

HETEROSEXUAL REPRODUCTIVE IMPERATIVES[†]

David B. Cruz^{*}

INTRODUCTION

This Article began as the second annual Mary C. Dunlap Memorial Lecture on Sex, Gender, and Social Justice, which I was deeply honored to deliver at the University of California, Boalt Hall School of Law in February 2006. As I recounted there, Mary was a very *good* fighter, a superb trial attorney, and, eventually, a Supreme Court advocate. Her U.S. Supreme Court brief in the case of *Richmond Unified School District v. Sonja Lynn Berg* was exemplary.¹

[†] A version of this Article was presented as the Mary C. Dunlap Memorial Lecture on Sex, Gender, and Social Justice at the University of California, Berkeley, Boalt Hall School of Law with the title *Reproductive Ideologies in the Courts: The Stakes for Women, Queers, and Transgendered Persons*, on February 23, 2006. I have tried to preserve the tone of that live presentation. Another version was presented at the Equality and Reproductive Rights Symposium co-sponsored by the Center for Reproductive Rights and by Social Justice Initiatives at Columbia Law School on March 4, 2006. I am grateful to the helpful comments of my respondent at the Dunlap Lecture, Eveline Shen, Executive Director of Asian Communities for Reproductive Justice (<http://www.apirh.org/index.html>); my moderator at the CRR Symposium, Professor Sylvia Law; the Symposium convener, Kim Buchanan; Reva Siegel, author of the Symposium's Introduction; and many participants at both events.

In my contribution to the volume of what was then called the *Berkeley Women's Law Journal* that paid tribute to Mary Dunlap, David B. Cruz, *A Real People Person*, 19 BERKELEY WOMEN'S L.J. 7 (2004), I explained that I would not be the person I am were it not for the intersections of my life with Mary's. Mary's influence on me was deep: she inspired. When I was in high school, the one thing I knew I did not want to be was a lawyer. Yet Mary's passion for justice and her keen intellect showed me that one could pursue law in a noble fashion—that law still could be a tool for justice even after what seemed to many the peak of the civil rights movement for racial justice in the United States. Mary's compassion and humor showed me that even tremendously successful lawyers could remain *good* people, fun people, the sort of people I'd like to know and hang out with—and be.

An out-and-proud lesbian Stanford law professor, Mary helped encourage me to continue on the perpetual journey of coming out in a society conditioned by a presumption of heterosexuality. So, persuaded by Mary's words *and life* that I, a gay Mexican-American son of a grocery clerk and a college student/mother/homemaker, could survive the law, I went off to study a new field. And, some years later, there I was, standing before a room full of people who believed that social justice is worth fighting for, who knew that sex and gender have been and continue to be sites where the fight for justice is ongoing and critical, and who appreciated the spirit of the scrappy fighter and path breaker, Mary Dunlap. This Article is dedicated to Mary and to her partner Maureen Mason, the force behind the Mary C. Dunlap Memorial Lecture on Sex, Gender, and Social Justice.

^{*} Professor of Law, University of Southern California, Gould School of Law.

¹ Brief for the Respondent, *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977) (No. 75-1069).

In that case, Sonja Berg was the victim of a school district's double bind. She was subjected to mandatory pregnancy leave (despite her physician's assurance that she was capable of work), and yet simultaneously denied use of her earned disability leave. Mary understood this treatment to be unlawful sex discrimination under Title VII, and her brief was trenchant. After recounting the background of the school district's policies, Mary concluded: "These facts evidence petitioners' overarching purpose to discriminate against certain women employees, by manipulating the terms and conditions of their employment to the detriment of their economic equality and human liberty, under the pretext of protecting these women, their offspring, and their students."² She demolished the testimony of one of the school district's witnesses as "gross sex-stereotyping . . . of pregnant women as doddering, irrational fools."³ Moreover, although the district refused to let pregnant women teachers use accumulated sick leave for their actual disability,⁴ district policy provided that "[p]aternity leave of one . . . day may be granted the male employee without loss of pay during or after the confinement of his wife."⁵ "This 'have-a-cigar' approach to the economics of childbirth," in Mary's pithy phrasing, underscored that the district's "denial of earned sick pay to pregnant employees . . . [was] founded upon nothing but an impermissibly sex-discriminatory view of fathers as breadwinners and mothers as economic dependents"⁶ And, Mary rejected the defendant's argument that pregnancy was not treated as a disability because it was a natural condition and not an illness or an injury.⁷

