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WORDS THAT DENY, DEVALUE, AND PUNISH: JUDICIAL RESPONSES TO FETUS-ENVY?

SHERRY F. COLB*

“As regards little girls, we can say of them that they feel greatly at a disadvantage owing to their lack of a big, visible penis, that they envy boys for possessing one.”¹

These are the immortal words of Sigmund Freud. He believed that the biological disparity between men and women should inspire envy for the great male organ. Although the capacity for pregnancy and birth can be gratifying for women, it was to Freud only a consolation prize: “In other women, we find no evidence of this wish for a penis; it is replaced by the wish for a baby . . . . It looks as if such women had understood . . . that nature has given babies to women as a substitute for the penis that has been denied them.”²

Dr. Freud’s view appears quite counterintuitive, at least to many women. Women in our male-dominated society may well envy men for a variety of things, but it is hardly evident why the possession of a penis should be one of them. Indeed, rather than perceiving penis-envy, Dr. Freud himself may have experienced envy for a woman’s impressive capacity to become pregnant and to carry out the transformation of a zygote into a baby inside her body. I refer to this envy of women’s unique reproductive capacity as “fetus-envy.”³

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³ Several psychoanalytic theorists have identified this male phenomenon, which they have labeled “womb-envy.” See, e.g., Karen Horney, The Flight from Womanhood, in Feminine Psychology 54, 60-61 (Harold Kelman ed., 1967) (“When one begins, as I did, to analyse men only after a fairly long experience of analysing women, one receives a most surprising impression of the intensity of this envy of pregnancy, childbirth, and motherhood, as well as of the breasts and of the act of sucking.”), quoted in Janet Sayers, Mothers of Psychoanalysis 100 (1991); Eva F. Kittay, Rereading Freud on “Femininity” or Why Not Womb Envy?, 7 Women’s Stud. Int’l F. 385 (1984) (explaining that traditional psychoanalytic theory has never embraced the concept of womb-envy because, given Freud’s androcentric conception of femininity, the idea of womb-envy would be incoherent); Betty Yorburg, Psychoanalysis and Women’s
This Article does not defend fetus-envy as such but instead analyzes what might be considered its manifestation in judicial rhetoric. The Article focuses on the ways in which judicial rhetoric perpetuates disempowering images of women and therefore, indirectly, gender discrimination itself. By concentrating on three cases involving human reproduction, this Article identifies several common rhetorical devices that judges deploy—perhaps unconsciously—to enforce male hegemony.4


I choose to label the phenomenon “fetus-envy” rather than “womb-envy” because the former term better captures the ultimate reason for the emotion: a woman's ability to develop a fetus inside her body.

4 In analyzing judicial rhetoric, this Article does not focus primarily on the results of particular cases. There is not—nor would one expect there to be—a consensus among feminists on the correct result in every case. See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (holding that California may afford special treatment to pregnant employees consistent with the Pregnancy Discrimination Act amended to Title VII), construed in Martha Minow, Making All the Difference 58 (1990) (describing the divided opinions held by women's groups on whether to treat pregnant women like men or whether to recognize their special status); see also Frances Olsen, The Sex of Law, in The Politics of Law 453-67 (David Kairys ed., 1990) (describing the variety of feminist positions); Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373, 1384-88 (1986) (same); Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 58-59 (1988) (same). Acknowledging this lack of consensus, however, is not inconsistent with Catharine MacKinnon’s view that, despite the disagreements, there are not many feminisms, but only one. See Catharine A. MacKinnon, Feminism Unmodified 22 (1987). As Christine Littleton elaborated in her review of MacKinnon’s Feminism Unmodified, this one feminism is not defined by any particular agenda or substantive program, but is instead a distinct methodology. See Christine A. Littleton, Feminist Jurisprudence: The Difference Method Makes, 41 Stan. L. Rev. 751, 752-54 (1989) (book review). The central feature of this methodology is the commitment to valuing women’s viewpoints—to seeing the world through women’s eyes.

Moreover, this Article rejects the implicit message of “cultural feminists” that supposedly feminine values—nurturing, relationship, passion—represent the true expression of womanhood. See, e.g., Carol Gilligan, In a Different Voice (1982). Rather, the Article adopts the position of MacKinnon and Alcoff that women should receive credit for the strengths and attributes that they have developed under a system of oppression, but that we should not assume that we know how women would sound if they could speak outside of the context of male supremacy. See Linda Alcoff, Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory, 13 Signs 405, 414 (1988); see also Symposium, Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 75 (1985) (discussing the merits of giving women credit for their own accomplishments, whether or not these accomplishments were derived from a male-dominated society). The position articulated by Robin West provides a persuasive middle ground between cultural and radical feminism. See West, supra, at 70-72 (asserting that, culturally and biologically, women’s connections to others differ from men’s because of pregnancy and intercourse, and that a political philosophy of
I. THE THREAT TO MEN AND THE MALE RESPONSE

Given the present state of reproductive technology, men and women play undeniably unequal roles in reproduction. Once a man has contributed genetic material, his biological task is essentially complete. In contrast, a woman's biological role does not end after her genetic contribution. She also gestates the developing fetus for approximately nine months, after which she gives birth to the baby she has carried. Women's greater part in reproduction may threaten and inspire envy in men who wish to view their contribution as qualitatively and quantitatively equal to or greater than that of women.

A second potential threat to men arises from the first: absent technological intervention, women can determine with certainty who their children are, while men cannot. Because most of the reproductive process takes place inside a woman, she knows that she has mothered her own child when she has given birth. Similarly, absent her knowledge and participation, a woman cannot be a mother. A man, on the other hand, may be unaware that he has fathered children. Conversely, he may believe that a woman is pregnant.


Finally, this Article takes the view that women's subjectivity challenges not some pre-existing objectivity, but rather the dogma of male subjectivity. See MACKINNON, supra, at 65 (asserting that the claimed objective stance in our society is an expression of male subjectivity and that social institutions generally reflect a de facto white male affirmative action program); see also Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 346 (1984-85) (arguing for a gender-neutral approach to sex discrimination, yet criticizing decisions like Geduldig v. Aiello, 417 U.S. 484 (1974), for making "man the standard . . . and measur[ing] women against that standard"). But see Scott Brewer, Pragmatism, Oppression, and the Flight to Substance, 63 S. CAL. L. REV. 1753, 1756 (1990) (arguing that because members of oppressed groups sometimes lack an understanding of their circumstances—i.e., they have false consciousness—a listener must first evaluate the merits of a speaker's "oppressed perspective," its substance, before deferring to what the speaker says, and that, therefore, no speaker's perspective should receive special deference in setting policy).

This Article employs the methodology of feminism that includes women's experiences of reality in the formation, interpretation, development, and enforcement of legal rules. See Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 831 (1990) [hereinafter Bartlett, Feminist Legal Methods] (discussing three feminist methods of "doing law," one of which is testing legal principles against actual experience in the world).

8 Although new ova removal technologies complicate this picture, they affect a very minor percentage of overall pregnancies. Cf. SUSAN FALUDI, BACKLASH 29 (1981) (reporting that American women between the ages of 30 and 40 face only a 13.6%
with his child when in fact she is not. This Article outlines several instances in which judicial rhetoric diminishes the unique and powerful role that women play in reproduction, and suggests that this rhetoric is a response to these two threats.

In case law, as in our culture generally, the male eye observes the world and describes its contents—in much the same way as Dr. Freud, still the most celebrated psychological theorist, described psychological phenomena from a characteristically male viewpoint. “Women’s viewpoints,” on the other hand, “have been submerged, oppressed, invisible and voiceless.” This suppression of women’s perspectives appears not only when courts rationalize patently sexist results, such as excluding women from legal practice, but also in the rhetoric that exists independently of, and is not necessary to, the holdings. Such rhetoric typically can be found in those parts of opinions that judges label “The Facts.” In these discussions—or meditations on the world—judges strive for the appearance of gender neutrality. They reinforce the neutral appearance with terms such as “natural” and “scientific.” But, as this Article will demonstrate, the meditation has a gender, and its gender is male.

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The rhetoric of such purportedly neutral discussions subtly influences our thinking. Rhetoric paints a picture of the world which readers internalize.
and act upon. When legal actors read rhetoric, their actions translate the rhetoric into law, thereby profoundly influencing society at large. As Katharine Bartlett has observed, the law’s rhetoric also has “indirect effects on our modes of expression, our perceptions of ourselves, and our relationships with others.” The understandings and visions of women and their lives implicit in legal opinions can therefore shape the way women are perceived, by themselves and by men, and ultimately influence the way they are treated. Like Bartlett, I am “concerned less with the results of any particular law—who wins a dispute—than with the structure and expressive meaning of the law.”

The following sections of this Article will identify several rhetorical mechanisms used by judges to diminish women’s important reproductive role. Although the Article poses the possibility that this phenomenon constitutes the male response to fetus-envy, one need not accept this as true to recognize that these rhetorical mechanisms operate subtly to disempower women.

II. RHETORICAL MECHANISMS

A. Nature and Science in Support of Sexism

The word “natural” has two distinct connotations, both of which have been instrumental in rationalizing sexism. In one sense, natural means pre-social or part of the inevitable order of the world. Labeling an institution natural inherently involves an assertion that the law has not produced the institution—that it exists externally and independently and is susceptible to objective observation. But natural has a second meaning as well. Labeling something natural also expresses approval for that thing. For example, it is “natural” to feel rage at an unfaithful spouse. Such anger is considered righteous and appropriate. The identification of the two meanings of natural—of what is with what ought to be—has existed in Western culture at least since Aristotle’s time. Thus, when a judge calls an instance of ine-

Identifying the gendered character of . . . discourses can therefore be a feminist strategy for challenging the extensive and complicated network of social and cultural practices which legitimate the subordination of women. The assumption underlying this strategy is that language is a mechanism of power, that there is always more at stake in the relationship of gender and language than “just” a question of literary style—indeed, that style itself can constitute a powerful socializing apparatus.


12 Bartlett, Re-Expressing Parenthood, supra note 4, at 293.

13 Id. at 294-95.

14 See ARISTOTLE, THE POLITICS 67 (Thomas A. Sinclair trans., rev. ed. 1981) (“[W]hether or not it is a . . . better thing for one man to be a slave to another, or whether all slavery is contrary to nature—these are the questions which must be considered.”).
quality natural, the judge may mean both to absolve the law of responsibility for creating that inequality and to express approval of the inequality.

Courts similarly invoke the authority of science in support of sexism. While nature’s authority lies in describing culturally contingent events as positive expressions of our essence, science’s power lies in its status as an objective truth observer, translating controversial philosophical propositions about the world into neutral facts. As Katharine Bartlett contended with reference to “best interests of the child” determinations in custody battles, “[a]lthough we often pretend otherwise, it seems clear that our judgments about what is best for children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data.”

The concepts of nature and science complement each other in constructing an objectively verifiable and inevitable sexist world. Science allows judges to declare that their viewpoint represents an objective description of reality. Nature allows them to claim that this so-called objective reality is both inevitable and appropriate.

