ABSTRACT

The Future is Female:
A Philosophical and Legal Understanding of the Control of the Body

Rebecca Huerta

Director: Rebecca Flavin, Ph.D.

During a time in which the dominant narrative is that women are equal in all regards, this thesis will argue the opposite. Through an understanding of liberty, the concept of negative and positive rights will demonstrate that the Constitution was not crafted to encompass positive rights which ensures that reproductive rights are left up to interpretation and not guaranteed for all women in all places. Shifting to an examination of the role of the female, it will be evident that the role of the female in society has grown yet remained constant in its emphasis on the role for reproduction. Yet until women can exist in society without being defined by her body and her biology, she will not be truly equal to her male counterparts. Finally, an examination of Supreme Court cases and different legislation will demonstrate that the control of the female body has been placed in the hands of the government. The future of equality depends on a new understanding of what it means to have rights, what it means to be protected by the government, and what it means to be female.

APPROVED BY DIRECTOR OF HONORS THESIS:

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Dr. Rebecca Flavin, Department of Political Science

APPROVED BY THE HONORS PROGRAM:

_____

Dr. Elizabeth Corey, Director

DATE: _____

THE FUTURE IS FEMALE:

A PHILOSOPHICAL AND LEGAL UNDERSTANDING OF THE CONTROL OF THE BODY

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By

Rebecca Huerta

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INTRODUCTION

Looking through the lenses of old philosophers, it is hard to grasp an understanding of what equality in any sense meant for women because the works were written by men, for men, and for a male centric world. Women were merely an afterthought and left confined to a certain realm. As time has progressed, the understanding of the female has shifted to include both the evolvement of her place and the continuation of traditionally held beliefs. As a result, it has been argued that feminism is no longer needed because women are equal to men in all realms. Yet, this paper will argue the opposite. There will be an examination of the philosophical and legal understandings of the control of the female body in order to examine if men and women are truly equal. Throughout this thesis, there will be an examination of liberty and rights which will move forward to understanding the philosophy of being a woman to legal equality and concluding with a case study comparison to examine the gaps in state legislation.

As referenced in this paper, the phrase "the control of the body" refers to the autonomous right that exists within humans to control the functioning of one's personal body, which could also be considered property. Within this right, as will be defined in Chapter One, exists this ability to be able to control oneself and the decisions that directly affect the body. Specifically, there will be a comparison of the philosophical works of Thomas Hobbes, John Locke, John Stuart Mill and John Christman in order to understand the difference between negative and positive rights. Understanding the difference

between negative and positive rights will shed knowledge upon the foundations of American political thought and how it has directly influenced understandings of positive rights such as the right to privacy.

Overall, the definition of what it means to be female is often very limiting to a scope within body parts, a genetic distinction, and a combination of both gender and sex. Instead of separating the two, sex and gender become one understanding which intertwines a biological distinction with a social construct. While sex is biological given genetics or the anatomical differences, gender was constructed out of this polar understanding of sex, as it assumed as either male or female. In "The Five Sexes: Why Male and Female Are Not Enough" by Anne Fausto-Sterling, Fausto-Sterling argues that, "Western culture is deeply committed to the idea that there are only two sexes. Even language refuses other possibilities…" (20). Then, continuing her argument, Fausto-Sterling states that, "…for biologically speaking, there are many gradations running from female to male; and depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes-and perhaps even more" (21). Instead of viewing sex on a set polarity, it is important to think about the spectrum of sex and how people can be placed on different parts of this spectrum, which can elevate the pressure that society places on individuals to be either sex. As it stands now, this small understanding of sex and gender when it comes to being female and is incredibly limiting which ensures that there will be exclusion. Furthermore, different feminist authors will be presented and placed in a conversation together regarding the different roles of the female, what constitutes a female, and how the female is viewed from a cultural and social perception.

Moving forward from an understanding of rights and what it means to be female, there will be an examination of legal equality for women in the United States. This thesis will examine the different realms in which men and women exist, such as the workplace and parental responsibility, to determine if women are equal under the law to the male counterparts. After defining legal equality, there will be examination of the legal equality of women before 1960 and after 1960 using different state and federal legislation as well as significant Supreme Court cases.

Finally, using an understanding of liberty, philosophical understandings of the control of the female body, and the examination of legal equality, this paper will move forward into case study application. Through the rulings of different Supreme Court cases, it will be clear that the positive right to privacy, abortion, and birth control are often weighed against the interest of the state and other negative rights. As a result, states have created their own legislation in which to regulate, restrict, and limit the expression of the positive rights that should exist for all women equally. The case study application will reveal that there are gaps in public policy that disenfranchise the expression of the positive rights for women because not all women have the ability to express equally.

The combination of all of these philosophical and legislative understandings will provide an increased awareness that the right of privacy in the United States has become increasingly more blurred and legislated upon. As a result, the legislature has taken a more prominent role in legislating morality which results in gaps in policy that excludes different women from the ability to express the rights of privacy, abortion, and birth control. Consequently, the legislature needs to decrease its own role with the legislating

of morality to ensure that privacy, birth control, and abortion decisions are left to the decision of the individual woman to protect her bodily autonomy.

CHAPTER ONE

The question of liberty

"We throw to the winds the old dogma that governments can give rights. Before governments were organized, no one denies that each individual possessed the right to protect his own life, liberty, and property." ~Susan B. Anthony

Welcome to the Snowflake Generation where everything is considered a right and is something that must be protected by the government. As a result, there are often a lot of critiques of this generation that calls everything a "right" because, as defined by a slang lexicographer and author of several dictionaries of slang, "melts under the heat, it has no backbone, no spine, no guts, no spirit, anything…it just fades away as soon as people are nasty to it" (Goldstein). This slang word for people who believe in trigger warnings, creating safe spaces, and that there are more rights that exist for the American people has caught national attention. Calling someone a "snowflake" is "…part of a broader culture war between liberals, who want to see expanded rights for minorities and an atmosphere of inclusiveness, and conservatives who denounce those efforts as political correctness run amok" (AP News). In the current political climate, there is this constant battle in defining what someone has a right to. There should be a right to privacy in terms of the body, a right to universal and affordable healthcare, a right to unemployment compensation, a right to privacy in terms of the Internet and on the phone, a right for the government to take care of every person, and the list goes on within this climate. With the

attachment of "right" to any of one of the many terms, such as healthcare, there is this transformation. Suddenly, the right to healthcare has a power that signals its validity, its protection, and the priority it should have within the government. As argued by Jack Donnelly in *Universal Human Rights in Theory and Practice*, "rights are titles that ground claims of a special force. To have a right to x is to be specially entitled to have and enjoy x…" (9). This principal understanding of what it means to have a right ensures that this can encompass a wide array of topics. However, in a time in which the term "right" is attached to everything, has the word lost its meaning and truest definition? In order to understand the place of the citizen in the state, the question of liberty has become instrumental in defining both the citizen and the state equally. The concepts of liberty, freedom, and the concept of rights have become an important foundation in shaping society, the state, and the citizenry. But, in order to understand how the concept of liberty and rights apply to the twenty first century citizen in the United States, there is an important distinction to be made between negative and positive rights.

In his "Two Concepts of Liberty" essay, Isaiah Berlin rejuvenated the definition of positive and negative rights. According to Isiah Berlin, negative liberty "the area within which a man can act unobstructed by others…[and] you lack political liberty or freedom only if you are prevented from attaining a goal by human beings…" (169). This does not include any type of unequal access or disparity between the abilities to reasonably obtain things that are not forbidden by law. Negative liberty ensures that the individual is free because there are no restraints upon the person through physical means, such as coercion, or through laws. These restraints exist outside of the individual so freedom is created through the amount of options available. Consequently, "negative

liberty defines itself in opposition to concepts such as obligation and authority; these things, while perhaps necessary to human society, or even to individuals'' pursuit of their desires and possibly even to greater freedom in the future, are nonetheless limitations on freedom" (Hirshmann 5). As a result, negative rights protect against government interference and ensures there is inaction from others towards personal action.

In contrast, positive liberty exists because there is a collectivity and individuality. Positive liberty "derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, no on external forces of whatever kind. I wish to be the instrument on my own, not of other men's, acts of will…" (Berlin 178). However, this right to be the master of their own will but they also need to be able to overcome those external barriers that exist. As a result, "liberty is able to view individual conditions such as disability, as well as social conditions such as poverty, as barriers to freedom that can be overcome by positive actions, that is, the provision of conditions the individual cannot create on her own" (Hirschmann 7). Positive rights are those considered "basic social rights, since they require the state to act positively to promote the well-being of its citizens, rather than merely refraining from acting…" (Hirschl 1071). Instead, positive liberty requires action from the state in order to allow the individual to reach the fullest sense of self because there are no barriers to existing. Understanding the difference between negative rights and positive rights will shed light upon the development of rights beginning with the foundations of American political thought based in the works of Thomas Hobbes and John Locke. These two philosophers created this basic foundational understanding of negative rights as it applies to citizens living in the United States. These negative rights are the fundamental rights found

unprotected in the state of nature and can only be fully protected and expressed within the state. There is no mention or creation of positive rights within the philosophic understanding of Locke and Hobbes. Moving forward from the colonial period, there will be an examination of other philosophers John Stuart Mill and John Christman. John Stuart Mill argues for the protection of these negative rights while cautioning against the dangers of positive rights, yet John Christman argues in direct contrast with Mill for the protection and power of positive rights. Each of these philosophes will be placed in conversation in order to demonstrate the development from strictly negative rights to encompassing positive rights in the United States.

Within *Leviathan*, Thomas Hobbes presents the state of nature as one of war where men are placed in competition with each other for survival. Hobbes states that the state of nature has

> "made men so equall, in the faculities of body and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he" (68).

Men will use each other, kill each other, enslave each other, whatever is needed to accomplish some task or to reach some ultimate end. In the state of nature, men all have the right to self-preservation. However, men are equal in their physical and mental facilities which means that each man has the equality in the decision to consent to be governed and consent to be governed over for the sake of survival. This contract that is

entered into is done with the idea of self-preservation yet again. Hobbes argues that "liberty, is understood, according to the proper significance of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him." (72). Liberty is the ability to act free from impediment using his own power and reason.

Furthermore, there is a "Law of Nature (Lex Naturalis,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, which he thinketh it may be best preserved." (72). This is divided into two branches: first, "and Fundamentall Law of Nature; which is to seek Peace, and follow it. The Second, the summe of the Right of Nature; which is, By all means we can, to defend our selves…" (72). Although the state of nature is war, the ultimate law is to seek peace above anything else, but there is this second law in which man has the right to protect himself. But to "lay downe a mans Right to nay thing, is to devest himself of the Liberty, of hindering another of the benefit of his own Right to the same…and therefore there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred…" (73-74). The right to life is one that cannot be given up or taken away easily, an ultimate negative right. Civil government steps in to solve this problem with the state of war to provide a structure to ensure that there is no impediment to be allowed to express one's liberty, to live in a state of peace, and to ensure that your life is protected because "where there is no common Power, there is no Law; where there is no Law, no injustice." (71). In the state of war, "the notions of right and wrong, justice and injustice

have no place" because morality is left up to the decisions of each individual man. Each man decides what is just and right, and consequently, what is wrong and unjust (71). It is through this power that each man has the right to protect oneself using any means necessary because the state of war is also a state of chaos, ultimately. The government exists to ensure that are laws and structure to protect each individual through the enforcement of standards of right and wrong, just and unjust. In order to obtain peace, there was this creation of:

> "…an Artificall Man, which we call a Common-wealth; so also have they made Artificall Chains, called Civill Lawes, which they themselves, by mutuall covenants, have fastened at one end, to the lips of that Man, or Assmebly, to whom they have given the Sovereign Power; and at the end to their own Ears. These Bonds in their own nature but weak, may neverthelesse be made to hold, by the danger, though not by the difficulty of breaking them" (116).

Although a sovereign power takes control, either through force or universal consent, citizens have absolute liberty because they are the ones who created these so-called artificial chains so each subject is responsible for the creation of these chains, and, therefore, cannot complain. Within these constructed chains, citizens are impeded from experiencing liberty but with the removal of these chains, citizens can experience negative liberty. Through this removal of impediments and chains, there is nothing preventing citizens from the full participation of negative liberty. Furthermore, despite the artificial chains, there are cases in which "the Soveraign has prescribed no rule, there the Subject hath the Liberty to do, or forbare, according to his own discretion. And

therefore, such Liberty is in some places more, and in some lesse; and in sometimes more, in other times lesse…" (120-121). Ultimately, freedom can only exist in a state where the control has been willingly placed and authorized into the hands of a sovereign. When it is placed into the hands willingly into the hands of the sovereign, the rules and laws that are created to protect the people are created through popular support and freedom can be achieved through the prominence of power instead of fear. Although Hobbes' focus in the state of nature is that of war and control, his ultimate focus is upon the protection of the ultimate negative right of self-preservation which is in contrast with John Locke's emphasis on three distinct negative rights.