The school district's policy was an example of an ideologically driven rule with inegalitarian effects. It discriminated against women, and it did so in the service of an ideological, gendered, naturalized view of pregnancy and childrearing—that is, of the processes of procreation and reproduction of individuals and society. Some people in contemporary U.S. society appear to adhere to such ideological, gendered, and naturalized views of pregnancy and childrearing. The species and society must be reproduced, this is naturally and properly done only by women and men acting together, and women, queer, and transfolk should just recognize the primitive truth of that and willingly bear the

² *Id.* at 23.

³ *Id.* at 27.

⁴ *Id.* at 41.

⁵ *Id.* at 42.

⁶ *Id.*

⁷ *Id.* at 44.

burdens of laws designed to reinforce this natural reality.⁸ As discussed below, this is precisely the sort of gendered ideology that has been deployed—and is still at work today—in courts and legal scholarship to limit the reproductive autonomy of women, to deny equal marriage rights to same-sex couples, and to constrain the circumstances under which government will recognize the lived gender of transsexual or transgendered persons. These gendered ideologies should give the overlapping groups of women, lesbian people, and transgendered persons a common cause to fight for social justice and to embrace each other’s justice claims, both in court and in the broader political arena.

Part I of this Article addresses ideologies of heterosexual reproduction in perhaps their most obvious context—women’s rights to reproductive autonomy. Part II then examines the deployment of heterosexual reproductive imperatives (to attempt) to defeat the claims of same-sex couples to equal marriage rights. Part III considers the role of ideologies of heterosexual reproduction in the context of claims to legal recognition of their gender advanced by transpersons.

I. HETEROSEXUAL REPRODUCTIVE IMPERATIVES, ACT I: NATURAL, INEVITABLE FEMALE REPRODUCTION

This Part traces ideologies of naturalized heterosexual reproduction in the first of three contexts, identifying such heterosexual reproductive imperatives as important set pieces in dramas of life and law. What I mean here by ideology might be best described as an imperfect *Weltanschauung* or “systematic and totalized world view.”⁹ The relevant worldviews are imperfect in the sense of not necessarily being completely systematic and totalized. As Alan Hunt properly observes, “Consistent world views may exist, but they must be treated as special or exceptional cases.”¹⁰ “[A]n

⁸ See, e.g., Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 671 (2004) (asserting that allowing same-sex couples to marry civilly “threatens the procreative good of the larger community”); *id.* at 675 (“[T]he redefining of marriage is subversive of the state objective in sustaining the national population by responsible procreation.”); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1014–15 (2002) (recounting “nature”-based opposition to recognition of sex reassignment or confirmation surgeries); *id.* at 1014 (quoting abortion opponents relying on “nature” to ground their claims).

⁹ Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC’Y REV. 11, 13 (1985).

¹⁰ *Id.*

ideology is not a unitary entity. It draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents.”¹¹ “[I]deologies . . . select, sort, order, and reorder the elements of thought.”¹² With that understanding in mind, this Part tracks ideologies of women as natural, inevitable reproducers from nineteenth century manifestations in constitutional jurisprudence about women’s rights and roles through more modern incarnations, particularly in the context of women’s claims to autonomy rights with respect to their reproductive capacity and roles. As will become clear, it is the content and effects of the ideologies that are troubling, not simply the fact that law is being animated by ideologies—a circumstance that may well be inevitable.

Let me start with the role of ideologies of heterosexual reproduction and their (perhaps too obvious) relation to women’s reproductive rights. Frequently undergirding opposition to women’s reproductive rights has been a normative, ideological vision of women as naturally destined to self-sacrifice, to bear and to raise children for men and for society.¹³ We can see this in Justice Bradley’s infamous concurrence in *Bradwell v. Illinois* in 1873.¹⁴ While agreeing with the Court that Illinois did not violate the Constitution when it barred women from practicing law, Bradley’s opinion trumpeted his vision of women’s proper role:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The

¹¹ *Id.* at 16.