B. Denial, Devaluation, and Punishment

The science and nature rhetorical devices frequently appear in support of three other mechanisms: denial, devaluation, and punishment. The first mechanism denies the features of women’s reproductive capacity that men do not share, such as pregnancy. To the extent that fetus-envy motivates such rhetoric, denial renders women’s experience invisible, thereby alleviating the anxiety caused by the threat of women’s reproductive role. The second mechanism devalues women’s unique reproductive characteristics, rendering their special capacities a mark of inferiority. This devaluation can function to diminish the threat of women’s reproductive role by reassuring the threatened male that his inability to do what women can do makes him superior. The third mechanism uses women’s special reproductive role as a basis for subjugation and control, and punishes women for their unique ability. The threatened male can thereby take revenge upon women for posing the threat. The rhetoric is punitive in the sense that its tone is hostile. Thus, for example, punishment rhetoric has little tolerance for women who do not conform to the stereotype of “homemaker,” a status of financial and social powerlessness relative to men. The rhetoric also can be punitive in a more

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15 Bartlett, Re-Expressing Parenthood, supra note 4, at 303.
16 This type of rhetoric has a long pedigree. For example, in State v. Hunter, 300 P.2d 455, 458 (1956), the Supreme Court of Oregon stated,
Obviously it [the legislature] intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication . . . . She had already invaded practically every activity formerly considered suitable and appropriate for men only . . . . In these circumstances, is it any wonder that the legislative assembly took advantage of the
direct and active sense: judges often identify the biological differences between women and men as justifying decisions limiting women’s rights.

Three relatively recent cases, all concerning parenthood, contain examples of this debilitating rhetoric. First, in *Michael H. v. Gerald D.*, the United States Supreme Court upheld the California presumption of paternity. Second, in *Davis v. Davis*, a Tennessee trial court awarded frozen embryos to the woman who had contributed her ova, but the state appellate court awarded the embryos jointly to the woman and the man who conceived them. Third, in *International Union, UAW v. Johnson Controls, Inc.*, the United States Court of Appeals for the Seventh Circuit upheld, but the Supreme Court subsequently struck down, a battery company’s “fetal protection policy.” Each of these cases betrays several of the five rhetorical mechanisms through which men sometimes deal with reproductive differences and the possible threat that these differences pose.

III. NATURAL FATHERS AND UNNATURAL RULES

And the rib, which the Lord God had taken from the man, made He a woman, and brought her unto the man. And Adam said, This is now bone of my bones, and flesh of my flesh: . . . she was taken out of Man.

police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?
The court’s decision upheld a statute prohibiting female wrestling.

Additionally, in *Joyner v. Joyner*, 59 N.C. (6 Jones Eq.) 322, 325 (1862), the Supreme Court of North Carolina stated,

The wife must be subject to her husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family . . . . Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said, “Thy desire shall be to thy husband, and he shall rule over thee.” Genesis chap. 3, v. 16. It follows that the law gives the husband power to use such degree of force as is necessary to make the wife behave herself and know her place.
The *Joyner* court held that a man’s horsewhipping of his wife does not constitute grounds for divorce.

20 The authors of these opinions are male. Though other judges may join in an opinion, it does not necessarily follow that these judges adopt the author’s rhetoric. When a judge agrees with the result reached and the basic argument, she will generally not be inclined to concur separately, even if she would have omitted some of the language if the opinion were her own.
21 Genesis 2:22-23 (King James).
The events preceding the trial of *Michael H. v. Gerald D.*  

22 began when a married woman, Carole, committed adultery and conceived a child, Victoria, with a man named Michael H. About a year after Victoria's birth, the child and her mother lived for several months in St. Thomas with Michael H., who held Victoria out as his daughter. Carole then left Michael H., took Victoria with her, and began residing with another man, Scott K. Finally, Carole returned to her husband, Gerald D., with whom she and Victoria continued to reside when Michael H. sued for parental rights. Michael H.'s appeal ultimately came before the United States Supreme Court.

A. Denial of Paternal Uncertainty

Michael H. sought a judicial declaration that he was Victoria's father, a status that would allow him visitation rights otherwise denied by state law. California law presumes under most circumstances that a man whose wife has a baby is the father of that baby.  

23 The only individual who may rebut this presumption in California is the presumed or marital father—here Gerald D.  

24 Michael H. petitioned the Supreme Court to declare this presumption an unconstitutional denial of his fundamental right to act as Victoria's father.  

25 The Court upheld the challenged presumption in an opinion written by Justice Scalia. Rather than critique his legal analysis,  

26 however, this


23 CAL. EVID. CODE § 621 (West Supp. 1989) (amended 1990). The presumption operates only if the husband of the mother is neither impotent nor sterile. The presumption, once triggered, may be rebutted only if a motion for blood tests is made within two years of the child's birth. The husband of the mother may file such a motion by himself, but the mother may do so only if the biological father has filed an affidavit acknowledging paternity.  

CAL. EVID. CODE § 621(c)-(d) (West Supp. 1989) (amended 1990). The 1990 amendment of § 621(c) also allows the child's guardian ad litem to file a motion for blood tests on behalf of the presumed father.

Note that the presumption of paternity requires a married woman to rely upon a man, either her husband or her lover, to vindicate her wishes with respect to her child. This legal dependence upon men stands in marked contrast to the "natural" capacity of a woman who knows the identity of her child's father independently to choose to conceal or to reveal that information.


25 491 U.S. at 118.

26 For several such critiques, see Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (asserting that Justice Scalia improperly embraces tradition as a method for determining constitutional rights); Catherine A. Filhiol, Michael H. v. Gerald D.: Upholding the Marital Presumption Against a Dual Paternity Claim, 50 LA. L. REV. 1015 (1990) (arguing that Justice Scalia's analysis weighs state interests more heavily than that used in prior substantive due process cases); Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057, 1085-98 (1990) (criticizing Justice Scalia's tradition-bound formulation of the level of generality the Court should use to determine whether an asserted right is fundamental).
Article focuses on Justice Scalia’s rhetoric and its disempowering effect on women.\textsuperscript{27} Justices Scalia begins by characterizing the events described above as highly unusual, asserting that “[t]he facts of this case are, we must hope, extraordinary.”\textsuperscript{28} Justice Scalia’s characterization of marital infidelity in the nuclear family as “extraordinary,” however, is more wish fulfillment than fact. The opinion practically acknowledges this by qualifying the observation with the phrase “we must hope.” This characterization of the facts nevertheless reveals that Justice Scalia values highly the convention of fidelity in the family.\textsuperscript{29} By describing an event of which he disapproves as “extraordinary,” Justice Scalia transforms what he believes \textit{should} be, into what is. He denies the reality of adulterous relations, and replaces it with his normative vision.\textsuperscript{30} Justice Scalia invokes the authority of nature to defend the presumption of paternity, a presumption which gives legal reality to and simultaneously enforces the married man’s assumption of his wife’s fidelity. Justice Scalia asserts that “California law, like nature itself, makes no provision for dual fatherhood.”\textsuperscript{31} This statement has two apparently inconsistent implications. On the one hand, Justice Scalia associates the “natural” with the good. In upholding a provision of California law, he likens that body of law to “nature itself.” On the other hand, there is considerable irony in the Court’s

\textsuperscript{27} I emphasize here that the analysis of Justice Scalia’s rhetoric in this case is not a critique of the result reached by the Supreme Court. Many policy concerns support the state’s desire to keep a child in a stable environment and to preclude the disruption inherent in custody battles. In addition, one might want the states to regulate families in their jurisdictions and to prohibit the federal government from interfering in what might be deemed experimental laboratories. The language of the opinion, however, reveals that this is not merely a best interests of the child determination or a federalism question for Justice Scalia. It is an opinion about his vision of what it is to be a natural father and what happens when a man challenges that vision and dares to claim that the Constitution protects his challenge.

\textsuperscript{28} 491 U.S. at 113.

\textsuperscript{29} He speaks later of “the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.” 491 U.S. at 123.

\textsuperscript{30} Marjorie Shultz makes the more general observation that the presumption of paternity expresses normative approval for sexual fidelity in marriage:

[W]hat purports to be an inference about biological fact [i.e., the presumption of paternity] may actually grow out of a normative aspiration and may readily be transformed into a prescriptive command about marriage and family, often without acknowledgment that such a transformation has taken place. The important issue becomes not who is, but who \textit{should} be having sex with the mother: her husband. Thus, the social construct, in fact normative and mutable, draws substantial but disguised legitimacy from the representation that it simply expresses “givens” of nature.

Shultz, \textit{supra} note 6, at 317 (footnotes omitted) (emphasis added).

\textsuperscript{31} 491 U.S. at 118.
disparagement of Michael H.'s claim with an appeal to nature: Michael H. is, after all, the "natural father," as Justice Scalia acknowledges. Ironic though his reliance on nature may be, an examination of how the presumption of paternity denies men's uncertainty in identifying their biological offspring clarifies the purpose behind this otherwise bizarre appeal to nature. The nature rhetoric here denies the reality of parenthood—the reality that an adulterer like Michael H. can be a biological father to a married woman's child—and creates in its stead a reality in which men may abandon their uncertainty.

The institution of monogamous marriage and its mandate of sexual fidelity, if entirely successful, would eliminate as a practical matter the uncertainty that men face in identifying their biological children. A man would know that his wife's children are his children too. Anthropologist Carol Delaney emphasized this point in her interpretation of the institutions surrounding marriage and fidelity in one Turkish village. She found a great emphasis upon the purity of women and their seclusion from men:

[The villagers] commonly use the word field to describe [women's] role . . . . [T]he female soil must be enclosed if a man is to know unquestionably that the produce, that is, the child, is his own . . . . A woman's value, in Turkish village society, therefore depends . . . on whether she is able to guarantee the security of a man's seed.33

The weakness inherent in this institutional structure based on marital fidelity, where women enhance their own value through guaranteeing men's seed (i.e., paternal certainty) is that "it can be shaken by the behavior of women."34 That is, men's certainty turns on women's virtue. If women violate the rules—a possibility that men rarely can rule out entirely—the uncertainty of paternity returns.

California's presumption of paternity and the Supreme Court's decision to uphold it in Michael H. address precisely this precariousness—the possibility that women may not always be faithful. A conclusive legal presumption that a man whose wife has a baby is the baby's father defines away the uncertainty that married men otherwise must face. The presumption does not merely grant Gerald D. the right to rear the child, or "the right to the child's services and earnings,"35 rights that fathers ordinarily possess; it also calls him the "father." As if by magic, a man who did not conceive a child replaces the true biological father. If the presumption operated only as a reasonable inference, it would make sense for it to be rebuttable (under more than just a few limited circumstances). And if it involved only custodial

32 See 491 U.S. at 127.
34 Id. at 40.
35 491 U.S. at 118-19.
entitlements, it could consist of a list of rights rather than presumptive parenthood.

It is not fortuitous that Justice Scalia begins his discussion with an appeal to "nature itself." Though Michael H. is the "natural" father in fact, Gerald D. is the "natural" father in law. As Justice Scalia notes, "California declares it to be, except in limited circumstances, irrelevant for paternity purposes whether a child . . . [in Victoria's situation] was begotten by someone other than the husband." Paternity is, in other words, irrelevant to paternity. The natural fatherhood of Michael H. represents the inherent uncertainty that men—even married men—must experience about their paternity. When the law denies Michael H.’s paternity, it denies that uncertainty. The law reconstructs nature to reflect the threatened man’s perspective of what nature should be.

One might ask, what practical effect does this rhetorical transformation have? Does it really make husbands believe that they are always the fathers of their wives’ children? Does it actually establish certainty for individual men? No simple answers to these questions exist, but the rhetoric furthers each of these objectives—and more. Although the participants in Michael H. all knew the identity of the biological father (the adulterer), the next set of litigants may not. Furthermore, because the holding in Michael H. and the presumption of paternity make biological fatherhood legally irrelevant to paternity, the next family may never discover the identity of the biological father. The presumption essentially closes off the inquiry and requires judicial notice of the “fact” that the husband of the biological mother is always the biological father. The inability to inquire further, the legal irrelevance of any such inquiry, and the actual protection of all paternal rights generally reserved for only biological fathers seriously undermine the possibility of calling into doubt a married man’s paternity. The presumption thereby eradicates the reality of uncertainty—eradicates the truth—from our consciousness.

