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Contraception: Securing Feminism's Promise

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"I went to the gyno when I was scared I was pregnant. We discussed protection and how I can stay safe from sexual no-nos," says Jocelyn, 15, of Houghton, MI.

i've been going to planned parenthood since i became sexually active. how long ago that was is irrelevant! jokes aside, PP has been kind of like my makeshift parent. i never got "the talk," so i really have to give it up to them for schooling me in the ways of being a healthy, responsible and informed individual in my...umm...activities.¹ Trish G. Los Angeles, CA.

For many young women, the first trip to Planned Parenthood, a Title X clinic, or a gynecologist is an important rite of passage. Some go with a parent. Some go because they think they *might* have sex. Many go for the first time because they think they are already pregnant. Others go because they are married and not ready for children – or for more than already have.

Contraception is an issue where the law can matter. Feminist advocacy for reproductive rights nicely shows, in the words of the conference, how feminist legal theory is changing, and has changed, the law. Yet, we're not done: women's reproductive rights remain under attack. We want to use this to explore one complex aspect of feminist legal theory: one core strength of much of feminist legal theory is an emphasis on contextual legal reasoning and attention to relationships, while another strength is the feminist challenge to rethink existing frameworks. The two may collide when feminists engage with contraceptive opponents, who seek to define the debate. The answer here is not compromise, but re-framing, potentially at the expense of engagement. For example, several years ago, NARAL Pro-Choice America placed an ad in the *Weekly Standard*, a conservative magazine, asking anti-choice activists to join with it in programs to decrease the need for abortions.² A noble effort to form a coalition? A waste of money?"[T]actical skepticism [that] can leave people blind to real danger"³

Feminists are often good at coloring within the lines. We build alliances, we work within existing frameworks, we are sensitive to nuance, we want things that seem reasonable and common-sensical – at least once the world acknowledges women's perspectives. Are we out of place in a polarized political universe? That is, in an era where one side seizes on the very words "family planning" as a situs of political controversy and the other sides caves without protest, have our tactics been proven bankrupt? Or is the failure simply a return to the norm; a norm in which women's interests are marginalized and invisible? In this article, we will return to an issue associated with the modern women's movement: contraception. We will argue that this issue combines the two halves of feminist strategy. To prevail requires a reframing of the existing

¹ <http://www.yelp.com/biz/planned-parenthood-costa-mesa>

² <http://www.prochoicearizona.org/news/press/200502161.shtml>.

³ http://www.therevealer.org/archives/timely_001917.php

political discourse and the reframing turns on once again making women's issues, variety, and needs visible in the political arena.

Access to contraception is an arena in which law plays an important role. Legal changes secured the initial access to the pill, whose distribution was initially illegal throughout most of the United States. It won the extension of the right to contraception to the unmarried, a right that would have had difficulty passing muster in state legislatures. Constitutional rulings further secured access for minors, keeping pathways to middle class status open for increasing numbers of teens. Yet, these victories, which have enhanced women's autonomy and material well-being, have also been deeply threatening to traditional ideologies, both ideologies about family and about the control of sexuality. The alliance of conservative family values with conservative business interests has in turn created a political climate that threatens to once again marginalize women's interests.⁴

The legal fights over what forms of contraception are permissible, who has access and under what circumstances, are fundamentally about control of the socialization of the next generation. The much more divisive (and seemingly principled) issue of abortion receives the lion's share of publicity and anger, but contraception has been, and remains, a hidden casualty of the conflict. It is also an issue ripe for reframing – and for making the subterranean assaults on women's interests visible. While feminist theory can be separated into various strands – liberal, radical, dominance, reconstructive – and various waves – first, second, and third -- virtually all feminists would place women's ability to control our own bodies as a central tenet. Moreover, if there is any issue that should be able to rally consensus support with the general public, it should be the principle of reducing unwanted pregnancies. We believe that both abstinence and abortion are distracters in this effort; the critical issue is the availability and affordability of birth control. Over 95% of sexually active Americans will use contraception at some point in their lives, over 90% of Americans will engage in non-marital sexuality, and over 60% agree that sexuality outside of marriage is permissible. Moreover, unlike abortion, there is little objection to contraception per se, with even 75% of Catholics agreeing that the Church's position on birth control should be changed.

Yet, amidst controversies over abstinence education in public schools and the continuing abortion wars, the class-based nature of contraceptive access has become invisible. We explore the hypocrisy of a system that, whatever its values, makes reproductive autonomy readily available for the affluent and the sophisticated and increasingly beyond the reach of the most vulnerable. We also consider the potential of contraception as a reframing device, capable of exposing the hypocrisy of family values advocates whose policies disproportionately hurt the most vulnerable. This paper traces the history of attempts to restrict contraception, the legal events securing widespread access

⁴ See Thomas Frank, *What's the Matter With Kansas* (2004) ("mixing culture war and capitalism" is writ in the Republican Party's platform in Kansas).

to contraception and their importance to a generation of college-aged women, the short-lived nature of the consensus that produced them, and the potential of the issue to serve as a rallying point for a revitalized feminism.

