

LESBIANS AND ABORTION

RUTHANN ROBSON*

I. INTRODUCTION	247
II. PLANNED PARENTHOOD AND UNPLANNED CONSEQUENCES	248
III. CHOICE AFTER CHOICELESSNESS: RAPE, LESBIANS, AND ABORTION.....	256
IV. REPRODUCTIVE AMATEURS: TOO YOUNG OR TOO LATE.....	263
V. MAN-HATERS AND INDEPENDENT WOMEN	272
VI. CONCLUSION.....	279

I.

INTRODUCTION

In the pursuit of sexual justice for women, protections for lesbians and abortions are nonnegotiable. Feminist conceptualizations of sexual justice have foregrounded both lesbianism and access to abortion. Nevertheless, the arguments for these fundamental elements of what was once termed women's "liberation" have been articulated relatively independently of one another. For lesbians, reproductive rights are generally articulated as rights to achieve pregnancy and rights to legal parenthood and custody of children. The reproductive right of access to abortion, in contrast, is generally construed as the right of heterosexually active women to terminate unwanted pregnancies.

However, lesbians do have a specific stake in access to abortion. Additionally, both "lesbians" and "abortions" implicate fundamental rights integral to feminism, feminist legal theory, and democracy. The right of any woman, for any reason, to be a lesbian or to have an abortion—or both—is a prerequisite for the necessary redistribution of power. Thus, it is not sufficient that being a lesbian or having an abortion be merely permissible under certain circumstances. As the theorist Slavoj Žižek contends, abortion and other sexual matters are often granted by the state in the "guise of permissions" and merely "masked as rights."¹ This may

* Professor of Law and University Distinguished Professor, City University of New York (CUNY) School of Law. I am grateful to the editors and staff of the *New York University Review of Law & Social Change* for their work; to Rachel Terri Nilliasca, CUNY School of Law, Class of 2011, and Laura Nixon, CUNY School of Law, Class of 2010, for research assistance; to Dean Michelle Anderson for financial scholarship support; and to Sarah Valentine for sustenance. Copyright © 2011 by Ruthann Robson.

1. SLAVOJ ŽIŽEK, FIRST AS TRAGEDY, THEN AS FARCE 59–60 (2009). Žižek argues that "the right to divorce, abortion, gay marriage, and so on and so forth," are actually "permissions masked as rights." *Id.* at 59. Regarding "gay marriage," his assessment is not

make “life easier, which is not nothing,” but it does not “give access to the exercise of a power, at the expense of another power.”² For women, lesbianism and abortion as freely available options are not merely about making life easier; they change the distribution of power in favor of women.

Law is one method of seeking redistributions of power. Part II of this Article briefly rehearses the doctrinal linkages, distinctions, and relative strength of the rights of lesbians and the right to abortion in American jurisprudence. The next sections discuss specific overlaps between lesbians and abortion as lived realities and as subject to legal regimes. Part III considers the availability of reproductive choice after the choicelessness of rape committed against lesbians. Part IV examines the difficulties lesbians, especially young lesbians, face as what might be called “reproductive amateurs” who can become pregnant. As minors, they may be legally forced to interact with parents or judges hostile to their sexuality as well as to their desire to terminate pregnancy. As both minors and adults, they may be less likely to discover their pregnancy early, and thus they may be more likely to encounter strict time limits in abortion statutes. Part V considers the construction of lesbians and of women who have abortions as “independent” or as “man-hating” women. It argues that the paternalism of the law and specific statutes that seek to remove certain choices from women express male anxiety about the power of women, including, perhaps paradoxically, sex selection.

Although Žižek writes that the sexual liberation that characterized the 1960s in France has transformed into a “tolerant hedonism easily incorporated into our hegemonic ideology”³ this may be less true in American jurisprudence. The doctrinal and theoretical maneuvers, complexities, and reversals of sexuality doctrine in the last forty years cannot be described as tranquil or depoliticized. Instead, the trajectory of sexual liberation has taken numerous judicial and legislative twists, turns, and tumbles.

II.

PLANNED PARENTHOOD AND UNPLANNED CONSEQUENCES

In U.S. constitutional jurisprudence, the legal protection of women’s sexual and reproductive freedom might be said to have started in the beds of married women. In the early 1960s, feminist reproductive rights activists devised a plan to challenge an 1879 statute that criminalized the provision

one with which I would disagree. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMPLE L. REV. 709 (2002).

2. ŽIŽEK, *supra* note 1, at 59 (quoting JEAN-CLAUDE MILNER, L’ARROGANCE DU PRÉSENT 233 (2009)).

3. *Id.* at 58.

of contraceptive materials.⁴ Estelle T. Griswold, the Acting Director of the new Planned Parenthood Center of New Haven as well as the long-standing Executive Director of the Planned Parenthood League of Connecticut,⁵ was reportedly delighted by the prospect of being arrested in order to challenge the constitutionality of the Connecticut statute.⁶

When *Griswold v. Connecticut* reached the United States Supreme Court, a majority of the Court expressed its belief that a constitutionally-protected “zone of privacy” protected marital sex from legislative interference, and on that basis, struck the Connecticut statute down.⁷ The word “privacy” is not in the text of the Constitution and the Court in *Griswold* had a difficult time grounding the right in any specific constitutional provision. Justice Douglas famously opined that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁸ The first case in which a majority of the United States Supreme Court agreed that “privacy” was grounded in the liberty guarantee of the Due Process Clause of the Fourteenth Amendment was *Roe v. Wade*,⁹ the case in which the Court first held that a state statute criminalizing abortion was unconstitutional.

The trajectory of constitutional privacy after *Roe v. Wade* is erratic. The Court rejected challenges to state and federal laws which prohibited government money from being used to fund abortions.¹⁰ In the 1986

4. The original 1879 Connecticut statute was modeled on the federal Comstock law, which includes family planning information in its broad interpretation of obscenity. Comstock Act, ch. 258, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (2006)). During the early part of the twentieth century, other states with similar “little Comstock” laws repealed them. See generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); Margaret A. Blanchard & John E. Semonche, *Anthony Comstock and His Adversaries: The Mixed Legacy of This Battle for Free Speech*, 11 COMM. L. & POL’Y 317 (2006). However, repeated attempts to reform Connecticut’s law were unsuccessful. As amended in 1958, the law provided that “[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). The law also provided that “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Id.*

5. Lee Buxton, a licensed physician and a professor at the Yale School of Medicine who served as Medical Director for the Center, was also arrested and also challenged the law. JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 82–83 (2005).

6. *Id.* at 81.

7. *Griswold*, 381 U.S. at 486.

8. *Id.* at 484.

9. *Roe v. Wade*, 410 U.S. 113, 129 (1973).

10. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a Connecticut statute that prohibited state funds from being used for abortions that were not medically necessary. Three years later, in *Harris v. McRae*, 448 U.S. 297 (1980), the Court upheld the Hyde

decision, *Thornburgh v. American College of Obstetricians and Gynecologists*,¹¹ the Court declined by the narrowest of margins to reverse *Roe v. Wade*, as President Reagan's Solicitor General advocated.¹² Its decision relied in part on *stare decisis*.¹³ In the same term, however, the Court also decided *Bowers v. Hardwick*.¹⁴ This 5–4 decision upheld the constitutionality of Georgia's criminal sodomy statute.¹⁵ *Hardwick* could be described as the decision the conservative justices on the Court wanted to write regarding abortion, but for which they did not have a majority.¹⁶ Writing about *Hardwick* shortly after the decision, Abby Rubenfeld, then Legal Director of the Lambda Legal Defense and Education Fund, a gay rights organization devoted to legal advocacy and an amicus in *Hardwick*, observed that it was "only when gay men and lesbians were involved" that the Court was able to obtain the fifth vote to limit privacy.¹⁷ She added: "It has not *yet* happened in the abortion context, but it says something about the power that lesbians and gay men have, and that which we do not have."¹⁸

Rubenfeld's "yet" was prescient, at least with respect to abortion rights, which the Court significantly restricted, six years after *Hardwick*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁹ However,

Amendment, Pub. L. 96-123, § 109, 93 Stat. 926 (1977), which limited use of federal funds to reimburse the cost of abortions, in the face of a Fifth Amendment due process challenge to its constitutionality. The Court made no distinction between the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment when it concluded that it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. *Harris*, 448 U.S. at 316–17.

11. 476 U.S. 747 (1986).

12. As Linda Greenhouse writes:

The intervention of the Reagan Administration as amicus curiae for Pennsylvania substantially elevated the temperature of this case. The Solicitor General went beyond the state's own position to argue that the Court should overrule *Roe*. This intervention infuriated Justice Blackmun, who concluded the first draft of his majority opinion with these sentences: "For the Solicitor General to ask us to discard a line of major constitutional rulings in a case where no party has made a similar request is, to say the least, unusual. We decline the invitation." Justice Stevens urged Justice Blackmun to omit the direct attack on the Reagan Administration, and he agreed to do so, informing the other members of his majority by letter.

Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 766–67 (2010).

13. *Thornburgh*, 476 U.S. at 759.

14. 478 U.S. 186 (1986).

15. *Id.* at 196.

16. See Abby Rubenfeld, *Lessons Learned: A Reflection Upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 65 (1986). See generally Ruthann Robson, *Lifting Belly: Privacy, Sexuality & Lesbianism*, 12 WOMEN'S RTS. L. REP. 177, 181–89 (1990).

17. Rubenfeld, *supra* note 16, at 65.

18. *Id.* (emphasis added).

19. 505 U.S. 833 (1992).

Rubinfeld did not appear to envision the increasing power that those advocating “gay rights” would have. Seventeen years after *Hardwick* was decided, the Court reversed itself in *Lawrence v. Texas*, noting that *Hardwick* “was not correct when it was decided.”²⁰ Dissenting, Justice Scalia chastised those Justices in the *Lawrence* majority who had voted to reaffirm *Roe v. Wade* in *Casey* for ignoring or distorting the factors laid out in *Casey* that were supposed to govern when earlier decisions should be overruled.²¹ Scalia argued that the majority opinions in *Lawrence* “do not bother to distinguish—or indeed, even bother to mention—the paean to *stare decisis*” in *Casey*.²² “[W]hen *stare decisis* meant preservation of judicially invented abortion rights,” he noted, “the widespread criticism of *Roe* was strong reason to reaffirm it.”²³ In contrast, the “widespread opposition” to *Bowers v. Hardwick*—a decision he described as just as “intensely divisive” as the issue in *Roe*—was offered by the majority as a “reason in favor of overruling” *Hardwick*.²⁴

Only four years after *Lawrence v. Texas* reversed the seventeen-year-old precedent of *Hardwick*, the Court in *Gonzales v. Carhart*²⁵ failed to honor the seven-year-old case of *Stenberg v. Carhart*.²⁶ At issue in *Gonzales* was the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003.²⁷ The Court upheld the Act, despite its earlier conclusion in *Stenberg* that Nebraska’s substantially similar partial birth abortion statute was unconstitutional because it failed to provide an exception for the preservation of the life and health of the mother, as *Roe* appeared to require.²⁸ The 5-4 decision in *Gonzales v. Carhart* thus vitiated one of the essential pillars of *Roe* (even as reinterpreted in *Casey*): the principle of protection for the health of the pregnant woman.²⁹

20. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

21. *Id.* at 586–92 (Scalia, J., dissenting).