In the *Second Treatise of Government*, John Locke puts forth an explanation regarding human motivation as it relates to the creation of civil government. Humans live in "…a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." (3). This state of nature places all men in this equal playing field full of the freedom to control himself and property. It is a place where:

> "all the power and jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same facilities, should also be equal one amongst another without subordination or subjection, unless the lord and mast of them all should, by any manifest declaration of his will, set one above another, and

confer on him by an evident and clear appointment, an undoubted right to dominion and sovereignty." (3)

Each man is equipped with the same levels of facilities and level within the state of nature without being subjected to any levels of subordination or subjection because he is "bound to preserve himself, and not quit his station willfully…" (5). Self-preservation is a priority for man, as argued by both Locke and Hobbes, but Locke focuses on the ability of each man to reason and act according to his own will. As a result, the "freedom then of man and liberty according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by and make him know how far he is left to the freedom of his own will" (37). Reason and the equal facilities of mind are given to man from a creator. Because man express liberty and freedom in the state of nature, or in the civil state, these are inherited from the moment of creation. But when man is not in competition with other people who threaten "the life, the liberty, health, limb or goods of another," he does what he can to preserve the rest of mankind (5). Men live in this state of nature with the utmost priority is taking care of himself and being the ultimate judge in determining how to best preserve himself. In this space, "…every man hath a right to punish the offender, and be executioner of the law of nature" (6). To solve the problems that arise in the state of nature, civil government provides the needed remedy. However, each man must consent to place himself in the state of nature which places the power to protect one's life, property, liberty, and goods in the hands of the government.

As Locke argues, "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have

the law of nature for his rule" (15). Ultimately, this is the fulfillment of absolute negative liberty as each man exists without restraint. But within the state, there are created rules to ensure that the society can protect each individual person's life and property, and then still allow each individual to express their will "in all things where the rule prescribes not, not to be subject to that constant, uncertain, unknown, arbitrary will of another man…" (15). Ultimately the contract with the sovereign does remove the total state of nature rules in which each man is looking out for himself, being the ultimate judge, and having the authority to take life or property from another through the creation of the state but the state itself still allows this concept of free will. According to Locke, these negative rights allow men to exist within the state, even with some added impediments of laws, without complete impediment. Although the impediments exist outside of the person, negative rights within the state are protected because no one is capable of taking away these inalienable rights of life, liberty, and property. However,

> "…the end of law is not to abolish or restrain, but to preserve and enlarge freedom: For in all the states of created beings capable of laws, where there is no law, there is no freedom. For liberty is to be free from restrain and violence from others which cannot be where there is no law: But freedom is not, as we are told, A liberty for every man to do what he lists…" (34).

The government is designed to protect liberty, to protect each person, and to create an environment in which they are not oppressed. Yet there are limitations placed upon this seemingly endless power of the government because it "can never have a right to destroy, enslave, or designedly to impoverish the subjects…" (83). The people willingly consent

to be ruled over by the government so if that is not accomplished, the people have another inalienable right to revolt and establish a new one in which these negative rights are upheld.

Society was created, according to Locke, because men were not meant to live alone and the first society that was created was "between man and wife, which gave beginning to that between parents and children; to which, in time, that between master and servant came to be added…" (47). Children enter into this society and do not have the full experience of the state of nature, regardless of the civil government, because they are placed under the dominion of their parents. It does not extend to the same extent that the civil government has over people, but it still does place limitations and restrictions. Children do not have the choice when entering this society, but maintaining this civil government only comes from the mutual consent of those who are being governed over. Leaving the state of nature must be done willingly because the civil government provides protections that the state of nature does not and ensures that all citizens can experience negative rights. Although both Locke and Hobbes focus on the right to life, liberty, and property that would be protected within the creation of the civil government, Locke focuses upon these three rights through the growth and subsequent limitation of the government while Hobbes focuses on the right to self-preservation and liberty through the removal of impediments from expressing these rights. Both of these thinkers had a direct influence upon the thinking of the Founding Fathers, and therefore, the genesis of American political thought.

As philosophers, the ideas of Locke and Hobbes had impact upon readers and their ideas had influence upon the formation of the United States of America as shown in

the founding documents: The Declaration of Independence, the Constitution and the Bill of Rights. The Declaration of Independence is one of the documents that created the identity of the United States. Written as a direct response to the king of England, it was explaining the motivation and reasoning behind the decision to leave England. It begins like with a unanimous declaration from the thirteen states of America that they want to "dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them…". Even within this opening sentence, the influence of both Locke and Hobbes is revealed. These ideas of the Laws of Nature and the ability to change one's government if it is not serving the people and protecting liberty are found in Locke and Hobbes's work which influenced the writers. This whole document and movement are something that had never been done before and it would take the unification of the colonists in America in order to accomplish it. While united, the people in this document declare:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

Locke's idea of unalienable rights is revealed due to the fact that the government does not control them or give them to the citizenry; but that they were given to each human being from god and they cannot be taken away or abolished. Although Thomas Jefferson and the committee who drafted the original document argued that these natural rights were life, liberty, and the pursuit of happiness, the influence of these natural rights comes from Locke who argued for life, liberty, and property. However, to fully experience these rights, men willingly and with consent enter into a contract with the government. Liberty is best understood through the removal of impediments but the civil government exists to ensure that the standards of right and justice are kept in place to prevent men from resorting back to the state of war and allowing each man the ability to strip each other man the right to life, as argued by Hobbes. The Founding Fathers demonstrate the influence of both Hobbes and Locke in the creation of the founding documents, especially with their reliance upon Locke, through the demonstration of what the government should do and how it should function in order to allow each man the ability to express individual rights. Although the Declaration of Independence itself is not law or something that has molded the full laws of the United States, it is a document that influenced the thinking of those who wrote the Constitution and subsequent laws.

The Constitution, or the Supreme Law of the United States, was written and ratified only a few years after the publication of the Declaration of Independence. In a similar style, the Constitution begins with "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States

of America." Building upon the ideals and thoughts in the Declaration of Independence, the Constitution is setting into law a foundation in which to govern the newly created nation. Each article would then go on to describe the creation and separation of different branches in order to ensure that the government created by the people would not infringe on liberty, freedom, or rights. Because the people have willingly entered into a contract with the government, the elements of trust and consent are needed to demonstrate the "…two-step progression from the state of nature to civil society: first the combination of individuals into society, and second the vesting of power in the legislature as a trust…" (Doernberg 62). Because there is an emphasis on "…the transfer of power from community to legislature is a delegation rather an alienation, Locke explicitly makes the legislature's power subordinate to the people's…" (Doernberg 62). This separation of powers and ensuring that the people hold the ultimate power in the functioning of the government reveals itself through the different branches of government. Furthermore, the people can remove who is representing them and reinstall someone else. As a result, the United States citizens have the ability to express liberty with the ultimate guarantee that the government can be halted, stopped, or removed from the various positions that were created. With the passage of the Constitution also came the first ten amendments, known as the Bill of Rights. Although the Bill of Rights was initially ratified and created through political compromise, it has become a document that enumerated specific types of rights that the American people were guaranteed such as freedom of speech, due process of law, freedom of religion, and the right to bear arms. As a result, these individual rights are negative rights in the sense that they cannot be removed, they cannot be violated, and there can be no impediments by which citizens can access these rights. Through the

enumeration of these negative rights, individuals within American society could challenge any usurpations and violations that would arise by pointing back to this specific document. Although there were rights that were spelled out, such as the freedom of speech, press, and the right to assemble, the Ninth Amendment protected against rights that were not specifically spelled out but that the citizenry still had these rights. However, during this time period, the full expression of liberty and rights was limited to a specific small group of people. In essence, full rights for citizens could be expressed by white men who owned property. As that class of citizen, they had the full expression of liberty with the knowledge that the government was structured in order to ensure that the federal or state government did not gain too much power, and that both of these governments were created to protect the people and their rights. The writings of Locke and Hobbes were influential upon the founding documents of America.

By taking in the ideas about the purpose of a civil government and the role that it will play in the lives of citizens, the Founding Fathers utilized this knowledge, combined with their own discontent with the rule of England, to shape the future of liberty in this nation. Although rights may appear to largely unlimited within the Constitution and the Bill of Rights, the scope of rights and expression was largely limited to a small group of people and to a specific type of rights. The Constitution and the Bill of Rights are created on a foundation of negative rights which does not leave open a lot of space in the political sphere for a new understanding of positive rights which would come decades of years after the passing of these documents.

Within *On Liberty*, John Stuart Mill argues for liberty through the protection of negative rights while arguing against the dangers of positive liberty. He begins with

defining "…civil or Social Liberty [as] the nature and limits of the power which can be legitimately exercised by society over the individual" (7). The government was created to protect "certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which if he did infringe, specific resistance, or general rebellion, was held to be justifiable" (9). These negative rights would be protected because the government ensured that there would be no impediments against the people existing in this civil society. However, laws are often shaped by the majority of people in power. The problem that lies in positive liberty and positive rights are that they depend upon the popular opinion to shape what is the general will. As a result,

> "The will of the people, moreover, practically means the will of the most numerous or the most active of the people; the majority, or those who succeed in making themselves accepted as the majority: the people, consequently, may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power…" (12).

Although those who constitute a minority can exist within society by exercising their own self-will, they are not free because they face oppression and multiple impediments as a result. The general will can become synonymous with "the likings and dislikings of society…[and] are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion" (17). Because positive liberty as an individual is based in the true interest of the whole, individuals can be coerced into fulfilling these interests. Mill argues that "there needs protection also

against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them..." (13). In order to combat the tyranny of the majority that might exist, there is a reinforcement of the idea of negative liberty and these rights that cannot be halted or removed. For "…the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (21-22). This relates back to the state of nature and the ultimate right that all men have of self-protection and self-preservation, as argued by Locke and Hobbes, which created this ultimate negative right. Although Mill argues that

> "though society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who received the protection of society owes a return for the benefit, and the fact of living in society render it indispensable that each should be bound to observe a certain line of conduct towards the rest" (145).

Every person who lives in society should be able to exist within a space where they can respect those negative rights of life and liberty. However, popular opinion and the opinion of the majority shape the laws, the nature, and the makeup of this sphere. The danger within this is that it becomes law and it "is quite as likely to be wrong as right; for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people; while very often it does not even mean that; the public, with the

most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference" (150). Through the reliance on the state to provide more opportunities, more social justice, more areas for positive rights to exist, the state is creating the opposite. It is allowing the state through the governance of the majority to decide what is right and wrong in order to oppress the minority through the guise of fulfilling the general public will. These changeable and moldable definitions of right and wrong serve as standards defined by the majority in power ensures that what seems to be black and white definitions are more gray than previously thought. Shifts in political power and majority opinion define what is considered right and wrong in acts and groups of people which influences rights.

In direct response to the criticisms of positive liberty, John Christman focuses on "…the requirement that free agents must be, in a fundamental sense, self-governing…" (344). People can continue to participate in the institutions of the government and society but Christman argues that "the notion of *individual* positive liberty is of a piece with the tradition and also does not make participation in democratic institutions a conceptual necessity" (345). In order to be truly self-governing and experiencing individual positive liberty,

> "…it at least must be the case that she is not moved by desires and values that have been oppressively imposed upon her, even if she faces no restraints in performing actions such desires motivate. Her character must be formed in a certain manner…Self-mastery means more than having a certain attitude toward one's desires at a time. It means in addition that

> one's values were formed in a manner or by a process that one had (or could have had) something to say about…" (345-346).

According to Christman, the truest sense of positive liberty means that an individual must have a say in shaping their own personal autonomy. One cannot exist within the space of political and civil life without having the ability to control who they are and decide where they place themselves in this space. Furthermore, "freedom demands more than the condition that desires must be self-chosen, it must also be the case that these (meta-) choices are made under conditions free of external manipulation and interference" (347). In contrast with Mill, positive liberty is not a collective terror, but an individual choice to shape one's own personal autonomy. Positive liberty does not mean that there is one way in which a person should live, and society does not force people into adopting specific patterns of behaviors. A person could experience positive liberty when they rationally examine all options of life in front of them and decide which is the best option for them. Yet freedom is more than

> "a set of opportunities created by removing constraints from the path of thought and action-even 'constraints' defined in a robust and nuanced manner-is to set out a view of human agency as a set of powers and abilities, ones regarding the development and expression of authentic and effective self-government. Certain political institutions and policies may well remove or minimize constraints faced by an agent but do nothing to establish or protect those powers. The injustice that many claims this involves fails to get a foothold in a conceptual terrain that disallows (or misunderstands) the core concepts of that injustice" (87).

