Reproduction and Regret

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ABSTRACT: What is the legal significance of regret following a reproductive decision or outcome? In *Gonzales v. Carhart*, a Supreme Court majority offered one answer to this question, famously invoking the regret of some women for their past abortions as a reason to uphold a federal law criminalizing a particular abortion procedure. But *Gonzales* is not the first case to confront what I call "reproduction and regret," and the Court's approach in *Gonzales* ignores the contrasting judicial responses from these other cases.

This Article supplies the missing analysis—contextualizing *Gonzales*'s treatment of reproduction and regret by identifying and developing five additional models. These additional models come from disputes about adoption surrenders, the performance of surrogacy arrangements, support obligations arising from children born of unplanned pregnancies, the use of previously frozen embryos, and the status of sperm donors. Each model depicts a different understanding of reproduction and regret, supplementing *Gonzales* and the ensuing commentary on that case with a more expansive inquiry into the work courts have used regret to perform and the unarticulated assumptions or normative commitments that might explain the doctrinal and rhetorical inconsistencies. This wider lens illuminates regret's regulatory function across the range of cases.

This Article's examination of regret as a regulatory tool in turn has three analytical payoffs. First, it disrupts *Gonzales*'s depiction of regret as a natural and self-generated emotion, clarifying the role of the state in producing regret. Second, it reinforces the critiques of *Gonzales*'s use of maternal stereotypes

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with a more robust account of gender that not only includes stereotypes of fatherhood but also exposes a specific link among regret, heterosexual intercourse, and unexamined beliefs about sexual pleasure. Finally, it highlights deep policy rifts in family law, a field that continues to prioritize the regulation of sex in particular, despite rhetoric to the contrary.

The importance of the jurisprudence of reproduction and regret transcends the particular disputes that exemplify it. As a general matter, contemporary family law celebrates what the Supreme Court has called "the private realm of family life" and scholars have called "the republic of choice." This vision not only puts a premium on individual decisionmaking; it also complicates the question of what the legal significance of an actor's own second thoughts about such decisions should be. An analysis of reproduction and regret thus offers a window into family law's foundational values and contests writ large, providing insights into the principles, themes, and clashes dominating family law today.

INTRODUCTION

How should law respond to a woman's regret or second thoughts following an abortion, about the surrender of a child for adoption, or about a surrogacy agreement? How do these cases compare to those in which a genetic father wishes he had never conceived, wants to destroy frozen embryos he previously created, or seeks to be more than a sperm donor in the lives of children he helped bring into being?

This Article explores the legal significance of regret following reproductive decisions. Regret's legal salience in such cases poses a challenge because contemporary family law celebrates what the Supreme Court has called "the private realm of family life"[1] and scholars have called "the republic of choice."[2] This vision puts a premium on individual decisionmaking in family and personal matters. In turn, it also complicates questions about the import of an actor's own second thoughts or regrets following such decisions.

In *Gonzales v. Carhart*,[3] a Supreme Court majority offered one response to such questions, famously invoking the regret of some women for their past abortions as a reason to reject a constitutional challenge to a federal law criminalizing a particular abortion procedure.[4] This case generated extensive commentary, including widespread condemnation of the Court's explicit paternalism and reliance on unalloyed gender stereotypes.

This Article, however, takes a different tack. It situates *Gonzales* on a larger landscape, revealing regret's legal traction in this particular opinion as just one point on a continuum. It does so by identifying in case law, largely predating *Gonzales*, a range of contrasting treatments of what I call "reproduction and regret" and exploring the variations found in disputes about adoption surrenders, the performance of surrogacy arrangements, support obligations arising from children born of unplanned pregnancies, the disposition of previously frozen embryos, and the status of sperm donors. The *Gonzales* majority's blinders caused it to treat the problem of reproduction and

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1. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

2. LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 27 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

3. Gonzales v. Carhart, 550 U.S. 124 (2007).

4. *Id.* at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained," citing Brief for Sandra Cano, the Former "Mary Doe" of Doe v. Bolton, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380)).

regret as a new and isolated issue, even though other courts had confronted it before in several different settings.[5]

Using five case studies in addition to *Gonzales*, this Article uncovers in each a different understanding of reproduction and regret, supplementing *Gonzales* and the ensuing commentary with a more expansive inquiry into what work courts have used regret to perform and what unarticulated assumptions or normative commitments might explain the doctrinal and rhetorical variations. This wider lens illuminates regret's regulatory function across the range of case studies. Understanding regret as a regulatory tool in turn has three analytical payoffs.[6] First, it disrupts *Gonzales*'s depiction of regret as a natural and self-generated emotion, clarifying the role of the state in producing regret and in using regret to transfer power from the individual to the state. Second, it reinforces the critiques of *Gonzales*'s use of maternal stereotypes with a more robust account of gender; this richer and more nuanced account not only includes stereotypes of fatherhood but also exposes a specific link among regret, heterosexual intercourse, and unexamined beliefs about sexual pleasure. Finally, this analysis highlights deep policy rifts in family law, a field that continues to prioritize the regulation of sex in particular, despite expressions to the contrary.

Taken together, these insights reveal how courts' conceptualizations and uses of regret in reproductive settings often embrace familiar but outdated scripts about gender, sex, autonomy, and family, anchoring these constructions all the more firmly in law. Indeed, although representing only a narrow slice of family law, cases about reproduction offer a window into the field's foundational values and its contests writ large.[7] Thus, according to

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5. The analysis in this Article focuses on the Court's failure to consider judicial treatments of regret in cases about various reproductive decisions. Other critiques note the Court's failure to consider relevant learning from additional sources, such as the "elaborate body of psychological research that describes the way regret actually operates." Chris Guthrie, Carhart*, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 881 (2008); *see also* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2036-37 (2010) (acknowledging Guthrie's critique).

6. *See generally* Abrams & Keren, *supra* note 5 (exploring ways in which law and emotions scholarship might prove useful, including contributions to doctrinal and rhetorical improvements and the illumination of the unacknowledged role of emotions in legal analyses).

7. The contemporary critique of "family law exceptionalism" challenges the very notion of family law as separate field. Janet Halley offers the following definition of the term:

> "Family law exceptionalism" (FLE) will be my term for the extremely broad range of ideas and practices—legal, cultural, social, economic, ideological, aesthetic—that set marriage, reproduction, the family, childhood, sexuality, the home (the list could go on) aside from domains of life deemed to be more general, more political, more international, more economic (and again the list could go on indefinitely).

Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1, 20-21 (2011). For additional elaboration, see, for example, Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

contemporary accounts, American family law prizes several liberal values—autonomy, pluralism, privacy, and gender equality.[8] These values animate an array of modern doctrines, from constitutional limits on state regulation of family matters, including reproductive freedom, to no-fault divorce, the abandonment of gender-based role assignments, and an elaborate web of child support duties and enforcement procedures designed to keep dependency private. Today, although acknowledging the dark side of intimate life, law portrays family principally as a domain of personal liberty;[9] as a refuge from state interference,[10] standardization,[11] and stereotyped identities;[12] and as a site for self-definition and sexual intimacy,[13] as well as for responsibilities voluntarily[14] and lovingly[15] assumed.

Cases about reproduction crystallize these values, themes, and clashes.[16] Accordingly, autonomy has received explicit and especially well developed attention in such cases, with reproductive decisions identified as

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8. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (criticizing family law's emphasis on autonomy and the privatization of dependency); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) (rooting family liberty and pluralism in the history of slavery); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000) (discussing family privacy); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194-96 (2007) (citing emphasis on gender equality); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 523 (1992) (noting the rejection of traditional gender roles); *see also, e.g.*, Laura T. Kessler, *New Frontiers in Family Law*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 226 (Martha Albertson Fineman ed., 2011) (examining trends in contemporary family law).

9. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992); Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also, e.g.*, Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 8 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (explaining that the rationale for unilateral no-fault divorce lies "in the ideal of marriage as a relationship characterized by the continuing existence of a mutual loving commitment between the spouses"). On the dangers posed by such autonomy and privacy, see, for example, Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 948-49 (1985) (describing one view of the family as "a hell of oppression and brutality"); Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1633-35 (2004) (criticizing the failure of *Lawrence*'s liberty and equality values to address power imbalances and the risks of domestic violence).

10. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing the "private realm of family life which the state cannot enter").

11. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

12. *E.g.*, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Orr v. Orr, 440 U.S. 268 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

13. *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (overturning a state ban on same-sex sodomy and the precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld the constitutionality of such laws).

14. *E.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing constitutional protection for "the freedom of choice to marry").

15. *E.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979) (noting parents' "high duty" to prepare their children for adult responsibilities and justifying parental authority over children based on law's recognition "that natural bonds of affection lead parents to act in the best interests of their children"); *cf.* GARY S. BECKER, A TREATISE ON THE FAMILY 277-306 (enlarged ed. 1991) (positing the "altruist" model of the family).

16. Sometimes individual members of a given family have conflicting interests, creating a clash of policies and values. *See, e.g.*, Meyer, *supra* note 8, at 554-58; Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627 (1987).

quintessentially central to personal liberty, family privacy, and self-definition.[17] Likewise, the rhetoric of "personal responsibility," with its focus on child support obligations, initially achieved prominence in the development of welfare reform efforts designed to combat "irresponsible reproduction"[18] and now provides the euphemism for one of two competing federally supported programs of sex education.[19] Finally, legal analyses of laws about reproduction trace out a contested boundary between permissible sex-based classifications, based on would-be "real differences," and impermissible distinctions, reflecting and perpetuating gender stereotypes.[20] Such disputes mark the current frontier of family law's transition from a once deeply gendered set of rights and responsibilities to an increasingly gender-neutral regime.[21]

The analysis proceeds as follows. Part I examines *Gonzales*, its understanding and treatment of reproduction and regret, and the difficulties posed by this approach, including those identified by critics. To contextualize what I call the "reproach model of regret" discernible in *Gonzales*, Part II

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17. *E.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

18. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996) (reauthorized and revised by the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996).

19. 42 U.S.C.A. § 713 (2011). *Cf.* 42 U.S.C.A. § 710 (2011) (allotting funding for a separate program for abstinence education).

20. *Compare, e.g.*, Michael M. v. Super. Ct., 450 U.S. 464, 471-72 (1981) (plurality opinion) (citing females' capacity to become pregnant as a difference justifying gender-based statutory rape laws), *and* Nguyen v. INS, 533 U.S. 53, 62-68 (2001) (upholding different treatment of nonmarital children born abroad of citizen fathers versus those of citizen mothers, because only mothers must be physically present at birth), *with Michael M.*, 450 U.S. at 496 (Brennan, J., dissenting) (finding stereotypes underlying gender-based statutory rape laws), *id.* at 501 (Stevens, J., dissenting) (finding "traditional attitudes" reflected in gender-based statutory rape laws), *and Nguyen*, 533 U.S. at 86 (O'Connor, J., dissenting) (condemning the majority opinion for relying on "an overbroad sex-based generalization"). Scholars have criticized the Court's understanding and treatment of "real differences." For example, Sylvia Law writes:

> The difficulty with [the Court's] approach is that a central justification for limiting the use of explicit sex-based classifications is that they are not related to *real differences* between men and women. By contrast, laws governing reproductive characteristics, such as those prohibiting abortion or providing nutritional supplements for pregnant women, may be precisely related to the individual characteristics of the people they identify. The prevailing sex equality standard determines whether the sex-based classification at issue actually is responsive to *real differences* between men and women and rejects classifications when there are no such differences. This standard usually works in relation to explicit sex-based classifications because individual men and women escape stereotypical sex roles. The escapees disprove the judgment about men and women that motivated the explicit sex-based classification. However, because there are no escapees from biology, no pregnant men, or women sperm donors, a standard focusing solely on comparative equality does not provide a helpful tool for evaluating laws governing ways in which men and women categorically, biologically differ.

Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1004 (1984) (emphasis added).

21. *See, e.g.*, Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010).

introduces five additional case studies, with each showcasing a different model of regret and each providing a contrast to *Gonzales*. In these models, courts deploy regret not for the purpose of reproach, as in *Gonzales*, but instead for distinctive objectives that I describe in turn as redemption, resistance, responsibility, reconsideration, and respect. Part III first explores what these various models might have meant for the *Gonzales* Court and then takes a closer look at three salient themes teased out from the models: (A) the unacknowledged role of the state in constructing regret and, reciprocally, the new practices and legal approaches that such constructions themselves have prompted; (B) assumptions about gender, sex, and sexual pleasure, which both operate as an engine for the legal uses of regret and also persist as a product thereof; and (C) the deep policy conflicts in family law, including an abiding but disavowed interest in the regulation of sex, that the various understandings of regret help expose. Part IV briefly concludes.

I. *GONZALES*'S INVITATION

The Supreme Court's 2007 decision in *Gonzales v. Carhart*[22] changes in several important ways the constitutional doctrine governing abortion restrictions.[23] Yet, perhaps the majority's most provocative move is its acceptance as true—and as justification for state protection—the asserted likelihood that women will regret the abortions they have chosen, in turn suffering psychological distress. As the Court explains in part:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.[24]

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22. 550 U.S. 124 (2007).

23. *But see* David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 Sup. Ct. Rev. 1 (contending that *Gonzales* had little impact on medical practice and constitutional law).

24. 550 U.S. at 159 (citation omitted). These sentences are part of a longer passage:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as Amici Curiae. . . . Severe depression and loss of esteem can follow.
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> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical

This reasoning released a torrent of disapproval, beginning with Justice Ginsburg's incisive dissent,[25] quickly followed by condemnation in the popular press[26] and then numerous and varied critiques in legal scholarship. Such mostly negative reviews have highlighted, inter alia, the majority opinion's paternalism,[27] its use of gender stereotypes,[28] its reliance on unfounded generalizations,[29] its misuse of informed consent doctrine,[30] its misunderstanding of psychological learning,[31] and its analytical overkill.[32]

> procedures become the more intense. This is likely the case with the abortion procedures here in issue.
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> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.
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> It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

Id. at 159-60 (some internal citations omitted).

25. *Id*. at 169-91 (Ginsburg, J., dissenting).

26. *E.g*., Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007; Jeffrey Toobin, *Five to Four*, THE NEW YORKER, June 25, 2007, at 35; *see also* Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007 (Magazine) (critically examining the development of the argument presented to the Court before the *Gonzales* decision and opinions were handed down).

27. *E.g*., Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009); *cf*. Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading* Casey, 83 WASH. L. REV. 1 (2008) [hereinafter Blumenthal, *Abortion, Persuasion, and Emotion*] (arguing that some statutes purportedly enhancing a woman's abortion decisionmaking will interfere with her choice by requiring the delivery of emotionally laden messages); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007) [hereinafter Blumenthal, *Emotional Paternalism*] (examining the case for paternalism to correct for emotional bias).

28. *E.g*., Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1688 (2008) ("Woman-protective antiabortion argument is gender-paternalist in just the sense that the old sex-based protective labor legislation was. It restricts women's choices to free them to perform their natural role as mothers.").

29. *E.g*., Ronald Turner, Gonzales v. Carhart *and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 41 (2008) ("The language of the Court's opinion reveals and reflects an asserted moral certainty and worldview based upon (in the Court's view) an inarguable premise and conclusion about abortion and 'women.' . . . On that view, the individual woman's liberty rights and interests are extinguished . . . .").

30. *E.g*., Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1559 (2008).

31. *E.g*., Guthrie, *supra* note 5.

Scholars have examined *Gonzales*'s reasoning through the lens of the emerging field of law and emotion[33] and have drawn provocative parallels between the majority's approach, on one hand, and now familiar feminist insights about the effects of domestic violence and the difficulties underlying the conventional legal treatment of consent, on the other.[34]

Such responses identify problems with *Gonzales* that, for purposes of analysis, can be organized under three different headings: the evidence cited in the opinion, the meaning attributed to the term "regret," and the marshaling of gender and autonomy to uphold an abortion restriction. A closer look at each not only illuminates the commentary on *Gonzales* but also provides useful signposts for the case studies that follow.