22. *Id.* at 587 (Scalia, J., dissenting).

23. *Id.* (Scalia, J., dissenting).

24. Justice Scalia stated:

Today’s approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an “intensely divisive” decision) *if*: (1) its foundations have been “eroded” by subsequent decisions; (2) it has been subject to “substantial and continuing” criticism; and (3) it has not induced “individual or societal reliance” that counsels against overturning. The problem is that *Roe* itself—which today’s majority surely has no disposition to overrule—satisfies these conditions to at least the same degree as *Bowers*.

Id. (citations omitted).

25. 550 U.S. 124 (2007).

26. 530 U.S. 914 (2000). For further discussion of the relationship between *Stenberg* and *Gonzales*, see *infra* notes 118–124 and accompanying text.

27. 18 U.S.C. § 1531 (2006).

28. *Stenberg*, 530 U.S. at 929–30.

29. *Gonzales*, 550 U.S. at 166–67. The Court in *Casey* (re)confirmed “the State’s power to restrict abortions after fetal viability, *if* the law contains exceptions for

The twisted trajectory of the Court's due process case law since *Casey* has thus resulted in a doctrinal landscape that seems to afford more protection for lesbians than for presumably heterosexual women seeking abortions. Certainly this was not the intent of Estelle Griswold and others who advocated for reproductive rights. The current contours of the doctrine seem to demand an explanation. One such explanation may be the incoherency of substantive due process. It is easy to believe that the problem with *Roe v. Wade*'s continued vitality as precedent is the decision itself, which grounds the privacy penumbra in due process rather than equality.³⁰ Even those who agree with the decision's outcome have criticized the Court's reliance on "privacy" as grounded in the Due Process Clause.³¹ In contrast, the Equal Protection Clause as the grounding for reproductive rights has appeal. Certainly, it has proven vital to lesbians and gay men. For example, in *Romer v. Evans*,³² the Court declared Colorado's Amendment 2, which had barred state and local legislators from enacting anti-discrimination laws protecting homosexuals, lesbians, and bisexuals, unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.³³ In *Lawrence v. Texas*, although the Court did not ground its decision in equal protection, it could have easily done so: the Texas statute criminalized homosexual but not heterosexual sodomy. In her concurring opinion, Justice O'Connor argued that this distinction made the Equal Protection Clause a more appropriate basis of the

pregnancies which endanger the woman's life or health." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (emphasis added).

30. See generally WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (providing multiple rewritings of the decision in *Roe v. Wade*, many grounded in the Equal Protection rather than the Due Process Clause of the Fourteenth Amendment)

31. Justice Ginsburg, who joined the Court two decades after *Roe*, has suggested that the Equal Protection Clause of the Fourteenth Amendment would have been a less controversial basis of decision. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379, 386 (1985) (arguing that *Roe* should have rested on women's autonomy and on sex-based and equal-protection-based arguments and that the public reaction against *Roe* could therefore have been abated).

Additionally, Reva Siegel has advocated an "equal citizenship" principle for women as embodied not only in the Fourteenth Amendment's Equal Protection Clause, but also in the Nineteenth Amendment. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) [hereinafter Siegel, *She the People*]; Reva B. Siegel, *Siegel, J., concurring, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 30, at 63. See also Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

32. 517 U.S. 620 (1996).

33. *Id.* at 635-36. For some of the many discussions of Amendment 2 and *Romer v. Evans*, see Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261 (2002); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 365-98 (1997).

decision.³⁴ Moreover, even Justice Scalia recognized that *Romer v. Evans* “eroded” the foundation of *Bowers v. Hardwick*.³⁵

Nevertheless, equal protection doctrine is no panacea. Conceptualizing reproductive freedoms under the rubric of equal protection may solve some of the problems of substantive due process, but it reveals other doctrinal and theoretical troubles. The legitimacy and rigor of judicial review of legislation under the Equal Protection Clause is often justified with reference to the minority status of those seeking judicial protection.³⁶ Thus, as a majority or near-majority, women can be seen as less attractive candidates for judicial intervention than statistical minorities, even lesbians and gay men.

The non-minority status of women was not specifically addressed by the Court in *Craig v. Boren* when it held that gender classifications were subject to a lower tier of equal protection scrutiny than racial classifications.³⁷ However, in one of the most recent major equal protection cases regarding gender, *United States v. Virginia (VMI)*, Justice Scalia explicitly raised the issue in his dissent. Scalia noted that because women “constitute a majority of the electorate,” it was difficult to consider them a discrete and insular minority unable to employ the “political processes ordinarily to be relied upon,” meriting heightened judicial scrutiny.³⁸ According to Scalia, if women objected to an all-male military institute barring women as students, their views would prevail in a democratic process.³⁹

The theoretical underpinnings of equal protection doctrine might likewise pose problems for women as non-minorities. John Hart Ely, who championed a theory of the Equal Protection Clause that construed it

34. *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring in the judgment).

35. *Id.* at 588 (Scalia, J., dissenting) (“I do not quarrel with the Court’s claim that *Romer* . . . ‘eroded’ the ‘foundations’ of *Bowers*’ rational-basis holding.”).

36. For example, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), the Court refused to accord the “mentally retarded” a higher level of judicial scrutiny, reasoning that federal and state laws regarding mental disability demonstrated that “lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary,” *id.* at 443, and that “the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers,” *id.* at 444.

37. *Craig v. Boren*, 429 U.S. 190 (1976). Without fanfare or analysis, the Court departed from the plurality’s conclusion in *Frontiero v. Richardson*—decided several months after *Roe*—that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.” *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

38. 518 U.S. 515, 575 (1996) (Scalia, J. dissenting).

39. Scalia wrote that to believe women “incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.” *Id.*

primarily as a means of correcting malfunctionings of representative democracy by requiring heightened judicial scrutiny of laws that affected the rights of minorities (the “representation-reinforcement theory” of equal protection), did not think the Clause protected abortion rights.⁴⁰ He reasoned that fetuses are even more entitled to minority status, than women,⁴¹ writing that: “Compared with men, very few women sit in our legislatures . . . But *no* fetuses sit in our legislatures.”⁴² Hence, he concluded, fetuses were more entitled to heightened judicial protection than were the women who wished to abort them.⁴³ Ely’s reasoning may seem extreme, but it demonstrates that equal protection doctrine, like substantive due process doctrine, poses problems as a grounding for reproductive rights.

Additionally, re-theorizing equal protection and due process doctrines in light of a different concept, such as dignity, is not necessarily a guarantee of protection for reproductive rights. As Reva Siegel has argued, there are at least three distinct usages of dignity in the substantive due process and equal protection cases: dignity as life, dignity as liberty, and dignity as equality.⁴⁴ Siegel compellingly contends that the gender

40. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

41. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973).

42. *Id.* at 933. Likewise, women seeking abortions are not protected in the articulation of the representative-reinforcement defense of judicial review provided by Jeremy Waldron. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Waldron acknowledges that the representation-reinforcement theory of judicial review has “plausibility.” *Id.* at 1351. Nonetheless, he reads it narrowly, to require heightened scrutiny only for those minorities “whose members are isolated from the rest of the community in the sense that they do not share many interests with non-members that would enable them to build a series of coalitions to promote their interests.” *Id.* at 1403–04. It is unclear that women would qualify as this kind of minority, for the reasons Scalia points to in his *Virginia* dissent. See *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting). Second, Waldron argues that, although heightened scrutiny is generally justified as a way to guard against prejudice by the majority against minorities, religious or ethical views should not be considered examples of this kind of illegitimate prejudice. Waldron writes: “It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—are deeply felt and rest in the final analysis on firm and deep-seated convictions of value.” *Id.* at 1404 n.141.

I discuss Ely and Waldron’s theories of judicial review, especially as they are applicable to sexual minorities, in Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1, 2–3, 6, 14–18 (2007).

43. Ely, *The Wages of Crying Wolf*, *supra* note 41, at 935. Ely also noted that he found *Roe* to be a “frightening” decision and that he did not believe a substantive due process right to abortion was “inferable from the language of the Constitution” or “the framers’ thinking on the issue.” *Id.* at 935–36.

44. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions*

paternalism of *Gonzales v. Carhart* “violates the very forms of women’s dignity that *Casey*—and the equal protection cases—protect.”⁴⁵ Yet, as Siegel notes, the majority in *Gonzales* adopted anti-abortion language that makes the choice to have an abortion appear to be itself the act that strips a woman of her dignity.⁴⁶

Conceptualizations of dignity in the United States constitutional context are heavily indebted to the groundbreaking constitutional theorizing of dignity in South Africa. Yet in South Africa, where dignity—*ubuntu*—is considered a constitutional norm,⁴⁷ the Constitutional Court nevertheless concluded that the concept does not extend to women who are sex-workers:

To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself [T]he dignity of prostitutes is diminished not by the [criminal code section] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.⁴⁸

The South African example thus makes clear that dignity—like equality and privacy—has the potential to be interpreted in ways that do not support all women. No doctrinal theory guarantees success. Thus, the

Under Casey/Carhart, 117 YALE L.J. 1694, 1737 (2008).

45. *Id.* at 1792.

46. As Siegel writes:

The opinion employs the discourse of female “depression” and “regret,” and the movement-inflected usage of a “choice [that] is well informed.” The opinion also makes disparaging reference to “[a]bortion doctors,” insistently refers to a woman who has had an abortion as a “mother,” and provocatively shifts in its description of antenatal life from “the life of the fetus that may become a child,” to the “unborn child,” “infant life,” and “baby,” and finally again to the fetus. In speaking of women’s regret, referring to women who have had abortions as mothers, and discussing the unborn child, *Carhart’s* use of the antiabortion movement’s idiom communicates the Court’s receptivity to the movement’s claims, without deciding questions of law.