Consider two other examples of the law’s rhetorical capacity to define some properties as necessarily coinciding with others where their coinci-

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36 491 U.S. at 119.
37 Incidentally, it also simultaneously punishes the man who reminds us of that uncertainty.
38 Judith Resnik criticized Justice Scalia’s approach to the disparities between his expectations and the reality of what it is like to be a federal judge. Rather than adjusting his rhetoric and world view, Resnik argued, Scalia sought to use the law to adjust reality. For example, after discovering that federal judges hear cases that Justice Scalia viewed as “‘trivial cases’—explicitly defined as many social security claims . . . [he suggested that they] be removed from the federal courts.” Resnik, supra note 9, at 1931. Resnik further observed that “Justice Scalia wants to change the reality to conform to his view of what judges ‘should’ do; important men do not engage in routine tasks.” Id. (emphasis added). In both the case of a father and the case of a federal judge, rather than adjusting his expectations, Justice Scalia prefers to rewrite the contents of the categories themselves so that they continue to fit his preconceived notions of propriety.
dence is aspirational rather than empirically observable. Marital rape
exemptions—laws which confine the crime of rape to cases in which a man
victimizes a woman “not his wife”—reflect this phenomenon. Husbands do
not rape their wives, says the law, by definition. In addition to protecting
husbands’ sexual access to their wives, these laws construct a world in which
benign husbands do not sexually assault their wives. They reinforce social
beliefs that marital rape does not take place. From this perspective, they are
laws about denial.

A second example of this denial lies in the Biblical story of Solomon and
his determination of maternity in the “Judgment of Solomon” baby case. Solomon, by offering to cut the baby in half, determined that one woman
cared about the child’s life and well-being while the other did not. Of
course, one’s willingness to see a baby cut in half is not relevant to maternity
because such willingness is so unusual, among non-mothers as well as
mothers. At the same time, however, unwillingness to see the baby killed is
not a sign of motherhood, but merely an indication of a minimal sensitivity
to human life. Solomon, one could argue, selected the identity of the better
guardian, not the biological mother. But Solomon did not simply choose a
custodian; he declared her the natural mother. He did so because society
needed to believe that sensitivity and caring inevitably accompany natural
motherhood. Solomon’s “law” announced that the natural mother was the
better guardian, and that a mother would never let her child die. He thereby
gave legal structures the stamp of nature and quelled doubts by defining
them out of existence.

Like the presumption of paternity, however, Solomon’s declaration cannot
obscure the truth entirely. Natural mothers can be abusive, and married
women can be unfaithful. But like a campaign slogan or a television adver-
tisement, legal rhetoric permits an illusion to take hold. It allows people to
embrace a falsehood and believe in it, even while they know, intellectually,
that it is false.

B. The Devaluation of Relationship

The Court in Michael H. employed a second strategy for addressing the

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39 As one commentator notes: “[T]he law’s sanctioning of this exercise of power [in
marital rape] transforms this power into truth. Therefore, when men say ‘a husband
cannot rape his wife,’ they speak the truth . . . .” Note, To Have and to Hold: The
Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255
(1986). The commentator further asserts, “A ‘female perspective,’ on the other hand,
interprets marital rape as involving ‘brutality and terror and violence and humiliation
to rival the most graphic stranger rape.’ ” Id. at 1260-61 (quoting D. Finkelhor, Marital
Rape: The Misunderstood Crime, Address to the New York County Lawyer’s
Association (May 3, 1984)).

40 1 Kings 3:16-28. For further discussion of this story, see Martha L. Minow, The
Judgment of Solomon and the Experience of Justice, in The Structure of Procedure
unique and potentially threatening features of female reproductive capacity: the devaluation of nurturing. This treatment of nurturing has subtle implications for the underlying difference in male and female reproductive roles as well.

Justice Scalia omits Michael H.'s prior relationship with Victoria in calculating whether Michael has a constitutionally protected privacy right. To determine whether there exists a fundamental right to act as the father of one's biological child, which Michael H. has claimed, Justice Scalia employs what he believes is a neutral approach to finding fundamental rights under the Due Process Clause. Under this approach, he must determine into which of two historical traditions Michael H.'s circumstances fit: one that recognizes his interest as a fundamental liberty or one that does not. In employing this strategy, Justice Scalia professes to "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." He settles upon the following question: Is there a right of paternity traditionally accorded "the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child[?]" Justice Scalia omits Michael's preexisting relationship with Victoria as part of his most "specific" description of the facts of the case. He leaves out this fact despite a "relevant tradition" in the law: the Supreme Court's indication that a father's fundamental right to custody of his genetic child turns on his preexisting relationship with that child—a tradition that Justice Scalia acknowledges elsewhere in the opinion.

By omitting Michael H.'s prior relationship with Victoria from his concise summary of the facts, Justice Scalia devalues the act of nurturing a child. One might believe the omission justified because the relationship was too minimal to rise to the level necessary for a fundamental right to exist; if the relationship had been more established, perhaps Justice Scalia would have included it. If that had been the case, however, Justice Scalia could have cited the lack of significant contacts between Michael H. and Victoria as fitting within a tradition denying such a liberty interest.

\[\text{41} 491 \text{U.S. at 127 n.6.} \]
\[\text{42 Id.} \]
\[\text{43 Id. at 127.} \]
\[\text{44 See Tribe & Dorf, supra note 26, at 1085-98 (arguing that despite Justice Scalia's claim to the contrary, his description of the relevant facts of Michael H. requires him to select which facts to emphasize).} \]
\[\text{45 Compare Stanley v. Illinois, 405 U.S. 645 (1972) (declaring it unconstitutional to divest an unwed father of children he has taken part in raising, without a fitness hearing) with Lehr v. Robertson, 463 U.S. 248, 262 (1983) (holding that there is no fundamental right of custody in a father who "has never had any significant custodial, personal, or financial relationship with [his biological daughter]").} \]
\[\text{46 491 U.S. at 123.} \]
\[\text{47 See Lehr v. Robertson, 463 U.S. at 262 n.18 ("[A] natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent.") (emphasis added).} \]
consider the relationship factor—either to bolster or to defeat Michael H.'s paternity claim—reflects a belief in the insignificance of paternal nurturing. By contrast, although Michael H.'s status as the "natural" father did not decide the case, this fact does appear in Justice Scalia's condensed description of the significant elements of the case.\footnote{48}

By focusing on Michael's genetic relationship with Victoria—describing him as the "natural father"—to the exclusion of his nurturing relationship with her, Justice Scalia elevates the significance of genetic contribution, that which a man can do, over nurturing, that which women have traditionally done and men have designated as belonging to a woman's sphere. True, the consequence in \textit{Michael H.} was to deny a genetic father's entitlement, but the denial elevates genetic fathers generally by redefining their attributes in a way that negates their uncertainty, by likening California law, the source of Gerald D.'s counterfactual privilege, to "nature itself."

Nurturing, like certainty of parenthood, is a feature of reproduction that is the special domain of the female: gestation is the physiological nurturing of a developing human being. Additionally, women are still the primary nurturers of children in our society.\footnote{49} When one parent remains at home to care for a young child, it is usually the mother.\footnote{50} Women constitute an overwhelming majority of the educators working in our nursery schools, kindergartens, and elementary schools.\footnote{51} Perhaps this tendency stems from barriers to women's entry into other fields. Perhaps it results from a character trait developed more fully by women—because they need it to survive or because pregnancy sensitizes them to human relationships.\footnote{52}

\footnote{48} 491 U.S. at 127 ("What counts is whether the States in fact award substantive parental rights to the natural father of a child . . . .")

\footnote{49} Cf. Martha Fineman, \textit{Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking}, 101 \textit{Harv. L. Rev.} 727, 769 (1988) ("[N]ormally it is the mother who assumes day-to-day primary care." (citing Elizabeth Maret & Barbara Finlay, \textit{The Distribution of Household Labor Among Women in Dual-earner Families}, 46 \textit{J. Marriage & Fam.} 357, 360 (1984) (stating that the female is the primary caretaker of children even when both parents work))).

\footnote{50} \textit{Id.}

\footnote{51} See \textit{Statistical Handbook on Women in America} 129 (Cynthia Taeuber ed., 1991) (documenting that in 1989, out of a total of 3,936,000 teachers over 20 years of age, excluding colleges and universities, 2,853,000 were women and 1,039,000 were men).

\footnote{52} West, \textit{supra} note 4, at 15 ("According to cultural feminist accounts of women's subjectivity, women value intimacy, develop a capacity for nurturance, and an ethic of care for the 'other' with which we are connected . . . ."); see also Suzanna Sherry, \textit{Civic Virtue and the Feminine Voice in Constitutional Adjudication}, 72 \textit{Va. L. Rev.} 543 (1986) (arguing that liberal individualism is a masculine approach to the law and that civic republicanism, by contrast, has the potential to elevate the sorts of community connectedness authentic to the female experience). \textit{But see} Iris Marion Young, \textit{Politics and Group Difference: A Critique of the Ideal of Universal Citizenship}, 99 \textit{Ethics} 250, 253 (1989) (arguing that civic republicanism, by mandating a homogeneous notion of the
Whatever the explanation, in our society, nurturing is a characteristically female trait.53

In Michael H., a man wanted the opportunity to nurture and have a relationship with his daughter. A man valued what is traditionally a woman's role. By omitting this aspect of Michael H.'s connection to Victoria, Justice Scalia made the primary substance of many women's lives and pregnancies invisible. As the late Professor Frug wrote in a different context, "By omitting material which is traditionally more closely linked to women and their experiences than to men, the [writer] . . . perpetuate[s] that aspect of gendered thinking which privileges 'male' concerns."54 Frug also asserted, "[M]en's dominance over women permits the eclipse of traits that are associated with women. Male traits seem standard only because female traits are suppressed from observation and consideration."55 Even radical feminists who argue that male supremacy rather than pregnancy accounts for women's propensity for nurturing have criticized the minimization of and disregard for that trait.56 Nurturing, however, can be acknowledged as valuable without treating it as the inevitable destiny of women.

C. Genetic Fixation and the Denial of Gestation

Justice Scalia elevates "natural" fatherhood by including it in the most "specific" description of Michael H.'s claim while excluding nurturing from general will and social justice, suppresses variation from the supposedly "universal values and norms which were derived from specifically masculine experience").

53 See, e.g., Gilligan, supra note 4.
54 Mary Joe Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 Am. U. L. Rev. 1065, 1087-88 (1985). Moreover, Frug observed that a case appearing in John P. Dawson et al., Cases and Comment on Contracts (4th ed. 1982), a contracts casebook, denigrated the importance of nurturing and relationship. In this case, Fitzpatrick v. Michael, 9 A.2d 639 (Md. 1939), excerpted in Dawson et al., supra, at 128, cited in Frug, supra, at 1080 n.58, the court did not enforce negative specific performance for a nurse where the man she had cared for under her contract dismissed her in violation of their contract, after years of faithful service. The reason the court did not enjoin Mr. Michael's hiring of another nurse is that such an injunction may only be granted for services which are unique and special. The court found that Miss Fitzpatrick's services were not "rare or unusual," explaining that "they involved no more than doing such things as a housewife often does." 9 A.2d at 647, excerpted in Dawson et al., supra, at 128, 131, quoted in Frug, supra, at 1081 & n.59. Just as the court in Fitzpatrick did explicitly, Justice Scalia implicitly devalues what women have traditionally cared about, ranking it lower than that which has had significance for men, here marital fidelity.