A. Be fruitful????

At one time, the trip in search of birth control would have been illegal. Although birth control devices were legally available during much of the nineteenth century, they became victims of the Victorian quest for moral purity. In 1873, Anthony Comstock launched a crusade against obscenity. As a result, he was able to persuade Congress to pass a law that restricted using the mail service to circulate obscene materials, and that prohibited advertising, importing, transporting across state lines, or mailing contraceptives.⁵ The states followed suit, with about half passing legislation that explicitly banned the distribution or sale of contraception, and most of the rest passing less clearly worded laws that could be interpreted to do so.⁶ Connecticut went the furthest, prohibiting any use of contraception, including by married couples in the privacy of their bedrooms.⁷

Scholars have developed numerous theories as to the origins and popularity of the anti-obscenity campaign. These theories situate these campaigns in the context of the changing family norms of the nineteenth century that remade the norms of middle class life by celebrating women's purity and enshrining them as the guardians who would insure that middle class boys did not stray from the path of enhanced education. For some theorists, the anti-obscenity campaigns represent a class-based attempt to return to a more traditional morality in the midst of a rapidly industrializing world; others see them as an attempt to punish women as they gained more autonomy; other

⁵ Act of March 3, 1873, ch. 258, 17 Stat. 598; *see also* J.E. Leonarz, Annotation, *Validity of Regulations as to Contraceptives or the Dissemination of Birth Control Information*, 96 A.L.R.2d 955, § 6 (2001).

⁶ For an example of such laws, see An Act Concerning Offences Against Chastity, Morality and Decency, 1879 Mass. Acts 512 (codified at [MASS. GEN. LAWS ANN. ch. 272, § 21](#) (1992)). The Act stated:

Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

⁷CONN. GEN. STAT. § 6399 (1878).

scholars place more emphasis on the attempt to protect elite children from corruption.⁸

The laws lived on a long time, but, by the nineteen-fifties, court decisions allowed doctors to circumvent the law everywhere but in Massachusetts, Connecticut, and Mississippi. These decisions allowed doctors to write prescription where the health of their patients required it, and no one policed the fine distinction between contraceptives for health purposes and those designed solely to prevent inconvenient conceptions. A thriving black market also developed, for those who knew when and where to look. The result, however, was a segmented industry in which the wealthy and sophisticated had relatively easy access to contraceptives purchased discretely from catalogues or drugstores while poorer people, "who either didn't have the cash for such items or even the knowledge that they were available," were left out.⁹ Unmarried women, especially if they were below the age of majority (twenty-one in most states), were among the many denied systematic access to birth control.

Moral Crisis in the Land of Ozzie and Harriet

What set the stage for the greater availability of contraceptives was the explosion of unplanned pregnancies in the fifties. During the period from 1950 to 1960, teen birthrates jumped for women aged 15 to 19 from 79.5 to 91.0 per thousand.¹⁰ During that same period, the adoption rate doubled, the average age of marriage fell to nineteen (?), the lowest level in a century, and the percentage of brides who gave birth within eight months of marriage grew to 30%, figures not seen since the early 1800's. One of the casualties was women's educational attainment; women's degree of educational parity with men dropped sharply.

Within 20 years, however – by 1980 -- family patterns and women's rights had been transformed again, – at least for the new class of baby boomers heading off to college. What happened?

The explanation starts with an increase in the ranks of college graduates. Overall college attendance grew, and from 1960 to 1970, the rise in the number of college students "was nothing short of phenomenal, " with enrollment more than doubling from 3.8 million to 8.5 million, an increase of over 100%, and increasing by another 42% in the seventies.¹¹ By 1980, women constituted more than half of all undergraduates. In 2003, 30.9% of the women aged 25 to

⁸ See Donna Dennis, Review Essay, 27 *Law & Soc. Inq.* 369, 370-375 (2002).

⁹ Deborah Spar, *Selling Stem Cell Science: How Markets Drive Law along the Technological Frontier*, 33 *Am. J. L. and Med.* 541, 548 (2007). For a more complete history of these laws, see MARY WARE DENNETT, *BIRTH CONTROL LAWS* 7 (Da Capo Press, 1970) (1926); Note, *Some Legislative Aspects of the Birth-Control Problem*, 45 *HARV. L. REV.* 723, 724-26 (1932);

¹⁰ Kristen Luker, *The Politics of Teen Pregnancy*, 196, tbl. 1.

¹¹ Russell W. Rumburger, *The Market for College Graduates, 1960-1990*, 55 *Journal of Higher Education* 433-54 (1984), <http://www.jstor.org/stable/pdfplus/1981442.pdf>

29 in the United States were college graduates compared to 26% of the men.¹² With this change in pattern, a new cadre of women not only secured university degrees but entered the professions. Between 1950 and 1970, the percentage of women in professional schools stayed flat, with no more than one percent in medicine (0.1), law (0.04), dentistry (0.01), and business administration (0.03). By 1980, however, the numbers had jumped to 30% in medicine, 36% in law, 19% in dentistry and 28% in business.¹³

The rise in women's educational attainment and career ambitions would have been difficult to reconcile with the family formation patterns of the fifties, and the entire set of practices changed as marriage ages increased. Of the women born in 1950 and entering college in the late sixties, half were married by the age of twenty-three. For those born seven years later in 1957, and entering college in the mid-to-late seventies, fewer than thirty percent had married by twenty-three, a year after the normal age of college graduation.¹⁴ Not only did the percentage of college graduates married by twenty-three drop by 40%, but those married by 26 fell from more than 70% of those born in the mid-forties (the college graduates of the late sixties) to approximately half of those born in 1960.¹⁵ The increase in the ranks of unmarried young adults occurred with an increase in the sexual activity of younger women more generally, a dramatic drop in teen births, and changing expectations about fertility.

