

LAWRENCE V. GEDULDIG: REGULATING WOMEN'S SEXUALITY

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INTRODUCTION

The Supreme Court's 1974 decision in *Geduldig v. Aiello*¹ established that, for the purposes of the Equal Protection Clause of the Fourteenth Amendment, discrimination against women on the basis of pregnancy was not sex discrimination.² Because the Court deemed governmental classifications based on pregnancy to be constitutionally innocuous, they were not entitled to the heightened scrutiny accorded to governmental classifications based on sex. This decision was subject to immediate and sustained criticism.³ Many state courts declined to follow it,⁴ and Congress⁵ and many state legislatures rejected it, enacting statutory prohibitions on discrimination against pregnant women.⁶

Nonetheless, *Geduldig* is not a dead letter: Doctrinally, it continues to “ma[k]e it more difficult to claim that reproductive freedom is an aspect of sex-based equality.”⁷ *Geduldig*'s legacy shapes equal protection analysis in three important ways: (1) it deems pregnancy-based government classifications to be facially neutral with respect to gender; (2) it allows governments to

¹ 417 U.S. 484, 496–97 (1974).

² Or at least, not necessarily. While *Geduldig* has generally been understood to establish that pregnancy discrimination is not sex discrimination, the Court's words in *Geduldig*—“[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.” *id.* at 496 n.20—“leave[] open the possibility that *some* legislative classifications concerning pregnancy are sex-based classifications.” Reva B. Siegel, “*You’ve Come a Long Way, Baby*”: *Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891 (2006).

³ “Criticizing *Geduldig* has . . . become a cottage industry.” Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983–84 (1984). For examples of contemporary criticisms of *Geduldig*, see *id.* at 983–84 nn.107–09.

⁴ See, e.g., *Badih v. Myers*, 43 Cal. Rptr. 2d 229 (Cal. Ct. App. 1995); *Quaker Oats Co. v. Cedar Rapids Human Rights Comm’n*, 268 N.W.2d 862 (Iowa 1978); *Mass. Elec. Co. v. Mass. Comm’n Against Discrimination*, 375 N.E.2d 1192, 1198–200 & n.6 (Mass. 1978); *Bully v. General Motors Corp.*, 328 N.W.2d 24 (Mich. Ct. App. 1982); *Minn. Mining & Mfg. Co. v. State*, 289 N.W.2d 396 (Minn. 1979); *Castellano v. Linden Bd. of Educ.*, 386 A.2d 396 (N.J. Super. Ct. App. Div. 1978); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854 (N.M. 1998); *Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd.*, 359 N.E.2d 393 (N.Y. 1976); *Anderson v. Upper Bucks County Area Vocational Technical Sch.*, 373 A.2d 126, 129–30 (Pa. Commw. Ct. 1977); *Kimberly-Clark Corp. v. Labor & Indus. Review Comm’n*, 291 N.W.2d 584 (Wis. Ct. App. 1980). See generally Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 90–94 (1997).

⁵ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)) (amending Title VII to prohibit pregnancy discrimination, passed after the Court applied *Geduldig*'s reasoning in the Title VII context in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

⁶ See, e.g., CAL. GOV'T CODE § 12945 (West 2004).

⁷ Law, *supra* note 3, at 985.

advance pregnancy, or women's capacity to become pregnant, as a justification for government-imposed sex classifications that, in practice, enforce traditional gender roles; and (3) its reasoning justifies a deferential approach to government action that infringes the equal protection and due process liberty rights of pregnant women.

This Article contends that *Lawrence v. Texas*⁸ offers an opportunity to disrupt the *Geduldig* paradigm. In *Lawrence*, the Supreme Court recognized a due process liberty interest of adults to be free from governmental interference in decision making about private, consensual sex. The majority opinion in *Lawrence* is ambiguous as to whether the sexual liberty right was fundamental. It elides the question of the standard of review applicable to sexual liberty claims,⁹ and lower courts have construed the scope of the right quite narrowly.¹⁰ But whatever the scope and nature of due process sexual liberty, equal protection requires that women must enjoy it equally with men.¹¹

Geduldig's conclusion rests on the naturalistic assumption that pregnant women are not similarly situated to men in any constitutionally relevant way.¹² But women, whether pregnant or not, are similarly situated to men with respect to their interests in sexual autonomy and reproductive control.¹³ The Supreme

⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹ David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 WIDENER L. REV. 249, 251–53 (2005); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116 (2004); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27 (2003); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1915–16 (2004).

¹⁰ See *infra* text accompanying notes 281–98.

¹¹ By analogy, see for example, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[W]hatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

¹² See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1304, 1306 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1297 (1991).

¹³ As Reva Siegel and Erin Daly have argued, pregnant women are indeed “similarly situated” to men with respect to constitutionally relevant dimensions of similarity, such as their rights to self-determination and reproductive control.

Th[e] biological measure for sameness is too narrow, excluding the significance of intended or unintended pregnancy in a person's life and the real life contexts in a person's life and the real life contexts in which the abortion decision arises.

. . . Because of the profound effects of pregnancy on a woman's body and the responsibilities entailed in raising children, reproductive rights, perhaps more than anything else, define the degree to which women can control the course of their lives. It is in this sense that reproductive rights must be addressed for the purposes of an equal protection claim

Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 136–37 (1995); see also Reva B. Siegel, *Comments from the Contributors*, in

Court has recognized that both women and men have constitutional interests in being able to “organiz[e] intimate relationships and ma[k]e choices that define their views of themselves and their places in society . . . [and] to participate equally in the economic and social life of the Nation.”¹⁴ As Erin Daly has pointed out, “If these rights are so important as to implicate the constitutional right to liberty, they must be available to women and men on an equal basis.”¹⁵

Lawrence offers an opportunity for courts to reject *Geduldig*’s legacy without having to challenge the long-established “similarly situated” test.¹⁶ By affirming a right to sexual autonomy, *Lawrence* reorients the equal protection analysis. Rather than comparing men to women during pregnancy, an equal sexual liberty analysis compares the sexual liberty accorded to men and women at the moment of (hetero) sex. At that moment, the man and woman have equal due process interests in deciding how to conduct their private lives in matters pertaining to sex, and their conduct carries equal potential to create fetal life.

An equal sexual liberty approach to sexual regulation—one that affirms that women enjoy rights to sexual autonomy equal to those of men—would put governments to a stringent standard of justification when they impose legal, social, financial, or health burdens on women’s sexual expression that are not imposed on that of men. In particular, equal sexual liberty requires heightened scrutiny of state action that enforces traditional gender roles by binding women to the reproductive consequences of heterosexual activity while excusing men.

In practice, governments impose countless forms of gendered sexual regulation that operate in exactly this way, as is described in Part I of this Article. Laws that regulate sexual activity typically invoke women’s pregnancy or their capacity to become pregnant, as justification for reinforcing traditional gender roles.¹⁷ Such laws typically safeguard men’s ability to engage in nonmarital sexual activity without legally imposed consequences, while imposing reproductive burdens that coerce women into compliance with

WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 230, 244 (Jack M. Balkin ed., 2005).

¹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (quoted in Daly, *supra* note 13, at 137).

¹⁵ Daly, *supra* note 13, at 137.

¹⁶ Although abandonment of the similarly situated test is richly warranted, it does not seem likely. For persuasive critiques of the “similarly situated” argument, see, e.g., Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753, 1756–57 (2001); Law, *supra* note 3, at 1009–11; MacKinnon, *supra* note 12, at 1286–88; *Law Soc’y of B.C. v. Andrews*, [1989] 1 S.C.R. 143 (Can.).

¹⁷ See generally Law, *supra* note 3, at 957–62; MacKinnon, *supra* note 12, at 1308–09.

gender norms that demand premarital virginity, marital fidelity, and mandatory motherhood. *Geduldig* thus carves out an exception to gender equality that threatens to swallow the rule.

Part II of this Article develops the equal sexual liberty argument. Part II.A reviews the initial promise of *Lawrence* and its disappointing implementation: Lower courts apply a deferential form of rational-basis scrutiny to due process sexual liberty claims in ways that protect individuals against criminal bans on sodomy, adultery, and fornication, but offer few protections beyond this narrow scope. Where legislation restricts sexual liberty in a way that discriminates on the basis of sexual orientation, though, state appellate courts have used a form of equal sexual liberty analysis to justify a “more searching”¹⁸ level of equal protection scrutiny. Part II.B addresses *Geduldig*’s legacy in equal protection jurisprudence. While the Supreme Court has long been skeptical of arguments based on reproductive physiology when they are used to exclude women from public life,¹⁹ it has been remarkably credulous of such rationales when the impugned laws are understood to regulate sexual activity.²⁰ Moreover, the Supreme Court and federal appellate courts have repeatedly suggested that the normally rigorous level of scrutiny applicable to women’s equal protection claims of sex discrimination is somehow attenuated when pregnant women seek to vindicate their abortion rights—a phenomenon I describe as the “abortion discount.” By refocusing equality jurisprudence on the regulation of sex rather than pregnancy, *Lawrence* reaffirms that women’s equal protection rights against governmental reproductive coercion are as compelling, if not more so, in the context of sexual activity as compared to economic activity. Finally, Part II.C considers the shape of the equal sexual liberty analysis and explores its promise and pitfalls.

I. SEXUAL REGULATION: COERCING WOMEN, LIBERATING MEN

Sexual regulation has always been gendered. While the law extends a marked solicitude to the right of men to have nonmarital sex without incurring unwanted reproductive consequences, it visits the legal, financial, health, and

¹⁸ *Limon v. State*, 122 P.3d 22, 29 (Kan. 2005) (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring)).

¹⁹ *See, e.g.*, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Stanton v. Stanton*, 429 U.S. 501 (1977); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), *superseded by statute*, Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076.

²⁰ *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53 (2001); *Michael M. v. Sonoma County*, 447 U.S. 904 (1980).

reproductive burdens of unmarried sex exclusively on women²¹ and attributes the disparate treatment to nature.²² Judicial and legislative sexual regulation relies on “the premise that women’s reproductive role is dictated by nature, and that regulation of women’s reproductive conduct can be evaluated by consulting facts of nature. The result is that social relations enforced by the body politic often find constitutional justification in the organization of the female body itself.”²³

Unlike the Supreme Court in *Geduldig*, many foreign courts and international tribunals have recognized that discrimination against pregnant women is sex discrimination.²⁴ Similarly, sources of international law suggest that restrictions on abortion, contraceptive information, and reproductive health care violate women’s right to equality, as well as their rights to life and health.²⁵

Although many of the legal rules and practices described in this section might not satisfy the discriminatory purpose requirement²⁶ for equal protection sex claims based on disparate impact, they are not facially neutral. “They are too gendered to be neutral, and any law on rape or pregnancy affects the sexes

²¹ See generally MacKinnon, *supra* note 12, at 1300–01.

²² “[U]nwanted pregnancy is not simply a burden women must, in the nature of things, bear. Where the state denies access to contraception, it is a burden the state imposes.” Law, *supra* note 3, at 978. Legally imposed abortion restrictions, likewise, have devastating consequences on women, but not men. *Id.* at 981; see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985).

²³ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267–68 (1992); see also Law, *supra* note 3, at 1008.

²⁴ See, e.g., *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.); *Dekker v. Stichting (Case-177/88 VJV)* [1990] ECR I-3941 (E.C.J. Nov. 8, 1990); *Student Representative Council of Molepolole Coll. of Educ. v. Attorney Gen.*, [1995] 3 LRC 447 (Botswana C.A.); *Lloyd Chaduka and Morgenster Coll. v. Enita Mandizvidza*, Judgment No. SC 114/2001 (Zimbabwe S.C.); Recommendation 6/95 of the Federal District of Mexico Commission on Human Rights, June 1, 1995; see also S. AFR. CONST. 1996, c. 2, s. 9(3) (prohibiting unfair discrimination on the grounds of, *inter alia*, sex and pregnancy); Human Rights Comm., *General Comment 28: Equality of Rights Between Men and Women* (Article 3), ¶¶ 10, 20, U.N. Doc. CCPR/C/21/Rev/1/Add.10 (Mar. 29, 2000) (nondiscrimination requires equal privacy between men and women in enjoyment of the right of privacy in the area of reproductive health; right to life requires that women not be forced to resort to clandestine, unsafe abortion).

²⁵ The Human Rights Committee has held that lack of access to health services, and particularly reproductive health services, violates the right under Art. 3 of the ICCPR to equality between men and women. *Concluding Observations of the Human Rights Committee: Ecuador*, ¶ 11, U.N. Doc. CCPR/C/79/Add.92 (Aug. 18, 1998); *Concluding Observations of the Human Rights Committee: Poland*, ¶ 11, U.N. Doc. CCPR/C/79/Add.110 (July 29, 1999); see also Comm. on the Elimination of Discrimination Against Women, *General Recommendation 24, Women and Health*, ¶ 11, U.N. Doc. A/54/38 (“It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”).

²⁶ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

differentially, without necessarily being discriminatory.”²⁷ An equal sexual liberty analysis may discredit the underpinnings of *Geduldig* by exposing the ways in which such rules and practices reinforce gender stereotypes²⁸ so that regulations of sex, pregnancy, and reproduction, though not malicious, might be identified as the facial sex classifications they are.

The gendered regimes of sexual regulation described in this Part require the sacrifice of women’s health, liberty, and autonomy to uphold legislative conceptions of sexual morality. The legal coercion of sexual morality is typically interpreted in a way that requires the control, surveillance, and punishment of women, but rarely of men.

A. *The Laws of Paternity: Boys Will Be Boys*

Traditionally, marriage has marked the boundary between licit and illicit sex.²⁹ At common law, heterosexual men were exempted from the reproductive consequences of their unwed sexual conduct unless they opted to accept responsibility by marrying the woman or taking other steps to recognize the child.³⁰ If the father did not choose to undertake the legal obligations of parenthood, the unmarried mother bore sole legal responsibility for the child.³¹ For women, biological parenthood was in law an “unshakable responsibility;”³² for unmarried fathers, it was “merely an opportunity to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship.”³³

This gender distinction was blamed on nature: The mother’s identity is always certain.³⁴ “Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown.”³⁵ However, the certainty of maternity is socially constructed. “Biology does not

²⁷ MacKinnon, *supra* note 12, at 1299; *see also* Law, *supra* note 3, at 981.

²⁸ *See generally* Siegel, *supra* note 2.

²⁹ Hunter, *supra* note 9, at 1109; *see also* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 769–81 (2006).

³⁰ *See, e.g.*, Law, *supra* note 3, at 960–62; Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 253–57 (2003).

³¹ CATHARINE A. MACKINNON, SEX EQUALITY 581 (2001); Weinrib, *supra* note 30, at 253–57.

³² *Caban v. Mohammed*, 441 U.S. 380, 408 (1979) (Stevens, J., dissenting).

³³ *Id.*

³⁴ *See, e.g.*, *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (Stewart, J., plurality); *see also* *Nguyen v. INS*, 533 U.S. 53, 65 (2001) (noting that the mother may not be sure of the father’s identity).

³⁵ *Parham*, 441 U.S. at 355.

determine who cares for the child after birth.”³⁶ Although, in practice, mothers “seldom deny that a child to whom they give birth is theirs,” they could do so at any time after birth.³⁷

“The law has typically assumed and even affirmed paternal irresponsibility.”³⁸ The Supreme Court has noted, “The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy.”³⁹ Such legal expectations are self-fulfilling. “When the Court allows sex-based classifications to be justified by the presumption that fathers are unidentified, absent, and irresponsible, it is more likely that these generalizations will continue to be true.”⁴⁰

Nonetheless, the Court understands these differences to be based in biology rather than in law or social convention.⁴¹ A major reason that paternity was uncertain was that law made it so. In support of his conclusion in *Parham v. Hughes* that unwed mothers and fathers were not “similarly situated”⁴² with respect to the right to bring a tort claim for wrongful death of a child, Justice Stewart cited a Georgia statute by which “only a father can by voluntary unilateral action make an illegitimate child legitimate”⁴³—a distinction which is itself created by law, not nature.

The law created another reason for the uncertainty of unmarried paternity by supporting the presumption that unchaste women—such as prostitutes, black women, raped women, and unwed mothers—lie.⁴⁴ Like the law of rape,

³⁶ Ginsburg, *supra* note 22, at 382–83; Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977); Law, *supra* note 3, at 995.

³⁷ MACKINNON, *supra* note 31, at 578.

³⁸ Lalli v. Lalli, 439 U.S. 259, 268–69 (1978) (Powell, J., plurality) (quoting *In re Ortiz*, 303 N.Y.S.2d 806, 812 (1969)) (quoted with approval in *Parham*, 441 U.S. at 355 n.7).

³⁹ *Id.*

⁴⁰ Law, *supra* note 3, at 996.

⁴¹ Lehr v. Robertson, 463 U.S. 248, 261–62 (1983); *Parham*, 441 U.S. at 355; Caban v. Mohammed, 441 U.S. 380, 399 (1979) (State classification treating mothers and fathers differently “reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and custodian of the child.”).

⁴² *Parham*, 441 U.S. at 355.

⁴³ *Id.*

⁴⁴ This assumption underlies the special rules of proof applied in traditional rape law. As Susan Estrich points out,

Professor Wigmore, for example, thought all women rape victims to be sufficiently suspect to argue that the complainant be examined by a psychiatrist, and that no case go to the jury unless

the common law of paternity reflected judges' reluctance to burden a man with the legal or financial consequences of sex based on the uncorroborated word of a woman.⁴⁵

The only children for whom a man bore automatic legal responsibility were those born to his wife. The rights and obligations of paternity were imposed automatically only where the laws of marriage⁴⁶ ensured the man's legal, social, physical, and sexual authority over the mother of his children. Thus, "[b]irth status laws enable the state to regulate sexual relationships and pressure women into heterosexual marriages. If they are to protect their children—an expectation that is already socially conditioned—women are forced to accede to the sexual relationships that the state and their fathers have authorized."⁴⁷

Although discrimination on the basis of "illegitimacy" is now unconstitutional in many circumstances,⁴⁸ the common law tradition of birth status persists in the gendered citizenship provisions that the Supreme Court

such an examination had been performed and the physician had testified as to her personal history and mental health. According to Professor Wigmore:

[Rape complainants'] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions The unchaste . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straight-forward and convincing.

Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1128 n.125 (1986) (quoting 3A J. WIGMORE, EVIDENCE § 924a, at 736 (Chadbourn rev. ed. 1970)); see also Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1470 (1992) [hereinafter Crenshaw, *Race, Gender, and Sexual Harassment*] ("Because Black women were not expected to be chaste, . . . they were unlikely to tell the truth. Judges were known to instruct juries to take a Black woman's word with a grain of salt."); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1269, 1279–80 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

⁴⁵ "The usual justification for corroboration requirements [in rape law] is that women intentionally lie about sex." Estrich, *supra* note 44, at 1137. Other legal requirements of rape law, such as fresh complaint requirements, were designed to protect men against the "unsubstantiated risk of lies or blackmail." *Id.* at 1140.

⁴⁶ Common law doctrines such as coverture, the legal disabilities of married women, the marital rape exemption, and laws that ensured judicial noninterference in domestic violence ensured women's legal subordination to their husbands well into the twentieth century. See generally MACKINNON, *supra* note 31, at 565–770; Estrich, *supra* note 44; Reva B. Siegel, "Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121–74 (1996).

⁴⁷ Weinrib, *supra* note 30, at 253.

⁴⁸ The Court has often applied intermediate scrutiny in equal protection challenges to classifications on the basis of legitimacy. See *Trimble v. Gordon*, 430 U.S. 762 (1977); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); see also *Levy v. Louisiana*, 391 U.S. 68 (1968) (preclusion of "illegitimate" child's tort claim for wrongful death failed rational basis scrutiny).

upheld in *INS v. Nguyen*:⁴⁹ while a child born abroad to an unmarried American woman and a foreign father automatically gains the mother's citizenship, a child born abroad to an unwed American man and a foreign mother is automatically denied citizenship, unless the man opts to undertake the legal and financial obligations of fatherhood.⁵⁰ Despite the heightened, near-strict scrutiny to which the Court purports to hold gender claims,⁵¹ the Supreme Court majority upheld this vestige of the common law of unwed paternity, citing "concern" that young servicemen should be excused from passing on U.S. citizenship when they had sex with foreign women without intending pregnancy.⁵² The Court also revived the common law concern that men need legal protection against baseless paternity allegations by unmarried women, holding that it was "[not] always clear that even the mother will be sure of the father's identity."⁵³

The assumption underlying both *Nguyen* and the common law rules of paternal responsibility is that if a man has sex without intending to undertake parental responsibility, the law should excuse him from responsibility for any pregnancy that results. The corresponding rule is that the obligations of parenthood are imposed on a woman whether she wanted them or not. The net effect is to "facilitat[e] men's sexual freedom [while] constraining women's sexual choices."⁵⁴

The Supreme Court's boys-will-be-boys approach to sexual regulation in *Nguyen* is not anomalous. It reflects pervasive social norms that women, not men, must bear legal, economic, and social responsibility for the reproductive consequences of heterosex. This assumption informs the popular perception

⁴⁹ 533 U.S. 53 (2001).

⁵⁰ *Id.* at 57–60; Immigration and Nationality Act, § 309, 8 U.S.C. § 1409(a)(1), (3)–(4), (c) (2000).