The focus of positive liberty is to ensure that each individual is given the ability to self-govern and determine how one can best exist in the sphere of civil and social life. Although the power of positive rights is through eliminating those barriers that exist, such as the inability to afford a quality education, the real power of positive liberty is the way that it allows individuals to experience autonomy and self-governance. As argued by Christman,

> "…Autonomy is defined in various ways, but most conceptions stress the capacity for critical self-reflection in the development of value systems and plans of action. Such capacities do not merely emerge naturally, but must be developed through various processes involving educational, social, and personal resources. To see freedom as nothing more than the removal of certain interferences blinds us to the need for such resources, as well as their precise character, and so blinds us to the demands of just institutions" (87).

To experience the fulfillment of positive rights, citizenry and the government must focus on ensuring that the various barriers, such as education and wealth, that exist must be examined and redefined to ensure that individuals can be autonomous. Each person can use reason to examine the rules and acceptable levels of behavior in society to decide the best course of action and the way that they want to individually live their lives given that society has also allowed the individual the space in which to do so. The space must be carved out in every aspect of civil, political, and social life to ensure that positive rights can exist regardless of the majority's moral beliefs.

When understanding negative rights, as understood through the foundations of Hobbes and Locke, there are similarities and differences when comparing directly with positive rights, as understood through the foundation of Mill and Christman. Both types of rights are protected and uplifted through the government because without the civil government, the basic negative rights of life, liberty, property, and self-preservation are not protected. Civil government exists as a framework in which these rights, which already naturally exist, can be protected and ensure that equal citizens have the ability to express these rights. However, this power that the civil government has over the protection of these negative liberties is not absolute and the people hold the power to create a new government. Ultimately, Mill agrees with this ultimate negative right of self-preservation that is protected by the government. Yet Mill would argue that the people holding the power to create a new government are in the majority of the population, so they have the ability to manipulate the power over positive rights. The will of civil government can be easily manipulated and controlled through the power of the majority so the protection of positive rights will disappear. Mill shifts the conversation from focusing on the ability to express negative rights based solely on self-will to focusing on how there are other oppressions and impediments built into society which limit the expression. Christman would challenge all of these notions of the need for civil government to protect these rights as he shifts the focus from all citizens to individual positive liberty. This can only be harnessed when the individual holds all the power to shape their autonomy and self-govern without the barriers of civil government. Civil government and political life serve as institutions that place limits upon the development of the individual and the expression of positive rights. Mill and Christman both focus

upon the removal of different barriers that need to be removed to ensure that positive and negative rights can be experienced at their fullest capacity. Hobbes and Locke do not comment on these different barriers, such as education and wealth, because the focus is upon the protection for all citizens instead of the individual.

After examining the differences between negative and positive rights, it is evident that the Constitution creates little space for positive rights to exist. This small space has been channeled through different amendments to allow for positive rights to exist, such as the Sixth Amendment's right to an attorney, as established in *Gideon v. Wainwright*. Yet the priority of the Constitution and the Bill of Rights was to focus upon those negative rights to create a space where citizens could exist without impediment and where citizens could experience a government that allowed them to exist without many forms of chains and without a certain level of coercion. But that was over two hundred years ago. Society has drastically changed and developed since the creation of these documents. As Catharine MacKinnon argues, "Looking at the Constitution through the lens of feminism, initially one sees exclusion of women from the Constitution. This is simply to say that we had no voice in the constituting document of this state. From that one can suppose that those who did constitute it may not have had the realities of our situation in mind" (206). As a result, it has become increasingly difficult to interpret and read in these positive rights into a document that has been geared towards the opposite direction. Allowing the expression of these positive rights in society continues to become an issue of debate, especially when discussing the ability to have an abortion or receiving welfare. Focusing specifically on the right to choose when it comes to the female's decision to have an abortion, this is a negative right with positive right aspects. Although the right to choose

is often interpreted as a completely positive right because it depends on the free choice of the individual woman and the autonomous control over her own body, the government has to play some sort of role in protecting this guarantee. This right should be interpreted as a positive right because it depends on the state to promote the well-being of its citizens and this individualized positive right protects the ability of each woman to express her right in the way that she chooses. As a result, the government has to ensure that all people can have access to this right through the protection of individual autonomy and removal of different barriers, such as waiting periods or approval from other parties, transforms this into a negative right. It depends on the lack of impediments from the state, from other citizens, and the lack of restrictive laws. Ultimately, it depends more upon "…institutional support for equality, both because of and in spite of the fact that power in women's hands is different from power in men's hands" (MacKinnon 42). In order to adapt to the lack of inclusivity, it will become increasingly important to view the Constitution as a living document where it can create the space to incorporate other types of rights that correspond to the time period.

CHAPTER TWO

Philosophy of the Body

"A king is always a king – and a woman always a woman: his authority and her sex, ever stand between them and rational converse." (Wollstonecraft 132)

Through viewing of the Constitution as a living document, American civil society can adapt to the changes of the time period and allow for new types of rights to be incorporated, such as female rights. So as the nation has evolved, the understanding of the female has both grown and stayed the exact same. Traditional societal views continuously have reinforced the same type of female through movies, television, print media, toys, literature and social media. Although there could be a larger discussion about how the world in general views women, the focus here will be upon the United States. Within the culture, history, and society of the United States, there is an underlying thread of upholding a traditional stance of how a woman should be. Women are told through every avenue possible on how to act, think, feel, dress, and groom in order to reach the ultimate goal of marrying a man and having children. This constructed idea of what it means to be female has been influenced by philosophy where the nature of women has revolved around her sexual functions within the family structure that has gone unchallenged to the point where there has not been an attempt "…to separate out women's nature from the effects of the distinctive nurture that is given to them, no been concerned to discover what innate potential exists beneath the overlay that results from socialization and other environmental factors…" (Okin 395). As a result, this cultural

understanding has also shaped the roles, identity, and the interactions that exist for women. Women are meant to fulfill the responsibilities of reproduction, the maintenance of the family and home, and balancing all of these responsibilities simultaneously. Consequently, women in general have been placed in the same category and encouraged to follow the same path. This path is the norm because it has become so ingrained into how the culture understands how women fit into the mold of society. It becomes the way that relationships are judged, people are valued, and the standards are further ingrained. Shifting societal expectations to only one way that a female can exist is incredibly limiting to other types of females that exist. Once defined as a woman, they also tell her what she can and cannot do. As a result, "this construction of social behaviors and rules comes to constitute not only what women are allowed to do, however, but also what they are allowed to be: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are, their epistemology and language" (Hirschmann 11). This list of what a woman can and cannot do has an impact for the identity, the body, the perception of society upon the woman, and ultimately, has implications in every space of the community. The negative and positive rights that exist for women have evolved over time to ensure that women can maintain more autonomy, yet she is still regulated by the state. Although the laws are updated, and the oppression changes its face, there are always limits placed on the female which reinforces this idea that women are not considered equal and her will is under the control of this overarching patriarchy. Her positive liberty is limited due to the majority will which desires to constrict her ability to express her rights to privacy and abortion. In order to understand the world in which the females are meant to live in, it must begin with defining what it

means to be female at a biological and social level to understand a philosophy of the female body. Building on this definition of the female body and identity, there will be an examination of the four roles created for women to understand how this constructed woman exists in society.

I. Female Definition

When presented with the word "female," what comes to mind? Possible images or words that come to mind are mother, nurturing, sweet, warm, matriarch, vagina, kind, housewife, makeup, beautiful, pink, virginal, and unassuming. These things that come to mind are seemingly the opposite of what it means to be male. This binary system of thinking can be found in the two separately gendered bathrooms, the selection of either male or female on a driver's license, the separate clothing sections in any shopping store, Barbies or GI Joes, pink or blue, masculine or feminine. This type of either-or thinking plays a role in how society thinks and functions: white or black, hot or cold, up or down, and left or right. As a result, gender is presented as either male or either female, and as something that is biologically compatible. As Susan Moller Okin said, "We live in a society that has over the years regarded the innate characteristic of sex as one of the clearest legitimizers of different rights and restrictions, both formal and informal" (5). In the current climate, sex and gender are considered one thing used to describe human beings. While in reality, they are two separate concepts that influence one another. Sex is biological which revolves around genitalia, hormones, and genes. Gender is cultural definition of what it means to be male or female, so it becomes this polarity distinction.

The female is presented as the other and simply categorized as not male. She is instead, defined, by her biological role and the biological parts she possesses to fulfill her ultimate destination. Her biological parts become synonymous with defining who she is. As Simone de Beauvoir argues in *The Second Sex*, "Woman has ovaries and a uterus; such are the particular conditions that lock her in her subjectivity; some even say she thinks with her hormones. Man vainly forgets that his anatomy also includes hormones and testicles. He grasps his body as a direct and normal link with the world that he believes he apprehends in all objectivity, whereas he considers woman's body an obstacle, a prison, burdened by everything that particularizes it." (5). It is within this understanding that the female exists. This is something that is taught to females beginning in childhood "…as a privation: the absence of a penis was converted to a stain and fault. She makes her way toward the future wounded, shamed, worried, and guilty..." (Beauvoir 340). She is taught that she is inferior because of her body and she is defined based on this inferiority. As she grows up, her life is shaped by this understanding that she is the "other" in this world and how she can best become the compliment to her male counterpart. Females are told that they are naturally inferior which translates to an inferiority mentally, physically, spiritually, and psychologically. As a result, the female's bodily definition ensures that she is seen as not only the other but the inferior other in all realms. Early feminist writers believed that because that women are "…naturally inferior to men, their virtues must be the same in quality, if not in degree, or virtue is a relative idea; consequently, their conduct should be founded on the same principles, and have the same aim…" (Wollstonecraft 97). Although Wollstonecraft is responding to traditional critiques of females, she is providing a way in which men would allow women to have some level of

equality through the assurance that the strengthening of her virtues and new opportunities, women would become better wives and better mothers. Building upon this social understanding of women as wives and mothers, Wollstonecraft and other early feminist philosophers appealed to men by arguing that the providence of the same opportunities and new ways to strengthen her virtues would ensure that women would become better at these seemingly natural roles. This appeal ensures that men would equally benefit from the raising of the status of women. The roles of mother and wife ensure that the definition of being female revolve around reproduction and her biology. As Andrea Dworkin said, "She is defined by how she is made, that hole, which is synonymous with entry; and intercourse, the act fundamental to existence…" (123). She continues to argue that, "…intercourse as an act often expresses the power men have over women. Without being traditionally recognized as rape, it is what the society-when pushed to admit it-recognizes as dominance. Intercourse often expresses hostility or anger as well as dominance…" (126). Through this traditional biological definition of what it means to be female, men are still able to exert power and control over their supposed counterparts. Dworkin believes that sex between two consenting female and male partners can never be truly equal because society, through the constrain of biology, continues to place women in an inferior status, so sex itself can never be equal between two people who are inherently differentiated in status. The emphasis on the biological differences fuels the social differences and roles that are created and enforced for each sex. As a result, the differences at the biological level ensure that there are differences at the social level which guarantees the inequality between men and women. This biological hierarchy is inherent into separating the spheres between men and women to place them

in unequal opportunities and creating different levels of status. This inferiority is something that is taught to women from a young age. Or as Mary Wollstonecraft believes, "It arose simply from the fact that form the very earliest twilight of human society, every woman (owing to the value attached to her by men, combined with her inferiority in muscular strength) was found in a state of bondage to some man…" (8). Although it is a fact that men and women are different at a biological level, these differences do not have to alienate and dictate the possible opportunities that are available and are not available. The focus of laws and the conduct of society has been "convert[ing] what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitutions of public and organized means of asserting and protecting these rights…" (Wollstonecraft 8). These basic biological differences have been translated into social structure, stereotypes, and a structured way of living that have limited the experience of the female and shaped her place beyond her control. It is important to consider that men and women are biologically different, but it is not biology that continues to separate the two in all aspects in life.

However, this traditional concept of the female expands beyond the purely biological to also include other definable characteristics such as race and socioeconomic status. It is found in

> "…dominant Western feminist thought has taken the experiences of white middle-class women to be representative of, indeed normative for, the experiences of all women. Much of such thought, it is now common to say, expresses and reinforces the privilege of white middle-class women: their lives and works, their griefs and joys constitute the norm in relation to

> which other women's lives-if they are mentioned at all-are described as 'different." (Spelman ix).

Even if women are separated from their purely biological function, they are still being held up in comparison with one another and they are seemingly unable to meet these new standards again. It is impossible to have a conversation about gender identity and what it means to be female without also including a discussion about race because "…race, ethnicity, class, disability, and sexual orientation often overshadow or interact with gender" (Rhode 6). The female experience cannot be contained into a simple definition that revolves around biology or race, but it is something that has been built upon these pillars. As a result, women are placed into the same category when it comes to all types of oppression and lumped as equals when talking about the large overarching field of feminism. Women from different backgrounds, different races, different economic levels of standing all experience the world differently and, consequently, experience different forms of oppression. All of these factors ensure that the female experience is unique yet still unified under gender. When understood as a unifying factor, gender allows for a collective experience to allow women to gather together to express shared goals, different oppressions, and communicate about what it means to be female. When defining who a female is and what role she plays, one must be able to separate the biological from the social.

