.g., Greene, *supra* note 45.

<sup>48</sup> Ethics Newline, *Is Illegal Downloading Theft, Plain and Simple?*, Feb. 25, 2008, <http://gloablethics.org/newsline/2008/02/25/is-illegal-downloading-theft-plain-and-simple/> (last visited Sept. 23, 2008); Gary Shapiro, *Lasting Impression – Downloading is Illegal*, Sept. 26, 2002, [http://news.zdnet.com/2100-9595\\_22-959632.html](http://news.zdnet.com/2100-9595_22-959632.html) (last visited Sept. 23, 2008); Rick Lockridge, *Downloading Music from the Internet: Theft or Democracy?*, Mar. 3, 1999, <http://cgi.cnn.com/TECH/computing/9903/03/webweb.music.pirates/> (last visited Sept. 23, 2008).

<sup>49</sup> Lori Enos, *Music Downloads Not Theft, Americans Say*, Oct. 2, 2000, <http://www.ecommercetimes.com/story/4442.html?welcome=1204652433> (last visited Sept. 23, 2008); Mary Madden & Amanda Lenhart, *Music Downloading, File-Sharing and Copyright*, July 2003, [http://www.pewinternet.org/report\\_disp\\_lay.asp?r=96](http://www.pewinternet.org/report_disp_lay.asp?r=96) (last visited Sept. 26, 2008).

<sup>50</sup> Ann Bartow, *Copyright and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75, 80 (2004); Thomas F. Cotter, *Fair Use and Copyright Overenforcement* (Minnesota Legal Studies Research Paper No. 06-69, 2006), available at [http://ssrn.com/abstract\\_id=951839](http://ssrn.com/abstract_id=951839) (last visited Sept. 23, 2008); Michael J. Madison, *Fair Use and Social Practices* (University of Pittsburgh Legal Studies Research Paper No. 2007-02, 2006), available at [http://ssrn.com/abstract\\_id=998478](http://ssrn.com/abstract_id=998478) (last visited Sept. 23, 2008); Joseph P. Lui, *Copyright and Breathing Space* (Boston College Legal Studies Research Paper No. 139, Sept. 6, 2007), available at [http://ssrn.com/abstract\\_id=1012596](http://ssrn.com/abstract_id=1012596) (last visited Sept. 23, 2008).

Copyright law is additionally concerned with “moral rights,” which mainly refer to the rights of attribution and integrity.<sup>51</sup> The attribution right is intended to insure that the author of a work receives appropriate recognition. The right of integrity is supposed to make certain that the author’s artistic vision is unaltered. The entire focus of a moral rights regime is on treating the author in a principled way, to recognize and honor the enriching contributions that creative works make to society.

The morality of the acts that content creators engage in during the production of artistic works, however, has never been a consideration of statutory copyright law. In holding that obscenity was copyrightable, the *Mitchell Brothers* court wrote: “Because the private suit of the plaintiff in a copyright infringement action furthers the congressional goal of promoting creativity, the courts should not concern themselves with the moral worth of the plaintiff.”<sup>52</sup>

The morality of expanding the economic incentives associated with pornography by making pornographic works eligible for copyright protections has never been publicly debated. Yet if copyrightability has increased the production of pornography, and therefore the harms associated with said production, it should be the focus of a debate. Compared to music and non-pornographic audiovisual works, the scant attention pornography has received from copyright law scholars is surprising, given the size of the industry. Yet it mirrors the larger zone of repressive silence surrounding the effects of pornography on society generally.

Few are willing to contemplate the possibility that significant harms can be linked to pornography production. Cans of tuna are adorned with “dolphin safe” labels because tuna consumers care about the well being of dolphins.<sup>53</sup> General release movies often roll notices that no animals were harmed during the making of the film.<sup>54</sup> In fairly stark contrast, pornographic works are often advertised in ways that highlight actual violence that was done to performers during production, such as “bloody first times,” “blondes getting slammed,” “big mutant dicks rip small chicks,” and “men fucking that teen virgin

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<sup>51</sup> Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 95 WM. & MARY J. ONLINE L. 2, art. 2, ¶ 21 (1995-1996), available at [http://www.wm.edu/law/publications/jol/95\\_96/lemley.html](http://www.wm.edu/law/publications/jol/95_96/lemley.html) (last visited Sept. 23, 2008).

<sup>52</sup> *Mitchell Bros. Film Group v. Cinema Adult Theater et al.*, 604 F.2d 852, 862 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

<sup>53</sup> Earth Island Institute, *Dolphin Safe Tuna*, <http://www.earthisland.org/dolphinSafeTuna/consumer/> (last visited Sept. 23, 2008).

<sup>54</sup> American Humane, *No Animals Were Harmed*, available at [http://www.americanhumane.org/site/PageServer?pagename=pa\\_film](http://www.americanhumane.org/site/PageServer?pagename=pa_film) (last visited Sept. 23, 2008).

bitch's ass so hard she couldn't sit for days." Apparently this is an effective way to sell pornography to average pornography consumers. One wonders how the same audience would respond to cans of tuna bearing labels that said, "[n]ow with more brutally slaughtered dolphins than ever!"<sup>55</sup> It may be that pornography consumers erroneously (or preferentially) believe that all pornography performances are voluntary and consensual.<sup>56</sup> It seems more likely that they do not care whether they are or not. It is additionally possible that some derive enhanced erotic pleasure from the possibility that the performers are being subject to coercion and force.

In 2001 Martin Amis published a description of the pornography industry he called "A Rough Trade."<sup>57</sup> In the publication, Amis described the violence, degradation, and disease dangers associated with pornography production. He wrote:

In the yard of the house on Dolorosa Drive, during a break in filming, Chloe, Artie and Lola stood there naked, discussing a new rollercoaster ride called Desperado. They were all smoking. I came across many a good little smoker in pornoland. What with the risks they run already, who cares about smoking? Then it was butts out and back to work. And I do mean work. Porno is a proletarian form. And porno people are a hard-grafting, ill-paid fraternity who, by and large, look out for each other and help each other through. They pay their rent, with the deaths of feelings.

Copyright law is only one piece of the legal regime that regulated pornography, but compared with the First Amendment, its effects have been virtually ignored. Because the Intellectual Property Clause of the U.S. Constitution<sup>58</sup> authorizes copyright law only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime.

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<sup>55</sup> I owe credit for this rhetorical framing to a pseudonymous feminist blogger whose blog archives are no longer available for reading or linking.

<sup>56</sup> See generally Shelley Lubben, *The Truth Behind the Fantasy of Porn*, available at <http://www.blazinggrace.org/thetruth.htm> (last visited Sept. 23, 2008); Shelley Lubben, *Pornstars Speak Out*, available at [http://www.shelleylubben.com/articles/pornstars\\_speakout.pdf](http://www.shelleylubben.com/articles/pornstars_speakout.pdf) (last visited Sept. 23, 2008).

<sup>57</sup> Martin Amis, *A Rough Trade (Part 2)* (Mar. 17, 2001), [http://www.martinamis\\_webweb.com/commentary%5Ffiles/rough%5Ftrade%5F2.pdf](http://www.martinamis_webweb.com/commentary%5Ffiles/rough%5Ftrade%5F2.pdf) (last visited Sept. 23, 2008).

<sup>58</sup> U.S. CONST. art. 1, § 8, cl. 8.

## RECENT DEVELOPMENT

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### ***CHRISTIAN V. STATE: THE MITIGATION DEFENSES OF HOT-BLOODED RESPONSE TO ADEQUATE PROVOCATION AND IMPERFECT SELF-DEFENSE CAN APPLY TO MITIGATE FIRST-DEGREE ASSAULT CHARGES.***

**By: Jason Heller**

In a matter of first impression, the Court of Appeals of Maryland held that, under certain circumstances, the mitigation defenses of hot-blooded response to legally adequate provocation and imperfect self-defense may apply to reduce first-degree assault to second-degree assault. *Christian v. State*, 405 Md. 306, 951 A.2d 832 (2008). More specifically, the court stated that these mitigation defenses are applicable to first-degree assault charges where such assaults would supply the underlying malice for a felony-murder charge in the event the victim dies. *Christian*, 405 Md. at 332-33, 951 A.2d at 847-48.

In the first of two consolidated cases, a dispute arose between Daniel Christian (“Christian”) and Raynard Moulden (“Moulden”) in a mall parking lot. Following a verbal altercation between Christian and Moulden, a physical struggle ensued, and Christian stabbed Moulden, allegedly in self-defense.

Before the Circuit Court for Baltimore County, Christian requested a jury instruction on imperfect self-defense to mitigate the first-degree assault charge. The court denied the request, and the jury convicted Christian of first-degree assault and related charges. Christian appealed to the Court of Special Appeals of Maryland, which held that the circuit court did not commit reversible error in refusing the instruction because an imperfect self-defense instruction is only applicable in homicide cases. The Court of Appeals of Maryland granted certiorari to consider this case.

In the second consolidated case, Kalilah Romika Stevenson (“Stevenson”) drove to her estranged husband’s home to retrieve her daughter’s book bag. While in the home, Stevenson and her mother-in-law began arguing. Her husband, Antonio Corbin (“Corbin”), intervened in an attempt to break up the dispute and sought to forcibly

remove Stevenson from his home. Stevenson stabbed Corbin twice in the forearm with a butcher knife, allegedly in response to Corbin's use of force.

Stevenson, on trial before the Circuit Court for Wicomico County, requested a jury instruction on the mitigation defense of hot-blooded response to adequate provocation, which the court denied. The jury found Stevenson guilty of first-degree assault and related charges. Stevenson appealed to the Court of Special Appeals of Maryland, which affirmed, holding that the mitigation defense of hot-blooded response to adequate provocation was inapplicable in Stevenson's case because first-degree assault was not a shadow offense of murder. The Court of Appeals of Maryland granted certiorari to consider this case.

In front of the Court of Appeals of Maryland, Christian and Stevenson argued that the intent to cause serious physical harm supplies the requisite malice to consider first-degree assault a shadow form of murder because it shares the malice associated with other shadow offenses such as attempted murder, felony-murder, and the inchoate forms of those crimes. *Id.* at 313, 951 A.2d at 836. Further, Christian and Stevenson contended that first-degree assault is an underlying crime for felony-murder, and thus mitigation defenses should apply. *Id.* at 314, 951 A.2d at 836. Conversely, the State asserted that mitigation defenses to negate malice are unavailable because the intent and malice requirements for first-degree assault are disparate from murder and its shadow forms. *Id.* at 314-15, 951 A.2d at 837. The court rejected the State's argument, effectively altering Maryland's traditional common law. *Id.* at 332-33, 951 A.2d at 848.