⁵¹ The "heightened scrutiny" to which the Supreme Court holds state-imposed sex classifications has been fatal to the impugned legislation in most cases. Since the intermediate scrutiny standard was adopted in *Craig v. Boren*, 429 U.S. 190 (1976), the few cases in which sex classifications have survived equal protection scrutiny at the Supreme Court have included two sexual regulation cases—*Nguyen* and *Michael M.*—in which it was not at all clear that the majority in fact applied heightened scrutiny. *Nguyen*, 533 U.S. at 74 (O'Connor, J., dissenting); *Michael M. v. Sonoma County*, 450 U.S. 464, 488–89 (1981) (Brennan, J., dissenting); *see also* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding requirement that only men register for the draft). As Justice Scalia pointed out in his dissenting opinion in *United States v. Virginia (VMI)*, 518 U.S. 515, 571–73 (1996) (Scalia, J., dissenting), the standard of review applied by the majority looks more like strict scrutiny than like the intermediate standard established in its earlier equal protection jurisprudence regarding governmental sex classifications.

⁵² *Nguyen*, 533 U.S. at 65; *see* Weinrib, *supra* note 30; *see also* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002).

⁵³ *Nguyen*, 533 U.S. at 65.

⁵⁴ Weinrib, *supra* note 30, at 254.

that child support obligations are a coercive form of sexual regulation directed at men. They are not. Child support is a gender-neutral obligation that is imposed by law on both mothers and fathers.⁵⁵ Moreover, because of lax enforcement⁵⁶ and because about eighty-five percent of sole custodial parents are women,⁵⁷ women are much more likely to fulfill the child support obligation than men are.

The law does not authorize the biological father to compel a woman to have an abortion,⁵⁸ nor does a biological father's demand that a woman abort her pregnancy relieve him of child support obligations.⁵⁹ As a result, child support is criticized in popular culture as an injustice to men: "Men should not be made to become fathers against their will."⁶⁰ Fathers' rights advocates call for laws that would mandate that a pregnant woman notify the man of her pregnancy; if she refuses to abort the pregnancy on his demand, the man should be allowed to abdicate responsibility—an option described by its proponents as a "financial abortion."⁶¹ *New York Times* columnist John Tierney suggests that biology has given women an unfair advantage: "[W]omen . . . have more power than men to prevent the pregnancy because they have exclusive control over some forms of contraception . . . a woman may li[e] about being on the pill to . . . trick a man into marrying her or making child-support payments for 18 years."⁶²

It is not clear how common this scenario is. The lying woman of Tierney's nightmare would herself become pregnant and would have to support the child, with only the possibility that child support payments (much less marriage) might be forthcoming from the man she had tricked. In any case, men have "exclusive control" over one very effective form of contraception—

⁵⁵ Social Security Act, Title IV-D, 42 U.S.C. §§ 651–99a (2000).

⁵⁶ Only about 45% of custodial parents (male or female) in 2002 received the full amount of child support owed to them; approximately 25% of noncustodial parents owing child support fail to make any payments at all. U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 2, 6–7 (2003), <http://www.census.gov/prod/2003pubs/p60-255.pdf>; see also U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, FY 2005: PRELIMINARY REPORT tbl.2 (2006), http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/preliminary_report/table_2.html.

⁵⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 56, at 1.

⁵⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–94 (1992); *Doe v. Smith*, 486 U.S. 1308, 1309–10 (1988); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69–71 (1976).

⁵⁹ See, e.g., *Harris v. State*, 356 So.2d 623 (Ala. 1978); *People in Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982); *Dorsey v. English*, 390 A.2d 1133 (Md. 1978); *D.W.L. v. M.J.B.C.*, 601 S.W.2d 475 (Tex. Civ. App. 1980).

⁶⁰ John Tierney, Opinion, *Men's Abortion Rights*, N.Y. TIMES, Jan. 10, 2006, at A25.

⁶¹ *Id.* (quoting Frances Goldscheider).

⁶² *Id.*

condoms—which many men refuse to use. The only way men’s lack of a pregnancy opt-out can be framed as a gender injustice is to accept that men have a right to visit the consequences of unprotected sex (or contraceptive failure) exclusively on their female partners.

Other fathers’ rights advocates have gone further, arguing that child support obligations should entitle a man to some form of legal authority over the woman he has impregnated. For example, op-ed columnist Dalton Conley argued recently in the *New York Times* that if a man undertakes to provide exclusive financial support for his child without help from the mother, the law should empower him to compel her to bear the child for him: “If you play, you must pay. But if you pay, you should get some say Otherwise, don’t expect anything more of me than a few million sperm.”⁶³

B. Masturbation: Obscenity, Prurience, and Normal, Healthy Sex

Legal solicitude toward men’s heterosexual pleasure is not limited to procreative sex. Since the mid-twentieth century, the Supreme Court has afforded robust constitutional protection to the practices and materials—sexual books,⁶⁴ magazines,⁶⁵ moving images,⁶⁶ photos,⁶⁷ drawings,⁶⁸ nude dancing,⁶⁹ and phone sex⁷⁰—that are normatively associated with straight men’s sexual pleasure.⁷¹ These masturbation aids are recognized as “expression” and

⁶³ Dalton Conley, *A Man’s Right to Choose*, N.Y. TIMES, Dec. 1, 2005, at A33.

⁶⁴ See, e.g., *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.*, 383 U.S. 413 (1966); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

⁶⁵ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957); *Marcus v. 104 East Tenth Street*, 367 U.S. 717 (1961).

⁶⁶ See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965).

⁶⁷ See, e.g., *Roth*, 354 U.S. 476; *Hamling v. United States*, 418 U.S. 87 (1974).

⁶⁸ See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

⁶⁹ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (nude dancing is “not without” First Amendment protection); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (nude dancing falls within “outer perimeters” of conduct protected by First Amendment); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (same).

⁷⁰ See, e.g., *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989).

⁷¹ Heterosexual women and LGBT people also use these forms of sexual expression as masturbation aids, although the overwhelming bulk of mainstream commercial pornography is designed for heterosexual men. See, e.g., Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney-General’s Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681; see also *infra* note 73 and accompanying text.

protected under the First Amendment;⁷² their possession is subject to constitutional protections of privacy in the home.⁷³ In addressing the regulation of these forms of pornography, the Court does not acknowledge that these materials are designed to inspire and aid masturbation. Rather, as James Allon Garland illustrates, it describes straight men's use of pornography with euphemistic reverence:

[T]he Court eloquently described Stanley's "right" as protecting the "spiritual nature" of his "feelings" and "his intellect," both as "conditions favorable to the pursuit of happiness." The Court concluded that governmental intrusion "into the contents of his library" (of porn) endangered not only his thoughts but his "emotions and sensations" and, thus, his right to "satisfy his intellectual and emotional needs" (for porn).⁷⁴

In the Court's first modern obscenity case, *Roth v. United States*, it held that nonobscene depictions of sex were expression protected by the First Amendment.⁷⁵ The printed pornography at issue in *Roth* dealt with "[s]ex, a great and mysterious motive force in human life,"⁷⁶ and was not obscene unless "the average person, applying contemporary community standards" would judge that "the material taken as a whole appeals to prurient interest."⁷⁷

⁷² See, e.g., *Sable Commc'ns*, 492 U.S. at 126.

⁷³ *Stanley*, 394 U.S. 557. Although the use of such masturbation aids by LGBT and straight women enjoys the same constitutional protections as similar use by heterosexual men, sexual materials designed for a woman-positive or LGBT-positive audience, which by definition transgress the heterosexist norms and conventions of straight men's pornography and the laws designed to protect it, are much more likely to be deemed obscene. See, e.g., James Peterson, *Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender*, 1998 WIS. L. REV. 625, 625–26 (application of "community standards" incorporates homophobic attitudes into obscenity law; police termination of university event exhibiting Annie Sprinkle video, *Sluts and Goddesses Video Workshop*); Nadine Strossen, "Is Minnesota Progressive?" *A Focus on Sexually Oriented Expression*, 33 WM. MITCHELL L. REV. 51, 62–83 (2006) (use of anti-obscenity laws to suppress information about contraception and abortion and to suppress educational, activist and sexual materials for LGBT); see also *Finley v. Nat'l Endowment for the Arts*, 795 F. Supp. 1457, 1461 (C.D. Cal. 1992), *rev'd*, 524 U.S. 569 (1998); *City of Cincinnati v. Pink Pyramid*, 1995 WL 610709, at *1 (Ohio Ct. App. Oct. 18, 1995); *Little Sisters Book & Art Emporium v. Canada* (Minister of Justice), [2000] 2 S.C.R. 1120 (Can.); *Little Sisters Book & Art Emporium v. Canada* (Commissioner of Customs & Revenue), 2007 SCC 2 (ongoing litigation over discriminatory Customs targeting of publications shipped to LGBT bookstore for confiscation as "obscene materials"). See generally NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* 161–78 (2000).

⁷⁴ James Allon Garland, *Sex as a Form of Gender and Expression After Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297, 302 (2006) (quoting *Stanley*, 394 U.S. at 564–65) (footnotes omitted).

⁷⁵ 354 U.S. 476 (1957).

⁷⁶ *Id.* at 487.

⁷⁷ *Id.* at 489.

Thus mainstream commercial pornography (the overwhelming bulk of which is directed at a heterosexual male market⁷⁸) was not by definition obscene.⁷⁹

In *Brockett v. Spokane Arcades, Inc.*, the Supreme Court interpreted the “prurient interest” standard to further accommodate men’s right to be aroused by conventional porn.⁸⁰ Even if sexually explicit materials violated community standards and had no redeeming literary, artistic, political, or scientific value, they were non-“prurient,” protected expression as long as they appealed to a “normal interest in sex.”⁸¹ Justice White held for the *Brockett* majority that the *Roth* Court could not have intended to allow states to prohibit material that “does no more than arouse, ‘good, old fashioned, healthy’ interest in sex.”⁸² Sexually explicit materials could be prohibited only if they appealed to “abnormal sexual appetites”⁸³ or to “unhealthy,” “shameful,” or “morbid interest in sex.”⁸⁴

If there was any doubt as to what the Court meant by “normal, healthy” sex as opposed to “abnormal,” “shameful,” or “morbid” appetites, it was clarified one year later, in 1986, when Justice White wrote the majority opinion in *Bowers v. Hardwick*.⁸⁵ In *Bowers*, Justice White declared that the Court was “quite unwilling” to “announce . . . a fundamental right to engage in homosexual sodomy.”⁸⁶ The Court upheld Georgia’s gender-neutral criminal ban on anal and oral sex on the basis that it would be enforced only against same-sex couples,⁸⁷ denying that the rights to reproductive and intimate autonomy protected in *Loving v. Virginia*⁸⁸ and the *Griswold*⁸⁹–*Eisenstadt*⁹⁰–

⁷⁸ See, e.g., Peter Baker, *Maintaining Male Power: Why Heterosexual Men Use Pornography*, in PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 124, 125–26 (Catherine Itzin ed., 1993); Robert Jensen & Gail Dines, *The Content of Mass-Marketed Pornography*, in PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY 65 (Gail Dines et al. eds., 1998).

⁷⁹ The material at issue in *Roth* was mainstream commercial pornography. See *United States v. Roth*, 237 F.2d 796, 799, 800 (2d Cir. 1956).

⁸⁰ 472 U.S. 491 (1985).

⁸¹ *Id.* at 504–05.

⁸² *Id.* at 499 (quoting *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 492 (9th Cir. 1984)).

⁸³ *Id.* at 507.

⁸⁴ *Id.* at 504.

⁸⁵ 478 U.S. 186 (1986).

⁸⁶ *Id.* at 191.

⁸⁷ See *id.* at 188 n.2 (noting that district court had denied standing to heterosexual couple on basis that “they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute,” and that that finding had not been contested before the Supreme Court).

⁸⁸ 388 U.S. 1 (1967).

⁸⁹ *Griswold v. Connecticut*, 381 U.S. 497 (1965).

⁹⁰ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

*Roe*⁹¹–*Carey*⁹² line of cases had anything to do with any liberty interest gay men might have in sexual autonomy⁹³ and dismissing Hardwick’s liberty claim as “at best, facetious.”⁹⁴

“Normal, healthy,” legally protected sexual pleasure, then, is what heterosexual men like (or are supposed to like): mainstream porn. Sexual materials and educational resources for lesbian, gay, or other queer audiences are much more likely to be deemed obscene for offending heterosexist “community standards.”⁹⁵ For heterosexual women, sexual minorities, and straight men who enjoy nonnormative sexual activities, nonprocreative sexual pleasure can amount to a “queer sex practice” that challenges heterosexist sexual norms.⁹⁶

In striking contrast to the Court’s embrace of straight men’s autoeroticism, the legal treatment of sex toys—that is, masturbation aids associated with women and sexual minorities⁹⁷—is marked by a legislative hostility and judicial ambivalence that betrays a fundamental societal discomfort with the nonprocreative sexual pleasure of women and sexual minorities.⁹⁸ “Since the majority of people who use dildos, vibrators, and other insertable sex toys are women, making them contraband is another institutionalized form of controlling female sexuality.”⁹⁹

⁹¹ *Roe v. Wade*, 410 U.S. 113, 154–55 (1973).

⁹² *Carey v. Population Servs. Int’l*, 431 U.S. 678, 715 (1977).

⁹³ *Id.* at 190–91.

⁹⁴ *Id.* at 194.

⁹⁵ See, e.g., William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 892 (1997); Peterson, *supra* note 73; Connie Samaras, *Feminism, Photography, Censorship, and Sexually Transgressive Imagery: The Work of Robert Mapplethorpe, Joel-Peter Witkin, Jacqueline Livingston, Sally Mann, and Catherine Opie*, 38 N.Y.L. SCH. L. REV. 75 (1993); Strossen, *supra* note 73; see also *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 561 (2004); *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.); *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)*, 2007 SCC 2.

⁹⁶ See Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 699 (1995); see, e.g., Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 76 (2006) (quoting Lauren Berlant & Michael Warner, *Sex in Public*, in *INTIMACY*, 311, 328 (Lauren Berlant ed., 2000)).

⁹⁷ Many heterosexual men may use such toys as well, but their use is nonnormative and contravenes dominant norms of male sexual behavior. McClain, *supra* note 96, at 76.

⁹⁸ See Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN’S L.J. 171, 180 (2006).

⁹⁹ Tristan Taormino, *Pucker Up: Dallas Dildo Defiance*, VILLAGE VOICE, May 28, 2002, at 160 (quoted in Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 344 (2006)).

The legislatures of at least fourteen socially conservative states, including Georgia, Louisiana, Alabama, Mississippi, Kansas, Colorado, Virginia, and Texas, have banned possession, sale, or distribution of vibrators under antiobscenity statutes¹⁰⁰—prohibitions that would never be permitted by the standards developed to protect straight men’s porn. While several courts have struck down such statutes on state constitutional grounds,¹⁰¹ others have upheld sex toy bans against challenges on the bases of expression, privacy, and vagueness.¹⁰² As Danielle Lindemann has pointed out, when courts strike down a sex toy prohibition, they emphasize the therapeutic use of vibrators to treat female sexual dysfunction, “anorgasmia[.]”¹⁰³ This argument pathologizes women who use vibrators for sexual pleasure;¹⁰⁴ it fails to recognize that women, like men, have a “normal, healthy” desire to supplement their imaginations with external aids toward orgasm.

Nonetheless, plaintiffs have avoided or downplayed the argument that masturbation with a vibrator is not “prurient” and therefore not obscene.¹⁰⁵ They have excellent reason to do so: It may be a losing argument. Even after *Lawrence*, courts remain reluctant to acknowledge women’s sexual pleasure as an interest that deserves constitutional protection against government intrusion. For example, in a post-*Lawrence* decision upholding a Mississippi sex toy ban, the Supreme Court of Mississippi held that while the rights to control conception and medical treatment are constitutionally protected, women’s right to sexual pleasure is not.¹⁰⁶ In an analytically confused passage, the court held that “society’s interest in protecting the right to control conception is of greater magnitude than the interest in protecting the right to purchase sexual

¹⁰⁰ Lindemann, *supra* note 99, at 330–31; *see also* State v. Brenan, 772 So.2d 64, 69 (La. 2000); VA. CODE ANN. § 18.2-373 (2000). Some states ban the devices only in certain zip codes, while others only “lacking adaisically enforce their law.” Lindemann, *supra* note 99, at 330–31 (quoting Jenifer Joseph, *Sexual Buzzzzz Killer: States Banning Vibrators and Other Marital Aids*, ABC NEWS).

¹⁰¹ *See, e.g.*, People *ex rel.* Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985) (privacy); State v. Hughes, 792 P.2d 1023 (Kan. 1990) (privacy); *Brenan*, 772 So.2d 64 (irrational exercise of police power).

¹⁰² *See, e.g.*, Sewell v. State, 233 S.E.2d 187 (Ga. 1977) (vagueness and overbreadth); Pierce v. State, 239 S.E.2d 28 (Ga. 1977) (vagueness, overbreadth, and privacy); Regalado v. State, 872 S.W.2d 7, 11 (Tex. App. 1994) (vagueness); Yorko v. State, 690 S.W.2d 260 (Tex. Crim. App. 1985) (statutes withstood challenge that they exceeded police power and unconstitutionally violated privacy); PHE, Inc. v. State, 877 So.2d 1244 (Miss. 2004) (privacy and free speech); State v. Acosta, No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App. Aug. 31, 2005) (*Lawrence* exclusions of public conduct and prostitution place sale of obscene devices outside scope of due process sexual liberty).

¹⁰³ Lindemann, *supra* note 99, at 326, 337–38; *see also* Borgmann, *supra* note 98, at 182–83.

¹⁰⁴ Lindemann, *supra* note 99, at 345.

¹⁰⁵ *Id.* at 343.

¹⁰⁶ *See* PHE, 877 So.2d 1244.

devices”¹⁰⁷—conflating individual rights to reproductive control and bodily autonomy with an undefined societal interest. This court apparently cannot imagine an important or legitimate purpose for sex toys that are not used to treat illness or dysfunction. “People who are sexually dysfunctional (presumably those people who cannot achieve sexual enjoyment and fulfillment without a sexual device) should be treated by a physician or a psychologist.”¹⁰⁸ Since the Mississippi obscenity statute “expressly provides that physicians and psychologists may prescribe sexual devices for their patients,”¹⁰⁹ the court concludes that “[t]he novelty and gag gifts which the vendor plaintiffs sell have no medical purpose.”¹¹⁰

Heterosexual men do not have to prove that they are sexually dysfunctional to establish a right to use visual aids for masturbation. Rather, their use of mainstream porn is an indicator of their “‘good, old fashioned, healthy’ interest in sex.”¹¹¹

The rational-basis review employed in due process sexual liberty cases is unlikely to overcome judicial disregard for women’s sexual pleasure such as that reflected in the Mississippi sex toy decision. Small wonder, then, that *Lawrence* has afforded little assistance in fighting sex toy bans: Due process sexual liberty requires plaintiffs to assert a pleasure-based rather than a therapeutic rationale.

Thus, in *Williams v. Pryor*,¹¹² *Lawrence* proved to be of little help in ongoing litigation over Alabama’s sex toy ban. In 2001, the Eleventh Circuit set aside the initial success of the plaintiffs’ facial challenge on the basis of *Bowers v. Hardwick*.¹¹³ *Lawrence* has not improved matters: The plaintiffs lost both post-*Lawrence* proceedings.¹¹⁴

¹⁰⁷ *Id.* at 1248.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1249.

¹¹⁰ *Id.*

¹¹¹ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (quoting *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 492 (9th Cir. 1984)).

¹¹² *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999), *rev’d*, 240 F.3d 944 (11th Cir. 2001); *see also Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev’d*, *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004), *cert. denied*, *Williams v. King*, 543 U.S. 1152 (2005); *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006).

¹¹³ *Williams v. Pryor (Williams II)*, 240 F.3d 944 (11th Cir. 2001).

¹¹⁴ *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004); *Williams V*, 420 F. Supp. 2d 1224.

In the Eleventh Circuit's 2004 decision in *Williams*, the majority rejected the notion that substantive due process "encompass[ed] a right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas."¹¹⁵ Affirming the Eleventh Circuit's earlier holding that in *Lawrence*, the Supreme Court had "declined" to recognize "a fundamental right to sexual privacy,"¹¹⁶ the Court held that the state of Alabama was free to ban the "unsavory" sale of such devices on the basis that "the majority of the people of Alabama" might find it "morally offensive."¹¹⁷

In the most recent decision in the *Williams* litigation,¹¹⁸ district court Judge Smith adopted a rather strained and unconvincing reading of *Lawrence* due process liberty in response to his second reversal by the Eleventh Circuit. He found that the due process liberty recognized in *Lawrence* protected only the "implements"¹¹⁹ and practices common to the sexual practices of stigmatized "discrete and insular minorities."¹²⁰ Since sex toys could be used by men or women of any sexual orientation, he held, the Due Process Clause did not protect their use or sale. Due process, he concluded, protected only those noncommercial, private, consensual sexual practices that are "common to a homosexual lifestyle."¹²¹ By this reasoning, heterosexual women might arguably enjoy no due process sexual liberty rights at all.

The regulation of sex toys reveals "an insidious double standard at play: A much higher percentage of men than women . . . masturbate to orgasm with their . . . hands."¹²² Although the distinction between masturbating with one's hands and masturbating with a toy may rest on biology, it is difficult to imagine that it is constitutionally significant.

¹¹⁵ *Williams IV*, 378 F.3d at 1250 (quoting *Williams III*, 220 F. Supp. 2d at 1296).

¹¹⁶ *Id.* at 1236 (citing *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004)).

¹¹⁷ *Id.* at 1241 n.13, 1250.

¹¹⁸ *Williams V*, 420 F. Supp. 2d 1224.

¹¹⁹ *Id.* at 1253.

¹²⁰ *Id.* at 1251 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)). The *Lawrence* court, of course, had not referred to *Carolene Products* and had adopted the due process analysis rather than a "tenable" equal protection one expressly in order to ensure that sodomy bans were unconstitutional whether they applied to partners of the same or different sex. *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

¹²¹ *Williams V*, 420 F. Supp. 2d at 1230.