¹² *Id.*

¹³ The observations in this Part do not purport to be entirely new. The legal literature contains fine examinations of ideologies of “women as vessels for procreation and social reproduction.” Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J.L. MED. & ETHICS 89, 96 (2004); see, e.g., Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At The Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1258–59 (1992); Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147 (1996).

¹⁴ 83 U.S. (16 Wall) 130 (1873).

paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.¹⁵

Although the U.S. Supreme Court began to apply the Equal Protection Clause to protect women from outmoded assumptions and archaic stereotypes about their proper role starting in the 1970s,¹⁶ Bradley-esque visions of woman's "sphere" did not disappear, even if they sometimes took a more subtle form, illustrating the dynamic that Reva Siegel has called "preservation-through-transformation," whereby challenges to a status hierarchy can result in changes to legal rules or their justificatory rhetoric or both.¹⁷ One place where such gendered ideologies surfaced was in the reproductive control context.

In 1973, the Court held in *Roe v. Wade* that the Constitution protected a woman's right to choose to have an abortion.¹⁸ The ruling was 7–2, with Associate Justices White and Rehnquist dissenting.¹⁹ The sizeable majority rejected the state's argument in defense of its sweeping criminal abortion law, which the Court characterized as contending that "[o]nly when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail."²⁰

Note the phraseology: "pregnant *mother*."²¹ She is not a pregnant *woman* or pregnant *female*, where those might perhaps be understood as factual biological terms.²² Rather, she is a *mother*, which reflects an assumption not simply about biology but about her proper role. This is unlikely to be merely an innocent slip of the pen. Rather, it is a reflection of a particular world view about the order of things—the gendered order of things—that calls upon women to "fulfil the noble and benign offices of wife and mother," as Justice Bradley had earlier put it.²³ Even supporters of some reproductive rights for women recognize this. Justices O'Connor, Kennedy, and Souter surprised many in the legal community in 1992 in *Planned Parenthood of Southeastern*

¹⁵ *Id.* at 141 (Bradley, J., concurring).

¹⁶ *See, e.g.,* Reed v. Reed, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁷ Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178–87 (1996); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1113 (1996).

¹⁸ 410 U.S. 113 (1973).

¹⁹ *Id.* at 115.

²⁰ *Id.* at 150.

²¹ *Id.* (emphasis added).

²² *But cf.* SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley ed. & trans., Vintage Books 1989) (1952) (noting that "[o]ne is not born, but rather becomes, a woman").

²³ *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring).

Pennsylvania v. Casey by adhering to some of *Roe v. Wade*.²⁴ But even as they reaffirmed limited constitutional protection for a right to choose to have an abortion, they recognized that “[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”²⁵ “[T]hese sacrifices,” they wrote in their controlling joint opinion, “have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love.”²⁶

Recall that in *Casey*, the Court was one vote away from overruling *Roe*. To Justice Blackmun, the author of the *Roe* opinion and one of the Justices who thought it should be preserved in its full robustness, “the Chief Justice’s view of the State’s compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.”²⁷ And that, constitutional scholar Jed Rubenfeld has argued, is what legal restrictions on abortion *do*: “Anti-abortion laws produce motherhood: they take diverse women with every variety of career, life-plan, and so on, and make mothers of them all.”²⁸

This observation did not appear to trouble the dissenting Justices in *Casey*, including then-Chief Justice Rehnquist. Nor did the fact that they would have to confront *stare decisis* if they were to overrule *Roe v. Wade*; in the dissenters’ views, this was not a problem, despite the fact that, arguably, there had been no national change in the understanding of facts that might support overruling a precedent that had repeatedly been affirmed by the Supreme Court.²⁹ “Of course,” Rehnquist wrote, “what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children.”³⁰ *Women become pregnant. Women give birth to children.* It is just what they do—inevitably, naturally, and properly.

Chief Justice Rehnquist and Justices Scalia and Thomas continued to interpret the Constitution to allow states to take natural, reproductive

²⁴ 505 U.S. 833, 869 (1992) (reaffirming “the essential holding” of *Roe*).

²⁵ *Id.* at 852.

²⁶ *Id.*

²⁷ *Id.* at 941 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

²⁸ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 788 (1989).

²⁹ *Casey*, 505 U.S. at 862–64 (discussing the relevance of a changed understanding of facts impact on *stare decisis*).