Historically, the Court of Appeals of Maryland has held that mitigation defenses of hot-blooded response to adequate provocation and imperfect self-defense only apply to charges of criminal homicide and its shadow forms. *Id.* at 322, 951 A.2d at 841. Before the General Assembly enacted the current assault statutes in 1996, the court expanded the availability of the mitigation defenses to charges of assault with the intent to murder. *Id.* at 325, 951 A.2d at 843. The difference between the mitigation defense for murder and an assault with intent to murder charge is that murder would be reduced to manslaughter, whereas an assault with intent to murder would be reduced to simple assault. *Id.* at 326, 951 A.2d at 844.

To determine the applicability of the mitigation defenses to first-degree assault, the Court of Appeals of Maryland examined the relationship between mitigation and malice. *Id.* at 329, 951 A.2d at 846. The court explained that the requisite malice for a murder charge is different than the malice required for other crimes. *Id.* (citing *Richmond v. State*, 330 Md. 223, 231, 623 A.2d 630, 634 (1993)). The malice element of murder encompasses the requisite state of mind, as well as an absence of mitigation. *Christian*, 405 Md. at 329, 951 A.2d at 846 (citing *Richmond*,

330 Md. at 231, 623 A.2d at 634). However, criminal charges other than murder do not require an absence of mitigating circumstances to satisfy the malice element. *Christian*, 405 Md. at 329, 951 A.2d at 846 (citing *Richmond*, 330 Md. at 231, 623 A.2d at 634). The court noted that the use of mitigation defenses is specific only to murder charges and its shadow forms. *Christian*, 405 Md. at 329-30, 951 A.2d at 846 (citing *Richmond*, 330 Md. at 231, 623 A.2d at 634).

The Court of Appeals of Maryland further stated that the purpose of the felony-murder doctrine is to deter dangerous acts by charging any homicide resulting from the acts as murder, regardless of the offender's intent to kill. *Christian*, 405 Md. at 330, 951 A.2d at 846 (citing *Roary v. State*, 385 Md. 217, 226-27, 867 A.2d 1095, 1100 (2005)). The court explained that first-degree assault is within the doctrine's purpose, therefore sufficiently serving as an underlying crime to felony-murder. *Christian*, 405 Md. at 330, 951 A.2d at 846 (citing *Roary*, 385 Md. at 226-27, 867 A.2d at 1100).

In the present case, the Court of Appeals of Maryland stated that a felony-murder charge is dependent on the malice of the underlying crime being applied to the resulting homicide. *Christian*, 405 Md. at 332, 951 A.2d at 847. In light of its prior holdings, the court reasoned that first-degree assault can possess the requisite malice to charge an offender with felony-murder if the victim dies. *Christian*, 405 Md. at 332, 951 A.2d at 847. Therefore, the court found that under certain circumstances, first-degree assault constitutes a shadow offense of homicide. *Id.* The court thus held that the mitigation defenses of hot-blooded response to adequate provocation and imperfect self-defense are applicable to mitigate first-degree assault charges where the assault would create the requisite malice for felony-murder. *Id.* at 332-33, 951 A.2d at 847-48. The court noted that the availability of mitigation defenses still does not extend to crimes other than murder and its shadow forms; but now, under certain circumstances, first-degree assault is a shadow form of murder. *Id.*

By holding that mitigation defenses can be applicable to reduce first-degree assault charges, the Court of Appeals of Maryland strives to amend the incongruity that enables a perpetrator whose victim dies to be incarcerated for less time than an offender whose victim lives. The court's decision may encourage offenders, who are unaware that mitigation defenses are still limited to murder and its shadow forms, to invoke mitigation defenses for lesser crimes, resulting in delayed proceedings. However, this potential consequence is incomparable to the benefit of mending an unjust sentencing incongruity. The decision in *Christian* will encourage courts to be more liberal with the availability of mitigation defenses for assault charges. Further, as this is an issue of first impression in Maryland, it is plausible to predict that the availability of mitigation defenses for assault related charges, under certain circumstances, will evolve to include additional variations of assault.

## RECENT DEVELOPMENT

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### **CLANCY V. KING: A FIDUCIARY, DESPITE ADVERSE REPERCUSSIONS TO THE PARTNERSHIP'S INTERESTS, MAY IN GOOD FAITH ENFORCE A VALIDLY OBTAINED LEGAL RIGHT AGAINST HIS OR HER PARTNERSHIP.**

**By: Joseph Maher**

The Court of Appeals of Maryland held that there is no breach of fiduciary duty when a validly obtained legal right is enforced by a partner against his or her partnership despite adverse repercussions to the partnership, provided the partner acts in good faith. *Clancy v. King*, 405 Md. 541, 954 A.2d 1092 (2008). In so holding, the court explained that contracted rights established within the four corners of partnership agreements may preempt statutory and common law fiduciary duties. *Clancy*, 405 Md. at 541, 954 A.2d at 1092.

In 1992, Thomas L. Clancy, Jr. ("Clancy") created the Jack Ryan Limited Partnership ("JRLP") with Wanda King ("King"), his then wife. The provisions of the agreement allowed each partner to engage in activities that were in competition with JRLP. Additionally, the agreement required neither partner to disclose his or her interest in such activities.

The following year, JRLP contracted with S&R Literary, Inc. ("S&R") to form Tom Clancy's Op-Center ("Op-Center"). This joint venture agreement was signed by Clancy, individually and as a partner of JRLP. Additionally, it specifically provided Clancy the prevailing power with respect to the venture's development in the event of a stalemate.

A subsequent development from the Op-Center agreement was a successful paperback book series. Clancy's chief contribution to this endeavor was the association of his name and reputation. In the midst of the book series, Clancy and King divorced, but they retained their respective ownership interests in JRLP. In 2001, S&R and Clancy, individually and as a partner of JRLP, agreed by letter that JRLP could withdraw permission to use Clancy's name in conjunction with the series after publication of the fourteenth book. Clancy withdrew such permission in 2004.

King, requesting injunctive relief, filed a complaint against Clancy for breach of his fiduciary duty to her and JRLP in the Circuit Court

for Calvert County. The circuit court found that Clancy breached his fiduciary duty to JRLP, Op-Center, and King. Upon Clancy's appeal, this ruling was affirmed by the Court of Special Appeals of Maryland. Clancy then petitioned for a writ of certiorari, which the Court of Appeals of Maryland granted.

The court addressed the primary question of whether the lower courts erroneously failed to recognize that contract principles override fiduciary duties where the contract and intentions of the parties are clear and unambiguous. *Clancy*, 405 Md. at 553, 954 A.2d at 1099. The court did not dwell upon the fiduciary duties provided under the common law or Maryland statutes because it is well-established in Maryland that contract law is fully applicable over partnership agreements. *Id.* at 554-56, 954 A.2d at 1100. Thus, the court analyzed King's claim by applying the governing law to effectuate the contents within the four corners of the JRLP and Op-Center agreements. *Id.* at 556, 954 A.2d at 1101.

First, the court deduced that a fiduciary may enforce validly obtained legal rights against other parties to the fiduciary relationship. *Id.* at 563, 954 A.2d at 1105. In making such a conclusion, the court initially looked to Maryland case law, which provided minority shareholders of a corporation the right to protect their personal investment of property against the corporation. *Id.* at 562-63, 954 A.2d at 1104-05 (citing *Waterfall Farm Sys., Inc. v. Craig*, 914 F. Supp. 1213, 1215, 1228 (D. Md. 1995)). Additionally, the court relied upon its prior ruling that prevented a corporation from filing a claim for breach of fiduciary duty against a director because the director enforced his own valid rights against the company. *Clancy*, 405 Md. at 563, 954 A.2d at 1105 (citing *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 67, 915 A.2d 991, 1009 (2007)).

The court explained that in order to enforce validly obtained legal rights, an individual or firm does not need to show personal financial loss. *Clancy*, 405 Md. at 564, 954 A.2d at 1005. The court's reasoning was based on precedent set by the United States Supreme Court which stated that directors who purchased notes from third parties at a discount were allowed to continue receiving payments on those fairly purchased notes, despite the fact that the profit was obtained at the company's expense. *Id.* at 563-64, 954 A.2d at 1005 (citing *Mfrs. Trust Co. v. Becker*, 338 U.S. 304, 305-06, 314-15 (1949)). Therefore, the Court of Appeals of Maryland concluded that no breach of fiduciary duty occurs when a fiduciary enforces his or her valid rights even if the fiduciary profits at the principal's expense. *Clancy*, 405 Md. at 565, 954 A.2d at 1106.

However, the court limited a fiduciary's ability to profit at the principal's expense to a good faith standard, regardless of whether

such a standard is included in the partnership agreement. *Id.* at 565-66, 954 A.2d at 1106 (citing MD. CODE ANN., CORPS. & ASS'NS § 9A-103(b)(5) (West 2007)). In setting this limitation, the court defined bad faith as conduct motivated to injure the firm, venture, or business partner. *Clancy*, 405 Md. at 568, 954 A.2d at 1108. The court illustrated bad faith by referring to another Maryland case in which a general partner acted to outmaneuver other partners hoping to block the exercise of their statutory rights. *Id.* at 567, 954 A.2d at 1107 (citing *Della Ratta v. Larking*, 382 Md. 553, 557, 856 A.2d 643, 657 (2004)). The court also pointed to a case from the Supreme Court of Delaware, where a general partner's abuse of discretion in retaliation against limited partners was deemed to constitute bad faith. *Clancy*, 405 Md. at 568, 954 A.2d at 1108 (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993)).

Applying the foregoing principles, the Court of Appeals of Maryland concluded that Clancy contracted with both JRLP and Op-Center to maintain control over the use of his name. *Clancy*, 405 Md. at 565, 954 A.2d at 1106. The provisions of the contracts trumped the usual duty of non-competition or theft of partnership opportunities. *Id.* at 558, 954 A.2d at 1102. Clancy enforced his validly obtained legal right, as the court deemed it reasonable and rational for an artist to retain creative control over a project which bears his name, despite his actual amount of contribution. *Id.* at 565, 954 A.2d at 1106. The court noted that, upon remand, bad faith could be found if Clancy acted to impair the Op-Center franchise out of personal ill feelings toward his ex-wife and partner, King. *Id.* at 571, 954 A.2d at 1109.