¹²² Lindemann, *supra* note 100, at 344 (quoting Taormino, *supra* note 99) (internal quotation marks omitted).

Sex toys, sexual imagery and publications, and sexual performances are all regulated under obscenity laws, but sex toys have been afforded lesser constitutional protection, in part because they are understood to lack expressive content. Upon examination, though, the expression–conduct distinction breaks down. “[S]exual aids designed predominantly for men, such as *Playboy* and *Viagra*, do not fall under the same codes,”¹²³ whether they are expressive or not. Furthermore, as Garland contends, *Lawrence* offers some basis for arguing that sexual activity is inherently expressive.¹²⁴ The use of sex toys, like other sexual activities, may be argued to convey messages of love, eroticism, or sexual transgression. The sensory (as opposed to imaginative) sexual stimulation offered by sex toys should not be dispositive of the expression–conduct issue. Lap dancing (performed for a fee in commercial establishments) is widely tolerated, both socially and legally,¹²⁵ and, in some cases, enjoys constitutional or statutory protection.¹²⁶ If lap dancing can convey meaning, it is at least arguable that the use of sex toys does as well.

¹²³ *Id.*

¹²⁴ Garland, *supra* note 74, at 304–06.

¹²⁵ Many jurisdictions tolerate lap dancing or have backed down from proposed ordinances that would restrict it. *See, e.g.*, State v. Ashley, 66 S.W.3d 563 (Ark. 2002); Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 302–03 (1998) (lap dancing widespread in strip clubs, even in jurisdictions in which it is nominally prohibited); Jacqueline Lewis, *Lap Dancing: Personal and Legal Implications for Exotic Dancers*, in PROSTITUTION: ON WHORES, HUSTLERS, AND JOHNS 376 (James E. Elias et al. eds., 1998); Mariana Valverde & Mimir Cirak, *Governing Bodies, Creating Gay Spaces: Policing and Security Issues in ‘Gay’ Downtown Toronto*, 43 BRIT. J. CRIMINOLOGY 102, 117 (2003).

¹²⁶ The U.S. Supreme Court has not addressed the application of the First Amendment to lap dancing. The Supreme Court of Canada, however, has found that lap dancing (where patrons were allowed to touch dancers’ breasts and buttocks) did not exceed community standards of tolerance and was not obscene. *R. v. Pelletier*, [1999] 3 S.C.R. 863 (Can.). For state and federal court decisions striking down lap dancing restrictions, *see, e.g.*, DPR, Inc. v. City of Pittsburg, 953 P.2d 231, 244 (Kan. App. 1998) (prohibition on touching breasts, buttocks, or genitals unconstitutionally overbroad); City of Nyssa v. Dufloth, 121 P.3d 639 (Or. 2005) (four-foot distance requirement violated state constitutional expression guarantee); *see also* Jakes, Ltd. v. City of Coates, 356 F.3d 896, 898, 903 (8th Cir. 2004) (questioning whether offering lap dancing by bikini-clad lap dancers constituted operating a “sexually-oriented business”); *Ashley*, 66 S.W.3d 563 (lap dancing permitted by state law if it takes place in curtained area of bar); *People v. Janini*, 89 Cal. Rptr. 2d 244, 254–55 (Cal. App. 1999) (lap dancing is entitled to First Amendment protection unless it was “obscene”); *City of La Habra v. Gammoh*, 2002 WL 31667943 (Cal. App. 2002) (invalidating lap dancing ordinance prohibiting dancers and other performers from coming within six feet of patrons as overbroad); *Furfaro v. City of Seattle*, 27 P.3d 1160, 1168 (Wash. 2001) (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), as authority that lap dancing is expressive conduct subject to First Amendment protection). In most cases, though, U.S. courts have upheld restrictions or prohibitions on lap dancing against challenges based on expression, vagueness, or overbreadth. *See, e.g.*, G.M. Enters., Inc. v. Town of St. Joseph, 350 F.3d 631 (7th Cir. 2003) (five-foot distance requirement); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) (ten-foot); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (six-foot); *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500, 1506 (M.D. Fla. 1992) (three-foot); *Zanganeh v. Hymes*, 844 F. Supp. 1087, 1089 (D. Md. 1994) (six-foot);

Moreover, it seems quite unlikely that the private, noncommercial use of sex toys might lead to the purported “secondary effects”—crime and prostitution—that justify restrictions on nude dancing.¹²⁷ Thus the use of sex toys may deserve greater constitutional protection.

C. Regulation of Women’s Sexuality: Punishing Sex

In contrast to the courts’ solicitude for men’s nonprocreative sexual pleasure, a plethora of historical and contemporary laws use the threat of pregnancy to coerce compliance with gendered norms that require premarital chastity and marital fidelity for women, but not for men.¹²⁸ Regulation of the reproductive consequences of men’s heterosex is pragmatic. Even if many Americans consider premarital sex to be immoral,¹²⁹ the law does not generally punish men for it. On the other hand, “moral” considerations justify laws that impose devastating legal, social, financial, and health consequences upon women who become pregnant through disfavored sex. Such laws authorize forms of sexual surveillance, regulation, and punishment that are almost never imposed on men.

Sexual regulation is not directed equally at all women. The legal enforcement of moral norms of premarital chastity is aimed at the subgroups of

City of Colorado Springs v. 2354 Inc., 896 P.2d 272, 298 (Colo. 1995) (three-foot); Ino Ino, Inc. v. City of Bellevue, 937 P.2d 154, 168–69 (Wash. 1997) (four-foot); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 484 (5th Cir. 2002) (no-touch rule; neither dancers nor patrons have First Amendment rights to touch each other).

For cases in which lap dancing was held not to be expressive conduct protected by First Amendment, see *State ex rel. Miller v. Private Dancer*, 613 N.E.2d 1066, 1069 (Ohio App. 1992); *State ex rel. Rothal v. Smith*, 783 N.E.2d 1001, 1014–15 (Ohio App. 2002); *State ex rel. Gibbons v. Jackson*, 16 S.W.3d 797, 802 n.6 (Tenn. Ct. App. 1999). Likewise, many U.S. courts have enforced obscenity prohibitions on lap dancing. See *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995); *Tily B., Inc. v. City of Newport Beach*, 81 Cal. Rptr. 2d 6, 22 (1998); *Hoskins v. Dep’t of Bus. Regulation*, 592 So.2d 1145, 1146 (Fla. App. 1992); *People v. Hill*, 776 N.E.2d 828, 832 (Ill. App. 2002); *State v. McGraw*, 879 P.2d 1147, 1155 (Kan. App. 1994); *Michigan ex rel. Wayne County Prosecutor v. Dizzy Duck*, 535 N.W.2d 178, 183 (Mich. 1995); *People v. Hinzmann*, 677 N.Y.S.2d 440 (N.Y. Crim. Ct. 1998) (lap dancing involving touching of breasts and buttocks, in exchange for a fee, may constitute prostitution); *Am. Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324 (Tenn. App. 2000).

¹²⁷ See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296–97 (2000).

¹²⁸ Regarding the sexual double standard that requires chastity and fidelity of women, but not men, see generally *Law*, *supra* note 3, at 960–61 n.19; Anna Stubblefield, *Contraceptive Risk-Taking and Norms of Chastity*, 27 J. SOC. PHIL. 81 (1996); Keith Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195 (1959).

¹²⁹ “[P]ublic opinion polls over the last 20 years have consistently shown that about 35% of [American] adults say premarital sex is always or almost always wrong.” Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 74 (2007). Nonetheless, more than 90% of Americans have had premarital sex. *Id.* at 75–78.

women whose sexuality and maternity is deemed a threat to collective societal well-being: young women, black women and other women of color, and women on welfare.¹³⁰ Upper-middle-class white women have premarital sex, as do virtually all other adults,¹³¹ but their sex is not constructed by lawmakers as a pressing social problem, and the state does not typically intervene to prevent or punish it.

The state imposes *quasi*-parental control over young women's sexuality.¹³² Courts and legislatures take for granted that government intervention in young women's decision making to prevent pregnancy is a legitimate means toward a pressing societal goal.¹³³

The other main targets of contemporary sexual regulation are low-income women, women receiving social assistance, and women of color. "Over the course of this century, government policies have regulated Black women's reproductive decisionmaking based on the theory that Black childbearing causes social problems."¹³⁴ Sexualized racial stereotypes of black women stigmatize them as sexually promiscuous and as bad mothers.¹³⁵ Moreover, because "the poor single mother on welfare is typically racialized in American

¹³⁰ See generally Daly, *supra* note 13; Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 961 (1997); Anna Marie Smith, *The Politicization of Marriage in Contemporary American Public Policy: The Defense of Marriage Act and the Personal Responsibility Act*, 5 CITIZENSHIP STUD. 303 (2001).

¹³¹ Ninety-four percent of women, 96% of men, and 97% of those who have ever had sex had it before marriage; by age 44, 95% of Americans have had premarital sex. Finer, *supra* note 129, at 76.

¹³² Daly, *supra* note 13, at 106 ("Parental consent laws . . . are constitutional because they permissibly treat minors or children (albeit pregnant children) like children . . . [H]ere[.] the institution of family and parental authority rather than the institution of marriage supplant [the decisional autonomy of] the unmarried minor.").

¹³³ See, e.g., *State v. Limon*, 122 P.3d 22, 37 (Kan. 2005) ("[T]he State's interest is to discourage teen pregnancies, not encourage them."); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(6)-(10), 110 Stat. 2105 (congressional findings characterizing the marriage-promotion objectives of the Act as a response to the "crisis" of increasing rates of "nonmarital teen pregnancy," attributing child and maternal poverty and juvenile delinquency to nonmarital adolescent childbearing, characterizing the Act as an "effective strategy to combat teen pregnancy," and expressing "the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests").

¹³⁴ Roberts, *supra* note 130.

¹³⁵ See, e.g., Crenshaw, *Race, Gender, and Sexual Harassment*, *supra* note 44, at 1471; Zanita E. Fenton, *Silence Compounded—The Conjunction of Race and Gender Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 271, 283 (2003); Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 537 (2003) ("In the package of acculturated meanings prevailing among middle-class whites, a young, poor mother of color who goes out to work is neglecting her children, but if she stays home she is lazing around, exemplifying 'welfare dependency.'"); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436-40 (1991).

political rhetoric as African American,”¹³⁶ these stereotypes inform public policy toward welfare recipients generally. “The myth of the Black Jezebel has been supplemented by the contemporary image of the lazy welfare mother who breeds children at the expense of taxpayers in order to increase the amount of her welfare check.”¹³⁷ Thus the woman on welfare “is routinely regarded as a licentious being whose sexual excess must be curbed at all costs [S]he is even widely regarded by policymakers as sexually abnormal in spite of her heterosexual identity.”¹³⁸ Furthermore, such women’s poverty exposes them to greater monitoring, surveillance, and intervention by government agencies such as police, child welfare, social assistance, and public health care facilities.¹³⁹

Laws that single out women for adverse treatment on the basis of pregnancy are often justified on the basis that pregnancy is voluntary.¹⁴⁰ The irony is that the sexual behavior that leads to pregnancy is more often voluntary for men than it is for women, yet it is women who are penalized.¹⁴¹ Moreover, the young women, poor women, and women of color who are the main targets of coercive governmental sexual regulation are the women who are most vulnerable to sexual and reproductive coercion by male partners as well.¹⁴²

These laws do not serve to prevent pregnancies resulting from voluntary sexual activity, nor do they bring home the natural consequences of voluntary sex. The young and poor women who face the greatest stigma for sexual activity and the highest barriers to access and information about contraception

¹³⁶ Smith, *supra* note 130, at 305; *see also* Karst, *supra* note 135, at 537; Roberts, *supra* note 135, at 1436–44.

¹³⁷ Roberts, *supra* note 130, at 951.

¹³⁸ Smith, *supra* note 130, at 305; *see also* Karst, *supra* note 135, at 537; Roberts, *supra* note 130, at 951.

¹³⁹ Roberts, *supra* note 130, at 939.

¹⁴⁰ *See generally* David B. Cruz, “The Sexual Freedom Cases”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 300–02 (2000) (discussing “abstinence gap”); Mary Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 938 (1990).

¹⁴¹ MacKinnon, *supra* note 12, at 1312.

¹⁴² *See, e.g.*, Karen M. Wilson & Jonathan D. Klein, *Opportunities for Appropriate Care: Health Care and Contraceptive Use Among Adolescents Reporting Unwanted Sexual Intercourse*, 156 ARCHIVES PEDIATRIC & ADOLESCENT MED. 341, 341 (2002) (Thirty to 42% of young women and 10 to 32% of young men report unwanted sexual contact.); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 146 (2d ed., Routledge 2000) (1990) (Because of racialized stereotypes that stigmatize black women, they are more likely to be sexually assaulted than white women, and less likely to report it.).

and abortion also have the highest rates of unintended pregnancy, abortion, and unintended birth.¹⁴³

Today, the federal government funds programs that seek to mandate the sexual behavior of young and low-income women through marriage promotion and abstinence-only-until-marriage curricula funded under the Welfare Reform Act.¹⁴⁴ While the legislative provisions are facially gender neutral,¹⁴⁵ the Congressional findings are not. They explicitly attribute poverty to unwed pregnancy and unwed motherhood.¹⁴⁶ The Welfare Reform Act mandates that abstinence-promotion activities be targeted at “those groups which are most likely to bear children out-of-wedlock.”¹⁴⁷ In practice, the federal government’s target audience for marriage promotion programs is primarily low-income women of color.¹⁴⁸ Such federally funded programs exhort low-income African-American women, but not men, to get married as a strategy for escaping poverty, yet fail to offer economic options by which women (or their prospective husbands) might support themselves and their children.¹⁴⁹

The state of California directly regulates the sexual behavior of women receiving social assistance by conditioning welfare eligibility on use of specific methods of contraception. There, a “family cap” rule provides that social assistance benefits are not increased if a child is born more than ten months after a family begins receiving aid.¹⁵⁰ The only exceptions are if the child is conceived as a result of rape or incest, or if the child’s conception resulted

¹⁴³ Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 93–94 (2006) (Each year, less than 3% of women whose income is more than twice the poverty level have an unintended pregnancy, while more than 11% of poor women have an unintended pregnancy.); see also HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., ABORTION IN WOMEN’S LIVES 25–29 (2006), <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>.

¹⁴⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

¹⁴⁵ 42 U.S.C. §§ 401(a)(2), 710 (2000).

¹⁴⁶ See, e.g., § 101(5)(A)(IV)(ii)(c), (6), (8) (characterizing teenage pregnancy and unwed motherhood as causing “negative consequences . . . [to] the mother, the child, the family and society”). Fathers are also mentioned in the Congressional Findings at § 101(3) (noting that “promotion of responsible fatherhood and motherhood is essential to successful child-rearing and the well-being of children”) and § 101(7) (recommending that “male responsibility” for teenage pregnancy be addressed through enforcement of criminal prohibitions on statutory rape).

¹⁴⁷ § 710(b)(1).

¹⁴⁸ See, e.g., Katherine Boo, *The Marriage Cure: A Reporter at Large*, NEW YORKER, Aug. 18, 2003, at 105 (reporting on Oklahoma implementation of federally funded marriage-promotion programs).

¹⁴⁹ *Id.*

¹⁵⁰ CAL. WELF. & INST. CODE § 11450.04 (West 2006).

from the failure of an intrauterine device or sterilization.¹⁵¹ If a woman wants to avoid punitive “family cap” reductions in social assistance benefits for giving birth while on welfare, she must use a method of contraception that cannot be reversed except by medical intervention. If she uses a less invasive method of birth control such as oral contraceptives or condoms, she and her children will be subject to the “family cap” benefit reduction.¹⁵²

At least nineteen states and the federal government authorize a financial penalty—a family cap¹⁵³—which is cast in gender-neutral terms, but for obvious reasons is applied almost exclusively to women.¹⁵⁴ If a person receiving social assistance has another child (living in the home) more than ten months after she begins receiving social assistance, she is denied benefits for the newborn child. When social assistance grants are not increased with the arrival of another child, the Supreme Court has acknowledged that “the lot of the entire family is diminished because of the presence of additional children without any increase in payments.”¹⁵⁵ The social assistance family cap is a twenty-first century echo of draconian mid-twentieth-century welfare laws that imposed criminal penalties on women who gave birth out of wedlock while receiving social assistance; “[m]ost states also had provisions for the

¹⁵¹ § 11450.04(b)(3). This legislation authorizes the exception for “any child who was conceived as a result of contraceptive failure if the parent was using an intrauterine device, a Norplant [device], or the sterilization of either parent.” *Id.* Norplant, however, was withdrawn from the market in 2002 after more than 50,000 lawsuits in the United States and an FDA investigation into its efficacy. Erica Johnson, *Medical Device Lawsuits*, CBC NEWS, Apr. 1, 2003, http://www.cbc.ca/consumers/market/files/health/medical_devices/lawsuits.html; Letter from Victoria Kusiak, Wyeth Pharmaceuticals to Health Care Professionals, (July 26, 2002), <http://www.fda.gov/medWatch/SAFETY/2002/norplant.htm>.

¹⁵² § 11450.04.

¹⁵³ The nineteen states are Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Jersey, North Carolina, South Carolina, Tennessee, Virginia and Wisconsin. See DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, SETTING THE BASELINE: A REPORT ON STATE WELFARE WAIVERS, TABLE III: FAMILY CAP POLICIES BY STATE n.1 (1997), <http://aspe.hhs.gov/HSP/isp/waiver2/TABLE3.htm>. These programs vary from state to state but uniformly seek to eliminate any incremental increases for a child born to a mother on welfare. See, e.g., ARIZ. REV. STAT. ANN. § 46-292(G) (2006) (denying benefits to children born into families that are ineligible to receive benefit pursuant to a penalty for failure to comply with the benefit eligibility requirements); N.J. STAT. ANN. § 44:10-61(a) (West 2006) (same).

¹⁵⁴ According to the Congressional findings of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(5), 110 Stat. 2105, 89% of children receiving AFDC in 1996 “live[d] in homes in which no father is present.”

¹⁵⁵ *Dandridge v. Williams*, 397 U.S. 471, 477 (1970). The Court upheld a Maryland statute that capped social assistance benefits at \$250 per month regardless of family size against a Fourteenth Amendment Equal Protection challenge on the basis that the cap served a legitimate state interest in “encouraging employment” by ensuring that welfare payments did not exceed the monthly earnings of a single-breadwinner family earning the minimum wage. *Id.* at 486.

sterilization of women welfare recipients who gave birth to children outside of marriage. African American women were particularly singled out for these forms of sexual policing.”¹⁵⁶

In eleven of the nineteen family cap states, public funding for abortion is, by law or in practice, unavailable,¹⁵⁷ placing abortion out of reach for low-income women.¹⁵⁸ Since women in these states cannot afford either to have an abortion or to have a child, the intersection of these rules and practices seems to require that they renounce sex in exchange for public assistance—a cost that has not been imposed on men.

The federal government also spends hundreds of millions of dollars yearly on religious groups’ presentation of “abstinence-only-until-marriage” programs¹⁵⁹ to young people in public schools, churches, and community centers.¹⁶⁰ These programs, which are required to “focus on those groups which are most likely to bear children out-of-wedlock,”¹⁶¹ must have, as their “exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;” they must teach that sexual abstinence until marriage is “the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems.”¹⁶² Reasoning that accurate information about contraceptives would

¹⁵⁶ Smith, *supra* note 130, at 311 (citing GWENDOLYN MINK, WELFARE’S END 6, 35–36, 47–49 (1998)).

¹⁵⁷ In eleven of the “family cap” states, see *supra* note 153, public funding is limited to cases of life endangerment, rape, or incest, or is in practice not provided. Nine “family cap” states reported no publicly funded abortions in FY 2001: Arizona, Arkansas, Delaware, Florida, Illinois, Indiana, Mississippi, Nebraska, and Tennessee. In two other states in which public funding is limited to cases of life endangerment, rape, or incest, very few abortions received public funding. There were two such abortions in Virginia and six in North Carolina. BOONSTRA ET AL., *supra* note 143, at 34, 37 tbls.1–2.

¹⁵⁸ MacKinnon, *supra* note 12, at 1320; Dudziak, *supra* note 140, at 917–18.

¹⁵⁹ 42 U.S.C. § 710 (2000); U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN, YOUTH & FAMILY, CBAE FUNDING REQUIREMENTS 7 (2006), <http://www.acf.hhs.gov/grants/pdf/HHS-2006-ACF-ACYF-AE-0099.pdf>.

¹⁶⁰ See U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV’T REFORM—MINORITY STAFF, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 2–3 (2004), <http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf> [hereinafter *Waxman Report*]; SIECUS Curriculum Reviews, http://www.communityactionkit.org/curricula_reviews.html (reviewing *Choosing the Best LIFE*, *Choosing the Best PATH*, *FACTS (Family Accountability Communicating Teen Sexuality)*, *A.C. Green’s Game Plan*, *Heritage Keepers*, *Navigator*, *Passion & Principles*, *Sex Respect*, *WAIT (Why Am I Tempted?) Training*, *Why kNOW?*, and *Worth the Wait*); HUMAN RIGHTS WATCH, IGNORANCE ONLY: HIV/AIDS, HUMAN RIGHTS AND FEDERALLY FUNDED ABSTINENCE-ONLY PROGRAMS IN THE UNITED STATES: TEXAS: A CASE STUDY (2002); Adam Sonfield & Rachel Benson Gold, *States’ Implementation of the Section 510 Abstinence Education Program, FY 1999*, 33 FAM. PLAN. PERSP. 166 (2001).