Id. at 1769 (footnotes omitted).

47. The concept “ubuntu” was explained by the South African Constitutional Court in a 1995 decision finding the death penalty unconstitutional. The Court noted:

The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

State v. Makwanyane, 1995 (3) SA (CC) at 224.

48. *Jordan v. State*, 2002 (6) SA 642 (CC). For further discussion, see Ruthann Robson, *Sexual Democracy*, 23 S. AFR. J. ON HUM. RTS. 409, 421–422 (2007).

decreasing protections in the United States for women who seek abortions are not necessarily attributable to the doctrinal failures of substantive due process. Indeed, it might now be said that *Gonzales v. Carhart* is the case that limits privacy for women who seek abortions in a way in which some members of the Court would like to limit privacy for lesbians and other sexual minorities, but for which the “fifth vote” is now absent. Perhaps it also reveals the power that lesbians and gay men (as well as other sexual minorities) now have, and which abortion rights advocates now do not.

Yet competition between sexual and reproductive rights must be avoided. While much recent scholarship advocating for lesbian interests stresses parenthood and marriage, rather than abortion, lesbians have a vital interest in abortion rights. The next sections examine the nature of this interest in practical, doctrinal, and theoretical terms.

III.

CHOICE AFTER CHOICELESSNESS: RAPE, LESBIANS, AND ABORTION

Lesbians, like other women, are raped by men. The Bureau of Justice Statistics' most recent report reveals that in 2007, women reported 248,280 rapes and sexual assaults.⁴⁹ This number of victimizations does not account for the more than sixty percent of rapes and sexual assaults that are not reported to law enforcement.⁵⁰ According to a Department of Justice Survey, approximately eighteen percent of women in the United States are raped at some point during their lives.⁵¹ Data from the National Lesbian Health Care Survey revealed that thirty-two percent of lesbians polled had been raped or sexually assaulted.⁵² The statistical record makes clear that

49. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES, 14 tbl.1 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf>.

50. The most recent report available from the Department of Justice states that “[s]ixty-three percent of completed rapes, 65% of attempted rapes, and 74% of completed and attempted sexual assaults against females were not reported to the police.” CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000 2 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsarp00.pdf>. But see Lauren R. Taylor, *Has Rape Reporting Increased Over Time?*, 254 NAT'L INST. JUST. J. 28, 28 (2006), available at http://www.ojp.usdoj.gov/nij/journals/254/rape_reporting.html (discussing evidence that willingness to report rape has increased).

51. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3 exh. 1 (1998), <http://www.ncjrs.gov/pdffiles/172837.pdf>.

52. Judith Bradford, Caitlin Ryan & Esther D. Rothblum, *National Lesbian Health Care Survey: Implications for Mental Health Care*, 62 J. CONSULTING & CLINICAL PSYCHOL. 228, 239 (1994); Monica J. Descamps, Esther Rothblum, Judith Bradford & Caitlin Ryan, *Mental Health Impact of Child Sexual Abuse, Rape, Intimate Partner Violence and Hate Crimes in the National Lesbian Health Care Survey*, 11 J. GAY &

rape and sexual assault impacts a shocking number of women, including a frightening percentage of lesbian women.

The few existing appellate cases that discuss both lesbianism and rape provide an important glimpse into the rape of lesbians and its legal treatment. Many of these cases involve disputes about the admissibility of evidence about the victim's lesbianism given the existence of state rape-shield statutes that prohibit introduction of evidence of the victim's sexual history at rape trials.⁵³ Courts differ widely over whether evidence of the victim's lesbianism can be introduced to challenge the defense's assertions that there was consent.⁵⁴

At times, the fact of the victim's lesbianism is included in the appellate court's recitation of the facts with little indication of its relevance, or even truth. For example, in *People v. Hicks* a California appellate court revealed that the prosecuting witness told the defendant that "she was a lesbian," but made no further reference to this fact.⁵⁵ In a relatively recent case from an Ohio appellate court, the prosecuting victim was described as having a "lesbian partner" who was on a "cocaine binge."⁵⁶ Meanwhile, the

LESBIAN SOC. SERVS. 27, 38 (2000).

53. For a comprehensive discussion of rape shield statutes, see Michelle Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

54. See, e.g., *Meaders v. United States*, 519 A.2d 1248, 1254 (D.C. 1986) (affirming defendant's conviction for rape despite the trial court's refusal to allow the admission of evidence calling into question the lesbian identity of the victim); *People v. Jackson*, 576 N.E.2d 308, 310-11 (Ill. App. Ct. 1991) (refusing to reverse defendant's conviction despite the prosecution's introduction during trial of evidence of the victim's lesbianism on the grounds that the defendant had "ample latitude to impeach" the state's contention that the victim's "sexual orientation precluded consensual sexual relationships with men at the time of the encounter in question"); *People v. Kemblowski*, 559 N.E.2d 247, 250 (Ill. App. Ct. 1990) (rejecting the argument that the victim's lesbianism was a "sexual status" not covered by the Illinois rape-shield statute); *State v. Lessley*, 601 N.W.2d 521, 527-28 (Neb. 1999) (reversing the defendant's conviction on the grounds that the trial court's exclusion of the defense's evidence of the victim's "sexual preference and experience" was clear error because it "permitted the jury to draw an inference that [the victim] did not consent to sexual relations" and "materially impaired Lessley's Sixth Amendment right to confront his accuser on the dispositive issue of consent"); *People v. Smith*, 493 N.Y.S.2d 623, 624-25 (N.Y. App. Div. 1985) (affirming defendant's conviction despite his claim that the trial court improperly limited his inquiry into the victim's heterosexuality); *Johnson v. Commonwealth*, 385 S.E.2d 223 (Va. Ct. App. 1989) (finding no clear error in the trial court's refusal to hold an evidentiary hearing to determine the admissibility, under the state rape-shield statute, of evidence that two of the three prosecuting victims—all minors—were involved in a lesbian relationship and therefore had a motive to fabricate rape charges against the defendant, their pastor).

55. *People v. Hicks*, 7 Cal. Rptr. 2d 166, 168 (Cal. Ct. App. 1992).

56. As the Ohio court explained:

On the night of June 14-15, 2003, the victim went to look for her lesbian partner, because the partner had gone on a cocaine binge. The victim went with her partner's brother to the place where the partner had previously bought cocaine. At that point they picked up Wilson because he could accurately describe the partner and said that the partner was at a nearby motel. Once at the motel the

dissenting justice in an Indiana Supreme Court opinion reversing a death sentence invoked the victim's lesbianism to make the defendant's crime appear more heinous.⁵⁷

Lesbianism can also be an aggravating or motivating factor in sexual assault. In *People v. Davis*, for example, the California Supreme Court noted that when a victim "who had worked as a volunteer at a rape crisis unit, attempted to 'talk her way out of the situation'" by telling her attacker that she was a lesbian, "that seemed to excite him more."⁵⁸ According to the defendant's testimony, the victim:

told him she was a lesbian but wanted to see men again. He was disgusted; he spit on her and told her to take him back to his truck. She asked to go to a motel with him; he told her he did not go out with lesbians. . . . She began screaming "rape."⁵⁹

The revelation that the victim is a lesbian may also make the defendant more violent. For example, in a rape case that came before the North Carolina Supreme Court, the victim's revelation prompted the defendant to ask "didn't a man satisfy her." The defendant soon thereafter brutally sexually assaulted the victim and left her to bleed to death in the woods.⁶⁰

These cases demonstrate how lesbianism itself may spur sexual assault, and suggest that many of these cases are also hate crimes. Hate crimes—in which bias is a motivating factor—occur with some frequency in the

victim and the brother thought they saw the partner's car. Accordingly, the victim and Wilson rented a room to "stake out" the partner; the brother waited in the car. During this escapade the victim got money from her bank's ATM. Most of the money went for the motel room, but Wilson also bought some cocaine with it. The victim testified that while she was watching for her partner, Wilson smoked the cocaine. Then he grabbed her, threw her on the bed, ripped off her pants, and raped her. Immediately afterwards, they left the hotel room, basically together. Wilson walked away, and the victim returned to her vehicle. She then drove to her partner's mother's house where she called her counselor, who advised her not to wash and call 9-1-1. The victim followed this advice, and subsequent testing showed Wilson's DNA present from the victim's vaginal swabs. Wilson testified that he thought the victim and the brother were primarily looking for cocaine and that the sex was consensual. Indeed, the victim told him she had a fantasy of having sex with a black man.

State v. Wilson, No. 89257, 2008 WL 5257929, at *2 (Ohio Ct. App. Dec. 16, 2008).

57. *Schiro v. State*, 669 N.E.2d 1357, 1360–62 (Ind. 1996) (Shepard, C.J., dissenting) (noting that the victim "was unmarried and lived with a roommate," that "[s]he had felt an aversion toward men ever since her rape as a child," and that, during the course of the sexual assault, the victim "revealed her lesbianism" to the defendant and told "of being sexually abused as a child and said that, except for the earlier rape, she was a virgin and had no desire for sex with a man," but the defendant "nevertheless raped, bludgeoned, and strangled her, and concluded by indulging his necrophilic fantasies").

58. *People v. Davis*, 896 P.2d 119, 130 (Cal. 1995).

59. *Id.* at 132.

60. *State v. Thomas*, 423 S.E.2d 75, 79 (N.C. 1992).

United States.⁶¹ The 2009 compilation of the Anti-Violence Project states that reports of sexual assaults against sexual minorities rose forty-eight percent between 2007 and 2008,⁶² and that this is consistent with “a three year trend of marked increases in reports of hate-motivated sexual violence.”⁶³ The hate element of hate crimes can be difficult to prove; unequivocally assigning anti-lesbian sentiments as the causal factor in any crime, including rape, against a lesbian is not a simple endeavor.⁶⁴ For example, in an alleged gang-rape⁶⁵ of a lesbian near San Francisco in late 2008, the fact that the suspects made explicit comments about the victim’s sexual orientation led prosecutors to pursue the case as a hate crime.⁶⁶ Nonetheless, at least one commentator has cast doubt on the extent to which the rape was motivated by animosity against lesbians, noting that she “ha[s] no doubt [the men] would have raped this unfortunate young woman whether she was a lesbian or not. They were just sick enough to throw insults about her being a lesbian into the mix.”⁶⁷

Less ambiguous in motivation are the so-called “corrective rapes” of lesbians, in which lesbians are specifically targeted for sexual assault with the supposed purpose of instilling heterosexuality. In South Africa, there have been several high-profile incidents of this kind, including an incident in 2007 in which Sizakele Sigasa and Salome Massooa, a lesbian couple, were brutally tortured, gang raped, and murdered.⁶⁸ In 2008, Eudy Similane, a former soccer star, activist, and lesbian was murdered, and since then a “violent tide of violence against lesbians in South Africa has

61. See U.S. DEPT’ OF JUSTICE, HATE CRIME STATISTICS, 2008: INCIDENTS AND OFFENSES (2009), <http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf> (noting that participating law enforcement agencies reported 7783 hate crime incidents involving 9168 offenses during 2008).

62. NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 2008, at 5 (2009), <http://avp.org/documents/2008HVRReportDraft3smallerfile.pdf>. The report does not separate lesbians from other sexual minorities.

63. *Id.*

64. I have previously discussed the problem with defining hate crimes. See Ruthann Robson, *Incendiary Categories: Lesbian/Violence/Law*, 2 TEX. J. WOMEN & L. 1 (1993).

65. Trial has not yet occurred for the four defendants, two of whom are minors. See Seth Hemmelgarn, *A Year After Lesbian Raped, Hearing Set for Next Month*, BAY AREA REPORTER, Dec. 10, 2009, <http://ebar.com/news/article.php?sec=news&article=4388>.

66. See Kelly Zito, *4 Charged in Alleged Rape of Lesbian*, SAN FRANCISCO CHRONICLE, Jan. 2, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/02/BAB9152HP7.DTL>.

67. Tammerlin Drummond, *Proposition 8’s passage Had Nothing to Do with Attack on Woman*, CONTRA COSTA TIMES (CAL.), Jan. 11, 2009. Drummond concluded, despite her misgivings about the extent to which the rape was particularly motivated by animus against lesbians, that the “despicable act” should “be prosecuted as a hate crime nonetheless.” *Id.*

68. ACTION AID, HATE CRIMES: THE RISE OF “CORRECTIVE” RAPE IN SOUTH AFRICA 4 (2009), http://www.actionaid.org.uk/doc_lib/correctiveraperep_final.pdf.

continued to rise.”⁶⁹ The NGO Action Aid has issued a report condemning the lack of legal and state response to violent crimes against lesbians.⁷⁰ According to this report, there is an epidemic of rapes directed at lesbian women and these rapes are committed as a way of “punishing and ‘curing women’ of their sexual orientation.”⁷¹ The majority of lesbians do not report attacks against them.⁷² Lesbians in Johannesburg and Cape Town say that they are targeted and threatened on a daily basis with sexual violence because of their sexual orientation. Of the more than thirty reported rapes of lesbians in South Africa in the last decade only one has resulted in a conviction.⁷³ The South African situation, which has received widespread media attention, illustrates the reality of bias-motivated rapes against lesbians in order to “cure” them of their lesbianism.

No matter the motivation behind them, rapes and sexual assaults raise the possibility of unplanned pregnancy. Variables include the manner of the sexual assault and the fertility of both parties. The accepted incidence of pregnancy from one-time unprotected heterosexual intercourse is approximately three to five percent.⁷⁴ Lesbians, who might not be using birth control methods, may be especially likely to become pregnant when raped. Abortion when the pregnancy is a result of rape is widely considered to be an acceptable choice, perhaps even a necessity. As Shauna Prewitt has compellingly argued, the rhetoric supporting abortion in cases of rape includes a choice justification: “Having been denied a choice over her reproductive freedom by being forced to engage in a sexual act against her will, the raped woman must be given the choice over her reproductive freedom by having the option to end the pregnancy.”⁷⁵

69. Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, guardian.co.uk, Mar. 12, 2009, <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa>.

70. See ACTION AID, *supra* note 68.

71. *Id.* at 5.

72. In a poll of survivors of homophobic hate crimes in the Western Cape, sixty-six percent of women said they did not report their attack because they would not be taken seriously. Of these, twenty-five percent said they feared exposing their sexual orientation to the police and twenty-two percent said they were afraid of being abused. *Id.* at 13.

73. Kelly, *supra* note 69.

74. The incidence of pregnancy will depend upon various factors, including the woman’s ovulation cycle. Allen Wilcox, David B. Dunson, Clarice R. Weinberg, James Trussell & Donna Day Baird, *Likelihood of Conception with a Single Act of Intercourse: Providing Benchmark Rates for Assessment of Post-Coital Contraceptives*, 63 CONTRACEPTION 211, 212 (2001) (“The probability of pregnancy with one completely random act of unprotected intercourse was 3.1% in our data. Estimates can be substantially improved by including information on when intercourse occurred in the menstrual cycle.”). The Rape, Abuse, and Incest National Network (RAINN) states that the rate of pregnancy from one-time protected sex is five percent. *Who Are the Victims?*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited May 18, 2011).

75. Shauna R. Prewitt, *Giving Birth to a “Rapist’s Child:” A Discussion and Analysis*

Yet as Prewitt also notes, the rhetoric includes a necessity justification: “[A] raped woman does not choose abortion; instead, she needs it to end the rapist’s terrorization.”⁷⁶ Prewitt argues that this latter view prevails in successful legislative arguments for a rape exception to abortion restrictions, including the Hyde Amendment and its progeny, which in almost all other situations ban the use of federal funds for abortions.⁷⁷

However, while the current Hyde Amendment does include a rape (and incest) exception, as well as a health of the woman exception,⁷⁸ the rape (and incest) exception was reintroduced after a hiatus of a dozen years. From 1981 until 1993, the Hyde Amendment prohibited federal funds for abortions “except where the life of the mother would be endangered if the fetus were carried to term.”⁷⁹ Thus, while the rape exception presently enjoys favor in the Hyde Amendment, perhaps due to the acceptance of the “necessity” argument,⁸⁰ this does not guarantee that the notions of necessity—never mind choice—are ensconced in federal laws providing funding for impoverished women. Moreover, state laws that impose other burdens on women seeking abortions generally do not have rape exceptions alleviating those obstacles. For example, a recently passed Oklahoma statute requires an ultrasound image of the fetus, with a “simultaneous explanation of what the ultrasound is depicting” and display of the ultrasound images “so that the woman may view them.”⁸¹ There is no exception to this requirement and no mention of rape (or incest) in the

of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape, 98 GEO. L.J. 827, 841 (2010).

76. *Id.* at 842.

77. *Id.* at 843–45. Incest is the other exception generally recognized by federal law. *Id.* at 843.

78. The current version of the Hyde Amendment is found in Section 508 of the Consolidated Appropriations Act, 2010. It provides that:

(a) The limitations [on the federal funding of abortion] established in the preceding section shall not apply to an abortion—

- (1) if the pregnancy is the result of an act of rape or incest; or
- (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed one of the Federal funds appropriated under this Act shall be expended for any abortion except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy is the result of an act of rape or incest.

Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, §508, 123 Stat. 3034, 3280 (2009).

79. Pub. L. No. 101-166, §204, 103 Stat. 1159, 1177 (1989). *See also* Hope Med. Grp. for Women v. Edwards, 63 F.3d 418, 421 (5th Cir. 1995) (discussing the previous version of the Hyde Amendment).

80. Prewitt, *supra* note 75, at 842–45.

81. Act of June 14, 2010, § 2, 2010 Okla. Sess. Laws 173 (to be codified at OKLA. STAT. tit. 63, § 1-738.3d) (overriding Governor’s veto).

text of the statute. Another Oklahoma statute provides a mandatory waiting period after the provision of information, including the gestation age of the fetus and a state-mandated lecture highlighting the father's responsibility for child support.⁸² Again, there is no exception for rape.⁸³ Additionally, the availability of abortion providers is severely limited, due in part to targeted regulation of abortion provider (or "TRAP") laws, which seek to impose regulations on abortion providers that are not imposed on other health service providers.⁸⁴ According to the pro-choice advocacy group, NARAL Pro-Choice America, ninety-six percent of counties in Oklahoma have no abortion provider.⁸⁵ In addition, once a woman reaches an abortion provider, she may find her way impeded by persons protesting.⁸⁶ The fact that the woman's pregnancy is due to rape does not improve the locations of abortion providers, the regulations to which the providers are subject, or the fervor of the protesters who greet her at the clinic.

Thus, while rape as an exceptional circumstance enjoys some favored statutory status in allowing access to abortion, this status does not influence non-statutory factors such as accessibility. Moreover, the favored statutory status does not transfer to other statutory mandates, such as the requirement for an ultrasound or state-mandated information. Finally, the favored status is politically transitory, as the history of the inclusion-exclusion-inclusion "rape exception" to the Hyde Amendment demonstrates.

The next section considers additional statutory mandates to which rape is not an exception: situations involving women who are minors and women who seek late-term abortions. The health of the pregnant woman is one of the pillars of *Roe v. Wade*. The rejection of the health—or perhaps even life—of the pregnant woman as a justification for abortion may

82. OKLA. STAT. tit. 63, §§ 1-738.2.B.2 (2009).

83. In cases of rape, the possibility that the rapist will continue to be involved in the woman's life because of his responsibilities to the child may not be a factor likely to encourage women to choose to continue the pregnancy. Nonetheless, as Shauna Prewitt notes, Oklahoma is one of only sixteen states that attempts to protect a raped woman who chooses to give birth and raise a child born out of rape from the rapist who seeks visitation and custody. Prewitt, *supra* note 75, at 855 n.202 (citing OKLA. STAT. tit. 10A, § 1-4-904.B.11 (2009) ("The court may terminate the rights of a parent to a child based upon the following legal grounds: . . . A finding that the child was conceived as a result of rape perpetrated by the parent whose rights are sought to be terminated.")).

84. See Dawn Johnsen, "TRAP"ing *Roe* in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1369 (2009).

85. See *Oklahoma State Profile*, NARAL PRO-CHOICE AMERICA, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/oklahoma.html (last visited May 18, 2011).

86. See generally William Alex Pridemore & Joshua D. Freilich, *The Impact Of State Laws Protecting Abortion Clinics and Reproductive Rights on Crimes Against Abortion Providers: Deterrence, Backlash, or Neither?*, 31 LAW & HUM. BEHAV. 611 (2008).

portend a similar fate for rape as an acceptable rationale.

IV.