³⁰ *Id.* at 955 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

circumstances and transform them into legal compulsions to procreate. In the Court's 2000 decision in *Stenberg v. Carhart*, they, joined this time by Justice Kennedy, dissented from the Court's decision to invalidate Nebraska's so-called partial-birth abortion ban.³¹ In some of the dissenting Justices' views, a state could forbid dilation and extraction, or "D & X," and similar abortion methods because "D & X *perverts the natural birth process* to a greater degree than" the most common method of late-term abortion, dilation and evacuation, or "D & E."³² Further, the dissenting Justices found no fault with Nebraska's failure to make an exception to the ban for the health of the pregnant woman, hinting that a "State can constitutionally require a tradeoff between the woman's health and that of the fetus."³³

The law does not demand such ennobling sacrifices of fathers. They need not risk their health for the sake of their children nor bear any burdens comparable to those that antiabortion laws insist women endure.³⁴ Those who would essentially dismantle all constitutional protections for a woman's right to choose to have an abortion are by and large operating under a gendered ideology of proper procreation and reproduction, in which women are expected to bear the burdens of maternity so that species and society may reproduce.

II. HETEROSEXUAL REPRODUCTIVE IMPERATIVES, ACT II: NATURAL, HETEROSEXUAL REPRODUCTION AND FAMILIES

Similar gendered ideologies about proper reproduction are being used to defend the denial of equal marriage rights to same-sex couples. Here, too, we see preservation of such ideologies through transformation of their justificatory rhetoric.³⁵ Once upon a time, the arguments of marriage exclusionists might have relied on expressly religious grounds and the supposed sinfulness of homosexuality.³⁶ But increasingly, religious denominations are taking a stand

³¹ 530 U.S. 914, 945 (2000).

³² *Id.* at 962–63 (Kennedy, J., dissenting) (emphasis added).

³³ *Id.* at 1012.

³⁴ See generally EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

³⁵ Cf. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1331 (2000) ("Antigay discourse itself has changed, with social republican arguments superseding medical arguments, which earlier had superseded natural law arguments. But the old arguments do not disappear; they remain as foundational layers over which new arguments intellectually sediment.").

³⁶ See, e.g., WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2003).

in favor of equality of committed relationships regardless of the parties' genders. And, besides, defenders of current U.S. marriage laws (outside Massachusetts, which alone among U.S. states allows same-sex couples to marry) probably realize that there is something a little unseemly about making expressly religious, sectarian arguments to defend a law when the Establishment Clause is still a part of the Constitution.³⁷ So, with specifically religious arguments out of legal bounds, marriage exclusionists might have relied not on sin, but crime.³⁸ But, at least since *Lawrence v. Texas* invalidated the states' remaining sodomy laws in 2003,³⁹ criminality can no longer provide a legal justification for the marriage exclusion.

This brings us to the kinder, gentler face of heterosexism today: reproduction. Not that those concerns about procreation and childrearing are entirely novel defenses of the bastion of heterosexual privilege that is civil marriage. From the earliest reported U.S. case rejecting constitutional challenges to the exclusion of same-sex couples from marriage, the Minnesota Supreme Court's decision in *Baker v. Nelson* in 1971,⁴⁰ we get the following proclamation of dubious legal value: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁴¹ As for the plaintiffs' pointed observation that "the state does not impose upon heterosexual married couples a condition that they have a prove[n] capacity or declared willingness to procreate,"⁴² the court dismissively retorted that "the classification is no more than theoretically imperfect," and "that 'abstract symmetry' is not demanded by the Fourteenth Amendment."⁴³

This was essentially the position adopted in December 2005 by the intermediate appellate court in New York and affirmed by that state's highest

³⁷ "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I. Although addressed to Congress, the Establishment Clause has been understood as applicable to the federal government generally, and it has been adjudged applicable to state and local governments as well. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). This application to the states has been contested, see, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring), though this is far afield from the project of this Article.

³⁸ See, e.g., ESKRIDGE & HUNTER, *supra* note 36.

³⁹ 539 U.S. 558, 575 (2003) (invalidating homosexual conduct law on due process grounds, thus not limiting holding to regulations reaching only same-sex acts).

⁴⁰ 191 N.W.2d 185 (Minn. 1971).