Conversely, the dissent emphasized the significance of a fiduciary relationship. *Id.* at 584, 954 A.2d at 1117 (Battaglia, J., dissenting). The dissent argued that in this situation, one must show an adverse effect on his or her personal finances. *Id.* Only upon such a showing would one be acting within their fiduciary obligation. *Id.* Agreeing with the lower courts, the dissent would have held that Clancy did not prove an adverse effect upon which to justify his actions. *Id.*

The court's opinion elucidates the rules and application of contract law within the state of Maryland with regard to the fiduciary duties of partners. The court's holding protects the legally obtained rights of individuals at the time of contracting. This ruling also emphasizes the high regard that written agreements have under the law and the controlling power of the relationships created by these agreements. Practitioners must pay meticulous attention to the contractual language of partnership agreements to ensure protection from undue harm that may result in another fiduciary's exercise of contracted rights.

## RECENT DEVELOPMENT

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### ***COMPTROLLER OF THE TREASURY V. SAIC: THE COMPTROLLER MUST PAY INTEREST ON A TAX REFUND WHERE THE TAX REFUND RESULTED FROM THE STATE'S ERROR.***

**By: Elizabeth Cowan**

The Court of Appeals of Maryland held that the Comptroller must pay interest on a refund resulting from the State's error and not solely from the fault of the taxpayer. *Comptroller of the Treasury v. Sci. Applications Int'l Corp.*, 405 Md. 185, 950 A.2d 766 (2008). Even if the Comptroller does not take an affirmative action that causes the error, the error is still attributable to the State if the taxpayer reasonably interpreted the Maryland tax laws. *Id.* at 203, 950 A.2d at 776.

Science Applications International Corporation ("SAIC") paid income taxes for the 1999 fiscal year under the assumption that it owed state taxes based on capital gains from the sale of stock. In 2003, SAIC amended its 1999 return, claiming that the capital gains from the stock sale were not taxable in Maryland because they did not have a "sufficient nexus" to Maryland. As a result, SAIC sought a refund. The Comptroller determined that the gain was taxable and denied SAIC's claim for a refund.

SAIC appealed to the Maryland Tax Court. The tax court agreed with SAIC's argument that there was not a sufficient nexus to Maryland and granted SAIC the refund, which the Comptroller paid. SAIC then filed a motion in the Maryland Tax Court to compel the Comptroller to pay interest on the refund. The Maryland Tax Court ruled in favor of SAIC, holding that the Comptroller owed SAIC interest on the refund. The Comptroller obtained review by the Circuit Court for Baltimore City, which affirmed the tax court's decision. The Comptroller appealed to the Court of Special Appeals of Maryland. On its own initiative, the Court of Appeals of Maryland granted *certiorari* before the intermediate appellate court had the chance to rule.

After holding that the Maryland Tax Court had subject matter jurisdiction to compel the Comptroller to pay interest on the refund and that *res judicata* did not bar SAIC from bringing the action, the court analyzed whether the Comptroller had to pay interest on the refund under section 13-603(b) of the Tax General Article of the Annotated Code of Maryland. *Science Applications*, 405 Md. at 191-97, 950 A.2d at 772-73. Section 13-603(b) provides that a tax collector does not have to pay interest on a refund if the claim for refund is based on “an error or mistake of the claimant not attributable to the State or a unit of the State government”. *Science Applications*, 405 Md. at 197, 950 A.2d at 773 (citing MD. CODE ANN., TAX-GEN. § 13-603(b) (1988, 2004 Repl. Vol.)). Since both parties agreed that there was a mistake, the issue was whether the error on the original return was “attributable to” SAIC or to the State. *Id.*

The Comptroller argued that the mistake was not attributable to the State because it did not take an affirmative act such as an assessment of tax against SAIC. *Id.* The Court of Appeals of Maryland disagreed, basing its analysis on the plain language of the statute. *Id.* at 198, 950 A.2d at 773. This included an interpretation of the legislative intent based on the plain meaning of the predecessor statute of section 13-603. *Science Applications*, 405 Md. at 199, 950 A.2d at 773 (citing *Comptroller v. Fairchild Indus.*, 303 Md. 280, 286, 493 A.2d 341, 344 (1985)). The court determined that the legislative intent was that the State should pay interest on refunds unless the error was solely on the part of the taxpayer. *Science Applications*, 405 Md. at 199, 950 A.2d at 774 (citing *Fairchild Indus.*, 303 Md. at 286, 493 A.2d at 344). Since the current version of section 13-603(b) was enacted in 1988 without any substantive changes, the court determined that this interpretation still applies. *Science Applications*, 405 Md. at 200, 950 A.2d at 774.

The court then considered the test used by the Maryland Tax Court to determine whether the taxpayer reasonably relied on the State’s policies in determining the amount of taxes owed. *Science Applications*, 405 Md. at 201, 950 A.2d at 775 (citing *DeBois Textiles Int’l v. Comptroller*, Income Tax No. 1630, 1985 WL 6117 (Md. T.C. Aug. 23, 1985)). Using the *DeBois* standard, the tax court found that SAIC’s decision to pay taxes on the capital gains was a reasonable decision based on state law, making the error attributable to the State. *Science Applications*, 405 Md. at 202, 950 A.2d at 776. The Court of Appeals of Maryland agreed with this analysis. *Id.* The court reasoned that the State’s policy at the time of the error required the tax because

Maryland law did not allow a subtraction for excluding capital gain. *Id.* at 205, 950 A.2d at 778. SAIC reasonably relied upon Maryland's law, and therefore, it was an error of the State rather than solely one of the taxpayer. *Id.*

The court rejected the Comptroller's position that it could not have been an error on the part of the State because the State did not make an affirmative assessment of tax. *Id.* at 203, 950 A.2d at 776. The court determined that it was sufficient that the State's policy at the time of the tax payment misled the taxpayer. *Id.* Ultimately, the court determined that the Maryland Tax Court based its decision on substantial evidence and did not err as a matter of law. *Id.* at 205, 950 A.2d at 778. The court held that the Comptroller was required to pay interest on the refund because the State was at least partly at fault. *Id.*

The decision in *Science Applications* protects taxpayers from errors of the State. Interest paid by the Comptroller replaces the interest that the taxpayer could have earned from his money while the State was holding it in error. A taxpayer is now more likely to be successful in an action to recover interest on his refund, even if the taxpayer was partially at fault. Maryland practitioners should seek interest on refunds for their clients if there is an indication that the State may have had some part in the error. The State's part, however, does not need to be an affirmative act. The crux of this premise is that the State is in a better position than a taxpayer to understand the tax law.

## RECENT DEVELOPMENT

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### ***HAND V. MFRS. & TRADERS TRUST CO.: A HOLDER IN DUE COURSE OF A PROMISSORY NOTE IS NOT SUBJECT TO A STATUTORY ILLEGALITY DEFENSE UNLESS THE STATUTE VOIDS THE SPECIFIC TRANSACTION.***

**By: David Coppersmith**

The Court of Appeals of Maryland held that a holder in due course of a promissory note is not subject to an illegality defense based on the violation of a statute, unless the statute voids the specific transaction. *Hand v. Mfrs. & Traders Trust Co.*, 405 Md. 375, 952 A.2d 240 (2008). The court further held that a guardian has legal capacity to sue, be sued, and execute promissory notes that encumber a property belonging to a ward. *Hand*, 405 Md. at 410-11, 952 A.2d at 261.

In the District of Columbia, Cordelia Smith (“Cordelia”) was appointed guardian of the property of her son, Clifton Smith (“Clifton”), both of whom resided in the District of Columbia at the time. Clifton settled a medical malpractice claim with a provision for the purchase of a house in Maryland. While residing in Maryland, Cordelia executed a promissory note, using the property of Clifton’s estate as collateral security for repayment of a personal loan. Cordelia refinanced the personal loan, again encumbering the guardianship property, without first obtaining required statutory approval from the District of Columbia court. Manufacturers & Traders Trust Company (“M&T”) succeeded to the interest in the second promissory note, which ultimately came into arrears. Cordelia petitioned the District of Columbia court to be removed as Clifton’s guardian. Patrick Hand (“Hand”) was appointed Clifton’s successor guardian.

M&T sued Hand, Cordelia, and Clifton in the Circuit Court for Prince George’s County for default in payment. The trial court found that M&T qualified as a holder in due course and awarded M&T a money judgment against the Guardianship and Cordelia in her individual capacity. Hand appealed to the Court of Special Appeals of Maryland, which affirmed the trial court, holding that M&T conducted an appropriate due diligence investigation which did not raise concerns about Cordelia’s authority to sign as guardian. The

Guardianship petitioned the Court of Appeals of Maryland for a writ of certiorari, which was granted.

The Guardianship's defenses were based on Section 3-305(a)(1) of the Commercial Law Article of the Maryland Code, which states that the right to enforce the obligation of a party to pay an instrument is subject to the defenses of lack of legal capacity and illegality of the transaction. *Hand*, 405 Md. at 391-92, 952 A.2d at 250 (citing MD. CODE ANN., COM. LAW § 3-305(a)(1) (West 2002)). The Guardianship contended that Cordelia lacked the legal capacity to sign the bill obligatory under the District of Columbia Code section 21-157, which requires court approval before a guardian can encumber the property of a ward; therefore, the transaction was illegal. *Hand*, 405 Md. at 381-83, 952 A.2d at 243-44 (citing D.C. CODE § 21-157 (2001)).

The Court of Appeals of Maryland held that a guardian, such as Cordelia, has the legal capacity to enter into transactions that encumber the ward's property. *Hand*, 405 Md. at 399-400, 952 A.2d at 254. The court explained that a lack of legal capacity relates to the legal ability to maintain legal proceedings. *Id.* at 394-95, 952 A.2d at 251-52 (citing *United States v. Poe*, 120 Md. 89, 87 A. 933 (1913)). Incapacity to sue exists when there is some legal disability, such as infancy, lunacy, or want of title in the plaintiff to the character in which he sues. *Hand*, 405 Md. at 397-98, 952 A.2d at 253 (quoting *Ohlstein v. Hillcrest Paper Co.*, 195 N.Y.S.2d 920 (1959)). The court found that Cordelia was neither incompetent nor incapacitated at the time she entered into the transactions at issue. *Hand*, 405 Md. at 399, 952 A.2d at 254. Additionally, the court determined that there was no want of title to Cordelia's character when she was Clifton's guardian because she was properly appointed guardian by the District of Columbia court. *Id.* at 398, 952 A.2d at 253.