REPRODUCTIVE AMATEURS: TOO YOUNG OR TOO LATE

Lesbians, like other women, have consensual sex with men. Such a declaration may seem oxymoronic, prompting interrogation of the meaning of lesbianism, as well as consent, and perhaps even the terms “sex” and “men.” Yet even Sappho—from whose residence on the island of Lesbos in the sixth century BCE the term lesbian is derived—is reputed to have had a daughter and to have had a love affair with a man.⁸⁷ In this century, studies such as the Kinsey Report and the Hite Report have found that categories such as “lesbian” and “heterosexual” are permeable.⁸⁸ A 1995 survey of approximately 7000 self-identified lesbians revealed that over seventy percent had engaged in vaginal intercourse with a man at least once, with over eighty-eight percent of those women disclosing that they had not used a condom.⁸⁹ The medical researchers relying on the study argue that it is important that health care practitioners not assume that women who “describe themselves as lesbians have never engaged in sexual activity with men or are not currently doing so,” in order to “make appropriate decisions” regarding health care, including “performing Pap smears, screening for STDs, assessing HIV risk factors, and advising on sexual risk reduction.”⁹⁰ While these researchers do not mention pregnancy as a risk of heterosexual sex, it is one that cannot be ignored.

Pregnancy as a consequence of sex with men is especially pronounced among lesbian youth. Indeed, several studies have documented that young lesbians are two to ten times more likely to become pregnant than their

87. Both legends are disputed, however. Regarding the mention of a daughter named Kleis in some of Sappho's extant fragments, Sappho scholar Page DuBois says that the “modern tendency to turn Kleis unquestioningly into a daughter may be a sign of the ways in which the family as a social structure of our universe occludes our reading of the past.” PAGE DUBOIS, *SAPPHO IS BURNING* 148 (1995). Similarly, Margaret Williamson describes the legend that Sappho had a male lover named Phaon, and for whom she reputedly leapt off a cliff at Leucas after he rejected her, as “fantasy,” “one of the most durable fictions” of Sappho, and one of the multiplying “biographical fantasies.” MARGARET WILLIAMSON, *SAPPHO'S IMMORTAL DAUGHTERS* 7–11 (1995).

88. See generally, SHERE HITE, *THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY* (1976); ALFRED KINSEY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

89. Allison L. Diamant, Mark A. Schuster, Kimberly McGuigan & Janet Lever, *Lesbians' Sexual History with Men*, 159 *ARCHIVES INTERNAL MED.* 2730, 2732 (1999). The investigators relied on a 186-item questionnaire that was developed by three health service researchers and distributed in a national gay and lesbian magazine. The survey resulted in almost 7000 respondents, 1000 of whom were excluded because they did not self-identify as lesbian. *Id.* The study's findings—namely, that many lesbians have a history of sexual contact with men among—are consistent with previous studies. *Id.* at 2731, 2734, 2735 nn.16–26 (citing ten previous studies).

90. *Id.* at 2735.

heterosexual counterparts.⁹¹ The explanation for such disparity is multivalent. Lesbian, gay and bisexual teens may have a higher incidence of some of the risk factors generally associated with teen pregnancy, including high and early rates of heterosexual intercourse.⁹² This intercourse often occurs in the context of sexual abuse or substance abuse, and without the use of condoms or other forms of contraception.⁹³ Additionally, lesbian, gay and bisexual youth are over-represented in the runaway and homeless youth populations, increasing the chance that they will engage in survival sex and prostitution, or be the victims of sexual exploitation.⁹⁴ Moreover, discrimination and harassment of young lesbians may lead them to engage in “camouflage” sexual activities in order to protect themselves.⁹⁵ The ineffectiveness and homophobic bias of sexual education may also contribute to a lack of information among lesbian youth.⁹⁶ Finally, a lack of supportive services, such as connections with families, schools, and heterosexual peers, may contribute to sexual activity and pregnancy.⁹⁷

For lesbians who become pregnant and desire an abortion, two current doctrinal limitations are especially relevant. For pregnant lesbian minors, statutes requiring parental consent may pose an obstacle, particularly if the family relationship is already difficult. For pregnant lesbians, whether minors or adults, statutes requiring early detection and action to terminate a pregnancy may likewise pose an obstacle to women who do not expect pregnancy and do not use contraception effectively. Some of the same factors that can contribute to a lesbian teen’s pregnancy, such as homelessness or a lack of connection with her family, make seeking parental consent for an abortion potentially deeply troubling. The theoretical perspective supporting the constitutionality of statutes requiring parental consent derives from the recognition of a parent’s constitutional rights to the “care, custody, and control” of their children.⁹⁸

91. Elizabeth M. Saewyc, Colleen S. Poon, Yuko Homma & Carol L. Skay, *Stigma Management? The Links Between Enacted Stigma and Teen Pregnancy Trends Among Gay, Lesbian, and Bisexual Students in British Columbia*, 17 CANADIAN J. HUM. SEXUALITY 123, 124 (2008) (citing several studies of North American youth).

92. *Id.* at 125, 133.

93. *Id.* at 125.

94. *Id.*

95. *Id.*

96. *Id.* The researchers in the study of British Columbia school students were “unable to tease out whether a lack of LGB content in sexual education in schools” might be contributing to the higher rates of pregnancy-involvement amongst sexual minority youth, but cite to studies in Massachusetts regarding the possible connection between education and pregnancy. *Id.* at 135. If the correlation is meaningful, the problem could be even more pronounced in American jurisdictions that provide abstinence-only sex education.

97. *Id.* at 134.

98. *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming an injunction against a state law because it interfered with the “liberty of parents and guardians to direct

However, when teens are homeless, or alienated from their families, they may not be in their parents' "care, custody, and control."

The U.S. Supreme Court has struggled with the issue of whether a pregnant minor must obtain her parents' permission or have them notified (which may be tantamount to permission) before having an abortion. Only three years after *Roe v. Wade*, the Court concluded that a Missouri statute that allowed a parent to deny a minor the right to an abortion was unconstitutional.⁹⁹ The Court soon settled on the so-called "judicial bypass" option in order for a parental consent requirement to be deemed constitutional.¹⁰⁰ This allows a minor to "bypass" the parent's consent through a judicial process that requires the minor to prove either that she is sufficiently mature to make the decision without her parents or, if she is not sufficiently mature, that the abortion is in her best interest.¹⁰¹ The Court has continued to adhere to judicial bypass procedures when confronted with state statutes regulating a minor's access to abortion.¹⁰² Most recently, the Court unanimously declined to rule substantively on a state law requiring a forty-eight hour waiting period after parental notification.¹⁰³ Although the statute did include a judicial bypass procedure, it did not include an exception from the judicial bypass or notification requirement for the health of the pregnant minor.¹⁰⁴

the upbringing and education of children under their control").

99. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding that a parental "veto" over a minor's right to abortion is unconstitutional).

100. *Bellotti v. Baird*, 443 U.S. 622 (1979) (striking down a Massachusetts law requiring a minor to obtain parental consent prior to an abortion—with no alternative procedure available—based on the minor's right to seek a confidential judicial bypass without consulting her parents where she may prove either that she is sufficiently mature to make the decision or that the procedure is in her best interest).

101. *Id.* at 643.

102. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (upholding a parental consent requirement with a judicial bypass alternative for minors seeking abortion); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 519–20 (1990) (upholding an Ohio statute requiring one-parent notification as because it contained an adequate judicial bypass procedure but reserving the question of whether one-parent notification statutes require judicial bypass procedures); *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (upholding a two-parent notification requirement because of the inclusion of a judicial bypass provision); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 (1983) (holding a Missouri parental consent requirement constitutional because the judicial bypass alternative contained in the statute conformed to the standards set out in *Bellotti*); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 (1983) (striking down as unconstitutional a city ordinance requiring minors to obtain consent because it failed to have an adequate judicial bypass procedure); *H.L. v. Matheson*, 450 U.S. 398, 408–09 (1981) (upholding a Utah statute that required a physician to "notify if possible" the parent or guardian of a minor upon whom an abortion is to be performed).

103. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 332 (2006).

104. *Id.* at 323–24. The Court interpreted the question concerning the challenged law's constitutionality to be "one of remedy: if enforcing a statute that regulates access to abortion would be unconstitutional in the case of medical emergencies, what is the appropriate judicial response?" *Id.* at 323. Writing for the Court, Justice O'Connor rejected

State courts have likewise confronted issues surrounding minors' access to abortion. For example, the Florida Supreme Court has held, as a matter of state constitutional law, that minors have the same constitutional rights as adults and on this ground invalidated, as a violation of minors' privacy rights, both a state parental consent statute and a state parental notification statute, despite their inclusion of judicial bypass provisions.¹⁰⁵ In response to these decisions, the Florida Legislature then proposed, and the voters ratified, a constitutional amendment authorizing the Florida Legislature to require notification of a parent or guardian before termination of a minor's pregnancy, notwithstanding a minor's right to privacy under Florida law.¹⁰⁶

In addition to the constitutional issues, state courts have also had to determine what factors courts should take into account when determining the "maturity" and the "best interests" of a pregnant minor in the judicial bypass proceedings adopted by state legislatures pursuant to the *Bellotti* standard. Courts have found that maturity determinations should include consideration of the minor's age, future plans, performance in school, and familiarity with the abortion procedure.¹⁰⁷ Courts have meanwhile

the First Circuit's declaration that the statute was unconstitutional because it lacked a health exception, reasoning that a declaratory judgment and an injunction barring the unconstitutional application of the statute were sufficient remedies. *Id.* at 332. The New Hampshire legislature subsequently repealed the statute. See *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265, 271 (D. N.H. 2008).

105. *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (striking down the state parental consent statute as a violation of state privacy rights because it provided inadequate procedural protections to pregnant minors); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 638 (Fla. 2003) (striking down the Florida Parental Notice of Abortion Act, passed soon after *In re T.W.*, for similarly violating the privacy rights of minors).

106. The amendment provides:

The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exception to such requirement for notification and shall create a process for judicial waiver of the notification.