⁴¹ *Id.* at 186.

⁴² *Id.* at 187.

⁴³ *Id.*

court in June 2006, in *Hernandez v. Robles*.⁴⁴ According to the appellate court, “[the plaintiffs’] argument that the statute does not have a rational basis because it allows heterosexual couples unable or unwilling to have children to marry ignores precedent holding that the classification created by a statute need not be perfect.”⁴⁵ The high court concurred: “Rational basis review is highly indulgent towards the State’s classifications.”⁴⁶ But why did the courts take procreation to be an adequate basis to justify the contours of marriage law in the first place? The decisions illustrate heterosexual reproductive imperatives at work.

After discussing judicial restraint and legislative supremacy,⁴⁷ the appellate court in *Hernandez* started its analysis on a somewhat less controversial note: “Marriage, defined as the union between one man and one woman, is based upon important public policy considerations and has been recognized as a fundamental constitutional right.”⁴⁸ But to explain these considerations, the court launched into the rhetoric of naturalized, gendered procreation. For instance, the court noted that “[t]hese considerations are based on innate, complementary, procreative roles, a function of biology, not mere legal rights.”⁴⁹ The idea of complementarity of the sexes comes from Catholic natural law philosophy and, as Andrew Koppelman has persuasively shown, can only be made sense of as a defense for the mixed-sex requirement for civil marriage in religious terms.⁵⁰

Next, taking its cue from the dissents in the Massachusetts marriage case, *Goodridge v. Department of Public Health*, cited repeatedly in both the appellate and high court *Hernandez* opinions,⁵¹ the *Hernandez* appellate court waxed rhapsodic about reproduction:

⁴⁴ 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff’d*, 855 N.E.2d 1 (N.Y. 2006) (plurality opinion).

⁴⁵ *Hernandez*, 805 N.Y.S.2d at 361.

⁴⁶ *Hernandez*, 855 N.E.2d at 12 (plurality); *see also id.* at 22 (Grafteo, J., concurring) (stating that “under rational basis review, the classification need not be *perfectly* precise or narrowly tailored”) (emphasis added).

⁴⁷ *See Hernandez*, 805 N.Y.S.2d at 359–60.

⁴⁸ *Id.* at 360.

⁴⁹ *Id.* Judges Grafteo and G.B. Smith of the New York Court of Appeals similarly adverted to biology, insisting that “[t]he binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female.” *Hernandez*, 855 N.E.2d at 15 (Grafteo, J., concurring); *cf.* Kmiec, *supra* note 8, at 653 (“The first civilization of the family necessarily rests upon the marital faithfulness of the couple and the creation of a complementary unity that is distinct from either individual.”).

⁵⁰ *See* Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 94–95 (1997).

⁵¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). *See, e.g., Hernandez*, 805 N.Y.S.2d at 360; *id.* at 370, 371, 375 (Catterson, J., concurring); *Hernandez*, 855 N.E.2d at 8 (plurality); *id.* at 21 (Grafteo, J., concurring).

[Marriage] systematically regulates heterosexual behavior, brings order to the resulting procreation and ensures a stable family structure for the rearing, education and socialization of children It is based on the presumption that the optimal situation for child rearing is having both biological parents present in a committed, socially esteemed relationship. The law assumes that a marriage will produce children and affords benefits based on that assumption. It sets up heterosexual marriage as the cultural, social and legal ideal in an effort to discourage unmarried childbearing and to encourage sufficient marital childbearing to sustain the population and society; the entire society, even those who do not marry, depend on a healthy marriage culture for this latter, critical, but presently undervalued, benefit.⁵²

This is ideology at work. There is no evidence of the claims asserted; rather, they are “presum[ed]” and “assume[d].”⁵³ The above passage simply regurgitates the rhetoric of the Alliance for Marriage (“AFM”), the nonprofit group that masterminded the proposed Federal Marriage Amendment to exclude same-sex couples from marriage because, in the words of AFM President Matt Daniels, “protecting the legal status of marriage . . . is a necessary condition for the renewal of a marriage-based culture in the United States.”⁵⁴ The court’s procreative argument rests not on verifiable empirical observations, but on ideals that are normative and thus nonfalsifiable.⁵⁵ Justice Catterson’s opinion concurring in the judgment is at least as objectionable. In his view,

reserving marriage to opposite-sex couples is reasonably related to the State’s interests in ensuring a stable legal and societal framework in which children are procreated and raised, and providing the benefits of dual gender parenting for the children so procreated Moreover, it is evident that same-sex couples cannot procreate by themselves or provide dual-gender parenting.⁵⁶

⁵² *Hernandez*, 805 N.Y.S.2d at 360.