¹⁶¹ 42 U.S.C. § 710(b)(1) (2000).

¹⁶² § 710(b)(2)(A), (C).

send a “conflicting message”¹⁶³ or “encourage sexual activity by offering . . . protection against the consequences of pregnancy,”¹⁶⁴ such programs are required to suppress all information about condoms and other modern forms of contraception, except failure rates.¹⁶⁵ They teach instead that birth control is dangerous,¹⁶⁶ condoms are ineffective in preventing pregnancy,¹⁶⁷ and HIV and other STI pathogens can pass through a condom.¹⁶⁸

While government-funded efforts to discourage condom use put all sexually active people at increased risk of sexually transmitted infection, the suppression and distortion of information about contraception imposes the risk of pregnancy on young women—but not young men—who have heterosexual sex.¹⁶⁹ Rather than challenging societal expectations of male sexual irresponsibility and punitive attitudes toward women who are sexually active, such programs reinforce this double standard in the hope that it will force young women to stop themselves, as well as young men, from having sex. Accordingly, these programs teach that premarital sex inevitably results in financial and emotional ruin for young women, while enhancing the reputation of young men.¹⁷⁰ They promote a model of marriage that embodies the egregious gender stereotypes that the Supreme Court has long condemned.¹⁷¹

¹⁶³ OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, ABC GUIDANCE #1: FOR U.S. GOVERNMENT IN-COUNTRY STAFF AND IMPLEMENTING PARTNERS APPLYING THE ABC APPROACH TO PREVENTING SEXUALLY-TRANSMITTED HIV INFECTIONS WITHIN THE PRESIDENT’S EMERGENCY PLAN FOR AIDS RELIEF 5 (2005), <http://www.state.gov/documents/organization/57241.pdf>.

¹⁶⁴ COLEEN KELLY MAST, SEX RESPECT: THE OPTION OF TRUE SEXUAL FREEDOM 34 (2001).

¹⁶⁵ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 159, at 5, 7.

¹⁶⁶ MAST, *supra* note 164, at 47.

¹⁶⁷ *Waxman Report*, *supra* note 160, at 11–12; MARTHA E. KEMPNER, SIECUS, TOWARDS A SEXUALLY HEALTHY AMERICA: ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS THAT TRY TO KEEP OUR YOUTH “SCARED CHASTE” 32–34 (2001), http://www.siecus.org/pubs/tsha_scaredchaste.pdf.

¹⁶⁸ *Waxman Report*, *supra* note 160, at 8–10; KEMPNER, *supra* note 167, at 34–35; SIECUS, Curriculum Review: FACTS (Family Accountability Communicating Teen Sexuality) (2005), <http://www.communityactionkit.org/reviews/FACTS.html>; SIECUS, Curriculum Review: Choosing the Best PATH (2005), <http://www.communityactionkit.org/reviews/ChoosingTheBestPath.html>.

¹⁶⁹ See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring in part and concurring in the judgment) (noting that the infliction of harm, i.e., a “significantly increased risk of unwanted pregnancy and venereal disease,” is an “unacceptable” means of conveying government’s moral message).

¹⁷⁰ See, e.g., ARIZONA DEP’T OF HEALTH SERVS., ABSTINENCE ONLY EDUCATION PROGRAM FIFTH YEAR EVALUATION REPORT, at D-3, D-7 (2003), http://www.azdhs.gov/phs/owch/pdf/abstinence_final_report2003.pdf (describing state and federally funded abstinence-promotion television advertisements showing a pregnant bride figurine abandoned atop a wedding cake and showing a teenage girl “alone and portray[ing] a sense of sadness and remorse” after having had sex and learning of the resulting “negative reputation with which her peers have branded her”).

¹⁷¹ The presumption that married women are (or should be) dependent on their spouses while married men are not is a discriminatory premise that invalidates legislation based on it. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651–53 (1975). Thus the Supreme Court has struck

[Abstinence-only curricula] reinforce notions that the man should be the breadwinner, while the woman's role is as dependent wife and mother; that men marry to get sex and "domestic support," while women marry to get emotional closeness and "financial support"; that girls are focused on relationships and do not prioritize success at school or work, while boys prioritize workplace success and are uninterested in relationships; and that because of men's brain size and intellectual capacities, they are better suited to professions such as "math, engineering and architecture," whereas girls' "emotional" nature suits them to marriage and motherhood.¹⁷²

Although family cap legislation and government-funded abstinence- and marriage-promotion programs aim to regulate women's sexual and reproductive behavior more or less directly, the most common forms of sexual regulation applied to women are indirect. Rather than directly mandating women's sexual behavior, many laws impose harsh penalties upon young and low-income women who deviate from the standards of conduct prescribed by official morality by having sex. Such burdens are rarely imposed on the sexual conduct of heterosexual men.

The most blatant of indirect sexual regulations is obstruction of access to contraception, which threatens women but not men with unwanted pregnancy.¹⁷³ This burden is not facially neutral: "[N]o man faces the physical risks of pregnancy. Even assuming that both parents bear equal responsibility

down statutes whose purposes were to impose traditional gender roles. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (nursing college admission limited to women); *Stanton v. Stanton*, 429 U.S. 501 (1977) (parents must support sons until age 21, daughters only to age 18); *Weinberger*, 420 U.S. at 645, 651–52 (sex discrimination in veterans' benefits).

A state intention to reinforce the male breadwinner and female dependent model among its citizens cannot justify a sex classification under the Equal Protection Clause. *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (The state has no constitutional authority to prefer "an allocation of family responsibilities under which the wife plays a dependent role."); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975); *Reed v. Reed*, 404 U.S. 71 (1971); *see also J.E.B. v. Alabama*, 511 U.S. 127, 130–31 (1994); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992) (rejecting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)); *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973).

¹⁷² CTR. FOR REPROD. RIGHTS, WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: A SHADOW REPORT 26–27 (2006), <http://www.ohchr.org/english/bodies/hrc/docs/ngos/CRR.pdf> (prepared for the Eighty-Seventh Session of the Human Rights Committee) (footnotes omitted) (citing *Waxman Report*, *supra* note 160, at 16–18; KEMPNER, *supra* note 167, at 3; WAIT TRAINING STUDENT MANUAL 39, 62 (2d ed. 2004); WHY KNOW 122 (2004); SIECUS, Curriculum Review: FACTS, *supra* note 168; SIECUS, Curriculum Review: Worth the Wait (2005), <http://www.communityactionkit.org/reviews/WorthTheWait.html>; SIECUS, Curriculum Review: Sex Respect (2005), <http://www.communityactionkit.org/reviews/SexRespect.html>).

¹⁷³ "Before the pill, a woman could be assured of preventing conception and childbirth only through a strategy of denial—a strategy affecting not only her behavior but her sense of self." Karst, *supra* note 135, at 529.

for the child after birth, only women are confronted with the choice of obtaining an abortion or enduring the physical burdens of pregnancy.”¹⁷⁴

Both before and after the Supreme Court decided *Griswold v. Connecticut*¹⁷⁵ in 1965, wealthy and middle-class American women escaped the worst consequences of government-imposed restrictions on contraception because they could afford private physicians who were willing to provide the medical and contraceptive services they needed.¹⁷⁶ Then, as now, low-income women who were dependent on public clinics for health care bore the health, social, and financial consequences of unwanted pregnancy, unsafe abortion, and unplanned birth.¹⁷⁷ Before *Griswold*, these laws were justified in part on the basis that if women (or couples) did not want to have children, they need only abstain from sex.¹⁷⁸ Thus, low-income women, but not the comfortable and wealthy, were punished by the state for engaging in sexual activity.

In *Griswold*, the Supreme Court questioned the legitimacy and sincerity of Connecticut's efforts to protect morality and discourage nonmarital sexual intercourse by choosing to restrict or prohibit access to hormonal contraception and diaphragms while allowing the sale of condoms to proceed unrestricted. “The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons . . . , unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception.”¹⁷⁹ Although human reproductive biology would permit governments to use the threat of sexually transmitted infection to coerce celibacy by banning condoms, contemporary state and federal governments make no effort to do this. In every U.S. state, condoms are available over the counter without a prescription; within the United States, we do not hear of condoms being banned or restricted for fear of “promiscuity” among young men.¹⁸⁰ The threat of disease (or of unwanted parenthood) is not ordinarily used to enforce sexual morality on heterosexual men.

¹⁷⁴ Law, *supra* note 3, at 978 (footnote omitted).

¹⁷⁵ 381 U.S. 479 (1965).

¹⁷⁶ See, e.g., BOONSTRA ET AL., *supra* note 143, at 13; C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL 116 (1972); Dudziak, *supra* note 140, at 917.

¹⁷⁷ See, e.g., BOONSTRA ET AL., *supra* note 143, at 13; DIENES, *supra* note 176, at 116; Dudziak, *supra* note 140, at 917.

¹⁷⁸ Dudziak, *supra* note 140, at 938; see *Buxton v. Ullman*, 156 A.2d 508, 514 (1959).

¹⁷⁹ *Eisenstadt v. Baird*, 405 U.S. 438, 448–49 (1972) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring)).

¹⁸⁰ At least one U.S. Senator has called for labeling of condoms to suggest that they do not work to prevent sexually transmitted infection. Russell Shorto, *Contra-Contraception*, N.Y. TIMES, May 7, 2006, § 6 (Magazine), at 48.

The few exceptions in which men *are* subject to coercive sexual regulation underline the low status of the groups that are subjected to coercive forms of sexual regulation that enforce moral prohibitions on sexual activity at the expense of their health and well-being. Criminal prohibitions on oral and anal sex were enforced almost exclusively against men who had sex with men.¹⁸¹ Like sexual regulations directed at heterosexual women, “sodomy laws discriminate on the basis of sex—for example, permitting men, but not women, to have sex with women—in order to impose traditional sex roles.”¹⁸² As Justice Kennedy observed for the Court in *Lawrence*, the criminal prohibition of homosexual sex served as “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹⁸³ Sexual regulations, then, serve as instruments of political and social domination.¹⁸⁴ They “express and reinforce the status ordering of social groups.”¹⁸⁵

In prisons and jails, men’s access to condoms is routinely blocked by law or administrative regulation.¹⁸⁶ Unlike men on the outside, men in prison are at high risk of rape or sexual coercion,¹⁸⁷ and they are subject to an official prohibition on sex.¹⁸⁸ Although correctional authorities acknowledge that sex is common in prison and that condom distribution is an effective method of preventing the transmission of HIV,¹⁸⁹ prison administrators, like abstinence promoters,¹⁹⁰ defend this prohibition on the basis that condom availability would “give an inappropriate and confusing message to prisoners.”¹⁹¹ Finally,

¹⁸¹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171 (2004); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

¹⁸² Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988).

¹⁸³ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); see also Thomas, *supra* note 181, at 1440–41.

¹⁸⁴ Thomas, *supra* note 181, at 1440–41.

¹⁸⁵ Karst, *supra* note 135, at 545.

¹⁸⁶ See, e.g., Rebecca Nerenberg, *Spotlight: Condoms in Correctional Settings*, HEPP NEWS, Jan. 2002, <http://www.thebody.com/hepp/jan02/spotlight.html>. See generally Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 182 (2006).

¹⁸⁷ See Ristroph, *supra* note 186, at 154–55; James E. Robertson, *A Punk’s Song About Prison Reform*, 24 PACE L. REV. 527 (2004).

¹⁸⁸ Jails and prisons routinely prohibit sex among prisoners. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), <http://www.hrw.org/reports/2001/prison/report8.html>.

¹⁸⁹ See, e.g., Nerenberg, *supra* note 186.

¹⁹⁰ See *supra* notes 159–68 and accompanying text.

¹⁹¹ Mary McLean Jordan, Comment, *Care to Prevent HIV Infection in Prison: A Moral Right Recognized by Canada, While the United States Lags Behind*, 37 U. MIAMI INTER-AM. L. REV. 319, 325 (2006) (quoting Testimony of Robert L. Cohen, M.D., former Dir. of Med. Servs., Rikers Island, N.Y., before the Commission on Safety and Abuse in America’s Prisons (July 20, 2005), http://www.prisoncommission.org/statements/cohen_robert.pdf).

federally funded international AIDS-prevention programs deployed in African and other Southern countries with high rates of HIV infection¹⁹² discourage condom use in the hope that men and women will abstain from sex for fear of HIV.¹⁹³ Gay men, male prisoners (especially those who have consensual sex, rape, or are raped in prison), and African men are, by virtue of race, sexual activity, and criminal conviction, among the most stigmatized men in society.

Laws that enforce official moral disapproval of sex by exposing sexually active women or men to the threat of pregnancy or disease thus serve as markers of the degraded status of the people whose sexual autonomy and physical integrity are sacrificed to prove a moral point. In Missouri, for example, the State legislature has prohibited all State funding of family planning services since 2003.¹⁹⁴ State legislators who support the funding ban acknowledge that their intent is to discourage women from having unmarried sex. As one Missouri legislator put it, “If you hand out contraception to single women, we’re saying promiscuity is OK as a state.”¹⁹⁵

Similar concerns drove the notorious controversy within the Food and Drug Administration (FDA) over nonprescription status for Plan B emergency contraception (the “morning-after pill”). Although there was no scientific dispute that the drug was safe and appropriate for nonprescription use, over-the-counter approval was delayed for more than two years, and the FDA eventually imposed an unprecedented age requirement for nonprescription access: It allowed women over 16, but not younger women, to obtain Plan B without a prescription.¹⁹⁶ The unprecedented delay in the agency decisionmaking process and the eventual age requirement rested, at least in part, on concern expressed by political appointees on the FDA panel that nonprescription availability of the morning-after pill might lead to “promiscuity” among young women.¹⁹⁷

¹⁹² See President’s Emergency Plan for AIDS Relief, <http://www.pepfarmpi.com/eplan.htm> (last visited May 31, 2006).

¹⁹³ See generally HUMAN RIGHTS WATCH, *supra* note 160, at 63–65; OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, *supra* note 163, at 5.

¹⁹⁴ David A. Lieb, *House Rejects Spending for Birth Control*, ASSOCIATED PRESS, Mar. 15, 2006.

¹⁹⁵ *Id.*

¹⁹⁶ Letter from Steven Galson, Dir., FDA Ctr. for Drug Evaluation & Research, to Joseph A. Carrado, Vice President, Clinical Regulatory Affairs, Duramed Research, Inc. (Aug. 24, 2006), http://www.fda.gov/cder/foi/nda/2006/021045s011_Plan_B_APPROV.pdf (Approval Letter for Application No. 21-045/S011).

¹⁹⁷ In a memorandum explaining the reasons for the FDA’s decision to refuse Barr Pharmaceuticals’ application for nonprescription (over-the-counter) availability for Plan B emergency contraception, FDA official Dr. Steven Galson expressed concern that such availability might lead to “important potential

Restrictions on abortion constitute another form of sexual regulation that imposes a “crushing restraint” on the sexual expression of heterosexual women.¹⁹⁸ Such restrictions target a reproductive health procedure needed only by women¹⁹⁹ for adverse treatment. This adverse treatment includes targeted regulation of abortion providers (“TRAP laws”),²⁰⁰ restrictions on federal and state funding that block poor women’s access to abortion,²⁰¹ and burdensome parental involvement requirements²⁰² that place young women at risk of family violence and delay their abortions,²⁰³ as well as federal and state

behavioral changes associated with the availability of an emergency contraceptive[,] e.g., . . . increased medically risky sexual behavior.” Memorandum from Steven Galson, Acting Dir., FDA Ctr. for Drug Evaluation & Research, to NDA 21-045, at 2, (May 6, 2004), <http://www.fda.gov/OHRMS/DOCKETS/dockets/01p0075/01p-0075-ref0001-07-050604-SGalson.pdf> (filed in Appendix to Plaintiffs’ Supplemental Memorandum of Law in Opposition to Defendant’s Motion for a Protective Order at 8, *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212 (E.D.N.Y. 2006) (No.05-366)). Dr. Galson denied that the FDA decision was “based on non-medical implications of teen sexual behavior, or judgments about the propriety of this activity.” *Id.*

However, a memorandum from Dr. Curtis Rosebraugh indicated that during a follow-up discussion to the FDA scientific advisers’ recommendation that Plan B was appropriate for over-the-counter status without restriction, several panel members expressed concern that OTC availability of Plan B would lead to “promiscuous” behavior among adolescents. Dr. Rosebraugh reported that at a meeting he attended on February 19, 2004, Dr. Galson and Dr. Woodcock expressed concern that “we did not really know what behaviors adolescents would exhibit [S]he stated that we could not anticipate, or prevent extreme promiscuous behaviors such as the medication taking on an ‘urban legend’ status that would lead adolescents to form sex based cults centered around the use of Plan B.” Memorandum from Dr. Curtis Rosebraugh (May 23, 2004) (filed in Appendix to Plaintiffs’ Supplemental Memorandum of Law in Opposition to Defendant’s Motion for a Protective Order, *supra*).

¹⁹⁸ Law, *supra* note 3, at 1019.

¹⁹⁹ MacKinnon, *supra* note 12, at 1297.

²⁰⁰ See discussion *infra* notes 411–26 and accompanying text.

²⁰¹ See, e.g., the Hyde Amendment, Pub. L. No. 108-447, div. F, tit. V, §§ 507(a), 508(a)(1),(2) (2004); Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993), discussed *infra* note 206. Restrictions on funding for and access to abortion delay low-income women’s access to abortion, forcing them to obtain abortions several weeks later in pregnancy than they otherwise would have. *BOONSTRA ET AL.*, *supra* note 143, at 16–17. Funding restrictions also prevent some women from obtaining abortions altogether. See, e.g., Philip J. Cook et al., *The Effects of Short-Term Variation in Abortion Funding on Pregnancy Outcomes*, 18 J. HEALTH ECON. 241, 242 (1999); Stanley K. Henshaw & Kathryn Kost, *Abortion Patients in 1994–1995: Characteristics and Contraceptive Use*, 28 FAM. PLAN. PERSP. 140, 144 (1996); James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120 (1980).

²⁰² Statutes in most states impose parental consent or notification statutes “that effectively allow parents to override a young woman’s decision to terminate her pregnancy unless she can obtain authorization for the abortion from a judge.” CTR. FOR REPROD. RIGHTS, *supra* note 172, at 16; *BOONSTRA ET AL.*, *supra* note 143, at 34–35 app. tbl.1; Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1).

²⁰³ Marianne Bitler & Madeline Zavodny, *The Effect of Abortion Restrictions on the Timing of Abortions*, 20 J. HEALTH ECON. 1011 (2001); Charlotte Ellertson, *Mandatory Parental Involvement in Minors’ Abortions: Effects of the Laws in Minnesota, Missouri, and Indiana*, 87 AM. J. PUB. HEALTH 1367 (1997); Mary S. Griffin-Carlson & Paula J. Schwanenflugel, *Adolescent Abortion and Parental Notification: Evidence for the Importance of Family Functioning on the Perceived Quality of Parental Involvement in U.S. Families*, 39 J.

efforts to obtain disclosure of confidential medical records of young and mature women who have had abortions on the purported ground of investigating child sexual abuse.²⁰⁴ “[N]o similar duties, burdens, or sanctions [are imposed] on the men who were co-participants in the act of conception.”²⁰⁵

Most legal restrictions on abortion allow abortion when it results from rape or incest, or when the abortion is necessary to protect the woman’s life or health.²⁰⁶ The widespread rape-or-incest exception, which is in practice illusory,²⁰⁷ nonetheless reflects the legal construction of pregnancy as

CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 543 (1998); Stanley K. Henshaw & K. Kost, *Parental Involvement in Minors’ Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 202, 207 (1992) (Thirty percent of pregnant minors who did not tell their parents about the abortion feared parental violence, had already experienced it, or feared being forced to leave home.); Theodore Joyce et al., *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 NEW ENG. J. MED. 1031 (2006).

²⁰⁴ Brief of Respondent at 2, *Alpha Med. Clinic v. Anderson*, No. 04-93383-S (D. Kan. 2005); Amended Joint Brief of Petitioners, *Alpha Med. Clinic v. Anderson*, No. 04-93383-S (D. Kan. 2005); *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004); *Planned Parenthood Fed’n of Am., Inc. v. Ashcroft*, No. C03-4872 PJH, 2004 WL 432222 (N.D. Cal. Mar. 5, 2004); *Nw. Mem’l Hosp. v. Ashcroft*, No. 04 C 55, 2004 WL 292079 (N.D. Ill. Feb. 4, 2004); *Nat’l Abortion Fed’n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 WL 555701 (S.D.N.Y. Mar. 18, 2004); see also Suzanne Hoholik, *Women’s Center Sues to Block State from Getting Records*, COLUMBUS DISPATCH, Aug. 23, 2005, at 2D (Ohio Health Department seeking records of abortion patients in pursuit of undisclosed complaint); David Klepper, *Area Clinic Alerts Patients that Kline Seeks Records*, KANSAS CITY STAR, Mar. 17, 2005, at 1; Peter Slevin, *A Kansan with Conviction; Attorney General Sees Abortion Records Fight as Matter of Principle*, WASH. POST, Mar. 20, 2005, at A03.

²⁰⁵ Siegel, *supra* note 23, at 364.

²⁰⁶ The Supreme Court mandates that abortion-restrictive legislation create exceptions for abortions that are necessary to preserve the woman’s life or health. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 929–30 (2000).