The court then addressed the District of Columbia statute that requires court approval prior to encumbering guardianship property. *Id.* at 382, 952 A.2d at 244. The court noted that Maryland has no comparable court approval requirement to that of the District of Columbia. *Id.* When the note was executed and the misuse of the money occurred, all parties were residents of, and the collateral security was situated in, Maryland. *Id.* at 409, 952 A.2d at 260. Under Maryland law, if a court limits a guardian's authority, the letter appointing the guardian — usually a court order — must contain the limitation. *Id.* at 388, 952 A.2d at 248 (quoting MD. CODE ANN., EST. & TRUSTS § 13-215 (West 2001)). The court pointed out that the District of Columbia court order appointing Cordelia as guardian did not contain any express limitation on her power. *Hand*, 405 Md. at 388, 952 A.2d at 248. The court explained that unless a creditor has

actual knowledge of the limitation contained in the appointment letter, the creditor is protected as if the guardian had properly exercised her power. *Id.* at 389, 952 A.2d at 248 (quoting MD. CODE ANN., EST. & TRUSTS § 13-219 (West 2001)).

The dissent opined that Cordelia lacked the legal capacity to bind the guardianship. *Hand*, 405 Md. at 411, 952 A.2d at 261 (Harrell, J., dissenting). The dissent posited that the majority too narrowly limited the meaning of legal capacity to legal status. *Id.* at 412, 952 A.2d at 262. A guardian may lack legal capacity to act if an action taken is outside her authority. *Id.* at 413, 952 A.2d at 262.

The Court of Appeals of Maryland also held that an alleged illegality based upon the violation of a statute does not subject a holder in due course to the defense of illegality unless the statute, in express language, voids the specific transaction. *Hand*, 405 Md. at 411, 952 A.2d at 261. The court found that M&T qualified as a holder in due course because M&T was a holder of an instrument who took it (1) for value; (2) in good faith; (3) without notice that it contained an unauthorized signature; and (4) without notice that any of the parties had a defense described in section 3-305(a). *Id.* at 391, 952 A.2d at 249-50 (citing MD. CODE ANN., COM. LAW § 3-302 (West 2002)). Furthermore, the court found no express statutory language applicable to this situation. *Hand*, 405 Md. at 411, 952 A.2d at 261.

The court determined that an alleged infirmity must actually be a void transaction to be “illegal” in the context of applying as a valid defense by makers of the notes in holder in due course transactions. *Id.* at 403, 952 A.2d at 256-57. If an obligation is merely voidable, rather than void, at the election of the obligor, the defense of illegality is not available. *Id.* at 404, 952 A.2d at 257 (quoting *Kedzie & 103rd Currency Exch., Inc. v. Hodge*, 619 N.E.2d 732 (Ill. 1993)). Finally, the court explained that while Maryland law prohibits a guardian from using promissory note proceeds to benefit herself, the law does not require a holder in due course to monitor a guardian to ensure proper expenditure of loaned funds. *Hand*, 405 Md. at 408-09, 952 A.2d at 260.

The Court of Appeals of Maryland’s decision provides a narrow definition of legal capacity under Section 3-305(a)(1), limiting it to legal ability and excluding lack of authority. By holding that guardians may execute promissory notes that encumber a ward’s property, the court allows guardians wide latitude in what they may do with a ward’s property. If a guardianship is to be limited in what it may do with guardianship property, the court must include the limitation in the letter of appointment, giving a holder in due course notice of the limitation.

## RECENT DEVELOPMENT

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### **JANICE M. V. MARGARET K.: MARYLAND DOES NOT RECOGNIZE *DE FACTO* PARENTHOOD AS A LEGAL STATUS, THUS ALL THIRD PARTIES MUST DEMONSTRATE PARENTAL UNFITNESS OR EXCEPTIONAL CIRCUMSTANCES TO OVERCOME A PARENT'S CONSTITUTIONAL RIGHT IN CUSTODY AND VISITATION DISPUTES.**

**By: Angela Ablorh-Odjidja**

The Court of Appeals of Maryland held that *de facto* parenthood is not a recognized legal status. *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008). As a result, individuals who would qualify as *de facto* parents must overcome the threshold considerations of parental unfitness and exceptional circumstances to overcome a legal parent's constitutional right to the care, custody, and control of his or her child. *Id.* at 664, 948 A.2d at 75.

Domestic partners Janice M. ("Janice") and Margaret K. ("Margaret") were involved in a committed relationship for approximately eighteen years. During their relationship, Janice adopted a child, Maya, from India in December 1999. Margaret was not involved in the formal adoption process in India nor did she seek to adopt the child in Maryland. The couple lived together with Maya and divided most of the child's caretaking duties. In 2004, Janice and Margaret separated; however, Margaret continued to visit Maya, unsupervised, three to four times a week. As tension between Janice and Margaret mounted, Janice placed restrictions on Margaret's visitation. Frustrated with the restrictions, Margaret, through her lawyer, sent a letter to Janice regarding her limited visitation rights. Janice completely denied Margaret all visitation and access to Maya in response to the letter.

Margaret filed a complaint in the Circuit Court for Baltimore County seeking custody or, in the alternative, visitation. The circuit court granted Janice's motion for summary judgment on the issue of custody; however, the circuit court found that Margaret was a *de facto* parent and granted her visitation rights. Janice appealed, and the Court of Special Appeals of Maryland affirmed, holding that Margaret was, indeed,

Maya's *de facto* parent. Both parties petitioned the Court of Appeals of Maryland for writs of certiorari, which were granted.

The Court of Appeals of Maryland reviewed the legal history regarding parental rights in custody and visitation disputes with third parties. *Janice M.*, 404 Md. at 671-80, 948 A.2d at 79-84. The court recognized that the Due Process Clause of the Fourteenth Amendment protects a legal parent's fundamental right to take care of and make decisions regarding her child. *Id.* at 671, 948 A.2d at 79 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)). Accordingly, parents are presumed to act in the best interest of their children. *Janice M.*, 404 Md. at 673, 948 A.2d at 80. To overcome this presumption in third party custody disputes, a court must find the legal parent unfit or find the existence of extraordinary circumstances deemed harmful to the child. *Id.* at 676, 948 A.2d at 81 (citing *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005)). Findings of parental unfitness or exceptional circumstances also are required in third party visitation disputes. *Janice M.*, 404 Md. at 680, 948 A.2d at 84 (citing *Koshko v. Haining*, 398 Md. 404, 443-44, 921 A.2d 171, 194 (2007)). In the past, however, the Court of Special Appeals of Maryland distinguished *de facto* parents from third parties and held that *de facto* parents were not required to overcome these threshold considerations. *Janice M.*, 404 Md. at 683-84, 948 A.2d at 86-87 (citing *S.F. v. M.D.*, 132 Md. App. 99, 111-12, 751 A.2d 9, 15 (2000)).

In light of the relevant legal history, the Court of Appeals of Maryland considered the following two-pronged issue: (1) whether Maryland recognizes *de facto* parenthood status, and (2) if it does, whether a person who satisfies the requirement of the status is entitled to visitation or custody over the objection of a fit, legal parent, without having to establish that exceptional circumstances exist. *Janice M.*, 404 Md. at 664, 948 A.2d at 74. Margaret argued that an individual who qualifies as a *de facto* parent automatically demonstrates the exceptional circumstances needed to overcome a legal parent's presumption of custody. *Id.* The court disagreed with her interpretation of case law and indicated that exceptional circumstances are not established by a rigid test, but rather by an analysis of all relevant factors in the particular custody or visitation case. *Id.* at 689, 948 A.2d at 89. The court set forth several factors, which include: (1) the child's age when the third party assumed care; (2) the potential emotional impact on the child; (3) the child's physical, mental and emotional needs; (4) the past relationship and bond between the child and the third party; and (5) the stability of the child's current home environment. *Id.* at 694-95, 948 A.2d at 92-93.

The court held that Maryland does not recognize *de facto* parent status and, as a result, overruled the intermediate appellate court's decision in *S.F. v. M.D.*, 132 Md. App. 99, 751 A.2d 9 (2000). *Janice M.*, 404 Md. at 685-86, 948 A.2d at 87. The Court of Appeals of Maryland noted that the intermediate appellate court's decision was made prior to the case law that currently guides Maryland custody and visitation disputes. *Janice M.*, 404 Md. at 683, 948 A.2d at 86. The court, therefore, reasoned that allowing *de facto* parents to circumvent the necessary showing of parental unfitness or exceptional circumstances was inconsistent with current Maryland law. *Id.* at 685, 948 A.2d at 87.

The court further reasoned that even if Maryland recognized *de facto* parent status, a *de facto* parent is indistinguishable from other third parties. *Id.* A person who would qualify as a *de facto* parent in Maryland would still need to prove parental unfitness or exceptional circumstances to overcome the presumption that the legal parent will act in the child's best interest. *Id.* Furthermore, a court may only apply the best interest of the child test after making these threshold considerations. *Id.*

The court considered the approach of other jurisdictions. *Id.* at 686-89, 948 A.2d at 88-89. The court acknowledged that statutes from other states grant visitation to *de facto* parents, despite objections from legal parents. *Id.* at 686, 948 A.2d at 88. Despite this recognition, the court indicated that the choice to create a similar Maryland statute fell under the purview of the Maryland General Assembly and refused to comment on the constitutionality of such a statute under Maryland law. *Id.* at 689, 948 A.2d at 89. The Court of Appeals of Maryland ultimately held that the circuit court erred in granting visitation to Margaret, on the basis of her *de facto* parent status, without first addressing the threshold considerations of parental unfitness and the existence of exceptional circumstances. *Id.* at 695, 948 A.2d at 93.

In this case, the Court of Appeals of Maryland strengthened the constitutional right of a legal parent to control the care and upbringing of her child. Additionally, the court identified a number of factors to help legal practitioners determine whether extraordinary circumstances exist. The court's decision, however, does not support the growing number of non-traditional families in custody and visitation disputes. Same-sex partners, step-parents, grandparents, and others regularly assume responsibility for the care, custody, and control of non-biological children. Recognizing *de facto* parenthood as a legal status would help legitimize the significant role these parties play in the lives of children today. The court leaves open the possibility for the

Maryland legislature to recognize *de facto* parent status through Maryland statute and afford third parties equal standing as fit, legal parents in custody and visitation disputes.