⁵³ *Id.*

⁵⁴ Posting of jboushka@aol.com to queerlaw@abacus.oxy.edu, (July 13, 2001) <http://legalminds.lp.findlaw.com/list/queerlaw/frm04302.html> (reprinting text of AFM’s press conference) (statement of Matt Daniels).

⁵⁵ Indeed, operating under nominal rational basis review, the plurality opinion declares that “[i]n the absence of conclusive scientific evidence [to the contrary], the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.” *Hernandez*, 855 N.E.2d at 8 (citing *Goodridge*, 798 N.E.2d at 979–80 (Sosman, J., dissenting)).

⁵⁶ *Hernandez*, 805 N.Y.S.2d at 374.

These ideologies of imperative heterosexual reproduction have, however, lost any hegemonic status they once may have claimed. The appellate dissent in *Hernandez*, for example, highlighted the majority's bald heteronormativity by explaining that the American Psychiatric Association's review of "the best empirical research available" shows that the "asserted negative consequences for children raised in same-sex rather than [different-sex] households find no support in the scientific literature."⁵⁷ Further, the dissent noted,

[A]n avowed interest in promoting procreation within marriage as a means of best protecting children presumes that children are biologically created in only one way, through sex between one man and one woman. To offer this principle as a rational basis for the [marriage] statutes' limitation presumes that encouraging such couples to form a permanent family bond through marriage, will in turn best protect society's children by ensuring that they will be raised in a stable household by both biological parents. In fact, due to technological advances, along with undisputable changes in our society, this underlying assumption is now far from universal.⁵⁸

Similarly, the dissenting judges on New York's highest court avowed that "[u]nder our Constitution, discriminatory views about proper marriage partners can no more prevent same-sex couples from marrying than they could different-race couples."⁵⁹ To them, compared to the procreative rationale, the eligibility criteria for marriage were "so grossly underinclusive and overinclusive as to make the asserted rationale in promoting procreation 'impossible to credit.'"⁶⁰

Perhaps because of the kind of societal change described above, the trial judge in the consolidated marriage litigation in California also rejected the procreative defense of denying marriage equality to same-sex couples.⁶¹ In that litigation, Randy Thomasson's antigay group, the Campaign for California Families, argued "that California courts have long recognized that the purpose of marriage is procreation and that limiting the institution to members of the

⁵⁷ *Id.* at 387 (Saxe, J., dissenting).

⁵⁸ *Id.* at 390.

⁵⁹ *Hernandez*, 855 N.E.2d at 25 (Kaye, C.J., dissenting).

⁶⁰ *Id.* at 31.

⁶¹ *In re Coordination Proceeding*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), *aff'd in part, rev'd in part*, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. App. 1 Dist. 2006), *rev. granted*, 53 Cal. Rptr. 3d 317 (Cal. 2006).

opposite sex rationally would further that purpose.”⁶² After a careful review, the trial court concluded that

the cases cited by the plaintiffs do not establish that California courts have recognized that the purpose of marriage in this state is procreation The facts in plaintiffs’ cases also confirm the obvious natural and social reality that one does not have to be married in order to procreate, nor does one have to procreate in order to be married. Thus, no legitimate state interest to justify the preclusion of same-sex marriage can be found in plaintiffs’ cases.⁶³

III. HETEROSEXUAL REPRODUCTIVE IMPERATIVES, ACT III: NATURAL, HETEROSEXUAL REPRODUCTION AND TRANSGENDER BODIES

Finally, let me touch on the area of transgendered persons’ human rights and, in particular, the right to governmental recognition of their lived gender. As British legal scholar Andrew Sharpe has remarked, “While the treatment of reproduction or procreation in transgender jurisprudence lacks consistency, several strands of the discourse deploy procreative capacity in styles that reproduce a notion antithetical to feminism, namely, that anatomy determines destiny.”⁶⁴ And this is true even in progressive or reformist jurisprudence wherein courts accept the sex of identification of transpeople; judges still limit transpersons’ rights in ways they do not when it comes to non-transpersons.

