

# EYES WIDE SHUT: ERASING WOMEN'S EXPERIENCES FROM THE CLINIC TO THE COURTROOM

ELLEN WALDMAN\*  
MARYBETH HERALD\*\*

## I. INTRODUCTION

Approximately one year ago, an article published in the *American Journal of Obstetrics and Gynecology* lifted the drape on a clandestine training ritual in the culture of medicine.<sup>1</sup> A survey of medical student attitudes about the need to secure consent before performing pelvic exams on anesthetized women revealed a paradoxical finding: students who had completed an obstetric/gynecology (“OB-GYN”) clerkship were more cavalier about the need to secure consent than those who had not yet begun to train with OB-GYN doctors in the trenches.<sup>2</sup> The move from sterile book learning to on-the-job training blunted, rather than sharpened, student sensitivity to women’s dignitary interests. Textbook exhortations conflicting with professional norms were abandoned—and the results were not pretty.<sup>3</sup> Al-

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\* Professor of Law, Thomas Jefferson School of Law.

\*\* Professor of Law, Thomas Jefferson School of Law. Thanks go out to a number of people. Our hardworking and ever-cheerful research assistants, Stephanie Martin and Meghan Hanson, proved to be “clutch-players,” even making late-night runs to the library to meet last-minute deadlines. Dorothy Hampton, our friend in the library, kept up with our unending requests for interlibrary loans, and Dr. Lawrence Schneiderman of the University of California San Diego gave us a candid and extremely helpful early first read. We would also like to thank Brianne Suska and the entire staff of the Harvard Journal of Law & Gender, who were superb partners at every step of this process. Additionally, we received financial support from the Thomas Jefferson School of Law. Most of all, we thank our departing dean, Kenneth Vandeveld, for inspiring us with his enthusiasm for all things inquiring and creative. In ten years his work to create a vibrant and compassionate intellectual community has been unceasing. He leaves us a great gift, and we dedicate our work here—and in the classroom—to him, in gratitude.

<sup>1</sup> See Peter A. Ubel et al., *Don't Ask, Don't Tell: A Change in Medical Student Attitudes After Obstetrics/Gynecology Clerkships Toward Seeking Consent for Pelvic Examinations on an Anesthetized Patient*, 188 AM. J. OBSTETRICS & GYNECOLOGY 575, 577 (2003). See generally Robin F. Wilson, *Unauthorized Practice: Teaching Pelvic Examination on Women Under Anesthesia*, 58 J. AM. MED. WOMEN'S ASS'N 217 (2003) (reporting findings from a survey of medical students concerning the frequency at which students at various levels in their training perform unauthorized exams).

<sup>2</sup> Ubel et al., *supra* note 1, at 577 (noting that “students who had completed an obstetric/gynecology clerkship felt that consent for pelvic examination on an anesthetized patient was less important than did other students.”).

<sup>3</sup> See *id.* at 578 (noting that “[w]hat is actually conveyed to students at the bedside and

though 70% of medical students who had not completed an OB-GYN clerkship felt that it was “very important” or “somewhat important” to secure consent for genital examinations (euphemistically termed “pelvic” exams) before the patient was anesthetized,<sup>4</sup> that number dropped to 51% when polling students who had completed an OB-GYN clerkship.<sup>5</sup> Apparently, on the OB-GYN wards, a little bit of practical knowledge is a dangerous thing.

Paternalism in medical practice has long been on the radar screen of lawyers, ethicists, psychologists, and social workers.<sup>6</sup> Indeed, physician appropriation of patient decisional autonomy catalyzed the patients’ rights movement and gave birth to bioethics, a new discipline devoted to the study of value dilemmas in the life sciences.<sup>7</sup> Although bioethicists took aim at the equal opportunity hubris that led physicians to trench on the value choices of patients regardless of age, race, or religion, far less attention has been focused on the medical profession’s attitude toward women’s health issues.<sup>8</sup> Gender bias in the healthcare environment has obvious

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in the corridor (the “hidden curriculum”) often differs from what is recommended and presented in formal courses”).

<sup>4</sup> Medical researchers have uncovered a well-established practice of performing clinical exams for teaching purposes on anesthetized women who had consented to surgery or other invasive procedures, but not a pelvic exam. See John Duncan et al., *Using Tort Law To Secure Patient Dignity*, TRIAL, Oct. 2004, at 42, 42–48 (describing the incidence of unauthorized pelvic exams and doctors’ attitudes about this practice and suggesting trial strategies for recovering damages on a battery theory for exams performed without consent). Often, the woman is not in an emergency situation that would justify a medical intervention absent consent, and in most situations the exam is delegated to the medical student to assist the student in developing appropriate clinical skills. See *id.* at 49. A study in 1992 showed 37% of U.S. and Canadian medical schools allowed students to learn to perform pelvic exams on anesthetized women without their consent. *Id.* at 43.

One state has enacted legislation banning the practice. See CAL. BUS. & PROF. CODE § 2281 (2004) (making unauthorized exams a misdemeanor and grounds for revocation of medical license). Yet consent is not the universal rule; pelvic exams still remain a part of many teaching hospitals’ training regimens. The director of the residency program at Johns Hopkins School of Medicine, which does not require specific consent, stated, “I don’t think any of us even think about it. It’s just so standard as to how you train students.” Duncan et al., *supra* note 4, at 22.

<sup>5</sup> Ubel, *supra* note 1, at 577.

<sup>6</sup> See, e.g., DAVID J. ROTHMAN, STRANGERS AT THE BEDSIDE: A HISTORY OF HOW LAW AND BIOETHICS TRANSFORMED MEDICAL DECISION MAKING 84–87, 158–59, 190 (1991) (discussing the attitudes of various parties concerning medical care); Michelle Oberman & Margie Schaps, *Women’s Health and Managed Care*, 65 TENN. L. REV. 555, 564–69 (1998) (discussing gender bias in delivery of health care); Karen H. Rothenberg, *Gender Matters: Implications for Clinical Research and Women’s Health Care*, 32 HOUS. L. REV. 1201, 1204 (1996) (same).

<sup>7</sup> ROTHMAN, *supra* note 6, at 222–46 (detailing bioethics’s concern with medical paternalism and the development of norms that enhanced patient authority and diminished physician control). See MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION 70–101 (1991) (analyzing bioethics’s project of enhancing patient autonomy). Garrison and Schneider also note that “[t]hese views of autonomy have contributed not only to the doctrine of informed consent but more generally to commanding and widespread ideas about patients and medical decisions.” *Id.* at 81.

<sup>8</sup> Although the bioethics literature is voluminous (as, for example, the National Refer-

primary effects and more subtle secondary effects. Most saliently, bias in medical education,<sup>9</sup> disparities in clinical research,<sup>10</sup> and asymmetric diagnostic and treatment practices<sup>11</sup> mean that women, in some instances, receive inferior care and suffer worse outcomes.<sup>12</sup> More subtly but equally perniciously, stereotypical thinking and cognitive biases lead to a skewed "database" that undergirds legal doctrines that disadvantage women.

Although existing legal doctrine is concerned with gender bias as the product of conscious, invidiously motivated bigotry, recent advances in cognitive psychology suggest that most discriminatory behavior results from autonomic cognitive processes that occur far beyond the reach of the conscious self.<sup>13</sup> Overbroad and inaccurate categorical thinking leads to stereotypes that ground larger explanatory theories about what people are like and how they will function in the world. Once in place, incoming information is organized, interpreted, and retrieved in ways that support and strengthen the stereotype's explanatory power. A variety of cognitive

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ence Center for Bioethics Literature holds a collection of "[o]ver 28,000 volumes about ethical and bioethical subjects, including access to health care, resource allocation, genetics, human experimentation, reproductive technologies, abortion, and death and dying," available at <http://www.georgetown.edu/research/nrcbl/nrc/aboutNRCBL.htm> (last visited Apr. 12, 2005)), only a small subsection of that literature details the effects of medical paternalism on women. For a brief sampling of that specialized literature, see HELEN BEQUAERT HOLMES ET AL., *FEMINIST PERSPECTIVES IN MEDICAL ETHICS* (Helen Bequaert Holmes & Laura M. Purdy eds., 1992) (collecting essays that consider medical issues from a range of feminist perspectives); SUSAN SHERWIN ET AL., *FEMINISM AND BIOETHICS: BEYOND REPRODUCTION* (Susan M. Wolf ed., 1996) (same).

<sup>9</sup> See Sarah Knab Keitt et al., *Positioning Women's Health Curricula in US Medical Schools*, *MEDSCAPE GEN. MED.*, 5(2), 2003 (surveying medical schools to find that 44% of schools have a women's health curriculum in place, despite a need for greater attention to women's symptoms and treatment), at <http://www.medscape.com/viewarticle/455372> (last visited Apr. 12, 2005).

<sup>10</sup> For many years, women were excluded from clinical trials because of unfounded researcher fears and biases. See Rothenberg, *supra* note 6, at 1208–10 (1996). Although revised NIH guidelines now require federally funded research to include women, scientists fail to separate and compare results for women and men, and thus do not acquire the information they need to treat their women patients. See, e.g., AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., EVIDENCE REPORT/ TECHNOLOGY ASSESSMENT NO. 80, RESULTS OF SYSTEMATIC REVIEW OF RESEARCH ON DIAGNOSIS AND TREATMENT OF CORONARY HEART DISEASE IN WOMEN: SUMMARY, AHRQ PUB. NO. 03-E034, at 3 (2003) (surveying medical article databases to find that few studies on coronary heart disease sort data or recommendations by gender), available at <http://www.ahrq.gov/clinic/epcsums/chdwomsum.pdf> (last visited Apr. 12, 2005).

<sup>11</sup> See Mary Anne Bobinski & Phyllis Griffin Epps, *Women, Poverty, Access to Health Care, and the Perils of Symbolic Reform*, 5 J. GENDER, RACE & JUST. 233, 238–40 (2002) (noting gender-related disparate treatment in medical care and outcomes in connection with public and private health insurance).

<sup>12</sup> See BARBARA L. KASS-BARTELMES, BARBARA M. ALTMAN, AMY K. TAYLOR, U.S. DEP'T OF HEALTH & HUMAN SERVS., DISPARITIES AND GENDER GAPS IN WOMEN'S HEALTH, AHRQ PUB. NO. 02-0003, at 25 (2001) (noting 1996 data that shows women are more likely to suffer functional limitations than men), available at [http://www.meps.ahrq.gov/papers/cb8\\_02-0003/cb8.pdf](http://www.meps.ahrq.gov/papers/cb8_02-0003/cb8.pdf) (last visited Apr. 12, 2005).

<sup>13</sup> See, e.g., TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 11, 53–56, 188–94 (2002) (discussing the unconscious aspects of stereotyping and racism).

mechanisms, such as the availability and egocentric biases as well as after-the-fact rationalization techniques, assure that new data is consonant with existing schemas and that dissonant data is disregarded or rationalized into place.<sup>14</sup>

It is tempting to ascribe practices like the widescale performance of unconsented-to pelvic exams to an overt, explicit, and self-aware prejudice that holds women's dignity and privacy in low esteem. But the truth is probably both more and less troubling. Degrading medical practices, like disabling legal doctrines, are likely not the work of a few confirmed sexists seeking actively to keep women in subservient roles both as patients and as litigants. Rather, they are more likely explainable as a product of inconspicuous cognitive habits that will prove hard to diagnose and even harder to dislodge.<sup>15</sup>

Taking the male perspective as their viewpoint, both the medical and legal professions have sought to tame and account for complex phenomena with stereotypes that fail to incorporate female experiences. Embraced by the unconscious as useful in organizing and distilling information, these stereotypes then drive further inquiries and shape the way new knowledge is understood and weighted. Thus, a conviction that women's biological construction better equips them for childrearing than arms-bearing, for example, will determine which clinical studies are designed, how resulting data is perceived, and whether dissonant information about women's fighting capacity is explored or ignored. The resulting database, reflecting incomplete or inaccurate judgments of women, then becomes the basis of legal doctrines that harm women.<sup>16</sup>

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<sup>14</sup> See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1100–03, 1108–14, 1143 (2000) (assessing the traditional rationality function in law and discussing nonrational mechanisms). Korobkin and Ulen note, "People are boundedly rational. To save time, avoid complexity, and generally make dealing with the challenges of daily life tractable, actors often adopt decision strategies or employ heuristics that lead to decisions that fail to maximize their utility." *Id.* at 1143. See generally Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37(3) J. PERSONALITY & SOC. PSYCHOL. 322 (1979) (discussing the egocentric bias in assessments of contributions to group efforts).

<sup>15</sup> See WILSON, *supra* note 13, at 35. As Professor Wilson notes:

Men are often said to just "not get it" when it comes to understanding sexual harassment. Generalizing from the research by Bargh and colleagues, this might literally be true: men likely to engage in sexual aggression are unaware that they have a nonconscious association between sex and power, and unaware that this association is triggered automatically. This lack of awareness makes it more difficult to prevent sexual aggression. Men in a position of authority may believe that their behavior toward female subordinates is motivated by good intentions, because they are unaware that their feelings were triggered by their position of power.

*Id.*

<sup>16</sup> For example, the marital rape exception, a doctrine that held sway in all fifty states as recently as thirty years ago, was premised, in part, on medical accounts that defined non-

This Article explores how cognitive biases and distortions taint medical and legal understandings of women, and how these constricted understandings form the foundations of legal doctrines unresponsive to women's experiences. In examining the interplay between medical and social science data and legal dogma, this Article will discuss how bodies of knowledge are selectively pursued, exploited, or ignored in the service of biased assumptions that achieve expression in legal responses to emerging social dilemmas. Selective information flow between the medical and legal professions results in untoward consequences in a wide variety of settings. Here, we limit our focus to two: female sexuality and psychological parenthood. Our Article can be mapped as follows.

In Part II, we provide a brief overview of how stereotypes form and how cognitive biases involved in the perception, recall, and interpretation of information work to instantiate them. We draw from research examining how implicit biases infect the judgment of those outwardly committed to equality principles, and we suggest how these cognitive biases may compromise gender equality in much the same fashion. In Part III, we discuss the impoverished medical discourse on female sexuality and how inattention to female sexual fulfillment has led to legal rules that disproportionately affect women's expression as sexual beings. In Part IV, we examine available social science data detailing the distinction between psychological and genetic parenthood and show how that data has been ignored in favor of judicial presumptions that privilege men and disadvantage women in disputes over frozen embryos.