The Hyde Amendment, 42 U.S.C. § 1396, prohibits the use of federal Medicaid funds for abortion except in cases of rape, incest, or life endangerment, although states may use their own funds to pay for such abortions. See also Pub. L. 108-447, Division F, Title V, §§ 507(a), 508 (a)(1) (creating an exception to Medicaid ban on abortion funding for “pregnancy resulting from rape or incest”). Sixteen states that deny funding for most abortions officially permit funding of those abortions that are medically necessary. Center for Reproductive Rights, *Medicaid Funding for Medically Necessary Abortions*, http://www.reproductiverights.org/st_law_medicaid.html (last visited Mar. 13, 2007), although in practice such funding is rarely provided. See *infra* note 207 and accompanying text.

²⁰⁷ Although federal and state funding restrictions purport to allow funding of abortions when the pregnancy results from rape or incest, “Medicaid authorities reportedly disregard these exceptions, so that women and girls are routinely denied Medicaid funding for abortions after they have been raped.” CTR. FOR REPROD. RIGHTS, *supra* note 172, at 16 (citing ADAM SONFIELD & RACHEL BENSON GOLD, ALAN GUTTMACHER INST., *PUBLIC FUNDING FOR CONTRACEPTIVE, STERILIZATION AND ABORTION SERVICES, FY 1980–2001* (2005), <http://www.guttmacher.org/pubs/fpfunding/tables.pdf>; Stephanie Poggi, *Abortion Funding for Poor Women: The Myth of the Rape Exception* (Apr. 28, 2005), <http://www.americanprogress.org/issues/2005/04/b615981.html>).

punishment for women's participation in sex:²⁰⁸ if the sex was forced upon her, the woman deserves to be allowed an abortion. Recent federal²⁰⁹ and state²¹⁰ abortion bans impose an additional penalty upon women who have been sexually active. They disallow abortion even when it is medically necessary to protect the woman's health, unless she is in danger of immediate death. Such laws burden women's sexual activity not only with the usual threat of unwanted pregnancy, but also with the prospect of severe health consequences (short of death).

Laws and government practices targeting sex by young women are even more intrusive. Most states require a young woman seeking an abortion to notify or obtain consent from one or both of her parents prior to the procedure,²¹¹ thereby delegating the state's surveillance and punishment of young women's sexual activity to their parents. In 2003, the Attorney General of Kansas issued a "kiss-and-tell"²¹² directive requiring that if any physician, nurse, counselor, or other health care provider learns that a person under 16 years old has been sexually active, the provider must report the young person to child protective services or the police—even if it was consensual sexual activity with an age-matched peer and even if the activity did not involve sexual intercourse.²¹³ Although the regulation nominally applied to both young women and young men, this restriction disproportionately exposes sexually active young women to governmental surveillance and punishment. They are more likely than young men to have to consult a health care provider for regular reproductive health care, advice about and prescriptions for contraception, and prenatal or abortion care if they get pregnant.

Finally, *Geduldig* invites the targeting of pregnant women for adverse treatment. Throughout the United States, police, prosecutors, and lawmakers

²⁰⁸ See Siegel, *supra* note 23, at 364.

²⁰⁹ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201. The Supreme Court recently held that the law is constitutional. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

²¹⁰ See, e.g., S.D. CODIFIED LAWS § 22-17-1 (2006) (defeated by referendum on Nov. 8, 2006). Megan Myers, *S.D. Rejects Abortion Ban*, ARGUS LEADER (Sioux Falls, S.D.), Nov. 8, 2006, at 1A; Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. § 132: 24–132:28 (Supp. 2004), *invalidated by* *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961 (2006).

²¹¹ See BOONSTRA ET AL., *supra* note 143, at 34–35 app. tbl.1.

²¹² "Kiss-and-tell" was a shorthand for the directive adopted by its detractors. See, e.g., Kari Lydersen, *No 'Kiss and Tell' Big Brother in Kansas, Say Rights Groups*, NEW STANDARD (Oct. 25, 2005), <http://newstandardnews.net/content/index.cfm/items/2523>; Press Release, Ctr. for Reprod. Rights, Court Sets Precedent, Stopping Kansas Attorney General's Effort to Invade Teen Privacy (Apr. 18, 2006), http://www.reproductiverights.org/pr_06_0418KansasPrecedent.html.

²¹³ See *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1099–100 (D. Kan. 2006).

have imposed coercive restrictions on pregnant women's liberty and health care, enforcing them through punitive criminal and civil sanctions that are targeted almost exclusively at low-income African-American, Latina, and indigenous women.²¹⁴ Many substance-dependent women have been prosecuted and imprisoned for behavior during pregnancy—such as use of alcohol or legal or illegal drugs—that is alleged to have harmed the fetus.²¹⁵ Although women of all racial groups are about equally likely to use illicit drugs during pregnancy,²¹⁶ black women are ten times more likely than white women to have their drug use reported to law enforcement authorities.²¹⁷ Although most such convictions have been overturned on appeal,²¹⁸ prosecutions persist nonetheless.²¹⁹ Several state legislatures have passed laws that impose civil liability or criminal punishment on women who use substances while pregnant.²²⁰ Like restrictions on contraception, criminal regulation of conduct during pregnancy is gender-targeted: No man faces the risk of such liability.

The Supreme Court's "historic refusal to view women and men as similarly situated with respect to reproductive rights"²²¹ reflects a failure of traditional equal protection analysis to see that women and men are similarly situated with respect to their interests in reproductive control. The Court has "failed to accord women the respect necessary to make equal protection claims appropriate [Its] opinions have traditionally reflected the view that women cannot make decisions about their pregnancy on their own."²²²

²¹⁴ See, e.g., Lynn M. Paltrow, *Winning Strategies: Defending the Rights of Pregnant Addicts*, CHAMPION, Aug. 1993, at 19, 21; Roberts, *supra* note 135, at 1422, 1432–36; Roberts, *supra* note 134, at 954.

²¹⁵ See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *People v. Gilligan*, Docket No. 2003-1192 (Glens Falls, N.Y. 2003).

²¹⁶ I.J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) (15.4% of white women and 14.1% of black women had positive toxicological test results.).

²¹⁷ *Id.* at 1204.

²¹⁸ The notable exceptions are *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), and *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003), *cert. denied*, 540 U.S. 819 (2003) (upholding such prosecutions).

²¹⁹ See, e.g., *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); Ken Kobayashi, *Meth Mother's Conviction Overturned*, HONOLULU ADVERTISER, Nov. 30, 2005.

²²⁰ ARIZ. REV. STAT. ANN. §§ 13-604.01, 13-3409, 13-3623 (2006); ARK. CODE ANN. §§ 12-12-503(12), 9-27-303(35) (West 2006); COLO. REV. STAT. ANN. §§ 19-1-103(VII), 19-1-102(1)(g), 19-3-308(1)(c) (West 2006); LA. CHILD. CODE ANN. art. 603(14) (2006); NEV. REV. STAT. ANN. §§ 432B.170(1), 432B.220(3), 432B.230(2), 432B.310(2), 432B.330(4), 432B.400 (West 2005); OKLA. STAT. ANN. tit. 12, § 1053 (2006).

²²¹ Daly, *supra* note 13, at 78.

²²² *Id.*

While only women can become pregnant, it is the law and not biological reality that visits the reproductive consequences of heterosex exclusively on women.²²³ A woman may become or remain pregnant when, if not for a legal rule restricting her access to contraception or abortion, she would have prevented or terminated the pregnancy. Such laws burden women with the reproductive consequences of sex when they would otherwise be free to avoid them. With few exceptions,²²⁴ our laws do not do this to heterosexual men.

Criminal prohibitions and other penalties for sexual activity, then, are not merely benign or misguided attempts to enforce old-fashioned morality. Like sodomy laws, the sexual regulations described in this Part serve a “symbolic, expressive function.”²²⁵ Such regulations “stand as official pronouncements of the evil of homosexual [or other disfavored] sex,” and of the persons identified with that disfavored sex.²²⁶ As Laurence Tribe has pointed out with respect to the effect of abortion restrictions on women’s societal participation, “[e]ven a woman who is not pregnant is inevitably affected by her knowledge of the power relationships thereby created.”²²⁷ Sexual regulations, including sodomy laws, stigmatize members of the target groups as immoral, deviant, or threatening and justify the extension of state surveillance over the sexual and public behavior of target groups—forms of stigma and surveillance that individual members of the target groups cannot escape by complying with the sexual behavior prescribed by law.²²⁸ Such sexual regulations thus coerce the targeted women and sexual dissenters (and, less commonly, low-status heterosexual men) into gendered norms of chastity, and subject them to private and governmental surveillance, monitoring, and punishment for deviation from these prescribed roles. Thus sexual regulations reinforce the degraded out-group social status²²⁹ of the young women, poor women, and women of color they target, stigmatizing them for their presumed, feared, or actual deviation from socially accepted norms of sexual behavior.

²²³ Law, *supra* note 3, at 978; Ginsburg, *supra* note 22, at 382–83.

²²⁴ See *supra* notes 181–93 and accompanying text.

²²⁵ Karst, *supra* note 135, at 545.

²²⁶ *Id.*

²²⁷ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1354 (2d ed. 1988).

²²⁸ As Kendall Thomas has observed with respect to pre-*Lawrence* bans on “homosexual sodomy,” even those gay men and lesbians who complied with sexual prohibitions would likely embrace a “homosexual” identity or have such an identity ascribed to them, and such individuals would continue to be vulnerable to discrimination, stigmatization, and homophobic violence. Thomas, *supra* note 181, at 1507.

²²⁹ Unwed mothers are at least arguably a form of stigmatized sexual minority. See, e.g., Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 *HASTINGS L.J.* 1131, 1147 (1979).

II. EQUAL SEXUAL LIBERTY

A. *Due Process Liberty in Lawrence: Promise and Disappointment*

The Supreme Court's decision in *Lawrence v. Texas* overruled the Court's 1986 decision in *Bowers v. Hardwick*,²³⁰ in which the majority upheld a gender-neutral sodomy ban on the basis that due process liberty did not encompass a "fundamental right [of] homosexuals to engage in sodomy."²³¹ In *Lawrence*, the Court repudiated *Bowers*, invalidating a Texas sodomy ban that prohibited anal and oral sex between same-sex partners.²³² Justice Kennedy held for the Court that, by defining the liberty right so narrowly, the *Bowers* Court "fail[ed] to appreciate the extent of the liberty at stake."²³³ "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."²³⁴ The Court placed same-sex sexual activity squarely within the due process liberty framework established in *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey*:²³⁵ "[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²³⁶ "These matters," the Court had held in *Casey*, "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."²³⁷ "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."²³⁸ These rights applied equally to same-sex and different-sex relationships. Justice Kennedy's majority declined to base its decision on the "tenable" equal protection argument endorsed by Justice O'Connor in her concurring opinion: "[S]ome might question whether a prohibition would be valid if drawn differently, say,

²³⁰ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

²³¹ *Bowers*, 478 U.S. at 190.

²³² TEX. PENAL CODE ANN. § 21.06(a) (2003).

²³³ *Lawrence*, 539 U.S. at 567.

²³⁴ *Id.*

²³⁵ *Id.* at 565–66, 573–74.

²³⁶ *Id.* at 574.

²³⁷ *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (internal quotation marks omitted).

²³⁸ *Id.*

to prohibit the conduct both between same-sex and different-sex participants.”²³⁹

The sodomy ban imposed a “stigma” on gay men that was “not trivial.”²⁴⁰ The maintenance of *Bowers* as precedent, the Court held, “demeans the lives of homosexual persons.”²⁴¹ The Court affirmed Justice Stevens’s dissenting opinion in *Bowers*: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,”²⁴² and due process liberty protected the decisions of married and unmarried persons “concerning the intimacies of their physical relationship.”²⁴³ Justice Stevens’s analysis, the Court concluded, “should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. . . . [It] should be and now is overruled.”²⁴⁴

In *Lawrence*, the Court established that due process “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”²⁴⁵ Lawrence and his partner, Tyron Garner, “were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”²⁴⁶ The due process liberty interest recognized in *Griswold*, *Eisenstadt*, *Roe*, and *Carey* protected the right of persons, whether married or unmarried, heterosexual or homosexual, to make “individual decisions . . .

²³⁹ *Id.* at 575.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotation marks omitted). Thus, the Court held in *Lawrence*, the moral disapproval asserted by the state of Texas “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* at 578.

Lower courts, however, have often suggested that the *Lawrence* majority did not really mean what it said on this point. In rejecting a Due Process sexual liberty challenge to the Alabama sex toy ban, Judge Smith of the District Court asserted that Justice Stevens in his *Bowers* dissent, the majority in *Lawrence*, and Justice Scalia in his *Lawrence* dissent “engaged in hyperbole” when they held that majoritarian sexual morality was an insufficient basis for a law that infringed the due process liberty interest in private, consensual adult sex. *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1248 (N.D. Ala. 2006); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) (“[O]ur own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest.”). *But cf.* *State v. John M.*, 894 A.2d 376, 393 (Conn. App. 2006) (*Lawrence* established that morality was not a legitimate basis for criminal prohibitions on sex.).

²⁴³ *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216) (internal quotation marks omitted).

²⁴⁴ *Id.* at 578.

²⁴⁵ *Id.* at 572.

²⁴⁶ *Id.* at 564.

concerning the intimacies of their physical relationship, even when not intended to produce offspring.”²⁴⁷ Whatever the precise scope and nature of this liberty interest, *Lawrence* left no doubt that it applies equally to the married and the unmarried, the gay and the straight,²⁴⁸ and that it applies to nonprocreative as well as procreative sex.

The scope and nature of due process sexual liberty is contested. The majority decision deploys artful ambiguity as to whether the liberty interest is fundamental or not, and carefully avoids specifying a standard of review.²⁴⁹ By situating *Lawrence* within the tradition of *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey*, the Court suggests that, like reproductive liberty and privacy, sexual liberty is a fundamental right.²⁵⁰ But by assimilating the right to this line of cases, the decision raises the disturbing possibility that *Lawrence* may require, at best, “undue burden” scrutiny, which would afford no greater protection to sexual liberty than the rather minimal protections due process liberty affords to abortion.²⁵¹

As Katherine Franke points out, by framing the due process sexual liberty right in terms of “intimate relationships” and connecting it to rights of “family, marriage, or procreation,”²⁵² *Lawrence* recognized a “domesticated liberty”²⁵³ that opened up the in-group of permitted sexual activity to include same-sex sex, but simultaneously reinscribed the hegemonic social norms by which legitimate sex is confined to marriage and the family.²⁵⁴

The language used in *Lawrence* and subsequent due process sexual liberty cases highlights one of the frailties of the equal sexual liberty argument. To

²⁴⁷ *Id.* at 578 (quoting *Bowers*, 478 U.S. at 216) (internal quotation marks omitted).

²⁴⁸ *See, e.g., id.* at 574–75.

²⁴⁹ For arguments that it is a fundamental right, see, e.g., Sunstein, *supra* note 9; Laurence H. Tribe, Essay, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). But, since the *Lawrence* Court did not announce that due process sexual liberty was a “fundamental” right, courts have consistently held that it was not one. *See, e.g.,* Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004); *State v. Limon*, 122 P.3d 22 (Kan. 2005).

²⁵⁰ Hunter, *supra* note 9, at 1115. Since *Casey*, though, the abortion decision has not enjoyed the strict scrutiny afforded to other fundamental rights; governmental interference with abortion decision making is subject to the more deferential “undue burden” standard.

²⁵¹ Cruz, *supra* note 9, at 256.

²⁵² Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400, 1412, 1417 n.69 (2004) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)).

²⁵³ *Id.* at 1413.

²⁵⁴ *Id.* at 1414 (*Lawrence* “privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality.”).

protect sexual liberty, the Court tends to declare that the case is not really about sex. In *Lawrence*, the Court noted that although the Texas sodomy ban “d[id] no more than prohibit a particular sexual act,” it had “more far-reaching consequences . . . seek[ing] to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”²⁵⁵

Sodomy laws, like other gendered sexual regulations, “overdetermine[]” their targets “in sexual terms” by framing their identity solely in terms of their sexual behavior.²⁵⁶ Accordingly, when judges “demean” a due process liberty right by constructing it as a right to have sex,²⁵⁷ they are about to deny the claim.²⁵⁸ Just as Justice White belittled the constitutional claim asserted in *Bowers v. Hardwick* as “a fundamental right [of] homosexuals to engage in sodomy,”²⁵⁹ in *Williams*, the Eleventh Circuit derided the trial court’s “discovery of a constitutional ‘right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas,’”²⁶⁰ and refused to recognize any constitutional right to the “unsavory”²⁶¹ advertising and sale of such items.

By contrast, when a court aims to protect the conduct targeted by a sexual regulation, it construes it in grand and euphemistic nonsexual terms: it declares that the case is not about sex.²⁶² The Court and the challengers frame the claim as being about something “transcendent,”²⁶³ something that can be discussed in polite company. Same-sex sex is “but one element in a personal bond that is more enduring,”²⁶⁴ even when it is not.²⁶⁵ The use of porn is not masturbation;

²⁵⁵ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²⁵⁶ See Franke, *supra* note 252, at 1408.

²⁵⁷ *Lawrence*, 539 U.S. at 567.

²⁵⁸ For example, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 88 (1981), Chief Justice Burger concluded, in dissent, that to accept nude dancing as an expressive activity subject to First Amendment protection “trivializes and demeans that great Amendment.”

²⁵⁹ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

²⁶⁰ *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1244 (11th Cir. 2004) (quoting *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1296 (N.D. Ala. 2002)).

²⁶¹ *Williams IV*, 378 F.3d at 1241 n.13.

²⁶² See *Lawrence*, 539 U.S. at 567.

²⁶³ “‘The instant case involves liberty of the person both in its spatial and more transcendent dimensions,’ writes Justice Kennedy. We come to learn later in the opinion that by ‘spatial’ he means private, and by ‘transcendent’ he means to refer to relationship-based intimacy.” Franke, *supra* note 252, at 1409 (quoting *Lawrence*, 539 U.S. at 562).

²⁶⁴ *Lawrence*, 539 U.S. at 567.

²⁶⁵ Although there was no evidence before the Court in *Lawrence* that the two men, Tyron Garner and John Lawrence, were in a relationship, but the Court’s reasoning was premised on the assumption that they were. Franke, *supra* note 252, at 1407–08.

it is “the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”²⁶⁶ The Alabama sex toy ban, according to Judge Barkett’s dissent in *Williams*, “is not . . . about sex or about sexual devices. It is about the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships.”²⁶⁷ The abortion right is a right of women (and men) to “organize[] intimate relationships,”²⁶⁸ “define their views of themselves and their places in society,”²⁶⁹ “participate equally in the economic and social life of the Nation,”²⁷⁰ and to shape their “destiny” in accordance with their own “spiritual imperatives.”²⁷¹

The existence of a due process liberty right to sexual self-determination has proven insufficient to overcome the squeamishness of an Eleventh Circuit majority that refuses to see the liberty forest for the sexual trees. Assuming, optimistically, that the Eleventh Circuit majority decided the sex toy challenges on the basis of principle and not of a visceral aversion to “unsavory” sex toys, an equal sexual liberty argument might deflect judicial attention from sexual acts that judges may find distasteful and redirect it toward discrimination they may find unconstitutional, as happened in the Supreme Court’s reversal of *Bowers* in *Lawrence*. The equal sexual liberty issue is not the particular acts that are prohibited. It is the disparity in the regulations governing men and women.

In his dissenting opinion in *Lawrence*, Justice Scalia balefully predicted that, by rejecting morality as a basis for criminalizing consensual, private sex between adults, the majority decision would lead inexorably to the legalization of a parade of horrors: “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”²⁷² His concerns have hardly been vindicated. As described above, state and federal courts have

²⁶⁶ *Roth v. United States*, 354 U.S. 476, 488 (1957) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)).

²⁶⁷ *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1250 (11th Cir. 2004) (Barkett, J., dissenting).

²⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 852.

²⁷² *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

refused to extend due process liberty even to protect adults' private, consensual use of sex toys.²⁷³

The main constraint *Lawrence* has placed on governmental power to regulate sex²⁷⁴ has been that state courts, and even the Sixth and Eleventh Circuits, now acknowledge that *Lawrence's* due process liberty analysis precludes the enforcement of criminal bans on private, consensual "sodomy," adultery, or fornication between adults,²⁷⁵ at least in nonmilitary settings.²⁷⁶

The sexual liberty right, as David Cruz has warned, may turn out to be as narrow as the limited decisional autonomy protected by the due process right to abortion.²⁷⁷ Penalties short of prison, such as financial sanctions, may not be construed to engage due process liberty. In *Beecham v. Henderson County*, for example, the Sixth Circuit upheld the dismissal of a court clerk for adultery after she became engaged to a man who was separated from his wife but not yet divorced.²⁷⁸ The Court of Appeals found no "direct and substantial interference" with Beecham's intimate relationship because it "only made it economically burdensome to marry a small number of . . . eligible individuals."²⁷⁹ Furthermore, the government action survived rational-basis review because it "did not bar her from every form of employment in every sector of society. She was discharged from one position at one courthouse. All other employment opportunities are available to her."²⁸⁰

²⁷³ *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1244 (11th Cir. 2004); *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1248 (N.D. Ala. 2006); *PHE, Inc. v. State*, 877 So.2d 1244 (Miss. 2004).

²⁷⁴ A discussion of the different-sex marriage requirement as a sexual regulation falls outside the scope of this Article. For an intriguing discussion of this issue, see Dubler, *supra* note 29.

²⁷⁵ See, e.g., *State v. Whiteley*, 616 S.E.2d 576 (N.C. Ct. App. 2005); *Berg v. State*, 100 P.3d 261, 264 (Utah Ct. App. 2004); *Martin v. Zihnerl*, 607 S.E.2d 367 (Va. 2005).