55 Frug, supra note 54, at 1107.
56 See Symposium, supra note 4, at 25, 27. Catharine MacKinnon, a symposium participant, states that she has some affection for Carol Gilligan's work because it values what women do and say right now, though she criticizes the work for assuming that the voice (feminine behavior) is actually woman's voice instead of the voice of the sexually degraded and oppressed.
that description. In addition to devaluing relationship as a feature of paternity, the elevation of genetic fatherhood serves to deny the unique female role in reproduction. The denial may be disguised by men's and women's equal contribution to the genetic composition of their children. The focus on genetics, however, represents a strand of reproductive theories that diverts attention from uniquely female capacities in order to promote inequality.

In ancient times, many believed that men were the sole contributors to the "form" or "heredity" of their children, while women provided only nutrition and raw material.\(^5\) Aristotle, for example, wrote that what the male contributes to generation is the form and the efficient cause, while the female contributes the material . . . . If, then, the male stands for the effective and active, and the female, considered as female, for the passive, it follows that what the female would contribute to the semen of the male would not be semen but material for the semen to work upon . . . .\(^5\)

Carol Delaney observed a similar concept at work among the Turkish villagers she studied. "The child comes from the seed . . . . The female body, like soil, is a generalized medium of nurture . . . . Blood in the womb and milk at the breast . . . . swell the being of the child but in no way affect its essential identity. That is a matter of seed."\(^5\) Finally, a feminist theologian, Gerta Lerner, similarly described the Biblical world as that in which "God's blessing of man's seed which would be planted in the passive receptacle of woman's womb symbolically defined gender relations under patriarchy."\(^6\)

Although modern genetics has exposed the empirical inaccuracy of this picture of reproduction, it still retains a powerful influence over our culture and language. For example, parents typically give the father's last name to their children. They are therefore identifiably "his" children. Similarly, a man's ability to become erect and ejaculate sperm is termed "potency," an active, powerful noun, while a woman's ability to become pregnant is termed "fertility," a word which connotes passive protective capacity.

Moreover, modern societies have developed a new quasi-scientific myth of male importance to replace the religious myth identified by Delaney and Lerner: it is now scientifically accepted that a woman contributes half of her

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\(^5\) See generally Carol Delaney, The Meaning of Paternity and the Virgin Birth Debate, J. ROYAL ANTHROPOLOGICAL INST., Sept. 1986, at 494 (describing the Virgin Birth as a male ideological metaphor for all human reproduction, in which the woman is a vessel and the male is the true parent).


\(^5\) Delaney, supra note 33, at 35, 38.

\(^6\) GERTA LERNER, THE CREATION OF PATRIARCHY 200-01 (1986) (arguing that a monotheistic conception of the universe contributed to a patriarchal society), quoted in Resnik, supra note 9, at 1918-19.
child's genetic material. Women, however, are uniquely capable of pregnancy. Thus, although men threatened by pregnancy can no longer cope with the threat by denying women's genetic contribution to children, they can sustain the notion that the male role in reproduction is not qualitatively less important than the female role through a genetic fixation which denies an important difference between the sexes. Pregnancy and birth are thereby reduced to nonessential features of procreation. In the new mythology, the law invokes scientific authority to conclude that only the contribution of genetic material is significant in reproduction.

IV. Frozen Embryos

The denial of women's unique role in reproduction makes a more explicit appearance in Davis v. Davis, a frozen embryo case in Tennessee, than it did in Michael H. Although the appellate and trial courts in Davis disagree as to both result and rationale, both express views of the world and reproduction that effectively deny pregnancy by equating male and female reproductive experiences.

Davis involved a married couple who underwent in vitro procedures (whereby an ovum is fertilized in a laboratory container) to produce nine embryos genetically their own. After two unsuccessful implantation attempts, the couple had seven of the embryos cryogenically preserved for future implantation. The Davises' marriage ended in divorce, and Mrs. Davis sought custody of the embryos for implantation and pregnancy. Mr. Davis, however, wished to prevent implantation and therefore asked the court to award joint custody of the embryos to him and Mrs. Davis, effectively preventing implantation without his consent.

A. Davis 1

The trial court found that "Mr. and Mrs. Davis ha[d] produced human beings, in vitro, to be known as their child or children;" that as human children they were entitled to a custody award in line with their best interests; and that implantation—the mother's stated intention—would serve the "children's" best interests. Accordingly, the court awarded "temporary custody" of the embryos to Mrs. Davis.

The court's language and reasoning reveal a significant commitment to demonstrating that life begins at conception. The court considered extensive

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63 Id. at *8. "Cryopreservation is a procedure whereby the cells of plants or animals are subjected to freezing in laboratory and unthawed through a step by step procedure for later use. Liquid nitrogen is generally utilized as the freezing agent." Id. at *6 n.3.
64 Id. at *2.
65 Id. at *37.
scientific expert testimony on the question. As part of its evidence, the court noted that "all four witnesses agree that the seven cryopressed embryos are human"\(^\text{66}\) (although no one had challenged the species of the embryos). It pointed out one doctor's testimony that "there is nothing before the embryo; before an embryo there is only a sperm and an egg\(^\text{67}\) and added that "[n]o scientist has ever offered the opinion that an embryo is property.\(^\text{68}\)

A scientist has no special expertise to evaluate whether or not a sperm and an egg are "nothing," and while it is true that no scientist has ever offered the opinion that an embryo is property, it is equally true—and equally irrelevant—that no scientist has ever offered the scientific opinion that the recitation of the Lord's prayer in public schools violates the Establishment Clause of the First Amendment. These are legal questions, not matters of scientific expertise. This appeal to scientific testimony, however, is very revealing because it represents an effort to give the stamp of scientific "objectivity" to the idea that once fertilization has occurred, a child has been created.\(^\text{69}\)

It is not immediately apparent why the court took the trouble to "demonstrate" that life begins at conception. Such a proof was not necessary to justify a custody award to Mrs. Davis. The state's interest in the mere potentiality of life would have provided sufficient justification. Though abortion law is currently in a state of flux,\(^\text{70}\) even under the Supreme Court's most liberal formulation of abortion rights, the state has an interest in potential life.\(^\text{71}\) In Davis, moreover, the privacy interests of the man and the woman were arguably equal because, unlike in the abortion context, the court's decision would not implicate either individual's right to be free of a physical burden like pregnancy. Instead, the state had to interfere with either Mr. Davis's reproductive privacy—by denying him the right not to procreate—or Mrs. Davis's reproductive privacy—by denying her the right to procreate. The court therefore could have found that the state's interest in potential life tilted the balance in favor of Mrs. Davis. It would have been a simple matter to decide the case on these grounds.

"Demonstrating" that life begins at conception, however, does have important implications for the question of the respective roles of males and females in procreation. When the court describes an embryo as a child, it

\(^{66}\) Id. at *12.

\(^{67}\) Id. at *15.

\(^{68}\) Id.

\(^{69}\) Although such an idea has obvious implications for the abortion context, the court did not exploit it for these implications. The court in fact made a point of distinguishing this case from that of abortion, claiming that the state's compelling interest in human life in the abortion cases is not identical to its interest in the in vitro context. See id. at *32-33. The court was not, therefore, necessarily attempting to lay the groundwork for abortion decisionmaking.


\(^{71}\) See Roe, 410 U.S. at 155.
implies that genetic contribution is biologically sufficient for procreation. In
the court's reconstruction of nature, pregnancy and childbirth—of which
only women are capable—are not essential to reproduction, just as in
Michael H., that activity which women tend to do—nurturing—was not
essential to the definition of constitutionally protected fatherhood. More-
over, by calling the award of the embryo to Mrs. Davis "temporary cus-
tody," an appellation which is gender-neutral, the court denies that
pregnancy is special; it obscures the fact that women have capabilities that
men lack. A man, no less than a woman, can have temporary custody of a
child. The court similarly obscures the unique role of pregnancy in the
development of an embryo when it compares an embryo to "a newborn
human being, left naked in a field without . . . sustenance, aid and assist-
ance." A newborn under these circumstances could survive with the assist-
ance of any caring individual, male or female. The embryo's needs, on the
other hand, are more specific: only a woman, through pregnancy, can pro-
vide the requisite "sustenance, aid and assistance."

In obscuring the essentiality of pregnancy, the court obviously could not
deny that pregnancy is a necessary element of the reproductive process. The
court implicitly acknowledges this necessity by preferring implantation and
the consequent "custody" award to the only party capable of gestation—a
woman. That something is necessary, however, does not mean that it is
important or part of the "essence" of that to which it is necessary. For
example, it is necessary to any job that an employee travel to work each day,
but we would not describe the commute as part of the essence of most jobs.
Similarly, although reproduction requires pregnancy, and children's survival
requires nurturing, the Davis 1 and Michael H. courts describe the essence of
reproduction and parenting without overtly acknowledging these elements.
By cloaking the processes in gender-neutral terms, these courts acknowledge
the occurrence of implantation, pregnancy, and nurturing, without attribut-
ing special capabilities to women.

72 Davis 1, 1989 Tenn. App. LEXIS 641, at *37.
73 Id. at *28.
74 The resort to gender-neutral phraseology and denial rhetoric also played an
important role in a recent surrogacy case in Los Angeles. In that case, the birth mother
was not genetically related to the child she bore. The trial judge awarded full custody to
the genetic parents and ruled that the birth mother—Anna Johnson—was in no way the
child's parent by virtue of having carried him for nine months of development. The judge
likened Johnson's pregnancy to "a foster parent who cares for a child while the 'natural
mother' is unable to do so." Catherine Gewertz, Genetic Parents Given Sole Custody of
Child; Surrogate: Judge Rules that the Woman Who Bore an Infant for an Infertile Couple
Has No Rights to the Boy, L.A. TIMES, Oct. 23, 1990, at A1. Note that "natural"
parenthood there included only genetic contribution. The judge abstracted away
pregnancy as incidental to parenthood and gender-neutralized it with the appellation
"foster parent."

Margaret Jane Radin suggests that the existence of surrogacy arrangements, which
until recently involved a surrogate who was both the genetic and the gestational mother,
Denying that pregnancy is essential to reproduction, as the court did in *Davis 1*, is not only counterintuitive, it is also inconsistent with the court’s own reasoning. To bolster Mrs. Davis’s claim to the embryos, the court observes that “Mrs. Davis went through many painful, physically tiring, emotionally and mentally taxing procedures” in having her ova extracted for fertilization and subsequent implantation. This observation effectively acknowledges that submitting to painful and difficult experiences in the process of creating an entity gives one an entitlement to that entity. This acknowledgment is inconsistent with the way in which the court abstracts away from the definition of creating a child the most significantly laborious and difficult parts of the process—pregnancy and childbirth.

**B. Davis 2**

The appellate court in *Davis 2* engages in a form of denial related to that evidenced in *Davis 1*. Rather than deny the role of pregnancy in the definition of parenthood, however, the *Davis 2* court denies the unique nature of the hardships of pregnancy.

The premises underlying the two *Davis* opinions are facially in opposition. The appellate court firmly rejects the trial court’s analysis of the *Davis* facts as well as its decision to award the embryos to Mrs. Davis. Based on its analysis of *Roe v. Wade*, Tennessee statutes, and Tennessee common law, the appellate court concludes that embryos are not people. In support of this finding, the court points to, among other things, the fact that “their [the embryos’] development was limited to the 8 cell stage. At this juncture there is no development of the nervous system, the circulatory system, or the pulmonary system.” Because embryos are not yet people, and therefore have no cognizable “best interests,” the appellate court looks to Mr. Davis’s

“feeds the further understanding that the important genetic line is the male line, and that women are fungible in helping to perpetuate it.” Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1929-30 (1987). I would add that the genetic fixation that characterizes surrogacy arrangements—even and especially when both adoptive parents have contributed the genetic material—feeds the understanding that the male role in reproduction (genetic contribution) is the only significant factor in defining a parent, and that women’s additional role (gestation) is fungible and nonessential.