A close look at these contested arenas of sexuality and reproduction demonstrates the difficulty of charting women's progress toward equality. On the surface, in both law and medicine, norms of gender equity command facial allegiance. The medical community has abandoned its earlier efforts to exclude women from the profession, while law proffers the equal protection doctrine as proof that sexist behavior can be ferreted out through constitutional and statutory doctrines that affirm formal equality across gender lines. Under the waterline, though, unconscious beliefs and stereotypes hold sway. These unruly currents lead to rationalizations and

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consensual sexual intercourse with a conscious healthy woman to be an impossibility. See Elizabeth Ann Mills, *One Hundred Years of Fear: Rape and the Medical Profession*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES AND CRIMINAL JUSTICE 29, 44–45 (Nicole Hahn Rafter & Elizabeth A. Stanko eds., 1982) (discussing medical understandings of women's sexuality that helped support the marital rape exception); MORRIS PLOSCOWE, SEX AND THE LAW 170–74 (1951) (noting the medical experts' opinion that women in good health cannot be raped because they should be able to resist penetration). See also LESLIE LAURENCE & BETH WEINHOUSE, OUTRAGEOUS PRACTICES: HOW GENDER BIAS THREATENS WOMEN'S HEALTH 3, 6–10 (1997) (outlining the exclusion of women from medical research and discussing male physician insensitivity to female needs); Terri D. Kelville, *The Invisible Woman: Gender Bias in Medical Research*, 15 WOMEN'S RTS. REP. 123, 127 (1994) (discussing the variety of reasons that studies are not concerned with women's health).

cognitive errors that elude rigorous examination, but affect women at work, at home, and in the bedroom.

## II. STEREOTYPES AND COGNITIVE BIAS: THE ARCHITECTURE OF THE UNCONSCIOUS

### A. *Stereotypes: The Basic Structure*

Stereotypes, though odious in operation, derive from the necessary and adaptive processes of categorization. As the preschool pedagogy of *Sesame Street* reminds us,<sup>17</sup> our efforts to achieve mastery of the world rely on our ability to sort phenomena into categories of like and unlike things.<sup>18</sup> Nails, pins, and knives can harm; pillows, cotton balls, and Play-Doh are safe. A cactus likely fits in the former category and so is best left alone.

Unfortunately, our drive to use categories to simplify our world primes us for prejudice. Once we place things—or people—in categories, we are likely to draw conclusions about those things simply by virtue of their category placement. For example, we are inclined to overemphasize the homogeneity of group members, viewing people in our own group as “like us,” but people in other groups as fundamentally different. We are likely to feel connected to and positive about our fellow group members,<sup>19</sup> and are unlikely to view out-group members with the same sympathy. Furthermore, although our own group members may be viewed as individuals with unique traits and characters, out-group members are more apt to be viewed as one large *congerie*, each member indistinguishable from the other.<sup>20</sup> In-group and out-group activities are similarly interpreted with a

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<sup>17</sup> Many *Sesame Street* programs include a segment in which the young audience is asked to determine “Which of these things is not like the others?” *Sesame Street Games*, available at <http://www.sesameworkshop.org/sesamestreet/games/play.php?contentId=3971> (last visited Apr. 12, 2005). See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163–65 (1995) (discussing *Sesame Street* song and how it encourages children to learn to categorize and stereotype, and also arguing that employment discrimination results from unintentional categorization-related judgment errors typical of human cognitive function).

<sup>18</sup> See Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION, 27, 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978) (“One purpose of categorization is to reduce the infinite differences among stimuli to behaviorally and cognitively usable proportions.”).

<sup>19</sup> See Henri Tajfel et al., *Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups*, 22 ACTA PSYCHOL. 191, 199–200 (1964) (reporting a study that Indians and Canadians viewed in-group members as more similar to themselves than out-group members on those traits included in their stereotypes).

<sup>20</sup> See Bernadette Park & Myron Rothbart, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-Group and Out-Group Members*, 42 J. PERSONALITY & SOC. PSYCHOL. 1051, 1058, 1066 (1982) (describing experiments that confirmed the principles of out-group homogeneity and in-group heterogeneity).

different gloss. In-group activities are assessed more favorably, and failures are attributed to environmental rather than dispositional factors.<sup>21</sup> By contrast, out-group behaviors are viewed more suspiciously and out-group failures characterized as dispositional rather than situational.

Numerous studies demonstrate that even non-overtly biased individuals can hold implicit negative stereotypes.<sup>22</sup> For example, one study of white college students found that explicit attitudes reflecting support for equality norms did not track students' implicit attitudes about race, as measured by their responses to subliminal presentations of black or white faces.<sup>23</sup> Whereas students' explicit attitudes predicted their deliberative verbal behaviors with black colleagues, their implicit attitudes predicted nonverbal behaviors reflecting discomfort or unfriendliness, such as lack of eye contact or high rates of blinking.<sup>24</sup> Claims of allegiance to racial neutrality to the contrary, analysis of implicit attitudes demonstrated systematic bias against blacks by whites.<sup>25</sup>

Subjects in another experiment unconsciously revealed a stronger cognitive link between "male" and "famous" than between "female" and "famous."<sup>26</sup> In that study, subjects were shown a list of names that included those of both famous and nonfamous people. The following day, the subjects were shown a second list, mixing names from the first list with new names.<sup>27</sup> When asked to identify the names on the second list that corresponded to famous people, the test subjects identified some famous people, but also some of the nonfamous people from the first list that they mistakenly remembered to be famous.<sup>28</sup> By a margin of almost two-to-one, the people mistakenly thought to be famous were male.<sup>29</sup> This identification was probably neither conscious nor intentional. It is more likely that most of these subjects were equality-minded people who were simply mining existing categories to assist in generating a quick decision in circumstances

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<sup>21</sup> DAVID A. WILDER, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 221–22 (David L. Hamilton ed., 1981).

<sup>22</sup> See, e.g., John F. Dovidio et al., *Stereotyping, Prejudice, and Discrimination: Another Look*, in STEREOTYPES AND STEREOTYPING, 276, 288–89 (C. Neil Macrae et al. eds., 1996) (surveying contemporary racial stereotypes held by white people about black people in the United States).

<sup>23</sup> John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 66 (2002).

<sup>24</sup> *Id.* at 63 (citing J. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510 (1997), available at [http://www.psych.yorku.ca/kawakami/documents/Onthenatureofprejudice\\_000.pdf](http://www.psych.yorku.ca/kawakami/documents/Onthenatureofprejudice_000.pdf) (last visited Apr. 12, 2005)).

<sup>25</sup> See Dovidio, *supra* note 23, at 63.

<sup>26</sup> Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 196–97 (1995).

<sup>27</sup> *Id.* at 184–85.

<sup>28</sup> *Id.* at 185–86.

<sup>29</sup> See *id.* at 186.

of imperfect recall. Unfortunately, the category called in to assist was the stereotype that men are higher achievers than women.<sup>30</sup>

*B. Other Cognitive Add-Ons: Availability, Salience, Egocentricity, and Rationalization*

Links like “male-famous, female-nonfamous” receive support from a number of cognitive heuristics that inform the way we retrieve, understand, and deploy information. The availability heuristic, for example, leads us to estimate the frequency or probability of an event based on how easy or difficult it is to imagine the event occurring.<sup>31</sup> The ease with which instances or associations are recalled is in turn affected by the salience, vividness, or repetitiveness of relevant information.<sup>32</sup> Thus, individuals are likely to erroneously predict that, for example, airplane crashes pose a greater threat than car crashes because airplane disasters are more frequently reported and colorfully rendered than motor vehicle fatalities. Consequently, information about airplane deaths is more readily recalled and leads to inflated predictions of their frequency, as compared to the less dramatized but more lethal threat posed by driving.

Stereotypes combine synergistically with the availability bias. An expectation that a member of a particular group will behave in a particular fashion can bias information processing in favor of affirming that behavioral stereotype. In one study, researchers gave subjects information about fictional people who were identified by their occupation and invested with particular traits.<sup>33</sup> In certain sentences, the trait bore a stereotypic association with the occupation. In other sentences, the trait was nonstereotypic. So, some sentences listed Carol the librarian as serious and Barbara the stewardess as attractive, affirming common stereotypes that librarians are earnest

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<sup>30</sup> *Id.* at 182, 186. *But see* Melanie C. Steffens et al., *On the Bounded Rationality of Gender Stereotyping in Fame Judgments*, 34 EUR. J. SOC. PSYCHOL. 297, 404 (2004) (arguing that the false-fame effect observed by Banaji and colleagues does not reflect gender stereotyping so much as the workings of the availability heuristic).

<sup>31</sup> *See* Amos Twersky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 163, 164 (Daniel Kahneman et al. eds., 1982) (“Availability is an ecologically valid clue for the judgment of frequency because, in general, frequent events are easier to recall or imagine than infrequent ones. However, availability is also affected by various factors which are unrelated to actual frequency.”).

<sup>32</sup> *See* Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192 (Daniel Kahneman et al. eds., 1982) (“Salience biases refer to the fact that colorful, dynamic, or other distinctive stimuli disproportionately engage attention and accordingly disproportionately affect judgments.”). *See also* SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 54 (1993) (“These results show that a handful of individual testimonials can outweigh comprehensive statistical summaries. As many new car buyers are aware, vivid stories about one person’s lemon can quickly erode the confidence that might otherwise come from reading an endorsement in *Consumer Reports*.” (citation omitted)).

<sup>33</sup> Taylor, *supra* note 32, at 197.

and stewardesses are hired based on their physical appeal. In other sentences, the stereotypes were reversed: Carol the librarian was termed attractive and Barbara the stewardess was labeled serious. Traits were paired with occupations in stereotypic ways one-third of the time. The other two-thirds of the time, the pairing was nonstereotypic. Despite this weighted frequency, when subjects were asked to estimate the number of times each trait had described a member of each occupation, they misremembered the pairings to favor stereotypic associations. "[T]hey were more likely to recall that librarians had been serious than that waitresses had been serious."<sup>34</sup>

Because no information is as salient, dramatic, and easily recalled as our own experiences, our tendency to make associations and attribute causality based on the most readily retrieved information leads us to approach the world from a profoundly self-referential vantage point. Sometimes referred to as the egocentric or self-serving bias, this approach leads us to explain existing phenomena in ways that confirm existing belief structures<sup>35</sup> and maintain a positive self-image.<sup>36</sup> We overestimate our contribution to joint efforts<sup>37</sup> and shift our definitions of fairness depending upon how we stand to benefit.<sup>38</sup> We tend to attribute our successes to ability, but our failures to bad luck.<sup>39</sup> An egocentric bias influences not only our self-evaluations, but also our evaluations of those of the groups with whom we align. When Princeton and Dartmouth students were asked to assess the penalties committed by both teams in a game, Princeton students identified more than twice as many minor violations committed by Dartmouth as by Princeton, while the Dartmouth students spotted an equal num-

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<sup>34</sup> *Id.* at 198.

<sup>35</sup> See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2103–06 (1979) (reporting a study showing that persons who favor or disfavor capital punishment more firmly hold their initial positions after being confronted with both adverse and supporting data).

<sup>36</sup> See, e.g., Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 814, 818 (1980) (reporting results of a study showing that persons are unrealistically optimistic about the future).

<sup>37</sup> See Ross & Sicoly, *supra* note 14, at 325–27. The authors report that married persons, when asked to determine whether they or their spouse were primarily responsible for various household chores, each claimed that they performed the chores more than their spouse. *Id.* The combined totals of responsibility added up to greater than 100%, reflecting each spouse's perception that he or she was shouldering the bulk of the load. *Id.*

<sup>38</sup> See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11(1) J. OF ECON. PERSPS. 109, 120 (1997).

<sup>39</sup> Miron Zuckerman, *Attribution of Success and Failure Revisited, Or: The Motivational Bias Is Alive and Well in Attribution Theory*, 47 J. PERSONALITY & SOC. PSYCHOL. 245, 254–55 (1979). This bias can lead to a powerful "illusion of control." See PLOUS, *supra* note 32, at 170–72 (1993) (noting people often believe they have more control over an outcome than they actually do). This perception of control, though illusory, can affect our health. Studies have shown that when people, especially older people, experience a sense of control over their lives, they tended to be healthier. *Id.* at 172. These particular studies may have implications in the area of female sexuality. Labeling women as dysfunctional and in need of medical care is counterproductive if the goal is to empower women with the knowledge they need to pursue sexual satisfaction themselves.

ber committed by both teams.<sup>40</sup> Noting the differences, researchers commented that it was as if the two groups of students were “‘seeing’ an entirely different version of the game.”<sup>41</sup>

To support our egocentric view, we have developed the ability to rationalize to make sense of our view of the world.<sup>42</sup> We may look at data and think we are assessing it, but often we are just refashioning it to look compatible with the design that we have already created. After a nuclear meltdown was averted at Three Mile Island in 1982, a survey of prominent scientists, including those who had advocated as well as those who had opposed nuclear power, revealed that none changed their minds after the accident. Rather than assess, they assimilated the evidence: For opponents of nuclear power, the narrow aversion of disaster was evidence of impending doom; for proponents, it established the effectiveness of existing safeguards.<sup>43</sup>

The rationalization process will generate an explanation, even one that is completely arbitrary. When asked to choose one pair of pantyhose out of a set of four, participants made their picks and gave detailed reasons for the choice, “such as its superior knit, sheerness, or elasticity.”<sup>44</sup> Yet all the items were identical and the reasons for their preferences were rationalizations, disturbing evidence that we are not always in touch with the reasons for our judgments.<sup>45</sup>

Apparently the brain’s quest to understand can be more procedural than substantive. Although humans have a need to know, we do not necessarily need to know the truth. We seek an explanation that makes sense to us, even when we have no data to suggest or prove that the explanation is accurate.<sup>46</sup>

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<sup>40</sup> Albert Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 131 tbl.2 (1954).

<sup>41</sup> *Id.* at 129.

<sup>42</sup> See JONATHAN BARON, THINKING AND DECIDING 195 (3d ed. 2000) (“People tend not to look for evidence against what they favor, and, when they find it anyway, they tend to ignore it.”); LAUREN SLATER, OPENING SKINNER’S BOX: GREAT PSYCHOLOGICAL EXPERIMENTS OF THE TWENTIETH CENTURY 113, 116–17 (2004) (discussing the rationalizing actions of a cult in the aftermath of a failed apocalyptic prediction).

<sup>43</sup> See PLOUS, *supra* note 32, at 140–42.

<sup>44</sup> WILSON, *supra* note 13, at 103.

<sup>45</sup> *Id.* at 102–04, 106 (noting the position of items in the display may have influenced participants’ choices, but no participants spontaneously mentioned that reason and almost all denied it when asked whether it had influenced their choice); see also RITA CARTER, MAPPING THE MIND 41 (1998) (discussing the contributions of the left and right hemispheres of the brain in persons’ inexplicable preferences).