Despite the increase in sexual activity, birth rates dropped. Whereas the teen birthrate crested in 1957 at 97 births per thousand girls between the ages of 15 and 19, by 1983 the rates fell almost in half to 52 births per thousand girls.¹⁶ Adoption rates between unrelated individuals also changed markedly. They peaked at all time highs in 1970, but dropped in half by 1975.¹⁷ During this same period, expectations about fertility changed. In 1963, 80 percent of non-Catholic female college students wanted three or more children, and 44 percent wanted at least four. By 1973, just 29 percent wanted three or more (and the group had less than even those lower numbers) – extraordinary shift in a ten period.¹⁸

¹² <http://www.census.gov/prod/2004pubs/p20-550.pdf>

¹³ Id. at 749.

¹⁴ Claudia Goldin and Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, [Journal of Political Economy, 2002, vol. 110, no. 4], p. 731 (2002).

¹⁵ Id. at 751.

¹⁶ Coontz, at 202-203. See also LUKER, *supra* note , at 196 tbl.1 (showing that **teenage** birthrates were **79.5 births** per thousand women aged 15 to 19 in 1950, **91.0 births** per thousand women aged 15 to 19 in 1960, **73.3 births** per thousand women aged 15 to 19 in 1965, **69.7 births** per thousand women aged 15 to 19 in 1970, and **59.9 births** per thousand women aged 15 to 19 in 1990).

¹⁷ Maza, P. *Adoption trends: 1944-1975*. Child Welfare Research Notes #9. Washington, DC: Administration for Children, Youth, and Families, 1984.

¹⁸ Goldin and Katz, *supra*, at 752.

The traditional emphasis on sexuality only within marriage, early marriage containing the sexual urges of the young, and the shotgun wedding or adoption as the fall back holding the line on unsanctioned pregnancy was giving way, and giving way dramatically for the most advantaged part of the population. To explain so far-reaching a transformation within so short a period requires exploration of the social and legal changes that introduced “the pill” into American life.

The Birth Control Pill, the Law, and the Remaking of Women’s Lives

Research on the possibility of a birth control pill may have begun as early as 1921, but legal restrictions on development discouraged the effort until the fifties. Then, Katherine Dexter McCormick, heir to Stanley McCormick of the International Harvester Company fortune, funded private research on the use of progesterone to prevent ovulation.¹⁹ McCormick was a feminist who worked with Carrie Chapman Catt on ratification of the Nineteenth Amendment, and then worked with Margaret Sanger on birth control issues. Indeed, it was through Sanger that McCormick met one of the men who helped developed the birth control,

The clinical trials for the Pill were conducted in Puerto Rico²⁰ and Haiti, which unlike most American states, had no laws interfering with the tests. The Food and Drug Administration approved the first commercial birth control pill in 1957 as a treatment for “gynecological disorders,” and in 1959 as a contraceptive.²¹ By the time the manufacturer Searle secured the 1959 approval, 500,000 women were already using the pill as a contraceptive. Those numbers increased to a million by 1961, 1.75 million in 1963, and 10 million in 1973. More than 80% of American women born after 1945 have been on the pill at some point in their lives.²²

Legal changes – brought about through a series of test cases engineered by birth control activists and lawyers -- facilitated the pill’s greater availability. The landmark case of *Griswold v. Connecticut* brought the issue to public attention in 1965.²³ Connecticut had the strictest birth control law in the country, an act passed in the nineteenth century that banned the use of contraceptives, even by married couples. The courts had rejected early efforts to test the legality of the statute, concluding in 1961 that doctors did not have standing the challenge the law.²⁴ Estelle Griswold, the executive director of Planned Parenthood in Connecticut, and Dr. Charles Buxton, the chief of

¹⁹ LORETTA MCLAUGHLIN, THE PILL, JOHN ROCK, AND THE CHURCH 106, 115-16 (1982)

²⁰ See Briggs, Laura (2002). *Reproducing Empire: Race, Sex Science, and U.S. Imperialism in Puerto Rico*. University Of California Press

²¹ Id. at 135.

²² Spar, at 551.

²³ 381 U.S. 479 (1965).

²⁴ Poe v. Ullman, 367 U.S. 497 (1961).

obstetrics and gynecology at Yale University's School of Medicine, sought to force the issue by opening a birth control clinic in New Haven. Three days after the clinic opened, local detectives raided the operation. The clinic did not attempt to conceal its provision of contraceptives; indeed, Harold Berg, one of the New Haven detectives, told the New York Times, "They gave us everything we were looking for."²⁵ The trial court convicted them, and the appeal went to the United States Supreme Court, with Thomas Emerson of the Yale Law School faculty arguing the case. In a seven-to-two decision, the Court found the statute to be unconstitutional. The most controversial aspect of the decision was not the invalidation of the law, which many viewed as archaic and which was rarely enforced, but the recognition of a right to privacy grounded in the "penumbra" of other constitutional guarantees.

The Supreme Court extended the decision to single individuals in 1972. The decision in *Griswold* had guaranteed only married couples access to contraception. Indeed, Planned Parenthood, which had helped bring the 1965 case, indicated in 1967 that: "Medical consultation and services may be provided to minors who are married or engaged or have been pregnant or are accompanied by a parent or guardian or are referred by a recognized social or health agency, a doctor or a clergyman . . ."²⁶ While broader than the law allowed in many states, it was too conservative for Bill Baird, an activist who wished to ensure access to everyone, and particularly to poorer and less privileged women. Massachusetts had one of the most conservative remaining laws on birth control, which the legislature had refused to change, punishing unlawful dissemination as a felony with up to a five year prison sentence. In an effort to test the law, Baird gave an unmarried, nineteen-year-old a condom during a speech on the Boston University campus in front of several thousand people and was arrested.²⁷ The Supreme Court reversed his conviction, holding that: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁸ In 1972, however, the age of majority was still 21 in many states, so even a right to contraception for single adults did not necessarily extend to the growing ranks of college students. Five years after Baird won the right to distribute contraceptives to the unmarried, the Supreme Court concluded that the same rights extended to minors. The Court explained that: "Read in light of

²⁵ Mary L. Dudziak, Catherine Roraback, attorney in *Griswold v. Connecticut*, had died, [Legal History Blog, October 20, 2007, http://legalhistoryblog.blogspot.com/2007/10/catherine-roraback-attorney-in-griswold.html](http://legalhistoryblog.blogspot.com/2007/10/catherine-roraback-attorney-in-griswold.html)

²⁶ Bill Baird, *THE POLITICS OF GOD, GOVERNMENT, AND SEX: A THIRTY-ONE-YEAR CRUSADE*, 13 St. Louis U. Pub. L. Rev. 139, 144 (1993).