²⁷⁶ Federal military appellate courts have repeatedly upheld military bans on sodomy and adultery in the face of *Lawrence* due process liberty challenges by applying a unique form of analysis. The military court considers "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *United States v. Marcum*, 60 M.J. 198, 206–07 (C.A.A.F. 2004), *reconsidered*, 60 M.J. 395 (C.A.A.F. 2004); *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004); *United States v. Bart*, 61 M.J. 578 (N-M. Ct. Crim. App. 2005); see also *United States v. Myers*, 2005 WL 318709 (N-M. Ct. Crim. App. 2005); *United States v. Avery*, 2005 WL 453135 (N-M. Ct. Crim. App. 2005); *United States v. Gamez*, 2005 WL 743052 (A.F. Ct. Crim. App. 2005); *United States v. Brown*, 2005 WL 2381094 (N-M. Ct. Crim. App. 2005); *United States v. Teague*, 2005 WL 2375179 (N-M. Ct. App. 2005).

²⁷⁷ Cruz, *supra* note 9, at 256.

²⁷⁸ 422 F.3d 372 (6th Cir. 2005).

²⁷⁹ *Id.* at 376 (quoting *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996); *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 712 (6th Cir. 2001)).

²⁸⁰ *Id.*

In general, state and lower federal courts addressing state-imposed penalties on private, consensual, noncommercial sex between adults have restricted *Lawrence* due process sexual liberty to its narrowest possible reading,²⁸¹ as they did in the Alabama and Mississippi sex toy challenges.²⁸² Since *Lawrence* did not explicitly purport to recognize a “fundamental” right, courts have been loath to recognize one.²⁸³ In reviewing due process sexual liberty claims, they have consistently applied a deferential form of rational-basis scrutiny.²⁸⁴

Lower courts seeking to constrict the scope of due process sexual liberty in order to uphold state sexual regulations have seized on the following passage in *Lawrence*, in which Justice Kennedy reserves judgment on several controversial matters that were not before the Court in that case:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.²⁸⁵

North Carolina and Virginia courts have used the Supreme Court’s reference to “public conduct” as authority to uphold criminal prohibitions on “solicitation” of homosexual sex. Proposing a “crime against nature” is treated as the constitutional equivalent of performing it in the street.²⁸⁶ Under this interpretation of due process sexual liberty, police may target gay men’s meeting places and arrest them for suggesting sex,²⁸⁷ while straight men may

²⁸¹ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), of course, was the most striking of *Lawrence*’s due process offspring, but liberty-based rights to equal marriage fall outside the scope of this Article.

²⁸² See *supra* notes 105–22 and accompanying text.

²⁸³ See *supra* note 251 and accompanying text.

²⁸⁴ See, e.g., *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004); *State v. John M.*, 894 A.2d 376 (Conn. App. 2006); *State v. Limon*, 122 P.3d 22 (Kan. 2005).

²⁸⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁸⁶ *State v. Whiteley*, 616 S.E.2d 576, 580–81 (N.C. Ct. App. 2005); *Singson v. Commonwealth*, 621 S.E.2d 682, 742–43 (Va. Ct. App. 2005).

²⁸⁷ See *Singson*, 621 S.E.2d 682.

safely continue to publicly proposition women for normative heterosexual acts.²⁸⁸

By contrast to the narrow interpretation of due process liberty in cases involving sex toys, “adulterous” women, or gay men talking about sex, the courts have given a surprisingly broad interpretation of due process sexual liberty in cases involving men charged with sexual offenses. In *State v. Whiteley*, the North Carolina appellate court applied the *Lawrence* disclaimers to uphold the use of a “crimes against nature” statute to prosecute solicitation offences, but held that *Lawrence* due process sexual liberty protected what a jury had found to be a serious sexual assault.²⁸⁹ Whiteley was convicted of “crimes against nature” after he was found to have “forcibly inserted”²⁹⁰ “something” into a woman’s vagina, “possibly repeatedly,” while the woman was blacked out²⁹¹ (either from benzodiazepine that the woman alleged he had slipped into her drink,²⁹² or, as he claimed, as a result of her intoxication²⁹³). His actions were found to have resulted in “bruises around [her] pelvic area and a swollen, red, and bleeding vagina.”²⁹⁴ The appellate court vacated Whiteley’s conviction because it found the woman’s level of inebriation had not reached the North Carolina standard for nonconsent; she had not been “physically helpless.”²⁹⁵ Finding “no evidence . . . that the act was committed by force and against the [woman’s] will,”²⁹⁶ the court concluded that the activities that had injured the woman constituted the kind of consensual²⁹⁷ sex that fell within the scope of Whiteley’s due process liberty.²⁹⁸

²⁸⁸ At least as long as they do not offer to pay for them. After *Lawrence*, state courts have consistently upheld statutes prohibiting solicitation for the purpose of prostitution. See, e.g., *State v. Freitag*, 130 P.3d 544 (Ariz. Ct. App. 2006); *State v. Thomas*, 891 So.2d 1233 (La. 2005).

²⁸⁹ 616 S.E.2d at 581.

²⁹⁰ *Id.* at 578.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 577.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 582–83.

²⁹⁶ *Id.* at 582.

²⁹⁷ “Because this constitutional challenge arose in the context of a rape prosecution, where the defendant was acquitted of rape but convicted of violating the crime-against-nature statute, the actual conduct protected by the court’s holding may be better characterized as not having been proven nonconsensual.” Cruz, *supra* note 140, at 300 n.10 (discussing *Post v. Oklahoma*, 715 P.2d 1105 (Okla. Crim. App. 1986)).

²⁹⁸ *Whiteley*, 616 S.E.2d at 580–81, 583 (*Lawrence* due process liberty mandated that Whiteley’s conviction be vacated). The Court of Appeals did not acknowledge the *Lawrence* majority’s disclaimer regarding “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

The due process liberty recognized in *Lawrence* is being interpreted to mandate little more than rational-basis scrutiny of governmental restrictions on private, noncommercial sexual activity between consenting adults (or, as in *Whiteley*, adults who are deemed to be consenting). The lower courts' grudging recognition of due process sexual liberty rights suggests that they will not easily release the traditional assumptions that law should protect the sexual activity of heterosexual men, but may punish that of women and sexual dissenters.

The addition of equal protection considerations, though, changes the sexual liberty equation. Where state action is understood to deprive plaintiffs of sexual liberty in a way that discriminates on the basis of sexual orientation, state appellate courts in both Kansas²⁹⁹ and Connecticut³⁰⁰ have departed from the deferential model of rational-basis review applied in most of the post-*Lawrence* due process sexual liberty cases to apply a "more searching" standard of rational-basis review similar to that applied by the Supreme Court in *Lawrence* and in *Romer v. Evans*. In these cases, the state courts invalidated sexual orientation distinctions in state laws that penalized incest³⁰¹ and statutory rape.³⁰² The equal protection argument, based in these cases on sexual orientation,³⁰³ seems to add the "teeth"³⁰⁴ that ordinary rational-basis review as applied to due process sexual liberty claims after *Lawrence* seems to lack.

In both *Limon v. State* and *State v. John M.*, the courts purported to apply rational-basis review. However, the form of rational-basis review deployed in these cases is markedly more rigorous than that employed in post-*Lawrence* challenges based on sexual liberty alone. In *Limon*, for example, the Kansas court of appeals upheld a "Romeo and Juliet" sentencing mitigation provision,³⁰⁵ which mandated a significantly lighter penalty for statutory rape when the offence involved consensual sex between young people who were

²⁹⁹ *State v. Limon*, 122 P.3d 22 (Kan. 2005).

³⁰⁰ *State v. John M.*, 894 A.2d 376 (Conn. App. Ct. 2006) (invalidating incest statute prohibited kindred persons from engaging in heterosex, but not homosex).

³⁰¹ *Id.*

³⁰² *Limon*, 122 P.3d 22.

³⁰³ Laws that differentially penalize sexual activity based on whether the participants are of the same or different gender could equally be understood to constitute sex discrimination. *See generally* Koppelman, *supra* note 182.

³⁰⁴ *See, e.g.*, David O. Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112-14 (1985) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985)).

³⁰⁵ KAN. STAT. ANN. § 21-3522 (Supp. 2004).

close in age and were “members of the opposite sex.”³⁰⁶ It distinguished *Lawrence* on the basis that *Limon* involved minors. Applying a deferential form of rational-basis scrutiny, it upheld the legislative distinction between consensual teenage heterosexual and consensual teenage homosexual, finding that the classification was “rationally related to the purpose of protecting and preserving the traditional sexual mores of society and the historical sexual development of children.”³⁰⁷

The Kansas Supreme Court overturned the court of appeals and invalidated the “opposite sex” criterion. Following the lead of Justice O’Connor’s concurrence in *Lawrence*, the Court held that “a more searching form of rational basis review” should apply to a law that exhibits a “desire to harm a politically unpopular group.”³⁰⁸ It found, for example, that the state cited no “scientific research or other evidence justifying the position that homosexual sexual activity is more harmful to minors than adults.”³⁰⁹ The Court accepted evidence that sexual orientation was settled by age fourteen and was not affected by sexual experience nor by efforts to change the young person’s sexual orientation³¹⁰ so that the state’s child-protection rationale lacked a rational basis. The Court also rejected the factual basis of the state’s proffered rationales of preventing sexually transmitted infection³¹¹ and rejected the state’s contention that it had a legitimate interest in promoting procreation among teenagers: “[T]he State’s interest is to discourage teen pregnancies, not encourage them.”³¹² Thus it concluded that the sexual orientation classification was, like Colorado’s Amendment 2,³¹³ “a status-based enactment [so] divorced from any factual context’ [that] we cannot ‘discern a relationship’ to the espoused State interest.”³¹⁴

In *State v. John M.*, the Connecticut Court of Appeals invalidated a state incest statute that prohibited heterosexual but not homosexual between kindred persons and vacated the conviction of a man who had been convicted of having

³⁰⁶ *Limon*, 122 P.3d at 24 (quoting KAN. STAT. ANN. § 21-3522 (Supp. 2004)).

³⁰⁷ *Id.* at 26 (quoting *State v. Limon*, 83 P.3d 229, 237 (Kan. Ct. App. 2004)).

³⁰⁸ *Id.* at 29 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring)) (internal quotation marks omitted).

³⁰⁹ *Id.* at 35.

³¹⁰ *Id.*

³¹¹ *Id.* at 36.

³¹² *Id.* at 37.

³¹³ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

³¹⁴ *Limon*, 122 P.3d at 35 (quoting *Romer*, 517 U.S. at 635).

sex with his stepdaughter.³¹⁵ The Court purported to apply a “deferential”³¹⁶ form of rational-basis scrutiny, which it held the courts had applied in *Lawrence* and *Limon*.³¹⁷ It did not acknowledge that it was applying (or that *Limon* had applied) any “more searching” form of rational-basis scrutiny. Nonetheless, the court deployed a notably rigorous form of rational-basis review to deny that the prohibition on heterosexual incest was rationally related to the state’s proffered objective of preventing inbreeding. Although it acknowledged that rational-basis scrutiny did not require that the state objective be the objective that had truly motivated the legislation, the court pointed out that the “sole purpose” of the statute was actually “to protect victims of incest.”³¹⁸ In any case, it concluded that the legislative classification bore no rational relationship to any legitimate purpose; the incest prohibition applied to persons who were infertile and to heterosexual persons related by adoption or marriage, making the relationship to the asserted legislative purpose “so attenuated as to render the distinction arbitrary and irrational.”³¹⁹

Thus, equal sexual liberty—the intersection of equal protection with due process liberty—has resulted in the application (acknowledged in *Limon*, unacknowledged in *John M.*) of a “more searching” form of rational basis review.³²⁰ The equal protection argument seems to have elevated these courts’ scrutiny of sexual regulations to the more searching standard that, in practice, the Supreme Court now applies to laws that target lesbians, gay men, and other sexual minorities on the basis of sexual orientation.³²¹

The courts have not yet addressed an equal sexual liberty claim on the basis of gender. Given that due process sexual liberty applies equally to men and

³¹⁵ 894 A.2d 376 (Conn. App. Ct. 2006). The Connecticut statute prohibited sex between persons who, because they fell within prohibited degrees of relationship by blood, marriage, or adoption, were prohibited from marrying at state law. CONN. GEN. STAT. § 53a-72a(a)(2) (2006). In Connecticut, marriage is limited to different-sex couples; the incest prohibition was thus framed in gender-specific terms, e.g., “No man may marry his mother, grandmother, daughter, . . . and no woman may marry her father, grandfather, son” § 46b-21.

³¹⁶ *John M.*, 894 A.2d at 389.

³¹⁷ *Id.*

³¹⁸ *Id.* at 390.

³¹⁹ *Id.* at 392. By contrast, see the reasoning of the Supreme Court in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding gender-specific statutory rape law as “sufficiently related” to purported state objective of preventing pregnancy, despite the facts that not all girls under age 18 can become pregnant and the statute punished sex even if no pregnancy resulted or could have resulted). A “perfect” fit was not required with the state’s objective. *See id.* at 468.

³²⁰ *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

³²¹ *See id.*; *see also Romer v. Evans*, 517 U.S. 620 (1996).

women and that gender-based legislative classifications are subject to heightened scrutiny, gendered sexual regulations should be subject to this more rigorous standard of equal protection review.

Nonetheless, a note of caution may be appropriate here. The basis for the Supreme Court's application of this more searching form of rational-basis scrutiny under the Equal Protection Clause is, as Justice O'Connor observed in *Lawrence*, that the impugned law "exhibits . . . a desire to harm a politically unpopular group."³²² Unlike sodomy laws, the paternalistic sexual regulations described in Part I of this Article do not often conform to the aversive model of discrimination. Many of the most punitive sexual regulations are defended by their proponents as efforts to protect women, not to harm them.³²³ Rather than following the aversive models by which discrimination on the bases of race and sexual orientation are often understood,³²⁴ sex discrimination, the Court has recognized, is often "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."³²⁵

On the other hand, sexual regulations also intersect with racial stereotypes. While gendered regulations aimed at coercing wealthier white women into marriage and motherhood may superficially appear to place those women on a pedestal,³²⁶ the gendered treatment of black women and other women of color is rarely, if ever, so disguised.³²⁷ Sexual regulations that are stereotypically associated with women of color, such as the welfare "family cap," which

³²² *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

³²³ See, e.g., Reva Siegel & Sarah Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 2006, at 22 (discussing the increasing popularity, among antiabortion groups, of the argument that abortion bans protect women); *Bray v. Alexandria Clinic*, 506 U.S. 263 (1993) (Opposition to abortion is not discriminatory animus against women.) (discussed *infra* text accompanying notes 339–45); see also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding exclusion of women from the practice of law on the basis of their delicate sensibilities and maternal role) (rejected in *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

³²⁴ The Court's limited understanding of patriarchy, heterosexism, and racial inequality may be informed by the intent requirement that applies to equal protection claims. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976). Thus, the race and sexual orientation cases that reach the Supreme Court often (but not always) involve overtly hierarchical aversive or hateful forms of discrimination. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558. But see *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (affirmative action cases).

³²⁵ *Frontiero*, 411 U.S. at 684 (quoted with approval in *J.E.B. v. Alabama*, 511 U.S. 127, 133 (1994)).

³²⁶ See, e.g., Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 307 (2002) ("[T]he very same set of stereotypes that privileges economically comfortable white women also subordinates them.")

³²⁷ See generally ANGELA Y. DAVIS, *WOMEN, RACE & CLASS 175–77* (1983); Crenshaw, *Race, Gender, and Sexual Harassment*, *supra* note 44.

punishes low-income women for childbearing,³²⁸ might more closely fit the aversive model of discrimination, particularly when contrasted with abortion restrictions,³²⁹ which are often linked to paternalistic notions of protecting young and adult women from themselves.³³⁰

Another limitation of *Limon* and *John M.* as equal sexual liberty precedents is that the challengers were so similarly situated to sex offenders favored by the classification that the only relevant difference was the gender of the person with whom they had had sex.³³¹ By contrast, most of the disparate sexual regulations discussed in Parts I.A and I.C regulate sexual behavior by reinforcing stereotypical gender roles in ways that are particular to one gender or the other. Proponents of equal sexual liberty may point out, though, that in *Lawrence*, Justice O'Connor cited the Court's invalidation of a state law prohibiting the distribution of contraceptives to unmarried persons (while allowing their distribution to married couples) as an example of a law manifesting a "bare desire to harm" that did not survive this more searching standard of rational basis scrutiny.³³²

B. Equal Protection After *Geduldig*

1. Gender-Neutral Pregnancy

The most apparent contemporary legacy of *Geduldig* is that it deems facial distinctions on the basis of pregnancy to be gender-neutral, permitting governments to continue to engage in direct discrimination against pregnant women in nonemployment settings. For example, in *Ferguson v. Charleston*, a public hospital undertook a secret drug testing program at its prenatal health clinic.³³³ Health care workers tested the urine of low-income Medicaid patients whom they considered likely to be using drugs and turned positive test results over to the police.³³⁴ Of the thirty women arrested, twenty-nine were African American;³³⁵ the sole white woman targeted by this program was

³²⁸ See Roberts, *supra* note 130.

³²⁹ See *supra* notes 157–58 and accompanying text.

³³⁰ See, e.g., Siegel & Blustein, *supra* note 323.

³³¹ "Limon . . . agrees he deserves punishment. He simply disputes that he should be punished more severely for having sex with a member of the same sex." *State v. Limon*, 122 P.3d 22, 36 (Kan. 2005).

³³² *Lawrence v. Texas*, 539 U.S. 558, 580–82 (2003) (O'Connor, J., concurring) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 447–55 (1972)).

³³³ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

³³⁴ *Id.* at 71–72.

³³⁵ Brief for the Petitioners at 13, *Ferguson*, 532 U.S. 67 (No. 99-936), 2000 WL 728149.

pregnant through her relationship with an African-American boyfriend.³³⁶ The majority of the Supreme Court condemned the program as an unreasonable search in violation of the Fourth Amendment.³³⁷ Unfortunately, *Geduldig*'s legacy precluded recognition of the direct sex discrimination involved in targeting the women for their pregnancy.³³⁸ Sex discrimination was neither alleged by the petitioners nor addressed by the Supreme Court.

Similarly, in *Bray v. Alexandria*,³³⁹ *Geduldig* blinded the majority of the Court to the equal protection dimensions of abortion-clinic protesters' desire to protect fetuses by forcing women to carry them.³⁴⁰ In *Bray*, the plaintiffs brought a § 1985 action to enjoin abortion clinic protesters from blocking the entrances to abortion clinics in Washington, D.C. To perfect their § 1985(3) claim, the plaintiffs had to establish that the protesters aimed to interfere with women's right to interstate travel and that the protesters were motivated by "invidiously discriminatory animus."³⁴¹ Justice Scalia held that since *Geduldig* established that pregnancy discrimination was not necessarily sex discrimination, pregnancy classifications merely had an adverse impact on women.³⁴² He derived from this that the protesters' opposition to abortion, which motivated their efforts to physically block women's entry to the clinics to exercise a due process liberty right that can be exercised only by women, could not form the basis of a § 1985 claim unless the plaintiffs could establish discriminatory animus. To disfavor abortion, he wrote, "is not *ipso facto* sex discrimination."³⁴³ The protesters' actions could constitute intentional discrimination only if they targeted abortion "at least in part 'because of,' not merely 'in spite of,'" the effects their actions had on women.³⁴⁴ As Reva

³³⁶ Interview with Priscilla Smith, Dir. of Litigation, Ctr. for Reprod. Rights (Feb. 27, 2006).

³³⁷ *Ferguson*, 532 U.S. at 85–86.

³³⁸ See, e.g., *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1240 (Can.) (rejecting *Geduldig* and finding that pregnancy discrimination is sex discrimination). Since then, the Supreme Court of Canada has rejected coercive governmental regulation of the behavior of pregnant women in *Winnipeg Child & Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925, para. 56 (invalidating child protective services' detention of pregnant woman addicted to sniffing glue for the purpose of protecting the fetus) and *Dobson v. Dobson (Litigation Guardian)*, [1999] 2 S.C.R. 753 (precluding tort action of child born alive against mother for injuries sustained in utero during motor vehicle accident caused by pregnant woman's negligent driving).

³³⁹ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

³⁴⁰ For example, although many antiabortion advocates also oppose embryonic stem cell research, they are seldom reported to surround embryonic stem cell research clinics, block access, and assault visitors and staff.

³⁴¹ *Bray*, 506 U.S. at 267–68 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Carpenters v. Scott*, 463 U.S. 825, 833 (1983)) (internal quotation marks omitted).

³⁴² *Id.* at 271.

³⁴³ *Id.* at 273.

³⁴⁴ *Id.* at 275–76 (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

Siegel has pointed out, the purpose and effect of abortion restrictions is to force women into the social role and devalued status of motherhood.³⁴⁵

2. *Pregnancy-Based Justifications for Sex Discrimination*

Over the past three decades, in spite of *Geduldig*, the Court has made remarkable strides in recognizing constitutional rights to gender equality in the public sphere: education,³⁴⁶ employment,³⁴⁷ estate administration,³⁴⁸ the courts,³⁴⁹ and legal majority.³⁵⁰ It has often rejected pregnancy-based rationales for excluding women from public life.³⁵¹ As early as 1975, the Court rejected a state's argument that because girls "mature earlier" and generally marry earlier than boys, the state could mandate child support payments for boys until age 21, but for girls only until age 18.³⁵² "[W]here the sexes are reasonably fungible and the inequalities can be seen to function similarly—as in some elite employment situations, for example—equality law can work for sex,"³⁵³ even when the disparate treatment is justified on the basis of reproductive capacity.