A. The Evidentiary Basis: Sandra Cano's Brief

In support of its generalization about regret, the opinion cites only a brief by Sandra Cano,[35] once known as Mary Doe, the plaintiff in *Doe v. Bolton*,[36] the companion case to *Roe v. Wade*.[37] Both Cano and her more highly publicized counterpart in securing a constitutional right to abortion (Norma McCorvey, then known as plaintiff Jane Roe[38]) now work as anti-abortion activists, thus becoming would-be poster children for the legal salience of abortion regret—despite the fact that these two carried to term the pregnancies that brought them to the Supreme Court in the 1970s.[39] Their recent efforts

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32. *See id*. at 879-80 (noting how the Court's reasoning extends beyond the particular abortion procedure in question); Turner, *supra* note 29, at 41 (same). The broad reach of such reasoning is confirmed by the rationale used in *Planned Parenthood v. Casey* to uphold a detailed "informed consent" requirement: "In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. 833, 882 (1992) (joint opinion). Analytical overkill also describes how the Court cited the purported absence of information about the procedure to justify banning it altogether.

33. *E.g*., Blumenthal, *Emotional Paternalism*, *supra* note 27; Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 889-902 (2009).

34. *See, e.g*., Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

35. Brief of Sandra Cano et al., *supra* note 4.

36. 410 U.S. 179 (1973).

37. 410 U.S. 113 (1973).

38. For how McCorvey became plaintiff Jane Roe, see NORMA MCCORVEY WITH ANDY MEISLER, I AM ROE: MY LIFE, *ROE V. WADE* AND FREEDOM OF CHOICE (1994), and SARAH WEDDINGTON, A QUESTION OF CHOICE 50-54 (1992). *See also* Alex Witchel, *At Home with: Norma McCorvey; Of Roe, Dreams, and Choices*, N.Y. TIMES, July 28, 1994, at C1. Subsequently, McCorvey announced that she had joined the pro-life movement, saying that she had "always been pro-life [but] just didn't know it" and that she had been exploited by abortion-rights groups. *See "Jane Roe" Joins Anti-Abortion Group*, N.Y. TIMES, Aug. 11, 1995, at A12. Years later, she filed a motion for relief from judgment, seeking to revisit *Roe*, but the case was deemed moot. McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 543 U.S. 1154 (2005). More recently, McCorvey appeared as a protester during the confirmation hearings of then Supreme Court Justice-designate, Judge Sonia Sotomayor. Peter Baker & Neil A. Lewis, *Judge Focuses on Rule of Law at the Hearings*, N.Y. TIMES, July 14, 2009, at A1.

39. *E.g*., Witchel, *supra* note 38.

reflect a strategic push among opponents of legal abortion to change the focus from fetuses to the women who carry them, thereby purporting to challenge advocates for gender equality and reproductive rights on their own feminist turf.[40] The majority opinion in *Gonzales* seems to validate such tactics[41]—all the more so because a close reading of the passage discussing women's regret reveals its highly attenuated connection to the holding: that Congress acted within constitutional bounds in banning one particular abortion procedure.[42]

Cano's brief recounts her story, including her unwanted pregnancy, her reluctant (perhaps unknowing) role as an abortion-rights litigant pressured by her family, her ultimate surrender of the child from that pregnancy for adoption, and her subsequent anguish for her participation in the legalization of abortion.[43] Her brief also includes testimonials from 178 women detailing life-long emotional trauma that they attribute to their past abortions[44]—part of a collection of symptoms dubbed "[p]ost-abortion [s]yndrome."[45] These testimonials do not single out any particular abortion procedure, such as the one at the center of *Gonzales*, but purport to identify problems arising from all abortions.

Addressing the issues before the Court, Cano's brief attempts to counter the argument advanced by challengers of the federal "Partial-Birth Abortion Ban Act" that the omission of a therapeutic exception covering mental or psychological health makes the law unconstitutional.[46] The brief thus seeks to

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40. Consider, for example, the efforts of Feminists for Life adherents, http://www.feministsforlife.org/ (last visited Oct. 30, 2011). *See also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1002-29 (2007) (tracing the development of modern gender-based arguments against abortion from the "traditional family values movement" to the woman-protective rationale underlying the attempt to ban abortion in South Dakota). Those on the political right have appropriated the rhetoric of their opponents in other controversies as well, most notably in the battle over same-sex marriage in California, where advocates for Proposition 8 (the referendum changing the state constitution to limit marriage access to heterosexuals) appropriated the rights rhetoric used to support marriage equality and successfully deployed it to argue that expanded access to marriage would infringe the rights of parents to direct their children's upbringing. *See* Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 367-68 (2009) (explaining how proponents of Proposition 8 argued that the measure would infringe the civil rights of private families who oppose same-sex marriage).

41. For other examinations of this strategy and its use in *Gonzales*, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008) (exploring appeals to dignity in *Gonzales* and other abortion cases); Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in* Gonzales v. Carhart, 94 VA. L. REV. 1451, 1455 (2008) (exploring three discourses at work in *Gonzales*: "fetus-focused discourses, physician-focused discourses, and woman-focused discourses").

42. 550 U.S. at 132; *see also id*. at 169 (Ginsburg, J., dissenting).

43. Brief of Sandra Cano et al., *supra* note 4, at App. 1-10.

44. *Id*. at App. 11-106.

45. *See* Turner, *supra* note 29, at 16-17; Bazelon, *supra* note 26.

46. In past cases, the Court had always required an exception to abortion restrictions when the restriction posed a threat to the woman's health, as well as her life. *E.g*., Stenberg v. Carhart, 530 U.S. 914, 929-38 (2000). Early on, the Court conveyed that its understanding of "health" extends beyond purely physical problems:

revisit the previously uninterrupted line of precedents elevating all aspects of a woman's health over other considerations. It does so by contending that the longstanding mental-health or psychological-health exception is not just unnecessary but incoherent, because such exception would permit abortions that themselves inflict mental or psychological harm.[47]

The *Gonzales* majority, however, employs the Brief not so much to accept the asserted incoherence of requiring an inclusive health exception,[48] but instead to bolster the opinion's earlier paragraphs on the brutality and gruesomeness of the abortion procedure it calls "intact D & E."[49] When citing Cano's brief, the majority portrays this brutality and gruesomeness as a trigger for regret that the woman will experience after the abortion. Not surprisingly, Justice Ginsburg and other observers wonder what this move might mean for other abortion procedures, which might also be described as brutal and gruesome.[50]

By citing only Cano's brief while describing abortion regret as "unexceptionable," the Court both overshoots and undershoots its mark. The opinion implicates all abortions, not just those banned by the challenged statute; yet it also fails to take into account what could be learned from the full range of judicial treatments of regret in other reproductive settings.

B. The Meaning of "Regret"

What does the Court mean by "regret"? The *Gonzales* opinion provides few clues. Other authorities, however, offer definitions that might illuminate some of the majority's assumptions and implications. Writing as an expert in contract law, E. Allan Farnsworth defines regret as "the sensation of distress that you feel on concluding that you have done something contrary to your present self-interest, something that does not accord with your present preferences."[51] According to law-and-emotion scholar Terry Maroney, "[t]o say that a person 'regrets' something is to express that she has made a negative self-evaluation based on past voluntary action now judged to be an avoidable

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> [T]he [physician's] medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Doe v. Bolton, 410 U.S. 179, 192 (1973).

47. Brief of Sandra Cano et al., *supra* note 4, at 6-26.

48. The Court upheld the statutory provision, articulating more circumscribed health justifications than those required by past opinions. 550 U.S. at 161-67.

49. *See* 550 U.S. at 136-40 (discussing the intact D & E procedure); *id.* at 159 (citing Cano's Brief).

50. *Id.* at 182 (Ginsburg, J., dissenting); *see, e.g.*, Guthrie, *supra* note 5, at 879; Manian, *supra* note 27, at 260-61.

51. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 20 (1998).

mistake, and that she has coupled that evaluation with a wish for an imagined reality that would have obtained had the action been different."[52] Behavioral law and economics scholar Chris Guthrie puts it this way: "[R]egret is a painful feeling we experience upon determining that we could have obtained a better outcome if we had decided or behaved differently."[53] Jeannie Suk's challenge to the feminist party line on abortion pushes the understanding of regret as distress or pain a step further, connecting regret to trauma experienced (and re-experienced, as in post-traumatic stress disorder) over past events.[54]

Psychological and psychoanalytic literature offers similar definitions,[55] while emphasizing the positive emotional growth that regret and regret-like experiences can foster. So, for example, such literature connects regret to the mourning process, which enables reality testing;[56] it explains how regret "allows reparative strivings to lead to potential interpersonal understanding"[57] and "carries some clear benefits for the individual;"[58] and it asserts that "the sorrow of regret represents a developmental improvement over blaming others for one's unhappiness."[59] From this vantage point, regret signals a positive transition: the embrace of one's past choice and an affirmation of "the chosen path as one's own."[60]

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52. Maroney, *supra* note 33, at 892-93.

53. Guthrie, *supra* note 5, at 882. Guthrie proceeds to criticize the *Gonzales* majority for failure to take into account considerations revealed by psychological research, including regret aversion (the anticipation of regret and its influence on decisionmaking), regret overestimation (the exaggeration of the intensity and duration of anticipated regret), regret dampening (steps taken to minimize regret), and regret learning (the benefits of regret for future decisionmaking).

54. Suk, *supra* note 34, at 1249-52.

55. *See, e.g.*, JANET LANDMAN, REGRET: THE PERSISTENCE OF THE POSSIBLE 36 (1993) ("Regret is a more or less painful cognitive and emotional state of feeling sorry for misfortunes, limitations, losses, transgressions, shortcomings, or mistakes. It is an experience of felt-reason or reasoned-emotions."); Daniel T. Gilbert et al., *Looking Forward to Looking Backward: The Misprediction of Regret*, 15 PSYCHOL. SCI. 346 (2004) ("Regret is a counterfactual emotion that occurs when one recognizes that a negative outcome was caused by one's own actions, and, indeed, self-blame is the critical element that distinguishes regret from closely related emotions such as disappointment. Because self-blame is a key ingredient in the recipe for regret, it is only natural that people should expect regret to be exacerbated by factors that highlight their personal responsibility for negative outcomes.") (internal citations omitted); Marcel Zeelenberg, *The Use of Crying Over Spilled Milk: A Note on the Rationality and Functionality of Regret*, 12 PHIL. PSYCHOL. 325, 326 (1999) ("Regret is the negative, cognitively based emotion that we experience when realizing or imagining that our present situation would have been better had we acted differently.").

56. MELANIE KLEIN, *Mourning and Its Relation to Manic-Depressive States*, *in* LOVE, GUILT AND REPARATION & OTHER WORKS 1921-1945, at 344 (1975).

57. Susan Kavaler-Adler, *The Conflict and Process Theory of Melanie Klein*, 53 AM. J. PSYCHOANALYSIS 187, 200 (1993).

58. Marcel Zeelenberg et al., *The Experience of Regret and Disappointment*, 12 COGNITION & EMOTION 221, 228 (1998).

59. LANDMAN, *supra* note 55, at 219 (attributing this "pertinent insight" to Melanie Klein).

60. PETER SHABAD, DESPAIR AND THE RETURN OF HOPE: ECHOES OF MOURNING IN PSYCHOTHERAPY 270 (2001).

Finally, as noted in the philosophical literature, regret might well follow from a difficult decision regardless of the choice that one makes[61] or even from action causing an unintended result.[62] In other words, regret can be understood as an inescapable feature of engagement with the world.[63]

Gonzales's portrayal of regret does not track any of these understandings. First, all these understandings of regret entail a look back in time, that is, a second look at an earlier situation with knowledge that would not have been available then. *Gonzales*'s language, by contrast, explicitly portrays the problem not simply as the subsequent rise of second thoughts but rather the absence of full knowledge that would have been available at the outset: "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, *what she once did not know*: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[64] This absence of knowledge has far more expansive implications, however, given the testimonials in Cano's brief, which are not confined to just the particular banned abortion procedure.[65] The reasoning is eerily reminiscent of the campaign in the late nineteenth century to criminalize abortion by persuading the public that women who sought such services were "*inadvertent* murderesses" who did not appreciate what abortion entailed.[66] Further, *Gonzales* co-opts the premise of voluntary action underlying the usual understandings of regret, a premise implicit in much of the legal literature and explicit in the psychoanalytic conception of regret as evidence of one's "owning" a past choice.[67]

To address the possibility of post-decision grief and sorrow, the *Gonzales* majority validates prohibiting access to intact D & E—a procedure that no woman was ever compelled to undergo but rather that offered one option to patients and their physicians. In so holding, the Court ignores the distress experienced by those *denied* the banned procedure, which might result in the birth of child facing a painful existence, damage to the woman's reproductive

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61. Explaining incommensurability, Joseph Raz writes: "One has to show why the fact that an agent is faced with options none of which is better or worse than the others does not justify his choice of one of them, whatever it may be." JOSEPH RAZ, THE MORALITY OF FREEDOM 362 (1986).

62. Bernard Williams writes of unavoidable "agent-regret" that follows even unintended results of an actor's conduct, such as a truck driver's accidental running over a small child. BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980, at 27-30 (1981). *See* Sharon R. Krause, *Political Agency and the Actual*, *in* READING BERNARD WILLIAMS 262, 270-71 (Daniel Callcut ed., 2009) (discussing this aspect of Williams's work).

63. *See* Joseph Raz, *Agency and Luck* 7-13 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 09-214, 2009) (examining Bernard Williams's concept of agent-regret), *available at* http://ssrn.com/abstract=1487552.

64. 550 U.S. at 159-60 (emphasis added).

65. *See* Brief of Sandra Cano et al., *supra* note 4, at App. 11-106.

66. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 22 (1984); *see* Siegel, *supra* note 28, at 1655-56.

67. *See supra* notes 59-60 and accompanying text.

future, or intense psychological hurt caused by the loss of control over difficult personal and medical choices.[68] And failing to look back even further, as Justice Ginsburg points out, the majority opinion assumes that conception and the sexual intercourse producing this result were either actively chosen or inevitable, without considering a possible role for regret for such pre-abortion-decision occurrences.[69]

C. Capturing Autonomy and Gender Equality: Regret as Reproach

The majority's language about the pre-abortion absence of knowledge and post-abortion grief of "a mother" has more particularized significance. It reflects a reliance on gender stereotypes that characterize women as ignorant, naive, and unable to elicit pertinent information from health care providers, as well as emotionally fragile if not psychologically unfit.[70] It also envisions all pregnant women as "mothers" and ascribes to them self-sacrifice[71] and child

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68. *See* Pamela S. Karlan, *The Law of Small Numbers:* Gonzales v. Carhart, Parents Involved in Community Schools*, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1394-95 (2008). Some empirical evidence shows that women facing abortion decisions experienced regret most often not from making "selfish choices," but instead from "capitulation to the wishes of others." Maggie Jones Patterson et al., *Abortion in America: A Consumer-Behavior Perspective*, 21 J. CONSUMER RES. 677, 684 (1995). Others point to empirical evidence of mental health problems experienced by women who sought abortions but were denied the procedure. Ronli Sifris, *Restrictive Regulation of Abortion and the Right to Health*, 18 MED. L. REV. 185, 200-01 (2010); *see also* Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RES. L. REV. 571, 592 (2009) ("[M]any empirical studies of post-abortion response . . . suggest that the predominant emotion women feel, both immediately after abortions and over the longer-term, is relief, and that few of those who do feel grief or conflict over their choice actually regret it."); Jennifer Steinhauer, *Long Floor Fight Over Spending Cuts Gets Personal*, N.Y. TIMES, Feb. 19, 2011, at A15 (reporting that Representative Jackie Speier, D-CA, during a House floor debate over an amendment to take away federal funding of Planned Parenthood, revealed that she had had an abortion).