<sup>46</sup> Those who sought to defend genital exams on unconscious women rationalized the practice by noting that exams performed on relaxed muscles are technically less challenging and less intimidating for trainees to perform. See Avram Goldstein, *Practice vs. Privacy on Pelvic Exams: Med Students’ Training Intrusive and Needs Patient Consent*, *Activists Say*, WASH. POST, May 10, 2003, at A1. Of course, most medical training could be more easily accomplished on unconscious bodies. Blood draws, breathing tube insertion, and prostate exams—all could be practiced with less “complication” on insensate individuals. Yet the law’s concern with consent and bodily integrity allows patients subjected to non-consensual touching to sue either for battery or negligence. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 783 (D.C. Cir. 1972) (noting the established rule that therapy without con-

In an informational vacuum, we seek meaning, even if the meaning we seek is at odds with reality, and of course, an explanation that satisfies our ego-centric reality is often the easiest answer at hand. Unfortunately, when these biases manifest themselves in medical research and judicial decisions, the results affect more than one individual's concept of reality. The distortions are magnified and the consequences enlarged as medical researchers set a standard of care and judges make law and shape policy.

### III. UNEXAMINED LIVES: WOMEN, MEDICINE, AND THE LEGAL SYSTEM

#### A. *Still Ignorant After All These Years*

Freud spent his life trying to answer the question, "What does a woman want?"<sup>47</sup> Unfortunately, he was unable to separate this question from the one that he actually answered in his lifetime, "What do men want women to want?" Freud was not the first to ponder the problem, but the elaborate theory he developed is symbolic of the study of female sexuality throughout the ages. The female is defined in relation to the male, her sexuality governed by male needs. Neither Freud specifically, nor the medical establishment generally, has been able to clearly discern what a woman wants or needs because the investigation has never been and perhaps can never be completely severed from the investigator's bias.

Freud constructed a theory that distinguished between clitoral and vaginal sexuality, referring to the former as the "immature" form and the latter as the "mature" form.<sup>48</sup> Freud's theory, in summary, was that a young

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sent may amount to physician commission of the tort of battery). Legal niceties aside, if the point of clinical training is to produce skilled clinicians, this ritual involving unconscious women falls far from the mark. It is little wonder that a doctor may graduate proficient at the technical aspects of patient care, but be unable to deal with a patient's emotional needs, or to connect to them in a way that insures the kind of communication between doctor and patient essential to good medical care. Training on comatose women does not prepare doctors to treat women who are nervous, distressed, or uncomfortable—and these women will be a portion of a doctor's client base.

<sup>47</sup> Sigmund Freud, *Letter to Marie Bonaparte*, in 2 ERNEST JONES, SIGMUND FREUD: LIFE AND WORK (1995) (quoted in OXFORD DICTIONARY OF QUOTATIONS 324 (Elizabeth Knowles ed., 5th ed. 1999)) ("The great question that has never been answered and which I have not yet been able to answer, despite my thirty years of research into the feminine soul, is 'What does a woman want?'").

<sup>48</sup> Jane Gerhard, *Revisiting "The Myth of the Vaginal Orgasm": The Female Orgasm in American Sexual Thought and Second Wave Feminism*, 26 FEMINIST STUD. 449, 452–53 (2000); see also SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS, 99–119 (James Strachey ed. & trans., 1965). In his lecture on "Femininity," Freud explained that:

We are entitled to keep to our view that in the phallic phase of girls the clitoris is the leading erotogenic zone. But it is not, of course, going to remain so. With the change to femininity the clitoris should wholly or in part hand over its sensitivity, and at the same time its importance, to the vagina. This would be one of the two tasks which a woman has to perform in the course of her development, whereas the more fortunate man has only to continue at the time of his sexual maturity the

girl's "heterosexual identity would be consolidated only when the girl shifted her libido away from the mother and the clitoris and on to the father and the vagina."<sup>49</sup> This transfer was critical because, if not completed, neurotic discontent, penis envy, hysteria, and hostility toward men could result.<sup>50</sup> If a woman did not make the transition completely, she could become "frigid."<sup>51</sup> Because "warmth" is a positive quality associated with women, "frigid" encapsulates in shorthand the social concept of failure as a female.<sup>52</sup>

Of course, later studies of sexual behavior, including those by Masters and Johnson, lent support to the notion that the vagina was not the unique center of female sexual pleasure as Freud claimed.<sup>53</sup> More specifi-

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activity that he has previously carried out at the period of the early efflorescence of his sexuality.

*Id.* at 104.

<sup>49</sup> See Gerhard, *supra* note 48, at 453.

<sup>50</sup> *Id.* (citing Freud's *Three Essays on The Theory of Sexuality*, 7 THE STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD, 87 (James Strachey ed. & trans., 1953–1974)).

<sup>51</sup> Gerhard, *supra* note 48, at 456. The category of the "frigid" or abnormal woman was a broad one in the 1930s and 1940s:

Technically, psychoanalysts labeled a woman frigid if she was unable to reach vaginal orgasm through intercourse. But as a diagnosis, frigidity also contained other related concerns about what constituted normal female sexuality. For instance, if a woman was too sexual or too aggressive, she was labeled frigid. Similarly, if a woman did not enjoy intercourse but did enjoy other forms of sexual exchange, she too was "frigid." At the same time, frigid women also included those deemed to be "neurotically undersexual" or who cared nothing for sexual pleasure. Frigidity thus became a label and a diagnosis that defined how much sexual desire a woman must have and in what kinds of sexual behavior she must engage to be "healthy."

*Id.* at 457.

<sup>52</sup> See Anne Koedt, *The Myth of the Vaginal Orgasm*, in RADICAL FEMINISM 198 (Anne Koedt et al. eds., 1973). As Koedt noted in *The Myth of the Vaginal Orgasm*, the "worst damage was done to the mental health of women, who either suffered silently with self-blame, or flocked to psychiatrists looking desperately for the hidden and terrible repression that had kept them from their vaginal destiny." *Id.* at 201. See Peter Glick & Susan T. Fiske, *Ambivalent Stereotypes as Legitimizing Ideologies: Differentiating Paternalistic and Envious Prejudice*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 278, 289 (John T. Jost & Brenda Major eds., 2001) (noting loss of affection conveyed to women who do not behave within parameters of traditional feminine ideals, in that they are no longer perceived as "warm"); see also Diane Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5(3) PSYCHOL. PUB. POL'Y & L. 665, 670 (1999) ("A great deal of research has been conducted on the content of the descriptive component of gender stereotype. In general, women are believed to be warm, caring, deferential, and interpersonally skilled, whereas men are believed to be strong, controlling, assertive, and achievement-oriented.").

<sup>53</sup> See William Masters & Virginia Johnson, HUMAN SEXUAL RESPONSE 63, 66–67 (1966) (calling the clitoris "the center of the female sexual focus"); SHERE HITE, THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY 99 (1976) ("In other words, clitoral stimulation evokes female orgasm, which takes place deeper in the body, around the

cally, the clitoris,<sup>54</sup> maligned by Freud as immature, plays a vital role in female sexual response.<sup>55</sup>

That Freud's theory was wrong, however, is less interesting than how it was wrong. Remarkably, Freud's theory supported a vision of human sexuality that exactly complemented male needs and desires.<sup>56</sup> Acknowledging that the clitoris played a role in mature female sexuality would have required acknowledging that traditional male–female intercourse might not necessarily provide the female adequate stimulation to achieve orgasm.<sup>57</sup> More attention might had to have been paid to stimulating the clitoris than simple penetration of the vagina by the penis, thus requiring an awareness of distinct female needs. From the perspective of male heterosexual patriarchy, Freud's theory was a dream come true. Male sexuality, focused on the vagina as a source of satisfaction, was coincidentally in harmony with what women should want—a vaginal climax timed and driven by male desires. Failure to conform to this model was conveniently characterized as a disorder, an abnormality of the female psyche.

More fantasy than science, Freudian and other sexual stereotypes were able to thrive in the dark recesses created by medicine's inattention to female sexuality.<sup>58</sup> Medical science's inability to focus on the mechanisms of fe-

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vagina and other structures, just as stimulation of the tip of the male penis evokes male orgasm, which takes place inside the lower body of the male.”); Kevin L. Billups, *The Role of Mechanical Devices in Treating Female Sexual Dysfunction and Enhancing the Female Sexual Response*, 20 *WORLD J. UROLOGY* 137, 138 (2002) (“Clitoral engorgement plays an important role in female sexual arousal and overall sexual satisfaction. . . . Clitoral engorgement likely results in the activation of sensory and vasomotor nerve endings that could improve genital sensation, orgasm, and vaginal vasocongestion.”); see also ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 592 (1953) (noting that the vagina was “of minimum importance in contributing to the erotic responses of the female . . . [and] may even contribute more to the sexual arousal of the male than it does to the arousal of the female”); RICHARD C. FRANCIS, *WHY MEN WON'T ASK FOR DIRECTIONS: THE SEDUCTIONS OF SOCIOBIOLOGY* 17 (2004) (“It was Kinsey who decisively refuted this Freudian notion. . . . Kinsey demonstrated that virtually all orgasms involve the clitoris and that Freud's orgasmic transfer could not occur without major surgical reconstruction.”).

<sup>54</sup> See Jennifer R. Berman & Irwin Goldstein, *Female Sexual Dysfunction*, 28 *UROLOGY CLINICS OF N. AM.* 405, 408 (2001) (noting the historical inadequacy of anatomical literature on the female pelvis, and explaining that “the clitoris is an erectile organ similar to the penis and arises embryologically from the same structure, the genital tubercle”).

<sup>55</sup> See *supra* note 53.

<sup>56</sup> See Gerhard, *supra* note 48, at 458–59; THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 243 (1990) (noting Freud in discussion of the “cultural myth of the vaginal orgasm”).

<sup>57</sup> As Shere Hite noted thirty years ago:

Not only is “failure” to orgasm during coitus (intercourse) the most common female sexual complaint found in sex therapy clinics, but the fact that women very frequently do not orgasm during intercourse has been general popular knowledge for a very long time. . . . Even the question being asked is wrong. The question should not be: Why aren't women having orgasms from intercourse? but, rather: *Why have we insisted women should orgasm from intercourse?*

Hite, *supra* note 53, at 236.

<sup>58</sup> Even when research is available, it is often ignored. For example, a recent study found

male sexuality mirrors a larger disinterest in the female body, writ large.<sup>59</sup> Medical textbooks through the ages ignored the female body,<sup>60</sup> leading to prescription drug dosages<sup>61</sup> and surgical interventions<sup>62</sup> founded primarily on guesswork, rather than on empirically based data and research.<sup>63</sup>

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that ten million women who have had hysterectomies are still getting routine pap smears even though they no longer have a cervix. The noted author of the American College of Obstetrics and Gynecology guidelines on cervical screening, puzzled by the study's result, offered an explanation for administering the unnecessary test: "It's sort of become a habit." Gina Kolata, *10 Million Women Who Lack a Cervix Still Get Pap Tests*, N.Y. TIMES, June 23, 2004, at A1.

<sup>59</sup> *Medical Research Lacks Female Participants*, MED. ETHICS ADVISOR, Aug. 1, 2004, at 91, 92 (quoting Sherry Marts, Vice President for Scientific Affairs for the Society for Women's Health Research, as stating, "For a long time in medicine, we had this thing called the 'male norm. . . .' It was just assumed that the male was 'normal' and women were just small men with different plumbing and a hormone problem.").

<sup>60</sup> See Berman & Goldstein, *supra* note 54, at 408. Berman & Goldstein note, "In anatomy texts, the clitoris is not displayed accurately in terms of size, and its neurovascular supply rarely is described. The bulbs are omitted, or, if described, their relationship to other cavernous tissue is not described." *Id.*; see also Gerhard, *supra* note 48, at 452 ("Early-nineteenth-century anatomy textbooks noted the existence of the clitoris but believed that, unlike the supposedly analogous penis, the clitoris was passive and unimportant to female sexual expression. By the twentieth century, most, including the industry standard GRAY'S ANATOMY, did not label the clitoris or discuss its function."); Helen E. O'Connell et al., *Anatomical Relationship Between Urethra and Clitoris*, 159(6) J. UROLOGY 1892, 1897 (1998) ("A dissection based study of female cadavers suggests that current anatomy texts do not accurately display female perineal anatomy.").

<sup>61</sup> See, e.g., JANET HEINRICH, GENERAL ACCOUNTING OFFICE, DRUG SAFETY: MOST DRUGS WITHDRAWN IN RECENT YEARS HAD GREATER HEALTH RISKS FOR WOMEN, GAO-01-286R (2001) (finding that eight out of ten prescription drugs withdrawn from the market between 1997 and 2001 caused greater health risks for women, and speculating about likely cause of disparity for one such drug), available at <http://www.gao.gov/new.items/d01286r.pdf> (last visited Apr. 12, 2005).

<sup>62</sup> Berman and Goldstein note:

Even hysterectomy alone without the removal of the ovaries can result in sexual dysfunction. Symptoms women commonly experience postoperatively include decreased desire, decreased arousal, decreased genital sensation, and orgasmic dysfunction. The anatomic/physiologic basis for sexual dysfunction after hysterectomy is unclear, and the understanding of female neurovascular anatomy vital to normal sexual arousal and function is limited. Most likely, the sexual dysfunction symptoms women experience after hysterectomy occur as a result of nerve or vascular injuries and loss of ovarian estrogens and androgens. . . . This dysfunction is a focus of research, and, in the future, women may be offered nerve-sparing pelvic procedures similar to those routinely performed in men.

Berman & Goldstein, *supra* note 54, at 409.

Although the operation is common, many women do not know its full ramifications. See Lisa Napoli, *The Doctrine of Informed Consent and Women: The Achievement of Equal Value and Equal Exercise of Autonomy*, 4 AM. U.J. GENDER & L. 335, 353-54 (1996) (describing the informed consent doctrine as currently ineffective for hysterectomy patients).

<sup>63</sup> For example, in response to criticism concerning the lack of women in clinical trials, the National Institute of Health encouraged the inclusion of women in clinical trials that were federally funded. With some further encouragement, by 2000, women's participation in clinical trials increased; however, there was no routine analysis of the data that differentiated by sex. See generally Sarah K. Keitt, Catherine R. Wagner & Sherry Marts, *Understanding the Biology of Sex and Gender Differences: Using Subgroup Analysis and Statistical Design To Detect Sex Differences in Clinical Trials*, MEDSCAPE GEN. MED., 5(2), 2003 (noting that though clinical trials now involve women participants, the data is not routinely ana-

Despite the fact that more than half of all women, as reported in the Kinsey and Hite reports, do not experience orgasm through peno-vaginal penetration alone,<sup>64</sup> the reasons behind women's lack of sexual responsiveness have not generated much scientific inquiry.<sup>65</sup> Rather, medical diagnoses that categorize a reported 43% of the female population as sexually "dysfunctional"<sup>66</sup> have been met with bland acceptance, rather than a reappraisal of these diagnoses and reconsideration of what "normal" sexual functioning might mean for the female population.