*Davis 2*, 1990 Tenn. App. LEXIS 642, at *1 n.1. This fact, however, received only brief mention in the appellate court decision and played no apparent role in the court’s reasoning or conclusions. Therefore, there is no reason to think the court’s decision would have been different if Mary Stowe had wished to implant the embryos in her own body, as she had in *Davis 1*. The court awarded joint control of the fertilized ova to Mary Stowe and Junior Davis, her former husband. *Id.* at *9.


*Id.* at *2. Note that this appeal to science parallels that found in the trial court’s
“right not to beget a child where no pregnancy has taken place,” part of his constitutionally protected privacy right in matters of procreation.\(^7\) In support of Mr. Davis’s privacy right, the court states:

On the facts of this case, it would be repugnant and offensive to constitutional principles to order Mary Sue [formerly Mrs. Davis] to implant these fertilized ova against her will. It would be equally repugnant to order Junior [Mr. Davis] to bear the psychological, if not the legal, consequences of paternity against his will.\(^8\)

It is no doubt true that Mr. Davis had an interest in whether or not his sperm were used to create children. For this reason, not all men are willing to be sperm donors, nor is any man legally required to be one, and those men who do choose to donate sperm must often sign waivers giving up any rights or duties to the future products of their sperm. Implicitly, \textit{Griswold} and \textit{Eisenstadt} protect the rights of married and unmarried people, not just women, to use birth control because of the validity of a man’s interest in not becoming a father against his will. Finally, it is at least in part because men are invested with legal control over the destinies of their sperm that they can later be charged with supporting children in paternity actions.

Nonetheless, recognizing that forced paternity constitutes a harm does not require that this harm be equated with forced maternity. Indeed, the court’s own argument belies the assertion that forced paternity is truly equivalent to forced implantation. In order to demonstrate the horrors of forced paternity, the court begins by declaring that forced implantation is “repugnant and offensive,”\(^8\) and then analogizes forced paternity with an uncontrovertially horrible practice, forced implantation. Forced implantation, however, is repugnant at least in part because of its intrusiveness on women’s bodies. Thus, the moral force behind the court’s conclusion that forced paternity is repugnant depends upon a comparison to a practice that would uniquely burden women. By selecting for analogy a burden that falls uniquely on females, the court unwittingly provides support for the proposition that forced implantation really does impose a qualitatively greater burden on women than forced paternity imposes on men.

Moreover, just as the court in \textit{Davis 1} did not need to assert that life

\(^7\) Id. at *5-6 (quoting Carey v. Population Servs. Int’l, 431 U.S. 678, 685 (1977) (invalidating New York statute limiting the sale of contraceptives and prohibiting their advertisement)). The \textit{Davis 2} court also cites Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (overturning criminal conviction based upon Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons), Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating Connecticut statute criminalizing the use of any drug or article to prevent conception), and \textit{In re} Romero, 790 P.2d 819, 822 (Colo. 1990) (reversing order sought by guardian to sterilize incapacitated adult woman).

\(^8\) \textit{Davis 2}, 1990 Tenn. App. LEXIS 642, at *8-9 (emphasis added).

\(^8\) \textit{Id.}
begins at conception to justify its custody award to Mrs. Davis, the court in
Davis 2 could have argued persuasively that forced paternity is unconsti-
tutional without equating it with forced maternity. It could have expanded
upon the argument that having children entails ongoing emotional rela-
tionships and responsibilities, both legal and moral, into which one should only
enter voluntarily. Unwanted parenthood is a psychologically injurious expe-
rience that no one should have to endure. Under Griswold and Eisenstadt,
the privacy right includes the right to decide not to have children, and
neither case distinguishes this right as a uniquely female one.

The court in Davis 2 rejects this strategy, however, and chooses instead to
equate forced paternity with forced implantation. In so doing, the court
abstracts the pain and vulnerability that women alone endure out of the defi-
nition of human experience. It mandates gender-blindness even though real-
ity makes greater demands of women than of men.

Robin West elaborated upon the harm of the unwanted physical intrusion
that women alone suffer when forced to be parents. She related that
“[a]ccording to radical feminism, women’s connection with the ‘other’ is
above all else invasive and intrusive: women’s potential for material ‘connection’ invites invasion into the physical integrity of our bodies, and intrusion
into the existential integrity of our lives.”82 West observed that “the original
feminist argument for reproductive freedom turned on the definitive radical
feminist insight that pregnancy—the invasion of the body by the other to
which women are distinctly vulnerable—is an injury and ought to be treated
as such.”83 A right to procreative privacy and liberty resting upon this argu-
ment would not have any necessary application for males, either in general
or in the specific circumstances of Davis. West proposed, nevertheless, that
it is . . . the radical argument—that pregnancy is a dangerous, psychi-
cally consuming, existentially intrusive, and physically invasive assault
upon the body which in turn leads to a dangerous, consuming, intru-
sive, invasive assault on the mother’s self-identity—that best captures
women’s own sense of the injury and danger of pregnancy, whether or
not it captures the law’s sense of what an unwanted pregnancy involves,
or why women should have the right to terminate it.84

Some statements made by women experiencing unwanted pregnancy dur-
ing the pre-Roe era, and cited by West, poignantly illustrate the pain felt by
women undergoing unwanted pregnancy. One woman reported that she
‘‘could not conceive of any event which would so profoundly impact upon

82 See West, supra note 4, at 15. West contrasted radical feminism with cultural
feminism before uniting the two in her connection thesis. Cultural feminism focuses
upon the positive qualities of women and women’s experience, while radical feminism
emphasizes the harm women experience because of sexual hierarchy and the humiliation
inherent in being a woman in our world today. Id. at 29.

83 Id. at 30.

84 Id.
any man.' Another wrote that "[y]ou cannot possibly know what it is like to be the helpless pawn of nature." A third woman recounted that when she learned she was pregnant, "I was sick in my heart and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer." West also has pointed out the similarity between having an unwanted pregnancy and being raped. "An unwanted fetus, no less than an unwanted penis," she related, "invades my body, violates my physical boundaries, occupies my body and can potentially destroy my sense of self." Because unwanted pregnancy is an experience unique to women, these examples expose as false the Davis 2 court's statement that forced fatherhood and forced motherhood are "equally repugnant."

Had the court ordered Mrs. Davis to have an embryo implanted, it would have effectively achieved both forms of invasion that West elucidated. First, the forced implantation procedure itself would parallel forced intercourse. "'The vagina itself is muscled and the muscles have to be pushed apart . . . . She is opened up, split down the center. She is occupied—physically, internally, in her privacy . . . .'" Second, the resulting unwanted pregnancy would be a prolonged physical intrusion. Yet the court in Davis 2 equates this two-stage physical invasion with using a man's consensually surrendered sperm to accomplish a pregnancy which he opposes.

In light of the obvious differences between forced maternity and forced paternity, one might ask why the Davis 2 court equates them. One might wonder generally why a court would want to deny that women have unique reproductive experiences. One answer is that denial rhetoric is about control. Denying pregnancy permitted the court to remove control over reproduction from a woman and to vest it in a man, Mr. Davis, by giving him veto power over implantation of the embryos. The court could have given Mr. Davis this control without the accompanying denial. What the denial permits is the pretense that men ordinarily can and do have this control over reproduction. Ordinarily, however, when an embryo is growing inside of a woman's body and is not frozen in a petri dish, a man has neither the ability nor the constitutional right to arrest the development of that embryo to avoid unwanted fatherhood.

85 Id. at 31 (quoting Amicus Brief for the National Abortion Rights Action League et al. at 13, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379)) [hereinafter NARAL Amicus Brief].
86 Id. (quoting NARAL Amicus Brief, supra note 85, at 19). Note that, unlike Justice Scalia, this anonymous woman did not equate the "natural" with the good.
87 Id. (quoting NARAL Amicus Brief, supra note 85, at 28).
88 Id. at 35.
89 Id. at 34 (quoting ANDREA DWORKIN, INTERCOURSE 122-23 (1987)). West cited a description of intercourse generally, not one of only rape. One need not, however, view intercourse as inherently assaultive to recognize the description's application to non-consensual intercourse or, analogously, to forced implantation.
Similarly, as we have seen, the Supreme Court used denial rhetoric to transfer control over reproduction in *Michael H.* Because men do not ordinarily control the development of an embryo from conception to birth, a man does not ordinarily know with certainty that a developing child is his own. In *Michael H.*, however, Justice Scalia obscured this inherent uncertainty by calling California law "like nature itself." Justice Scalia and the California presumption of paternity thereby rewrote nature. Rewriting nature and defining the "natural" father as the husband of the natural mother enabled the law to extinguish a man's otherwise inevitable uncertainty about whose biological children his wife is bearing.

The attempt to neutralize or deny a woman's unique capacity and control in the process of creating children has not appeared in every male judge's opinion in every case involving reproduction. In his dissent in *Stanley v. Illinois*, for example, Chief Justice Burger suggested that a biological mother has a greater connection with her child by virtue of her physical role in reproduction than does a biological father. He wrote: "I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter." Similarly, in *Lehr v. Robertson*, the Supreme Court stated in a footnote that "[t]he mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures." The Court in *Lehr* was not gauging genetic motherhood and fatherhood, but rather determining the entitlements of each genetic parent. In the same footnote, the Court referred to the fact that "the relation between a father and his natural child may acquire constitutional protection," and thereby acknowledged the particular individual's "natural" fatherhood, yet denied protection to his parental claims.

Commentators have also recognized the value of nurturing and its role in pregnancy. For example, Robin West has argued that the special relationship between a mother and her child which develops during pregnancy helps

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a statute requiring married women and minors to obtain consent from their respective husbands or parents prior to receiving abortions).

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define women as existentially "connected" to, rather than autonomous from, the "other."

The claim that we are individuals "first," and the claim that what separates us is epistemologically and morally prior to what connects us — while "trivially true" of men, are patently untrue of women. Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly "connected" to another human life when pregnant.97

Recognizing a mother's special relationship to her newborn baby, however, may entail two troubling corollaries. First, some may be tempted to derive from that relationship a mandate upon women that they act as the primary caretakers, effectively turning their pedestal—i.e., their superior role in reproduction—into a cage.98 As both MacKinnon and Minow have suggested, the price of emphasizing women's difference is often exclusion and maltreatment. In a male-dominated world where the prototypical human being is male, "difference" means inferiority and stigmatization; one must be male, for all practical purposes, to be treated as human.99 Second, acknowledging women's special relationship with their children may risk driving men away from child-rearing. For example, Chief Justice Burger's dissenting opinion in Stanley v. Illinois did not fairly credit Mr. Stanley's relationship with his children, with whom he lived and whom he raised, when it spoke generally of a "male's often casual encounter" with his child.100 The majority opinion gave more weight to the father's interest, noting that "[t]he private interest here [is] that of a man in the children he has sired and raised."101 It would be unfortunate to discourage relationships like the one Mr. Stanley may have had with his children in the process of acknowledging the unique female role in procreation.

Ignoring a woman's special capacity to become pregnant and to give birth as both courts did in Davis, however, is neither necessary nor likely to liberate women from the pedestal/cage. Instead, it will generate insensitivity to what a woman must endure to have a child, and it will perpetuate the minimization of experiences which are unique to women. Accordingly, the world will continue to be structured around male life.