More generally, one can find several studies suggesting that parenthood has a negative relationship to adult happiness. *E.g.*, DANIEL GILBERT, STUMBLING ON HAPPINESS 221-22 (2006); Robin W. Simon, *The Joys of Parenthood, Reconsidered*, CONTEXTS, Spring 2008, at 40, *available at* http://www.wfu.edu/~simonr/pdfs/Simon%20Contexts%202008.pdf.

69. 550 U.S. at 184 n.8 (Ginsburg, J., dissenting).

70. As Jeannie Suk points out in tracing the understanding of psychological trauma, beliefs about women's mental and emotional instability have a long history, including Freud's work on hysteria. Suk, *supra* note 34, at 1201-03. But even earlier understandings of hysteria regarded the disease as a physical problem based in the uterus, with the favored treatment the inducement of "hysterical paroxysms" by means of a physician's or midwife's manual or mechanical stimulation of the patient's clitoris. *See* Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love,"* 35 WASH. U.J.L. & POL'Y 363, 402-03 (2011). *See generally* RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION 111-14 (1999) (tracing the history of the vibrator, including its use as medical treatment for "hysterical" women). Whether viewed as emotional or physical, however, hysteria exemplifies the enduring tendency to pathologize women's experiences.

71. Judith Jarvis Thomson's classic analysis of abortion as a woman's refusal to perform as a Good Samaritan to the fetus challenges assumptions of maternal self-sacrifice. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 62 (1971). The argument receives a full legal elaboration in Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979). *See also, e.g.*, EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT (1996) (conceptualizing abortion as akin to self-defense, with the fetus as an active agent to whose intrusion the woman must consent); Suzanna Sherry, *Women's Virtue*, 63 TUL. L. REV. 1591, 1593 (1989) (describing

protection as preeminent interests, so that they necessarily feel self-reproach for deviating from these norms.[72] Because the majority essentializes women and treats post-abortion self-reproach as a more reliable feeling than the prior preference, it sees no need to argue that legislative decisions are generally better than individual decisions for purposes of avoiding regret.[73] In turn, the asserted concern about women's self-reproach[74] serves as a projection of judicial reproach for those who would entertain undergoing the procedure in question, or—given the testimonials in Cano's brief—any abortion.

We might call the archetype exemplified in *Gonzales* "regret as reproach" or "the reproach model of regret." Such shorthand emphasizes judicial disapproval, if not disdain, and also incorporates a cluster of reasons why *Gonzales*'s generalization about abortion regret has attracted so much criticism.

Justice Ginsburg and many of the commentators find especially offensive the idea that the state could target abortion choices and limit them in order to protect the women who make them. After all, up until *Gonzales*, abortion jurisprudence had come to rest on an increasingly thick understanding of autonomy,[75] reinforced, albeit belatedly,[76] with appreciation for what reproductive self-determination (or its absence) means for gender equality.[77]

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the Good Samaritan argument as the "best argument" for abortion freedom because it gets to the "real question," which is "not the importance of the dependent life involved" but rather whether the pregnant woman "may be compelled to provide the aid" without which the fetus will die).

72. *See supra* note 64 and accompanying text; *see also* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183-97 (2001) (criticizing feminists' preoccupation with motherhood and "the repronormativity of motherhood").

73. In other words, the Court's assertions about the essential nature of women simplify the line of reasoning. The Court no longer needs to establish that legislators are better able to predict individuals' future feelings than the individuals themselves.

74. In examining a situation in which one regrets his or her own action, philosopher Joseph Raz notes the connection between what Bernard Williams calls agent-regret and self-reproach:

> The essentially self-referential character of regret is particularly poignant due to its being, in part, about the person one is or was, as manifested on that occasion. It is poignant in being not regret that there is such a person, but that *I* am such a person. More specifically this instance of self-regret, though not all, involves something of a self-reproach, and self-reproach is essentially self-referential.

Raz, *supra* note 63, at 9 (emphasis in original).

75. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

76. Scholars highlighted the issue before the Court acknowledged it. *E.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Law, *supra* note 20.

77. *See, e.g.*, *Casey*, 505 U.S. at 856; *id.* at 927-28 (Blackmun, J., concurring in part and dissenting in part); *see also* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 207-27 (2005) (recounting how Justice Blackmun, author of the majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), initially resisted the Court's gender equality rulings but came to understand the link to abortion rights around the time of *Casey*); Heather J. Carlson, *Blackmun's Position Influenced Daughter's Decision About Pregnancy*, POST-BULLETIN (Rochester, Minnesota), Sept. 23, 2009 (reporting the unexpected teen pregnancy of Blackmun's daughter, her decision to marry, the dissolution of that marriage, and her present activities as an advocate for abortion rights).

Gonzales's reliance on a woman-protective rationale[78]—with its distrust of individual understanding and decisionmaking, its reliance on maternal stereotypes,[79] and its disapproval for those who would seek abortions—embodies a thinly disguised frontal attack on autonomy and gender equality, both underpinnings of reproductive rights. Critiques of *Gonzales* that take aim at paternalism reflect astonishment at this "disconnect" as well as fear about what it portends for the future of abortion rights and equality jurisprudence more generally.[80] From a more theoretical perspective, just as imaginative thinking about alternative courses of action makes choice possible,[81] regret—no matter how painful—can occur only if the subject had a choice to make.[82] Using the profoundly gendered context of abortion to justify limits on autonomy in order to prevent regret necessarily sets off alarms.

Despite these flaws, several reasons might suggest that *Gonzales* calls for a more searching response. First, contrary to the critics, some authorities contend that ascribing legal significance to regret—that is, allowing one to reconsider a decision later—enhances autonomy, by removing at Time 2 a constraint imposed at Time 1.[83] This argument gains force because of studies documenting widespread inability to predict even one's own emotional responses to future events—the difficulty of affective forecasting,[84] especially when it comes to the intensity of one's feelings. One way to conceptualize this difficulty sees it as absence of knowledge at Time 1, more precisely, knowledge then of how one will feel about the decision later, at Time 2.[85] Although this absence of knowledge differs from that invoked by *Gonzales*,[86]

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78. *See* Siegel, *supra* note 40.

79. *Id.* at 1036-40; Rebecca J. Cook et al., *Unethical Female Stereotyping in Reproductive Health*, 109 INT'L J. OF GYNECOLOGY & OBSTETRICS 255 (2010).

80. For a deeper analysis of the problems in trying to anchor reproductive justice to a constitutional right to abortion, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

81. ETHEL S. PERSON, BY FORCE OF FANTASY 32 (1996) ("Imagination allows us to contemplate alternatives to the real world. . . . Without it, there could be no picturing of mental alternatives to current discomfort or deprivation, no planning of a future course of action, no creative rethinking of the past to make it pertinent to the present and future."); Anne C. Dailey, *Imagination and Choice*, 35 L. & SOC. INQUIRY 175, 178 (2010) ("Because conceiving of alternatives to the present state of affairs is a necessary component of decision making, imagination is what, in part, makes individual choice possible.").

82. *See supra* notes 55-60 and accompanying text (noting psychological and psychoanalytic understandings of regret); *cf.* Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality and Its Alternatives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 348, 348-49 (Thomas Gilovich et al. eds, 2002) [hereinafter HEURISTICS AND BIASES] (examining "power of backward thinking" to compare what happened "to counterfactual alternatives that are constructed ad hoc rather than retrieved from past experience").

83. *See* Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 234-37 (2005).

84. *Id.* at 165-81.

85. Even so, however, data show that people tend to overestimate negative emotions when anticipating how they will feel in the future about particular events. *See* Daniel T. Gilbert et al., *supra* note 55.

86. *See supra* notes 64-66 and accompanying text.

the opinion blurs the distinction by conflating the absence of knowledge at Time 1 of then-knowable facts with absence of knowledge at Time 1 of emotional reactions that will not arise until Time 2.

Second, the literature on contract law claims to find a general trend favoring "paternalism," that is, the ability of promisors to renege. Although the freedom to renege seems to cut against the grain of a growing tendency to treat promises as binding in the first place, some observers see the two developments as related. They theorize that the opportunity to change one's mind operates as a safety valve in an era of commitments increasingly recognized as binding.[87] *Gonzales*'s consideration of regret, albeit in a very different context, could be rationalized as consistent with this trend, especially given the heightened significance ascribed to personal choices such as abortion.[88]

Third, when Justice Ginsburg, who clearly supports women's reproductive autonomy, expresses concern in *Gonzales* about pregnancies resulting from sexual assault, she puts the question of consent (to sex) on the table. Feminist theorist Catharine MacKinnon long ago portrayed abortion rights as one additional tool in men's arsenal of control over women's sexuality.[89] Others, acknowledging our patriarchal world in which women remain subordinate to men, stop short of MacKinnon's conclusion but call for more thoughtful understandings of women's "consent," particularly in sexual intercourse.[90] More recently, Jeannie Suk pushes further still, arguing that such feminist concerns about consent to sex problematize a constitutional right to make other personal choices, including abortion.[91] With these observations, the case for legal consideration of second thoughts seems less strained and manufactured.

Finally, to the extent critics target *Gonzales*'s portrayal of women as unusually emotional, the psychoanalytic and psychological literature complicates the argument. Despite the negative valence of regret, such painful feelings are said to contribute positively to personal development.[92] Thus, ascribing emotions to women is not the problem, but rather might well evoke additional concerns about autonomy and paternalism: singling out abortion patients for protection against regret infantilizes women well beyond the immediate choice to be made, denying them experiences that could prove

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87. FARNSWORTH, *supra* note 51, at 20.

88. *See supra* note 17 and accompanying text; *infra* note 94 and accompanying text.

89. Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade (1983), *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (Catharine A. MacKinnon ed., 1987).

90. *See* Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 335 (2008); Robin West, *Sex, Law and Consent, in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter West, *Sex, Law and Consent*]; Robin West, *The Harms of Consensual Sex*, *in* THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 317 (Alan Soble & Nicholas Power eds., 5th ed. 2008); *see also* MARCIA DOUGLASS & LISA DOUGLASS, THE SEX YOU WANT: A LOVERS' GUIDE TO WOMEN'S SEXUAL PLEASURE 148 (2002) (using the term "sex against desire" or "SAD").

91. Suk, *supra* note 34.

92. *See supra* notes 55-60 and accompanying text.

valuable for their ongoing growth, capacity, and agency.[93] Indeed, as noted, various precedents indicate that reproductive matters occupy an elevated place in each individual's self-definition or "concept of existence."[94] Given these stakes, it becomes easy to speculate that regret about such matters must trigger particularly sharp distress and poignant imaginings of a different self in a different family or nonfamily that might have been[95]—while also providing a unique opportunity for developing emotional maturity.

Taken together, such considerations suggest that *Gonzales*'s invocation of abortion regret and its expression of disapproval masquerading as concern about self-reproach call for more than reliance on autonomy, appreciation for the importance of abortion freedom, rejection of gender stereotypes, and condemnation of paternalism. The analysis that follows examines other factual settings in which courts have confronted the legal significance of regret about a reproductive decision or outcome. The range of contrasting treatments that emerge contextualizes *Gonzales*'s regret doctrine, allowing a deeper exploration of the regulatory and other functions for which courts have used the concept.

II. REPRODUCTION AND REGRET BEYOND *GONZALES*

Cases about abortion rights and other reproductive and related family choices and activities articulate several shared foundational values. For example, constitutional protection for "the decision to bear or beget a child," an autonomy principle frequently cited in abortion cases, originated in *Eisenstadt v. Baird*,[96] a case about contraception. This principle later developed a life of its own, appearing in a range of disputes about reproductive and other intimate or family matters, from pregnancy-based discrimination[97] to gay sex,[98] access to sex toys,[99] family caps in public assistance programs,[100] sterilization[101] and

93. *See id.*

94. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

95. *See* PERSON, *supra* note 81, at 132; *see also supra* note 74 (quoting Raz on Williams: "The essentially self-referential character of regret is particularly poignant due to its being, in part, about the person one is or was, as manifested on that occasion."); *cf.* Dale T. Miller & Brian R. Taylor, *Counterfactual Thought, Regret, and Superstition: How To Avoid Kicking Yourself*, *in* HEURISTICS AND BIASES, *supra* note 82, at 367.

96. 405 U.S. 438, 453 (1972) (striking down a law barring access to contraceptives by unmarried individuals); *see also* Roe v. Wade, 410 U.S. 113, 169-70 (1973) (reading *Eisenstadt*'s "bear or beget" language to encompass a woman's decision whether to terminate a pregnancy).

97. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974); Ponton v. Newport News Sch. Bd., 632 F. Supp. 1056, 1062 (E.D. Va. 1986); Lewis v. Del. State Coll., 455 F. Supp. 239, 248-49 (D. Del. 1978).

98. Lawrence v. Texas, 539 U.S. 558, 565 (2003); *cf.* Conaway v. Deane, 932 A.2d 571, 621 n.64 (Md. 2007) (upholding a state statute prohibiting the issuance of marriage licenses to same-sex couples). For an early reading of *Eisenstadt* challenging its suggestion of a right to sexual freedom, see Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83 (1980).

99. Williams v. Pryor, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002), *rev'd*, Williams v. Attorney General, 378 F.3d 1232 (11th Cir. 2004), *aff'd*, Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007).

other restrictions on procreation;[102] paternity;[103] parental custody;[104] and the exercise of other parental prerogatives;[105] as well as surrogacy arrangements,[106] the use of assisted reproductive technologies (ARTs),[107] and adoptions.[108]

The opinions in some such controversies, despite the shared values and doctrinal similarities, present understandings of reproduction and regret that differ significantly from the reproach model apparent in *Gonzales*. Selected from this array, the following case studies identify five archetypes that both supplement and unsettle *Gonzales*'s approach. These case studies are just that—studies or stylized sketches designed to capture a particular way of thinking that some, though not necessarily all, courts embrace. Moreover, in labeling the models exemplified by the case studies, I use names intended to distill the stance, value, or purpose that I ascribe to the court in question—shorthand for the particular deployment of regret that I see at work in each. Thus, I attribute "reproach" to the *Gonzales* Court although the opinion never uses that term. Accordingly, the ensuing case studies evoke models of regret

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100. *See* C.K. v. N. J. Dep't of Health and Human Servs., 92 F.3d 171, 194-95 (3d Cir. 1996) (rejecting the argument that family caps unconstitutionally burden reproductive choice); *cf.* Doe v. Norton 356 F. Supp. 202, 205 (D. Conn. 1973), *vacated by* Maher v. Doe, 432 U.S. 526 (1977).

101. Ruby v. Massey, 452 F. Supp. 361, 365-66 (D. Conn. 1978); Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977); Conservatorship of Valerie N., 707 P.2d 760, 785 (Cal. 1985) (Bird, C.J., dissenting); *In re* Romero, 790 P.2d 819, 821-22 (Colo. 1990); Wentzel v. Montgomery Gen. Hosp., Inc., 447 A.2d 1244, 1261-62 (Md. 1982); *In re* Eberhardy, 307 N.W.2d 881, 891-92 (Wis. 1981); *cf. In re* Moe, 432 N.E.2d 712, 719-20 (Mass. 1982); *In re* Grady, 426 A.2d 467, 473 (N.J. 1981); *In re* Moore, 221 S.E.2d 307, 312-13 (N.C. 1976).

102. *E.g.*, State v. Oakley, 629 N.W.2d 200, 216 (Wis. 2001) (Bradley, J., dissenting) (citing *Eisenstadt* to assert the unconstitutionality of conditioning probation for a delinquent child support obligor on the requirement that he has no more children); Trammell v. State, 751 N.E.2d 283, 290 (Ind. Ct. App. 2001) (holding unconstitutional a no-pregnancy condition of probation after the defendant's conviction of child neglect).