### B. *It Is All in Your Head*

What Freud unwittingly demonstrated was the unparalleled ability of the human mind to rationalize, confirming his more insightful hypotheses about the power of the unconscious mind.<sup>67</sup> Freud's construction of his complicated model of female sexuality—a model that justifies preexisting male preferences—was textbook human behavior and entirely predictable.

In a world fixed through a male perspective, it is unsurprising that the mechanics of female sexuality are made to fit male needs. Intercourse is an activity that generates sexual pleasure for men, and also, according to sociobiologists, ensures the survival of their gene pool.<sup>68</sup> Although even

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lyzed by sex and suggesting strategies for using data to detect sex differences), at <http://www.medscape.com/viewarticle/455924> (last visited Apr. 12, 2005).

<sup>64</sup> KINSEY, *supra* note 53, at 567–93 (detailing the possible ways orgasm can be experienced by women biologically and physiologically); HITE, *supra* note 53, at 136 (survey data shows that only 30% of women achieve orgasm during intercourse); *id.* at 51 (reporting that penetration is rarely used by women as a means of achieving orgasm); MASTERS & JOHNSON, *supra* note 53, at 133 (“[T]he maximum physiologic intensity of orgasmic response subjectively reported or objectively recorded has been achieved by self-regulated mechanical or automanipulative techniques. The next highest level of erotic intensity has resulted from partner manipulation, again with established or self-regulated methods, and the lowest intensity of target-organ response was achieved during coition.”).

<sup>65</sup> See generally Berman & Goldstein, *supra* note 54.

<sup>66</sup> See, e.g., Billups, *supra* note 53, at 137 (noting more than 43% of American women are affected with Female Sexual Dysfunction (FSD)); Edward O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 J. AM. MED. ASS'N 537, 540 (1999) (showing that sexual dysfunction is more prevalent among women than men). Other studies estimate that 30–50% of women suffer sexual problems. See, e.g., Berman & Goldstein, *supra* note 54, at 405. These dysfunctions include hypoactive sexual desire disorder, sexual aversion disorder, orgasmic disorder, and sexual pain disorders. *Id.* at 406. These numbers are consistent with earlier studies of the “frigidity” rates of women. See RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR, AND WOMEN’S SEXUAL SATISFACTION* 61 (1999) (noting studies showing rates of 66–75% and 60–90%); Kinsey, *supra* note 53, at 567–93.

<sup>67</sup> See WILSON, *supra* note 13, at 4 (“The idea that a large portion of the human mind is unconscious is not new and was Freud’s greatest insight.”); FRANCIS, *supra* note 53, at 16 (“Freud was particularly unimpressed with his patients’ accounts of their own experiences whenever they contradicted what he knew apriori [sic].”).

<sup>68</sup> See FRANCIS, *supra* note 53, at 12 (“The function of orgasms in males is obvious. Except for those highly skilled in the techniques of certain tantric practices, . . . it is part and parcel of ejaculation; and ejaculation is, from a male’s evolutionary perspective, the

the nonconsensual participation of a female can be rationalized when necessary,<sup>69</sup> social norms—derived from biblical injunctions, recipes for marital stability, and notions of fair play—counsel in favor of a willing, and even sometimes equally pleased, partner. To justify the centrality of intercourse in sexual relations as maximally gratifying for both men and women required the construction of a baroque and inaccurate model of female sexuality. With eyes wide shut, this model was able to flourish uncontradicted by actual inquiry or study for some time.

Interestingly, though, the commercial realm awoke to a reality of female sexuality before the medical establishment. Whereas early medical practitioners deemed the female orgasm to be a specialized cure for women suffering from depression, hysteria, or “womb disease,”<sup>70</sup> commercial manufacturers understood that clitoral stimulation might be something that the vast population of healthy women might be interested in—and pay for. Early medical treatises report that physicians induced orgasm through genital massage and vibrators to treat their “ailing” patients as early as the middle 1600s.<sup>71</sup> Nevertheless, the use of vibrators as a quality of life enhancement for healthy women did not emerge on the scene until Sears and other purveyors of domestic goods chose to include them in their catalogs in the early twentieth century.<sup>72</sup>

Thus, it came to be that Sears catalog stores, driven by profit rather than an interest in justifying male myths of sexuality, seemed more responsive to women’s sexuality than either Freud or medical science.<sup>73</sup> Commer-

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raison d’être of sexual intercourse.”).

<sup>69</sup> See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (detailing the history of the marital rape exemption).

<sup>70</sup> See MAINES, *supra* note 66, at 8–9.

<sup>71</sup> A 1653 medical text written by Pieter van Foreest described the treatment: “[M]assage the genitalia with one finger inside, using oil of lilies, musk root, crocus, or similar.” *Id.* at 1. See generally ILZA VEITH, *HYSTERIA: THE HISTORY OF A DISEASE* (1965) (recording the history of “hysteria,” its treatment, and its relation to sexuality).

<sup>72</sup> MAINES, *supra* note 66, at 100–10.

<sup>73</sup> Of course, the commercial realm has exploited women through pornography and perpetuated harmful and degrading stereotypes, as pointed out by feminists. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (challenging the framing of female sexuality as a matter of dependency or danger); Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 701–02 (2000) (criticizing postmodern feminist books written about pornography but lacking real discussion of the pornography industry); DEBORAH L. RHODE, *SPEAKING OF SEX* 133–34 (1997) (summarizing evidence of pornography’s indirect effect on attitudes toward sexual violence and other harms towards women); Lynn S. Chancer, *Feminist Offensives: Defending Pornography and the Splitting of Sex from Sexism*, 48 STAN. L. REV. 739 (1996) (reviewing and responding to Nadine Strossen’s work, *Defending Pornography*); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN’S RIGHTS* (1995) (defending pornography from a women’s rights perspective and explaining why censorship is a threat to women’s rights); Carlin Meyer, *Sex, Sin, and Women’s Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994) (rejecting the suppressionist movement directed toward pornography); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) (discussing discourse that is harmful to women and applying this discussion to the discourse of pornography).

cial ingenuity enhanced women's choices beyond the narrow range offered by medical science. With greater independence and more disposable income, women are able to explore their sexual needs and express them, by shopping in stores named "Good Vibrations" or "Toys in Babeland" that cater to female sexuality, or at the increasingly popular "passion parties," small gatherings of friends modeled on Tupperware parties.<sup>74</sup> Bypassing medicine's focus on sick women in need of a cure, and focusing instead on normal women in need of accurate information about their bodies, business majors seem to have tapped a market and found answers that eluded doctors.<sup>75</sup>

### C. *The Perfect Storm: Medicine, Law, and Female Sexuality*

Having emerged from the stigma and negative judgments of a male medical environment into a surprisingly open free-market world, women must now contend with legal regulation that would shut down this market as illegal and immoral. Several states have banned the sale of vibrators and other sex aids that assist female orgasm. The rationale is morality: some legislatures find the devices immoral and obscene.<sup>76</sup> Typical is Alabama, which banned the sale or barter of "any device designed or mar-

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<sup>74</sup> See Jennifer Senior, *Sex Tips for Red-State Girls!*, N.Y. TIMES, July 4, 2004, at A1 (describing the new phenomenon of "Passion Parties" and one saleswoman's experience with the business); Mireya Navarro, *Women Tailor Sex Industry to Their Eyes*, N.Y. TIMES, Feb. 20, 2004, at A1 (reporting on the increasing role of women in the sex industry, including women-founded Toys in Babeland and Tupperware-style parties).

<sup>75</sup> Critics have noted, however, that other commercial incentives to "medicalize" female sexual issues can have a harmful effect by encouraging unnecessary and expensive drug therapies. See generally *Arriving at a "New View" of Women's Sexual Problems: Background, Theory, and Activism.*, in A NEW VIEW OF WOMEN'S SEXUAL PROBLEMS (Ellyn Kaschak & Leonore Tiefer eds., 2001).

<sup>76</sup> See TEX. PENAL CODE ANN. § 43.21, 43.23 (Vernon 2003); GA. CODE ANN. § 16-12-80 (2003); ALA. CODE § 13A-12-200.2(a)(1) (1975 & Supp. 2003); LA. REV. STAT. ANN. § 14:106.1 (West 2003); KAN. STAT. ANN. § 21-4301 (2003); COLO. REV. STAT. § 18-7-101, 102 (2003). Georgia, Texas, and Mississippi statutes prohibiting the sale of obscene devices have withstood constitutional attacks on various grounds. See *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *appeal dismissed*, 435 U.S. 982 (1978) (holding statute providing any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material not unconstitutionally vague or overbroad); *Regalado v. State*, 872 S.W.2d 7, 9 (Tex. App. 1994) (holding that constitutionally protected right to privacy does not include use of or possession with intent to promote obscene devices); *Yorko v. State*, 690 S.W.2d 260, 266 (Tex. Crim. App. 1985) (upholding statute criminalizing promotion of and possession with intent to promote obscene devices as legitimate exercise of state police power, justified under rationale of protecting the societal interest in order and morality); *PHE Inc. v. State*, 876 So. 2d 1244, 1248 (Miss. 2004) (upholding Mississippi obscenity statute because the commercial sale of sexual devices is not protected by Mississippi constitution's right of privacy).

Some of these laws were passed quite recently—in the 1980s and 1990s—and cannot be excused as relics of a past era. See *State v. Brennan*, 772 So. 2d 64, 73 (La. 2000) (describing the law as one passed during the anti-pornography crusade of the mid-1980s and that was characterized by supporters as a "simple way of helping in the war on obscenity").

keted as useful primarily for the stimulation of human genital organs.”<sup>77</sup> The legal system becomes enmeshed in sexual mechanics when challenges to these statutes are filed.<sup>78</sup> How the legal system handles these claims parallels medical science in its male-centered approach to sexuality. Ultimately, the legal system builds upon questionable science and skews it further.

### 1. *The Conscious Approach—Helping a Few Sick Women*

Lawyers often win cases by arguing that the other side seeks to do something radical whereas they are hewing close to existing precedent and the underlying spirit of the law. Thus, litigation strategies challenging these “sex aid” bans often have taken a narrow tack.<sup>79</sup> The more conservative approaches assert that the bans harm impaired women who have a medical need for these devices, and must be struck down as overbroad because they do not include medical exceptions.<sup>80</sup> Judges are presented with the available data relating to female sexual “dysfunction.”<sup>81</sup> These strategies enlist the sympathies of a judiciary unwilling to unman the morality barricade when staring down the entire female population, but willing to look chivalrously away in the face of a few impaired women in need of special assistance.<sup>82</sup> In Louisiana and Colorado, such “obscenity” laws were struck down as violating the right to privacy and being overbroad because they contained no exception for medical and therapeutic uses.<sup>83</sup> The Louisiana

<sup>77</sup> ALA. CODE § 13A-12-200.2(a)(1).

<sup>78</sup> See generally Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J. L. & FEMINISM 1 (2004) (noting that medical bias can reinforce gender stereotypes in the law and exploring the legal reaction to sexual privacy).

<sup>79</sup> See generally David C. Minneman, Annotation, *Constitutionality of State Statutes Banning Distribution of Sexual Devices*, 94 A.L.R. 5th 497 (2001) (“Testimony of an expert witness, such as a state-certified psychologist and sex therapist may be helpful. Such an expert might, for example, testify that a dildo vibrator is effective and commonly prescribed in the treatment of both anorgasmic and incontinent women . . . and that if such devices were to become not readily available to the general public, anorgasmic women would be substantially impacted.”).

<sup>80</sup> See *id.*; see also *State v. Hughes*, 792 P.2d 1023, 1030 (Kan. 1990) (In discussing the issue of whether a statute against promotion of obscene devices was overbroad, the court explained, “As Dr. Mould [a sex therapist and psychologist] was the only witness at the hearing on the defendant’s motion to dismiss, the only evidence in the record is that the dildo vibrator is effective and is commonly prescribed in the treatment of both anorgasmic and incontinent women.”).

<sup>81</sup> See, e.g., Minneman, *supra* note 79, at 497.

<sup>82</sup> The strategy was successful. The Kansas court held that the “statute is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders.” *Hughes*, 792 P.2d at 1031–32 (“We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity.”). But see *PHE, Inc.*, 877 So.2d at 1248 (“People who are sexually dysfunctional (presumably those people who cannot achieve sexual enjoyment and fulfillment without a sexual device) should be treated by a physician or a psychologist.”).

<sup>83</sup> *People v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985) (“The statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices.”). See also *Hughes*,

Supreme Court, generally relying on “medical and health journals”<sup>84</sup> found that “vibrators remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships.”<sup>85</sup>

The problem with this strategy is that it reinforces stereotypes about women, and is based on medical and scientific studies that may be inaccurate or incomplete. Use of the terms “dysfunction” and “medical need” reinforces a male-centered view of female sexuality. The reality is that many normal, functional women find their sexual needs are better met through the use of sex aids than through traditional sexual positions geared for optimal male satisfaction.

## 2. *Sexual Privacy—Neutral Principles Meet Unconscious Bias*

A potentially broader litigation strategy to defeat the laws has been raised by the Supreme Court's decision in *Lawrence v. Texas*.<sup>86</sup> There, in finding that a Texas criminal statute punishing consensual, private sodomy violated constitutional guarantees of substantive due process, the United States Supreme Court departed from its use of a very specific and restrictive “fundamental rights” analysis in favor of a more general discussion of how the criminalization of such private, consensual action violated substantive due process. *Lawrence* did not track the Court's most recent guidelines for establishing a right as fundamental. Those guidelines, outlined in *Washington v. Glucksburg*,<sup>87</sup> require a specific description of the right.<sup>88</sup> Once described, the proponent must show that this specific right is so deeply rooted in this nation's history and traditions, and so “implicit in the concept of ordered liberty,” that “neither liberty nor justice would exist if [it] were sacrificed.”<sup>89</sup> For example, the question posed in *Bowers v. Hardwick*,<sup>90</sup> which earlier considered the constitutionality of a criminal sodomy statute, was whether the nation's history and tradition

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792 P.2d at 1032 (“We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be constitutionally protected activity. The State has demonstrated no interest in the broad prohibition of distributing the devices in question sufficiently compelling to justify the infringement of the rights of those seeking to use them in legitimate ways.”). The Louisiana Supreme Court upheld the state's obscenity statute, stating that it did not violate the Louisiana constitution's right to privacy because that right does not extend to purchasing or promoting obscene devices. Nevertheless, the court struck the statute down as not rationally related to a legitimate interest because it did not contain a medical exception for the use of vibrators where therapeutically appropriate. *State v. Brennan*, 772 So. 2d 64, 76 (La. 2000).

<sup>84</sup> The Louisiana Supreme Court also specifically relied upon a 1998 *British Medical Journal* and a 1992 “Harvard Health Letter.” *Brennan*, 772 So. 2d at 76.

<sup>85</sup> *Id.*

<sup>86</sup> 539 U.S. 558 (2003).

<sup>87</sup> 521 U.S. 702 (1997) (finding no fundamental right to assisted suicide).