## RECENT DEVELOPMENT

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### ***JOHN DEERE CONSTR. & FORESTRY CO. V. RELIABLE TRACTOR, INC.: OPEN-ENDED CONTRACTS WITH NOTICE OF TERMINATION REQUIREMENTS PERIODICALLY RENEW, AND SUBSEQUENTLY ENACTED LEGISLATION APPLIES PROSPECTIVELY TO THESE CONTRACTS AFTER THEIR RENEWAL.***

**By: Michael Beste**

The Court of Appeals of Maryland held that legislation enacted following the initial execution of open-ended dealer agreements may be prospectively applied to such contracts that require notice in advance of termination. *John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 957 A.2d 595 (2008). Specifically, the court held that the open-ended contracts, which required 120 days notice for no cause termination, effectively re-executed every 120 days; consequently, the statute prospectively applied to the contracts that were re-executed more than 120 days following enactment. *Id.* at 149-50, 957 A.2d at 601.

In 1984, John Deere Construction & Forestry Company (“John Deere”) entered into two dealer agreements with Reliable Tractor, Inc. (“Reliable”), which made Reliable an authorized dealer of certain John Deere products. These contracts were open-ended, meaning that they indefinitely continued until either party terminated them. The contracts provided that either party may terminate the contracts, without cause, by providing 120 days notice. In 1987, the Maryland legislature enacted the Equipment Dealer Contract Act (“the Act”), which was amended in 1998 to prohibit termination of dealer agreements without good cause (the “good cause provision”). On March 27, 2007, John Deere issued a 120-day notice of termination without cause to Reliable.

Reliable filed suit in the United States District Court for the Middle District of Georgia. Reliable sought a declaratory judgment that John Deere’s termination of the agreements violated the Act’s good cause provision. The district court certified to the Court of Appeals of Maryland the question of whether the good cause provision applied to

the contracts when the provision was enacted after the initial execution, but prior to termination, of the contracts.

The Court of Appeals of Maryland first noted that a contract is subject to the laws in existence at the time the contract was executed. *John Deere*, 406 Md. at 146, 957 A.2d at 599 (citing *Dennis v. Mayor of Rockville*, 286 Md. 184, 189, 406 A.2d 284, 287 (1979)). John Deere argued that since execution of the agreements predated enactment of the good cause provision, application of the law is retrospective. *John Deere*, 406 Md. at 145, 957 A.2d at 598. The court agreed with John Deere's argument that a statute may only be applied to a contract retrospectively when such application is pursuant to the legislature's clear intention and the statute does not violate vested rights or deny due process. *Id.* at 145-46, 957 A.2d at 598-99 (quoting *Allstate Ins. Co. v. Kim*, 376 Md. 276, 289, 829 A.2d 611, 618 (2003)). However, the court never reached this analysis because it held that the good cause provision applied prospectively to the contracts. *John Deere*, 406 Md. at 146, 957 A.2d at 599.

The court explained that retrospective application of a statute has not been defined in detail in Maryland. *Id.* at 147, 957 A.2d at 599. Therefore, the court relied on a United States Supreme Court decision, which held that application of a statute is not definitively retrospective when the conduct predates the statute. *Id.* (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). The court stated that "fair notice, reasonable reliance, and settled expectations" must be considered to determine whether a statute's application was retrospective. *John Deere*, 406 Md. at 147-48, 957 A.2d at 600 (quoting *Landgraf*, 511 U.S. at 270). The court noted that the mere enactment of a statute constitutes constructive notice of its existence to the parties. *John Deere*, 406 Md. at 148, 957 A.2d at 600. Therefore, when the parties continued to perform under the contracts after the statutory provision was enacted, the contracts effectively re-executed every 120 days. *Id.* Consequently, the court held that application of the Act's good cause provision was prospective. *Id.*

The court analyzed a federal case with similar facts, which held that an open-ended dealer agreement that required 30 days notice of termination effectively renewed every 30 days. *Id.* at 148-49, 957 A.2d at 600 (citing *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041, 1043 (5th Cir. 1990)). Adopting the Fifth Circuit's rationale, the Court of Appeals of Maryland found that the open-ended agreements re-executed every 120 days if the parties failed to provide notice of termination, effectively creating a sequence of 120-day

contracts. *John Deere*, 406 Md. at 149-50, 957 A.2d at 601. The court concluded that because both parties continued to perform under the contracts after the good cause provision's enactment for a period longer than 120 days, the statutory provision prospectively applied to the most recently renewed contracts. *Id.* at 150, 957 A.2d at 601. The court explained, however, that if a party provided notice of termination within 120 days after enactment of the statutory provision, application would be retrospective. *Id.* at 149-50, 957 A.2d at 601.

John Deere relied on a Maryland case, where the application of a statute to a fixed-term lease executed prior to the statute's enactment was retrospective. *Id.* at 150, 957 A.2d at 601 (citing *Rigger v. Balt. Co.*, 269 Md. 306, 305 A.2d 128 (1973)). The court distinguished *Rigger*, explaining that fixed-term contracts do not automatically re-execute because the fixed-term binds parties for a definite period. *John Deere*, 406 Md. at 150-51, 957 A.2d at 601. The court further explained that, in *Rigger*, the court used the date of the initial execution of the contract to determine whether the statute was retrospectively applied. *Id.* at 150, 957 A.2d at 601 (citing *Rigger*, 269 Md. at 312, 305 A.2d at 132). Here, the agreements were open-ended contracts which effectively re-executed every 120 days; therefore, the court used the date of the most recently renewed contract to determine whether application was retrospective. *John Deere*, 406 Md. at 151, 957 A.2d at 602.

The court clarified that not all contracts with a notice of termination requirement automatically renew. *Id.* at 149, 957 A.2d at 601. The court evaluated persuasive authority where a contract was executed for a fixed term and required 90-days notice for termination. *Id.* at 149, 957 A.2d at 600-01 (citing *Cloverdale Equip. Co. v. Manitowoc Eng'g Co.*, 964 F. Supp. 1152 (E.D. Mich. 1997)). In *Cloverdale Equipment*, the contract did not renew every 90 days because it was a fixed term agreement without an automatic renewal provision. *John Deere*, 406 Md. at 149, 957 A.2d at 601. *John Deere*, on the other hand, concerned open-ended contracts; therefore, the court rejected the *Cloverdale Equipment* approach. *John Deere*, 406 Md. at 149, 957 A.2d at 601.

The court also relied on public policy to support its holding. *Id.* at 152, 957 A.2d at 603. The court explained that contracts may not conflict with public policy expressed in a statute and, where such a violation is found, conflicting contract provisions are invalid. *Id.* Therefore, the court considered the dealer agreements invalid to the

extent that they could be terminated without cause. *Id.* at 153, 957 A.2d at 603.

The dissent asserted that the majority improperly relied on dicta of prior case law. *Id.* at 159, 957 A.2d at 606 (Harrell, J., dissenting). The dissent argued that no court has held that open-ended contracts constitute a series of shorter contracts and that a “fresh decision” standard is more appropriate. *Id.* at 159, 165, 957 A.2d 607, 610. Under this standard a statute may be applied prospectively to a contract if the parties, following enactment of the law, either entered negotiations for a new agreement or renewed a contract that terminated on a specific date after the law became effective. *Id.* at 162, 957 A.2d at 608 (citing *Bitronics Sales Co. v. Microsemiconductor Corp.*, 610 F. Supp. 550 (D. Minn. 1985)).

The court’s holding necessitates that parties to open-ended agreements stay abreast of legislation modifying contract law. Otherwise, overlooked legislation may invalidate terms of noncompliant contracts. Lawyers must exercise care when drafting open-ended agreements that require little notice prior to termination. For instance, if a 30-day notice to terminate a contract is inconsistent with new legislation, the parties must modify or terminate the contract within the stated period. Longer notice provides more time to assess a piece of legislation’s effect following enactment. A better suggestion is to avoid using open-ended contracts. If attorneys use fixed-term agreements without an automatic renewal clause, parties can avoid the potential legal problems that arose in *John Deere* by ensuring that the agreements would be subject only to legislation enacted prior to the contract’s initial execution.

## RECENT DEVELOPMENT

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### ***MALDONADO V. AM. AIRLINES: EXPERT VOCATIONAL TESTIMONY IS NOT PER SE REQUIRED IN JUDICIAL REVIEW PROCEEDINGS TO REBUT THE PRESUMPTION OF CORRECTNESS OF A WORKERS' COMPENSATION COMMISSION AWARD OF "OTHER CASES" INDUSTRIAL LOSS.***

**By: Stephen Cornelius**

The Court of Appeals of Maryland held that there is no *per se* requirement to present expert vocational testimony to rebut the presumption of correctness of a Workers' Compensation Commission award of "Other Cases" industrial loss. *Maldonado v. Am. Airlines*, 405 Md. 467, 952 A.2d 294 (2008). An exception exists, however, when the factors of industrial loss are so complicated that no jury could justifiably alter the Commission's decision without hearing expert testimony. *Id.* at 480, 952 A.2d at 302.

George Maldonado ("Maldonado") was a fleet service clerk employed by American Airlines ("American"). Maldonado suffered a tear in his back while loading luggage into an aircraft carrier. He filed for workers' compensation benefits, claiming that he could not return to work because he could only sit for a limited period of time before needing to lie down. The Workers' Compensation Commission ("the Commission") determined that Maldonado sustained permanent partial disability of 50% from physical and psychological injuries.

American sought judicial review in the Circuit Court for Anne Arundel County. At trial, Maldonado testified that, following his injury, he obtained a bachelor's degree in theology, performed light housework, could walk continuously for thirty to forty minutes, and could drive a car. Additionally, both parties presented expert medical testimony addressing the severity of Maldonado's injuries. The jury, without hearing expert vocational testimony, reduced Maldonado's overall impairment to 35%. Maldonado appealed, and the Court of Special Appeals of Maryland affirmed, holding that there is no *per se* requirement for expert vocational testimony in a judicial review proceeding to rebut the Commission's presumption of correctness.

Maldonado then petitioned for a writ of certiorari, which the Court of Appeals of Maryland granted.

To determine the necessity of expert vocational testimony in judicial review proceedings, the Court of Appeals of Maryland commenced its analysis with the explanation that a Commission's decision is presumed correct, and that the challenging party has the burden of proof. *Maldonado*, 405 Md. at 477, 952 A.2d at 301 (citing MD. CODE ANN., LAB. & EMPL. § 9-745(b) (West 2008)). The court explained that no particular type of evidence is required to overcome the presumption of correctness; the challenging party can overcome the presumption by introducing new evidence, by relying on the record before the Commission, by contesting the significance of evidence, and by arguing witness credibility. *Maldonado*, 405 Md. at 478, 952 A.2d at 301 (citing *Abell v. Albert F. Goetze, Inc.*, 245 Md. 433, 437, 226 A.2d 253, 256 (1967)). The court held that while vocational expert testimony is admissible, vocational analysis has never been elevated to a *sine qua non* for proving permanent disability. *Maldonado*, 405 Md. at 479-80, 952 A.2d at 302 (citing *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 639, 911 A.2d 888, 900 (2006)).