103. Inez M. v. Nathan G., 451 N.Y.S.2d 607, 610 (N.Y. Fam. Ct. 1982) (rejecting a putative father's constitutional defense against a paternity adjudication); Sorrel v. Henson, No. 02A01-9609-JV-00212, 1998 WL 886561 (Tenn. Ct. App. Dec. 18, 1998) (rejecting a constitutional challenge to a paternity statute); Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984) (acknowledging *Eisenstadt*'s language but rejecting an asserted constitutional right to avoid child support obligations).

104. Smith v. Malouf, 722 So. 2d 490, 502 (Miss. 1998) (Smith, J., concurring in part and dissenting in part) (citing *Eisenstadt* in questioning the majority's reversal of the dismissal of an unmarried father's suit for the intentional infliction of emotional distress against the mother who placed a child for adoption in another state, thwarting his efforts to obtain custody).

105. *E.g.*, Arnold v. Bd. of Educ. of Escambia Cnty., 880 F.2d 305, 311-12 (5th Cir. 1989) (recognizing that reproductive choice includes the freedom to carry a pregnancy to term and allowing parents to sue the school board for coercing minors to refrain from consulting their parents in connection with abortion).

106. J.R. v. Utah, 261 F. Supp. 2d 1268, 1279 (D. Utah 2002) (citing *Eisenstadt* in a gestational surrogacy case to overturn statutory recognition that the woman who gives birth is the child's mother).

107. Lifchez v. Hartigan, 735 F. Supp. 1361, 1376 (N.D. Ill. 1990) (citing *Eisenstadt* in overturning restrictions on the practice of reproductive endocrinology); J.B. v. M.B., 783 A.2d 707, 715-16 (N.J. 2001) (citing *Eisenstadt* in a dispute over the disposition of frozen preembryos); Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992) (same); Litowitz v. Litowitz, 10 P.3d 1086, 1094 (Wash. Ct. App. 2000) (same), *rev'd en banc*, 48 P.3d 261 (Wash. 2002); Smedes v. Wayne State Univ., No. 80 72583, 1980 U.S. Dist. LEXIS 17850 at *10 (E.D. Mich. July 16, 1980) (citing *Eisenstadt* in a challenge to a clinic's policy of denying to unmarried women access to donor insemination procedures).

108. Doe 1 v. State, 993 P.2d 822, 835 (Or. Ct. App. 1999) (rejecting birth mothers' argument that allowing adoptees access to their birth records violates the constitutional right recognized in *Eisenstadt*).

that I name "redemption" (in adoption surrenders), "resistance" (in surrogacy arrangements), "responsibility" (in accidental parentage), "reconsideration" (in the disposition of frozen embryos), and "respect" (in sperm donor agreements). Each label emphasizes a distinctive doctrinal or rhetorical function of regret about a reproductive decision or outcome, while also presenting an alternative approach that *Gonzales* failed to acknowledge and investigating its fallout.

Despite the notable differences among the case studies, *Gonzales* emerges as less of an anomaly than an iceberg's tip about how law constructs gender, sex, choice, and reproduction. Together, these case studies challenge *Gonzales*'s depiction of the "causation" of regret, exposing both the state's role in inducing regret and regret's regulatory function in exacting an appropriate "price of pleasure" for certain sexual activities. Perhaps paradoxically, gender stereotypes provide a recurrent theme at the same time that the case studies ignore gender—for example, treating sexual intercourse, unlike technologically assisted reproduction, as always an equally tempting, desired, enjoyable, and satisfying erotic experience for men and women alike. This same analysis also reveals how family law today has diverted attention from inconsistencies in its policies and leading doctrines, in turn camouflaging its ongoing project of sexual governance.

A. Surrenders of Infants for Adoption: Regret as Redemption

One especially conspicuous counterpoint to *Gonzales* can be found in the legal treatment of regret experienced by women who have surrendered children for adoption. I call this approach "regret as redemption" or "the redemption model of regret," given judicial signals that regret has a positive role to play on a sexually transgressive woman's path to redemption. Here, we see a conceptualization of regret resembling that presented in the psychoanalytic literature—the idea that such painful feelings about a past choice can spark positive emotional development—but the resemblance is a mere caricature because the autonomous choice that forms the foundation of the psychoanalytic understanding is nowhere to be found in this case study. Although the most vivid evidence comes from the period spanning the end of World War II to the Supreme Court's required legalization of abortion in *Roe v. Wade* in 1973,[109] contemporary cases and practices indicate the extent to which the earlier views persist.

To capture how this model of regret played out during the earlier era and how it operates in more recent times, two snapshots comprise this case study—reflecting "then" and "now," respectively. An analysis of the governing legal principles, including the treatment of regret, follows.

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109. 410 U.S. 113 (1973).

1. Evidence of the Practice of Surrender

a. Then

During the pre-*Roe* decades, white unmarried mothers faced enormous pressure to relinquish—or "surrender,"[110] as the law often called it—their infants for adoption. Adoption practice treated these women as neurotic and deviant and hence unfit to parent, yet able to provide valuable resources (babies) to married infertile couples.[111] Ann Fessler's disquieting book, *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades Before* Roe v. Wade,[112] documents the resulting misery through the narratives of many of these women; their painful stories tell of parental pressures, stigma, shame, and life-long emotional scars—all despite experts' paternalistic contentions that surrender would help these women reconstitute their lives in a healthy way.[113] Reports like these have prompted historian Rickie Solinger to generalize that "adoption is rarely about mothers' choices; it is, instead, about the abject choicelessness of some resourceless women."[114]

The narratives in Fessler's book bear an uncanny similarity to the personal story that Sandra Cano tells in her amici brief in *Gonzales*—the brief that

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110. *See, e.g.*, *In re* Janet G. v. New York Foundling Hosp., 403 N.Y.S.2d 646, 651 (Fam. Ct. 1978). Both terms are evocative, especially "surrender," suggesting associations with religious beliefs (the salvation to be achieved by "surrender to Christ") or rehabilitation from past transgressions (Alcoholics Anonymous's 12-step "surrender"). Thus, for example, the New Testament of the Bible commands, "Do not offer any part of yourself to sin as an instrument of wickedness, but rather offer yourselves to God as those who have been brought from death to life; and offer every part of yourself to him as an instrument of righteousness." Romans 6:13. Similarly, the third step in AA's 12-step program recites that "[we] [m]ade a decision to turn our will and our lives over to the care of God *as we understood Him*." Alcoholics Anonymous, THE TWELVE STEPS ILLUSTRATED, *available at* http://www.aa.org/pdf/products/p-55_twelvestepsillustrated.pdf.

111. RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 69-70 (2001) [hereinafter BEGGARS AND CHOOSERS]. The conventional wisdom pathologized the behavior of white, unmarried mothers, sometimes in expressly Freudian terms. *See, e.g.*, LEONTINE YOUNG, OUT OF WEDLOCK: A STUDY OF THE PROBLEMS OF THE UNMARRIED MOTHER AND HER CHILD 21-39 (1954). Contemporaneously, white babies were sought-after commodities who would help white childless couples in this post-World War II era of "compulsory parenthood." ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 141-43 (1995). Children of color born to unmarried mothers during this era were often reared by their families, instead of being "placed out." ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 78 (2009). The "deviancy" of such mothers was assumed inherent, and their infants could not satisfy the desires of infertile adults seeking white babies. RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 188 (1992).

112. ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006).

113. The narratives include reports of parental pressure that are remarkably similar to what Cano describes in her own affidavit in her brief, *supra* note 4, at App. 1-10.

114. SOLINGER, BEGGARS AND CHOOSERS, *supra* note 111, at 67; *see also* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 489 (1996) (describing the marginalization of birth mothers and their interests in twentieth-century adoption practice).

constituted the sole citation of authority for the *Gonzales* majority's reliance on abortion regret.[115] The resemblance should come as no surprise, given that Cano's unplanned pregnancy occurred during the same time period as those of the women who contributed their reflections to Fessler's collection. This was a era when respectable (white) women were expected to avoid sex before marriage, and birth control and abortion remained out of reach in order to deter or even punish transgressions.[116] Moreover, despite Cano's role now in two famous abortion cases,[117] Cano did not terminate the pregnancy but—just like the women in Fessler's book—gave birth and surrendered the child for adoption.[118]

The testimonials of the "180 women injured by abortion" included in Cano's brief report emotional reactions to their past abortions that closely track the testimonials of surrendering birth mothers in Fessler's book. Consider first these two affidavits from Cano's brief:

> **AFFIDAVIT**
> * * *
> **The State of Georgia**
> * * *
> **Deborah R. Paine**
>
> *How has abortion affected you?* The abortions caused me to feel worthless, ashamed, angry, profound sadness. I was driven to perfectionism to try and make myself feel worthy of the air I breathed and space I occupied. I turned to 11 years of alcohol and drug addiction to cope with the regret. In my need to punish myself, I had a tubal ligation (sterilization). So I am childless. After killing my children, I did not deserve to be a mother. . . .[119]

> **AFFIDAVIT**
> * * *
> **The State of Kansas**
> * * *
> **Melody A. Athey**
>
> *How has abortion affected you?* I repressed any memory of the experience for 25 years. My whole lifestyle changed after my abortion.

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115. *See supra* notes 35-47 and accompanying text.

116. The stories took place not only before the Supreme Court decided *Roe v. Wade* but also before it granted constitutional protection the year before to access to birth control by unmarried women in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

117. Gonzales v. Carhart, 550 U.S. 124 (2007); Doe v. Bolton, 410 U.S. 179 (1973).

118. Brief for Sandra Cano et al., *supra* note 4, at App. 4.

119. *Id.* at App. 19.

> I started drinking heavily and married an alcoholic. Shortly after, I tried suicide once and considered it several times. I had repeated periods of depression especially around the anniversary date of my abortion. The guilt I felt was overwhelming.[120]

Now, consider this account of a birth mother's experience, from Fessler's book:

> I got married. I thought, "I better get myself off the streets. This is not going well." I was just living this lie, this lie, this lie. "Do you have children?" "No." It's like being Judas every time. You're denouncing who you are, who they are. You just feel terrible. I married this man under false pretenses. Did he ever know I had children? Absolutely not. I didn't tell him.
>
> I had a wedding, the wedding that my sister wanted. Everything was a lie. I didn't want a wedding, but he was Italian and Catholic, and you had to have a wedding. Oh, God. Then he says, "We can have children." I looked at him, like, "Are you insane?" The last thing I ever wanted to be was pregnant. I said, "I'm too young to get pregnant." That's what I told him. I was twenty, twenty-one at the time. He was an airline pilot, I was a stewardess. I said, "Well, maybe in five years, I don't know." But the whole idea was so repellent to me. It was all mixed up with this grief and this guilt. No, I just couldn't.
>
> So I'm married and everything is so perfect. We go on a Hawaiian honeymoon–everything is just so, so, nice. We lived on forty acres of land, we built this beautiful house, we had so much money. Every weekend we were going over to my parents' house and having steak dinners and barbecues. I remember one of these Sundays as we pulled into my parents' suburban neighborhood I just started hitting my head against the seat of the car. I was just going a little crazy. It was all the things I couldn't say. It was July. The birth month. So July was always horrible, horrible, horrible. Even if my mind didn't remember, my body remembered. This really lives in your body.
>
> *–Diane IV*[121]

Jeannie Suk recognizes the symptoms described by the women quoted in Cano's brief as those characteristic of post-traumatic stress disorder.[122]

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120. *Id.* at App. 35.
121. FESSLER, *supra* note 112, at 210.
122. Suk, *supra* note 34, at 1232-33.

Certainly the women in Fessler's book are similarly afflicted.[123] The juxtaposition is especially notable because of the frequency with which antichoice advocates have touted adoption as the preferred alternative for women facing unwanted pregnancies.[124] Some of Fessler's narrators express the view that the sequelae of an abortion would have been far less distressing than their post-surrender anguish.[125]

b. Now

In re Adoption of D.N.T.,[126] decided by a divided Mississippi Supreme Court in 2003, complements the material from the pre-*Roe* decades, revealing the persistence of the earlier attitudes and practices that account for the "choicelessness"[127] experienced by some birth mothers, at least in some jurisdictions. In this case, the majority declined to let seventeen-year-old Camille reclaim her baby, Diane, despite facts that led the dissent to find "coercion" and "underhandedness" by the prospective adopters, Carol and Rick, who "used every manipulative tactic available" to procure surrender.[128]

The case tells the following story: Soon after Camille, then age sixteen, gave birth to Diane in Texas, she and baby Diane moved to Arizona, where Camille's mother, Sally, lived. There, Camille agreed to have Sally serve as Diane's guardian. With Diane, Camille traveled from Arizona to visit her father, Curt, in Mississippi; there Camille met Carol, and Carol's husband, Rick, a couple desperately seeking an infant to adopt. Carol's mother was living with Curt, and she facilitated the introduction.[129]

In response to Carol and Rick's invitation, Camille and Diane moved into the couple's home, where Carol cared for Diane and supported both Camille and Diane for several months. For most of this period, Camille was present at the home during the day but, with encouragement from Carol and Rick, she spent many nights elsewhere with a new boyfriend, Calvin. Carol and Rick

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123. *See* FESSLER, *supra* note 112, at 211 (listing symptoms that include, inter alia, depression, shame, self-loathing, "and occasionally post traumatic stress disorder, characterized by extreme anxiety, panic attacks, flashbacks, and nightmares"); *id.* at 233 (quoting a birth mother's assertion that she had "all the classic symptoms" of post-traumatic stress disorder). For judicial acknowledgment of the emotional stakes in surrender, albeit in essentializing terms, see *Roe v. New York Foundling Hosp.*, 318 N.Y.S.2d 508, 515 (App. Div. 1971) (Stevens, P.J., dissenting) ("[T]he bond between natural mother and child is generally the strongest of all bonds").

124. For the rise of contemporary arguments for adoption as a preferred alternative to abortion, see Siegel, *supra* note 28, at 1678 n.122.

125. FESSLER, *supra* note 112, at 53; *see also* OFF AND RUNNING (First Run Features 2009). In this documentary, Avery, an adopted teen who tries to find and establish a relationship with her birth mother, discovers she is pregnant and has an abortion. Tellingly, Avery states that she would never have a baby and surrender the child for adoption.

126. *In re* Adoption of D.N.T., 843 So. 2d 690 (Miss. 2003).

127. *See supra* note 114 and accompanying text.

128. 843 So. 2d at 717 (McRae, J., dissenting).