²⁷ *Vice Squad Nabs BU Birth Control Speaker*, *Rec. Am.*, Apr. 7, 1967, at 2 \$

²⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

its progeny [*Eisenstadt* and *Roe v. Wade*], the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."²⁹ The Court observed that an unwanted pregnancy should not be imposed as the punishment for improvident sexual activity. The Supreme Court thus swept away the remaining barriers to the widespread dissemination of contraception.

The effective availability of contraception, however, changed at different times in different parts of the country. Some states began to relax their birth control laws after the *Griswold* decision in 1965. Still, most states limited distribution to minors without parental consent until the *Carey* case in 1977. In between, however, with ratification of the 26th Amendment in 1971, the Vietnam era amendment that lowered the voting age to 18, the vast majority of states changed the age of majority from twenty-one to eighteen as well. Although the legislatures that lowered the age of adulthood rarely considered the potential effect on the ability to get contraception, the legal changes had the effect of increasing access to the pill for students of college age. These changes also made it possible for universities to offer comprehensive family planning assistance. Only 12 institutions of higher learning, for example, would prescribe the pill to unmarried students in 1966; yet, by 1973, 42% of university students would have had access to such services.

Economists Goldin and Katz have attempted to use the uneven pace of these changes to test the effect of the law on birth control use, and the changing attitudes toward women's career, marriage, and fertility plans. They observe that the earliest states to provide minors access to birth control without parental consent were a seemingly random group: California and Georgia in 1968, Mississippi in 1968, Arkansas in 1970, Colorado, D.C., Illinois, Michigan, New Hampshire, New York, Oregon, and Tennessee in 1971. Controlling for other factors, they indicate that the timing of state liberalization of access to contraception had a small, but statistically significant effect in decreasing the likelihood that a college graduate would marry before the age of twenty-three.³⁰ Abortion, of course, complemented and enhanced the effect of contraception, and the economists found further that the legalization of abortion also contributed to the drop in the ranks of college graduates who married at earlier ages. They then used statistical techniques to attempt to separate the effects of abortion from those caused by greater access to birth control and concluded that legalization of access to birth control for minors had "a substantial and significant effect" while the effect of abortion rates became "small and insignificant" once they teased apart the combined effects.³¹ Goldin and Katz conclude that legal

²⁹ *Carey v. Population Services International*, 431 U.S. 678, 687 (1977).

³⁰ Goldin and Katz, 755.

³¹ *Id.* at 755. In this study, the authors first introduce the average abortion rate in an individual's state of birth when the individual was 18-21. Inclusion of this variable shows a large negative and statistically significant impact of the state abortion variable on the likelihood a female college graduate will marry by 23. The authors then add state of birth linear time trends, which reduces the size and significance of the abortion rate variable, and increases that of access to birth control.

changes in the access minors had to the pill in a given state generated “24-27% percent” of the large decline in the number of college graduates married by age 23.³² While the economists recognize that many minors obtained the pill even in the states that restricted access, legalization appears to have played a substantial role in the dramatic changes in family practices.

The emergence of what we have called elsewhere the blue family paradigm – delayed marriage and childbearing, greater investment in women’s careers, more egalitarian gender relationships – came with the advent of the birth control pill and the widespread availability of contraception for anyone who wanted it.³³ Goldin and Katz emphasize that oral contraceptives had a far wider impact than abortion, especially for the college educated.³⁴ Part of the explanation is simple convenience: “a virtually foolproof, easy-to-use, and female-controlled contraceptive having low health risks, little pain, and few annoyances” made possible widespread adoption and a wholesale change in the marriage norms of the newly expanded class of college graduates possible. Abortion almost certainly contributed as well, with contraception allowing a wholesale shift in attitudes toward the permissibility of non-marital sexuality, and abortion providing a form of insurance when contraception failed.

The increase in the age of marriage that followed also produced a cascade of other changes. Women who came of age away from their parents and enjoyed a substantial period of independence before starting families experienced a measure of autonomy impossible in earlier eras. They would expect substantially more from their mates and the world around them. Modern feminism emerged with confidence and visibility.

Contraception for the Masses

The advent of birth control did more, of course, than simply enhance the careers and marriage prospects of college educated women. It changed the norms and attitudes of society as a whole toward sexual activity – and toward women’s autonomy. The figures we cited earlier that indicate that the percent of the population having sex by the age of 21 rose from 40% to 70% were for the entire population. Today, 77% of men and women will have had sex, including 75% who will have had premarital sex, by the age of 20. By the age of 44, 95% of the entire population will have had sex outside of marriage, and they will overwhelmingly have done so with someone other than a person they will eventually marry.³⁵ Public attitudes toward non-marital sexuality have shifted with the change in practices; sixty-one percent of adults aged 18 to 29 approve

³² Id. at 758.

³³ Red Families v. Blue Families, forthcoming Oxford University Press.