97 West, supra note 4, at 2.
98 Cf. Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall, J., dissenting) (noting that restrictions which facially purport to protect women may actually work to limit their autonomy).
99 See MacKINNON, supra note 4, at 656 ("The white man's meaning of equality is being equal to him, which is the same as being the same as him. This meaning of equality has not valued any cultural or sexual distinctiveness except his own."); MINOW, supra note 4, at 42 (proposing that the "norm" is defined in terms of a male norm, and since women differ from men, they must bear the burden of their difference).
100 405 U.S. at 665 (Burger, J., dissenting).
101 405 U.S. at 651.
V. PUNISHMENT AND THE WORKPLACE

Structuring the world around male life effectively punishes women for experiences only they can have. The preceding pages have explored two cases in which the courts denied and devalued pregnancy. Not only do these two rhetorical attacks cause harm, but they also set the stage for the third device—punishment. Punishment, as rhetoric and result, is most prominent in the sphere of the workplace.

In Geduldig v. Aiello, the Supreme Court upheld as nondiscriminatory a state law excluding disabilities associated with pregnancy from the list of employment disabilities for which leave was available. The Court reasoned that because "there is no risk from which men are protected and women are not [and] there is no risk from which women are protected and men are not," the law treats men and women equally. The premise—that neither women nor men are protected from the disabilities associated with pregnancy—is false, however, because men cannot become pregnant, and are therefore inherently "protected." Only a workplace norm designed around men's lives would not, ordinarily, protect employees from disabilities flowing from pregnancy. By defining the "normal" employee as one who cannot become pregnant, the Court was able to sanction an employment policy that treated pregnancy differently from all other health-related disabilities.

Some feminists choose to focus not on how women's normal experiences differ from those of men. Instead, they try to find analogues to events such as pregnancy in the male experience, and demand that the female event and its analogue receive equal treatment. Wendy Williams advocates such a gender-neutral approach to discrimination, and accordingly recommends that we analogize female pregnancy to general disability. She abandons this analogy, and implicitly the whole approach, however, in a telling footnote confronting the argument that pregnancy, unlike most disabilities, is voluntary and therefore should not be treated like other disabilities. She responds that

as a social matter, pregnancy is not meaningfully voluntary any more than eating or sleeping is voluntary. All are basic functions of the human animal necessary to survival. In a workforce composed of men and women, it is as appropriate to expect employers to provide for preg-

103 Id. at 496-97.
104 See MINOW, supra note 4, at 58. Minow observes that the workplace is constructed upon a vision of the male employee, and is therefore not a "neutral" place but an affirmatively male place. "The problem [is] not women, or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind." Id.
105 See, e.g., Williams, supra note 4, at 342-43.
106 Id.
107 Id. at 354 n.114.
nancy-related absence as it is to expect them to provide time off to
employees to eat and sleep.\textsuperscript{108}

This is my position. Pregnancy is part of women's lives and should be
accommodated for that reason, not because it finds a persuasive analogue in
male experience. When faced with a potential discrepancy between preg-
nancy and other disabilities, Williams momentarily accepts this position,
demonstrating the inherent failure of gender neutrality to ensure that women
will count as whole people, regardless of whether their experience finds a
convincing analogue in the male life cycle.

It is not because ignoring the differences among people is inherently just
that it is often appropriate for the law to ignore gender distinctions, as well
as race or national origin distinctions. Rather, it is because no one should be
disabled because she or he belongs to one group rather than to another, espe-
sially where that group has historically been victimized. Where two groups
are not equally situated, however, as men and women are not in their suscep-
tibility to pregnancy, treating them as if they were alike ratifies inequity with
the force of law by accommodating men's but not women's needs.

Though nature or biology may dictate that women must undergo preg-
nancy, in part a disabling experience,\textsuperscript{109} in order to create children, nature
expresses no opinion about the job-related consequences of pregnancy for
women. Nature also does not command that women be forbidden from
choosing to use birth control or undergo an abortion to escape from that
experience. And nature does not hold that time away from work to care for
a child must be punished with discharge or the loss of seniority, or that
seniority—which presumes the capacity to stay employed at a particular
place for an uninterrupted interval of time—is an appropriate measure of
merit or entitlement.\textsuperscript{110} People—legislators, judges, and citizens—make the
normative choices that penalize women for their unique reproductive
capacity.

\textbf{Batteries, Women, and Fetuses}

The logic of a case like \textit{Geduldig} creates a Catch-22 for women seeking
equal employment opportunities. Initially, the courts deny that the work-
place is hostile to women by accepting its features as gender-neutral, rather
than male-centric. Having denied that the workplace is male, thereby
approving its structure, courts then hold that women—by virtue of their

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} To say that pregnancy is disabling is not, of course, to deny that for many women
it is a satisfying and worthwhile experience as well. The joys that result from pregnancy
may outweigh, but do not eliminate, whatever disabling effects pregnancy can entail.

\textsuperscript{110} See, e.g., Mary Joe Frug, \textit{Securing Job Equality for Women: Labor Market
Hostility to Working Mothers}, 59 B.U. L. REV. 55, 55-61 (1979) (arguing that the labor
market is structured around a prototypical employee who does not have childcare
responsibilities—i.e., a male with a wife at home—and thereby disadvantages working
mothers in gaining job security and advancement).
ability to become pregnant—do not fit into the approved structure. Therefore, excluding them is permissible. The second half of this trap, the retaliatory preoccupation with pregnancy, is exemplified by so-called "fetal protection" policies.

In 1991, the Supreme Court decided International Union, UAW v. Johnson Controls, Inc., a case confronting what has been an explosive issue for feminists and others: how to treat workplace dangers to women's reproductive health. In 1982, Johnson Controls, a battery manufacturer, instituted a fetal protection policy. This policy excluded all women, except those who could affirmatively demonstrate their sterility, from any position which could expose them to lead levels deemed harmful to fetuses. The policy extended beyond positions that actually exposed workers to dangerous lead levels; it included any position which could result in a promotion or transfer to a position involving such exposure. Women were therefore subject to the policy even if their actual jobs involved no exposure at all. The plaintiffs in the case, the class of production and maintenance employees affected by the policy, challenged the policy under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act. The United States Court of Appeals for the Seventh Circuit affirmed a grant of summary judgment to the defendants.

A substantial portion of the rhetoric in two of the four court of appeals opinions is punitive in its tone as well as in its concrete consequences for women. Though this Article's focus has been only upon rhetoric until this point, punishment rhetoric is inextricably intertwined with the results reached in a particular case. Therefore, this section will include a critique of the results reached by, as well as the rhetoric of, the court of appeals opinions in Johnson Controls. This Seventh Circuit case takes the male-centered workplace as neutral and then punishes women for not fitting in. It also uses science and its authority to support this punishment. In addition, on a more

112 111 S. Ct. at 1200.
113 Id.
115 42 U.S.C. § 2000e(k) (1988) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ... ").
116 The four opinions produced in the Seventh Circuit en banc court were the majority, authored by Judge Coffey, the dissents of Judges Posner and Easterbrook, and a third dissent by Judge Cudahy, in which he notes that "[i]t is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female." 886 F.2d at 902 (Cudahy, J., dissenting). The case produced three opinions in the Supreme Court: the majority, authored by Justice Blackmun, and separate concurrences by Justices White and Scalia. The analysis here will focus on the opinions of Judges Coffey, Posner, and Easterbrook in the court of appeals.
subtle level, the *Johnson Controls* opinions continue the denial and devaluation strategies discussed above.

Judge Coffey, the author of the majority opinion, began his summary of the facts by asserting that "[s]ince 1982 Johnson Controls, Inc. . . . has maintained a fetal protection policy designed to prevent unborn children and their mothers from suffering the adverse effects of lead exposure."\(^{117}\) Women might expect that a policy protecting them and their unborn children would require lead reduction at the workplace. The *Johnson Controls* policy required instead that the lead stay and the women go.\(^{118}\)

The company's justification for adopting this policy was its determination, "based upon scientific research," that "it was medically necessary to bar women from working in high lead exposure positions in the battery manufacturing division."\(^{119}\) This claim of scientific and medical necessity resembles the *Davis* court's discussion of life beginning at conception.\(^{120}\) In both cases, science, the "objective" observer, dictates that pregnant women are superfluous—in the one case, to reproduction, in the other, to the workplace. In *Davis*, pregnancy was not a significant feature of reproduction: once there was a zygote there was a child, and procreation for all intents and purposes had already taken place. In *Johnson Controls*, the pregnant or potentially pregnant woman was not considered an essential part of the workplace. Lead, however, was indispensable. If women and lead clashed, it was "medically necessary" to bar women. The political choice to consider women superfluous was translated into a scientifically inevitable and "necessary" outcome.\(^{121}\)

Judge Coffey's majority opinion addressed the question of why the women and not the lead must go by stating that neither Johnson Controls nor any other battery manufacturer has been able to design a lead-free battery or implement a procedure which would reduce lead exposure to an acceptable level for fertile women.\(^{122}\) This statement was presumably included to

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\(^{117}\) 886 F.2d at 874.

\(^{118}\) Wendy Williams claims that such protective legislation which excludes women is the inevitable, if unintended, consequence of giving those in power the ability to recognize the uniqueness of pregnancy. *See* Williams, * supra* note 4, at 371-72.

The restriction of health and safety regulation of the workplace to women employees certainly guarantees them a competitive disadvantage relative to men, as well as ensuring that workplace conditions remain the same—i.e., oppressive—as a rule. *See*, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1557 (1983) (demonstrating that humanizing the workplace by making it replicate the family incorporates the gender hierarchy of the family, and noting that legislation protective of women achieves the same effect as gender-neutral labor legislation whose protections men may waive).

\(^{119}\) 886 F.2d at 876.

\(^{120}\) *See* * supra* notes 63-74 and accompanying text.

\(^{121}\) *See* *Mackinnon,* * supra* note 4, at 38 ("Excluding women is always an option if equality feels in tension with the pursuit itself.").

\(^{122}\) 886 F.2d at 878.
demonstrate that it is either impossible or unreasonable to design such a battery or to implement such a procedure. This implicit assertion should be met with skepticism, however, because the law has historically determined what is “reasonable” from a male standpoint. The question then is whether industry, owned, controlled and largely populated by men, may be trusted to consider women’s interests important enough to put all possible efforts into making the workplace safe for them. Judge Coffey ignored the male bias of the industry and trusted it to do just that.

Judge Coffey could have acknowledged the fact that what industries are currently able to produce and what they could learn to produce with a different set of incentives are two different things. Instead, he complacently affirmed the policy at issue, with all its controversial scientific propositions, on a motion for summary judgment. He could have responded to the bias in the battery-making industry and provided the necessary set of incentives, by permitting both anti-discrimination law and tort law to operate in that industry. In that way, the industry would have had the appropriate motivation to move toward the creation of a battery-making process that accommodates fertile women in the workplace. But he chose not to do so.

Judge Coffey’s gender blindness permitted him to punish women by excluding them on the basis of their capacity for pregnancy. Although even the most reactionary of judges today would probably not say, “a woman’s place is in the home,” he might find other ways, such as excluding women from the workplace, to say essentially the same thing. By legally immunizing women’s exclusion, the court of appeals helped to ensure that the industry would make little effort to find safe alternatives to lead batteries. It is less expensive to exclude women and hire men than to attempt to make the workplace safe for both.