129. *Id.* at 694.

discussed adopting Diane with Camille, who neither consulted her mother, Sally, nor obtained independent counsel. Instead, Camille initially acquiesced in the adoption plan, and she signed a letter asking the Arizona court to terminate Sally's guardianship there. Accordingly, about three months after Camille and Diane arrived in Mississippi, the Arizona guardianship was terminated, and Carol and Rick submitted in a Mississippi court a sworn complaint for adoption, which Camille signed under oath, again without consulting her mother or counsel. In fact, all the paperwork for Camille to terminate the guardianship and to consent to adoption had been prepared by the attorney for Carol and Rick.[130]

Only two weeks later, Camille changed her mind. She regretted her decision to surrender Diane for adoption by Carol and Rick. Camille filed an objection, asking the court to nullify any documents she had signed. Camille's mother, Sally, came to Mississippi, joining Camille in these proceedings. Nonetheless, the court awarded temporary custody of Diane to Carol and Rick, who required Camille to leave their home and denied Camille the opportunity to see Diane.[131] In fact, when Camille had told Carol and Rick that she had changed her mind, Carol cried, and Rick told Camille to get the "'f— out of his house' and that 'no one was going to take this baby from them—that he would hurt anyone that tried.'"[132]

In *D.N.T.*, the Mississippi Supreme Court ruled against Camille and her mother, Sally, after Camille attempted to revoke her consent to adoption of her baby, Diane. Allowing the adoption case to proceed, the court relied inter alia on language in the state adoption consent statute that makes the parent's age irrelevant, construing Camille's initial surrender as an abandonment sufficient to justify termination of parental rights and condemning Camille's bad decisions and immaturity, including specifically her sexual relationship with her new boyfriend, Calvin.[133]

2. The Law of Surrender, Regret, and Revocation

As a matter of law, surrender for adoption, just like abortion, requires consent, although a child can become available for adoption through involuntary termination of parental rights in cases of sufficiently extreme and persistent abuse or neglect.[134] Contests about consent to adoption or surrender

130. *Id.* at 694-95.
131. *Id.* at 695.
132. *Id.* at 708.
133. *Id.* at 709.
134. *See* Santosky v. Kramer, 455 U.S. 745, 760 & n.10, 768 (1982) (articulating a requirement of parental unfitness that must be established by a more demanding standard than a preponderance of the evidence for state termination of parental rights).

implicate an important autonomy right, namely "the interest of parents in the care, custody, and control of their children," which is "perhaps the oldest of the fundamental liberty interests recognized by . . . [the Supreme] Court."[135] Despite the similar settings, however, the legal responses to assertions of regret diverge sharply in the context of abortion, on one hand, and adoption, on the other. Although *Gonzales* makes a generalization about women's post-abortion regret legally relevant, women's post-surrender regret—even when expressed on an individual, subjective basis—often carries no such legal weight. Surrenders are hard to revoke, usually requiring the birth mother to prove "fraud, misrepresentation, duress, overreaching, mistake or corruption."[136] Although reformers have proposed various safeguards, no legal authority has suggested, parallel to *Gonzales*'s reasoning, that prospective regret ought to preclude altogether particular options for birth parents,[137] namely surrender, even if certain anti-adoption support groups might embrace this preference.[138]

In the pre-*Roe* days, when birth mothers who had second thoughts went to court even shortly after they surrendered, judges seem to have regarded their emotional difficulties as "unexceptionable,"[139] yet refused to honor a change of mind, even under a then-modern standard allowing judicial discretion. For example, in the words of one court declining to allow a birth mother to revoke her consent:

> Contemplation of the surrender of one's own child is in many, if not all, cases a cause of emotional and mental stress. Many such surrenders are undoubtedly by mothers of children born out of wedlock and are contemplated because the trying circumstances tend to show that the welfare of the child calls for action at variance with that dictated by natural instincts of maternal love and affection. No statute has said that surrenders are valid only if executed free from emotion, tensions, and pressures caused by the situation. No principle of law requires the rule. A balance of the interests of the persons concerned and of society weighs strongly against it.[140]

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135. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

136. Stotler v. Lutheran Soc. Serv. of Iowa, 209 N.W.2d 121, 127-28 (Iowa 1973); *see also In re* Adoption of Baby C., 480 A.2d 101 (N.H. 1984) (determining by statute that withdrawal of the birth mother's consent would not serve the child's best interests).

137. Some would argue that children have a "right" to learn the identities of their birth parents upon adulthood. *E.g.*, MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 22 (2001).

138. *See* Lucinda Franks, *Annals of Law: The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56, 58-61 (recounting anti-adoption views of Concerned United Birthparents). For additional analysis of CUB's views and advocacy, see SOLINGER, BEGGARS AND CHOOSERS, *supra* note 111, at 103-38.

139. *See supra* note 24 and accompanying text.

140. *In re* Surrender of Minor Children, 181 N.E.2d 836, 839 (Mass. 1962). This language also appears in *In re* Adoption of a Minor Child, 287 A.2d 115, 121 (R.I. 1972). Further, the conventional wisdom regarded an unmarried birth mother's desire to keep the child as additional evidence of her

One can find resemblances between the legal responses then and now. True, most unmarried women who carry their pregnancies to term today rear their children.[141] Nonetheless, one still sees stories of deep and anguished regret in reported cases of attempted revocations of adoption plans. Birth mothers usually prevail only when they can prove coercion or duress,[142] and courts often set a high legal threshold for such findings. For example, one state appeals court stated, "'[P]roof of inexperience, indecisiveness, uncertainty, emotional stress and a failure to fully comprehend the effect of surrender is insufficient to justify revocation."[143] Even when circumstances raise serious questions about the voluntariness of the initial consent or surrender—as in *D.N.T.*, when the birth mother is a minor and especially eager prospective adopters have exploited her vulnerabilities—simple regret, no matter how intensely felt, typically fails to carry the day in court.[144]

Some of the adoption cases and literature, including the reminiscences collected in Fessler's book,[145] suggest that regret has no legal traction because the initial requirement of voluntary consent itself receives only lip service, as illustrated by *D.N.T.* Surely, Camille's status as a minor and the surrounding circumstances raise significant questions about the voluntariness and genuineness of her consent, questions the dissenting judges would find fatal.[146] Especially provocative is the majority's rejection of Camille's argument that, by analogy, her inability under state law to have an abortion without parental

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emotional instability. *See, e.g.*, CALEB FOOTE, ROBERT J. LEVY & FRANK E.A. SANDER, CASES AND MATERIALS ON FAMILY LAW 136-38 (1966) (instructing law students about relevant considerations in counseling unmarried mothers). *See generally* YOUNG, *supra* note 111 (attempting to explain personality patterns that produce out of wedlock births and decisionmaking about adoption and other responses).

141. Paul Placek, *National Adoption Data, in* ADOPTION FACTBOOK IV 3, 11 (National Council for Adoption, 2007) (reporting 98%).

142. *E.g.*, *D.N.T.*, 843 So. 2d at 707-09; *Baby C.*, 480 A.2d at 104; *see also* JESSICA VALENTI, THE PURITY MYTH: HOW AMERICA'S OBSESSION WITH VIRGINITY IS HURTING YOUNG WOMEN 114 (2009) (reporting schemes to pay teens to carry pregnancies to term and surrender babies for adoption). *But see, e.g.*, McCann v. Doe, 660 S.E.2d 500, 505, 508 (S.C. 2008) (allowing particular "emotional stressors" to justify revocation).

143. Sigurdson v. Wash. Dep't of Soc. & Health Serv. (*In re* Dependency of MS), 236 P.3d 214, 218 (Wash. Ct. App. 2010) (citing *In re* Adoption of Baby Girl K., 615 P.2d 1310, 1316 (Wash. Ct. App. 1980)). In *Baby Girl K.*, the court concluded: "We hold that a lack of full understanding of the consequences, coupled with inexperience, emotional stress, uncertainty and indecisiveness are insufficient findings to allow repudiation of the surrender." 615 P.2d at 1315.

144. *See, e.g.*, Kayla P. v. Morgan C., No. 1CA-JV 09-0190, 2010 WL 987071 (Ariz. Ct. App. 2010); *In re* Minor Child David, 256 A.2d 583, 587-88 (Me. 1969); *In re* Baby Boy L., 534 N.Y.S.2d 706 (App. Div. 1988). Indeed, also worth noting is the frequency of state intervention in ethnic and racial minority families, often including involuntary terminations of parental rights. In these cases, parental choice and autonomy expressly give way to the state's asserted interest in protecting children from harm, a test that critics see as racially biased. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Mary Lyndon Shanley, *Toward New Understandings of Adoption: Individuals and Relationships in Transracial and Open Adoption*, *in* CHILD, FAMILY, AND STATE 15, 38 (Stephen Macedo & Iris Marion Young eds., 2003).

145. FESSLER, *supra* note 112.

146. 843 So. 2d at 717-20 (McRae, P.J., joined by Diaz, J., dissenting).

consent (or court authorization obtained through a judicial bypass) should invalidate her surrender of her child. In the abortion context, the U.S. Supreme Court has cited the immaturity and vulnerability of minors as reasons why states may impose additional hurdles that would not survive constitutional scrutiny if applied to adults,[147] but it has not yet considered what this analysis means for minors' consent to adoptions. Certainly, the *D.N.T.* majority's glib reliance on the lower court's logic—that when Camille gave birth, she became a parent and thus achieved emancipation—fails to grapple satisfactorily with the autonomy values at stake.[148]

Instead of engaging seriously with the legal import of regret for improvident consent, the opinions in such cases often express disapproval of the birth mother's behavior. This negative stance is apparent in the *D.N.T.* court's treatment of Camille's initial surrender as abandonment,[149] with no inquiry whether such conduct might constitute a parental act, such as arranging for alternate care for one's child.[150]

Often, the expressions of disapproval focus on the birth mother's sexual activities. For example, the *D.N.T.* majority explicitly condemned Camille, stating: "The record is replete with bad decisions Camille has made her entire life. She has proven herself immature beyond understanding, as evidenced adequately by her own testimony of leaving Diane with almost strangers (Rick and Carol) while she spent the nights at her new boyfriend's house having sex and smoking marihuana with him."[151] Older cases often followed a similar approach,[152] revealing a mindset that tracks the general attitudes of the pre-*Roe* adoption boom: white unmarried birth mothers were neurotic and deviant, as their sexual activities demonstrated, but placement of their babies in two-parent homes could set these women on a respectable path and save the children, too.[153]

Against this background, the distress and pain of regret emerge as well-deserved punishment for women who have transgressed prevailing sexual

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147. *See, e.g.*, Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006); Bellotti v. Baird, 443 U.S. 622 (1979); J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS (2006).

148. 843 So. 2d at 709-10; *see also* Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 792-93 (2000).

149. 843 So. 2d at 707-08.

150. *See, e.g.*, *In re* K.A.W., 133 S.W.3d 1 (Mo. 2004) (reversing termination of parental rights based on the mother's twice surrendering twins for adoption); Sanger, *supra* note 114, at 422 ("[T]he distinction between providing alternate care for one's child and disregarding the child altogether is often overlooked").

151. 843 So. 2d at 709.

152. *E.g.*, Roe v. New York Foundling Hosp., 318 N.Y.S.2d 508 (App. Div. 1971). Such courts emphasize that the birth mother who changes her mind might have improper motives. *See id.* at 512; *see also* FOOTE, LEVY & SANDER, *supra* note 140, at 137 (instructing law students that "there must be consideration of the [unmarried] mother's motives for wanting to the keep the child").

153. FESSLER, *supra* note 112, at 182-85; SOLINGER, BEGGARS AND CHOOSERS, *supra* note 111, at 69-70; *see also* MAY, *supra* note 111, 141-43 (noting how white babies became valuable commodities after World War II in the era of "compulsory parenthood" in the U.S.).

norms. Rather than trying to address or prevent this emotion, adoption practice and case law often treat regret as a regulatory device, part of the price of illicit sex and also the start of the road to redemption. Under the conventional wisdom, surrender constitutes a prerequisite for a woman to overcome her aberrant past and clear the way for a more socially acceptable future. This paternalistic approach disregards a birth mother's assessment of her own best interests.

Of course, regret that serves as punishment is itself socially constructed. We can surmise that, absent powerful cultural forces, some surrendering mothers might well have felt (or admit that they felt) liberated.[154] Regardless, attitudes about women's nonmarital sexual activities meant that white birth mothers perceived that they had no choice but to relinquish their babies, and this absence of autonomy assumed its own distinctively oppressive character,[155] reinforced by law.

The Supreme Court's early abortion cases, *Roe v. Wade*[156] and *Doe v. Bolton*,[157] took for granted such sex-negative attitudes, citing the resulting emotional burden as a basis of the liberty interest driving recognition of a constitutional right to terminate a pregnancy.[158] Today, the Supreme Court has given its constitutional blessing to sexual relationships that take place outside marriage, even celebrating them, at least for men.[159] Nonetheless, earlier norms persist, and the Court's recent solicitude does not explicitly consider, beyond disallowing criminal penalties, how far law may go in imposing or reinforcing consequences that might follow from nonmarital sex.[160] Disapproval of women's sexual choices continues to loom large in abortion law

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154. Carol Sanger notes the strong social norm of maternal presence, Sanger, *supra* note 114, at 424; the frequent internalization of this norm, *id*. at 445; and the portrayal as "monsters" of those mothers who happily surrender their children, *id*. at 432.

155. Fessler herself has emphasized this point. Ann Fessler, Author of *The Girls Who Went Away*, NARAL Pro-Choice Missouri Speakers Series, St. Louis, MO (Mar. 24, 2009).

156. 410 U.S. 113 (1973).

157. 410 U.S. 179 (1973).

158. *Roe*, 410 U.S. at 153 (listing detriments, including "additional difficulties and continuing stigma of unwed motherhood"); *Doe*, 410 U.S. at 196-97 (discussing physicians' empathy for patients' "woes" and awareness of patients' "human frailty, so-called 'error,' and needs").

159. Lawrence v. Texas, 539 U.S. 558 (2003); Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1182 (2006) (describing "clear judicial approval"); *see also* Ariela Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 763 (2006) ("If, historically, marriage was the sine qua non of licit sex and nonmarriage necessarily marked sex as illicit, *Lawrence* turns that construct on its head by linking the licit nature of same-sex sex to its location outside of legal marriage."). Of course, many lower courts have read *Lawrence* narrowly so that it only protects against criminal punishment for consensual sexual activity in private. *See, e.g*., Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1151-52 (2010). Further, one can read *Lawrence* as a celebration of same-sex relationships only to the extent that they mimic marriage. *See, e.g*., Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414-16 (2004).

160. *See generally* Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 812-35 (2010) (detailing prevailing sex negativity and its persistence even after *Lawrence*). For additional analysis, *see infra* notes 227-285, 477-498 and accompanying text.

and politics, as illustrated, for example, by proposed abortion bans with exceptions for rape and incest[161]—situations in which the woman arguably did not consent to sexual intercourse or, at least, presumably did not enjoy it.[162]

These authorities hint at the operation of the traditional sexual double standard,[163] which comes into sharper focus with the juxtaposition of cases analyzing defects in birth fathers' consent to adoption. One finds a number of successful claims by unmarried fathers overturning adoptive placements, even some that had lasted for years, because of violation of these men's liberty interests.[164] True, law might well distinguish between a birth parent who consents but later changes her mind and one who was excluded from the process altogether; nonetheless, cases like *D.N.T.* raise doubts about what meaningful participation in the process should require. Tellingly, in one of the most highly publicized struggles in which a birth mother changed her mind, the "Baby Jessica case," the birth mother prevailed only after joining the birth father's claim that he had been improperly excluded from the process—even though his exclusion occurred solely because she had purposely thwarted him from satisfying the requirements for legal participation by first falsely identifying a different man as the father.[165] By herself, Baby Jessica's birth mother would not have succeeded in revoking her consent.

As a result, one cannot explain the legal irrelevance of birth mothers' regret by citing the well-founded reliance or investment of the prospective adopters, or even the psychological bonds to the adopters forged by the child between the initial placement and the court proceedings following attempted revocation.[166] First, not all adopters deserve such judicial solicitude, as Carol

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161. *E.g.*, No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. § 308 (2011).

162. Of course, sometimes women even experience orgasm in rape or other coercive sex. *See* SAPPHIRE, PUSH 24, 35 (Vintage Books 1997) (1996); FAMILY AFFAIR (C-Line Films 2010); *see also, e.g.*, Curtis v. State, 223 S.E.2d 721, 723 (Ga. 1976) ("The trial court did not err in refusing to allow Curtis' attorney to ask the prosecutrix [the victim] whether she experienced orgasm during these acts of intercourse; the answer would have been legally irrelevant to the issue of consent."). Even if our vocabulary lacks a word to describe such phenomena, clearly "enjoyment" or "pleasure" is too simplistic to be a suitable candidate.

163. *See, e.g.*, Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 787-88 (1988). Kim Buchanan sees evidence of this double standard in the operation of a "sex discount," which becomes apparent in the level of scrutiny that the Supreme Court applies. Although gender-based discriminatory state action triggers intermediate scrutiny, the Court uses such heightened review only when it sees such state action as a regulation of public life; the Court employs less demanding rationality review instead when framing the state action as a regulation of sex. Buchanan, *supra* note 159.