FLA. CONST. art. 10, § 22. In 2005, the legislature passed Florida's Parental Notice of Abortion Act, FLA. STAT. ANN. § 390.01114 (West 2007), implementing the Amendment. The statute provides that actual notice of an abortion shall be given to a parent or legal guardian of a minor by a physician at least forty-eight hours before the abortion. The statute only provides exceptions in cases of medical emergency, waiver of notice, or where the minor has been married or has had the disability of non-age removed. It also provides a judicial bypass procedure. *Id.*

107. See Stephen P. Rosenberg, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent? The Ex Parte Anonymous Cases (Alabama 2001)*, 34 CONN. L. REV. 1109, 1117–18 (2002); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 430 (2009).

interpreted the best interest prong of the judicial bypass procedure to essentially require the judge to act as *parens patriae* for the minor, and to determine when it is not in the minor's best interest to involve her parents in her decision to have an abortion, or not. Factors courts have found judges should take into account when determining the minor's best interests in a parental notification proceeding include: the stability of the minor's home, whether notification would cause serious and lasting harm to the family structure, as well as the relationship between the parent and the minor and the effect of notification on that relationship.¹⁰⁸

Feminist theorist Carol Sanger has likened the minor's narrative during contemporary judicial bypass hearings to sixteenth-century French letters of remission, or "pardon tales." Like letters of remission or pardon tales, these hearings are informal and involve a plea by a supplicant to a decision-maker.¹⁰⁹ Sanger notes also that "the task of both the pardon tale and the bypass testimony is similar: to establish a picture of someone worthy of the court's favor, an ordinary person seeking extraordinary relief on the strength of the presentation."¹¹⁰ Additionally, "the minor must also argue in a delicate alternative: first that she is mature enough to make the decision, but in case that fails, that she is too hapless to take on the responsibilities of motherhood and it is therefore in her best interest to have an abortion."¹¹¹ Sanger contends that this performance is made more difficult by "the problematic position of the minor," because from the beginning of "the bypass process, certain structural features make her appear an unreliable witness, an unreliable girl."¹¹²

While Sanger does not address lesbian "girls" seeking judicial approval in a bypass procedure, her theories highlight how a lesbian teenager might appear even more unreliable, and thus immature, than a heterosexual "girl." If the young heterosexual woman has a more difficult time invoking a "standard set of conventions" than the sixteenth century adult male supplicant who acted "hotheadedly,"¹¹³ then a young lesbian woman has even fewer conventions on which to draw. Indeed, one narrative convention that Sanger does not discuss, but that appears to play an important role in at least some judicial bypass hearings, is that of "the boyfriend." The presence of a steady and supportive boyfriend, preferably also a good student with a part-time job, appears to contribute positively to

108. See, e.g., *In re Jane Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000). Other factors the Texas Supreme Court suggests judges should consider include the minor's emotional or physical needs and the possibility of emotional or physical danger to the minor. *Id.*

109. Sanger, *supra* note 107, at 456-57.

110. *Id.* at 460.

111. *Id.*

112. *Id.* at 461.

113. *Id.* at 460.

judges' decisions to waive parental consent.¹¹⁴ Young lesbians do not have this narrative convention to draw upon. Furthermore, one might imagine the potentially negative reaction of many judges if they considered evidence of the minor's lesbianism while attempting to assess her maturity or her best interest in seeking an abortion without parental involvement. If, for example, a judge finds pursuing an athletic scholarship to college to be an insufficiently valid rationale supporting the abortion choice, pursuing a lesbian lifestyle would mostly likely not be a more impressive rationale.¹¹⁵

Young lesbian women also may lack the heterosexual connections that would enable them to access the already difficult and fraught judicial bypass procedure. These young lesbian women also may take more time than heterosexual young women to recognize a pregnancy because of their lack of the heterosexual connections that operate as informational exchange networks. This only worsens the serious problem that delay already poses for teenagers who desire abortions in judicial bypass states.¹¹⁶ Thus, for reproductive amateurs, the prospect of a so-called late-term abortion may be the most realistic—or only—abortion alternative.

114. For example, in reversing a trial court decision finding that the minor was not sufficiently mature to merit a waiver of the parental consent requirement, an Alabama appellate court noted:

The minor testified that she is 17 years old; is in the eleventh grade; makes A's, B's, and C's; and is a cheerleader. She works three days a week teaching young children gymnastics. She testified that with the money she earns she helps pay for her car, saves for college, and has some spending money. Her plans for the future include studying physical therapy at the University of Alabama at Birmingham (UAB). Following college, she plans to marry and to have children. The minor's boyfriend, who she says is the father, is 18 years old, attends UAB, and is currently employed. The minor says that he has stated that he would support her "100 percent" in whatever decision she made regarding her pregnancy.

In re Anonymous, 650 So. 2d 923, 924 (Ala. Civ. App. 1994). Likewise, in another anonymous case decided by an Alabama civil appellate court reversing the trial judge, the court found it relevant to state:

The minor has been in a relationship with her boyfriend, the father of her "unborn child," for several months. According to the minor, her pregnancy is the result of the first time she had sexual relations with this boyfriend; she testified that they used a condom but that the condom they used broke. The boyfriend is 19 years old and is employed. The minor testified that her boyfriend would support her decision either to have the child or to have the abortion procedure . . .

In re Anonymous, 905 So. 2d 845, 846–47 (Ala. Civ. App. 2005).

115. See *In re Anonymous*, 905 So. 2d at 850 (quoting the trial judge as stating that the "legislature, in its infinite wisdom, has determined that an unborn child who never has had even the ability to do any wrong, could be put to death so that his mother can play [sports]"). However, because this trial judge also viewed the judicial bypass proceeding as a "capital case" in which the judge must decide whether the minor's "unborn child should live or die," perhaps an assertion of lesbianism would have gone unnoticed. *Id.*

116. See Sanger, *supra* note 107, at 437–39 (outlining the various reasons why delay is such a serious problem for teenagers who wish to get abortions in judicial bypass states).

For adult lesbians, who do not need parental permission, the availability of late term abortions is as important to them as it may be to minor lesbians. Late term abortion, like parental notification and consent, has been a major subject of legislative regulation and judicial assessments of constitutionality. One legislative strategy is to ban abortion after a particular week of pregnancy. For example, a recently passed Nebraska statute bans abortion if “the probable postfertilization age of the woman’s unborn child is twenty or more weeks.”¹¹⁷ A previous Nebraska statute prohibiting a certain procedure for later term abortions, which has also been called “partial birth abortion,” was declared unconstitutional by the Court in *Stenberg v. Carhart*.¹¹⁸ Writing for the Court, Justice Breyer found fault with the statute because it did not contain an exception for the health of the pregnant woman and because it applied both to viable and nonviable fetuses.¹¹⁹

Subsequently, Congress enacted the federal Partial-Birth Abortion Ban Act of 2003.¹²⁰ Relying on *Stenberg* as well as *Casey*, three circuit courts affirmed district courts’ conclusions that the Act was unconstitutional.¹²¹ In *Gonzales v. Carhart*,¹²² the United States Supreme Court reversed the circuit and district courts¹²³ without reversing *Stenberg*,

117. Pain-Capable Unborn Child Protection Act § 5, NEB. REV. STAT. § 28-3,106 (2010).

118. 530 U.S. 914 (2000). The Nebraska so-called “partial-birth abortion” statute provided that “no partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” *Id.* at 921–22. It defined “partial birth abortion” as: “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Id.* at 922. It further defined “partially delivers vaginally a living unborn child before killing the unborn child” to mean “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” *Id.*

119. *Id.* at 938. The Court concluded that the Nebraska statute allowed prosecution of physicians who use any “dilation and evacuation” (D&E) procedure, although they are the most commonly used procedures for previability second-trimester abortions. *Id.* at 945. As the Court had earlier explained, D&E is a term that “refers generically to transcervical procedures performed at 13 weeks gestation or later.” *Id.* at 924. Thus, the Nebraska statute was found to create an undue burden. *Id.* at 945–46.

120. 18 U.S.C. § 1531 (2006).

121. See *Planned Parenthood Fed’n of Am., v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *aff’g* *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *aff’g* *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004); *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), *aff’g* *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

122. 550 U.S. 124 (2007).

123. *Gonzales v. Carhart* was an appeal from the Eighth and Ninth Circuit opinions, but not the Second Circuit. *Id.* at 133.

by distinguishing the federal act from the Nebraska statute.¹²⁴ The 5-4 decision in *Gonzales v. Carhart* vitiated one of the essential pillars of *Roe v. Wade* (even as reinterpreted in *Casey*): the principle of protection for the health of the pregnant woman. This is not to say that the majority was unconcerned with the well-being pregnant woman, but it emphasized the extent to which this well-being was connected to her role as a mother. In an opinion written by Justice Kennedy, the Court delivered a paean to motherhood:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.¹²⁵

As Linda Greenhouse has acutely observed, the "facts" that the Court

124. The Court distinguished the two statutes by pointing to differences in their texts: whereas the federal statute prohibits the delivery of "a living fetus," the Nebraska statute at issue in *Stenberg* prohibited "delivering . . . a living unborn child, or a substantial portion thereof." 550 U.S. at 152 (citations omitted). The Court construed these textual differences to mean that the federal statute, unlike the statute in *Stenberg*, prohibited only the "extraction of an entire fetus rather than [the] removal of fetal pieces," and "thus displaces the interpretation of 'delivering' dictated by the Nebraska statute's reference to a 'substantial portion' of the fetus." *Id.* The Court also found that its reference to the "identification of specific anatomical landmarks to which the fetus must be partially delivered" also differentiated the federal statute from the unconstitutional Nebraska law, because it meant that the "removal of a small portion of the fetus [was] not prohibited." *Id.* at 152-53. The Court also noted that to "come within the ambit of the Nebraska statute . . . , a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions," while the federal statute requires "the fetus to be delivered so that it is partially 'outside the body of the mother.'" *Id.* at 153.

125. *Id.* at 159 (citations omitted). The passage continues:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Id. at 159-60 (citations omitted).

relies upon in *Carhart* are problematic.¹²⁶ Greenhouse notes that Kennedy's description of motherhood as "a woman's presumed highest calling in society," was not supported by any facts, but was simply offered by the "five men who join the opinion" as an "observation on the ordering of human affairs so obvious to any reader as to require no evidentiary or legal foundation."¹²⁷ As Greenhouse argues, "[t]he implied message is that any woman who would so brutally sever the bond of motherhood as to have an abortion is not a real woman."¹²⁸ As for Kennedy's statement that "some women come to regret their choice to abort the infant life they once created and sustained" and thereby suffer "[s]evere depression and loss of esteem,"¹²⁹ Greenhouse points out that its only support is an amicus brief filed by Sandra Cano, who interestingly did not herself have an abortion, but who works with the anti-abortion organization, Justice Foundation.¹³⁰ Moreover, as Greenhouse notes, the affidavits presented as an appendix to Cano's amicus brief, as evidence for the claim, do not specifically link the regret, depression, and grief surrounding the abortion to the specific abortion procedure that the Court was assessing for constitutionality.¹³¹

The majority's celebration of motherhood in the 2007 case of *Gonzales v. Carhart* is reminiscent of the concurring opinion of Justice Bradley in the 1872 case of *Bradwell v. Illinois*.¹³² Rejecting Myra Bradwell's constitutional challenge to the decision of the Illinois Supreme Court to deny her a license to practice law because of her sex, Bradley opined: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."¹³³

Given such constructions of women, it seems obvious that claims by adult or minor lesbians requiring late-term abortions is not likely to be positively viewed by courts and legislatures. Indeed, if the proper role of a woman is to be a "wife and mother," this is all the more reason to deny lesbians access to abortion. For young lesbians, faced not only with social and psychological conditions attributable to discrimination that may impede their reproductive choices but also with the double obstacles posed by parental consent or notification laws and prohibitions of late-term abortions, the abortion choice may be chimerical at best. For young

126. Linda Greenhouse, *The Counter-Factual Court*, 47 U. LOUISVILLE L. REV. 1, 7–10 (2008).

127. *Id.* at 9–10.