Judge Coffey acknowledged that both the fetal protection policy and the exposure of fetuses to lead would result in harm. He described the case, however, as one in which “the interest in financial reward [to the excluded woman] is balanced against a medically established risk of the birth of a medically or physically deprived baby and where the challenged distinction is based upon the reality that only the female of the human species is capable of childbearing.” This characterization of the balancing devalues women as independent, self-sufficient human beings, and it devalues them because of

123 See, e.g., Susan Estrich, Rape, 95 YALE L.J. 1087 (1986) (noting that the law determines whether or not a rape has taken place by asking whether a man would believe his actions to constitute rape, rather than whether a woman would experience being raped); Lois Pineau, Date Rape: A Feminist Analysis, 8 LAW & PHIL. 217 (1989) (same).
124 See Joan C. Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 801 (1989) (arguing that the only way women can enter the workforce and have their needs met and their experiences taken into account is by “insisting on a redefinition of the ideal worker”).
125 886 F.2d at 883. Note that a woman’s unique capacity is emphasized here in a context in which the court views that uniqueness as disqualifying. By contrast, in the
their unique capacity to bear children. A woman who is jobless because of a fetal protection policy would probably not use the term "financial reward" to describe her interest in working. If she derives no fulfillment from the job and works only because she needs the money, then "economic necessity" would be a more apt description of her situation. Similarly, if she works because working gives her a sense of control that reliance upon a man for sustenance does not, "financial reward" also fails to capture all that she stands to lose.

Consider once again the maxim, "a woman's place is in the home." This maxim implies, among other things, that women are not individuals with the right to pursue their own goals; it suggests that they exist to serve others. One such service is reproduction. If women's sole permissible fulfillment in life were reproduction, then it would follow that we should calculate women's interest in not being excluded from work by determining the impact of such exclusion on their offspring alone. Judge Coffey does just that in his attempt to explain his use of disparate impact analysis, described below.

Disparate impact analysis is the law's approach to employment policies that appear neutral. Such policies do not explicitly discriminate based on sex, race, or any other prohibited category, but their effect is de facto discriminatory. One example is a written test, neutral on its face, which screens out black job applicants at a significantly greater frequency than their white counterparts. Under the Supreme Court's Title VII cases, such policies will be upheld on the basis of a lesser showing by the employer than is required in cases of direct differentiation, or disparate treatment.126

Judge Coffey found that Johnson Controls's policy was neutral, citing approvingly the United States Court of Appeals for the Eleventh Circuit, which held that this sort of fetal protection policy was "'neutral in the sense that it effectively and equally protects the offspring of all employees.' "127 Rather than focus on the undeniably different way in which the policy treated men and women, the court instead looked at how the policy treated their unconceived offspring. This focus is remarkable because it ignores the women as women. Only by conceiving of women as no more than potential incubators, by devaluing their autonomous existence entirely, is it possible to overlook the excluded employees and see only their potential offspring.128

As if by sleight of hand, the court made the women themselves disappear,

reproduction context, in which such capacity might elevate women above men, we saw that courts deny its existence. See, e.g., supra part IV.A.

127 886 F.2d at 885 (quoting Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984)).
128 See MACKINNON, supra note 4, at 24-25 (demonstrating that men value women not as ends in themselves but as objects for their sexual use, citing the fact that

HeinOnline -- 72 B.U. L. Rev. 131 1992
and once they were gone, they could no longer be the victims of discrimination.

Having decided to utilize disparate impact analysis, Judge Coffey set out to demonstrate a substantial risk of harm to the fetus, the exposure of the fetus to lead only through women and not men, and the lack of an equally effective less restrictive alternative to exclusion. He limited the goals of this demonstration, however, by declaring, "It is not necessary to prove the existence of a general consensus on the [first two issues] within the qualified scientific community." Here, the only scientists believed were Johnson Controls's experts, people with an obvious bias in favor of the defense. Though the plaintiffs' expert witnesses testified that animal studies showed risks of genetic damage to the offspring of males exposed to lead, Judge Coffey did not find this evidence convincing.

What counted as a convincing scientific fact was a controversial proposition which supported the exclusion of women; science was "at best speculative" when it suggested that it might be medically necessary to bar men as well.

Judge Easterbrook, in his dissent, challenged the supposedly scientific conclusion that only women must stay away from lead to protect fetuses. He noted that after extensive study, OSHA had "concluded that lead in men as well as women is hazardous to the unborn," and questioned the ability of judges to dismiss these findings summarily without the aid of a trier of fact. Justice Blackmun, writing the majority opinion for the Supreme Court, reversed the court of appeals. He similarly rejected Judge Coffey's blanket dismissal of scientific evidence of male reproductive harm resulting from lead exposure. He noted critically, "Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees."

Judge Coffey's biased appeal to science is similar to the statements that life begins at conception, that California law is "like nature itself," and, earlier in Johnson Controls, that it was "medically necessary" to bar women from certain jobs. These statements fail even to live up to science's own standards. By labeling a philosophical approach to life or law "science," "medicine," or "nature," and choosing one of many conflicting views in the

prostitution and modeling are the only two jobs for which women are paid more than men).

129 See 886 F.2d at 888-90.
130 Id. at 888-89 (quoting Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982)).
131 See id. at 888-90.
132 See id. at 889.
133 Id.
134 Id. at 918.
135 111 S. Ct. at 1203.
scientific community as the legally correct one, judges flaunt their power to convert what they choose to see into all that is there.\textsuperscript{136}

Thus, Judge Coffey not only devalues women and their needs and justifies women's punishment by an appeal to scientific authority, but he also utilizes denial. In a telling analogy, he denies the fundamental connection between a woman and her fetus during pregnancy. Judge Coffey concludes that even under the analysis appropriate for facially discriminatory action, the challenged fetal protection policy would be upheld because safety is essential to the business of making batteries and the policy directly relates to safety.\textsuperscript{137}

Therefore, even blatant gender discrimination, which Judge Coffey does not find here, may be justified by an underlying interest in fetal safety. To the contention that women have a right to decide what risks to endure, Judge Coffey responds that no one has the right to expose one's children to the risk of serious harm, and that "[t]his situation is much like that involved in blood transfusion cases."\textsuperscript{138}

Although there are similarities between the liberties asserted in Free Exercise cases concerning the refusal of medical treatment for one's children and the exposure of the unborn to lead, Judge Coffey fails to address a significant difference. When a doctor gives blood to Christian Scientists' children, the doctor does not affect the parents' physical autonomy; they are entities separate from their children. By contrast, a fetal protection policy dictates to a

\textsuperscript{136} According to some feminists, this is true of the whole scientific enterprise. For example, MacKinnon has declared that the posture of science, the non-situated distanced standpoint, is a male approach to knowledge. Science is male in that men have elaborated its criteria for verification, in that it objectifies that which it observes, and finally, in that it constructs truth from an interested standpoint while pretending neutrality. MacKinnon, \textit{supra} note 4, at 54. Sandra Harding similarly examined the male perspective of science, and noted the sexist ends that science has served. \textit{See} Sandra Harding, \textit{The Science Question in Feminism} (1986). She observed that "the cultural stereotype of science... tough, rigorous, rational, impersonal, competitive and unemotional—is inextricably intertwined with issues of men's gender identity. It suggests that 'scientific' and 'masculine' are mutually reinforcing cultural constructs." \textit{Id.} at 63. Furthermore, Harding argued,

[\textit{S}cience is used in the service of sexist, racist, homophobic, and classist social projects. Oppressive reproductive policies; white men's management of all women's domestic labor; the stigmatization of, discrimination against, and medical 'cure' of homosexuals; gender discrimination in workplaces—all these have been justified on the basis of sexist research. . . .] \textit{Id.} at 21.

\textsuperscript{137} Although Title VII of the 1964 Civil Rights Act permits an employer to discriminate explicitly on the basis of sex, religion, or national origin where any of these traits is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1) (1988), the Supreme Court has held that this exception to the general prohibition against discrimination is an "extremely narrow" one. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

\textsuperscript{138} 886 F.2d at 897.
woman what she can do, where she can go, whether and under what conditions she can work, and ultimately how dependent she must be upon men for her survival. This uniquely invasive quality is exacerbated when a policy is applied broadly, as it was at Johnson Controls, to all women who cannot prove sterility. Likening the right to work with the right to deprive a child of blood transfusions is a persuasive comparison only in a world in which we deny the features of women's reproduction that do not have analogues in the male experience.

Judge Coffey's approach not only denies women's experiences, thereby robbing women of personal autonomy, but it also fails to foster fetal welfare. As one commentator has observed:

Mothers have a kind of automatic responsibility for their children. . . . [S]he must decide how to conduct herself and care for herself and the child during pregnancy. . . .

. . . To promote responsibility, we must focus . . . on the links between responsibility, the need for freedom to act, and the circumstances under which parents will exercise this freedom.139

As Judge Easterbrook argued in his dissent, "No legal or ethical principle compels or allows Johnson to assume that women are less able than men to make intelligent decisions about the welfare of the next generation, [and] that the interests of the next generation always trump the interests of living woman."140 Moreover, the most responsible choice for a woman in this case is unclear. As Judge Cudahy argued in his dissent, women's exclusion from the workplace may conflict with the best interests of their future children:

this case . . . demands . . . some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make?141

In Judge Coffey's male-oriented world, a woman and her fetus are two distinct individuals. Only in such a world of denial can "womanhood," as a deviation from the prototypical qualified worker, "'undermine[ ] . . . [one's] capacity to perform a job satisfactorily.' "142 A desire to punish women,

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139 Bartlett, Re-Expressing Parenthood, supra note 4, at 322-23 (footnotes omitted).
140 886 F.2d at 913 (Easterbrook, J., dissenting).
141 886 F.2d at 902 (Cudahy, J., dissenting); see also Note, Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy, 103 HARV. L. REV. 1325, 1337-43 (1990) (arguing that it would be productive to recognize the commonalities of interest between mother and fetus).
142 886 F.2d at 898 (quoting Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1528 (7th Cir. 1988)); see MINOW, supra note 4, at 58 (discussing the model worker conceived of as "the traditional male employee who has a full-time wife and mother to care for his home and children").
independent of any desire to protect fetuses, explains the belief that it is appropriate to treat a mother and her fetus as adversaries and to control the former to protect the latter.\textsuperscript{143}

As discussed in connection with the Davis opinions, although different judges may reason differently and arrive at different conclusions, they nonetheless may share the use of rhetoric that denies, devalues, or punishes women. Judge Posner’s dissenting opinion in Johnson Controls also illustrates this phenomenon. According to Judge Posner, the factual record in the case required further development by a trial court to determine whether sex was indeed a bona fide occupational qualification (BFOQ).\textsuperscript{144} If sex were a BFOQ, then Judge Posner would have been willing to uphold the policy, notwithstanding its discriminatory effect.\textsuperscript{146}

In his analysis of the facts, Judge Posner, like Judge Coffey, devalues women for their capacity to become pregnant, by uncritically accepting a workplace that harms them. Judge Posner counts concern about fetuses among the considerations that inform bona fide exclusion. Indeed, he says, “To confine the occupational qualification defense to concerns with price and product quality would deny a defense to Johnson Controls even if the company excluded only pregnant women.”\textsuperscript{146} Judge Posner implicitly assumes that pregnant women are certainly unqualified to work in a factory filled with lead. He fails to consider condemning a workplace which is dangerous to women experiencing a regular, normal part of female life, because normal parts of female life are not considered the norm. Thus, for Judge Posner, designing a workplace that does not interfere with these normal experiences in women’s lives is termed “an accommodation for pregnant or potentially pregnant workers.”\textsuperscript{147}

\textsuperscript{143} One commentator has argued that a pregnant woman is in the best position to look after her fetus, by virtue of her connection to it, and that the law should therefore privilege her with decisionmaking power rather than penalize her for this connection. See Note, supra note 141, at 1340. The author has noted also that the willingness to regulate a pregnant woman—in the context of fetal endangerment laws regarding drug and alcohol use during pregnancy—is inconsistent with the law’s general reluctance to interfere with family relationships or to remove children from their parents’ homes. See id. at 1337; see also Bartlett, Re-Expressing Parenthood, supra note 4, at 322-23 (arguing that because of a mother’s connection to her fetus, we must give her the freedom to act if we are to encourage the benevolent use of that inherent responsibility).