164. *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992) ("Baby Jessica" case, halting proposed adoption and ending pre-adoptive placement); *In re* Petition of John Doe, 638 N.E.2d 181 (Ill.) (vacating adoption); *In re* Petition of Kirchner, 649 N.E.2d 324 (Ill.), *stay denied sub nom*. O'Connell v. Kirchner, 513 U.S. 1138 (1995) ("Baby Richard" case).

165. *B.G.C.*, 496 N.W.2d 239. The mother's deception of the birth father in the famous "Baby Richard" case also gave her an opportunity to change her mind about her own decision to surrender. *Petition of John Doe*, 638 N.E.2d at 181-82.

166. Certainly, such issues were raised in the litigation. *E.g.*, *B.G.C.*, 496 N.W.2d at 245; *In re* Baby Girl Clausen, 502 N.W.2d 649, 668-69 (Mich. 1993) (Levin, J., dissenting) (emphasizing the

and Rick in *D.N.T.* illustrate.[167] Second, a hypothesis that focuses on the adopters or even the child as the "promisee(s)"[168] fails to take into account the apparently greater readiness to undo placements in response to some birth fathers' claims. Although this double standard does not perfectly map onto the maternal stereotype animating *Gonzales*'s regret rhetoric, both have a place in a larger gender script.[169] Just as, per *Gonzales*, pregnant women should be willing to sacrifice their health for the sake of their fetuses, even those they would abort, so too a birth mother like Camille should be willing to endure psychological pain so that her child (as well as she herself) can enjoy a supposedly better future.[170] By contrast, unmarried birth fathers do not need redemption, they encounter far fewer expectations of altruism, and their offspring—even those whom these men previously did not suspect existed—constitute their protectable "rights," if not their "property."[171] Indeed, men's regret serves other purposes, as explored below.[172]

This analysis highlights how legal rules construct regret and do so in a gendered manner. Reforming the law to give birth mothers more time to change their minds or ensure them legal counsel, as some have proposed, could help reshape the emotional landscape.[173] Likewise, imposing more rigorous requirements of affirmative conduct on birth fathers who would object to adoption, as some states have done,[174] not only sends a normative message but

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child's bonds with the adoptive family to challenge the majority's deference to Iowa's jurisdiction in this multistate controversy).

167. For another illustration, see *Scarpetta v. Spence-Chapin Adoption Serv.*, 269 N.E.2d 787 (N.Y. 1971). After the *Scarpetta* court concluded that the child's "surrender was improvident and that the child's best interests—moral and temporal—will be best served by its return to the natural mother," the adoptive parents fled with "Baby Lenore" to Florida. *Id.* at 792. Scarpetta (the birth mother) filed a habeas corpus action there, claiming full faith and credit for the New York decision. At the ensuing trial, the court again focused on the child's best interests. The DeMartinos (the adoptive parents) successfully argued that they should not be bound by litigation in which they were not permitted to participate, and the Florida court ruled that the DeMartinos should retain custody. *See* Henry H. Foster, Jr., *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 8 (1972). The U.S. Supreme Court denied certiorari, DeMartino v. Scarpetta, 404 U.S. 805 (1971).

168. *See* FARNSWORTH, *supra* note 51, at 15, 37-38.

169. This gender script commonly includes, inter alia, greater stigma and punishment for sexually active unmarried women than for their male counterparts. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (rejecting the assumption that limits on access to birth control by unmarried persons were designed to prescribe "pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor"); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (illustrating the practice of punishing sexually active female students, as shown by their pregnancies, but not their male counterparts, who also conceived).

170. *See supra* note 71 and accompanying text (noting assumptions about women's self-sacrifice in the abortion context).

171. Of course, one can find cases in which courts give short shrift to fathers' efforts to claim a child whom the mother attempts to surrender for adoption. *See, e.g.*, *In re* Adoption of T.B., 232 P.3d 1026 (Utah 2010).

172. *See infra* notes 224-285 and accompanying text.

173. *See, e.g.*, *In re* Janet G. v. New York Foundling Hosp., 403 N.Y.S.2d 646, 651 (Fam. Ct. 1978); Elizabeth Samuels, *Time To Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509 (2005).

174. *See, e.g.*, *T.B.*, 232 P.3d at 1038 (requiring strict compliance with Utah's statute).

also could increase the likelihood that men will experience adoption regret for failure to act. In fact, before the U.S. Supreme Court decided *Stanley v. Illinois*[175] in 1972, most states excluded unmarried birth fathers from the adoption process altogether, often by defining "parent" narrowly so as to omit such men.[176] Under this regime, no doubt some felt wrongly excluded while others embraced the "free pass" their exclusion provided. In either case, however, the regret they might have felt or not felt cannot easily be disentangled from the legal expectations prescribed, any more than we can appreciate birth mothers' emotions outside of their legal and social context.[177]

B. "Surrogate-Mother"[178] Arrangements: Regret as Resistance

If the legal salience of regret in *Gonzales*,[179] on one hand, and that in adoption cases like *D.N.T.*,[180] on the other, occupy points at the extreme opposing ends of a continuum, then *In re Baby M*,[181] the case that made "surrogacy" a household word, falls much closer to the *Gonzales* pole. The case and the legal principle for which it stands make regret determinative, even though the court treated the controversy as an adoption matter. *Baby M*, holding surrogacy contracts void and unenforceable,[182] epitomizes the judicial exploitation of regret to resist changes in the legal status quo from encroachments by unfamiliar processes of family formation. Hence, we might see in this case study a paradigm of a court's use of "regret as resistance" or "the resistance model of regret."

The story of the case has been frequently told.[183] With the intermediation of the Infertility Center of New York, Mary Beth Whitehead agreed to conceive a child, by "artificial insemination" (now often called "alternative insemination")[184] with the semen of William Stern and then to relinquish the

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175. 405 U.S. 645 (1972).

176. *E.g.*, *id.* at 649-50 (invalidating an Illinois statute that did not include unmarried fathers in the definition of "parent").

177. *See infra* notes 374-404 and accompanying text.

178. I use the terminology popular at the time of the principal case in this section, *In re Baby M*, 537 A.2d 1227 (N.J. 1988), despite well-founded criticisms of the phrase "surrogate mother." For example, Barbara Katz Rothman writes: "A surrogate is a substitute. In some human relations, we can accept no substitutes. Any pregnant woman is the mother of the child she bears. Her gestational relationship establishes her motherhood. . . ." BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 167 (2000).

179. Gonzales v. Carhart, 550 U.S. 124 (2007).

180. *In re* Adoption of D.N.T., 843 So. 2d 690 (Miss. 2003).

181. 537 A.2d 1227 (N.J. 1988).

182. *Id.* at 1240.

183. In addition to inspiring extensive news coverage at the time and a still vibrant body of legal scholarship (*see, e.g.*, J. Herbie DiFonzo & Ruth C. Stern, *The Children of* Baby M., 39 CAP. U. L. REV. 345 (2011)), the story of *Baby M* was featured in a made-for-TV movie starring JoBeth Williams. BABY M (ABC Circle Films 1988).

184. Some authorities now prefer "alternative insemination" over the older term. *See* SHANLEY, *supra* note 137, at 80.

infant to Stern and his spouse, Elizabeth Stern, with the latter to undertake an adoption proceeding.[185] Whitehead changed her mind, however. Within hours after initially turning over the three-day-old infant to the Sterns, Whitehead "became deeply disturbed, disconsolate, stricken with unbearable sadness. She had to have her child. She could not eat, sleep, or concentrate on anything other than her need for her baby."[186]

This portrait of despair, elaborated in Whitehead's subsequent memoir,[187] is of a piece with both the snapshots in Cano's *Gonzales* brief and the more extended reflections in Fessler's book about surrendering birth mothers.[188] Note the legal impact: First, by holding the agreement void and unenforceable, the court validates Whitehead's intense, almost primal feelings, naturalizing her maternal longing and regret, in turn rendering her initial promise to relinquish the child an "unnatural" deviation, all in stark contrast to the adoption cases. Second, unlike the adoption cases, *Baby M* not only decides that regret should count; like *Gonzales*, it relies on the regret of "some women" (here, one woman) to propound a general rule applicable to all.[189] The *Baby M* court's leap provides a haunting reminder of the notorious opinion in *Bradwell v. Illinois*, upholding the denial of law licenses to women, in which Justice Bradley conceded that not all women would conform to the marital and maternal norm while still insisting that legal generalizations need not make room for the exceptional case.[190] Such reliance on generalizations about gender roles is precisely what the Supreme Court's contemporary antistereotyping approach to sex discrimination disallows.[191]

Accordingly, claiming to invoke principles from adoption law, the New Jersey Supreme Court decided in *Baby M* that surrogacy agreements are void because they conflict with:

> (1) laws prohibiting the use of money in connection with adoptions;
> (2) laws requiring proof of parental unfitness or abandonment before

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185. 537 A.2d at 1234-35; Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 HARV. J.L. & GENDER 67 (2007).

186. 537 A.2d at 1236.

187. MARY BETH WHITEHEAD WITH LORETTA SCHWARTZ-NOBEL, A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE 25-27 (1989).

188. As others have noted, Whitehead's attorney, Harold Cassidy, has now directed his legal efforts to fighting legalized abortion. Sanger, *supra* note 185, at 97 n.155; Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 143 (2009); Suk, *supra* note 34, at 48.

189. Elizabeth Scott has pointed out how *Baby M* prompted women-protective arguments like those more recently raised in the abortion context and illustrated by *Gonzales*. Scott, *supra* note 188, at 142-43.

190. 83 U.S. (16 Wall.) 130, 141-42 (1873) (Bradley, J., concurring).

191. *See, e.g.*, Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 730 (2003) (emphasizing the impermissibility of gender stereotyping); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010). On the costs of using gender-role feminism as a strategy to secure abortion rights, see Mary Ziegler, *The Bonds That Tie: The Politics of Motherhood and the Future of Abortion Rights*, TEX. J. WOMEN & L. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1830232.

> termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.[192]

After setting aside the contract, the court treated the resulting dispute as a custody fight between two legal (here, biological) parents, in turn preserving the traditional contours of "family." While custody went to Stern, Whitehead got visitation.[193]

Although *Gonzales*'s reliance on regret fails to distinguish between the absence at Time 1 of information that one could know then (the details of the abortion method) and the absence at Time 1 of unknowable information about the future (one's feelings at Time 2 about the past abortion), *Baby M* and the literature it has generated use a more precise analysis. Even if the intermediary, the Infertility Center of New York, could have more carefully screened Whitehead *before* she entered the agreement at Time 1[194] and even if such surrogates have full understanding of all available information at Time 1, *Baby M* has come to exemplify a requirement of contemporaneous consent, based on one brief paragraph in a very long opinion:

> Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary. . . .[195]

Thus, for example, based on empirical evidence of the inaccuracy of affective forecasting, Jeremy Blumenthal supports the rule derived from *Baby M* that surrogates must have the opportunity to change their minds after birth.[196]

Baby M, in its day, evoked some of the same critiques that followed *Gonzales*. Although feminists divided in reaction to the case,[197] some, most

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192. *In re* Baby M, 537 A.2d 1227, 1240 (N.J. 1988).

193. *Id.* at 1237.

194. *See* Sanger, *supra* note 185, at 85-86.

195. 537 A.2d at 1248.

196. Blumenthal, *supra* note 83, at 212-13; *see also* Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 249 (2010).

197. For commentary advocating restrictions or even bans on surrogacy to prevent exploitation, see Gena Corea, *Junk Liberty*, in RECONSTRUCTING BABYLON: ESSAYS ON WOMEN AND TECHNOLOGY 142, 153-156 (H. Patricia Hynes ed., 1991); Anita L. Allen, *Surrogacy, Slavery and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 140 (1990). Some of these concerns about exploitation focus on the class differences typified by *Baby M* and played out in scenarios in which racial minorities serve as surrogates or gestation is outsourced to poor women in other countries. *E.g.*, Lorillard, *supra* note 196, at 250;

prominently Marjorie Shultz, condemned *Baby M*'s legally required opportunity for a post-birth change of mind as unwelcome paternalism that reflects and reinforces gender stereotypes.[198] In fact, the court's unwillingness to abandon the traditional "tender years" approach, with its elevation of maternal bonds over those shared by young children and their fathers, in tandem with the naturalization of Whitehead's emotions, belie the opinion's recitation of a commitment to gender equality.[199]

Given *Baby M*'s reliance on adoption law, one would expect to find parallels in the legal relevance of regret in the two contexts, adoption surrenders and surrogacy agreements. Although courts minimize regret when surrendering birth mothers seek to change their minds, a focus on timing provides one way to reconcile the disparity. Both contexts treat as invalid prebirth consents to relinquish a child.[200] The adoption cases dismissing attempted revocations all concern consents given after the child's birth, while *Baby M* takes aim at the problems of an agreement entered even before conception. Yet, these particular timing differences stand out as important because the law makes them so. Put differently, when considered together, the cases raise the question why a decision at one particular Time 1 or another (whether preconception or after birth) ought to permit or foreclose recognition of a change of mind at Time 2, given what we know about how emotions can change during the interval and how such changes elude easy prediction. Moreover, to the extent that gestational relationships merit exceptional respect, as several authorities contend,[201] adoption surrenders and surrogacy both meet

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Scott, *supra* note 188, at 113, 117, 144; *see also* Tamar Audi & Arlene Chang, *Assembling a Global Baby*, WALL ST. J., Dec. 11, 2010; MADE IN INDIA (Chicken & Egg Pictures 2010).

198. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; *see also* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 9-10 (1989) ("[A]mid the serious debate on the morality of [all varieties of] medical reproduction, only surrogacy has been addressed in terms of criminal norms. It occurred to me that the reason for this was the untraditional role that women play in these arrangements."); Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107, 117 (1992) (pointing out the "dilemma for those who wish to use the mother-fetus bond to condemn [surrogacy] contracts while endorsing [a woman's] right to choose abortion").

199. *Compare Baby M*, 537 A.2d at 1254 (asserting that state law accords equal weight to claims of custody by mother and fathers), *with id*. at 1256 (justifying the different treatment of sperm donors and surrogate mothers), *and id*. at 1261 n.17 (noting the continuing validity of considerations underlying the "tender years doctrine" favoring maternal custody, despite the rejection of the doctrine itself).

200. *E.g*., Doe v. Clark, 457 S.E.2d 336, 337 (S.C. 1995) (concluding that the legislature intended for consent to adoption to be obtained after the child's birth). *See Baby M*, 537 A.2d at 1243-44.

201. *E.g*., Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 282-84 (2006); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429 (2007); *see also* I. Glenn Cohen, *The Right Not To Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008) (distinguishing gestational, genetic, and legal parentage). In addition, consent to adoption by the birth mother is valid only when given after birth, while some authorities will make a birth father's prebirth conduct determinative. *E.g*., John S. v. Mark K. (*In re* Adoption of Michael H.), 898 P.2d 891, 898-99 (Cal. 1995); *In re* Adoption of Kelsey S., 823 P.2d 1216 (Cal. 1992); C.F. v. D.D. (*In re* Adoption of B.B.D.), 984 P.2d 967 (Utah 1999); Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How To Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153 (2006).

the test—because in both contexts the woman who carried the pregnancy changes her mind.

Yet significant differences distinguish adoption and surrogacy—differences that would seem to allow less, not more, flexibility for a change of mind in the latter. For one, in a case like *Baby M*, the promisee, here William Stern, has something arguably more personal at stake than a prospective adoptive parent.[202] But for the agreement, he would not have provided his semen and the child at the center of the controversy, his genetic daughter, would never have been conceived.[203] Certainly, Whitehead's failure to perform caused *him* to experience regret, be it his wish that he had chosen a more compliant surrogate or his frustration that he did not do more to ensure the hoped-for result. Having allocated maternal rights to Whitehead, *Baby M* addresses Stern's status by recognizing him, not Whitehead's husband, as the child's legal father, thus making the issue to be resolved which custody and visitation arrangement, as divided between Whitehead and Stern, would serve the child's best interests.[204] Of course, shared custody was a far cry from the plan the Sterns envisioned when they set out to have a child with Whitehead's help.