³⁴ Id. at 764. They note that, among non-virgins, the fraction of women who have taken the pill is eight times the number who have had an abortion.

³⁵ Public Health Reports, <http://www.webmd.com/sex-relationships/news/20061220/premarital-sex-the-norm-in-america>

of premarital sex today compared with 21 percent of the same group in a Gallup poll in 1969.³⁶

Acceptance of non-marital sexuality also meant, at least for a brief period, a willingness to consider its consequences. Political proposals for greater family planning assistance date back decades. In the fifties, however, President Eisenhower dismissed them, observing that he could not “imagine anything more emphatically a subject that is not a proper political or governmental activity or function or responsibility. . . . This government will not, as long as I am here, have a positive political doctrine in its program that has to do with this problem of birth control. That is not our business.”³⁷ By the mid-sixties, however, the discourse on contraception more generally came together with greater concern about poverty, and a racialized discourse about fertility.

Perhaps the most influential study of fertility in the sixties indicated that while poor women had dramatically higher fertility rates than the affluent (one report compared the birth rates of the Chicago urban poor to those in India), poor women and minority women actually wanted fewer children than the affluent, and twice as many of the children born to the poor were unwanted in comparison with the children born to better off mothers. The study found, for example, that 17 percent of whites and 31 percent of blacks had not wanted the last child born to them. For those women who had not completed high school, the figures were even higher, with 31 percent of whites and 43 percent of blacks stating that their last child had not been wanted.³⁸ The two tiered system produced by the Comstock laws, in which the sophisticated secured effective birth control, where the less advantaged did not, had a palpable effect on fertility rates.

The discussion of fertility came as President Johnson was launching a war on poverty, and as the Supreme Court was eliminating the last vestiges of the moral regulations that excluded poor women from welfare eligibility. When Congress authorized the aid to dependent children program in the thirties, it designed the program primarily for widows, and allowed the states to bar non-marital children from benefits. By the sixties, the federal agency charged with oversight of the program had eliminated most of the formal prohibitions, but it continued to deem the income of males present in the home available to the family. To check up on the presence of such unreported cohabitants, welfare authorities conducted midnight visits, dubbed “Operation Bedcheck” to determine continued eligibility. In 1968, the Supreme Court ruled that such practices were inconsistent with the statutory scheme. It explained that “Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children.” The Court found it “simply inconceivable” that any state would be free “to

³⁶ abcnews.go.com/primetime/pollvault/Story?id=156921&page=2 -

³⁷ THOMAS C. DIENES, LAW, POLITICS, AND BIRTH CONTROL 266 (1972)).

³⁸ Luker, *Dubious Conceptions*, 56-57.

discourage immorality and illegitimacy by the device of absolute disqualification of needy children."³⁹

As a result of active outreach as part of the war on poverty and the relaxation of the restrictions, welfare ranks swelled. In the early to mid-sixties, only half of those who were eligible received welfare benefits.⁴⁰ By 1976, however, the number of families participating in the welfare program increased from less than a million in 1964 to 3.5 million, more than tripling the size of the program.⁴¹ Moreover, while the majority of welfare recipients have always been white, African-Americans are dramatically more likely than whites to be poor. The percentage of African-American beneficiaries increased steadily through the sixties and early seventies, peaking in 1976, with blacks at 46% of the caseload, even though they constituted only 11% of the population.⁴² During the same period, concern grew about the changing composition of the African-American family, with non-marital births growing from 25% of the total in 1965 (the time of the Moynihan report, which touched off a political firestorm by calling attention to the high numbers) to 60% by 1975.⁴³

In this context, calls for increased access to family planning services won bi-partisan support. Kristin Luker reports that: "When poor women were having unwanted, out-of-wedlock births in such large numbers (out-of-wedlock births were assumed to be unwanted births), and when unwanted babies seemed to swelling the AFDC rolls, an archaic birth control policy that kept contraceptives out of the hands of the poor seemed ludicrous, if not tragic."⁴⁴ It probably did not hurt politically that the Supreme Court's birth control decision in *Griswold* had drawn little protest, and that the major skeptics of the new proposals were black nationalists who saw the emphasis on birth control for poor black women as a form of genocide.

In 1966 -- 6 (?) years before the Supreme Court's decision in *Eisenstadt* extending the right to contraception to single women and ___ years before the Court's decision providing access to adolescents -- a bipartisan congressional committee recommended that publicly funded birth control be made available to any AFDC recipient over the age of 15, regardless of whether she was married. Congress also made contraception a special emphasis of the war on poverty, appropriating specific funds for family planning efforts. In 1970, Congress passed and President Richard Nixon signed Title X of the Public Health Services Act, which created "a comprehensive federal program devoted entirely to the

³⁹ King v. Smith, 329 U.S. 309 (1968).

⁴⁰ Sanford F. Schram and J. Patrick Turbett, Civil Disorder and the Welfare Explosion: A Two-Step Process, 48 American Sociological Review 408-414 (1983).

⁴¹ Human Services Policy, Aid to Families with Dependent Children: The Baseline, <http://aspe.hhs.gov/HSP/AFDC/baseline/2caseload.pdf> (June 1998).

⁴² Martin Gilens, Why America Hates Welfare: Race, Media and the Politics of Anti-poverty Warfare 106 (2000). See also Typical AFDC Family Smaller Than 10 Years Ago; Average Number of Children Fell From 3 to 2, 15 Family Planning Perspectives, 31-32 (1983).

⁴³ Donna Franklin, Ensuring Inequality, 164.