The court analyzed "Other Cases" industrial loss as a category of permanent partial disability under section 9-627(k) of the Labor and Employment Article of the Maryland Code. *Maldonado*, 405 Md. at 475-77, 952 A.2d at 299-300. The court found that two factors must be addressed: (1) the nature of the physical disability, and (2) the age, experience, occupation, and training of the disabled employee at the time of the injury. *Id.* (citing MD. CODE ANN., LAB. & EMPL. § 9-627(k)(2) (West 2008)). Expert vocational testimony is not *per se* required in every case, except when these two factors "are so complicated that no jury in any case, regardless of the other evidence presented, would have sufficient evidence upon which to alter a Commission decision." *Maldonado*, 405 Md. at 480, 952 A.2d at 302.

Maldonado asserted that the facts surrounding his injury were too complex for a jury to assess the extent of his injury without the help of a vocational expert. *Id.* at 474, 952 A.2d at 299. The Court of Appeals of Maryland disagreed, concluding that Maldonado's testimony, coupled with the expert medical testimony, provided sufficient evidence as to each factor under section 9-627(k)(2) for the jury to alter the Commission's decision. *Maldonado*, 405 Md. at 482-83, 952 A.2d at 303-04.

The court found the first factor adequately addressed at trial. *Id.* at 482-83, 952 A.2d at 304. Medical experts addressed the severity of Maldonado's physical and psychological injuries, and Maldonado testified that after the injury, he earned a degree and performed everyday activities such as working around the house and driving a car. *Id.* While expert medical testimony is mandated to establish the nature of an injury in a complex case, the court emphasized that it was not necessary for every subjective injury claim. *Id.* at 479, 952 A.2d at 302 (citing *Jewel Tea Co. v. Blamble*, 227 Md. 1, 7, 174 A.2d 764, 767 (1961)).

The court also determined that the trial sufficiently addressed the second factor. *Maldonado*, 405 Md. at 482, 952 A.2d at 303. First, Maldonado testified to the length of his employment, the physical nature of his position as a fleet service clerk, and the fact that he was forty-three years old at the time of the accident. *Id.* The court found that this testimony effectively addressed the statutory components of the second factor. *Id.* at 482-83, 952 A.2d at 303-04. Second, the court explained that jurors are generally familiar with matters involving work, age, experience, training, and job prospects. *Id.* at 481, 952 A.2d at 303. Consequently, the court concluded that the jury could determine, without a vocational expert, the extent of Maldonado's injury and how it affected his ability to work. *Id.* at 483, 952 A.2d at 304.

Despite the court's statutory analysis, Maldonado, relying on case law, argued that industrial loss determinations were inherently complicated, necessitating expert vocational testimony. *Id.* at 479, 952 A.2d at 301. In dismissing this argument, the Court of Appeals of Maryland noted that the case Maldonado relied on "explicitly stated that [it was] *not* establishing a *per se* requirement for expert testimony when a medical question was involved." *Id.* at 479, 952 A.2d at 302 (citing *Jewel Tea*, 227 Md. at 7, 174 A.2d at 767). Further, *Jewel Tea* required expert testimony because the challenging employee's lay testimony directly conflicted with all expert medical testimony, including his own expert's testimony. *Maldonado*, 405 Md. at 479, 952 A.2d at 301 (citing *Jewel Tea*, 227 Md. at 7, 174 A.2d at 767).

The court noted that several other states have also held that expert vocational testimony is not a *sine qua non* for determining industrial loss. *Maldonado*, 405 Md. at 481, 952 A.2d at 303. The court pointed out that, of the jurisdictions that purport to require expert vocational testimony, none of them apply a *per se* rule across the board. *Id.* at 481-82, 952 A.2d at 303.

The Court of Appeals of Maryland eliminated any uncertainty pertaining to a requirement of expert vocational testimony in judicial review proceedings for workers' compensation claims. The challenging party may produce any type of evidence so long as they satisfy the burden of proof. This approach promotes judicial economy because it conserves time in situations where a lay person can easily discern the extent of an injury and how it affects wage earning capacity. By holding that expert vocational testimony is not *per se* required to rebut the presumption of correctness of a Commission's award of permanent partial disability, the court empowers challenging parties with discretion in satisfying the burden of proof in judicial review proceedings.

## RECENT DEVELOPMENT

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### ***PRICE V. STATE: INCONSISTENT VERDICTS IN CRIMINAL JURY TRIALS ARE NO LONGER PERMISSIBLE.***

**By: Alison Karch**

The Court of Appeals of Maryland changed long-standing common law by holding that inconsistent jury verdicts in criminal cases are no longer allowed. *Price v. State*, 405 Md. 10, 949 A.2d 619 (2008). The court concluded that a jury verdict of guilty, which is flatly inconsistent with the jury's verdict of not guilty on another count, is illogical and contrary to law. *Id.* at 29, 949 A.2d at 630.

On November 20, 2002, two Baltimore City police officers observed about fifteen people congregating in a breezeway of an apartment complex known for the sale of drugs. The police officers observed Lawrence Price, Jr. ("Price") surrounded by others who exchanged money for small objects. Price and others ran when the officers approached the breezeway. When the officers caught and apprehended Price, he threw a bag that contained a handgun and U.S. currency.

Price was charged in the Circuit Court for Baltimore City with various drug offenses, including drug trafficking crimes. In addition, Price was charged with the possession of a firearm during and in relation to a drug trafficking crime. At trial, the judge instructed the jury that to find Price guilty of possessing a firearm during and in relation to a drug trafficking crime, they also had to find him guilty of at least one of the drug trafficking crimes. The jury acquitted Price of all the drug trafficking charges. However, despite the trial judge's instructions, the jury found Price guilty of possession of a firearm during and in relation to a drug trafficking crime.

Price moved to strike the guilty verdict on the firearms charge on the grounds that it was inconsistent with the not guilty verdicts to the drug trafficking crimes. The trial court denied the motion. Price appealed to the Court of Special Appeals of Maryland, which upheld the guilty verdict holding that inconsistent verdicts are generally permitted in jury trials. Price petitioned for writ of certiorari, which the Court of Appeals of Maryland granted.

The Court of Appeals of Maryland recognized that there are no Maryland statutes or procedural rules that relate to inconsistent verdicts generally or to specific types of inconsistent verdicts. *Price*, 405 Md. at 18, 949 A.2d at 624. The court previously held that inconsistent verdicts in jury trials were permissible in criminal cases. *Id.* (citing *State v. Williams*, 397 Md. 172, 189, 916 A.2d 294, 305 (2007)). Inconsistent jury verdicts were tolerated because the “inconsistencies may be the product of lenity, mistake, or a compromise to reach unanimity.” *Price*, 405 Md. at 19, 949 A.2d at 624 (quoting *Galloway v. State*, 371 Md. 379, 408, 809 A.2d 653, 671 (2002)).

Prior to this decision, inconsistent jury verdicts were the only inconsistent verdicts still permitted under Maryland law. *Price*, 405 Md. at 19-20, 949 A.2d at 624-25. Examples of inconsistent verdicts no longer tolerated include: (1) when a judge is involved in rendering one of the inconsistent verdicts; (2) when the judge has failed to give an instruction on the consistency of verdicts; or (3) when the jury has returned guilty verdicts on two inconsistent counts. *Id.* at 19-20, 949 A.2d at 625. The trial court, in its discretion, does not have to accept inconsistent verdicts and may grant its own relief. *Id.* at 21, 949 A.2d at 626. The court determined that it is the role of the jury to decide a criminal case according to the law. *Id.* Further, it is within the duty of the trial court to set aside the verdict when the jury has misapplied the law and returned verdicts that are inconsistent with both the law and the judge’s instructions. *Id.* However, the court has never established a criteria to guide trial courts in deciding whether or not to accept inconsistent verdicts. *Id.*

The court previously held that in civil trials, irreconcilably inconsistent jury verdicts are not allowed. *Id.* (citing *Southern Management v. Taha*, 378 Md. 461, 467, 836 A.2d 627, 630 (2003)). The court explained that if the traditional reasons for tolerating inconsistent jury verdicts are insufficient in civil cases, those reasons clearly are not sufficient in criminal cases. *Price*, 405 Md. at 26, 949 A.2d at 629. In civil cases, generally only money is at stake, but in criminal cases the defendant’s liberty or life is in jeopardy. *Id.* at 22, 949 A.2d at 626. The court stated that it was unwilling to give less protection to a criminal defendant than it has given to a civil defendant. *Id.* at 22, 949 A.2d at 626 (citing *Galloway*, 371 Md. at 417, 809 A.2d at 676). Based on this analysis, the court concluded that there is no longer any justification for tolerating inconsistent jury trial verdicts. *Price*, 405 Md. at 22, 949 A.2d at 626.

According to the Court of Appeals of Maryland, to uphold the inconsistent jury verdicts of guilty in *Price* would be to repudiate the principles set forth in previous decisions of this court. *Id.* Ultimately, the court held that while inconsistent verdicts were allowed under Maryland common law, the court has the authority under the state constitution to change the common law. *Id.* Inconsistent jury verdicts shall no longer be allowed. *Id.* at 29, 949 A.2d at 630.

The concurring opinion set out the proper procedure that a defendant and a trial judge should follow when an inconsistent verdict occurs. *Id.* at 35, 949 A.2d at 634 (Harrell, J., concurring). An objection to inconsistent verdicts is only allowed by the defendant and not by the prosecution. *Id.* at 42 n. 10, 949 A.2d at 638 n. 10 (Harrell, J., concurring). If a defendant does not note his or her objection to the allegedly inconsistent verdicts prior to the verdicts becoming final and the discharge of the jury, the claim is waived. *Id.* at 40, 949 A.2d at 637 (Harrell, J., concurring). Upon a timely objection, the trial court should instruct or re-instruct the jury on the need for consistency and the range of possible verdicts. *Id.* at 41-42, 949 A.2d at 638 (Harrell, J., concurring). The jury would then be allowed to resolve the inconsistency. *Id.* (Harrell, J., concurring). Judge Harrell opined that the court's holding should only apply to verdicts that are legally inconsistent and not those that are factually inconsistent. *Id.* at 35, 949 A.2d at 634 (Harrell, J., concurring).