For example, one of the cases commonly upheld as a “victory” for transgendered plaintiffs is *Attorney General v. Otahuhu Family Court*.⁶⁵ And it was a victory, of sorts, because this 1995 New Zealand decision held that so-called postoperative transsexual persons could marry as members of their “assumed,” i.e., postoperative, sex.⁶⁶ However, in so ruling, the High Court of

⁶² *Id.* at *6.

⁶³ *Id.* at *8. On appeal, a two-judge majority sustained the limitation of civil marriage to different-sex couples, declaring legitimate and sufficient the state’s interests in “preserving the definition of marriage,” In re *Marriage Cases*, 49 Cal. Rptr. 3d at 720, and in “carrying out the expressed wishes of a majority of Californians.” *Id.* at 724. Although the majority asserts that majoritarian preference cannot override fundamental rights or justify suspect classifications, they fail to recognize that their formulation makes it impossible for government to fail rational basis review. *Id.* at 724–25. Every law passed by the majority’s representatives presumptively expresses the majority’s wishes and hence rationally furthers those wishes, by definition. Hence, if a state interest in “carrying out the will of its citizens,” *id.* at 724 (capitalization omitted), counts as legitimate for rational basis review, rational basis review becomes transformed to no review at all.

⁶⁴ ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE* 6 (2002).

⁶⁵ [1995] 1 N.Z.L.R. 603 (H.C.).

⁶⁶ *Id.*

Wellington reasoned in a manner that seems driven by ideologies of heterosexual reproduction.

Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex. A male to female transsexual . . . can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female to male transsexual . . . can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment.⁶⁷

In seeking to allay disquietude occasioned by law's encounter with transgendered bodies, *Otahuhu Family Court* is not alone in insisting that the transperson's ability to procreate be extinguished. *Attorney General for the Commonwealth v. Kevin* was a 2003 decision of the Family Court of Australia holding that a transsexual man, Kevin, who had been identified as female at birth, could lawfully marry genetically uncontested female Jennifer.⁶⁸ Although recognizing that Kevin was a male, despite his having opted not to have expensive and risky "surgery involving the construction of a penis or testes," the Court took comfort from its observation that "[a]s a result [of the surgeries he did have], Kevin's body was no longer able to function as that of a female, particularly for the purposes of reproduction and sexual intercourse."⁶⁹ To be fair, it should be noted that Kevin's counsel had urged the court to take that into account: "Ms. Wallbank further argued that, at the time of the marriage, Kevin should be regarded as a man in that . . . his body was unable to function as that of a female, including for the purposes of reproduction and sexual intercourse"⁷⁰

At the same time, however, other courts take that inability to procreate as one reason to deny recognition of a transperson's claimed sex. In the 1999 Texas decision of *Littleton v. Prange*, for example, the court concluded that

[t]hrough surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a women [sic] There is no womb, cervix or ovaries in the post-operative transsexual female The male

⁶⁷ *Id.* at *13.

⁶⁸ *Attorney General for the Commonwealth v. Kevin* (2003) 30 Fam. L. R. 1 (Austl.).

⁶⁹ *Id.* at 30.

⁷⁰ *Id.* (Submissions for respondent).

chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.⁷¹

And the court explained, “Chromosomes are the structures on which the genes are carried which, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-spring.”⁷² So, in dealing with chromosomes, it is probably fair to assume that the court understood itself to be talking about reproduction.

In a similar transgender nonrecognition decision in 2002, the Supreme Court of Kansas held in *In re Estate of Gardiner* that a transsexual woman could not inherit intestate as a widow because she was really still a man, and thus had never lawfully married her husband.⁷³ In reaching this statutory conclusion, the court relied in part on the 1970 edition of Webster’s New Twentieth Century Dictionary to conclude that “[a] male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to ‘produce ova and bear offspring’ does not and never did exist.”⁷⁴

Thus, some courts deny the possibility of legal sex change or sex correction where transpeople no longer have the ability to procreate. Other courts have accepted that possibility, but often only on the condition that the transperson give up the ability to procreate.⁷⁵ In the latter case, the law is willing to countenance individuals crossing from one gender to another only when they cannot greatly threaten the gendered norms of proper reproduction. It just will not do to have a pregnant man, even though that has happened on occasion with transsexual men. For instance, consider the case of Matt Califia-Rice who, although bearded at the time, had not had a hysterectomy and used assisted reproductive technology to conceive after ceasing testosterone treatments. Once again in the words of Chief Justice Rehnquist, *women* become pregnant; *women* give birth to children.⁷⁶ *Not* transsexual men.