<sup>88</sup> *Id.* at 721.

<sup>89</sup> *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

<sup>90</sup> 478 U.S. 186, 191 (1986).

reflect a pattern of protection for the right to homosexual sodomy. Until *Lawrence*, the Court's substantive due process jurisprudence had been contracting in scope and breadth, moving away from the broad proclamations of *Roe v. Wade*<sup>91</sup> and cases of that vintage. The broad right of privacy announced in *Griswold v. Connecticut*<sup>92</sup> had, over the years, transformed into narrow pockets of protection.<sup>93</sup>

In *Lawrence*, however, the Court focused on whether same-sex intercourse fell within that sphere of private activity that was constitutionally immune from state interference. Answering yes, the Court opened up a possibility for those who would seek to place vibrator use within that same private sphere. The possibility would seem secure, resting upon the neutral principle that all persons have a right to sexual privacy that includes the right to avoid criminal prosecution for adult, consensual acts. Unfortunately, so far, a strategy that looks promising on paper has not proven successful in practice.

For example, the Eleventh Circuit recently considered Alabama's anti-vibrator law against a *Lawrence* challenge. In *Williams v. Attorney General of Alabama*, the court examined Alabama's statutory ban on the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."<sup>94</sup> Declaring that the statute banned "a relatively narrow bandwidth of activity," a divided Eleventh Circuit noted that:

[The statute] prohibits only the sale—but not the use, possession, or gratuitous distribution—of sexual devices (in fact, the users involved in this litigation acknowledge that they already possess multiple sex toys). The law does not affect the distribution of a number of other sexual products such as ribbed condoms or virility drugs. Nor does it prohibit Alabama residents from purchasing sexual devices out of state and bringing them back into Alabama. Moreover, the statute permits the sale of ordinary vibrators and body massagers that, although useful as sexual aids, are not "designed or marketed . . . primarily" for that particular

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<sup>91</sup> 410 U.S. 113 (1973) (finding unconstitutional a Texas statute criminalizing abortion at any stage except to save the mother's life).

<sup>92</sup> 381 U.S. 479 (1965) (holding unconstitutional a Connecticut law criminalizing the use of medicinal contraceptives).

<sup>93</sup> Thus the relatively broad right to an abortion announced in *Roe v. Wade* has been limited. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (finding women's right to make a decision to obtain an abortion before fetal viability protected under the substantive due process doctrine, and state may not subject that right to "undue burdens"). Although there is a right to guide and control one's children, *Troxel v. Granville*, 530 U.S. 57, 75 (2000), that does not include the right of a biological father to have a relationship with a daughter born of an adulterous relationship when the biological mother still is married and her husband chooses to raise the daughter as his own. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>94</sup> *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (examining ALA. CODE § 13A-12-200.2 (Supp. 2003)).

purpose. Finally, the statute exempts sales of sexual devices “for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.”<sup>95</sup>

Although the majority opinion is lengthy, the crux of the decision is outlined in this paragraph designed to frame the claim. Remarkably, the court's effort to portray the statute as a trivial burden on sexual privacy rests on the insight that the statute leaves the sale of products used by males, such as virility drugs and ribbed condoms, undisturbed. Moreover, the court is resigned to women purchasing “ordinary vibrators and body massagers” not marketed as sex aids, but useful for that purpose. But, if women can fulfill their needs discreetly with products that avoid truthful but indelicate descriptors such as “sex aid,” “vibrator,” or “dildo,” the court sees no hardship in imposing criminal penalties on those entrepreneurs crass enough to engage in truth in advertising.

The statute's asymmetrical effect is seen as a virtue rather than a vice, and the court seems almost reassured that if one can find other sex aids free,<sup>96</sup> out-of-state, or mislabeled, then the statute's workings must be inoffensive, and certainly less challenging to traditional male roles. The court accurately describes the irrationality of the statute's operation without a trace of consciousness of it. The court's main point seems to be that this all would be easier if women would keep quiet and be happy with the few “body massagers” that they are able to procure.

The Eleventh Circuit went on to discard the *Lawrence* opinion as all but irrelevant to the controversy, although the criminalizing of private adult consensual sexual conduct was specifically the issue in *Lawrence*. Why is *Lawrence* not relevant? In large part, the divided panel admitted that it could not believe that the Supreme Court meant what it said, and noted that the Court's opinion was inconsistent with previous “fundamental rights” analysis.<sup>97</sup> Moreover, *Lawrence* would cause chaos in the law.<sup>98</sup> In

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<sup>95</sup> *Id.* at 1233 (citing § 13A-12-200.4).

<sup>96</sup> The court later notes in its opinion that it understands that a restriction on the sale of the devices is a restriction on use. *See Williams*, 378 F.3d at 1242 (“For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. Thus it was that the *Glucksberg* Court analyzed a ban on *providing* suicide assistance as a burden on the right to *receive* suicide assistance. . . . Similarly, prohibitions on the *sale* of contraceptives have been analyzed as burdens on the *use* of contraceptives. . . .”) (citations omitted).

<sup>97</sup> *Williams*, 378 F.3d at 1237 (“As we noted in *Lofton*, we are not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights.”); *see also id.* at 1236 n.6 (“We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis” (quoting *Lofton v. Sec’y of the Dep’t of Children and Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004))). What is equally interesting is that the court clung to the *Glucksberg* analysis even though *Glucksberg* was a relatively recent decision itself, from 1997, and itself revised the fundamental rights inquiry. *See generally* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>98</sup> *See Williams*, 378 F.3d at 1240 (“If we were to accept the invitation to recognize a

other words, the majority could not make *Lawrence* fit consistently with its conception of substantive due process, so it rationalized that *Lawrence* was limited to its facts—the constitutionality of a criminal sodomy statute. According to the divided panel, *Lawrence* was not the relevant starting point, because the *Lawrence* decision was not directly relevant to the question of whether there is a fundamental right to use “vibrators, dildos, anal beads, and artificial vaginas,”<sup>99</sup> even though the *Williams* case implicated the criminalization of adult, private, consensual, sexual acts, exactly as *Lawrence* had.

The Eleventh Circuit panel, with one judge dissenting, thus reverted to the rhetorical high jinks of *Bowers v. Hardwick*,<sup>100</sup> constricting substantive due process protections to that small subset of practices established as prevalent in American society from colonial times forward.<sup>101</sup> Rejected by *Lawrence*<sup>102</sup> in favor of a more open, less transparently reactionary approach, the Eleventh Circuit rightly saw deployment of the older test as a sure-fire way to guarantee that the sex aids bans would continue on the books. Of course, the *Bowers*-type formulation is the preferred public relations approach, as it will elicit the maximum amount of desired “pseudo-agreement” among the misinformed.<sup>103</sup> Thus, for those who do not know the intricacies of substantive due process particularly, or the law generally, the question asked by the court molds opinion in the desired direction of agreement with the court’s approach that seeks to link a sacred constitutional precept with the more profane vibrators, dildos, and beads. Moreover, it also opportunistically replaces sexual privacy, an abstract concept that many might find a positive, with particular sexual devices, specific applications that may have fewer adherents among the general populace. Clearly, the

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right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults.”).

<sup>99</sup> *Williams*, 378 F.3d at 1250 (quoting *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1296 (N.D. Ala. 2002)).

<sup>100</sup> 478 U.S. 186 (1986).

<sup>101</sup> Judge Rosemary Barkett dissented, noting that the majority’s constricted framing of the issue “severely discounted the extent of the liberty at stake.” *Williams*, 378 F.3d at 1257 (Barkett, J., dissenting). She argued that “the analytical framework of *Lawrence* compels the conclusion that the Due Process Clause protects a right of sexual privacy that encompasses the use of sexual devices.” *Id.* at 1251.

<sup>102</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>103</sup> See PLOUS, *supra* note 32, at 54 (defining “pseudo-opinions”). Plous explains that

[w]hen [people] know fairly little about an issue, . . . they are more easily influenced by [variations in the question asked.] And when [people] know virtually nothing about an issue, a certain percentage will show the ultimate form of plasticity; depending upon how the question is asked, some portion will offer an opinion on a topic about which they have no real opinion. Such opinions are called, appropriately enough, “pseudo-opinions.”

*Id.*

courts are not oblivious to the substantial effect that the framing of a question may have on the answer.<sup>104</sup>

Fundamental rights status, under the *Bowers* test, hinges entirely on whether the practice in question is synchronous with our nation's history and traditions, regardless of whether that history and those traditions are themselves heavily tainted by prejudice or bias. Thus, the Eleventh Circuit asked whether "the right to use sexual devices when engaging in lawful, private sexual activity"<sup>105</sup> was deeply rooted in the traditions and history of our nation and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed."<sup>106</sup> It embarked on a search for affirmative instances in which the government had sanctioned use of sexual devices in the history of the United States, not simply where the state had forsworn regulation.<sup>107</sup> Indeed the court noted that recent practices and traditions were much less relevant than how the pioneers of the eighteenth and nineteenth centuries, unaided by recent medical or scientific advances, handled things.<sup>108</sup> Having framed the question to dictate the desired answer, and given a long history and tradition of sexual repression and misinformation, the unsurprising conclusion of the court's journey was to uphold Alabama's law. This path was not the one taken in *Lawrence*, but the Eleventh Circuit could not tear itself from its own well-worn wagon grooves leading to a comfortable resting spot. As this case illustrates, although it is normal for courts' decisions to show bias towards the preexisting views of the judges,<sup>109</sup> the result cannot necessarily be called neutral.

The world has been so male-centered for so long, it is no wonder that judges find it difficult to do the archaeological work necessary to unearth the biases. Even more destructive, however, is that courts show a willingness to cover biased rules in neutral rhetoric, thus bubble wrapping the problem with even more layers of protection. By returning to an analysis of substantive due process that protects only those rights historically protected, the court's "neutral" analysis disfavors women who have for centuries been the victims of both biased rules and stereotypical thinking,

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<sup>104</sup> See *id.* at 75 (noting that "question wording and framing often make a substantial difference [in people's expressed opinions], and it pays to be aware of their effects"). See also Cass Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1590 (2004) (discussing framing effect whereby people are more likely to undergo a risky medical procedure if they are told, "Of those who have this procedure, ninety percent are alive after five years," than if they are told, "Of those who have this procedure, ten percent are dead after five years.").

<sup>105</sup> *Williams*, 378 F.3d at 1242.

<sup>106</sup> *Id.* at 1235 (citing *Glucksberg*, 521 U.S. 702, 720–21 (1997)).

<sup>107</sup> See *id.* at 1243 ("The inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of *sexual devices* within that history and tradition.").

<sup>108</sup> *Id.* at 1243–44.

<sup>109</sup> See PLOUS, *supra* note 32, at 140–42 (discussing the interpretation of events as reinforcing preexisting views).

including the longstanding inertia in the medical profession towards female sexuality.<sup>110</sup> It entrenches these prejudiced principles in the constitutional analysis and calls them neutral. Not only is there no inquiry as to this effect, the court in *Williams v. Attorney General of Alabama* harshly critiqued the district court for taking into account this history of discrimination.<sup>111</sup>

### 3. *The Parlor Game—Repackaging the Stereotype in a Neutral Rule*

The court in *Williams v. Attorney General of Alabama* is hardly the only court that makes biased assessments. In fact, courts frequently play a rather elaborate word game whose object is to take gender-biased rules and interpret them—through the art of rationalization—as gender-neutral.

One prominent example is the Supreme Court's decision in *Geduldig v. Aiello*.<sup>112</sup> In that case, the Supreme Court majority considered whether a public employer's denial of pregnancy benefits constituted sex discrimination in violation of a statutory guarantee of equal treatment regardless of sex. Although pregnancy is undoubtedly linked with the female sex, the Court reasoned, "it does not follow that every legislative classification concerning pregnancy is a sex-based classification."<sup>113</sup>

The problem is that often the starting point for the analysis is male, and the female exists in relation to the male. The Supreme Court opinion delineated males as the crucial comparison group. Men could not get pregnant. There were some women who, like men, could not become pregnant. Therefore, there was no sex discrimination because all men and some women could not be pregnant. In other words, because some women were like men, sort of, there was no discrimination. The only "persons" denied a benefit were female, because only females can become pregnant, but females were not considered the comparison group.<sup>114</sup> It followed that where neither men nor women received pregnancy coverage, they were treated the same, there being "no risk from which men are protected and women are not," and "no risk from which women are protected and men are not."<sup>115</sup> The same logic would justify excluding coverage for ovarian cancer and postpartum depression, while covering prostate cancer and pattern baldness.

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<sup>110</sup> See generally Herald, *supra* note 78 (discussing sexual privacy rights after *Lawrence*).

<sup>111</sup> *Williams*, 378 F.3d at 1243.

<sup>112</sup> 417 U.S. 484, 496–97 (1974) (ruling that a law denying pregnancy benefits is not gender discriminatory because there are many women, like men, who will not be pregnant and thus the distinction is not sex-based).

<sup>113</sup> *Id.* at 496 n.20.

<sup>114</sup> *Id.* at 496 n.20 ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

<sup>115</sup> *Id.* at 496–97.

All persons would receive coverage for prostate cancer and pattern baldness—predominately male afflictions—and not for diseases affecting only females, such as ovarian cancer. Of course, at least theoretically, the same logic would apply when a coverage decision was made to exclude erectile dysfunction from coverage. As long as unspoken male bias governs the ultimate decisions as to coverage, however, it is more likely that benefits that accrue mainly to women will be cut—and these “neutral” principles of law will protect it from attack.

Following the Court's decision, Congress patched the statutory problem in *Geduldig* with regard to employment,<sup>116</sup> but the doctrine lives on in equal protection law and Title VII doctrine generally. Thus, there is no sex discrimination where breastfeeding is banned in public because this mandates that no *persons* may breastfeed, and women are just part of that general ban.<sup>117</sup> Indeed, it would be an “expansive interpretive leap” to include a ban on breastfeeding within the scope of “sex discrimination.”<sup>118</sup>

So too with the Eleventh Circuit's analysis in *Williams*—the statute only bans vibrators, not condoms or virility drugs.<sup>119</sup> No person can obtain a vibrator, and all persons can obtain virility drugs. There is as much a problem with treating unlike matters the same as with treating like matters differently. When one has passed the stage of ridding the books of facially discriminatory law, the more difficult and subtle task remains of undoing the vast body of law that is facially neutral, but geared to the predilections of decisionmakers who are guided by only a male frame of reference and whose decisions conveniently confirm the stereotypes.

Although the legal system has eradicated many of the patently biased laws that plagued it, the more difficult job is to rid the system of neutral laws designed and applied in a biased fashion. The courts have been unsympathetic to that cause absent a showing of intent to discrimi-

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<sup>116</sup> See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2004) (defining the terms “because of sex” or “on the basis of sex” to include pregnancy, childbirth, and related conditions). The Supreme Court had subsequently transferred its reasoning from the equal protection context in *Geduldig* to the Title VII context. See *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 138 (1976) (“It is impossible to find any gender-based discriminatory effect . . . simply because women disabled as a result of pregnancy do not receive benefits.”).