⁴⁴ Luker, Dubious Conceptions, at 57.

provision of family planning services on a national basis." The vote was unanimous in the Senate and overwhelming in the House (298-32).⁴⁵ Two years later, at the insistence of the Nixon Administration, Congress amended the Medicaid statute to add family planning to the list of "mandated services" that health care providers must provide in order to remain eligible for federal Medicaid funds. Even more remarkably, by the late seventies, Congress agreed that adolescent sexuality was an important concern and, in 1978, in the year following the Supreme Court's insistence that teen access to contraception could not be conditioned on parental consent, Congress amended Title X to make it clear that recipients of Title X family planning funds were *required* to provide services to adolescents.⁴⁶ Family planning had become central to Democratic *and* Republican anti-poverty efforts, and been transformed in the words of one historian from "private vice to public virtue."⁴⁷

Gender Equality – temporarily Triumphant

The emergence of what we are today calling the blue family paradigm was neither partisan nor ideological, though parts of it were certainly controversial. It reflected the convergence of the interests of a favored group – middle class college students – with concerns about the "excess fertility" of a disfavored group – the urban poor. Moreover, the most practical assertion of the new paradigm – support for contraception – was intensely pragmatic. Middle class women, whether married or single, had embraced the pill in overwhelming numbers, and opposition was politically perilous. At the same time, making the same means available for poorer women simply made sense, whether the support was motivated by concern for reproductive autonomy or for reducing the numbers of a group viewed as a drain on societal resources.

At the center of these developments, however, were important principles that allowed a reformulation of family practices. Critical among them was the idea that childbirth should be chosen, rather than an inevitable or punitive consequence of sexual activity. This idea commanded overwhelmingly support both in the congressional votes for family planning, and in the Supreme Court cases that extended the right to privacy to single individuals and teens. The idea was both substantive (at its core is a commitment to reproductive autonomy), and pragmatic (the alternatives were proven failures as the numbers of unwanted pregnancies attested). It was also an essential component in women's greater autonomy.

The Court in both *Eisenstadt* and *Carey v. Population Services*, the case that invalidated the New York law restricting distribution of contraceptives to

⁴⁵ Luker, at 59.

⁴⁶ See Kristin Luker, at 59, and J. Shoshanna Ehrlich, FROM AGE OF CONSENT LAWS TO THE "SILVER RING THING": THE REGULATION OF ADOLESCENT FEMALE SEXUALITY 16 Health Matrix 151, 160-62 (2006).

⁴⁷ Luker, at 60.

minors, further rejected the asserted state interest in pregnancy as a deterrent to sexual activity as a legitimate basis of state regulation. In *Carey*, the state had argued that the availability of birth control would "lead to increased sexual activity among the young."⁴⁸ Yet, the Court dismissed the suggestion that it is appropriate to deter sexual activity by "increasing the hazards attendant on it," observing that "no court or commentator has taken the argument seriously." The reason, which the *Eisenstadt* Court had also recognized, was that: "It would be plainly unreasonable to assume that the [the State] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication. We remain reluctant to attribute any such "scheme of values" to the State."⁴⁹ With that declaration, the shot gun marriage as official state policy was at an end – at least until the next decade brought it back.

Red Backlash and the New War on Contraception

The bipartisan support for contraception did not last. What changed, according to law professors Robert Post and Reva Siegel, is the identification of the abortion issue with feminism and the perceived threat to traditional family values. They observe that by the end of the seventies, conservatives mobilized against abortion in order to protect traditional family roles.⁵⁰ The *Christian Harvest Times* in 1980, for example, denounced abortion as part of a parade of secular evils. In its "Special Report on Secular Humanism vs. Christianity," it explained that "To understand humanism is to understand women's liberation, the ERA, gay rights, children's rights, abortion, sex education, the 'new' morality, evolution, values clarification, situational ethics, the loss of patriotism, and many of the other problems that are tearing America apart today."⁵¹ Reagan ran for the Presidency in 1980 on a Republican Party Platform that pledged to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."⁵²

While as Post and Siegel illustrate, abortion served as the rallying cry, the attack was not just on abortion as violation of certain religious teachings, but on modernism itself, and on family changes as a symbol of the decay of

⁴⁸ 431 U.S. 678, 694 (1977).

⁴⁹ Id. at 695.

⁵⁰ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L REV. 373, 420 (2007).

⁵¹ *A Special Report*, CHRISTIAN HARVEST TIMES, June 1980, at 1, quoted in MARTIN, *supra*, at 196.

⁵² See Republican Party Platform of 1980, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1980>. In 1984, the Republican Party reaffirmed its "support for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." See Republican Party Platform of 1984, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984>.

traditional values. At each stage therefore, attacks on abortion have been accompanied by less heralded cutbacks on the availability of contraception. The Reagan Administration, for example, cut Title X funding by over a quarter shortly after taking office, and attempted to divert family planning efforts from birth control to abstinence, adoption counseling, and other practices more acceptable to its social conservative base.⁵³ In particular, the Administration tried to undermine *Carey*; the Department of Health and Human Services promulgated new regulations requiring Title X grantees to notify their parents within ten working days, and disqualified them from further treatment if they failed to do so. The courts struck down the regulations as inconsistent with the statute.⁵⁴