\textsuperscript{144} 886 F.2d at 903, 908 (Posner, J., dissenting).


\textsuperscript{146} 886 F.2d at 904 (Posner, J., dissenting).

\textsuperscript{147} Id. (emphasis added). But see MINOW, supra note 4, at 58 (“The very phrase ‘special treatment,’ when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm.”); Nadine Taub & Wendy W. Williams, Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?, 37 RUTGERS L. REV. 825, 829-30 (1985) (arguing for gender neutrality despite the retort of critics that such neutrality masks the fact that “in a workplace whose rules and patterns are based on an assumption that the standard worker...
Judge Posner also devalues women by unflatteringly characterizing their reproductive conduct and by denying the realities which generate this conduct. In defense of fetal protection policies that apply to women who are not pregnant, Judge Posner relies upon the belief that many women become pregnant negligently even though they work in lead-contaminated environments and even though they have been warned. "[T]here are many careless pregnancies, as is shown by the frequency of abortion and of illegitimate birth . . . ."148

Judge Posner fails to understand that "illegitimate" births are not necessarily "careless," or even unintentional. Like Justice Scalia in Michael H.,149 however, Judge Posner seems to consider the traditional family the only desirable context for procreation. Moreover, women who have experienced a truly unwanted pregnancy would be unlikely to characterize this event as "careless." Perhaps the high abortion rate reflects not women's failure to care enough to avoid undesired pregnancy, but rather the involuntariness of sexual relations for women.150

Later in his dissent, Judge Posner denies a woman's unique connection to her fetus, making an argument similar to Judge Coffey's blood transfusion analogy. Judge Posner asks that we "not be deceived by superficial historical analogies or facile invocations of [the term] 'paternalistic.'"151 He argues that while laws that hurt women in the past were based on protecting their fitness to reproduce, fetal protection policies are only superficially similar, in part because a fetus "is a different person (or proto-person) from its

has no primary parental obligations, the woman who still carries that burden herself, as the average woman does, faces serious and continuing obstacles to her workforce participation").

148 886 F.2d at 906 (Posner, J., dissenting).
149 See supra text accompanying notes 28-30.
150 Catharine MacKinnon has stated:
I wonder if a woman can be presumed to control access to her sexuality if she feels unable to interrupt intercourse to insert a diaphragm; or worse, cannot even want to, aware that she risks a pregnancy she knows she does not want. Do you think she would stop the man for any other reason, such as, for instance, the real taboo—lack of desire? If she would not, how is sex, hence its consequences, meaningfully voluntary for women? ... Sex doesn't look a whole lot like freedom when it appears normatively less costly for women to risk an undesired, often painful, traumatic, dangerous, sometimes illegal, and potentially life-threatening procedure than to protect themselves in advance.

MACKINNON, supra note 4, at 95. Support for the link between coercive sexual experiences and the later failure to use contraceptives has emerged in a study of teenage pregnancy. The study found a significant correlation between childhood sexual abuse and teen pregnancy. One researcher explained that "[y]oung people who have been abused just don't see themselves in situations where they can take control over their bodies or over contraception." Alison Bass, Study Ties Teen-age Pregnancy, Childhood Sex Abuse, BOSTON GLOBE, Feb. 25, 1992, at 1, 4 (quoting Debra Boyer, a cultural anthropologist at the University of Washington).

151 886 F.2d at 906 (Posner, J., dissenting).
This argument misconceives pregnancy both by dismissing the similarities between old protectionist legislation prohibiting women from working and the Johnson Controls policy, and by characterizing a woman and her fetus as two separate beings.

First, Judge Posner mistakenly distinguishes the two types of rules. The protectionist rules, he posits, excluded women from the workplace or limited their available hours (and thereby accomplished virtually the same result) in order to ensure their fitness for reproduction. Policies like that of Johnson Controls, he suggests, are designed to protect the fetus rather than the woman's reproductive ability. The Johnson Controls policy, however, like the protectionist rules, attempted to ensure that fertile women would be ready to produce healthy offspring at any time. Both rules circumscribed what women could do for the sake of hypothetical offspring they might have. In other words, both rules treated women as little more than potential incubators. And both rules took the contemporary workplace as inevitable. Women whose potential children were in danger therefore had to leave.

Second, Judge Posner erroneously speaks of a fetus who inhabits the inside of a woman's body as a "different person (or proto-person)" from her, as though one could address the fetus separately from the mother. As one commentator has argued, "[C]haracterization of the maternal-fetal relationship as one of conflicting rights denies the physical and social context of pregnancy and undermines the importance of connection between the mother and the fetus." It is not surprising that Judge Posner uses the exclusively male pronoun to say, "A paternalistic measure is one that protects a person against himself." In a world where the prototypical human being is male and no persons are connected to other persons, it is incoherent to suggest that limiting a woman's freedom in order to protect her child constitutes paternalism.

Judge Posner's opinion utilizes the denial strategy in one final context: He denies the emotional pain of excluded women. Since emotionality is a trait linked to women and their nurturing qualities, this denial is another slight to women as nurturers, just as the omission of nurturing in Michael H. devalues the nurturing aspect of women's lives. Judge Posner states that if, as a result of tort liability, the cost of employing women were to render the battery business inviable, "[t]he plaintiffs would have won a Pyrrhic victory . . . . If Johnson Controls terminated its battery operation as a result of this suit, the plaintiffs would be in the same position as if the occupational

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152 Id.
153 See id. (citing Muller v. Oregon, 208 U.S. 412, 421-22 (1908)).
154 See id.
155 Note, supra note 141, at 1337.
qualification defense had prevailed except that they might . . . recover attorney's fees." From a woman's perspective, however, these situations would not be the same. Being excluded because one is female is not the same as losing one's job because a court has held that a business which cannot exist without discriminating against women cannot exist at all. The latter result is empowering. It communicates the message that women matter more than the operation of business as usual. It has the potential to generate real change in market priorities because it forces companies to internalize the costs of excluding women. The former result does just the opposite; it tells women that their needs are secondary and that their exclusion is just a cost of doing business, a cost that is theirs alone to bear.

On March 20, 1991, in the final act of the Johnson Controls legal drama, the Supreme Court reversed the decision of the court of appeals. In an opinion by Justice Blackmun, the Court held that fetal protection did not constitute a BFOQ under Title VII and the Pregnancy Discrimination Act. Because there was no evidence that fertile women performed their jobs at Johnson Controls less well than their male or sterile female counterparts, the Court held that the protection policy was illegal. Although the decision to invalidate Johnson Controls's policy was unanimous, Justice White, in a narrow concurrence in the judgment joined by Chief Justice Rehnquist and Justice Kennedy, took the position that some fetal protection policies might survive Title VII scrutiny. Justice White wrote that “a fetal protection policy would be justified . . . if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability.”

Although the Supreme Court's substantive decision obviously will have a much larger significance than the Seventh Circuit's decision did, the court of appeals' use of such rhetorical devices as science, nature, denial, devaluation, and punishment is more clearly evident than is the use of those techniques by the Supreme Court, which focuses on the statutory meaning of Title VII. The court of appeals opinions thus contain stronger evidence that judicial rhetoric can and does disempower women. The opinions in the Supreme Court, particularly that of Justice White, however, do merit brief exploration. The underlying assumption of Justice White's concurrence, like that of the opinions of Judges Coffey and Posner, is that a safe workplace may in some instances preclude the presence of women. Such an assumption can only be valid if we take the workplace, as it is, to be inevitable. Because “the

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157 886 F.2d at 907 (Posner, J., dissenting) (emphasis added).
158 Cf. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (using similar language to describe a society which justifies the violation of individual rights by an appeal to the need for effective law enforcement: “To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution.”).
160 Id. at 1210 (White, J., concurring in judgment).
market was constructed primarily by men, and the roles available in the market as well as the rewards associated with those roles were created in a sexist and discriminatory environment," it is not legitimate to take today's work environment as given. In fact, it seems inherently wrong to tolerate a workplace which is unsafe and unaccommodating for half of the population. To accept such a status quo devalues women and punishes them in the guise of the humane treatment of fetuses.

Both women and their children have an interest in nondiscriminatory employment as well as in a safe workplace. If the two interests conflict, it is appropriate that employers internalize the costs of discrimination and of fetal risk. Only in this way will the industry have a true incentive to make the workplace safe for all. Only by requiring employers to internalize both safety and discrimination costs is there a chance that the market will truly consider all the consequences of its behavior.

CONCLUSION

This Article has examined the denial, devaluation, and punishment relating to female reproductive capacity that can be found in judicial rhetoric and sometimes in judicial decisions as well. The discussion has demonstrated that science, the "neutral" observer, and nature, the writer of human destiny, are liberally employed in the service of this reactive rhetoric. Michael H. illustrated that a court can define paternal uncertainty out of existence through the manipulative use of the term "father," while simultaneously devaluing the nurturing of children in which women socially and biologically participate. Davis 1 and Davis 2 featured the denial of pregnancy's essentiality to reproduction and the denial of the unique burdens it imposes upon women. Finally, Johnson Controls, particularly at the court of appeals, illustrated the interplay between the mechanisms. The court's denial of women's unique relationship of connection to their fetuses, devaluation of women by considering them no more than producers of offspring, acceptance of the workplace as given, and understatement of the costs of excluding women together facilitated women's "scientifically necessary" punishment for their capacity to become pregnant.

This Article has posed the hypothesis that such rhetoric responds to the psychological phenomenon of fetus-envy. If this is correct, the male judges who exploit language in the ways here described feel threatened by women and the attributes that elevate women's significance and control over that of men in the reproductive sphere. To cope with such a threat, male judges can pretend it is not there. The phrase, "life begins at conception," for example, so widely used in public debate about abortion that it has acquired a surface legitimacy, is quintessentially the denial of pregnancy. Male judges can also devalue that which they do not have. Finally, male judges can punish: they have the pen and the power to convert a woman's fertile womb into an

161 Olsen, supra note 118, at 1548.
instrument of her subjugation, her control over human reproduction into enslavement of her body to the perceived welfare of future generations. Fetus-envy may be one example of the larger truth that at the root of injustice lies the self-doubt of the powerful.

The foregoing analysis is not an indictment of all men or of all male judges. Indeed, in Johnson Controls, Judge Easterbrook and Justice Blackmun expressly rejected the anti-female rhetorical devices used by other judges. For example, Judge Easterbrook showed sensitivity to women's perspectives in his response to the argument that employing women in a battery factory can be very costly if future offspring sue. In such a case, the argument runs, it is rational to discriminate. Judge Easterbrook's response was that "Title VII applies even when—especially when—discrimination is rational as the employer sees things." Although he did not go so far as to recognize that rationality reflects entrenched sexism, he exhibited insight into the differing plights of men and women when he stated that discrimination is most certainly occurring when its commission appears rational to the actor.

This exploration of judicial rhetoric attempts to raise the consciousness of those who read judicial opinions, of those who write them, and of those whose lives are influenced by them. The disempowering mechanisms described here frequently operate at a subconscious level and can be eliminated with awareness. As to those judges who deliberately manipulate images of women to obscure intentional disempowerment, their pretense is exposed, rendering their work more difficult and less damaging to women and to those who care about women's lives.

162 886 F.2d at 914 (Easterbrook, J., dissenting).
163 See, e.g., Scales, supra note 4 (arguing that the more "rational" the discrimination appears, the more suspicious it should be).