<sup>117</sup> See *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428 (6th Cir. 2004) (holding that, under both Ohio statute and Title VII of the Civil Rights Act of 1964, a store's ban on breastfeeding in public areas is not discrimination based on sex where there is no comparable class of males treated more favorably with regard to breastfeeding).

<sup>118</sup> *Id.* at 439. Similarly, for decades, many private insurers often refused to cover prescription contraceptives under health plans despite the serious problems caused by unintended pregnancies. See generally Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998). Yet many of these insurers added Viagra coverage to their plans—to combat male impotence—soon after the introduction of Viagra onto the market. See Tamar Lewin, *Agency Finds Many Health Plans Should Cover Contraceptive Costs*, N.Y. TIMES, Dec. 15, 2000, at A1. It was this clear juxtaposition that finally forced the passage of contraceptive equity bills in many states. See Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES, June 30, 1999, at A1.

<sup>119</sup> *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

nate.<sup>120</sup> But, as discussed above, the unconscious processes of our minds do not allow us to form that specific intent in many cases. We simply rationalize our “neutral” rules as consistent with unbiased behavior. In the medical profession, that means defining female sexuality as successful when it responds well to the needs of men, and as dysfunctional when it does not. In the legal arena, sadly, the most successful cases involving the anti-vibrator laws are those where the courts can be convinced to consider the needs of these dysfunctional women, and the least successful are those where the court hides behind the “neutrality” of our nation’s history and traditions and ignores the possibility that any viewpoints other than male exist.

#### IV. LAWMAKING BY INSTINCT: THE FROZEN EMBRYO CASES AND THE TRAGEDY OF “FORCED PARENTHOOD”

In the last Part, we detailed the existence of gender bias in the medical realm and showed how disinterest in and ignorance about women led to medically flawed understandings of women’s sexuality, and to a legal doctrine that reflects male bias rather than female reality. The mechanisms by which flawed assumptions about women worm their way into judicial decisions and legislative fiat are manifold. Error occurs both where information is scarce and where it is plentiful. Sometimes even when studies exist to explode stereotypes about men and women’s “essential natures,” the data are met with studied neglect and inattention.

In one particularly nettlesome area of family law, where the intrusion of Assisted Reproduction Techniques (“ART”) has rendered traditional family law concepts increasingly irrelevant, judges are working hard to ensure that population-based studies and a rich base of social science literature do not disconcert their more visceral notions of what parenthood is and how family ties are created. Judges in frozen embryo disputes defer to the autonomy-based interest in avoiding family ties to the detriment of the parental aspirations of the female litigants in these cases.<sup>121</sup> The judges’ efforts to “balance” the conflicting interests in experiencing and escaping parenthood fail to recognize the time-limited nature of female reproduction, as well as the central role that women play in the creation of frozen embryos.<sup>122</sup> Most fundamentally, they fail to realize that parental identity flows from the assumption of a nurturing, caretaking role, rather than the

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<sup>120</sup> See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1978) (holding that Massachusetts’ veterans’ preference statute did not discriminate against women despite claim that 98% of veterans eligible for the preference were men).

<sup>121</sup> See, e.g., *A.Z. v. B.Z.*, 725 N.E. 2d 1051, 1052–53 (Mass. 2000) (affirming permanent injunction prohibiting wife from utilizing embryos held in storage).

<sup>122</sup> See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 603–04 (Tenn. 1992) (considering the various burdens imposed on the relevant parties when confronted with a constraint on parental autonomy).

stark fact of genetic connection. In linking psychological parenthood to consanguinity, rather than to the physical acts of caretaking, the frozen embryo judges adopt a particular vision of family ties. This view undercuts and trivializes traditional female contributions and dictates outcomes that fail to recognize the importance of nurturance—an activity still primarily undertaken by women—in the construction of parental identity and parent-child bonding.

*A. Ensuring Procreation-Avoidance<sup>123</sup> at All Costs: A Consistent Result in Search of a Theory*

To date, six state supreme courts have entered the fractious territory of frozen embryo disputes.<sup>124</sup> The essential plot line in each of these cases is the same. A couple marries, has difficulty conceiving, enters fertility treatment, successfully creates and cryopreserves one or more embryos, and then divorces. In each case, one spouse seeks to have the embryos brought to term.<sup>125</sup> The other party seeks to have the embryos destroyed,<sup>126</sup> kept in storage,<sup>127</sup> or given up for adoption.<sup>128</sup> And in each case, the party seeking the less procreative option wins.

The subplots and subtexts in each of these cases present some variety. In four of the cases, the women sought custody of the embryos in order to raise the resulting child(ren) themselves,<sup>129</sup> while in two cases, either the wife or the husband wished to donate the embryos to a childless couple.<sup>130</sup> In four cases, the women litigants had been in fertility treatment for years but were childless,<sup>131</sup> while in the two other cases the women had children, either by adoption or through fertility treatments, but wanted

<sup>123</sup> I borrow the term “procreation-avoidance” from Judith Daar’s perceptive article on the courts’ result-oriented jurisprudence. See Judith Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J. L. MED. & ETHICS 197 (2001).

<sup>124</sup> *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051; *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588.

<sup>125</sup> *In re Witten*, 672 N.W.2d at 772; *Litowitz*, 48 P.3d at 264; *J.B. v. M.B.*, 783 A.2d at 710; *A.Z. v. B.Z.*, 725 N.E. 2d at 1055; *Kass*, 696 N.E.2d at 177; *Davis*, 842 S.W.2d at 590.

<sup>126</sup> *J.B. v. M.B.*, 783 A.2d at 710; *Davis*, 842 S.W.2d at 590.

<sup>127</sup> *In re Witten*, 672 N.W.2d at 773; *A.Z. v. B.Z.*, 725 N.E. 2d at 1053; *Kass*, 696 N.E.2d at 177 (Mr. Kass wished the embryos to be retained by the program storing them, to be used for research.).

<sup>128</sup> *Litowitz*, 48 P.3d at 264 (Mr. Litowitz wished the embryos to be put up for adoption as opposed to being brought to term by a surrogate mother for his wife.).

<sup>129</sup> *Litowitz*, 48 P.3d at 262, 264 (Ms. Litowitz was unable to bring the embryos to term herself, and had had a surrogate mother deliver her only child.); *In re Witten*, 672 N.W.2d at 772 (Ms. Witten wished to have the embryos brought to term either by herself or by a surrogate mother.); *A.Z. v. B.Z.*, 725 N.E. 2d at 1055 (B.Z. wished to bring the embryos to term herself.); *Kass*, 696 N.E.2d at 177 (same).

<sup>130</sup> *J.B. v. M.B.*, 783 A.2d at 710 (Husband M.B. intended to donate the frozen embryos to childless couples.); *Davis*, 842 S.W.2d at 590 (Ms. Davis wished to donate the frozen embryos to childless couples.).

<sup>131</sup> *Kass*, 696 N.E.2d at 175; *In re Witten*, 672 N.W.2d at 772; *Davis*, 842 S.W. 2d at 592.

more.<sup>132</sup> In three cases, the couples had signed informed consent documents containing provisions specifically addressing the disposition of the embryos in the event of separation or divorce.<sup>133</sup> In the remaining three cases, no such documentary evidence existed.<sup>134</sup> In two cases, the courts' analysis focused mainly on determining the appropriate weights to be assigned to the competing constitutional rights of procreating and avoiding procreation.<sup>135</sup> In four cases, the courts considered whether dispositional provisions in fertility clinic consent forms could bind disputing couples, and looked both at the clarity and precision of the particular language used, and at the public policy implications of contracts that fix people in intimate relationships they subsequently wish to disavow.<sup>136</sup>

Despite these mixed factual scenarios, these cases are remarkably consistent in result: procreation-avoidance. If judicial analysis focuses on the constitutional rights to procreate and to avoid procreation, the right to avoid procreation is given trump card status.<sup>137</sup> If a contract exists with conflicting and ambiguous terms, the courts nevertheless find the document to "clearly" require either donation of the embryos to research or permanent storage of the embryos until a mutual agreement can be reached.<sup>138</sup> Moreover, if the contract pellucidly vests custody with the party who would bring the embryos to term, the court finds such a contract contrary to public policy.<sup>139</sup> It almost does not matter how the court asks the question; the answer is always the same. The courts simply will not countenance the creation of embryos over the objection of one biological progenitor.

But why? Nothing in the constitution or elaborating case law states that the right to avoid procreation attaches with greater heft than the right to procreate.<sup>140</sup> Indeed, close followers of an abortion jurisprudence that has embraced parental notification requirements,<sup>141</sup> waiting periods,<sup>142</sup> and

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<sup>132</sup> *Litowitz*, 48 P.3d at 262; *J.B. v. M.B.*, 783 A.2d at 710; *A.Z. v. B.Z.*, 725 N.E. 2d at 1053.

<sup>133</sup> *J.B. v. M.B.*, 783 A.2d at 710; *A.Z. v. B.Z.*, 725 N.E.2d at 1053-54; *Kass*, 696 N.E.2d at 176-7.

<sup>134</sup> See *In re Witten*, 672 N.W.2d at 772 (Couple signed an informed consent document, termed the "Embryo Storage Agreement," but no contingency provisions detailing disposition in the event of divorce were included.); *Litowitz*, 48 P.3d at 264; *Davis*, 842 S.W.2d at 592.

<sup>135</sup> *J.B. v. M.B.*, 783 A.2d at 715-20; *Davis*, 842 S.W.2d at 600-04.

<sup>136</sup> *Litowitz*, 48 P.3d at 268-70; *A.Z. v. B.Z.*, 725 N.E. 2d at 1055-59; *Kass*, 696 N.E.2d at 179-82; *In re Witten*, 672 N.W.2d 781-83.

<sup>137</sup> See *Davis*, 842 S.W.2d at 602; *J.B. v. M.B.*, 783 A.2d at 716-17.

<sup>138</sup> See *Kass*, 696 N.E.2d at 181-82; *In re Witten*, 672 N.W.2d at 773.

<sup>139</sup> See *A.Z. v. B.Z.*, 725 N.E. 2d at 1059; *J.B. v. M.B.*, 783 A.2d at 719; *In re Witten*, 672 N.W.2d at 781.

<sup>140</sup> See *Davis*, 842 S.W.2d at 601.

<sup>141</sup> See generally Carol Sanger, *Regulating Teenage Abortion in the United States, Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305 (2004) (discussing procedures in thirty-four states that require parental notification for a minor to obtain an abortion); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (upholding constitutionality of parental notification law as long as a judicial bypass procedure was available).

<sup>142</sup> See *Casey*, 505 U.S. at 885 (upholding constitutionality of twenty-four-hour waiting

other significant restrictions on the right to end a pregnancy might be surprised at the deference being accorded the right to avoid family ties in this context.<sup>143</sup> Similarly, contract law is generally loathe to speculate about drafters' intent in the face of multiple, conflicting, ambiguous clauses, and public policy concerns have not typically released those contractually bound to familial commitments in cases of adoption, surrogacy, egg or sperm donation, or other brokered family arrangements.<sup>144</sup>

So how does one explain the courts' consistent efforts to find in favor of procreation-avoidance in this context? One concern the courts undoubtedly have with allowing one parent to bring the embryos to term over the objections of the other parent is the possible financial obligations that might attach. A spouse cannot waive a minor child's support entitlements.<sup>145</sup> Consequently, any agreement reached whereby one parent releases the other from the ordinary child support obligations that the state would impose would be unenforceable. The inalienability of a child's support claims creates a possible moral hazard whereby a parent could be required to finance the development of a child whose existence she or he sought to avoid. This difficulty, however, was not present in the two cases where the spouse seeking custody was planning to allow adoption of the embryo by a childless couple.<sup>146</sup> Adoption would release the biological parents from financial responsibility and remove the moral hazard threat. Moreover, as one judge pointed out, this problem could be readily solved with one flourish of the legislative pen.<sup>147</sup> As one state legislature has already done, the objecting

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period for abortion).

<sup>143</sup> One might legitimately ask why legislatures and courts alike are undercutting a woman's right to terminate an unwanted embryo *in utero* while at the same time staunchly defending a non-gestating individual's right to destroy an embryo that is desperately wanted by another genetic contributor.

<sup>144</sup> See, e.g., *In re Brittany H.*, 243 Cal. Rptr. 763 (Cal. Ct. App. 1988) (denying adoptive parent right to reclaim infant where parent sought to repudiate earlier adoption agreement); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (rejecting divorcing husband's claim that he had no relation to, and no responsibility for, the child he and his ex-wife had commissioned through the services of egg, sperm, and womb donors); *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989) (repudiating claim of known sperm donor seeking parental visitation).

<sup>145</sup> See *County of Orange v. Smith*, 117 Cal. Rptr. 2d 336, 341 (Cal. Ct. App. 2002) (examining alleged waiver of child support); *Matthew Bender 2-14 Child Custody and Visitation § 14.08[1][a]* (2004) ("[N]o agreement between parents that waives child support or seeks to limit or abrogate a minor's right to support by his parent can bind the court."). See also *McClish v. Lee*, 633 So. 2d 56, 57 (Fla. Dist. Ct. App. 1994) ("Clearly, parties to a marriage cannot, as a matter of law and public policy, contract away the child's right to support. This principle is so well established that it needs no citation of authority."); *Huckaby v. Huckaby*, 393 N.E.2d 1256, 1259 (Ill. App. Ct. 1979) (noting father may not be contractually relieved from child support); *Rosener v. Mitchell*, 637 S.W.2d 381, 382 (Mo. Ct. App. 1982) (emphasizing that court will not be bound by agreement waiving child support).

<sup>146</sup> *J.B. v. M.B.*, 783 A.2d 707, 710 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992).

<sup>147</sup> *Kass v. Kass*, 663 N.Y.S.2d 581, 594 (N.Y. App. Div. 1997) (Miller, J., dissenting), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

spouse in frozen embryo disputes could be placed in the same category as sperm donors: necessary for creation, but not responsible for care and feeding or resultant offspring.<sup>148</sup> This would eliminate the possibility of one spouse achieving aspirations for parenthood while free riding on an objecting spouse's bank account.