128. *Id.* at 10.

129. *Carhart*, 550 U.S. at 159.

130. Greenhouse, *supra* note 126, at 10–11.

131. *Id.* at 12.

132. 83 U.S. 130 (1872).

133. *Id.* at 141–42 (Bradley, J., concurring).

lesbians and other lesbians who are reproductive amateurs, the right to abortion must include the right to late-term abortion.

An underlying rationale behind forcing lesbians to give birth despite their desire for an abortion might be to “correct” them into heterosexual, or at least more suitable, women. The next section considers the hostility towards independent women that underlies restrictions on abortion access.

V.

MAN-HATERS AND INDEPENDENT WOMEN

Lesbians, like other women, are distrusted and feared by men. Such a statement may seem overbroad and combative; certainly it is not true that all men fear or distrust all women or even all lesbians. Yet it is also true that our legal history reveals a pervasive male anxiety towards women’s independence from male authority. Most commonly, this male anxiety is articulated as paternalism.

The “separate spheres” ideology is perhaps one of the best examples of how the law has historically served to assuage male anxiety. Under this ideology, women were relegated to the household, where they were controlled by their husbands, fathers, or other male relatives. Debates surrounding antebellum legal reforms that made it easier for married women to own property reveal the extent to which this ideology was motivated by male anxiety about the consequences of allowing women a measure of economic independence. As a Maryland attorney posed the question in 1858: “Would not *every* wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home?”¹³⁴

The controversies surrounding women’s ability to vote similarly illustrate male anxiety over women’s independence. Suffragists were depicted as inhuman, genderless monsters. It was contended that women’s suffrage would surely destroy “the family” or at least make men less masculine.¹³⁵

Justice Bradley’s assertion, in *Bradwell v. Illinois*, that the “proper role” for a woman such as Myra Bradwell was not attorney but “wife and mother”¹³⁶ has continued to have resonance in more recent legal history. Efforts to promote marriage among impoverished women,¹³⁷ regulations

134. *Schindel v. Schindel*, 12 Md. 294, 307–08 (1858) (R. Alvey for the appellee) (emphasis added).

135. See Siegel, *She the People*, *supra* note 31, at 977 n.81.

136. *Bradwell v. Illinois*, 83 U.S. 130, 139–42 (1872).

137. See ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* (2007) (discussing state coercion of indigent women into traditional marital relations); Kaaryn

that exclude domestic workers from ordinary minimum wage and maximum hour laws,¹³⁸ and custody decisions which penalize mothers selfish enough to pursue a career¹³⁹ or a sexual life¹⁴⁰ reflect enduring anxiety about women's independence, both inside and outside the home.

For lesbians, independence from men can have devastating legal consequences. Indeed, lesbianism can be used by courts as evidence of a hatred towards men sufficiently virulent to justify a sentence of death. In some instances, the construction of a lesbian defendant as a man-hater is elliptical and subtle.¹⁴¹ However, in the case of Bernina Mata, the rhetoric was direct: the prosecutor introduced the lesbian books on Mata's shelf as evidence to support his theory that she "lured" the male victim to his death because she was a "hard core lesbian."¹⁴²

In the family context, lesbians who co-parent a child have long been subject to judicial disapproval. Judges often believe that children need both male and female parents to inculcate appropriate gender roles, including one's place in the heterosexual family. Indeed, New York's highest court found that the legislature could rationally believe that "it is better, other things being equal, for children to grow up with both a

Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269 (2009) (discussing three marriage promotion movements in the United States); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 541-542 (2009) (discussing the programmatic "marriage movement" under Bill Clinton); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 786-788 (2002) (discussing welfare reform's promotion of marriage).

138. See, e.g., 29 C.F.R. § 552.109(a) (2010) (exempting employees "engaged in providing companionship services" within the home from the minimum wage and overtime pay requirements of the Fair Labor Standards Act). See also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (upholding 29 C.F.R. §552.109(a) as a valid administrative regulation); Ruthann Robson, *A Servant of One's Own: Virginia Woolf and the Continuing Class Struggles of Feminism*, 23 BERKELEY J. GENDER, L. & JUST. 392, 405-11 (2008) (discussing *Long Island Care* as an example of gendered perceptions of domestic servants hindering efforts towards equal treatment).

139. See, e.g., *Rowe v. Franklin*, 663 N.E.2d 955, 960 (Ohio Ct. App. 1995) (reversing trial court decision denying custody to mother because of her "poor choices" and "personal agenda" evident in her decision to attend law school and work as a member of the state National Guard).

140. See, e.g., *Brinkley v. Brinkley*, No. CA 86-388, 1987 WL 12998 (Ark. Ct. App. June 24, 1987) (discussing its disapproval of a mother who had "engaged in extra-marital affairs with men, even with one or more men subsequent to her present marriage," and was thus "placing her personal and selfish desires above the best interest of the child").

141. See RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* 29-41 (1998) (discussing various lesbians convicted of capital murder and sentenced to death).

142. See Ruthann Robson, *Lesbianism and the Death Penalty: A "Hard Core" Case*, 32 WOMEN'S STUD. Q. 181, 181-91 (2004) (discussing the case). Ms. Mata's sentence was among the 167 death sentences (including four of women) that Illinois Governor George Ryan commuted in January 2003, forty-eight hours before his term as Governor of Illinois expired. *Id.* at 190.

mother and a father.”¹⁴³ The court further opined that “[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”¹⁴⁴ Lesbians may also feel significant pressure to conform to gendered norms of motherhood.¹⁴⁵ In the lesbian family, perhaps the adult lesbians will not be controlled by adult men, but they will inhabit the privatized sphere of home, perhaps with male children.

Abortion doctrine particularly reveals male anxiety about women’s control over important issues. In *Roe v. Wade* itself, the pregnant woman was subject to the control of her presumptively male physician.¹⁴⁶ The Court’s most recent abortion decision, *Gonzales v. Carhart*, exhibits an especially paternalistic view of women’s decision-making regarding pregnancy.¹⁴⁷ Feminist legal theorist Maya Manian notes that the *Gonzales* Court’s “portrayal of women evokes a century-old societal view of femininity” and “reflects a gender-stereotyped view of women’s nature.”¹⁴⁸ Reva Siegel, in discussing the criminalization of abortion, similarly argues that there has been a triumph of “gender-conventional convictions” that “women are too weak or confused to be held responsible for their choices, and need law’s protection to free them to be mothers.”¹⁴⁹

Judicial paternalism is also evident in *Planned Parenthood v. Casey*, in

143. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

144. *Id.* For further discussion of homosexual parenting, see generally Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Gay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127 (2008); Ruthann Robson, *Our Children: Kids of Queer Parents and Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALBANY L. REV. 915 (2001); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623 (1996).

145. Anthropologist Ellen Lewin, in her groundbreaking study of lesbian mothers, notes that lesbians are motivated to become mothers by desires to achieve adulthood, responsibility, authenticity, naturalness, and “an identity as a ‘good’ woman.” More concretely, lesbians becoming mothers are often seeking acceptance from their own families of origin by creating new families. Lewin concludes that motherhood allows lesbians to “claim membership in the group known as ‘women’ on the same basis as single heterosexual mothers.” By becoming mothers, lesbians can refute the accusations that we are unwomanly, unfeminine, unnatural—denunciations perhaps made by our own families and certainly by society at large. Because mothering may thus be a “choice” constructed from the avoidance of pain and stigma, the coercive potential of lesbian motherhood should not be underestimated. ELLEN LEWIN, *LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE* 54–57 (1993).

146. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (“[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”).

147. See *supra* notes 125–31 and accompanying text.

148. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 225 (2009).

149. Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688 (2008).

which the Court addressed a state statutory requirement that married women consult their husbands before having an abortion.¹⁵⁰ Writing for the Court, Justice O'Connor chose to focus on battered women, characterizing women as victims needing sympathy and support. She stated that there are "millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands," and then observed that "[i]f anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement."¹⁵¹

O'Connor then discussed which women the statute would exempt, and more importantly, which women the statute would not exempt from its disclosure requirements. She focused on non-exempt psychological abuse, noting that many women "may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends."¹⁵² Furthermore, she noted that, even if the woman had become pregnant through sexual assault by her husband and was therefore arguably exempt under the Pennsylvania statute, the requirement that the woman had notified law enforcement authorities of the assault made the statute's protection illusory.¹⁵³ O'Connor deftly turned (some) women into victims needing judicial intervention, sympathy and support, even as she ultimately resisted infantilizing women.¹⁵⁴

Yet even when articulated as paternalism, the concern is linked to anxiety about women's independence from men: Would not *every* wife "take the refuge such a law would give her" and "abandon" her husband¹⁵⁵

150. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 892 (1992).

151. *Id.* at 893.

152. *Id.*

153. O'Connor observed, "If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement." *Id.*

154. O'Connor asserted:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Id. at 893–94. Rejecting the state's argument that the statute only affects a small number of women, O'Connor stated that the "analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Id.* at 894.

155. *Schindel v. Schindel*, 12 Md. 294, 307–08 (1858).

by making her own decision regarding her pregnancy? In *Casey*, Justice O'Connor reassuringly asserted that "in well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child."¹⁵⁶ However, there might certainly be different opinions amongst the partners regarding whether the marriage is "well-functioning" and apprehension about whether one's partner shares one's own opinion. There is also the suspicion that the woman's pregnancy might be attributable to an extra-marital sexual relationship.¹⁵⁷

A more complex regulation of women's authority regarding abortion is a negation of that authority on the basis of a specific reason the woman might articulate, especially the sex of the fetus.¹⁵⁸ Pennsylvania,¹⁵⁹ Illinois¹⁶⁰ and Oklahoma¹⁶¹ have sex selective prohibitions. A recent bill proposed in the Georgia state legislature would amend the criminal abortion statute to include abortions performed because of the sex or race of the "unborn child."¹⁶² The specter of sex-selection prohibitions in abortion statutes is

156. *Casey*, 505 U.S. at 892–93.