The Court of Appeals of Maryland changed the common law by prohibiting inconsistent jury verdicts in criminal cases. The court places the responsibility on the defense and on the trial judge to ensure that justice is fulfilled. The lower courts now are responsible for making sure that verdicts returned from the jury are legally consistent. *Price* only discusses legally inconsistent verdicts and opens the door to future debate on the permissibility of factually inconsistent verdicts. This holding helps guarantee that defendants in criminal trials have the fair trial that they are entitled.

## RECENT DEVELOPMENT

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### **STATE V. BABY: A WOMAN MAY WITHDRAW CONSENT FOR SEXUAL INTERCOURSE AFTER PENETRATION, AND CONTINUATION OF SEXUAL INTERCOURSE AFTER WITHDRAWAL OF CONSENT THROUGH FORCE OR THREAT OF FORCE CONSTITUTES RAPE.**

**By: Katlyn Hood**

The Court of Appeals of Maryland held that first-degree rape includes vaginal intercourse that continues with force or threat of force after the victim withdraws initial consent post-penetration. *State v. Baby*, 404 Md. 220, 946 A.2d 463 (2008). More specifically, the court rejected Maryland case law that suggested that if a woman consents prior to penetration and withdraws the consent following penetration, there is no rape. *Baby*, 404 Md. at 238, 946 A.2d at 473.

On December 13, 2003, J.L. was in the backseat of her car with Maouloud Baby (“Baby”), whom she had met at the local McDonald’s restaurant. Baby told J.L. that he wanted to have sexual intercourse with her. J.L. agreed, so long as he stopped when she told him. Baby then attempted to have intercourse with J.L., but she told him it hurt and said “stop” as she sat up. Baby did not stop and continued to have intercourse with J.L. as she tried to push Baby off with her knees.

Baby was charged in the Circuit Court for Montgomery County with first-degree rape and other sexual offenses. During jury deliberations, the jury asked the trial judge whether the withdrawal of consent after penetration constituted rape. The judge replied by restating the original jury instructions. The jury found Baby guilty of first-degree rape. Baby appealed to the Court of Special Appeals of Maryland, which reversed, holding that if a woman consents to intercourse and then withdraws the consent after penetration, there is no rape. The Court of Appeals of Maryland granted the State’s petition for writ of certiorari.

The Court of Appeals of Maryland addressed whether a woman, who initially consents to sexual intercourse, withdraws that consent after penetration, and then is forced to continue sexual intercourse, is a victim of rape. *Baby*, 404 Md. at 237, 946 A.2d at 473. Baby urged

the court to rely on language used in prior Maryland case law, which suggested that a woman's post-penetration withdrawal of consent does not constitute rape. *Baby*, 404 Md. at 244, 946 A.2d at 477 (citing *Battle v. State*, 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980)). The court rejected *Baby*'s argument, finding that the language from *Battle*, which *Baby* relied on, was mere dicta. *Baby*, 404 Md. at 246, 946 A.2d at 478. Therefore, it was not persuasive in whether post-penetration withdrawal of consent is rape in the present case. *Id.*

The court also considered the historical roots of virginity and the concept of penetration in relation to the crime of rape and the issue of consent. *Id.* at 247, 946 A.2d at 479. Essential to this discussion is the fact that English common law was based on the Old Testament and the belief that rape was complete upon penetration. *Id.* at 248, 946 A.2d at 479. The damage to the father's and the husband's interest in the woman's reproductive abilities was complete at the moment of penetration. *Id.* It was this belief that led to the idea that a woman was "de-flowered" upon penetration, and if consent was given prior to penetration and then withdrawn, there was no rape. *Id.* However, by the 13<sup>th</sup> century, the reference to virginity or the status of the victim was removed from English law. *Id.* at 251, 946 A.2d at 481.

By the time Maryland adopted the English common law in 1639, penetration did not complete the harm, and a virgin was not the only possible victim of rape. *Id.* at 248-49, 946 A.2d at 479-80. The issue of post-penetration withdrawal of consent arose infrequently in American case law. *Id.* at 253, 946 A.2d at 482. The cases in American history suggest that consent has to be withdrawn prior to penetration to constitute rape. *Id.* at 254, 946 A.2d at 483. While that rule was not explicitly stated, the courts did not focus directly on the point at which consent was withdrawn. *Id.* at 255, 946 A.2d at 483 (citing *State v. McCaffrey*, 19 N.W. 331 (1884); *State v. Cunningham*, 12 S.W. 376 (1889)).

The Court of Appeals of Maryland also considered other jurisdiction's holdings on post-penetration withdrawal of consent. *Baby*, 404 Md. at 255, 946 A.2d at 483. The court found that only one state held that the withdrawal of consent after penetration was not rape. *Baby*, 404 Md. at 255, 946 A.2d at 483 (citing *State v. Way*, 254 S.E.2d 760 (N.C.1979)). The court did not find the Supreme Court of North Carolina's holding persuasive because it did not provide any further analysis beyond its holding or cite to any authority as a basis for its reasoning. *Baby*, 404 Md. at 255, 946 A.2d at 484.

All other jurisdictions addressing this issue held that if sexual intercourse continues through force or threat of force after withdrawal of consent, it is rape. *Id.* at 256, 946 A.2d at 484. The Supreme Judicial Court of Maine held that it is rape if intercourse is continued after withdrawal of consent when the woman originally consented because she was forced or threatened with force. *Id.* at 256, 946 A.2d at 484 (citing *State v. Robinson*, 496 A.2d 1067 (Me. 1985)). The high court explained that the important element was not only the withdrawal of consent, but more importantly, the continuation of intercourse through force. *Baby*, 404 Md. at 256, 946 A.2d at 484 (citing *Robinson*, 496 A.2d at 1070). Other jurisdictions agreed that if sexual intercourse continues through force or threat of force after the withdrawal of consent, such conduct constitutes rape. *Baby*, 404 Md. at 256, 946 A.2d at 484. The Court of Appeals of Maryland found the holdings of these jurisdictions persuasive in reaching its holding in the present case. *Id.* at 259, 946 A.2d at 486.

The court concluded that if sexual intercourse was deemed to end at the moment of penetration, it would lead to illogical results not considered by the drafters of the rape statutes. *Id.* The Maryland rape statute, like those of other jurisdictions, punishes penetration, which continues after the withdrawal of consent. *Id.* Based on the above analysis, the court found no case law that supported the holding that initial penetration completes the act of sexual intercourse. *Id.* Therefore, the court held that forcing a woman to continue sexual intercourse after she withdraws her consent is rape. *Id.* at 260, 946 A.2d at 486.

The Court of Appeals of Maryland's holding expands Maryland first-degree rape law. Now, rape occurs not only when intercourse is forced upon a person in the absence of consent, but also when a victim withdraws consent after penetration. Maryland practitioners, when trying a case that concerns rape, will now not only have to consider whether there was original consent prior to sexual intercourse, but also whether that consent continued throughout the sexual encounter or was withdrawn after penetration. If the victim withdraws original consent after penetration and sexual intercourse continues through force or threat of force, under Maryland law, rape has been committed.

## RECENT DEVELOPMENT

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### **STATE V. COATES: STATEMENTS MADE TO A MEDICAL CARE PROVIDER ARE NOT ADMISSIBLE UNDER THE STATEMENTS MADE FOR MEDICAL DIAGNOSIS OR TREATMENT HEARSAY EXCEPTION WHEN THE DECLARANT WAS UNAWARE OF THE PURPOSE OF THE STATEMENT.**

**By: Neal Desai**

The Court of Appeals of Maryland held that statements made to a nurse practitioner during examination were not admissible under the hearsay exception for statements made for medical diagnosis or treatment because the declarant did not know the statements were being made for medical diagnosis or treatment. *State v. Coates*, 405 Md. 131, 950 A.2d 114 (2008). More specifically, the court stated that there is a lack of reliability in such statements, and therefore, the hearsay exception is inapplicable. *Coates*, 405 Md. at 147, 950 A.2d at 124.

In September 2002, Kimberly Jenkins (“Jenkins”) was involved in a romantic relationship with Frederick Roscoe Coates (“Coates”). When away from home, Jenkins often left Coates alone to take care of her daughter, Jazmyne T. (“Jazmyne”). Approximately one year later, it was discovered that Coates had sexually abused Jazmyne. Jazmyne was examined and interviewed by Heidi Bresee (“Bresee”), a nurse practitioner, to obtain a patient history and to conduct an external vaginal examination. During the interview, Jazmyne told Bresee, among other things, that Coates “put his private inside her private.” After the interview and examination, Jazmyne asked Bresee, “Are you going to go out and find him now?”

On October 7, 2004, the Grand Jury for Montgomery County indicted Coates on counts of second-degree rape and other related offenses. Coates filed a motion in limine, asking the circuit court to exclude Bresee’s testimony. The court denied the motion, and Bresee testified at trial. On May 25, 2005, the jury for the Circuit Court of Montgomery County found Coates guilty. Coates appealed to the Court of Special Appeals of Maryland, which reversed, ruling that Bresee’s testimony was improperly admitted and prejudicial. The

State filed a petition for writ of certiorari to the Court of Appeals of Maryland, and the court granted the petition.

The hearsay exceptions derive from the common law theory that certain out-of-court statements have a minimal risk of inaccuracy and untrustworthiness. *Coates*, 405 Md. at 141, 950 A.2d at 121 (citing 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420 at 251 (Chadbourn rev. ed. 1974)). The Court of Appeals of Maryland addressed the admissibility of Bresee's testimony under the hearsay exception in Maryland Rule 5-803(b)(4). *Coates*, 405 Md. at 141, 950 A.2d at 120. Under the Maryland rule, statements made for medical treatment or diagnosis are admissible if the declarant describes medical history, symptoms, pain, or the general character of the cause as reasonably pertinent to treatment or diagnosis in contemplation of treatment. *Coates*, 405 Md. at 141, 950 A.2d at 121 (citing Md. Rule 5-803(b)(4)). This exception does not apply to cases where a non-treating physician is merely preparing to testify on the patient's behalf. *Coates*, 405 Md. at 142, 950 A.2d at 121 (citing *Candella v. Subsequent Injury Fund*, 277 Md. 120, 124, 353 A.2d 910, 914-15 (2003); *Yellow Cab Co. v. Hicks*, 224 Md. 563, 571, 168 A.2d 501, 505 (1961)).