Masculinity and femininity encompass societal standards of what it means to be male and female, respectively. However, if gender is the cultural meaning that defines the body, then a gender cannot be attached to one sex or the other. There has to be a distinction between sex and gender which also implies that there is the possibility for

more than two sexes and two genders. This inability to distinguish sex from gender is where people also have problems understanding situations that occur outside of the traditional polarity. Take for example, this new wave of understanding and confusion when it comes down to defining transgender individuals, especially in regard to the use of bathrooms. Problems have arisen when it comes to separating sex and gender because someone may be born a female but identify as a male or the opposite which guarantees that society cannot easily place these individuals into a definable box. This calls into question the definability of both sex and gender which, in turn, calls into question the roles that have been established for the male and female sex and how those roles influence their respective places in society. How does humanity define a female who does not possess the genitalia to produce a child, since her biological role is often her social role or with breasts? How does society define a male who does not possess the physical parts? In Georgia Warnke's "Intersexuality and the Categories of Sex," she focuses upon the case of an individual named Bruce/Brenda who was born with a penis but it was damaged during a circumcision, so the parents and doctors decided to remove it, construct a vagina, and provide the child with hormone supplements. After this surgery, the parents enforced strict female norms where, now Brenda, was only allowed to wear dresses and was never told about the surgery. However, Warnke states that "…because Bruce lost a particular appendage, he was not allowed to *be* a boy or man…" (131). The parents decided the name, identity and appearance of their child based upon the physical biological parts that their child possessed and forced their child to fit into either one box or the other. Society is focused entirely on placing people into definable categories with regards to sex, race, ethnicity, income levels, and sexuality. Instead of focusing on the

things that are more definable like income levels, people are complex beings with complex backgrounds that cannot be easily placed into a checkmark box. The biological understanding of sex has become interchangeable with the cultural definition of gender when, in reality, they are not the same. Yet these biological differences should not be the only way in which people can be defined. It is important to begin to define human beings according to their own definitions and standards. Through the removal of the emphasis placed on biological definitions, gender can exist fully as a spectrum in which people can define who they regard regardless of their biological makeup.

II. Roles of the Female

When examining what roles that the female plays in society, there will be a focus on the four roles that create the structure, the mold, and the standard that women live up to on a daily basis: the virgin or being without sexual desires, the mother, the person who cares for the home, and the good wife. Through this subsequent defining of four specific roles that the female fulfills in society, these specific roles have been defined through the compilation of different feminist philosophers, such as Germaine Greer, Kate Millett, Joan Williams, Betty Freidan, Susan Moller Okin, Evelyn Glenn, Stephanie Coontz, and Carol Gilligan. Beginning with one of the first roles that women are placed into involves the shrouding of sex and sexual desires by ensuring that she is a virgin or a sexless being, as influenced by the work of Germaine Greer and Kate Millett. There are differing standards when it comes to men and women having sex. Men are praised and women are shamed. Sex is something that is denied for females outside of the construct of marriage, yet females are the objects that are used to sell products. Germaine Greer states, "Every

survey ever held has shown that the image of an attractive women is the most effective advertising gimmick" (50-51). Images of women being hyper sexualized can be found in magazines, advertisements, television shows, music videos, movies, and pornography. Even lyrics in music can sexualize women and reduce them to merely being an object for sex. Yet women are reminded everywhere to not be a sexual being as "…women's sexual organs are shrouded in mystery. It is assumed that most of them are internal and hidden, but even the ones that are external are relatively shady..." (Greer 29). Take for example, the idea of a woman going around without a bra on is considered shameful as her nipples have the possibility of being exposed. Women who breastfeed in public face the backlash of this idea constantly and are told to hide away while they are feeding their child because women are so sexualized. Breasts and nipples are something that is sexual in advertising, in the media, and in the bedroom yet shamed while fulfilling a biological necessity. As society has continued to progress, people have begun to challenge this double standard with a movement like Free the Nipple in which the aim is "…desexualizing women's breasts and promoting gender equality" (Turnbull 1). Despite this progress, there are a lot of swear words and derogatory terms created that center around being female and being a sexual being so a negative association is attached to all of them, and consequently, a female who is having sex casually outside of the confines of marriage: slut, whore, bitch, skank. Whenever someone is trying to insult a man for doing the same thing, man is added to the front which implies that these are words created for females exclusively: man-slut, man-whore, man-skank. As a result, females are meant to become these beings that do not desire to have sex, do not talk about having sex if they are, or waiting until marriage to finally have sex.

Furthermore, virginity is a social construct intended to keep women away from having sex. Losing one's virginity is centered around women and becomes this defining characteristic. For females, once the hymen breaks, she is no longer considered a virgin, yet the same type of biological standard does not exist for men. There is no male equivalent to biologically determine if he has lost his virginity. However, the hymen can break at any point for the female depending on the pressure and how she might fall onto something. Instead, this idea of remaining chaste and pure is intended so the female can be the most desirable candidate for a wife. Especially considering that "…the whole subject of sex is covered with shame, ridicule, and silence, any failure to conform to stereotype reduces the individual…to an abysmal feeling of guilt, unworthiness, and confusion…" (Millet 233). This ensures that women are conditioned to think of sex in one way and only in one way: to produce children. With this attachment of guilt, the pressure to maintain one's virginity, the over sexualization of women in the media, and the social pressure to have sex, women are caught in this never-ending cycle of confusion. But "there is no way out of such a dilemma but to rebel and be broken, stigmatized, and cured. Until the radical spirit revives to free us, we remain imprisoned in the vast gray stockades of the sexual reaction" (Millett 233). This radical spirit, as Kate Millet so describes it, has become more embodied in this newest generation with challenging the meaning behind sex. With this newest generation comes a criticism in what has been named "hookup culture." "Hookup culture" is filled with people who are having sex outside of relationships, marriage, and can simply be a one-time situation. This term was coined in order to shame a generation, especially the women in this generation, from having pre-marital sex with anyone and discourage multiple sexual

partners. The whole purpose behind this shame is to enforce this idea that the best type of wife is one who has not slept with a lot of people and someone whose sexual preferences remain hidden in the shadows, along with her genitals.

Becoming a mother is made a priority for young girls and women from a very young age as one of the most beautiful and special things to happen. The role of the mother, in this chapter, is influenced by the works of Kate Millet and Evelyn Glenn. The praises of motherhood should be sung since, "…It is through motherhood that woman fully achieves her physiological destiny; that is her 'natural' vocation, since her whole organism is directed toward the perpetuation of the species…" (Millet 524). The praises of motherhood are sung, and it soon becomes an ideal that all women desire to reach. Take for example, young girls often play with baby dolls and become "mothers" to this doll in a sense to mimic what they are seeing as well as gaining experience for their predicted future lives. As a result, this tells young girls that this is something that they should also do, and it becomes engrained as the expectation. It becomes an idea that is deeply threaded throughout her development as a priority to ensure that girls become mothers. The emphasis that traditional society places upon having children often overshadows any other emphasis on maintaining a career, the ability to have kids and have a career, and the acceptance of not having children. It is assumed that she will want to have children and questioned when she does not want to fulfill her biological role of becoming a mother. Even beyond bearing and birthing children,

> "It is commonly understood that women do the vast bulk of caring in the family. The pattern is so pervasive that it tends to be taken for granted as part of the natural order of things rather than being recognized as a socially created

> arrangement. What underlies the pattern is the deeply held belief that women 'ought' to care and the widely held expectation that women 'will' care. These beliefs and expectations arise because caring is a status obligation of women in their roles as wife, mother, daughter, or sister…" (Glenn 88).

The family requires lots of care and the burden is placed upon the woman in each stage of her development and each role that she plays within the family as mother, daughter, wife, and sister. It is expected of women to become the person who cares for the family due to this previously ingrained societal view. The role of mother is one that does not end with simply bearing children, but it continues due to the obligation of caring. This blossomed from the traditional belief that mothers are obligated to care. These traditional roles are upheld by also casting shame upon men who want to fulfill that role of main nurturer or primary caretaker. Despite this societal pressure, a mother often tries to meet the high standards set for her to be the woman who has it all. She has to be the best as the wife, the housekeeper, the chauffeur for the kids, the cook, the fixer of all problems, and balancing everything without a complaint. This pressure has continued to rise for mothers "…to what Sharon Hays terms 'intensive mothering.' This new approach to child rearing, which she describes as, 'child centered, expert-guided, emotionally absorbing, labor intensive, and financially expensive,' sets ideals of mother service so high, even upper-middle-class homemakers have trouble living up to them…" (Williams 23). With this ratcheting up of expectations, mothers have even more problems reaching these standards and adapt in different ways to create different stereotypes and expectations. Take for example, the term "tiger mom" referred to mothers who relied

more heavily on discipline and were stricter in order to push their children to achieve high levels of academic success. This term placed a whole new standard of mothering for Asian mothers while placing even more criticism on how a child should be raised. Becoming a mother comes with its fair share of criticisms, standards, and pressure but it can also hold something fulfilling for women who want that for their own lives. However, the societal pressure to conform to this role should be removed. Yet the societal pressure to become a mother often is accompanied with the role of the perfect housewife.

When imagining the perfect housewife, the image is that of a woman who is slim, she is dressed beautifully, her physical appearance is maintained, does all of the things she needs to without fighting with her husband, and takes the most pleasure out of being the housewife. This image was prominent and defined by Betty Freidan and Susan Moller Okin. An example in popular culture lies within the book and films of *The Stepford Wives*. In this world, successful women and their less than successful husbands move to this idyllic town in Connecticut where the women are beautiful, submissive, and obedient to their husbands' every desire. They have no opinions, generate no conflict, refuse nothing, and maintain the house spotlessly. This is the image that was "…created- by the women's magazines, by advertisements, television, movies, novels, columns and books by experts on marriage and the family, child psychology, sexual adjustment and by the popularizers of sociology and psychoanalysis-shapes women's lives today and mirrors their dreams…" (Friedan 80). It helped produce this idea of the feminine mystique, as so named by Betty Freidan, where the ultimate fulfillment for women can only be found in

being the dutiful housewife, wife, and mother. She best describes this conflict that exists when there is conflict within the female as the housewife, mother and wife:

> "The problem lay buried, unspoken, for many years in the minds of American women. It was a strange stirring, a sense of dissatisfaction, a yearning that women suffered in the middle of the twentieth century in the United States. Each suburban wife struggled with it alone. As she made the beds, shopped for groceries, matched slipcover material, ate peanut butter sandwiches with her children, chauffeured Cub Scouts and Brownies, lay beside her husband at night-she was afraid to ask even of herself the silent question- 'Is this all?" (Freidan 57).

Women have been reduced to these roles of mother and housewife so they are told that by fulfilling these roles that they will find their identity and their own person fulfillment as well. This leaves this strange stirring that causes women to wonder if they will be anything more than a wife, mother or housewife. Although Freidan's piece about the feminine mystique was published in 1963 and criticized for not arguing for a more progressive feminist agenda, "no other road to fulfillment was offered to American women in the middle of the twentieth century. Most adjusted to their role and suffered or ignored the problem that had no name…" (Friedan 70). The same old pattern of reducing women to their roles and biological features negated other aspects of the female experience. It placed women into one space, told them to find fulfillment in only one space, and punished them if they went outside of this space. The female identity became synonymous with a bodily experience of becoming a mother and her ability to fulfill the roles of housewife and wife.

Within the traditional role of the good wife lies this understanding that she must fulfill the other three roles, as influenced by the work of Susan Moller Okin, Stephanie Coontz, and Carol Gilligan. Furthermore, "…the sexual division of labor has not only been a fundamental part of the marriage contract, but so deeply influences us in our formative years that feminists of both sexes who try to reject it can find themselves struggling against it with varying degrees of ambivalence..." (Okin 6). It has become so deeply ingrained into the way that society functions that it increasingly difficult to truly separate out the power relations and hierarchy built into the marriage contract. This sexual division of labor entered all spheres all life and seeped into the legal field when it defined the legal responsibilities of the husband and wife separately. As Stephanie Coontz finds, "The legal definition of martial duties made the man responsible for providing 'necessaries' for his wife and children but allowed him to decide whether those included running water or new clothes. A wife's legal duties were the rear the children and provide services around the home." (7). These defined legal responsibilities stemmed from the roles that civilization created for men and women. As the husband is the sole provider for the family, "…the wife is chief consumer and showcase for her husband's wealth: idle, unproductive, narcissistic and conniving. She had been chosen as sexual object, in preference to others, and the imagery of obsession became more appropriate to her case…" (Greer 208). The wife became an object to possess and control completely in the eyes of her husband and the law. Take for example, until the later part of the twentieth century, "the law did not recognize that a married woman could be raped by her husband…the courts held that marriage vows implied consent to intercourse" (Coontz 13). In this sense, the law upheld the belief that the husband had the control over his

wife's body and she, ultimately, did not. The martial contract ensures that martial sex is linked exclusively with producing children and the good wife does desire to fulfill her biological role to become the good mother. Her biological ability to have children creates the structure in which she is the sole responsibility for being the mother in all aspects. The place of the female "…in man's life cycle has been that of nurturer, caretaker, and helpmate, the weaver of those networks of relationships on which she in turn relies. But while women have thus taken care of men, men have, in their theories of psychological development, as in their economic arrangements, tended to assume or devalue that care…" (Gilligan 17). The role of the female as the wife, the mother, and home caretaker is central to this understanding that it is a mutual bond between both sexes here that serves to benefit both. It is built into the interactions that exist between men and women on a daily basis. It is built into all the forms of media, the news, and the language. It has shaped the world to allow men to create a place in the world for themselves and make women "the other." Making women "the other" ensures that this defined place in society is not questioned due to the fear of some sort of punishment.