While pregnancy prevention efforts received renewed attention under Clinton, , federal funding, adjusted for inflation, never again reached the 1980 levels for Title X. In the later years of the Bush administrations, the levels remained stalled at 61% (in inflation-adjusted dollars) of the 1980 levels. Nor have the efforts to undermine adolescent access disappeared. Utah and Texas passed laws that prohibit state funds from being used to support minors access to confidential contraceptive services. And bills in other states, like Maine (2009) and Arizona (in 2006), seek to require parental consent for all prescriptions issued to a minor. Moreover, a number of the states that use Medicaid funds to extend family planning efforts, limit their programs to women over the age of 19.⁵⁵ And the Department of Health and Human Services, in the waning days of the Bush Administration issued regulations allowing for conscientious objection on behalf of health professionals. Although justified by anti-abortion concerns, the rules could easily be interpreted to allow pharmacists and other health professionals to pick and choose among the products they supply (selling condoms, for example, but not the "morning after pill,") and to deny birth control to minors, the unmarried, or others to whom they object on ethical grounds, making the process of securing contraception more burdensome.⁵⁶ ⁵⁷ Even the Obama Administration, early in its term, bowed to Republican pressure and removed expanded funding for family planning efforts from its stimulus

⁵³ G. Crum, Health care policy and the Reagan administration: the case of family planning. JOURNAL OF HEALTH AND HUMAN RESOURCES ADMINISTRATION. 1990 Spring;12(4):524-35.

⁵⁴ Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 665 (D.C. Cir. 1983).

⁵⁵ Alabama, Louisiana, Illinois, Michigan, Missouri, North Carolina, Oklahoma and Wyoming limit the program to women over 19. New Mexico, Texas and Pennsylvania offer services to those over 18. The other states (Arizona, Arkansas, California, Delaware, Florida, Iowa, Maryland, Minnesota, Mississippi, New York, Oregon, Rhode Island, South Carolina, Virginia, Washington and Wisconsin) do not have age limits. Guttmacher Institute, State Policies in Brief: State Medicaid Family Planning Eligibility Expansions, Feb. 1, 2009, http://www.guttmacher.org/statecenter/spibs/spib_SMFPE.pdf.

⁵⁶ 73 Fed. REg. 78072 *Dec. 19, 2008).

⁵⁷ National Women's Law Center, Final HHS Rule Threatens Women's Access to Health Care Information and Options, Poses Serious Risks to Women's Health (2008).

package.⁵⁸ The terrified teen, especially one in a small town, who is otherwise be willing to use contraception, might now has to guess on top of everything else which pharmacists will be willing to fill a prescription or sell publicly available products to her without humiliation. Members of Congress have promised to introduce legislation to block implementation of the regulations, and the Connecticut attorney general has already filed suit to challenge the provisions, but they illustrate the merger of anti-abortion rhetoric with efforts to undermine contraceptive availability.

Feminists Divided

The long hard fight over abortion, which has cloaked the less visible attacks on contraception, threatens in the long run to also divide feminist interests. In the sixties, the middle class embrace of contraception occurred side-by-side efforts to extend contraception to poorer women. With women's interests in reproductive autonomy on the defensive, the progress that has been made in recent years overwhelming secures middle class advantage. Thus, among the few victories in the Bush years have been securing approval of Plan B, the morning after pill, and expanding the availability of RU-486 and other forms of non-surgical abortion. With the expansion of these products, however, middle class women's support for surgical abortion has fallen. Yet, poor women depend to a much greater degree than middle class women on abortion rather than contraception, and surgical abortion, which is available later in pregnancy, than non-surgical abortion or the morning after pill.⁵⁹

⁵⁸ See Rachel Benson Gold, *Stronger Together: Medicaid, Title X Bring Different Strengths to Family Planning Effort*, 10 GUTTMACHER POL'Y REV. No. 2, at 18 (Spring 2007) (discussing how Title X clinics are struggling to meet the health needs of the rising numbers of immigrants ineligible for Medicaid); Cynthia Dailard, *Challenges Facing Family Planning Clinics and Title X*, GUTTMACHER REP. ON PUB. POL'Y (Spring 2001), available at <http://www.guttmacher.org/pubs/tgr/04/2/gr040208.pdf>; Adam Sonfield et al., *Cost Pressures on Title X Family Planning Grantees, FY 2001–2004* 4 (Guttmacher Inst., 2006) (explaining that Title X funded clinics reported an average cost increase of 58 percent from 2001–2004 for language assistance services to serve non-native English speakers), available at <http://www.guttmacher.org/pubs/2006/08/01/CPTX.pdf>. Overall, Medicaid funding for family planning has increased, and much of the increase directed toward contraception has been concentrated in fourteen states.

⁵⁹ See Rachel Benson Gold, *Stronger Together: Medicaid, Title X Bring Different Strengths to Family Planning Effort*, 10 GUTTMACHER POL'Y REV. No. 2, at 18 (Spring 2007) (discussing how Title X clinics are struggling to meet the health needs of the rising numbers of immigrants ineligible for Medicaid); Cynthia Dailard, *Challenges Facing Family Planning Clinics and Title X*, GUTTMACHER REP. ON PUB. POL'Y (Spring 2001), available at <http://www.guttmacher.org/pubs/tgr/04/2/gr040208.pdf>; Adam Sonfield et al., *Cost Pressures on Title X Family Planning Grantees, FY 2001–2004* 4 (Guttmacher Inst., 2006) (explaining that Title X funded clinics reported an average cost increase of 58 percent from 2001–2004 for language assistance services to serve non-native English speakers), available at <http://www.guttmacher.org/pubs/2006/08/01/CPTX.pdf>. Overall, Medicaid funding for family planning has increased, and much of the increase directed toward contraception has been concentrated in fourteen states.