"Work is a public venue in which individuals can express their autonomy, exercise responsibility, establish their worth in their own eyes, and in the eyes of others. It is, in short, nothing less than an opportunity to demonstrate their full citizenship."³⁵⁴ As discussed above, the young women, poor women, and women of color whose sexuality is constructed as a societal threat are profoundly marginalized from public life, including the workforce.³⁵⁵ Claims that challenge pregnancy-based rules excluding women from public participation redirect the Court's attention from these marginalized women toward "adults whom the Court could understand and respect: people who seek to participate in the public life of the nation, people who become pregnant despite responsible efforts to avoid it—in short, all people who wish and

³⁴⁵ See generally Siegel, *supra* note 23.

³⁴⁶ *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

³⁴⁷ *Stanton v. Stanton*, 421 U.S. 7 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

³⁴⁸ *Reed v. Reed*, 404 U.S. 71 (1971).

³⁴⁹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Orr v. Orr*, 440 U.S. 268 (1979).

³⁵⁰ *Stanton*, 421 U.S. 7; see also *Craig v. Boren*, 429 U.S. 190 (1976).

³⁵¹ *But cf. Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding requirement that only men register for the draft).

³⁵² *Stanton*, 421 U.S. at 14.

³⁵³ MacKinnon, *supra* note 12, at 1288.

³⁵⁴ Karst, *supra* note 135, at 517.

³⁵⁵ *Id.* at 536–37.

deserve to be treated as equals in society.”³⁵⁶ Only in such situations can the Court see that “everyone [is] situated similarly.”³⁵⁷

Accordingly, in *United States v. Virginia*, the Court recognized that reproductive justifications for excluding women from higher education had traditionally served to perpetuate the marginalization of women in education and in public life.³⁵⁸ In rejecting the State’s assertion that the exclusion of women from the Virginia Military Institute (VMI) served the legitimate state purpose of “diversify[ing] educational opportunities within the Commonwealth,”³⁵⁹ the Court pointed out that the exclusionary rule, which dated to VMI’s inception in 1839, was in fact based on “widely held views about women’s proper place,”³⁶⁰ that is, that “[h]igher education . . . was considered dangerous for women”³⁶¹ because, it was believed at the time, “hard study and academic competition with boys would interfere with the development of girls’ reproductive organs.”³⁶²

More recently, in *Nevada Department of Human Resources v. Hibbs*,³⁶³ the Court upheld the abrogation of states’ Eleventh Amendment immunity authorized by the Family and Medical Leave Act of 1993³⁶⁴ on the basis that the legislation was a valid exercise of congressional power under Section 5 of the Fourteenth Amendment to enact prophylactic legislation that proscribes facially constitutional conduct (i.e., by mandating unpaid family leave) to deter unconstitutional conduct (i.e., gender discrimination in employment).³⁶⁵ In a detailed review of the gendered impact of work-family conflict in the lives of men and women workers,³⁶⁶ Chief Justice Rehnquist, writing for the majority, rejected as “stereotypes” the notions that women workers were “mothers first, and workers second,” that they were likely to take leaves for pregnancy, and that women workers, as opposed to men, were likely to bear primary

³⁵⁶ Daly, *supra* note 13, at 138.

³⁵⁷ *Id.*

³⁵⁸ *United States v. Virginia*, 518 U.S. 515, 536–37 n.9, 543–44 (1996).

³⁵⁹ *Id.* at 535.

³⁶⁰ *Id.* at 536–37.

³⁶¹ *Id.* at 536.

³⁶² *Id.* at 536 n.9.

³⁶³ 538 U.S. 721 (2003).

³⁶⁴ 29 U.S.C. §§ 2615(a)(1), 2617(a)(2) (2000).

³⁶⁵ *Hibbs*, 538 U.S. at 738–40.

³⁶⁶ *Id.* at 729–34.

responsibility for child care.³⁶⁷ Although in an economy stratified by gender and class, these “stereotypes” generally hold true in practice, Chief Justice Rehnquist recognized that these notions, when implemented in law, created a “self-fulfilling cycle of discrimination” that excluded women from the work force, marginalized them within it, and forced them into roles as primary caregivers.³⁶⁸

Moreover, in *Hibbs*, the Court recognized for the first time that pregnancy-based classifications could constitute sex discrimination if they reflected and enforced sex-role stereotypes.³⁶⁹ The Court recognized that “commonplace practices of regulating ‘mothers and mothers-to-be’ reflect unconstitutional sex role stereotypes, and not simply ‘real differences’ between the sexes.”³⁷⁰ This has led to recognition in the circuit courts that “new mothers face special forms of gender bias at work.”³⁷¹

Even before the Pregnancy Discrimination Act (PDA),³⁷² the Supreme Court was quite skeptical of arguments based on women’s reproductive physiology when they were used to subordinate women in the work force. In 1977, in *Nashville Gas Co. v. Satty*, a pre-PDA Title VII case, the Supreme Court found sex discrimination when an employer “imposed on women a substantial burden that men need not suffer” by removing their accumulated seniority when they took pregnancy leave.³⁷³

In 1991, the Supreme Court disallowed an employer’s “fetal-protection” policy barring all women, except those who could prove that they were infertile, from higher-paying jobs that involved exposure to lead.³⁷⁴ The Court rejected the employer’s fetal protection rationale, pointing out that lead exposure was harmful to the reproductive health of both men and women, but “[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.”³⁷⁵ The women’s

³⁶⁷ *Id.* at 736 (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong., 2d Sess., at 33 (1986)) (internal quotation marks omitted).

³⁶⁸ *Id.*

³⁶⁹ Siegel, *supra* note 2, at 1889.

³⁷⁰ *Id.* at 1890.

³⁷¹ *Id.*

³⁷² Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

³⁷³ 434 U.S. 136, 142 (1977).

³⁷⁴ *Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

³⁷⁵ *Id.* at 197.

interests as workers outweighed the employer's purported interest in protecting fetuses the women might conceive.³⁷⁶

In 1992, the *Casey* Court upheld the due process liberty right to abortion in part on the basis of women's right to public participation. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."³⁷⁷ "Thus, to the Court in *Casey*, the participation of women, like men, in the economic and social life of the nation is constitutionally meaningful."³⁷⁸

In contrast to its robust skepticism of reproductive rationales for subordinating women at work, the Court has been remarkably credulous of reproductive rationales for laws that are understood to regulate sexual activity³⁷⁹—that is, cases in which the plaintiffs are demeaned by being subject to sexual regulation. As Susan Estrich has observed, "[I]f there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex."³⁸⁰

Even in cases where the pregnancy connection is more than a little farfetched, a majority of the Court, led by Chief Justice Rehnquist, has proven particularly susceptible to arguments that statutory gender classifications were really about regulating sexual activity. Once a statute is accepted as a regulation of sex, this majority disregards the applicable standard of heightened scrutiny to uphold the provision on the basis of the ostensibly natural difference of women's pregnancy.

³⁷⁶ The Court's affirmation of a nondiscrimination right of women workers to "choose" the same unsafe working conditions imposed on their male co-workers evokes the notorious line of freedom of contract cases that began with *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York maximum-hours legislation), in which the Supreme Court invoked economic liberty to strike down early legislative and collective bargaining efforts to establish unionization, economic security, and worker health protections. During the *Lochner* era, the Court upheld state statutes that infringed economic liberty on the bases of gender or race even as it struck down economic restrictions when they were facially neutral. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Muller v. Oregon*, 208 U.S. 412 (1908); *Adair v. United States*, 208 U.S. 161 (1908); see also David Bernstein, Note, *The Supreme Court and "Civil Rights," 1886–1908*, 100 YALE L.J. 725, 726–30 (1990).

³⁷⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

³⁷⁸ Daly, *supra* note 13, at 125.

³⁷⁹ This is consistent with the historical pattern by which, "even after [women] secured the vote in 1920, half a century would pass before women could successfully claim a constitutional right to control their own sexuality and maternity." Karst, *supra* note 135, at 529.

³⁸⁰ Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 814–15 (1991).

Thus, in *Michael M. v. Sonoma County*, the Supreme Court rejected an equal protection challenge to a statutory rape law that made it a crime for any male to have sexual intercourse with a female younger than eighteen years old (except his wife).³⁸¹ Michael M. was convicted of statutory rape when a sixteen-year-old girl “submitted to sexual intercourse” with him after he “struck [her] in the face for rebuffing [his] initial advances.”³⁸² M. argued that the statute discriminated on the basis of sex because it “presumes that as between two persons under 18, the male is the culpable aggressor”³⁸³—which it did, and he was. The remedy M. sought was to criminalize the young woman as well for having had sex before the age of majority.³⁸⁴ Unsurprisingly, the Court upheld the law; the majority found its justification in women’s reproductive difference from men.³⁸⁵

Justice Rehnquist held that the sex discrimination was justified by a “compelling” state interest in preventing “illegitimate teenage pregnancies.”³⁸⁶ The statute was not about pregnancy: Not all girls under the age of eighteen can become pregnant, and criminal liability for statutory rape punished intercourse, not pregnancy.³⁸⁷ Nonetheless, he held equal protection did not require a “perfect fit” between the legislative classification and its objective. The Rehnquist plurality did not acknowledge or purport to apply the intermediate scrutiny mandated in *Craig v. Boren*,³⁸⁸ but upheld the provision as being “sufficiently related to the State’s objectives to pass constitutional muster.”³⁸⁹

The gendered statutory rape statute, Justice Rehnquist held, “serve[d] to roughly ‘equalize’ the deterrents on the sexes” by imposing criminal sanctions on the man.³⁹⁰ “[N]ature” arranged to punish girls for underage sex by visiting “virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy” on them. “[T]he risk of pregnancy itself

³⁸¹ 450 U.S. 464 (1981).

³⁸² *Id.* at 466–67. It may be that prosecutors had opted for a statutory rape charge rather than ordinary rape because of the difficulty of proving nonconsent in the stereotyped world of the ordinary rape trial. The girl was not reported to have fought back, and she had been drinking. *Id.*

³⁸³ *Id.* at 475.

³⁸⁴ *Id.* at 473.

³⁸⁵ *Id.* at 471–76.

³⁸⁶ *Id.* at 470, 472.

³⁸⁷ *See id.* at 475.

³⁸⁸ 429 U.S. 190 (1976).

³⁸⁹ *Michael M.*, 450 U.S. at 472–73.

³⁹⁰ *Id.* at 473.

constitutes a substantial deterrence to young females.”³⁹¹ Thus the Court constructed pregnancy as nature’s punishment for the woman’s participation (as victim) in statutory rape.³⁹²

None of the opinions acknowledged the two ways in which the legislation “reinforce[d] the sex-based stereotype that young men may legitimately engage in sexual activity and young women may not.”³⁹³ It left young men, but not young women, unprotected against sexual exploitation by older partners, and it permitted a young man to have nonmarital sex as long as his partner was over eighteen, while criminally prohibiting all sex by a young woman (except with her husband).³⁹⁴

The Court’s credulous approach to reproductive rationales for sexual regulation has, regrettably, survived into the twenty-first century. In 2001, in *Nguyen v. INS*, the Court upheld the facially discriminatory citizenship legislation that confers automatic citizenship upon children born abroad to unmarried American women with foreign men, but not upon born-abroad children of unmarried American men with foreign women.³⁹⁵ The Court held that this facial sex classification simply accommodated a “biological difference”³⁹⁶ between men and women: “Fathers and mothers are not similarly situated with regard to the proof of biological parenthood.”³⁹⁷ The real purpose of this nineteenth-century legislation, Justice Kennedy concluded for the Court, was to ensure that citizenship was not conferred unless the American parent had had “the opportunity for a meaningful relationship” with the child.³⁹⁸

For the mother, he held, this opportunity “inheres in the very event of birth”³⁹⁹ because she must be present for it. The father, by contrast, is not necessarily present at the birth; he would not always “know that a child was

³⁹¹ *Id.*

³⁹² This decision seems clearly inconsistent with the holding of the Court in *Eisenstadt v. Baird*: “It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts [law].” 405 U.S. 438, 448 (1972).

³⁹³ Law, *supra* note 3, at 1001.

³⁹⁴ *Id.*; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 417 n.141 (1984).

³⁹⁵ 533 U.S. 53 (2001); 8 U.S.C. § 1409(a)(4)(A)–(C) (2000).

³⁹⁶ *Nguyen*, 533 U.S. at 64.

³⁹⁷ *Id.* at 63.

³⁹⁸ *Id.* at 65.

³⁹⁹ *Id.*

conceived,” nor could he be confident that the child was his (or, as the Court euphemistically put it, the mother might not “be sure of the father’s identity”⁴⁰⁰). The legitimation processes mandated by the Act, the Court concluded, merely ensured that the father had an equal opportunity to bond with the child.

3. *Constitutional Rights: The Abortion Discount*

Geduldig’s dichotomy between sex equality and reproductive biology has begotten a form of doctrinal analysis that approaches equal protection as if “notions of sex equality are irrelevant to the constitutional rights of pregnant women.”⁴⁰¹ Essentially, when pregnant women assert equal protection rights in the abortion context, the Supreme Court and federal appellate courts, without explanation, reduce the standard of review from the demanding form of heightened scrutiny mandated for women’s equal protection claims in *VMI* and *J.E.B. v. Alabama* to a much more deferential “undue burden” standard.

For the past fifteen years, pregnancy has served to reduce the level of scrutiny applicable to women’s constitutional claims to both due process and equal protection. Today, “fundamental” rights, which are subject to strict scrutiny,⁴⁰² are all rights that can be claimed by heterosexual men (and other “nonpregnant persons”⁴⁰³).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁰⁴ the plurality purported to uphold *Roe v. Wade* but demoted the abortion right from its status as a “fundamental” right subject to strict scrutiny.⁴⁰⁵ Instead, it

⁴⁰⁰ *Id.*

⁴⁰¹ *Law, supra* note 3, at 987.

⁴⁰² *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004) (Equal protection requires “searching judicial review” of discriminatory classifications that impact the exercise of fundamental rights.); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1153 (7th Cir. 1974).

⁴⁰³ In upholding the exclusion of pregnancy-related disability from a civil service disability plan, the Supreme Court in *Geduldig* found that the distinction between “pregnant women and nonpregnant persons” was not based on sex: “While the first group is exclusively female, the second includes members of both sexes.” *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

⁴⁰⁴ 505 U.S. 833 (1992).

⁴⁰⁵ Since *Casey*, the Court has implied that abortion may still be a fundamental right. *See Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (“[C]onsidering the matter in light of the Constitution’s guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose”). The ambiguity as to whether the

devised a unique, deferential standard of review for the due process claims of pregnant women: undue burden. Cruz rightly observes that *Casey* “[look] what had been a fundamental right subject to strict scrutiny and demot[ed] it in status to some tertium quid, subject neither to strict scrutiny nor to rational basis review but to ‘undue burden’ analysis.”⁴⁰⁶ Pregnant women now share with prisoners the dubious distinction of having a unique, deferential standard of review crafted to address their constitutional rights claims.⁴⁰⁷

This new standard of review⁴⁰⁸ for the due process liberty of pregnant women was designed to strike a balance between the woman’s rights and the interests of the state in the fetus she is carrying: “[t]o protect the central right recognized by *Roe* while at the same time accommodating the State’s profound interest in potential life.”⁴⁰⁹ A state-imposed obstacle to women’s right to abortion is valid unless “its purpose or effect is to place substantial obstacles in the path of a woman seeking abortion before the fetus attains viability.”⁴¹⁰

Nonetheless, the courts of appeals of two circuits have imported the “undue burden” standard to adjudicate the *equal protection* rights of pregnant women in cases that have nothing to do with any countervailing state interest in protecting fetal life. TRAP laws—targeted regulation of abortion providers—single out abortion for “burdensome licensing requirements that are different and more stringent than those applicable to other, comparable medical procedures, and that are designed to make abortion prohibitively expensive and increasingly difficult to obtain.”⁴¹¹ Such legislation typically imposes onerous inspection requirements authorizing warrantless searches and empowering

abortion right is still “fundamental” does not necessarily defeat claims for redress. *Cf.* Tribe, *supra* note 227, at 1898.

⁴⁰⁶ Cruz, *supra* note 9, at 253.

⁴⁰⁷ “Undue burden,” though deferential compared to strict or heightened scrutiny, is more protective of plaintiffs’ rights than the “reasonable relationship” scrutiny that applies to virtually all prisoner claims. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (Government action affecting prisoners’ constitutional rights must be upheld as long as it is “reasonably related to legitimate penological interests.”).

⁴⁰⁸ *But cf.* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 871 (1994) (arguing that the *Casey* “undue burden” standard is rooted “at least implicitly in prior precedent”).

⁴⁰⁹ *Casey*, 505 U.S. at 837 (O’Connor, J., plurality).

⁴¹⁰ *Id.*

⁴¹¹ CTR. FOR REPROD. RIGHTS, *supra* note 172, at 16. *See generally* CTR. FOR REPROD. RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS: AVOIDING THE “TRAP” (2003), http://www.reproductiverights.org/pdf/pub_bp_avoidingthetrap.pdf; CTR. FOR REPROD. RIGHTS, 2005 MID-YEAR LEGISLATIVE SUMMARY 4–5 (2005), http://www.reproductiverights.org/pdf/mid_year_report_05.pdf.

government inspectors to copy confidential medical records,⁴¹² unusual licensing requirements,⁴¹³ and specifications for the architectural design of the facility.⁴¹⁴ They burden women's right to obtain abortions while no similar legislation burdens men's liberty or privacy regarding reproductive health care. While certain restrictions on abortion may engage state interests in fetal protection in ways that other outpatient medical procedures of similar safety and complexity do not, TRAP laws are not justified on the basis of fetal protection. State governments do not claim that they are trying to prevent abortion by driving clinics out of business. Rather, the asserted state goal is to protect the health of women undergoing abortion procedures.⁴¹⁵

Abortion providers have brought equal protection challenges to TRAP laws, arguing that because such legislation burdens women's exercise of fundamental rights, their equal protection challenges are entitled to strict scrutiny.⁴¹⁶ Courts, though, have hesitated to recognize a sex equality interest in abortion or other reproductive health care. In two recent cases, for example, the Fourth⁴¹⁷ and Ninth⁴¹⁸ Circuits rejected sex-based equal protection challenges to TRAP laws. Courts of appeals in both circuits refused to subject the sex classifications to strict or heightened scrutiny on judicial review. Rather, these courts held, without explanation, that the Supreme Court's use of a deferential "undue burden" standard for abortion-related due process liberty and privacy claims in *Casey*⁴¹⁹ somehow established a level of scrutiny that supplanted heightened scrutiny of women's equal protection claims in that context. The deferential *Casey* standard, though, had been developed to balance women's liberty and privacy against the state interest in protecting fetal life—an interest that was not related to the licensing and facility

⁴¹² See, e.g., *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 537 (9th Cir. 2004); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 160 (4th Cir. 2000).

⁴¹³ See *Tucson*, 379 F.3d at 537; *Greenville*, 222 F.3d at 161.

⁴¹⁴ *Tucson*, 379 F.3d at 537; *Greenville*, 222 F.3d at 160.

⁴¹⁵ See, e.g., *Tucson*, 379 F.3d at 546; *Greenville*, 222 F.3d at 168, 171.

⁴¹⁶ Classifications made in legislation that burdens a fundamental right are subject to strict scrutiny. *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004) (Equal protection requires "searching judicial review" of discriminatory classifications that impact the exercise of fundamental rights.); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1153 (7th Cir. 1974). *But cf.* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006) (arguing that laws burdening fundamental rights only occasionally receive strict scrutiny and are usually protected by less stringent standards).

⁴¹⁷ *Greenville*, 222 F.3d 157.

⁴¹⁸ *Tucson*, 379 F.3d 531.

⁴¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

requirements imposed on abortion clinics by such laws. By using the deferential *Casey* standard to replace the strict or heightened⁴²⁰ scrutiny that the women's equal protection claims would normally warrant, these courts effectively took the view that the equality rights of pregnant women are attenuated when their unequal treatment relates to abortion.

On at least one occasion, the notion that pregnancy somehow reduces a woman's constitutional rights has bled into the Supreme Court's analysis of the equal protection rights of pregnant women. In *Bray v. Alexandria*, Justice Scalia concluded that the level of equal protection scrutiny of sex equality claims was reduced to rational basis when the claims concerned abortion.⁴²¹ The Court's abortion-funding decisions, *Maier v. Roe*⁴²² and *Harris v. McRae*,⁴²³ he held, "establish[ed] conclusively" that opposition to abortion is "not *ipso facto* sex discrimination"⁴²⁴—even though the plaintiffs in those cases had not alleged sex discrimination. In *Maier* and *Harris*, the plaintiffs' equal protection claims had challenged the legislative distinction by which Medicaid funding was provided to low-income women for childbirth and other medically necessary care, but denied for abortion.⁴²⁵ Justice Scalia held that since the Court had applied rational-basis scrutiny in these cases, rational basis was the appropriate level of scrutiny for equal protection sex claims when they concerned abortion rights.⁴²⁶ Thus the courts in *Tucson Woman's Clinic v. Eden*, *Greenville Women's Clinic v. Bryant*, and *Bray* all applied an abortion discount to the level of scrutiny afforded to the equality claims of pregnant women seeking abortion.

⁴²⁰ See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003); *United States v. Virginia*, 518 U.S. 515, 555 (1996). In recent decades, no gender-based classification has survived this demanding level of scrutiny at the Supreme Court. By contrast, over the past two decades, the Court has only twice found that an antiabortion law imposes an "undue burden" on women.

⁴²¹ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271–73 (1993).

⁴²² 432 U.S. 464 (1977) (*Roe v. Wade* establishes no government obligation to fund nontherapeutic abortion for indigent women.).