The court agreed with the intermediate appellate court, in that Bresee, in addition to having a cognizable medical reason for interviewing Jazmyne, also had a forensic purpose. *Coates*, 405 Md. at 143, 950 A.2d at 123. The court stated that the existence of dual medical and forensic purposes for an examination does not automatically disqualify an otherwise admissible statement under Maryland Rule 5-803(b)(4). *Id.* at 143, 950 A.2d at 122 (citing *Webster v. State*, 151 Md. App. 527, 546, 827 A.2d 910, 921 (2003)). However, the court conclusively noted that the overarching purpose Bresee had was investigatory in nature rather than related to medical concerns. *Coates*, 405 Md. at 143, 950 A.2d at 122.

Next, the court looked to whether the declarant believed there was a medical purpose for the examination. *Id.* at 144, 950 A.2d at 122. The court stated that the facts do not support a finding that Jazmyne would have understood that she was being seen for medical treatment or diagnosis because the interview with Bresee took place fourteen months after the last sexual-abuse incident and three weeks after her disclosure of the incident to her mother. *Id.* Further, the court determined that most eight-year-olds cannot distinguish "emergent circumstances or medical necessity in the absence of any medical complaints or symptoms." *Id.* at 144, 950 A.2d at 122. Finally, the

court found that Jazmyne's inquiry about whether Bresee would find Coates implied that Jazmyne did not understand that there was a medical or dual purpose for the examination. *Id.*

The court distinguished this case from other significant Maryland cases. *Id.* at 144, 950 A.2d at 123. In one such case, the victim had the requisite motive for providing sincere and reliable information because the victim's statement was "pathologically germane" to treatment by a hospital nurse in an emergency setting. *Id.* (citing *Webster*, 151 Md. App. at 546, 827 A.2d at 920). The court found the case at bar distinguishable because there was no emergency situation that would render Jazmyne's statements reasonably pertinent to diagnosis or treatment. *Coates*, 405 Md. at 145, 950 A.2d at 123. The court rejected the State's argument that Coates' identity was "pathologically germane" to diagnosis or treatment because statements to a medical practitioner about the identity of the person who caused the injury are unlikely to be considered by the declarant as related to diagnosis or treatment. *Id.* at 146, 950 A.2d at 123.

The court then compared the case at hand to another case where the intermediate appellate court reasoned that at the age of two, a declarant does not understand the purpose of a doctor's questions and therefore, does not have the self-interested motive to tell the truth that underlies the hearsay exception. *Id.* (citing *Cassidy v. State*, 74 Md. App. 1, 27, 536 A.2d 666, 678-79 (1988)). Similarly, here the court stated that it is unlikely that Jazmyne, a seven-year-old at the time of her statements to Bresee, would have known that Coates' identity was medically relevant in determining her exposure to a sexually transmitted infection. *Coates*, 405 Md. at 147, 950 A.2d at 124. The court concluded that the record indicates Jazmyne's motive was to find Coates because he had not been apprehended. *Id.*

By issuing a writ of certiorari, the Court of Appeals of Maryland recognized the importance of this decision regarding the hearsay exception embodied in Maryland Rule 5-803(b)(4). *Coates* clarifies Maryland law in establishing that where the declarant is unaware that the success of the diagnosis and treatment depends on the accuracy of his or her disclosure, the reliability of his or her information is no longer presumed. As a result, under Maryland Rule 5-803(b)(4), lawyers in Maryland will now have a greater burden of showing that the declarant made his or her statement with the knowledge that the success of treatment was dependent on the declarant's accurate disclosure.

## RECENT DEVELOPMENT

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### ***UNITED STATES V. CHACON: UNDER THE FEDERAL SENTENCING GUIDELINES, A FORCIBLE SEX OFFENSE CONSTITUTES A CRIME OF VIOLENCE EVEN IN THE ABSENCE OF THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE.***

**By: Chris Tully**

The United States Court of Appeals for the Fourth Circuit held, as an issue of first impression, that a forcible sex offense, which occurred without consent and in the absence of the use, attempted use, or threatened use of physical force, constitutes a crime of violence. *United States v. Chacon*, 533 F.3d 250 (4th Cir. 2008). Specifically, the court opined that a forcible sex offense does not require physical force as an element and thus can be categorized as a crime of violence under the Federal Sentencing Guidelines. *Chacon*, 533 F.3d at 252.

On December 12, 2002, a Maryland state court convicted Jesus Chacon (“Chacon”), an illegal alien, of second-degree rape under the Maryland Code. The criminal information did not specify the conduct underlying the charge, and Chacon plead guilty to the offense. Therefore, it was unclear which of the three subsections of the statute applied in Chacon’s conviction. Subsequently, he was deported to Honduras. In November 2006, Chacon illegally reentered the United States, and Immigration and Customs Enforcement agents arrested him for using a false permanent resident card.

On December 28, 2006, a federal grand jury for the United States District Court for the Eastern District of Virginia indicted Chacon for offenses relating to his illegal reentry and use of a false resident card. Chacon plead guilty to both offenses. The Sentencing Committee calculated the Presentence Report for these federal crimes by classifying Chacon’s previous rape conviction in Maryland as a “crime of violence” to increase the base offense level by sixteen. Based on this increase, the court sentenced Chacon to a forty-one month prison term. Chacon appealed to the United States Court of Appeals for the Fourth Circuit.

Section 2L1.2 of the United States Sentencing Guidelines provides that a prior “crime of violence” can increase the sentence for an illegal reentry by sixteen levels. *Chacon*, 533 F.3d at 253 (citing USSG § 2L1.2(b)(1)(A)(ii)). Under this section, “crime of violence” includes ten different felonies and misdemeanors, including: forcible sex offenses, statutory rape, or any state law that has the element of the use, attempted use, or threatened use of physical force. *Chacon*, 533 F.3d at 254 (citing USSG § 2L1.2 cmt. n. 1(B)(iii)). *Chacon* argued that the district court erred because his second-degree rape conviction was improperly considered a “crime of violence” in the Presentence Report. *Chacon*, 533 F.3d at 253.

In Maryland, second-degree rape convictions arise from three separate scenarios. *Id.* at 255. The crime may occur when a person engages in vaginal intercourse with another: (1) by force or threat of force against the will and without the consent of the other person; or (2) who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know of the other person’s condition; or (3) who is under fourteen years of age and the person performing the act is at least four years older. *Chacon*, 533 F.3d at 253 (citing MD. CODE ANN. Art. 27 § 463).

Since it was unclear which subsection of the rape statute *Chacon* violated, the Court of Appeals analyzed the Maryland second-degree rape statute in its entirety. *Chacon*, 533 F.3d at 253. The court found that the first subsection of the rape statute constituted a “crime of violence” under the guidelines because it contained the physical element language, “by force or threat of force,” which is the wording used in Section 2L1.2’s definition of a “crime of violence.” *Chacon*, 533 F.3d at 254 (citing USSG § 2L1.2 cmt. n. 1(b)(iii)). The court also explained that the third subsection describes the rape of a minor, which is specifically listed in Section 2L1.2’s definition of a “crime of violence.” *Chacon*, 533 F.3d at 254 (citing USSG § 2L1.2 cmt. n. 1(b)(iii)). Therefore, these two subsections are “crimes of violence” under the sentencing guidelines. *Chacon*, 533 F.3d at 254.

The second subsection of the rape statute deals with “vaginal intercourse with a person who is mentally defective, mentally incapacitated, or physically helpless and, the person performing the act knows or should reasonably know of the other person’s condition.” *Id.* at 255 (citing MD. CODE ANN. Art. 27 § 463). There is no language in this subsection providing that the use, attempted use, or threatened use

of force is a necessary element of the offense. *Chacon*, 533 F.3d at 255. As an issue of first impression, the court sought to determine if this form of rape should be considered a “forcible sex offense” based on the definition listed in the sentencing guidelines. *Id.* at 255.

The Fourth Circuit had to determine the ordinary meaning of “forcible” because the Federal Sentencing Guidelines do not provide a definition. *Id.* at 257. The court explained that “forcible” generally means “effected by force or threat of force against opposition.” *Chacon*, 533 F.3d at 257 (quoting BLACK’S LAW DICTIONARY 674 (8th ed. 2004)). In addition, the court defined the term “force” as “power, violence or pressure directed against a person or thing.” *Chacon*, 533 F.3d at 257 (quoting BLACK’S LAW DICTIONARY 674 (8th ed. 2004)). The court continued by stating that “power” is “dominance, control or influence.” *Chacon*, 533 F.3d at 257 (quoting BLACK’S LAW DICTIONARY 674 (8th ed. 2004)). Applying these definitions, the court concluded that physical force is not necessary for an action to be “forcible;” therefore, the second subsection of Maryland’s rape statute would be a “forcible act” without having an element of physical force. *Chacon*, 533 F.3d at 257.

The court next scrutinized the intention of the Sentencing Commission. *Id.* at 258. The Commission used the word “forcible” to modify “sex offenses,” instead of the less ambiguous term “physical.” *Id.* The court determined that the Commission deliberately chose the word “forcible” to show that “physical” was not a required element of “forcible sex offenses.” *Id.* The fact that there are other sections of the guidelines where the Commission specifically chose to use the word “physical” supports this conclusion. *Id.* Additionally, the Commission included in its list of “crimes of violence” statutory rape and sexual abuse of a minor, which have no “physical” force components. *Id.* This shows that physical force is not necessary to make rape a “crime of violence.” *Chacon*, 533 F.3d at 258.

The court examined how other circuits have ruled on this issue. *Id.* at 256-57. The court acknowledged that both the Fifth and Ninth Circuits have ruled that a “forcible sex offense” requires some physical component, and nonconsensual sex crimes should not be considered “forcible.” *Id.* at 256. However, the court also cited to the Tenth and Third Circuits, which held that nonconsensual sex constitutes a “forcible sex offense,” despite lacking any actual physical force. *Id.* at 256-57. The court clarified that the latter approach is more appropriate as the Third Circuit ruling deals with the latest

version of the Federal Sentencing Guidelines and is factually analogous to the instant case. *Id.* at 257. Thus, the court concluded that physical force is not a requirement for a “forcible act” under sentencing guidelines, and all subsections of Maryland’s rape statute are within the definition of “crimes of violence.” *Id.* at 257.

The *Chacon* decision is valuable to Maryland practitioners. First, with other circuits split on this issue, the court’s opinion may now provide greater clarity in this area. Second, the holding interprets Maryland’s second-degree rape statute as a “crime of violence” for the purpose of the Federal Sentencing Guidelines, allowing prior second-degree rape convictions in Maryland to justify harsher sentences. Finally, crimes which are “forcible offenses” do not need to have “physical force” as an element under sentencing guidelines. Therefore, juries now have the ability to impose harsher sentences without having to find that a defendant committed an act of physical force.