⁷¹ Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999).

⁷² *Id.* at 227.

⁷³ *In re Estate of Gardiner*, 42 P.3d 120, 136–37 (Kan. 2002).

⁷⁴ *Id.* at 135 (noting that “Webster’s New Twentieth Century Dictionary (2d ed. 1970) states the initial definition of sex as ‘either of the two divisions of organisms distinguished as male or female’”).

⁷⁵ See *supra* notes 66, 69.

⁷⁶ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 955 (1992).

CONCLUSION

As Mary Dunlap wrote in an article nearly a quarter century ago:

Once we have rejected the idea that “proper” sexual behavior in the female consists of nothing more, less or different than sexual intercourse within the bounds of a legally valid marriage—aimed at pregnancy and resulting in childbirth and the fulfillment of the “noble and benign offices of wife and mother”—and once we have rejected all related notions of “impropriety” based on gender, we face a vast and difficult array of questions.⁷⁷

But it is important that we who are subordinated in one or more ways by ideologies of normative heterosexual reproduction try to work in coalition to face those questions together. Heterosexually identified transpeople and same-sex couples all have an interest in rejecting the legal insistence on heterosexual procreation as the *sine qua non* for a valid marriage. Further, both they and heterosexual women have an interest in insisting that the near-Shakespearean question, to beget or not to beget, is an intensely personal question that should be left up to individuals and not the government.⁷⁸ It is important that these groups support each other in opposition to those who would use governmental power to reinforce their gendered ideologies of proper procreation and reproduction.⁷⁹ Those gendered ideologies lead to inegalitarian consequences and injustice.

And the time is, as times often are, perilous. The Supreme Court has been newly reconstituted, and one of its first actions has been to declare the intention to revisit the constitutionality of bans on abortion through dilation and extraction.⁸⁰ The South Dakota legislature passed a law banning almost all

⁷⁷ Mary C. Dunlap, *Toward Recognition of a Right to Be Sexual*, 7 WOMEN'S RTS. L. REP. 245, 248 (1982).

⁷⁸ Cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that state law prohibiting single women from obtaining birth control violated the Equal Protection Clause of the Constitution).

⁷⁹ The claim here is not, as one interlocutor at the Center for Reproductive Rights Symposium seemed mistakenly to believe, that gendered ideologies of proper procreation completely account for all resistance to women's claims to reproductive self-determination, same-sex couples' claims to equal marriage rights, or transgender persons' claims to live a life of integrity in their experienced gender (at least with regard to the marriage issue). Other factors are certainly in play as well, but these gendered reproductive ideologies are nonetheless a significant element of the legal and political resistance to this array of justice claims and thus worth addressing.

⁸⁰ *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006) (cert. granted Feb. 21, 2006); see also Linda Greenhouse, *Justices to Review Federal Ban on Disputed Abortion Method*, N.Y. TIMES, Feb. 22, 2006, at A1.

abortions,⁸¹ and Mississippi is moving to do the same, in order to provide the Court with a vehicle to revisit and quite possibly overrule *Roe v. Wade*. Our rights are insecure. And even if we may prevail in certain court cases, the only way they can be made secure is if society comes to accept them. In that sense, it is not enough to talk about rights. We must talk about justice and about ways to achieve a culture committed to justice for everyone in society.⁸² As Mary Dunlap knew, that is a big task, but one well worth the undertaking.

⁸¹ This law was subsequently overturned by referendum in the November 2006 election. See Editorial, *Voters Send Mixed Messages on Variety of Ballot Measures*, TIMES-NEWS (Burlington, NC), Nov. 13, 2006.

⁸² Cf. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1755 (2000) (working toward the generation of a culture of social justice in an often conflicted, diverse U.S. society).