It is clear, however, that the problem does not come down to money alone. Courts remain reluctant to allow embryos to be brought to term even when the embryo is to be adopted by an infertile couple seeking to assume all financial and social responsibilities.<sup>149</sup> Indeed, judicial discussion of the parties' competing reproductive interests makes clear that another concern looms large in the judicial imagination, a concern over the imposition of "forced parenthood."<sup>150</sup>

In *Davis v. Davis*,<sup>151</sup> Junior Davis made a forceful appeal to the court that allowing embryos containing his genetic material to be brought to term would sentence him to a life of psychic trauma.<sup>152</sup> Davis appealed as the child of a broken home, and stated that the distress he suffered as a boy being separated from his parents led him to recoil at the prospect that his genetic progeny would similarly grow up outside the shelter of an intact, genetically connected family.<sup>153</sup> He maintained that, even though he preferred the embryos to be destroyed, if the embryos were brought to term, he would fight for custody.<sup>154</sup>

The court was sympathetic to Davis's pleas, and presented in heart-string-tugging prose the full horror of forced parenthood. If, it surmised, the embryos were brought to term and donated to an infertile couple, Mr. Davis would "face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. . . . Donation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited."<sup>155</sup>

In a New York case, *Kass v. Kass*,<sup>156</sup> Justice Friedmann of the Appellate Division of the Supreme Court of New York made clear in his concurrence that his preference for a strong procreation-avoidance stance was driven by the conviction that allowing for the existence of unwanted genetic links would unleash a cloud of psychological napalm for which there is no antidote. Expounding on this danger, Justice Friedmann asserted:

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<sup>148</sup> See COLO. REV. STAT. ANN. § 19-4-106 (2005).

<sup>149</sup> See *J.B. v. M.B.*, 783 A.2d at 710; *Davis*, 842 S.W.2d at 590.

<sup>150</sup> See *Davis*, 842 S.W.2d at 603; Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004) (surveying frozen embryo cases and discussing biological and psychological parenthood).

<sup>151</sup> 842 S.W.2d 588.

<sup>152</sup> *Id.* at 603.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 604.

<sup>156</sup> 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

Once a child is born, there is no way to end biological ties, and very few ways to end emotional ones. . . . Put somewhat differently, “[e]ven if no rearing duties or even contact result[s], the unconsenting partner [former spouse] will know that biologic offspring exist, with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite.”<sup>157</sup>

Concerned that biological ties would inevitably catalyze psychological bonds, Friedmann urged adoption of a legal standard that tilts heavily in favor of the objecting spouse.<sup>158</sup> Friedmann would have the spouse seeking to use existing embryos to achieve genetic parenthood prove the virtual impossibility of achieving parenthood through other means, namely additional ART efforts or adoption.<sup>159</sup> Although the reproductive profiles of frozen embryo disputants renders the success of additional ART attempts statistically dubious,<sup>160</sup> and though the roulette wheel in adoption treats aging single women particularly harshly,<sup>161</sup> Friedmann would not allow these difficulties to factor into the analysis.<sup>162</sup> “Mere discomfort, expense or other potentially surmountable difficulties should not suffice to defeat the . . . fundamental right to avoid biological fatherhood.”<sup>163</sup>

Similar themes sound in the New Jersey Supreme Court decision in *J.B. v. M.B.*<sup>164</sup> Confronted with a husband whose religious convictions led him to advocate for embryo donation and a wife who sought embryo destruction, the court sided with the wife.<sup>165</sup> Although the adopting couple would legally assume all financial responsibility for the resulting child(ren), the court expressed concern for J.B.’s psychological welfare if the embryos were allowed to develop.<sup>166</sup> It opined that, “[i]mplantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions . . . ‘even if the progenitor is freed from the legal obligations of parenthood.’”<sup>167</sup>

The Washington State Supreme Court, in a recent frozen embryo dispute, also ruled against the party seeking to donate contested embryos

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<sup>157</sup> *Kass*, 663 N.Y.S.2d at 592–93 (citations omitted).

<sup>158</sup> *Id.* at 593.

<sup>159</sup> *Id.*

<sup>160</sup> See *supra* note 131.

<sup>161</sup> See Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 404, 434 (discussing favoritism of married couples over single women in the adoption process).

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

<sup>163</sup> *Id.*

<sup>164</sup> 783 A.2d 707 (N.J. 2001).

<sup>165</sup> See *id.* at 720. The court noted that if the husband paid the cost, the embryos could continue to be held in storage rather than be destroyed.

<sup>166</sup> *Id.* at 717.

<sup>167</sup> *Id.* (quoting Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 290 (1990)).

to an infertile couple.<sup>168</sup> The appellate court, adopting a functional rather than status-based definition of parenthood, held that an objecting spouse's right to avoid procreation could be preserved through donation, since the objecting spouse would be spared the social and financial obligations that parenting requires.<sup>169</sup> If the objecting spouse is able to avoid these burdens, then, the court reasoned, the psychological fallout should be limited.<sup>170</sup> Psychological links, the appellate court signaled, are created by "the long-term obligations of parenting," not the brief act of conception.<sup>171</sup>

Unsympathetic to this functional account of parenting, the Washington State Supreme Court instead looked to the parties' cryopreservation documents<sup>172</sup> for evidence to support their preferred outcome. Although neither party sought to have the embryos destroyed, that was the court's solution, and that was what they ordered.<sup>173</sup> The court, even more than the parties, seemed to view the embryos' continued biological existence as problematic. Above all else, the court appeared to desire to guard against the possibility that a child would be born, an atavistic instinct to nurture kin would develop, and the instinct would be thwarted with devastating consequences.

One might think that this apocalyptic thinking comes from the judges' studied attention to data that clearly establishes psychological parenthood to be a biologically driven phenomenon. Unfortunately, the predominant judicial presumption that blood is destiny is rebuked by almost the entire corpus of available social science data.<sup>174</sup> Inquiries into the nature of parental attachment point to its tenuous, malleable, and highly contingent nature.<sup>175</sup> Biology is not a determinative factor, and though many parents form strong and life-long attachments to their children, many do not.<sup>176</sup> Data from the social sciences points strongly to parental attachment as a "social construct," heavily context-dependent and influenced by a variety of societal influences.<sup>177</sup>

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<sup>168</sup> See *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

<sup>169</sup> See *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. App. 2001), *rev'd*, 48 P.3d 261 (Wash. 2002).

<sup>170</sup> *Litowitz*, 10 P.3d at 1092–93.

<sup>171</sup> *Id.* at 1092.

<sup>172</sup> *Litowitz*, 48 P.3d at 265–71.

<sup>173</sup> *Id.* at 264, 268, 271.

<sup>174</sup> See, e.g., Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *The Disappearing American Father? Divorce and the Waning Significance of Biological Parenthood*, in *THE CHANGING AMERICAN FAMILY: SOCIOLOGICAL AND DEMOGRAPHIC PERSPECTIVES* 197, 214–18 (Scott J. South & Stewart E. Tolnay eds., 1992) (surveying father involvement with biological children); Gina R. Hijjawi et al., *An Exploratory Analysis of Father Involvement in Low-Income Families* (2003), available at <http://crcw.princeton.edu/workingpapers/WP03-01-FF-Hijjawi.pdf> (last visited Apr. 12, 2005).

<sup>175</sup> See generally Furstenberg & Harris, *supra* note 174; Hijjawi, *supra* note 174.

<sup>176</sup> See Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1282 (2000).

<sup>177</sup> See, e.g., Susan D. Stewart, *Nonresident Mothers' and Fathers' Social Contact with Children*, 61 J. MARRIAGE & FAM. 894, 899–900 (1999) (examining sex differences in tele-

Consideration of this data might have forced judges to revisit their facile assumptions about “forced parenthood” and challenged their visceral identification with the spouse who seeks to control her or his “seed.” A look at this literature reveals that the judicial urge to provide complete refuge from genetic linkage is misguided and fueled by romantic notions that “blood is thicker than water,” rather than rational inquiries into the true nature of family ties.

*B. Data on Disappearing Dads and the Socially Determined Nature of Parenthood*

In some communities, the fragmentation of the nuclear family has reached epic proportions.<sup>178</sup> Although the divorce rate has stabilized at roughly 50%, nonmarital parenting continues on the upswing,<sup>179</sup> and the number of children growing up in single families remains high.<sup>180</sup> Family fragmentation and parental disengagement is so acute that government agencies, academics, and nonprofits have teamed together to undertake a systematic study of parenthood and its discontents.<sup>181</sup> These efforts reveal that the nature of the parent-child bond, far from being biologically determined, is molded by a host of social factors.<sup>182</sup> When these factors fortuitously converge, the bond is strong; when they refract, diverge, or co-

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phone, letter, and in-person contact with children by nonresident parents); Hijjawi, *supra* note 174.

<sup>178</sup> See Robert Lerman & Elaine Sorenson, *Father Involvement with Their Nonmarital Children: Patterns, Determinants, and Effects on Their Earnings*, 29 MARRIAGE & FAM. REV. 137, 138 (2000) (“Today, nonmarital births constitute about one of every three births and over four in ten children live away from at least one natural parent.”).

<sup>179</sup> See STEPHANIE J. VENTURA & CHRISTINE A. BACHRACH, CENTERS FOR DISEASE CONTROL AND PREVENTION, NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940–99, in 48(16) NAT’L VITAL STATS. REPS. 1 (2000) (reporting data showing that births occurring to unmarried couples increased from 28% in 1990 to 33% in 1999), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48\\_16.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf) (last visited Apr. 12, 2005).

<sup>180</sup> See Judith Seltzer, *Relationships Between Father and Children Who Live Apart: The Father’s Role After Separation*, 53 J. MARRIAGE & FAM. 79, 79 (1991) [hereinafter Seltzer, *Relationships*] (“Nearly half of all children born in recent decades will spend at least part of childhood living in a single-mother household.”).

<sup>181</sup> For one such project, see The Fragile Families and Child Wellbeing Study, a massive data collection effort conducted by research centers at both Princeton and Columbia University School of Social Work, funded by the National Institute of Child Health and Human Development, the National Science Foundation, the U.S. Department of Health and Human Services, as well as twenty-one separate foundations. This survey, conducted in over twenty cities and involving approximately 5000 subjects, follows a birth cohort of unwed parents and their children over a five-year period. The study is designed to provide information on the capabilities and relationships of unwed parents, as well as the effects of policies on family formation and child wellbeing. See <http://crcw.princeton.edu/fragilefamilies/about.asp> (last visited Apr. 12, 2005).

<sup>182</sup> See Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Stability and Change in Paternal Involvement Among Urban African American Fathers*, 13 J. FAM. PSYCHOL. 416, 417 (1999) (studying patterns of father involvement with respect to various demographic variables).

lesce in less salubrious patterns, the bond is weak or absent.<sup>183</sup> If judges see genetic linkage and psychological attachment as operating in near perfect causal sequence, social scientists have adopted an “ecological” approach to understanding parental ties.<sup>184</sup> Like a fragile biosphere, many interlocking systems must function synchronously in order for parental ties to develop and endure; if these systems are disrupted by changes in residence, relationship status, financial situation, or the like, the ties are vulnerable to atrophy and collapse.<sup>185</sup>

In studying the ecology of parental ties, researchers have identified at least five significant predictors for parental disengagement.<sup>186</sup> The first is geographic distance.<sup>187</sup> When parents split up and move away from their children, the relationship between the child and the nonresident parent suffers.<sup>188</sup> This is in one sense unsurprising. Physical visits become more difficult to arrange over long distances. On the other hand, phone contact and other indices of intimacy also decline, suggesting that the distance has negative impacts that surpass what might be expected to flow from the lessened frequency of physical contact.<sup>189</sup>

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<sup>183</sup> See *id.* at 417, 431 (finding paternal characteristics, household configuration, and family relationships influenced paternal involvement, and noting that one scholar on fatherhood terms the bimodal trend the “good dad-bad dad” dichotomy).

<sup>184</sup> See Deborah Johnson, *Father Presence Matters: A Review of the Literature—Toward an Ecological Framework of Fathering and Child Outcomes* (discussing variety of factors that affect father presence and involvement with children), available at <http://www.ncoff.gse.upenn.edu/litrev/fpmlr.htm> (last visited Apr. 12, 2005).

<sup>185</sup> See FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* (1991) (examining the effects of divorce and remarriage on children).

<sup>186</sup> See FRANK F. FURSTENBERG, JR. & KATHLEEN MULLAN HARRIS, *When and Why Fathers Matter: Impacts of Father Involvement on the Children of Adolescent Mothers*, in *YOUNG UNWED FATHERS* 124–25 (Robert I. Lerman & Theodora J. Ooms eds., Temple Univ. Press 1993) (finding that bonds with biological fathers drop off when they live outside the home). See generally Seltzer, *Relationships*, *supra* note 180 (finding that fathers’ involvement with their children lessens when they live apart).

<sup>187</sup> Judith A. Seltzer & Suzanne M. Bianchi, *Children’s Contact with Absent Parents*, 50(3) *J. MARRIAGE & FAM.* 663, 675 (1988) (“[M]ost biological parents and children who are separated from each other face barriers to continued interaction.”); Kay Pasley & Sanford Braver, *Measuring Father Involvement in Divorced, Nonresident Fathers*, in *CONCEPTUALIZING AND MEASURING FATHER INVOLVEMENT* 217, 222 (Randal D. Day & Michael E. Lamb eds., 2004) (“Researchers recognize geographic proximity as an important variable affecting fathers’ behaviors, and greater distance from a child is associated with less contact.”) (citations omitted).

<sup>188</sup> See Sanford L. Braver et al., *Promoting Better Fathering Among Divorced NonResident Fathers*, in *FAMILY PSYCHOLOGY: THE ART OF THE SCIENCE* (W. M. Pinsof & J. Lebow eds., forthcoming May 2005) (manuscript at 2, 5–6), available at [http://www.public.asu.edu/~devra1/art%20of%20the%20science%20\(div%2043\)%20chapter%20oct%20with%20all%20refs.pdf](http://www.public.asu.edu/~devra1/art%20of%20the%20science%20(div%2043)%20chapter%20oct%20with%20all%20refs.pdf) (last visited Apr. 12, 2005).

<sup>189</sup> See Seltzer, *Relationships*, *supra* note 180, at 85 (“The data show little evidence that fathers use telephone calls or letters to substitute for personal visits when they live far away or for other reasons are unable to visit frequently. Among those who did not visit at all during the past year, only 10% had any contact by telephone or mail. . .”).

A second important predictor is relationship quality with the other spouse.<sup>190</sup> For fathers especially, the degree of warmth and amicability with the child's mother is often a strong predictor of parental involvement.<sup>191</sup> When fathers are romantically involved with the child's mother, the likelihood of father-child engagement is higher.<sup>192</sup> When the romantic relationship ends, diminished father-child bonding frequently results.<sup>193</sup> Involvement with a new spouse or partner is also associated with a decline in parent-child contact, and the sequential nature of adult relationships often means that parents neglect the biological children of earlier unions in favor of the children with whom they currently live.<sup>194</sup> Because the paternal role is associated with providing materially for children, poverty or declines in financial status can lead to disengagement and detachment, as fathers who can no longer play the role of provider abandon their emotional and social relationships with their children as well.<sup>195</sup>

Lastly, community, peer group, and family support influence parent-child bonds.<sup>196</sup> In communities where pregnancy, childbearing, and childrearing commonly occur without paternal involvement, biology and genetic connection are viewed as only tenuously related to assumption of the "daddy" role, which carries with it life-altering sacrifices and rewards.<sup>197</sup> Similarly, young adults who were not strongly bonded to their own fathers are less likely to forge strong, enduring ties with their own biological children.<sup>198</sup>

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<sup>190</sup> See Braver, *supra* note 188, at 9–10.