157. *Id.* at 892 ("In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair."). Under the Pennsylvania statute "the woman [had] the option of providing an alternative signed statement certifying that her husband [was] not the man who impregnated her." *Id.* at 887.

158. On this view, the sex of the fetus is assumed to be either male or female. For discussions of the birth of so-called "intersex" persons, including legal and medical approaches, see Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41 (2004); Erin Lloyd, *From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children*, 12 CARDOZO J.L. & GENDER 155 (2006).

159. The Pennsylvania provision allowing for "necessary abortions" states that "[n]o abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion." 18 PA. CONS. STAT. § 3204(c) (2000). This provision was part of the statutory scheme that was challenged in *Casey*, but apparently the "American Civil Liberties Union chose not to challenge the sex selection provision." Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of A Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 119 n.124 (1997).

160. The Illinois statute provides: "No person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus" and further states that this shall not be construed to "proscribe the performance of an abortion on account of the sex of the fetus because of a genetic disorder linked to that sex." 720 ILL. COMP. STAT. 510/6(8) (2010).

161. The Oklahoma statute provides: "No person shall knowingly or recklessly perform or attempt to perform an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the unborn child. Nothing in this section shall be construed to proscribe the performance of an abortion because the unborn child has a genetic disorder that is sex-linked." OKLA. STAT. tit. 63, § 1-731.2.B (2007).

162. Senate Bill 529 would amend Georgia's criminal abortion statute to include abortions performed by a physician with "the actual knowledge that the pregnant woman is seeking the abortion with the intent to prevent an unborn child from being born based upon the race, color, or gender of the unborn child or the race or color of either parent of that unborn child." S. 529, 150th Gen. Assemb., Reg. Sess. (Ga. 2010), http://www.legis.ga.gov/legis/2009_10/fulltext/sb529.htm.

said to pose a political dilemma for feminists,¹⁶³ who can be “torn” between “support for reproductive autonomy” and “distaste for sex-selection practices driven by a gendered and patriarchal society.”¹⁶⁴ It also provokes opposing logical constructions. On one account, if there is right to an abortion for any or no reason, this includes a right to an abortion even for a problematical reason.¹⁶⁵ On an opposing account, “[t]he right to not have a child for any reason does not logically encompass the right not to have a child for any specific reason.”¹⁶⁶

Whatever the logic, however, an interrogation of a woman’s “reason” for having an abortion demonstrates a distrust of women similar to the distrust apparent in other abortion restrictions that treat women have abortions quite differently than ungendered patients providing informed consent for other medical procedures.¹⁶⁷ However, unlike other abortion restrictions such as mandatory ultrasounds or waiting periods, sex-selective prohibitions are not cast as being beneficial to women or assisting decision-making;¹⁶⁸ rather, they clearly seek to remove the power of a woman’s choice to terminate a pregnancy in service to a larger societal and state interest.

It is important to avoid conflating the relatively rare American practice of sex-selective abortion¹⁶⁹ with statutory schemes in the United States that prohibit the practice. The practice of sex-selection, in both abortion and in preconception practices, raises important issues for

163. Dave Andrusko writes, for example:

Talk about being caught on the horns of a dilemma. The Feminist Establishment—as opposed to genuine feminists—has pledged its undying fealty to abortion on demand for any reason, for no reason, or in spite of reason. What to do when unborn female babies are aborted precisely BECAUSE they are female?

Dave Andrusko, *Sex-Selection Abortion and Pro-Abortion Feminists: Caught on the Horns of a Dilemma*, NAT’L R. TO LIFE, http://www.nrlc.org/news_and_views/Feb09/nv022609.html.

164. Ashley Bumgarner, *A Right to Choose? Sex Selection in the International Context*, 14 DUKE J. GENDER L. & POL’Y 1289, 1305 (2007).

165. See Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1532–33 (2008).

166. Rachel E. Remaley, *“The Original Sexist Sin”: Regulating Preconception Sex Selection Technology*, 10 HEALTH MATRIX 249, 258 (2000).

167. See Manian, *supra* note 148, at 226 (“Abortion law invokes and then misuses ‘informed consent’ terminology. These so-called ‘informed consent’ to abortion regulations belie a deep suspicion of women as medical (and moral) decision-makers.”).

168. See Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 317 (2010) (noting that “anti-abortion-rights advocates often cast proposed restrictions as beneficial to women’s health and well-being,” but doubting the sincerity of these claims).

169. April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely A Matter of Choice?*, 10 WIS. WOMEN’S L.J. 161, 164 (1995).

feminists as April Cherry has extensively analyzed.¹⁷⁰ Nevertheless, the appearance of sex-selection prohibitions in the United States has been as part of statutory schemes that have as their ultimate purpose the outlawing of abortion. For example, in discussing the exceedingly restrictive Oklahoma legislation, one commentator lauded the inclusion of a sex-selection prohibition as forcing feminists to "show their true colors" because "the world knows 'sex selection' is code for 'search and destroy' unborn females."¹⁷¹ There is much agreement in the sex-selection literature that males would be preferred if sex-selection were permitted,¹⁷² and little attention to male anxiety about a prevalence of younger men. One need not subscribe to Freud's Oedipal theories to recognize the familiarity of mythic narratives in which younger men replace (or murder) their fathers.¹⁷³ There is also much in the literature regarding how the existence of fewer women is detrimental to all women.¹⁷⁴ Little emphasis is placed on the anxiety fewer women would place on heterosexual men. But whatever the long-term consequences of sex-selective abortion, the immediate problem is women's control over the decision.¹⁷⁵

170. *Id.* See also April L. Cherry, *Choosing Substantive Justice: A Discussion of "Choice," "Rights" and the New Reproductive Technologies*, 11 WIS. WOMEN'S L.J. 431, 432 (1997).

171. Andrusko, *supra* note 163.

172. See, e.g., Cherry, *supra* note 169, at 161.

173. See, e.g., Mikkil Borch-Jacobsen, *The Oedipus Problem in Freud and Lacan*, 20 CRITICAL INQUIRY 267 (trans. Douglas Brick 1994) (while analyzing Oedipus as a psychoanalytic trope, also saying of Lacan's relationship to Freud that "Sometimes you have to kill your father to preserve his heritage"); Jaap van Ginneken, *The Killing of the Father: The Background of Freud's Group Psychology*, 5 POL. PSYCHOL. 391 (1984) (arguing that Freud's mythical Oedipal imagery of the hated/beloved man who is father/leader and who must be vanquished is linked to the political mass movements of his time); Leonard V. Kaplan, *Unhappy Pierre: Foucault's Parricide and Human Responsibility*, 83 NW. U. L. REV. 321, 338-39 (1989) (stating that for Levi-Strauss, Freud's Oedipus "dominates contemporary consciousness," including sexual compulsion and pull towards the opposite sex and the "symbolic killing of the father").

174. See, e.g., Cherry, *supra* note 169; Remaley, *supra* note 166, at 273-75.

175. Sonia Suter provides a compelling perspective on feminist problems with women's control specifically regarding sex selection:

[I]f one considers the social context in which some people choose to select against female children, the problem becomes more complicated. In communities that devalue women and pressure families to have sons, women can be at risk for ostracization or even abuse if they bear a daughter. In such cases, women clearly bear a much greater burden than men if they are unable to prevent the birth of a daughter. These potential effects on women bring to mind some of the concerns that influenced the Casey Court's determination that the spousal notification law posed an undue burden on women. Just as the risks of spousal abuse from spousal notification requirements were an undue burden to many women so might laws preventing sex selection be. A common response to this argument is that the solution to these underlying discriminatory views is not to allow sex selective abortions or the discard of embryos with two X chromosomes, but rather to work toward changing the social norms and attitudes that pressure people to undergo sex selection. The same argument, however, could be made

Further, no matter the statistics or assumptions regarding male-preference, the fetus is symbolically coded as male. In her discussion of ultrasound images,¹⁷⁶ Joanne Boucher compellingly analyzes an anti-abortion video that purports to show that life begins at conception by using ultrasound techniques.¹⁷⁷ Boucher discusses the various fetuses in the video, two that are seven weeks, a pair of ten week fraternal twin fetuses, and a fourteen week fetus, noting how the video explains the fetuses in terms of their “personalities,” and concluding that the “fetus is shown to exert *his* will—and is invariably referred to with male pronouns.”¹⁷⁸

Finally, it is important to consider sex-selection prohibitions when the pregnant woman is a lesbian. The applicable mythic construction is not Oedipus, but the Amazons, who were known for their “manliness” and “manlessness” and who may even have crippled their male children.¹⁷⁹ The specter of a lesbian being denied an abortion because she voiced concern about parenting a male child or because she mentioned the apparent male sex of the fetus after a mandatory ultrasound may seem an extreme scenario. However, recalling the prosecution and death sentence of Bernina Mata based on her lesbianism makes the possibility less remote.

VI. CONCLUSION

The right, and not merely the permission,¹⁸⁰ to be a lesbian or to have an abortion, is a fundamental tenet of what was once called women’s liberation. Although there are now more women populating United States legislatures and courts than forty years ago, the quest for women’s sexual

with respect to the defense of contraception and abortion. The reason that pregnancy, childbirth, and child-rearing pose unequal burdens on women is largely because of social attitudes about the role of women in society and in the family. We might try to change these attitudes, but they are entrenched in our world in subtle and complex ways. Accordingly, reproductive rights afford women the opportunity to deal with these inequities in part but clearly cannot solve all inequity. Thus, if social context matters in defending rights to abortion, it should also matter in assessing whether similar rights should exist for reproductive decisions like sex selection.

Suter, *supra* note 165, at 1564–65 (citations omitted).

176. For a statute requiring ultrasound images with “simultaneous explanation of what the ultrasound is depicting” and display of the ultrasound images “so that the woman may view them,” see Act of June 14, 2010, § 2, 2010 Okla. Sess. Laws 173 (overriding Governor’s veto) (to be codified at OKLA. STAT. tit. 63, § 1-738.3d) (also discussed *supra* note 81 and accompanying text).

177. Joanne Boucher, *Ultrasound: A Window to the Womb?: Obstetric Ultrasound and the Abortion Rights Debate*, 25 J. MED. HUMAN. 7 (2004).

178. *Id.* at 15 (emphasis in original).

179. See *Amazons*, in OXFORD DICTIONARY OF THE CLASSICAL WORLD (John Roberts ed., 2007), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t180.e102>.

180. See *supra* notes 1–3 and accompanying text.

freedom, including the freedom to be lesbian and to have abortions, continues.