III. Conclusion

Ultimately, females exist, and are treated in these created roles as the other. She is not male, so she is this other being that cannot be defined in the masculine terms. She is not his equal biologically or physically, so she is the other. Society has conditioned people to think along this polarity of either male or female which creates roles, standards, and expectations that these two constructed genders must adapt to. By placing men above women in the social hierarchy and structure, women have been placed into a submissive

role and category. As John Stuart Mill once said, "the rule of men over women differs from all these others in not being a rule of force: it is accepted voluntarily; women make no complaint, and are consenting parties to it…." (24). This traditional understanding of women has enforced this idea that women are submissive and that they willingly play these traditional societal views. As a result, these submissive characteristics are highlighted in the roles that are created for women through her life cycle: the virgin, the good mother, the good housewife, and the good wife. Through the passage of time, the face of oppression has changed for women and liberties have been granted which ensure that the status of women has morphed over the years. As argued in *Speaking of Sex: The Denial of Gender Inequality*, progress has allowed for the image of women to change over the years but "…that progress itself obscures the more subtle biases that remain: the silences, subtexts, and stereotypes that still construct our images of women and reinforce traditional gender roles." (Rhode 66). Ultimately, women are defined, limited, and controlled by their own body due to these traditional gender roles. Until women can exist in society without being defined by her body and her biology, she will not be truly equal to her male counterparts.

CHAPTER THREE

Legal Equality

"A gender line…helps to keep women not on a pedestal, but in a cage."
~Ruth Bader Ginsburg

After defining liberty and examining what it means to be female, it is important to consider the equality that exists for females in society. When looking at the United States, equality under the law is something that has taken decades to unfold and still is something ambiguous in nature. When examining the legal equality of women in the United States, it is important to consider the realms in which women can be regarded as equal to their male counterparts under the law. These realms include political expression, finance, job security, parental responsibility, spousal responsibility, and sexual expression. The underlying threads that exists in these separate realms are the ability to exist without barriers, without discrimination, without harassment, and to control things in this realm as an individual. These four factors will be incorporated in the analysis of equality and inequality in the United States. However, in order to fully examine the legal equality of women, it is important to begin with a definition of legal equality. Moving forward from this definition of legal equality, there will be an examination of the legal equality of women both before 1960 and after 1960. To examine women's legal equality post 1960, one must examine different legislation that existed to provide equality as well as significant Supreme Court cases.

According to the Merriam-Webster dictionary, "equality is defined as the likeness or sameness in quality, power, status or degree." Moving beyond the definition of equality, legal equality sets the standard playing field for all people under the laws and legislation of the nation. Furthermore, legal equality ensues that "…all persons…are to enjoy the equal protection of the law…that is, no one is to be discriminated against by law on account of accidents of birth such as race, ethnicity, gender, or ancestry; nor on account of personal choices such as religion, group membership, or occupation" (Bahmueller 18). As an understanding, legal equality is how all people should be treated under the law which allows them to have the same opportunities and a structured position to avoid discrimination. As Catherine MacKinnon stated, "…the goal of legal equality is to end discrimination and produce social equality…" (44). Once legal equality has been fully realized, there will be no place for racism, sexism, discrimination, and bigotry to thrive within the social spaces. Although legal equality often follows a change in social thinking, they often strengthen each other. There is this synergistic effect that occurs as the legal standard strengthens the social equality and vice versa. This is an "informal 'spirit of equality' which appears in democracies as "the idea of equality generally spread to social habits" (Bahmueller 19). As formal equality exists in laws and legislation, it spreads to the motivations and actions of the citizens to treat one another "with equal respect, despite differences in wealth and social status," believe that "individual merit counts more in the estimation of society than accidents of birth, such as race, gender, and ancestry," and the overall "consciousness of social hierarchy and class resentment declines" (Bahmueller 19). Legal equality does not look at race, gender, sexual orientation, socioeconomic status, and educational level. Instead, legal equality serves as

a platform in which all people can exist in the same level area to have the same opportunities to succeed without the structural barriers of discrimination. This type of equality serves to provide all people with the abilities to live the best type of life they can without the types of impediments and restriction that exist within the law. For law is written by other human beings who are bringing their own prejudices and social standards of the time, yet the goal of legal equality is to break down the built-in disadvantages and structural limitations of a group of people. In order to understand the extent of legal equality, it is important to consider how the Supreme Court and society have dealt with the issues of sexual and employment discrimination.

I. Women's Legal Inequality before 1960

In the colonial period, women were not able to hold property, vote, or hold a place in the government. The foundation of these fears was that "women with economic power might try to rule over their husbands…women with political power might undermine government…" (Murphy 104). The American colonies based their laws on English Common Law and the legal opinion about women was summarized in the Blackstone Commentaries: "By marriage, the husband and wife are *one person in law*: that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband, under whose wing, and protection, she performs everything" (335). Within the martial contract, the wife is subordinate to her husband and her identity is crafted around her husband. Despite this surface level of seeming equality, women were not treated the same at the hands of the law. In 1777, all states passed legislation where no woman had the right to vote. Women

in this time period were not able to own property, were not in control of their own finances, made less than men, and unable to make contracts. Even in the states where some of these things were allowed, such as the ability to own property, women needed their husband's approval and consent. Depending on the region in the United States, education for women was limited to basic literacy and writing. There was no secondary or advanced education for women; that was intended for men. These different barriers and restrictions existed to prevent women from controlling anything on their own. This idea was challenged in 1848 when the Declaration of Sentiments was signed by over 300 women and men at Seneca Falls in New York. This document was modeled after the Declaration of Independence and it argued for the equal treatment of men and women as citizens. Contained within is an extensive list of "repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her…" which is justifiable cause for women to want a new type of contract with the government (citation). This moment at Seneca Falls was one of the first major moments in the women's suffrage campaign. Progress was achieved in 1890 when Wyoming was the first state to grant women the right to vote in all elections, yet this pattern did not follow until 1920. With the ratification of the Nineteenth Amendment, women received the right to vote as citizens of the United States and not face discrimination on account of sex. At this turning point in history, women's suffrage had accomplished its goal and the states had to treat women as equals when it came to voting after "many years of agitation-lecturing, lobbying, meeting, distributing leaflets, and demonstrating in the streets" (Jackson 34). Yet other barriers existed to prevent women from reaching the same levels of equality when it came to equal pay, employment

opportunities, limitations on birth control options, expressions of sexuality, the illegalization of abortions, and employment discrimination. In every sphere of her life, women were reminded that they were not in control and that they were lesser than men. Employment opportunities for women were very limited and often revolved around the enforcement of gender roles or in specific jobs tailored for a woman. Women were not allowed to enlist in the military until the end of World War I and then that role expanded during World War II. Despite this expansion of women in the armed forces, they were serving in semi-permanent, non-combat roles until the Women's Armed Services Integration Act (1948) where they received the ability to serve as permanent members in all branches (History.org). Be that as it may, this act limited the number of women to compose only a small number and percentage of each branch and required parental consent to serve if she was under the age of twenty-one.

When looking at female sexual expression in United States society, it has been legislated upon in order to control the level of expression. Female bodies were controlled by her husband because her role was to produce and raise the children. In the end, it appeared that wives were property of their husbands when it came to reproduction, sexual desire, and sex. Take for example, "New Mexico, Utah, and Texas...had statues codifying the so-called unwritten law that a man was entitled to kill someone he discovered in the act of sexual intercourse with his wife. Such a circumstance could be introduced as "a complete defense" against the charge of homicide. No state allowed a wife to kill a woman she caught having sex with her husband" (Coontz 8). Women were treated as property to be owned and controlled by their husbands in all aspects. Even the body of the female is controlled by her husband and her life could be ended at the hands of her

husband without significant ramifications. All of these differing degrees of discrimination and barriers serve to demonstrate the inequality faced and that fact did not change significantly until 1963 with the passage of the Equal Pay Act and in 1964 with the passage of the Civil Rights Act.

II. Women's Legal Equality post 1960

For such a long time in history, discrimination on the basis of sex was legal and crafted into law. As time progressed in the United States, women began to be treated as equals and equality was crafted into law instead. Moving into the 1960s, there were still areas in which women were treated as unequal and areas in which discrimination existed. In order to address the discrimination that still existed in the employment arena, the Equal Pay Act of 1963 "…declared that 'no employer…shall discriminate…between employees on the basis of sex.' It aimed to end the most direct, flagrant pay inequalities suffered by women" (Jackson 47). The Equal Pay Act provided legal equality for women in a space that was seemingly already equal because it allowed women to participate. However, this statute removed more barriers, legally prohibited discrimination in this space, and set in the law that women were meant to receive the same pay as their male coworkers. Furthermore, the Equal Pay Act "has special importance both because it laid the groundwork for women's inclusion in the Civil Rights Act and because it preceded the rise of modern feminism" (Jackson 47-48). In the Civil Rights Act of 1964, Title VII existed to prevent discrimination in the work place according to race, color, sex, or national origin. The original scope of the legislation was to protect the rights of disenfranchised African Americans and expanded to include sex.

However, despite the placement of women of in the workforce, they were still discriminated against as expecting mothers. The Pregnancy Discrimination Act was passed in 1978 to prohibit discrimination against women who were pregnant, who could possibly become pregnant, or became pregnant while employed. With this legislation, the barriers between becoming a mother and being employed were now theoretically eliminated, this form of discrimination was made illegal, and women would not be forced to choose a career over a child and vice versa. Within the Pregnancy Discrimination Act, women could also not be discriminated against in the workplace for having an abortion or considering having one. In spite of this legislation, general society still maintained a built-in bias towards women who are pregnant in the workforce called "…the 'maternal wall'-the negative stereotyping and gender bias that mothers experience on the job, often beginning as soon as they become pregnant…" (Williams 28). Women are told within society to choose between a career or having children as this "maternal wall reflects the continuing hold of separate-spheres imagery that mothers belong in a domestic sphere set apart from the world of work…" (Williams 93). But removing this barrier ensures that women who are mothers are treated the same as women who are not mothers in the workplace regardless of the stereotypes that exist in the traditional sphere. This barrier removal when it came to pregnant women, or women who did not want to have children, theoretically ensured that the sexual would be separated from the workplace.

In the same realm of sexual expression and separating the sexual from the workplace, women achieved more legal equality when the legal system recognized sexual harassment in order to create legislation to prohibit sexual harassment in the 1980s. The term "sexual harassment" was coined in 1975 after a group called Working Women

United came forward with their stories of being harassed in the workplace by their employers. In 1977 "a woman could sue her employer for harassment under Title VII of the 1964 Civil Rights Act, using the Equal Employment Opportunity Commission as a vehicle for redress…" (Cohen). Sexual harassment was defined according to two different standards: "quid pro quo" and if the action created a hostile work environment. Within the 1986 Supreme Court decision of *Meritor Savings Bank, FSB v. Vinson*, the Title VII of the Civil Rights Act of 1964 soon expanded the definition of discrimination to exist along a larger spectrum than just tangible or economic discrimination in the workplace. Furthermore, the Supreme Court found that violations of Title VII can be proven because situations or events produced a hostile work environment. With the recognition, legislation, and prosecution of sexual harassment, the United States provided legal equality for women to feel safe in their places of employment, to eliminate discrimination and intimidation, and ensure that the woman still had the ultimate control over her body. In order to further protect women and the family, the Family and Medical Leave Act (1991) provided for a maximum of twelve weeks of unpaid leave and job-security with continuous health insurance coverage. This was intended to protect expecting mothers to ensure that they have ability to take time off to spend with their newborn children without the fear of losing their job.

Equality for women also included the ability to be educated and receive the same type of educational experiences that men were afforded. Within the Education Amendments Act of 1972, the United States Congress added Title IX which is a law that states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance…" (United States Department of Justice). This was enacted to ensure that women were receiving the same type of educational possibilities and opportunities as men. As a result, educational barriers and discrimination against women were worn down and equality of education became law. All of this legislation after the 1960s paved the way for women to be treated equally in the eyes of the law as different barriers were tempered, different types of discrimination were halted, harassment was recognized, and women received individual control over their bodies to an extent. However, more barriers were removed, and women received more individual control over their bodies through different Supreme Court cases post 1960.