Second, the reneging mother who planned conception with the intended father, as in surrogacy, should call for less judicial empathy than her adoption-surrender counterpart, whose pregnancy presumably presents an unplanned and stressful predicament. Yet, the *Baby M* court is much more forgiving than the *D.N.T.* court and many others that must decide whether a birth mother may revoke consent to adoption. A focus on the child's interests fails to explain this contrasting treatment, given the absence of a consistent normative position whether, as far as child welfare is concerned, parental rights should remain with birth parents, on one hand, or adoptive or intended parents, on the other.[205]

Returning to the idea of sexual punishment opens up the analysis in promising ways, however. If the unaddressed regret in the adoption cases is designed to impose an emotional burden that is the price of nonnormative sex,[206] then surrogacy cases—which use alternative insemination—would not evoke such punitive impulses. Mary Beth Whitehead's contract might have transgressed maternal norms or left her with "unclean hands," but she did nothing to trigger the penalty for nonmarital sex, that is, to require regret as redemption, in contrast to Camille in *D.N.T.*, for example.

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202. *See* FARNSWORTH, *supra* note 51.

203. *See* Shultz, *supra* note 198. This analysis, of course, begs the question of what importance should attach to a man's genetic ties. *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

204. 537 A.2d at 1261-64 (remanding to resolve this issue).

205. Even when focusing on child welfare, the adoption-surrender cases reveal a preference for the adoptive parents, but *Baby M* privileges the claim of the birth mother.

206. *See supra* notes 151-163 and accompanying text; *see also infra* notes 282-285 and accompanying text (examining the "price of pleasure" exacted from males).

Shifting the focus to the intended parents provides an additional promising avenue for exploring *Baby M*'s decision to honor the surrogate's regret.[207] From this perspective, regret operates as a regulatory tool, a vehicle for subjecting to state control a then-maverick practice flourishing in the hands of private parties and brokers[208] and for clarifying public policy. In identifying the three principles of adoption law at odds with enforcement of the surrogacy contract,[209] *Baby M* contrasts surrenders in private-placement adoptions with those arranged by state-approved or state-operated agencies. The court emphasizes that, from the viewpoint of adoptive parents, New Jersey law favors agency adoptions. They alone offer the assurance of irrevocable consent by the birth parents. [210] *Baby M* hammers that point home: only by using state-approved agencies and processes can risk-averse adopters protect themselves from the possible consequences of a birth parent's change of mind. For disappointed surrogacy promisees, such as the Sterns, the costs are high, including the inability to secure full parental rights of a genetically related child, ongoing shared parenting with the surrogate (usually a stranger),[211] and the possibility of support obligations for a child who might spend most of his or her time in the surrogate's custody.[212] Thus, *Baby M* puts those like the Sterns on notice: If you want a child to rear and you cannot produce one yourselves, the surest path to follow is an agency adoption; private placements might not produce the expected adoption at all; and a surrogacy arrangement could result in a custody battle, shared parenting, and transfer payments for child support.[213] In doing so, the court makes clear its deep skepticism about surrogacy and the need for strong state regulation of an unfamiliar, and hence suspect, practice. The resistance expressed by the *Baby M* court, in turn, influenced some jurisdictions to restrict, or even ban, the practice in the wake of this famous case.[214]

This regulatory interpretation of *Baby M* reveals parallels to the Supreme Court's move in *Gonzales*. There, the majority Justices invoke regret to

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207. Other analyses seem to focus exclusively on the surrogate. *E.g.*, Blumenthal, *supra* note 83, at 209-14.

208. Sanger, *supra* note 185; *see also* Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009).

209. *See supra* note 192 and accompanying text.

210. *See In re* Baby M, 537 A.2d 1227, 1243 (N.J. 1988).

211. Indeed, these parties did not share even a "one-night stand." *See* Marjorie M. Shultz, *Taking Account of ARTs in Determining Parenthood: A Troubling Dispute in California*, 19 WASH. U. J.L. & POL'Y 77, 102 (2005).

212. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 98-101 (1998).

213. The court says that it may decide custody based on the child's best interest without undermining its regulatory goal: "Our declaration that this surrogacy contract is unenforceable and illegal is sufficient to deter similar agreements. We need not sacrifice the child's interests in order to make that point sharper. . . ." *Baby M*, 537 A.2d at 1257.

214. For a compilation showing each state's treatment of surrogacy today, see Darra L. Hofman, "*Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009).

express their reproach, indeed their disgust, at the hideousness of the banned abortion procedure.[215] In *Baby M*, the court seizes upon regret to express its disapproval of a new reproductive collaboration, stating: "There are, in a civilized society, some things that money cannot buy."[216] Although this sentence expresses concerns about commodification of children and exploitation of women's reproductive capacities, the subtext includes concerns about assisted reproduction's amazing potential to disrupt the understanding of procreation as a natural process and, in so doing, to challenge the familiar gender order,[217] including maternal norms of altruism and self-sacrifice.[218] Mary Beth Whitehead's regret provides a toehold for retaining the legal status quo, prioritizing reliance on state-controlled adoptions and discouraging the use of less regulated methods of child acquisition such as those arranged by private attorneys or surrogacy brokers. In any event, in both *Gonzales* and *Baby M*, a professed judicial concern about regret triggers the elimination of an option that at least some women would have chosen.

This reading of *Baby M*—in which regret is used to express judicial resistance to surrogacy's challenge to the traditional conceptualization of mothers, children, and family[219]—proves all the more significant because the case tells such an atypical story. Empirical evidence available even at the time showed that almost all surrogacy arrangements proceeded to intended conclusion without a hitch.[220] Most surrogates do not change their minds.[221] Yet, even if the threat of reneging remains small, by imposing legal risks on the intended parents, *Baby M*'s approach was designed to shape the way those seeking help in family-making will weigh their options—adoption, surrogacy, or neither.[222]

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215. *See supra* notes 49-77 and accompanying text.

216. *Baby M*, 537 A.2d at 1249.

217. Shultz, *supra* note 198, at 376-78.

218. Carol Sanger observes that in surrogacy the woman elevates her own objectives, including her financial interests and the pleasure she experiences from being pregnant, over concern for the planned child. Moreover, any altruism focuses on the intended parents, not the child. Sanger, *supra* note 114, at 462-63.

219. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1108 (2002) (reporting "public storm" and "societal debates" sparked by surrogacy).

220. *See* FIELD, *supra* note 212, at 5, 184 n.16 (citing figures that, for the 500 children born of surrogacy arrangements by the end of 1986, 495 of the contracts were performed without incident). For another early study, see Susan Fischer & Irene Gillman, *Surrogate Motherhood: Attachment, Attitudes and Social Support*, 54 PSYCHIATRY 13, 19 (1991) (describing Whitehead as an "anomaly").

221. The years since *Baby M* have confirmed the case as an outlier, with regret among surrogates very rare. *See, e.g.*, Lorillard, *supra* note 196, at 252; Scott, *supra* note 188, at 138-39. By contrast, an estimated eighty percent of birth mothers who planned placements with prospective adoptive parents change their minds, deciding to rear the child themselves. Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285, 315 (2011).

222. *See generally* Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393 (examining reasons, including applicable laws, why individuals and couples might find various forms of collaborative reproduction more attractive options than adoption).

C. The Case of the Accidental Father: Regret as Responsibility

In *Gonzales* and the next two case studies, examining adoption surrenders and surrogacy arrangements, women play the starring roles. The gendered portrayals of regret and its would-be causes suggest that reproductive decisionmaking and its emotional sequelae constitute a "separate sphere," in which men largely remain invisible.[223] Yet, other cases illustrate that men do confront reproduction and regret, even if gender remains a highly influential variable in the courts' construction and understanding of the issues.

In one relevant scenario, a man seeks to avoid support obligations for an unplanned and unwanted child. These are cases of "accidental procreation"—a phenomenon that looms large in several opinions attempting to rationalize a marriage regime open only to male-female couples.[224] To date, however, all of these child-support disputes have involved unmarried parents, with the most noteworthy alleging what we might call birth-control fraud or semen misappropriation by the mothers[225] and seeking what the fathers call a right to a "financial abortion" or a "*Roe v. Wade* for men."[226] The arguments of these men never prevail, no matter how intense their regret and how plausible their

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223. *See* Abrams & Keren, *supra* note 5, at 2029 ("[In the area of reproductive rights] the law has been surprisingly frank in acknowledging the role of emotion . . . . Yet emotion here is not treated as a pervasive, inevitable human attribute: in a move reminiscent of earlier dichotomies, legal actors associate emotion exclusively and restrictively with women . . . .").

224. Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009); *see also, e.g.*, Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 385-86 (2011) (explaining that such cases concern the role of marriage in procreation).

225. *See, e.g.*, Phillips v. Irons, 2005 WL 4694579 (Ill. App. Ct. 2005); Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001); State v. Frisard, 694 So. 2d 1032 (La. Ct. App. 1997); L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983); *see also* Jill E. Evans, *In Search of Paternal Equity: A Father's Right To Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045 (2005) (supporting the rejection of tort claims by such men); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 52-61 (2003) (using the term "purloined sperm" in discussing cases in which the woman appropriated the man's sperm for use without the man's consent); Brenda Saiz, *Tort Law: Tort Liability When Fraudulent Misrepresentation Regarding Birth Control Results in the Birth of a Healthy Child*—Wallis v. Smith, 32 N.M. L. REV. 549 (2002) (supporting the rejection of privacy-based and tort claims in deference to the child's interests).

226. *See, e.g.*, Ethan J. Leib, *A Man's Right To Choose (an Abortion)? Men Deserve Voice in Abortion Decision*, 18 LEGAL TIMES, Apr. 4, 2005; John Tierney, *Men's Abortion Rights*, N.Y. TIMES, Jan. 10, 2006, at A25; *see also, e.g.*, Melanie G. McCulley, *The Male Abortion: The Putative Father's Right To Terminate His Interests In and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 39 (1998) (proposing a model statute "recogniz[ing] the inequity existing between the female's ability to choose whether she will be responsible for her child, without interference from the putative father, and the putative father's inability to make the same choice"); Sarah E. Rudolph, *Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims*, 1989 U. CHI. LEGAL F. 331 (criticizing case law that allows women to sue for misrepresentation of fertility by men but disallows such suits by men against women); Christopher Bruno, Note, *A Right To Decide Not To Be a Legal Father:* Gonzales v. Carhart *and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008) (contending that unwanted declarations of legal paternity undermine the right to procreational autonomy of men).

claims of unfairness. Instead, courts invoke a principle of "personal responsibility" for the consequences of the man's sexual activities, suggesting a notion of "regret as responsibility" or "the responsibility model of regret."

Matthew Dubay's case, *Dubay v. Wells*,[227] epitomizes these controversies. Dubay asserted that he had made clear before sexual intercourse with Lauren Wells his desire not to become a father and had relied on her assurances that she was infertile and was using contraception as an extra precautionary measure.[228] Wells became pregnant, however, and chose to carry the pregnancy to term, joining with the county to seek a paternity order and child support after Dubay maintained his refusal to become a father.[229]

Dubay unsuccessfully pursued in federal court two equal protection challenges to the paternity and child-support statutes and their application to him, arguing that these laws discriminate on the basis of gender. First, Dubay contended, abortion permits women to disclaim legal parenthood following consensual intercourse, while men have no similar option.[230] Second, he cited adoption-relinquishment and "safe haven" laws,[231] which provide an additional woman-controlled opportunity for extricating oneself from parental responsibility.[232] To eliminate the discrimination and ensure men a comparable constitutional right to decide whether to bear or beget a child that women enjoy, Dubay contended that he should be able to disclaim legal fatherhood and the support obligations the status entails. Translated into the language of reproduction and regret, the argument is that men ought to have the same opportunity as women to actualize, post-conception, their regret.

Invoking an earlier case that had rejected similar claims sounding in substantive due process,[233] the district court dismissed Dubay's challenges.[234] At bottom, the district court found no state action, required for a Fourteenth Amendment claim, in the child's conception or the individual decisions leading to that result.[235] Reaching the same result as the district court, the U.S. Court of Appeals for the Sixth Circuit saw neither a fundamental right at stake nor discrimination based on gender, so it upheld the Michigan Paternity Act and its resulting child support obligations for Dubay as gender-neutral, rational

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227. 506 F.3d 422 (6th Cir. 2007).

228. *Id.* at 426.

229. *Id.*

230. *Id.* at 428.

231. On safe haven laws, see, for example, Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Haven Laws*, 24 QUINNIPIAC L. REV. 335 (2006); Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006); Lucinda J. Cornett, Note, *Remembering the Endangered "Child": Limiting the Definition of "Safe Haven" and Looking beyond the Safe Haven Law Framework*, 98 KY. L.J. 833 (2010).

232. 506 F.3d at 428.

233. N.E. v. Hedges, 391 F.3d 832 (6th Cir. 2004).

234. Dubay v. Wells, 442 F. Supp. 2d 404, 410 (E.D. Mich. 2006).

235. *Id.* ("[T]he State played no role in the conception or birth of the child in this case, or in the decisions that resulted in the birth of the child.").

responses to legitimate state interests. Both courts made clear that Dubay has no one but himself to blame for his predicament.[236] Put differently, any distress that Dubay might feel about his unwanted fatherhood ought to be understood as regret directed at his own decisions to engage in sexual intercourse and not to use (additional) birth control.[237]

There's quite a bit worth mining here. First, surely the court of appeals correctly rejects the district court's effort to identify biology alone as the basis of Dubay's paternity and resulting obligations.[238] Paternity is a species of parentage, a legal construction; even parentage laws based on biology reflect a choice made by the state.[239] Any doubts that the operative variables include far more than what the district court understands as "biological fact"[240] evaporate once one widens the focus to consider the full range of parentage rules. (These include several doctrines that reach well beyond genetics, such as the traditional presumption of legitimacy,[241] the "biology-plus" requirement imposed on unmarried birth fathers who seek to prevent the mother's surrender of a child for adoption,[242] and the emerging recognition of same-sex couples as parents, without the need for an adoption proceeding.[243])

Second, a thought experiment applying *Gonzales*'s approach to such scenarios provides no answer but instead emphasizes *Gonzales*'s flawed reasoning. Protecting the Dubays of the world from the regret they might experience would give rise to a rule that bans all sexual intercourse by men who do not wish to be fathers, unless they use condoms or have undergone a previous vasectomy. Indeed, that such contraceptive measures occasionally fail means that no penis-in-vagina intercourse can be fully regret-proof.[244] At the

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236. *See id*.; *Dubay*, 506 F.3d at 430 (rejecting Dubay's asserted equal protection "right to initiate consensual sexual activity while choosing to not be a parent").

237. *Dubay*, 442 F. Supp. 2d at 410-11 (citing *Hedges*, 391 F.3d at 834). The court also invokes the following reasoning of the Hawaii Supreme Court: "'[T]he father elected a course of conduct inconsistent with the exercise of his right not to beget a child. The reproductive consequences of his actions were imposed by the operation of nature, not statute.'" *Id*. (quoting Child Support Enforcement Agency v. Doe, 125 P.3d 461, 469 (Haw. 2005)).

238. *Dubay*, 506 F.3d at 430 n.4.

239. *See, e.g*., JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 26 (2006); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 61-62 (2008).

240. *Dubay*, 442 F. Supp. 2d at 414.

241. *E.g*., Michael H. v. Gerald D., 491 U.S. 110 (1989).