In the meantime, the unequal access to reproductive autonomy that motivated Congress in the seventies remains. In 2006, half of all pregnancies in the United States were unplanned. The rates varied by socioeconomic status. Women whose income levels were 200% of the poverty line had a mere 29 unplanned pregnancies per 1000 women aged 15-44, women whose income was 100% of the poverty line had 81 unplanned pregnancies per thousand women in the age group, and those below the poverty line had 112 per 1000 women, almost four times the rate of the most affluent. The disparities have increased in recent years, with poor women's unplanned pregnancy rates increasing by 29% while dropping for the better off. And the unplanned pregnancies produce even greater disparities in unplanned births: 11 per thousand women for the most affluent group, 35 per thousand for those women at 100% of the poverty line, and 58 per thousand for those in poverty, more than five times the rate of the wealthiest group.

Support for contraception should be mustered, therefore, as it was in the sixties and seventies on a consensus basis. Instead of commanding bipartisan support, however, contraception often enters public discourse framed in more divisive terms.

The question then is how to move away from the current impasse on control of fertility. In understanding these developments and the possible responses to them, two particular areas deserve special consideration. First, we must pay heightened attention to the political developments that have frustrated more effective policy responses. Contraception simply should not be that controversial. The overwhelming majority of American women *use* birth control at some point in their lives (over 96%), the vast majority have sex before they marry (95%), and the majority of Americans (61%) approve of premarital sex, with only those over the age of sixty disagreeing.⁶⁰

Nonetheless, as the debates over welfare reform, abstinence education, contraception and abortion illustrate, an activist minority has succeeded in using the political process to undercut assistance for the most vulnerable Americans, and in forcing feminists to compromise.

The results are particularly cynical. The middle class, which has the political clout to defeat more radical changes, has been largely unaffected by the lesser support for access to birth control and abortion.⁶¹ Wholesale cutbacks and their disproportionate impact on low income women remain virtually invisible to much of the electorate. Conservatives can accordingly satisfy their fundamentalist "base" without paying a political price among moderates.

The recent decision to remove a family planning provision from the 2009 stimulus package provides a perfect illustration. The funds would have helped poor women with contraception, sexually transmitted diseases, and other health needs. It was sufficiently complex, however, that it could easily be distorted –

⁶⁰ ABC News Poll: American Sex Survey, <http://abcnews.go.com/primetime/pollvault/Story?id=156921&page=2>.

⁶¹ See discussion, *supra* notes and accompanying text, indicating that the middle class has become more likely to reply on contraception than abortion, while poorer women have become more dependent on abortion as access to contraception has become more difficult.

and was. Existing law already allowed states to apply for waivers from Medicaid income standards so that they could cover family planning services and supplies to low-income women not otherwise eligible for Medicaid. 27 states had already received these waivers. The bill would simply have given states the option to provide such coverage without the administrative process of obtaining a waiver. Republicans, however, threatened to target conservative Democrats who supported the bill. Republicans claimed that the provision would “fund the abortion industry,”⁶² even though the Hatch Act prevents any federal money from funding abortions as part of family planning services. The US Conference of Catholic Bishops stated that it “strongly oppose[d] the specific sections that target efforts to expand coverage for family planning (and only family planning) for low-income and temporarily unemployed women. They neglect women’s real needs and serve no legitimate purpose for an economic stimulus package,” and it charged that the provision “effectively makes family planning clinics (many of which are abortion providers) a necessary entry point into the health care system, ignoring women’s genuine needs as well as their moral convictions.”⁶³ By contrast, the ACLU charged, “The removal of the Medicaid Family Planning State Option [was] fueled by the anti-choice rhetoric of certain lawmakers Our elected officials should be fighting to improve the health of low-income women by increasing access to health care services, such as contraceptives. Family planning services are a critical part of the continuum of health care needs and access to these services can increase women’s choices and opportunities at home, in the workplace and in the broader community.”⁶⁴ Democrats removed it from the legislation. Interestingly, the same provision has appeared before Congress several times under the innocuous title, “the Prevent Prematurity and Improve Child Health Act,” sponsored by two Democratic and two Republican Senators.⁶⁵

“Family planning,” whatever its content, has become one of the more effective targets in a world of polarized discourse; moreover, a significant portion of Congress would prefer to have a political issue salient in the next campaign to a compromise that might allow funding on a consensus basis. With the Obama Administration’s ready withdrawal of the family planning proposals, the press never gave much coverage to the issue, nor realistically described the consequences of the decision. The words “family planning” was enough to ensure removal of the provisions. The subsequent party line vote in the House of Representatives on the stimulus package even without the family planning funds provides an indication of just how difficult it will be to enact more realistic support for poor women’s health needs.

⁶² Sullivan, *infra*.

⁶³ Bishops Urge Congress to Make Poor a Priority in Economic Recovery Legislation, State News Serv., Jan. 28, 2009,

⁶⁴ ACLU Calls on Congress and President Obama, Jan. 28, 2009.

⁶⁵ Amy Sullivan, Behind the Family Planning Flap, Time Online, Jan. 29, 2009, avail. at <http://www.time.com/time/nation/article/0,8599,1874683,00.html>

Feminists are in the process of reframing the debate. But they must not, as Katha Pollitt charges, “deframe” the issue because “There's a word that doesn't show up much in the new abortion frames: women. Maybe it doesn't poll well. “Reframing” abortion is actually a kind of deframing, a way of taking it out of its real-life context, which is the experience of women, their bodies, their healthcare, their struggles, the caring work our society expects them to do for free.”⁶⁶ Women's issues won in the sixties because the feminist agenda intersected with some other important pressure groups, including those who wanted to limit poor women's sexuality. Now that we're on our own, we don't look out for ourselves very well.

⁶⁶ Katha Pollitt, *If the Frame Fits*, *The Nation*, (June 2005), <http://www.thenation.com/doc/20050711/pollitt>