⁴²³ 448 U.S. 297 (1980) (*Roe v. Wade* establishes no government obligation to fund abortion for indigent women even when abortion is medically necessary.).

⁴²⁴ *Bray*, 506 U.S. at 273.

⁴²⁵ At the time *Maier v. Roe* and *Harris v. McRae* were decided, the strict scrutiny mandated by the *Roe v. Wade* due process liberty right to decide about abortion offered a more stringent standard of review than the enhanced rational-basis scrutiny accorded to sex classifications by the equal protection jurisprudence of the time. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

⁴²⁶ *Bray*, 506 U.S. at 273.

C. Equal Sexual Liberty

The Supreme Court has now recognized that all adults (presumably, including women⁴²⁷) have a due process interest in freedom from state coercion in determining their private sexual lives.⁴²⁸ Moreover, the Court now recognizes that at least some pregnancy-based classifications that reinforce sex stereotypes constitute sex-based state action for the purpose of equal protection.⁴²⁹ Meanwhile, the Court's scrutiny of gender-based equal protection claims, at least with regard to claims to equal workforce participation, is now stronger than ever.⁴³⁰ The time is right, then, to revisit the legacy of *Geduldig*. Pregnancy can no longer serve as an exception to women's equality.

The equal sexual liberty argument has been made before.⁴³¹ Throughout the 1980s and 1990s, feminist legal commentators argued that women's equality encompassed rights to reproductive control and sexual autonomy.⁴³² Meanwhile, other scholars contended that the courts' decisions in *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey* established a due process right to sexual autonomy.⁴³³

Lawrence affirms for the first time that the *Griswold–Eisenstadt–Roe–Carey–Casey* line of cases had established a due process right to freedom from state coercion in sexual decision making (which the Court in *Bowers* had wrongly denied). The nonmarital, nonprocreative sexual pleasure that has always been afforded to heterosexual men in law and in practice now extends

⁴²⁷ *But see* *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1242, 1253 (N.D. Ala. 2006) (holding that *Lawrence* due process liberty extends only to members of “discrete and insular minorities” and to “sexual practices” and “implements” that are “common to a homosexual lifestyle”; since married and unmarried heterosexual men and women could use the banned sex toys, due process sexual liberty could not encompass them).

⁴²⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴²⁹ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003). *See generally* Siegel, *supra* note 2.

⁴³⁰ *Hibbs*, 538 U.S. 721; *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). *See generally* Siegel, *supra* note 2.

⁴³¹ *See, e.g.*, *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting from denial of certiorari to man and woman who brought equal protection and privacy claims after they were discharged from their employment for cohabiting without being married and noting that petitioners' equal protection claim “merits more than minimal scrutiny,” and their “rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble other aspects of personal privacy to which we have extended constitutional protection”).

⁴³² *See, e.g.*, Law, *supra* note 3, at 1019 n.227; articles cited in Siegel, *supra* note 23; MacKinnon, *supra* note 12, at 1319; *see also* Cruz, *supra* note 140, at 372; Daly, *supra* note 13.

⁴³³ Daly, *supra* note 13; Cruz, *supra* note 140.

to participants in private, consensual same-sex sexual activity. Although the Mississippi Supreme Court and the Eleventh Circuit Court of Appeals might have it otherwise,⁴³⁴ women and men of all sexual orientations now have a constitutional right to sex as pleasure, not just procreation. Equal sexual liberty constructs the deprivation of sexual liberty as a wrong to women which has not yet been recognized in due process or equal protection jurisprudence.

An equal sexual liberty approach to the gendered regulation of sex is built on the twin premises that sexual liberty is an important, constitutionally protected interest for women—not just for men—and that robust standards of equal protection should apply to government restrictions on women’s sexuality, as well as on their participation in public life. Thus equal sexual liberty puts government to a stringent standard of justification when it burdens women with legal, financial, reproductive, and health consequences of heterosex that are not ordinarily imposed on men.

Equal sexual liberty requires an equal protection analysis. It does not turn on affirming due process sexual liberty as a fundamental right, as the courts appear reluctant to do. Nor does it require the Supreme Court to repudiate *Geduldig*. Although *Geduldig* is best remembered for establishing that pregnancy discrimination was not sex discrimination, the Court actually held that “not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*.” As Siegel points out, this “leaves open the possibility that *some* legislative classifications concerning pregnancy *are* sex-based classifications like those considered in *Reed* and *Frontiero*.”⁴³⁵ In particular, the *Geduldig* Court acknowledged that pregnancy-based distinctions could constitute facial sex classifications where they served as “mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.”⁴³⁶ By illuminating the longstanding legal tradition of using reproductive difference to justify sexual regulations that relegate women to traditional sexual and reproductive roles, equal sexual liberty illustrates that most sexual regulations that are justified by pregnancy are, in fact, designed to enforce a sexual and moral double standard that subordinates women and liberates men.⁴³⁷ State

⁴³⁴ PHE, Inc. v. State, 877 So.2d 1244 (Miss. 2004); Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1244 (11th Cir. 2004).

⁴³⁵ Siegel, *supra* note 2, at 1891.

⁴³⁶ *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974).

⁴³⁷ Law, *supra* note 3, at 960–61 n.19; MacKinnon, *supra* note 12, at 1287; Weinrib, *supra* note 30, at 253–54.

action that imposes burdens on women's sexual activity that are not imposed on men "rests on sex-role stereotypes[.] [I]t is sex-based state action within the meaning of the Equal Protection Clause."⁴³⁸

Thus an equal sexual liberty analysis may help to dispel the credulity and deference that typify the courts' approach to equal protection analysis of gendered sexual regulations.⁴³⁹ By revealing such regulations as sex-based state action, equal sexual liberty raises the standard of review applicable to sexual liberty claims from the deferential rational basis approach of the post-*Lawrence* due process liberty cases⁴⁴⁰ to a demanding form of heightened scrutiny.⁴⁴¹

Another advantage of an equal sexual liberty approach is that it redirects the constitutional analysis from the right of claimants to engage in specific sexual activities that courts may find distasteful⁴⁴² to the broader characterization of sexual liberty mandated by the Court in *Lawrence*.⁴⁴³ Rather than focusing on particular prohibited acts, equal sexual liberty allows challengers to focus on rights construed more broadly, by demonstrating that either (1) a rule or practice restricts women's sexual activity while liberating that of men or (2) the sexual regulation enforces gender stereotypes. Obviously, there will be considerable overlap between the two arguments. The citizenship provisions upheld in *Nguyen*, for example, make parenthood (for the purpose of citizenship) automatic for women but optional for men, while reinforcing the stereotype that men, but not women, should be legally entitled to abdicate responsibility for their nonmarital children.

Equal sexual liberty addresses some of the reasons for the lackluster protections afforded to sexual liberty under due process and equal protection jurisprudence. This analysis reveals the unconstitutional gender stereotypes that inform the simultaneous legal entrenchment of heterosexual pleasure as a male entitlement and of pregnancy as a punishment for women's participation in disfavored heterosex. The rarity of coercive regulation of men's sexual

⁴³⁸ Siegel, *supra* note 2, at 1873.

⁴³⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

⁴⁴⁰ See *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005); *Williams v. Attorney Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1244 (11th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004); *State v. Limon*, 122 P.3d 22 (Kan. 2005).

⁴⁴¹ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *United States v. Virginia*, 518 U.S. 127 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

⁴⁴² E.g., *Williams IV*, 378 F.3d 1232.

⁴⁴³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

behavior “[has] not [been] visible as a lack because it is relatively unthinkable that men would be . . . [regulated] in these ways”⁴⁴⁴—unless they are gay, or black, or prisoners.⁴⁴⁵

Equal sexual liberty may also help alleviate the difficulty the Court has encountered in “differentiating between forms of state action that properly acknowledge sex differences and forms of state action that perpetuate sex stereotypes that denigrat[e] . . . either sex or impose artificial constraints on an individual’s opportunity.”⁴⁴⁶ By linking contemporary to historic patterns of gendered sexual regulation, equal sexual liberty analysis reveals that much state action based on reproductive “sex differences” reflects and enforces sex role stereotypes that the Court has repeatedly recognized as unconstitutional.⁴⁴⁷ These stereotypes include the notions “that caring for family members is women’s work”;⁴⁴⁸ that women alone should bear responsibility for birth control, pregnancy, and children;⁴⁴⁹ that a woman’s only proper role is as wife and mother;⁴⁵⁰ and the “unreasonable” notion that the state may “prescribe[] pregnancy and the birth of an unwanted child as punishment for fornication.”⁴⁵¹ By revealing the close links between these stereotypes and the sexual double standard—that is, the notion that premarital chastity may be morally and legally required of women, but not men⁴⁵²—equal sexual liberty offers a compelling argument that the double standard, too, constitutes an unconstitutional gender stereotype.

By illuminating these patterns of sexual regulation, equal sexual liberty also begins to close the *Geduldig* pregnancy loophole by disrupting the assumption that reproductive justifications for facial sex classifications are gender neutral. To justify a gendered sexual regulation, government must assert an “exceedingly persuasive” justification⁴⁵³ that is not itself unconstitutional.

⁴⁴⁴ MacKinnon, *supra* note 12, at 1297.

⁴⁴⁵ See *supra* notes 181–93 and accompanying text.

⁴⁴⁶ Siegel, *supra* note 2, at 1888 (internal quotation marks omitted).

⁴⁴⁷ See, e.g., Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003).

⁴⁴⁸ *Id.* at 731.

⁴⁴⁹ *Id.* at 736.

⁴⁵⁰ Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (cited as example of unconstitutional gender stereotyping in *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973)).

⁴⁵¹ Eisenstadt v. Baird, 405 U.S. 438, 448 (1972); see Cruz, *supra* note 140, at 372–73.

⁴⁵² The sexual “double standard” is widely recognized as discriminatory. See *supra* note 437.

⁴⁵³ United States v. Virginia, 518 U.S. 515, 524 (1996); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

The government's objectives must be "important" and "genuine, not hypothesized or invented post hoc,"⁴⁵⁴ like the objectives identified by the Court in *Nguyen*⁴⁵⁵ and *Michael M.*⁴⁵⁶ Furthermore, governments have no constitutional authority to prefer "an allocation of family responsibilities under which the wife plays a dependent role."⁴⁵⁷ Likewise, equal sexual liberty precludes governmental imposition of an official morality that frees men from the reproductive consequences of sexual behavior but deploys pregnancy-related sanctions to coerce women into chastity.

The reproductive rationales offered by governments to justify gendered sexual regulations—discouraging "promiscuity," preventing unwed pregnancy, protecting minors, and fetal protection—may themselves be informed by stereotypical notions about the proper roles of women and girls. Discouraging promiscuity, in particular, would at least arguably fail to qualify as an "important" government objective, as it impermissibly assigns women and girls to a "stereotypic and predefined place."⁴⁵⁸ Heightened scrutiny requires a substantial relationship between a government objective and the discriminatory means adopted;⁴⁵⁹ governmental efforts to reduce "promiscuity" by suppressing access to forms of contraception used only by women⁴⁶⁰ suggest that the true objective of contraceptive restrictions defended on this basis is impermissible: such regulations seek to suppress promiscuity among women but not among men.

Similarly, the gender stereotypes promoted in government-funded abstinence-promotion programs may be challenged for their promotion of a sexual double standard in order to discourage sexual activity among young women.⁴⁶¹ Such curricula are arguably "supported by no more substantial justification than 'archaic and overbroad' generalizations or 'old notions,' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed' than with contemporary reality."⁴⁶²

⁴⁵⁴ *United States v. Virginia*, 518 U.S. at 533.

⁴⁵⁵ *Nguyen v. INS*, 533 U.S. 53, 67 (2001).

⁴⁵⁶ *Michael M. v. Sonoma County*, 450 U.S. 464, 470–71 (1981).

⁴⁵⁷ *Orr v. Orr*, 440 U.S. 268, 279 (1979).

⁴⁵⁸ *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

⁴⁵⁹ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁴⁶⁰ *See supra* notes 194–97 and accompanying text (FDA delayed approval of emergency contraception; Missouri defunding of contraception).

⁴⁶¹ *See infra* notes 466–69 and accompanying text.

⁴⁶² *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977).

Moreover, quite apart from the ineffectiveness of abstinence-promotion programs, which fail to serve the government objective of deterring premarital sex,⁴⁶³ a state objective of deterring sex among teenagers is at least arguably illegitimate. As Cruz points out, “if a state has some legitimate interest in deterring people from engaging in sex, anticontraceptive laws should pass muster, for . . . [the] pains from denial of this form of physical intimacy would not be constitutionally significant.”⁴⁶⁴ The Court has forbidden state governments to promote morality by banning the distribution of contraceptives to teenagers.⁴⁶⁵ Similar reasoning might invalidate a state objective of deterring sex among teenagers as well as adults.

State action that subjects women and girls to the risk of unplanned pregnancy in order to dramatize or enforce the state’s preferred public morality is antithetical to the values underlying the equal protection and due process liberty guarantees. “Although the State may properly perform a teaching function, . . . an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message”⁴⁶⁶ even if that message is “otherwise legitimate.”⁴⁶⁷ Cruz notes that due process should forbid governments to “use the threat of increased risk of disease or serious bodily harm as a means of modifying persons’ behavior” regardless of the legitimacy of the state objective.⁴⁶⁸ It is equally “wrongful for government to use the

⁴⁶³ All rigorous studies of these programs have shown that they are ineffective: they do not reduce rates of adolescent pregnancy or STI, nor do they deter participants from having premarital sex. *Waxman Report*, *supra* note 160, at 3; Elaine A. Borawski et al., *Effectiveness of Abstinence-Only Intervention in Middle School Teens*, 29 AM. J. HEALTH BEHAV. 423 (2005); Alba DiCenso et al., *Interventions to Reduce Unintended Pregnancies Among Adolescents: Systematic Review of Randomised Controlled Trials*, 324 B.M.J. 1426 (2002); DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, DO ABSTINENCE-ONLY PROGRAMS DELAY THE INITIATION OF SEX AMONG YOUNG PEOPLE AND REDUCE TEEN PREGNANCY? 5 (2002), http://www.teenpregnancy.org/resources/data/pdf/abstinence_eval.pdf; DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, SUMMARY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY 15 (2001), <http://www.teenpregnancy.org/resources/data/pdf/emeraanswsum.pdf>; DEBRA HAUSER, ADVOCATES FOR YOUTH, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT 2–3 (2004), <http://www.advocatesforyouth.org/publications/stateevaluations.pdf>; John B. Jemmott et al., *Abstinence and Safer Sex HIV Risk-Reduction Interventions for African American Adolescents: A Randomized Controlled Trial*, 279 J. AM. MED. ASS’N 1529, 1529 (1998); Karin K. Coyle et al., *Draw the Line/Respect the Line: A Randomized Trial of a Middle School Intervention to Reduce Sexual Risk Behaviors*, 94 AM. J. PUB. HEALTH 843 (2004).

⁴⁶⁴ Cruz, *supra* note 140, at 324.

⁴⁶⁵ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 715 (1977).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ Cruz, *supra* note 140, at 372.

threat of bringing a new person into the world as a means of promoting desired behavior, here, the practice of abstinence.”⁴⁶⁹

Thus, equal sexual liberty reveals that, far from serving as presumptively neutral justifications for sexual regulation, pregnancy and other reproductive rationales should be viewed as red flags that can alert the court to the risk of gender stereotyping.

Legal rules imposing discriminatory surveillance and punishment on young women seeking reproductive health care, such as the Kansas “kiss-and-tell” directive and government attempts to seek disclosure of confidential reproductive health care records, often have been defended as attempts to protect children against sexual abuse.⁴⁷⁰ Equal sexual liberty may offer a promising approach to gendered sexual regulations based on the protection of minors. In the two cases in which an equal sexual liberty claim has been advanced to challenge the discriminatory means by which the state chose to protect young people against sexual abuse,⁴⁷¹ the courts deployed an appropriately skeptical view of the child-protective rationales asserted by the states under a “more searching form of rational basis review.”⁴⁷²

Finally, equal sexual liberty can be used to challenge the abortion discount that has too often reduced the level of scrutiny applied to the equal protection claims of pregnant women who seek to exercise their due process rights to abortion. Equal sexual liberty analysis would require that government establish an “exceedingly persuasive justification” for sex classifications, even when the woman’s equality claim concerns abortion. The government interest in fetal protection should go to the “importance” of the governmental objective for the classification rather than to the level of scrutiny accorded to women’s equality claims.

Even in those pregnancy discrimination and abortion cases which do involve a state interest in protection of fetal life, the heightened scrutiny required by equal sexual liberty requires that women’s liberty and equality rights must be taken much more seriously in the balancing exercise than they have been under the undue burden standard. Fetal protection rationales offered by the state must be viewed with at least as much skepticism as the Kansas

⁴⁶⁹ *Id.* at 376.

⁴⁷⁰ *See supra* notes 204, 212–13 and accompanying text.

⁴⁷¹ *State v. John M.*, 894 A.2d 376, 380 (Conn. App. Ct. 2006); *State v. Limon*, 122 P.3d 22, 35 (Kan. 2005).

⁴⁷² *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (quoted in *Limon*, 122 P.3d at 29).

court applied to the state child-protection rationale that it ultimately rejected in *Limon*.

Equal sexual liberty is a liberal critique, and may share many of the shortcomings of that tradition in addressing the very real racial, gendered, and sexual inequalities that constrain women's autonomy and jeopardize their well-being in ways that the Court's liberty and equality jurisprudence has thus far failed to adequately address.⁴⁷³ Equal sexual liberty will thus work best in cases such as *Nguyen, Michael M.*, and those involving abstinence-only programs that promote gender stereotypes in public schools, where reproductive difference is advanced as a justification for formal inequality on the basis of gender. An equal sexual liberty approach will likely also prove useful in challenging those sexual regulations that can be most readily constructed as governmental interference with liberty, that is, as claims to be left alone. This group of claims might include abortion restrictions such as antiabortion "counseling" requirements and mandatory delay, as well as differential regulation of masturbation aids.

Some of the most damaging restrictions on access to contraception and abortion, though, are the financial barriers caused by the denial of public funding.⁴⁷⁴ Low-income women cannot afford to exercise the decisional autonomy that is ostensibly safeguarded by *Roe* and *Casey*. A liberty-based equal protection argument will not likely establish a positive entitlement to government support of women's reproductive rights.⁴⁷⁵ Nonetheless, as I have argued with respect to the criminal targeting of pregnant women in *Ferguson v. Charleston*,⁴⁷⁶ equal sexual liberty can expose the reproductive targeting of women and their health care as a form of gender inequality that should be subject to heightened scrutiny under the equal protection clause. Under this analysis, funding restrictions on abortion and contraception may be reframed as conventional claims to formal sex equality, rather than as novel or illegitimate claims to "positive rights."

Equal sexual liberty means that pregnancy cannot be used to reduce the level of equal protection scrutiny accorded to the sex discrimination claims of pregnant women. Indeed, the notion that pregnancy somehow attenuates

⁴⁷³ See, e.g., ROBIN WEST, *CARING FOR JUSTICE* 138–64 (1997); Crenshaw, *Race, Reform and Retrenchment*, *supra* note 44; MacKinnon, *supra* note 12; Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

⁴⁷⁴ See *supra* notes 157, 173 and accompanying text.

⁴⁷⁵ See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

⁴⁷⁶ See *supra* notes 333–38 and accompanying text.

women's entitlement to constitutional protections is repugnant to their equal citizenship.

CONCLUSION

In *Lawrence*, the Court accepts, utilizes, and invites an equality spin on due process sexual liberty. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."⁴⁷⁷ The equal sexual liberty argument advanced here proposes to fortify the rather feeble protections accorded to sexual liberty under due process and equal protection jurisprudence by highlighting the ways in which gendered sexual regulations serve to bind women to punitive legal, financial, health, and reproductive consequences of their heterosexual conduct while exempting men from any such responsibilities. An equal sexual liberty approach transcends *Geduldig*'s legacy by illustrating that sexual regulations justified by women's reproductive "difference" reflect and enforce the stereotypical gender roles that are prescribed by official sexual morality.

The ability to give birth "is a biological privilege, not an opportunity for the State to constrict women's lives."⁴⁷⁸ Rather than accepting the *Geduldig*-inspired view that biology mandates pregnancy as an exception to women's equality, the Supreme Court of Canada, which long ago rejected *Geduldig*,⁴⁷⁹ has taken the opposite view: "Biology dictates that only women become pregnant. In light of this very demanding biological reality, the courts should be hesitant to impose additional burdens on pregnant women."⁴⁸⁰ Here in the United States, if equal sexual liberty is taken seriously, we may hope that the courts will eventually reject the legacy of *Geduldig* or distinguish it into irrelevance. Women's capacity for pregnancy might no longer serve as an exception to their equality rights. Rather, women should be taken seriously as

⁴⁷⁷ *Lawrence*, 539 U.S. at 575.

⁴⁷⁸ Daly, *supra* note 14, at 134.

⁴⁷⁹ *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219, 1240 (Can.) (Dickson, C.J.C., for the majority, rejecting the *Geduldig v. Aiello* approach on the grounds that it "does not fit well with the [non-intent-based] Canadian approach to issues of discrimination," and concluding that discrimination on the basis of pregnancy is sex discrimination). "In retrospect, one can only ask—how could pregnancy discrimination be *anything other* than sex discrimination? . . . Discrimination on the basis of pregnancy is a form of sex discrimination because only women have the capacity to become pregnant." *Id.* at 1242.

⁴⁸⁰ *Dobson v. Dobson (Litigation Guardian)*, [1999] 2 S.C.R. 753, 797 (Can.) (Cory, J., for the majority).

holders of constitutional liberty and equality rights through all stages of their social and sexual lives.