III. Women's Legal Equality post 1960

Griswold v. Connecticut (1965)

In 1965, Estelle Griswold was the Executive Director of the Planned Parenthood league in Connecticut who, along with the Medical Director, gave married couples information, instruction, and other medical advice about birth control. All of this was illegal under a Connecticut law that stated, "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender" (480). The overlying implication behind the restriction, and ultimate denial, of information about different birth control methods is that the state wanted to ensure that sex continued to be solely about reproduction. Either the couple produces children or stays ignorant on how to prevent a child using different

birth control methods. The Connecticut law was questioned under the Fourteenth Amendment for violating the right of martial privacy where a couple had the ability to be counseled in the use of contraceptives.

Within the decision, the Supreme Court found that the various amendments and guarantees within the Bill of Rights creates zones that establish a right to privacy in marital relations found in the First, Third, Fourth, Fifth, and Ninth Amendments. These amendments "…have penumbras, formed by emanations from those guarantees that give them life and substance…Various guarantees create zones of privacy…" (484). Although this marital right to privacy is not mentioned in the Constitution, the justices argue that

> "the association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice-whether public or private or parochial-is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights" (482).

This broader and wider interpretation of the aspects of the Constitution ensures that more rights are found and protected. This decision creates a space in which negative female rights exist because "without those peripheral rights, the specific rights would be less secure" (482-483). Although this marital right to privacy is not enumerated, it exists because other enumerated rights created spaces in which other interpreted rights can be protected. This positive right cannot be violated by the state law, so the Connecticut law is overturned and the prevention of education and instructed use of contraceptives to married couples is unconstitutional. Ultimately, this decision that found a new right that

was Constitutionally protected created an implication that more rights could be found if the Constitution was read more broadly. *Griswold v. Connecticut* could open up the door for new rights to exist and giving the Court the ability to "create" a new type of right not specifically enumerated. This decision simultaneously discouraged the involvement of the state in private matters of a married couple while avoiding the widening the possibilities of the state to be involved in the private matters of individual women, the youth, and the individual decisions of a wife. It placed limits on the right to privacy by placing this right solely within the confine of marriage. *Griswold v. Connecticut* increased the ability for the wife to have control over her contraceptives but placed a limit on that expression due to the necessary involvement of the husband.

Eisenstadt v. Baird (1972)

William Baird gave away Emko Vaginal Foam to a woman following his lecture at Boston University which was about birth control and over-population. Under a Massachusetts law, only married couples could obtain contraceptives and only registered doctors and pharmacists could provide them to married couples, so Baird was in violation of this law because he was not a licensed doctor or pharmacist and provided it to an unmarried woman. Furthermore, "the statutory scheme distinguishes among three distinct classes of distributes --*first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent not pregnancy, but the spread of disease" (405). The question that was raised was if this law violated the right to

privacy found in *Griswold v. Connecticut* and protected from state intrusion by the Fourteenth Amendment. This distinction between single and married individuals failed to satisfy the rational basis test because married couples were entitled to contraception but the withholding of this right to single people without a rational basis was unconstitutional. The majority opinion argued that, "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child" (445). Through this comparison between married and unmarried individuals, the Court finds that "…by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts General Laws…violate the Equal Protection Clause" (455). This decision broadens the right to privacy from a married couple, as established in *Griswold v. Connecticut*, to individual women and men. The expansion focuses less on the relationship between man and wife when it comes to matters of birth control, but it focuses on the ability for all women to be able to equally experience the right to privacy. Beyond the ability to equally experience the right to privacy, all women now have the equal access to birth control yet not equal access to have an abortion.

Roe v. Wade (1973)

As a Texas resident, Roe sought to terminate her pregnancy by abortion which was prohibited. Under Texas law, abortions were prohibited except in the case where it would save the pregnant woman's life. As a result,

> "Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments" (120).

In the majority opinion, the Supreme Court found that a woman's right to an abortion fell within the right to privacy protected by the Fourteenth Amendment which gave women total autonomy over the pregnancy during the first trimester but not total autonomy during the second and third trimesters. In order to come to this decision, the justices went through a history of abortion from ancient religion, to the Common Law and then United States legislation. It was not banned in ancient religion but in common law, "abortion was performed before 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense…." (132). English law made abortion a crime unless it saved the life of the mother and these same policies were translated into American law with "abortion before quickening was made a crime in Connecticut only in 1860" (139). As a result, there are three reasons identified to continue to criminalize abortion and justify their continued existence into the 19th century. The first is a "product of a Victorian social concern to

discourage illicit sexual conduct" but this is not a justification used in this case (148). The second reason revolves around the concern with abortion as a medical procedure because "…when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman" (148). The State has an interest to protect the health and life of the woman but there is also a State interest in prenatal life. And finally, "the third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception" (150). All of these reasons used to justify abortion restrictions do not completely trump the right to privacy that the woman has, but the Supreme Court did enter into a balancing test between these interests depending on the time within the trimester framework. Although the Constitution does not explicitly mention any right to privacy, "…whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (153). Through the ultimate denial of the woman's choice, there are specific instances of harm that is imposed upon the mother during pregnancy and after, as well as the child after birth. As the Court argued,

> "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically

> and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation" (153).

The Court takes into consideration all aspects of the woman's health when making these decision as it examines the physical, emotional, psychological, and social effects that pregnancy will have upon the women. Furthermore, the access to abortion does not infringe on the rights of any other person because "…the word 'person' as used in the Fourteenth Amendment, does not include the unborn" (158). Yet there is a viable state interest in the regulation of abortion "…to the extent that the regulation reasonably relates to the preservation and protection of maternal health…" (163). These regulations that the State can place on abortion revolve around the medicinal concerns of abortion regarding the type of facility, the qualifications of the person performing the abortion, and the license of the person performing the abortion. Yet these regulations and increased restrictions that the State can place upon abortions depends upon the time during the pregnancy. During "the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (164). For the period after the end of the first trimester, the State has the ability to regulate in any ways that are "reasonably related to maternal health" (164). Beyond that, in the "stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (164-165). Roe recognizes that the

state has two potential interests-the health of the mother and the life of the fetus. This allows the State to place different types and levels of restrictions on abortion during the time of pregnancy just as long as the restrictions are "…tailored to the recognized state interests…" (165). The second interest of the protection of the life of the fetus is left for the state to regulate and control in different ways during the third trimester.

In this landmark decision in *Roe v. Wade*, the right to privacy expanded to cover the right to have an abortion. Instead of being talked about in terms of morality or within the confines of a marriage, abortion is defined in medical terminology and with the emphasis on the period of time during the pregnancy. It expanded the reach of the Court and understanding of what privacy means when it comes to legislation and control of the body in terms of abortion. *Roe v. Wade* places the power in the hands of individual states and individual women in consultation with their physician depending on the time during the pregnancy. The decision is placed in the hands of each women to decide if they want to have an abortion during the first trimester of their pregnancy. Although there is not a complete autonomy of choice, women have more options available and more freedom in their expression of having an abortion. Building upon the decision in *Griswold v. Connecticut*, the zone of privacy created expands beyond married couples to allow women the ability to have an abortion and expanding this positive right.

When looking at these specific Supreme Court cases, legal equality for women comes with the creation and protection of the individual right to privacy. This individual protection ensures that each individual woman, regardless of her race or socioeconomic background, has the same equal protection to privacy and autonomy. Through these Supreme Court decisions, a new level of legal equality had been reached for women

because there was a new space in which women had autonomy over their bodies and this was a space that was not previously recognized or protected in any sense. Yet this legal equality is not complete. Especially demonstrated in *Roe v. Wade*, the woman's right to privacy and the right to have an abortion is not absolute and can be weighed against the interest of the state. The woman is not completely protected underneath these laws as there are different interests that override the rights of the female. Total legal equality within the realms of birth control, abortion, and privacy would ensuring that regardless of different moral beliefs and philosophies, that the law would ensure all women in all places would have the equal access, protection, and a lack of barriers to prevent anyone from the expression of these rights. Furthermore, total legal equality would ensure that the right to privacy, abortion, and birth control would be elevated to a positive right status where it its expression is entitled by the government. The government would ensure that not only would protect these rights for women but that the government also provides the access and the act itself.

VII. Women's Inequality Today

Despite the progress and elimination of different barriers for women over time, inequality still exists today. Though there is an emphasis on having children and raising children, there is not a structural protection for the reality of post-pregnancy. Besides the United States, "the only countries in the world that lack paid parental leave are Lesotho, Papua New Guinea, and Swaziland" (Williams 35). But this unpaid leave, while seemingly providing legal equality for families across the board, does not actually place all families on the same playing field. It furthers this idea that women should stay at

home to care for the child and allow her husband to assume all breadwinning responsibilities. It encourages this social stigma where it tells women that although they have other jobs in society, their ultimate job is being a mother so once that task is underway, all other jobs are left in the dust. This legal standing created more opportunities for women to re-enter the workforce after having children, but it also created more barriers for single mothers, families without disposable income, and women in same-sex marriages. There is no equal legal protection for all women or all families in terms of maternity and paternity leave.

When examining employment discrimination, it is built upon and goes hand-in-hand with sexual discrimination. It is based upon stereotypes and this inability to see women as equal. As a result, women are placed into boxes, fall into categories, and are judged before even entering the workforce. When examining the judgements and assumptions of women in the workforce, there have been common ideas that circulate society:

> "…women are too emotional, indecisive, deficient in quantitative skills, and lacking in career commitment; African American women are incompetent, lazy, and hostile; Hispanic women are overly passive and undereducated; and Asian women are inflexible, unassertive, and ineffective in interpersonal communications. Yet while most employers acknowledge that these stereotypes may influence other people's views, they usually are sure that their own decisions are strictly 'on the merits'" (Rhode 145).

These stereotypical ideas about women influence how the workforce perceives them and how they are treated at the hands of their employers when it comes to pay, status, and opportunities for advancement. In 1963, the Equal Pay Act was "aimed to end the most direct, flagrant pay inequalities suffered by women" in the employment sphere (Jackson 47). This sexual discrimination contributed to this employment discrimination where although women were seemingly granted the same opportunities in the world yet there was still this barrier to prevent them from becoming equal. Even though the Equal Pay Act was enacted in 1963, a pay gap still exists between men and women in 2018. In 2018, women "are paid 80 cents for every dollar paid to men…" which means that women "employed full time in the United States lose a combined total of more than $900 billion every year due to the wage gap" (National Partnership for Women & Families). Nearly sixty years past the passage of the Equal Pay Act, men and women are still not being paid the same amount of money regardless of industry**.** This does indicate, however, that over time, women have been given the opportunity to succeed, to gain capital, and to rise in society because the doors of employment have also been opened up. As society has progressed, women have been able to move from temporary or low status jobs and are now able to hold positions in every field. Women have been able to exist in all spheres because they have been given the ability to vote, to reach all levels of education, and able to exist in society without having a husband. Despite this progress to exist in all spheres and have the same opportunities at jobs, there is still this inherent sexual discrimination and bias against women. When picturing what a lawyer, doctor or engineer looks like, the image is often of a man. However, when picturing a teacher, nurse, or a social worker, the image is of a female. There is still this ingrained placement of women into roles

where they are caring for people, nurturing figures, and not holding the power of society. This idea has been fueled over years of sexual discrimination and this upkeep of the status quo. The status quo placement of women in society has been injected into all spheres of society which has controlled her employment, finances, and sexual expression.

Ultimately, women are shamed for their sexual expression, even in situations where it is not their fault. Every aspect of the female is examined, inspected, and can be used against her in all situations. In the 1960s, in the cases of rape, "most state penal codes permitted defense lawyers to impeach a woman's testimony by introducing evidence of previous consensual sex or claiming she had 'invited' the rape by wearing 'revealing' clothes or 'tight' dresses" (Coontz 13). Although it is not explicitly written in the law now, this similar idea of victim blaming is ingrained into the culture. When women are assaulted, they are questioned about their own actions, their clothing, their words spoken to their attacker, their action or lack of action during the assault, and what they have done to invite the attention of their attacker. The blame is shifted to the female and the severity of the crime is ignored. Take for example, when Brock Turner was found guilty of rape in 2016, his father wrote a letter to the judge before sentencing in which he refers to the rape itself as "20 minutes of action" which has altered his life forever (HuffPost). All of these situations contribute to this understanding that "rape is the most under-reported crime; 63% of sexual assaults are not reported to the police" (National Sexual Violence Resource Center). Furthermore, according to the Rape, Abuse, and Incest National Network (RAINN) supported by data from the Department of Justice, "out of 1000 rapes, 995 perpetrators will walk free" and "perpetrators of sexual violence are less likely to go to jail or prison than other criminals." These statistics demonstrate

that although women have the legal control and autonomy over their bodies, it is easily and often stripped away from them. Deborah Rhode furthers this argument by stating that, "Our tendency to fault women is apparent in virtually every systematic study of rape…Victims of sexual assault are often victimized twice-first by the abuse and then by the blame that accompanies it" (11). Women are reminded that the control over their bodies is something that can be taken away and the justice system will not always bring justice. Women are simultaneously blamed for their assault and witness their attacker avoid prison.