<sup>191</sup> Data further reveals a statistical correlation between relationship quality and parental warmth and positive parenting behaviors among married and unmarried couples. See Marcia Carlson & Sara McLanahan, *Do Good Partners Make Good Parents?: Relationship Quality and Parenting in Married and Unmarried Families* 21 (2005), available at [http://crrw.princeton.edu/workingpapers/WP02-16-FF-Carlson\\_R.pdf](http://crrw.princeton.edu/workingpapers/WP02-16-FF-Carlson_R.pdf) (last visited Apr. 12, 2005).

<sup>192</sup> Coley & Chase-Lansdale, *supra* note 182, at 428 (noting that the mother-father relationship is a significant predictor of paternal involvement in sample families studied: "In families where mothers report closer relationships with fathers, fathers are significantly more likely to be highly involved with their children at the time of the interview, regardless of whether they were involved at the time of birth.>").

<sup>193</sup> Marcia J. Carlson & Sara S. McLanahan, *Early Father Involvement in Fragile Families*, in *CONCEPTUALIZING AND MEASURING FATHER INVOLVEMENT*, *supra* note 187, at 241, 245 ("Previous research corroborates the hypothesis that fathers are more likely to be involved with their children if the relationship with the child's mother, particularly within marriage, is positive. For unmarried parents, a conflicted mother-father relationship discourages positive father involvement, while an amicable relationship supports healthy father-child interaction.") (citation omitted).

<sup>194</sup> See generally Frank F. Furstenberg, *Good Dads–Bad Dads: Two Faces of Fatherhood*, in *THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* 193, 203–04 (Andrew J. Cherlin ed., 1988).

<sup>195</sup> See Hijjawi, *supra* note 174, at 25–26 (noting a previous study that found unemployment may reduce paternal involvement, but finding similar paternal involvement in low- and high-income households in current study).

<sup>196</sup> See Hijjawi, *supra* note 174, at 14–15 (citing study finding that paternal involvement is more likely if relatives and friends approve). ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* 159, 162 (1999) (describing the important role of older adults in encouraging younger men to assume the parental role).

<sup>197</sup> See Furstenberg, *supra* note 194, at 139–44; Hijjawi, *supra* note 174, at 14–15.

<sup>198</sup> See Hijjawi, *supra* note 174, at 26–27 (noting a previous study that men who are

Although many questions about parental involvement and detachment remain, one question appears to have been clearly answered—and clearly ignored by the courts. Do biological ties *tout court* necessarily inspire lifelong psychological ties? No, they do not. They can, if the social factors identified as conducive to parent-child relations are properly aligned. But, if the alignment is unfavorable, as it would be in the frozen embryo cases,<sup>199</sup> the data suggests that these ties are surprisingly easily eroded.

### C. Ignoring the Data: Causes and Consequences

Although the courts' adoption of a procreation-avoidance strategy may appear even-handed, it has a disproportionately negative impact on women. In five of the six decided cases, the litigant who wanted the embryo brought to term was the wife.<sup>200</sup> Typically, women find infertility and the prospect of forced childlessness more emotionally traumatic than their male partners.<sup>201</sup> They are often the moving party behind the decision to pursue ART and are more reluctant to stop, even when success seems statistically remote.<sup>202</sup> Women, more than men, are more likely to be the party seeking to parent, and more likely to be the loser when the court declares its procreation-avoidance preferences.

Embryo destruction also bodes more ominously for women because their opportunities for future reproduction are more limited. Consider the plight of Ms. Kass, litigant in the second major frozen embryo case to reach a state supreme court.<sup>203</sup> At the time of her divorce, she had already endured ten unsuccessful IVF attempts over the course of the three preceding years.<sup>204</sup> Her ability to conceive was obviously already compromised and, at the age of thirty-six,<sup>205</sup> unlikely to improve with age. Although the court cavalierly spoke of the possibility of adoption,<sup>206</sup> that route, both

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more involved predominantly had fathers who were involved, but finding in a current study that 100% of men whose fathers were not involved were themselves involved, as compared to 49% of men whose fathers were involved).

<sup>199</sup> The alignment would be unfavorable because the fathers would be living distantly and in uneasy tension with their ex-wives, conditions that data suggest would lead to the erosion of parent-child ties.

<sup>200</sup> *In re Witten*, 672 N.W.2d 768, 772 (Iowa 2003); *Litowitz v. Litowitz*, 48 P.3d 261, 264 (Wash. 2002); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1055 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174, 177 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992).

<sup>201</sup> See MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION 71–75 (2001) (noting that studies show that women are more negatively affected by being infertile than are men); LEE VARON, ADOPTING ON YOUR OWN, THE COMPLETE GUIDE TO ADOPTING AS A SINGLE PARENT 201 (2000) (noting that the conditions in which orphans live abroad are wildly variable).

<sup>202</sup> See Ryan, *supra* note 201, at 72.

<sup>203</sup> *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

<sup>204</sup> *Id.* at 583, 584.

<sup>205</sup> *Id.* at 596.

<sup>206</sup> *Id.* at 595.

within and outside of the United States, is a difficult one for single divorced women. Both public and private agencies within the United States look first to married couples when a healthy child becomes available, and single mothers take their spot at the end of a long queue.<sup>207</sup> Adoption abroad is a risky enterprise, complicated by the primitive facilities in which children are often housed before being made available by the host country.<sup>208</sup> Whereas Mr. Kass was potentially able to contemplate starting a family with his second wife, Ms. Kass's dreams of parenthood effectively died with the court's decision.

Embryo destruction harms women more than men because women's investments in existing embryos far exceed those of men. To spur egg production, women take hormones that carry several potentially dangerous side effects, including increased incidence of breast cancer<sup>209</sup> and ovarian hyperstimulation syndrome,<sup>210</sup> which can lead to vascular complications,<sup>211</sup> liver dysfunction, and thromboembolic phenomena.<sup>212</sup> Use of the drugs also drastically increases the chances of multifetal pregnancy,<sup>213</sup> which increases the likelihood of premature birth,<sup>214</sup> low birthweight,<sup>215</sup> and other complications for both the mother<sup>216</sup> and the child.<sup>217</sup> Additionally, women endure transvaginal egg extraction, an uncomfortable surgical procedure that can

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<sup>207</sup> See Appleton, *supra* note 161, at 404, 434 (discussing favoritism of married couples over single women in the adoption process).

<sup>208</sup> See *id.* at 447 (noting dramatic media publicity on foreign orphanages).

<sup>209</sup> Ronald T. Burkman et al., *Infertility Drugs and the Risk of Breast Cancer: Findings from the National Institute of Child Health and Human Development Women's Contraceptive and Reproductive Experiences Study*, 79 FERTILITY & STERILITY 844, 848 (2003) (finding that women who used human menopausal gonadotrophins may have a higher risk of breast cancer).

<sup>210</sup> Annick Delvigne & Serge Rozenberg, *Epidemiology and Prevention of Ovarian Hyperstimulation Syndrome (OHSS): A Review*, 8 HUM. REPROD. UPDATE 559, 559–61 (2002) (providing a broad overview of OHSS and noting incidence in IVF treatment); Trifon Lainas et al., *Administration of Methylprednisolone To Prevent Severe Ovarian Hyperstimulation Syndrome in Patients Undergoing In Vitro Fertilization*, 78(3) FERTILITY & STERILITY 529, 530 (2002) (“[S]everal studies have shown that use of GnRH agonist, in conjunction with higher doses of fertility drugs to maximize assisted reproductive technology success rates, is associated with a higher prevalence of OHSS.”) (citations omitted).

<sup>211</sup> Lainas et al., *supra* note 210, at 529.

<sup>212</sup> Delvigne & Rozenberg, *supra* note 210, at 559.

<sup>213</sup> Carson Strong, *Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities*, 31 J. L. MED. & ETHICS 272, 273 (2003) (discussing complications of multifetal pregnancies and calling for increased attention to children's best interests); Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 607–08 (2003) (noting that some fertility treatments increase the risk of a multifetal pregnancy).

<sup>214</sup> Strong, *supra* note 213, at 273 (citing study revealing that 2% of singletons, as compared to 14% of twins and 41% of triplets, are born very prematurely).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 274. Complications for the mother can include preterm labor, anemia, pregnancy-induced hypertension, preeclampsia, gestational diabetes, preterm premature rupture of membranes, postpartum hemorrhage, and an increased likelihood of needing a cesarean section.

<sup>217</sup> *Id.* at 273–74. Complications for the child can include hyaline membrane disease, bronchopulmonary dysplasia, intraventricular hemorrhage, necrotizing enterocolitis, congenital malformations, cerebral palsy, mental retardation, and chronic lung disease.

result in organ puncture, hemorrhage, or infection.<sup>218</sup> Women do the bulk of the work creating the embryos, while men's contribution is much less onerously obtained. Destruction ignores women's greater "sweat equity" and minimizes the physical and emotional trauma they undergo in creating the embryos.

Finally, the assumption underlying the court's approach, that parental urges will be unavoidably catalyzed by the mere biologic existence of a genetically related child, assigns biology too significant a role in the construction of parental identity. What we know about parental ties points fixedly toward caretaking and nurturance—traditionally female functions—as the basis for the profound and enduring psychological connection that parents feel for their children (and that children, in turn, feel for their parents). To diminish the importance of these functions in the creation of parental ties is to diminish the primary role that women play in creating the psychological bonds that anchor individuals and serve to order and stabilize society at large.

It is unlikely that the judges faced with the Solomonic dilemmas that frozen embryo cases pose intended, or were even consciously aware, that their rulings would impact women more adversely than men. Rather, when assessing the probability that shared DNA alone will inspire strong psychological ties toward a distant infant, the judges likely fell prey to the availability and egocentric biases,<sup>219</sup> which led them to substitute their own experiences and attitudes for quantitative data on how psychological ties fare in the face of biological connection and social distance. Confronted with the question of whether the risk of psychological damage is likely for the opposing spouse if an embryo is brought to term against his wishes, the court substituted an easy question for a hard question. Rather than ask "What does the data on psychological parenthood actually show?" these judges asked, "Can I think of any illustrations where such psychological harm might result?"<sup>220</sup> Apparently drawing on their own experiences and perhaps those of friends, family, and acquaintances, the judges answered yes. Rather than consider the phenomena of psychological parenthood as they are manifested across diverse populations, the judges

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<sup>218</sup> See El-Shawarby et al., *A Review of Complications Following Transvaginal Oocyte Retrieval for In-Vitro Fertilization*, 7 HUM. FERTILITY 127–33 (2004) (aspiration needle may injure adjacent pelvic organs and structures leading to serious complications); Nan B. Hildebrandt et al., *Pain Experience During Transvaginal Aspiration of Immature Oocytes*, 80 ACTA OBSTETRICIA GYNECOLOGICA SCANDINAVICA 1043, 1044–45 (2001) (expected pain of oocyte retrieval exceeded actual pain experienced by women; however, fourteen out of fifty patients needed analgesics during stay at clinic following procedure); Zev Rosenwaks & Mark A. Damaro, *Contemporary Treatment Strategies: Egg Donation, in 2 REPRODUCTIVE ENDOCRINOLOGY, SURGERY, AND TECHNOLOGY* 1435 (Eli Y. Adashi et al. eds., 1996).

<sup>219</sup> See *supra* Part II.B.

<sup>220</sup> See Cass Sunstein, *Social Influences and Behavioral Economics*, 97 NW. U.L. REV. 1295, 1297 (2003) (noting that Washingtonians substituted the easy question of whether they could conjure illustrations of sniper attacks for the hard question of estimating from actual crime data what the statistical likelihood of getting shot during the sniper spree was).

relied on their own experiences and attitudes to answer the question of which harm, “forced parenthood” or “no parenthood,” should be most avoided. Starting from the premise, “I would be unhappy knowing a child with my gametes exists with whom I do not have a relationship,” the judges projected that sentiment to the population at large, consistent with the egocentric bias that leads one to believe that one’s perspectives are widely shared. Unfortunately, the trauma of thwarted parental ambitions did not conjure the same affect-laden set of images of serious psychological harm. And so, despite the data, judges continue to craft policy that seeks, above all, to avoid the possibility of “coerced parenthood.” This policy maintains cognitive comfort by validating judges’ traditional understandings of parenthood and its biological and emotional qualities. But this security is purchased at the expense of women whose investments in existing embryos and aspirations for future parenthood never fully enter the equation.

## V. CONCLUSION

Our unconscious mind is uniquely valuable because it acts quickly and automatically, and is uniquely dangerous for the same reason. Its efficient subliminal control can allow biases perfected in our unconscious mind to subtly influence our scientific methods and reasoned legal doctrines, so that even the best-intentioned actions are contaminated. Once we understand that this happens, we need to guard against the problems it can create. Evidence suggests that we can overcome cognitive “bad habits” by conscious thought, through an awareness of bias and of the psychological reasons why we might be attached to them.<sup>221</sup>

Given the complex interactions that influence us, unraveling implicit and autonomic gender bias will be a tough task. Still, consistently calling out the problem and routinely examining situations for both facial and unconscious bias is a necessary first step. Lawyers need to educate judges and legislators alike about the possibility that facially neutral rules may potentiate gender bias when decisionmakers do not scrutinize their own assumptions.

A first step would be to bring dissonant data to the attention of lawmakers. But efforts cannot stop there. Lawyers must go further and bring to light the cognitive biases that shape judicial responses to this data. They must urge a level of examination and introspection that has not, to

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<sup>221</sup> See generally Jody David Armour, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997) (positing that race-consciousness can help overcome the negative effects resulting from the stereotyping of African Americans); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power To Inspire Political Action*, 66 *LAW & CONTEMP. PROBS.* 221, 264–98 (2003) (discussing how organizations like Amnesty International and the ACLU can stimulate racial enthusiasm, anxiety, and political honor, leading to effective political action).

date, been the hallmark of the judiciary. In the past, we imagined that lawyers who helped judges understand the facts and argued persuasively about the meaning of the law would help clients obtain fair outcomes. Perhaps given our more recent understandings of stereotypes, biases, and the adaptive unconscious, we must revisit the admonition presented to pilgrims to the Delphic oracle: “Know thyself.”<sup>222</sup> If judges were truly to know themselves—unconscious biases included—we might take a great step forward in stripping gender bias from legal decisionmaking.

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<sup>222</sup> PLUTARCH, 4 MORALS 480 (William W. Goodwin ed., R. Kippax, trans., 1878).