Despite legislation, Supreme Court case rulings, and a growth in society about the role of the female, legal equality for women is something that does not fully exist. There is still a large amount of discrimination, harassment, and impediments to prevent women from achieving full legal equality in all spaces in society. Female identity in all realms is something that is heavily examined and legislated upon. There is still this economic constrain, stigma, and legislation over the female choice of whether or not to bear children and whether or not the female should have the ability to decide these things. However, "women in everyday life have no privacy in private. In private, women are objects of male subjectivity and male power …" (MacKinnon 38). In this current day and age, men have privacy in private. There is no legislation about the availability of male birth control or stigma about men who have sex outside of the confines of marriage. Although women have been allowed to have more freedom of choice and have the right to privacy when it comes to the decision to have an abortion which creates this idea of legal equality, when in reality, their ability to express this right is limited.

VIII. Conclusion

When examining the legal equality between men and women, there is a disparity and distinct lack of full legal equality. There are aspects of legal equality where women and men have the same opportunities for education, employment, legal rights in terms of owning property or making contracts, political involvement, and the ability to exist independently. On this seemingly level playing field, women and men have been placed with the ability to exist in the United States without total impediment. However, the face of oppression has changed. Despite this level playing field, opportunities for oppressing women have shifted to different areas. Although women are now given the ability to exist in different areas in the workforce, sexual harassment and discrimination occur to ensure that different types of women do not succeed. As Deborah Rhode argues, "Despite three decades of equal-opportunity legislation, the employment status of women and that of men remain far from equal. American workplaces are still gender-segregated and gender-stratified, with women of color at the bottom of the occupational hierarchy…" (9). Not all women have the same opportunities to exist fully and not all women are treated the same in the workforce despite what legal equality has been enforced. Women are then silenced in their ability to rise up from these other forms of oppression and are faced with new situations in which their ability to exist in the world are challenged. Sexual violence, the vilification of women for not confirming to femininity ideals, and victim-blaming place the scope of the female body under extreme scrutiny. This examination of the female ensures that she cannot exist in this world without being told that she is to blame for the violence enacted upon her, that every action of hers is criticized, and her ability to

choose a life for herself has been limited. Although the right to privacy encompasses the ability for women to have an abortion, it does not come without a large social stigma, protests at clinics, and condemnation. Furthermore, there is a lack of legislation dealing with male sexuality, the ability for men to have sex, and male birth control. So, while the legal equality exists to some extent, the social perspective has not changed over time. Despite this wave of equality for women that arise in the legal sphere, women are still viewed as lesser-than individuals whose role in society is to produce and raise children. All of her other roles are secondary to this primary caregiver one. Yet "women need institutional support for equality, both because of and in spite of the fact that power in women's hands is different from power in men's hands" (MacKinnon 42). By placing the power in the hands of women or by creating institutional support for women's rights, legal equality can be found through the production of the same equal opportunities because women understand women the most.

CHAPTER FOUR

Case Studies

"Looking at the Constitution through the lens of feminism, initially one sees exclusion of women from the Constitution. This is simply to say that we had no voice in the constituting document of this state. From that one can suppose that those who did constitute it may not have had the realities of our situation in mind."

~Catharine MacKinnon

I. Introduction

Normally considered private actions, sex and the decision of whether or not to have a child, the state places itself within this space and intrudes on this privacy. The state has opened up the private bedroom of each individual to legislate and open up the space for public debate. These topics include sexuality, contraceptive use, and the decision to have a child. As a result, the debate over abortion has become ingrained in political culture that it has created two camps: pro-life, those who do not support having an abortion in favor of the protection of the life of the child, and pro-choice, those who believe that the woman should have the ultimate choice in whether or not she has an abortion. The political foundation for both of these ideological camps, has been shaped through legislation and Supreme Court rulings. As a result, the positive right for a woman to have an abortion and receive birth control should exist and should be protected by the state instead of being suppressed in favor of already existing rights. When examining the

positive right that should exist, there will be an examination of three Supreme Court cases beginning in 1980 and ending in 2014. The ability for the woman to control her own reproductive destiny has been consistently reduced and regulated by the state which ensures that the positive right does not have the same power as other rights. This reduction of power for the right to an abortion, privacy, and birth control create policy gaps and ensure that all women in all states do not have the same equal access and ability for expression due to these new barriers.

Harris v. McRae (1980)

Under the Title XIX of the Social Security Act, the Hyde Amendment severely limited the use of federal funds to reimburse the cost of abortions. The Hyde Amendment states that: "[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service" (302). The question is whether or not the Hyde Amendment violates the right to privacy, the Due Process Clause of the Fifth Amendment, or the Religion Clauses of the First Amendment. In the majority opinion of the Court, the states are not obligated to fund medically necessary abortions, which is a denial of the positive right of having an abortion provided by the state. Although the right to choose to have an abortion has been created, "the Hyde Amendment… places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services,

encourages alternative activity deemed in the public interest" (315). Although it may appear as there are no limitations or real means of preventing a woman from receiving her positive right of an abortion, the state is not funding the medically necessary abortions and creating a barrier that disenfranchises some women. In the majority opinion, the Court argues "…it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices" (316). Regardless of the economic background of the woman, poverty is not a suspect classification and the State is not required to fund the medically necessary abortion. As the Court argues, The Court places more incentive to have the child than receive an abortion because "abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life" (325). Through this ruling, women who are in a lower income class are disenfranchised and unequally affected from their richer counterparts because they have to deal with the financial burden or bear the risk of having the child. As a result, this positive right has barriers that are created which prevent poor women from receiving equal access and expression. Although *Roe v. Wade* might have allowed for the interpretation of abortion as a positive right, the federal government does not have to ensure that it is a right that is accessible for all people on the same levels. Women of different economic backgrounds and locations do not have the same equal type of access to medically necessary abortions. The right of privacy and the right of choice are not fully protected by the federal government and new types of restrictions can exist to ensure that there is not equal access for all women in expression of these rights.

Webster v. Reproductive Health Services (1989)

In 1989, the Missouri Senate Committee Substitute, the passing of House Bill No. 1596 which placed different restrictions on abortions and were challenged on their constitutionality. House Bill No. 1596 contained different provisions, such as 205.1 (1), (2) which stated that "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health and wellbeing." In 1.205.2, physicians were to perform viability tests in their twentieth or more week because they are "necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child" (501). The focus of these specific sections of the law was to focus on the defining of life that began at conception. Other aspects of the law included requirements that public employees and facilities were not to be used in performing or assisting in abortions unnecessary to save the mother's life, encouragement or counseling to have abortions were prohibited, and no public funding allowed for abortion counselling. The emphasis of House Bill No. 1596 was to define the beginning of life at conception, to discourage the choice of abortion, and limit the role of the state within the expression of the right to choose. The question becomes if these restrictions unconstitutionally infringe on the right to privacy or the Equal Protection Clause of the Fourteenth Amendment. In the opinion, the Supreme Court found that none of the challenged provisions were unconstitutional. The Preamble of the law itself which defined life beginning at conception, as the Court found, was not applied in any concrete manner and did not present a constitutional question. The Due Process Clause did not require states to enter into "the business of abortion" and did not create an affirmative right to government aid

in pursuit of these constitutional rights, or as the opinion stated, "Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions" (510). In the majority opinion, the Court finds that the government does not have to guarantee what should be a positive right equally for all women which ensures that different barriers can exist. The viability tests requirements within the law was upheld by arguing that the State's interest in protecting potential life could come into existence before viability was reached. As the Court argued, "Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were, in fact, second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers the State's interests in protecting potential human life, and we therefore believe § 188.029 to be constitutional" (519-520). The State's interest in regulating abortion was in protecting potential human life through the "…viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity" (515). Although the focus has shifted away from the health of the mother to potential human life, the State's interest in regulating abortion still revolves around the protection of life, regardless of its definition or specific person. Regarding the controversy that existed in relation to the counselling provisions of the law, it disappeared because it was withdrawn in the end.

Despite poverty not being considered a suspect classification, the economic burden for the cost of the abortion plus the viability tests, which "…would add $125 to $250…" to the overall cost, is considerable. *Webster v. Reproductive Health Services*

creates new boundaries which women must overcome to have an abortion. Although *Webster v. Reproductive Health Services* creates new boundaries and new limitations for women when it comes to their right to privacy, it does not overturn the decision made in *Roe v. Wade*. It simply places more power in the hands of the state to determine the type of boundaries or limitations on abortion without overriding the right to privacy. Yet there are no guarantees that this right to privacy will have the governmental backing or protection to ensure that it is applied equally to all women.

Planned Parenthood v. Casey (1992)

Within the Pennsylvania Abortion Act of 1982 added new amendments that required informed consent of the woman and a twenty-four-hour waiting period prior to the abortion. A minor seeking an abortion required the consent of one parent and a married woman must indicate that she notified her husband of her intention to have an abortion. Yet minors could also receive a judge's order to skirt around the consent of the parents but there was no such provision that existed for the spousal notification. With these new provisions, it was questioned if the state could require women who wanted an abortion to have informed consent, wait twenty-four hours, notify husbands or obtain parental consent, without violating their right to an abortion. In order to make a ruling in this case, the justices created a new standard to determine the validity of laws that restrict abortions. There is an examination if the new standard has the purpose or effect of imposing an undue burden, which is a substantial obstacle in the path of a woman seeking

an abortion, and the timing, before the fetus attains viability. Within the opinion, the justices consider that:

> "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society" (852).

They note that abortion itself is an issue that divides people based on morality but that the Court's "…obligation is to define the liberty of all, not to mandate our own moral code" (850). The Court only removes the husband notification requirement from the Pennsylvania Abortion Act of 1982. The Court finds that

> "even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term, and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself" (873).

In order to determine "…a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all pre-viability regulation aimed at the protection of fetal life" which means examining the burden placed upon the right of abortion to determine if it is undue or not. With each limitation placed on the

ability to have an abortion, "an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (878). This removes the oversight of the trimester breakdown which the Court argued had major flaws with the largest being that "…it undervalues the State's interest in potential life" and places more consideration regarding the burden that it places upon the woman in general. Although the framework within *Roe v. Wade* is removed, *Planned Parenthood v. Casey* still upholds the understanding that "…a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability…" (879). This positive right of privacy is upheld as the state is now considering the burden that it would place, weighed against other state interests, and other rights.

Burwell v. Hobby Lobby (2014)

The Green family owns and operates the arts and crafts chain store Hobby Lobby Stores Incorporated that has over five hundred stores and over thirteen thousand employees. The chain has been built upon the principles of the Christian faith and the Green family has been explicit about running the company according to Biblical precepts. One of these precepts which is central to the running of the company that the use of contraception is immoral. Under the Patient Protection and Affordable Care Act (ACA), employers who provided health care plans must provide certain types of preventative care contraceptive methods. Although there were religious exemptions available for religious employers and non-profit religious institutions, as a for-profit institution, Hobby Lobby

Stores Inc. would face a fine per day based on the number of employees until it complied with the contraceptive mandate of the ACA. The Green family argued that this birth control requirement violated the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) of 1993 so the ultimate question became if RFRA allow a for-profit company to deny its employees' health coverage of contraception which they would otherwise have if the religious objections of the company's owners were not present. As a result, the right to an abortion and birth control is weighed against right of free exercise and religion. The Court rules in favor of the Hobby Lobby company because the contraceptive requirement forces religious corporations to fund something that goes against their state religious principles or face huge fines, so a substantial burden is created. Furthermore, this substantial burden is not the least restrictive method and struck down. In the opinion, the justices found that:

> "The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would" (2).

By having to choose between paying a substantial fine or upholding their religious beliefs, the Court finds that this is a substantial burden on the company. Furthermore, Congress "…provided protection for people like the…Greens by employing a familiar

legal fiction: it included corporations within RFRA's definition of 'persons'…" (18). Through the extension of the definition of "persons," all rights, whether found in the Constitution or state laws, are thereby extended to the corporation and these corporation rights will be protected. This ensures that "protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies…" (18). Despite Hobby Lobby Stores being classified as a for-profit company, the opinion argues that these types of organizations operate in other countries through the support of a wide variety of charitable causes to accomplish other objectives than making money so "…there is no apparent reason why they may not further religious objectives as well" (23). Regardless of the non-profit or for-profit status attached to organizations, the ability of organizations to express their religious beliefs is protected through RFRA. The justices argue that they "…doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans" (35). When examining whether or not the mandate imposes a substantial burden, it must both: further a compelling government interest and is the least restrictive means of furthering that interest. In *Burwell v. Hobby Lobby*, the Court finds that the contraceptive mandate has multiple important interests, one of which is "…guaranteeing cost-free access to the four challenged contraceptive methods…" (40). Yet the least restrictive means of furthering this interest is not met in this situation. The opinion argues that "the most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any

women who are unable to obtain them under their health-insurance policies due to their employers' religious objections" (41). Furthermore, the economic burden is a substantial burden upon the company, so the contraceptive mandate is overturned.

With this ruling, companies can now claim religious exemptions and refuse to provide contraceptives for their female employees, who may not be a member of that specific religion and shifts the focus of the burden on the company instead of the burden on the female. This stricter standard considers more than just the undue burden that is placed on the woman in comparison with a wider state interest and considers the way in which the regulation is carried out in comparison with a state interest. This decision opened the door for more religious exemptions and provided a development of positive rights to expand to reach organizations. Through this expanded definition, rights that were previously understood to be exclusive for people and protected only for people now included organizations. *Burwell v. Hobby Lobby* ensures that any substantial burden upon people or a company that is not tailored with the least restrictive means is struck down because it violates these interpreted and applied rights.

VI. State Regulations and Restriction

Through the rulings of these three Supreme Court cases, each state has the ability to regulate abortion in different ways and in the ways that best fit the interests of each specific state when it comes to funding, refusal to provide healthcare without consequences, and waiting periods. According to the Guttmacher Institute, only 16 states fund all or most medically necessary abortions and 33 states plus the District of Columbia

fund abortions based on life endangerment, rape, and incest (citation). Furthermore, only 11 states allow private insurances to cover the cost of abortion. The lack of both public and private funding ensures that the burden of having an abortion is heavier for poorer women and women who lack the financial resources which ensures that abortion is not equally shared by all women. When it comes to the refusal to provide healthcare, "a patchwork of federal laws explicitly allows many health care professionals and institutions to refuse to provide care related to abortion and sterilization services…without facing legal, financial, or professional consequences" (Guttmacher Institution). In 46 states, individual providers can refuse to provide abortion and 44 states allow institutions, both private and public, the same protections for refusal to provide abortions (Guttmacher Institution). Furthermore, in 9 states, individual providers can refuse to provide contraceptives and in private and public institutions can do the same for 6 states (Guttmacher Institution). When states allow both public and private institutions to deny women the access to abortion and contraceptives for different personal reasons, the tyranny of the majority appears that Mill warned about. When the morality of the majority is written into legislation, rights end up being weighed against each other and negative rights trump positive rights. This means that abortion is a right that all women have but not all women have it equally because states don't have to provide it which continues to disenfranchise women who are in a lower socioeconomic level which ensures that more poor women have to either engage in riskier and unsafe procedures for abortions or be forced to carry the fetus to term. Both options place the woman at risk and force upon her a significant financial burden that are not considered within this legislation.

Furthermore, 34 states require that women receive counseling before an abortion, but then different states can require a specific time period passes between the consultation and the actual treatment (Guttmacher Institute). As a result, "…the woman is effectively required to make two trips to the health care provider in order to obtain an abortion" which can place an economic hardship on women (Guttmacher Institute). Yet some of these abortion counseling requirements require "information that is irrelevant or misleading" which may include information about the potential effect on future fertility, creation of a link between abortion and an increased risk of breast cancer, and the definition of personhood (Guttmacher Institute). All of these requirements for the counseling and waiting period create economic burdens for women but also a compounding psychological effect as well.

Ultimately, state legislation when it comes to the right to an abortion, birth control, and privacy is influenced by majority morality and the weighing of state interests, as well as other negative rights, provide unequal access for all women to these rights. Through this unequal access, all women from all backgrounds cannot have the same avenue in which they can express these positive rights.

VII. Conclusion

When looking at the way that the Supreme Court has understood the right to privacy and the right to an abortion, it is clear that the autonomy that the female has over the control of her reproductive choices has been consistently regulated and reduced. With *Roe v. Wade*, the majority decision opened up the door to the larger right of privacy

which included the ability to have an abortion. Yet it "…was a limited ruling not only because it balanced a woman's privacy rights against the interests of the state and 'potential life'…" (Stein 54). The right to an abortion is not absolute and it is something that can be weighed against a variety of factors, especially when considering the interest of the state and the protection of a fetus. Although *Roe* did not necessarily define when life begins, it created a framework to measure out the growth and expectancy of a future child to determine when the right to an abortion is absolute and conditional. This decision allowed for a consideration into the effects that pregnancy and child rearing have upon a woman who is emotionally, physically, or economically unable to care for a child which ensured that the decision is left up to the woman and her physician. Despite this expansive ability to ensure that women have the right to have an abortion, it is still not absolute and is often limited. In *Harris v. McRae,* the federal government will not pay for abortions that are medically necessary or sought after in cases of rape or incest. The burden of paying for the abortion, upon all of the other psychological and emotional burdens that the woman is already facing, now falls upon the shoulders of the female. This ensures that women who live within a lower economic bracket have less of the ability to express their right to an abortion. Women who have less income or possibly a minor have to work harder at producing the funds necessary to have the abortion that might save their life or as a result of a case of rape or incest which means that the period of time, within the *Roe* framework, might pass by and the woman would be forced to have the child. The Court argued that poverty is not a suspect classification so women who are impoverished are left out of the decision and all women will not be treated equally. This new barrier to having an abortion exists to prevent more women, especially

poor women, ensures that the right to an abortion is not absolute and the consideration of the effects that pregnancy and having a child have upon a woman are no longer considered.

Instead, *Harris v. McRae* allowed for the states to regulate the funding for abortion, and thus, created more barriers for women. In *Webster v. Reproductive Health Services*, the Court allowed for more barriers to exist to limit the expression of the right to an abortion. Although the Court finds that the Preamble of the law was not applied in any concrete manner, the rhetoric of defining that life begins at conception ensures that it feeds into how other types of legislation regarding abortion and birth control are created, and shapes the understanding of the right to an abortion into a moral decision instead of liberty. Furthermore, the added costs of the viability tests ensure that women who do not have a lot of financial resources are faced with another burden before being able to express their right to an abortion. These viability tests were created under the understanding that life begins at conception because their purpose is to demonstrate the potentiality of human life and ensure that the state is not involved in what was called "the business of performing abortions" (510). In the consideration of the expression of the right to an abortion, the interests of the state seemingly trump that of the individual woman. This idea is challenged in *Planned Parenthood v. Casey* when examining if the regulation itself creates a substantial obstacle in the path of a woman who is seeking an abortion. The ability of the woman to be able to choose is now strongly considered in light of the regulation but an undue burden could be determined in any number of ways. The decision to keep the notification of the husband before the abortion occurs is similar in the decision in *Griswold* as the total autonomy of the woman to decide is placed

strongly within the space of the marriage again. Yet that does not remain for long as *Burwell v. Hobby Lobby* created a new type of limitation upon women receiving birth control. Now organizations who identify with a specific religion can decide not to provide birth control to their female employees regardless of the religious affiliation of those female employees. The Supreme Court ruling in favor of Hobby Lobby is a victory for religious expression at the limitation of women's rights. The power to choose the birth control method has been placed in the hands of her employer which demonstrates that the right to privacy has been limited for women yet again. It is no longer her choice or her choice in consultation with her doctor, but it is left in the hands of the company and the owners of a company to decide.

With the examination of these three court cases and subsequent review of current state policies, it is evident that the state continues to play a role in the private sphere of its citizens. The right to privacy is one that is not without limitations as the state continues to play a role in defining marriage, sexuality, contraceptives, and abortion, "…it appears that the law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives" (MacKinnon 96-97). The right to privacy is something that is constantly altered and adapted to best fit within a specific social agenda and the majority morality opinions become codified in law. This is a danger that is warned against in *On Liberty* by John Stuart Mill because when morality becomes law, there will always be a minority group of people who are oppressed as a result. Although this is a danger warned about by Mill, this does not necessarily mean that granting positive rights is dangerous. The danger arises when a minority is repressed at the benefit of the majority. Through the reliance on

general will, the right to express and limit positive rights is left to the state. The state does have a viable interest in regulating the right to privacy, birth control, and abortion but it is not an absolute one.

Women must face different types of burdens and have different levels of access to the right to privacy and to the right to have an abortion across the country due to the polarizing ideological divide of pro-life versus pro-choice. Yet, as Mary Glendon describes,

> "In trying to understand why pro-life sentiment, which undoubtedly exists on a wide scale in this country, does not translate into pro-child sentiment when nearly a quarter of all American children under six are poor, we come face to face with an American problem of at least equal magnitude with the abortion question, one that seems to be peculiarly our own and related to our attitude about race. Abortion cannot be disentangled from larger issues of social justice. It is likely that our laws and attitudes on abortion are affected by the belief that poor children and their families, many of whom are members of racial and ethnic minority groups, are undeserving of assistance" (55)

By placing the discussion of abortion and birth control into the realms of morality and religion, the ability to express the right to privacy is diminished and lessened. Although people should be able to express their opinion regarding any political issue, the problem arises when these opinions have real life consequences upon a woman in any circumstance of life. So "it seems that either the law does not exist, does not apply, is applied to women's detriment, or is not applied at all. The deepest rules of women's lives

are written beneath or between the lines, and on other pages" (MacKinnon 34). As a result, women's lives are controlled through the laws that are created and the Supreme Court case rulings that are delivered without the fullest consideration of the woman. In terms of expressing the right to privacy and the right to an abortion, the role of the woman is neglected, and the interests of other parties are reinforced.

CONCLUSION

Ultimately, the philosophical and legal understandings of the control of the body involve building off an understanding of liberty, rights, and a definition of a female which influences the way in which the body is legislated upon. Through the examination of the works of Thomas Hobbes, John Locke, John Stuart Mill, and John Christman, American political and legal tradition is deeply rooted in the protection of negative rights and the exclusion of positive rights. Through this exclusion, the rights of privacy, abortion, and birth control have not been recognized as formal positive rights where they would receive government provision. Consequently, these rights should obtain the status of positive rights to ensure that all women in the United States can have the equal expression of these personal bodily autonomy rights. By providing a way in which women can have the equal access and expression to this right ensures that the control of the body is placed in the hands of women through the governmental provision of the tools needed in order to express this bodily autonomy.

However, it is important to consider how philosophy and the traditional culture defined what it means to be a woman. The traditional definition of what it means to be a woman has its most fundamental roots in biology. At this biological level, sex is identified and defined according to chromosomes and the subsequent body parts. Then gender is the cultural definition used to further distinguish between male and female. The cultural definition of gender also creates roles, standards, and ways in which traditional society can ensure that people conform to the created polarity. Sex and gender have different meanings but become so intertwined that they are assumed to be the same. In

order to combat this confusion, there needs to be a widening of the gender spectrum to allow for more people to exist outside of the confines of a polarity. Existing outside of this binary ensures that defining what it means to be female expands to include more people and to include new roles. This expansion of the definition of the role of the female would help eliminate the enforcement of the four roles discussed in this thesis: the virgin, the mother, the housewife, and the wife. All of these roles are centered around the biological ability of the woman to produce children and this constant reinforcement of the patriarchal standard in which the female is expected to raise the children, care for her husband, and maintain the home. These traditional views ensure that the role of the woman does not evolve much over time and there is strong discouragement towards nonconformity. As a result of defining women by a biological ability and biological necessity, the law has reflected this same understanding.

Due to this biological understanding and enforcement of the roles created for women, the law reflects these attitudes which continues to place women below men in the law. As a result, legal equality for women has evolved over the years. Before 1960, women had limited political rights, no bodily autonomy, unequal access to education, discrimination in the workplace, denial to serve in the military, and the list of discrimination continues. Women were not considered equal to their male counterparts which reflected in legislation that restricted and limited the ways in which women could exist in society. This demonstrates that women did not have full legal equality during this time because women were discriminated against simply for being a woman and denying women the access to the same opportunities. With the passage of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, women began to experience more legal equality in

every realm because the barriers that were created to discriminate against women were in theory removed. Yet even with the passage of new legislation and the rulings of different Supreme Court cases, women are not truly equal under the law and do not experience full legal equality.

Through this lack of legal inequality, different Supreme Court cases and subsequent state legislation highlight the gaps in policy which ensure that different women are denied the same access to what should be positive rights of privacy, abortion and birth control. The gaps reveal the economic burden that the denial of these positive rights places upon women which disenfranchises women who are in a lower socioeconomic bracket. Poorer women are disenfranchised because the ability to have an abortion, to receive birth control, and express their right to privacy are not being provided and protected by the government. If these things were to become positive rights, all women would have equal access and no group of women would be disenfranchised in their expression because of their economic background. Moving forward, American society can protect women regardless of their own personal moral beliefs. Through the adoption of abortion, birth control, and privacy as positive rights, women at all levels can have the same equal access and the same guaranteed protection to these rights. Furthermore, the redefining of what it means to be female and the protection of these positive rights will ensure that the control of the body is placed back into the hands of women in order to provide for a future that is female.

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