242. *E.g*., Lehr v. Robertson, 463 U.S. 248 (1983). *See* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 827-28 (2006) (reviewing case law from the Supreme Court that ties fathers' rights to demonstrated commitment and establishes a "biology-plus" standard); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right To Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 975, 980 (1992) (using the term "biology plus" to describe the criteria for constitutionally protected paternal rights in the Supreme Court's case law).

243. *E.g*., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011); Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005).

244. As Judith Jarvis Thomson wrote in her classic article defending abortion, a woman's consistent use of birth control or sexual abstinence would not suffice to eliminate all risks of unwanted pregnancy, given that "anyone can avoid a pregnancy due to rape by having a hysterectomy, or anyway never leaving home without a (reliable!) army." Thomson, *supra* note 71, at 59.

very least, if abortion precedents are relevant, then detailed state-scripted warnings ("informed consent" requirements)[245] about the financial consequences should precede all sexual intercourse by men seeking to avoid fatherhood. Even with new attacks on contraception and its providers,[246] no one would seriously recommend such measures, which infringe sexual privacy[247] and depart from conventional social and legal assumptions about the value of male sexual freedom.[248]

Moreover, the question that Dubay raises has surfaced in other contexts. For example, some birth fathers attempting to block adoption relinquishments of infants have unsuccessfully challenged the inequality of a regime that disallows birth mothers from giving binding consent to adoption before birth but makes birth fathers' prebirth conduct decisive, as some states do.[249] Yet behind such particularized illustrations lurks an argument that, at first, bears an arresting resemblance to two familiar theories for (women's) abortion freedom.

Under the first of these theories, advanced by Sylvia Law, abortion restrictions disproportionately punish women for heterosexual conduct, compared to males.[250] A germ of this argument appeared earlier when, in *Eisenstadt v. Baird*, the Supreme Court struck down restrictions on access to birth control for unmarried individuals, noting how the law imposed disproportionate penalties on women, namely possible pregnancy and all the accompanying social baggage, especially outside of marriage.[251] Access to contraception and abortion allows women to avoid pregnancy as a consequence of heterosexual intercourse—a risk that men never face. Dubay and the regretful birth fathers try to press an analogous point when they contend that the state has chosen to exacerbate the biological differences between men and women when it should have elected equalizing measures instead.[252]

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245. *E.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 881-87 (1992) (joint opinion) (concluding that Pennsylvania's detailed pre-abortion "informed consent" requirement is constitutional). In *Casey*, the joint opinion invoked the possibility of post-abortion regret to justify this required information, rather than to eliminate an option altogether, as in *Gonzales*. *See supra* note 32 (quoting the opinion).

246. *See, e.g.*, Erik Eckholm, *Budget Feud Ropes In Planned Parenthood*, N.Y. TIMES, Feb. 18, 2011, at 16; Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAG., May 7, 2006, at 48.

247. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

248. Frances Olsen exposes this value with a telling hypothetical law purportedly designed to protect the "potential life" of sperm; as she writes, "Only [men's] convenience prevents us from valuing sperm." Frances Olsen, Comment: *Unraveling Compromise*, 103 HARV. L. REV. 105, 130 (1989).

249. *See supra* note 201.

250. Law, *supra* note 20, at 1016 ("When the state denies women access to abortion, both nature and the state impose upon women burdens of unwanted pregnancy that men do not bear."); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 225 (1988).

251. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972).

252. The father in *N.E. v. Hedges*, 391 F.3d 832, 834-35 (6th Cir. 2004) (cited in Dubay v. Wells, 506 F.3d 422, 429-30 (6th Cir. 2007)), most clearly advances this argument. 391 F.3d at 834-35. In turn, opponents of legal abortion contend that the principle of gender equality does not require the right to choose abortion, because "[m]en . . . have no right to avoid the responsibilities of fatherhood once a child is conceived." Brief for United States Conference of Catholic Bishops And Other Religious

Reva Siegel and others have developed a second equality-based theory for abortion freedom. Although biology dictates the different contributions that males and females make to human reproduction, law and culture ascribe meanings and expectations to these contributions. Outlawing or restricting abortion conscripts women to lives, identities, and responsibilities of motherhood, with all its social burdens and with profound consequences for the other paths such women might choose to pursue.[253] Using a parallel argument, Dubay takes aim at the forced fatherhood that he finds in the paternity statute and its support obligations.

Gender stereotypes provide an important subtext here. Law's and Siegel's arguments derive their power from the social meaning of motherhood, as later elaborations have underscored.[254] In addition, at least when this line of reasoning made its debut, family law had only begun to address unmarried fathers' possible obligations to their children—a topic that the national preoccupation with "deadbeat dads" has now transformed into vibrant legal terrain.[255] Yet, even now, the gender scripts that make motherhood so enveloping[256] have not migrated to our understanding of fatherhood. As the generalizations in both *Gonzales* and *Baby M* suggest, motherhood defines womanhood.[257] Men, by contrast, have identities separate from any role as fathers.[258] Indeed, for fatherhood, the script remains largely centered on economic obligation, with child support understood as "a tax fathers have had to pay in Western civilization."[259] Indeed, the Supreme Court has conceded as

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Organizations as Amici Curiae Supporting Petitioner at 16 n.14, Gonzales v. Carhart, 550 U.S. 124 (2006) (No. 05-380).

253. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,* 44 STAN. L. REV. 261 (1992). For the costs of such arguments, see West, *supra* note 80, at 1409-10; Ziegler, *supra* note 191.

254. *Compare* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 342-43 (2007) (positing two rights to abortion), *with* Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329 (2010) (arguing that pregnancy constitutes a unitary experience, with reproductive bodily integrity and motherhood inextricably connected).

255. *See e.g.*, Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228(a)(3) (2011); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006); David Ray Papke, State v. Oakley, *Deadbeat Dads, and American Poverty*, 26 W. NEW ENG. L. REV. 9 (2004).

256. This is especially so in today's era of "intensive parenting." *See* Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1271-73 (2011); *see also* AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2011) (presenting a law professor's popular account of her own intensive mothering of her daughters); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. L. REV. 1 (2005) (noting political and liberatory possibilities when nontraditional caregivers perform this function).

257. *See supra* notes 71, 187-191 and accompanying text.

258. *See* Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (explaining the Family and Medical Leave Act, the Court observes: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."); *see also* Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER SOC. POL'Y & L. 147, 183 (1996) (criticizing the judicial treatment of male fertility as an individual right or interest but "female fertility as a subject of concern to others, including society, and thus more appropriately subject to external controls").

259. N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004).

much—notwithstanding its doctrine of gender equality—by minimizing the personal interests a man has at stake in a paternity determination.[260] And, as the statutory scheme in *Dubay* illustrates, forced fatherhood as a legal matter entails only required transfer payments, nothing more.[261]

This understanding of legal fatherhood simply as a source of economic support illuminates the "legitimate government purpose"[262] invoked by the court of appeals in *Dubay*. The phrase refers to the policy of personal responsibility, which conceptualizes sexual intercourse as the but-for cause of a child's financial needs.[263] At least two federal statutes bear the name of this policy, the "Personal Responsibility and Work Reconciliation Opportunity Act of 1996," enacted to reform welfare,[264] and a provision creating a federally funded program of comprehensive sex education, "Personal Responsibility Education," enacted in 2010.[265] The policy of personal responsibility assumes child support must be a private matter, even a "private tragedy,"[266] but not a state responsibility, and that—absent other private alternatives—the price of sexual pleasure is the risk of a child support obligation.[267] The legal irrelevance of Dubay's regret, then, comes close to the construction of sex apparent in some of the adoption-surrender cases under the redemption model.[268] Recall how the *D.N.T.* court condemns the young birth mother Camille for the "bad decisions [she] has made her entire life."[269] In *Dubay*, the

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260. Rivera v. Minnich, 483 U.S. 574 (1987) (holding that due process does not require heightened procedural safeguards for establishing parentage, despite a paternity defendant's stake in avoiding an erroneous determination, even though such safeguards are required in terminations of parental rights).

At one time some courts saw every birth, even of an unplanned child, as a blessing. *See* Chrisenten v. Thornby, 255 N.W. 620, 622 (Minn. 1934) ("[T]he plaintiff has been blessed with the fatherhood of another child."). *But see* Univ. of Ariz. Health Sciences Ctr. v. Super. Ct., 667 P.2d 1294 (Ariz. 1983) (allowing recovery for wrongful pregnancy, but offset by the benefits of having a healthy child).

261. *See* Appleton, *supra* note 239, at 35-36. *Cf.* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (requiring fair procedures, although not necessarily appointed counsel, before the incarceration of a father held in contempt for failure to pay child support). Of course, parentage is a legally created status. *See* authorities cited *supra* note 239. *But see* Cohen, *supra* note 201, at 1125 (positing the concept of "attributional parenthood" that culture and society recognize apart from law).

262. Dubay v. Wells, 506 F.3d 422, 430 (6th Cir. 2007).

263. *See, e.g.*, Scott Altman, *A Theory of Child Support*, 17 INT'L J.L., POL'Y & FAM. 173 (2003) (exploring theoretical bases of child support obligations); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008) (same); Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 129 (2008) (same). *Cf.* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002) (recognizing parents by estoppel).

264. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (reauthorized and revised by the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)).

265. 42 U.S.C.A. § 713 (2011). *Cf.* Separate Program for Abstinence Education, 42 U.S.C.A. § 710 (2011).

266. Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3 (2010).

267. *See also* Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011) (proposing recognition of additional financial obligations between unmarried lovers when conception results from sexual intercourse, with tax reform for implementation).

268. *See supra* notes 109-177 and accompanying text.

269. *In re* Adoption of D.N.T., 843 So. 2d 690, 709 (Miss. 2003).

district court strikes a similar pose, saying, "The consequences of sexual intercourse have always included conception, and the State has nothing to do with this historical truism."[270] Likewise, as the court of appeals puts it, Dubay has no equal protection "right to initiate consensual sexual activity while choosing to not be a parent."[271] Under this responsibility model, law makes Dubay "own" his decision—although such external pressure no doubt limits the opportunities for personal growth that the psychoanalytic literature would find in regret.[272]

This idea—that men must support nonmarital offspring—took hold in the 1970s, after the Supreme Court held unconstitutional a string of laws disadvantaging children classified as "illegitimate."[273] Before that time, a nonmarital child was "filius nullius" or "filius populi,"[274] with unmarried fathers often excluded from the legal category of "parent."[275] Although many of the Court's rulings focused on fairness to children born outside marriage and the injustice of punishing them for their parents' failure to comply with the marital norm,[276] the public fisc stood to gain as well from the privatization of dependency. Today, the conversation has shifted dramatically from the equality-based roots of the Court's illegitimacy cases to a much more explicit emphasis on relieving government from supporting needy children. A father's marital status is irrelevant to his child support responsibilities,[277] and ever more carefully crafted enforcement tools seek to collect ever larger fractions of the obligations due.[278] Child support enforcement today entails a costly bureaucracy and the project sometimes seems quixotic,[279] but adherence to the notion of "personal responsibility" overpowers such practical considerations.

Against this background, given the underlying assumptions that child support must be a private parental responsibility and that every child must have

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270. *Dubay*, 442 F. Supp. 2d at 406.

271. *Dubay*, 506 F.3d at 430 (quoting plaintiff's brief).

272. *See supra* notes 55-60 and accompanying text.

273. *E.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

274. 1 WILLIAM BLACKSTONE, COMMENTARIES *454-59.

275. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972). For a critical discussion of such discrimination, see generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) (calling for an end to such discrimination).

276. *E.g.*, *Weber*, 406 U.S. at 175.

277. *E.g.*, Walsh v. Jodoin, 925 A.2d 1086 (Conn. 2007); Jackson v. Proctor, 801 A.2d 1080 (Md. Ct. Spec. App. 2002).

278. *See, e.g.*, 42 U.S.C. § 664 (2011) (authorizing the interception of tax refunds due to delinquent obligors); *id.* at § 666(a)(16) (2011) (conditioning states' receipt of federal funds on procedures for withholding, suspending, or restricting delinquent obligors' licenses).

279. *See, e.g.*, State v. Oakley, 629 N.W.2d 200 (Wis. 2001), *reconsideration denied and opinion clarified*, 635 N.W.2d 760 (Wis. 2001), *cert. denied*, 537 U.S. 813 (2002); *see generally* Papke, *supra* note 255. Both *Oakley* and Papke's analysis of this case highlight the futility of pursuing private support in some situations. *See also* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007) (detailing how child support policies are not successful and harm children and their families).

two parents, Dubay's victory could have come only at the detriment of the child[280]—so one could say that the courts reached the correct result in denying Dubay's attempt to opt out of fatherhood. This emphasis on a third party—here, the child—tracks those authorities concluding that the legal relevance of regret in modern contract law often depends less on the actions of the promisor or obligor and more on the reliance or disadvantage of another.[281]

Others, returning the focus to gender and equality, invoke basic fairness for imposing responsibilities on men like Dubay. For example, Shari Motro looks beyond the courts' rulings, recommending legal recognition of the financial obligations that men should share apart from child support, including the costs of the pregnancy itself (and any employment consequences for the woman) and the costs of abortion. Motro, who contends that women should not bear these costs alone, makes explicit her understanding of the source of such financial obligations for men, calling them "the price of pleasure."[282] Although Motro considers only monetary costs, her evocative phrase could be read more expansively, offering an apt reference to the emotional burden—the regret—left for men like Dubay to experience.

Read against the case law, the "price of pleasure" rationale apparently applies even when the male is so young that he is considered a victim of statutory rape.[283] It also extends to cases of "purloined sperm," in which the man took affirmative steps to minimize his procreative risk by participating in heterosexual intercourse with a condom or engaging only in oral sex, but the woman used the sperm he released in the encounter to inseminate herself and conceive.[284] Even here, his efforts notwithstanding, the man owes child support, although he might be able to recover damages for his emotional distress.[285]

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Even if compelling, the reasoning that the child's right to support should trump all other considerations does not apply in several settings in which conception occurs by assisted reproduction, however.[286] Here, law sometimes makes room for second thoughts or regret. Further, with assisted reproduction,

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280. *See also* L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983) (using similar reasoning).

281. *See, e.g.*, FARNSWORTH, supra note 51, at 38.

282. Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010); *see also* Motro, *supra* note 267.

283. *In re* Paternity of K.B., 104 P.3d 1132 (Okla. Ct. App. 2004); *see also* S.F. v. State *ex rel.* T.M., 695 So. 2d 1186 (Ala. Civ. App. 1997) (finding that the man was liable for child support even though he was unconscious during the sex act, making that act sexual assault).

284. For an example of such allegations, see State v. Frisard, 694 So. 2d 1032 (La. Ct. App. 1997). For use of the term "purloined sperm," see Hubin, *supra* note 225, at 52. For a critique of the prevailing approach, see Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. (forthcoming 2012) (on file with author).

285. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005) (reversing dismissal of the plaintiff's emotional distress claim). *But see, e.g.*, Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001) (rejecting a man's tort claim for economic injury).

286. *See* Higdon, *supra* note 284.

law not only tolerates solo-parent families but sometimes requires them, notwithstanding the objection of an eager-to-be-involved genetic father who regrets his failure to take the necessary steps for recognition as a legal parent. Even if the child's rights to equal treatment and support fail to explain such divergent outcomes, the "price of pleasure" theory could provide a rationale for distinguishing cases of sexual encounters from those based on assisted reproduction, as shown in the following case studies.

The case studies in the next two subsections explore these contrasts. In doing so, these case studies allow us to test three tentative conclusions that have emerged so far about the courts' various treatments of regret. First, the gender of the reproductive decisionmaker shapes the understanding to a large extent. Second, the discourse and results conflate sexual intercourse (and other sexual encounters) with sexual pleasure. Finally, in naturalizing regret and conceptualizing the regret-inducing dilemma or choice as a problem entirely of the subject's own making, the courts fail to acknowledge the role of law—although legal rules not only validate or invalidate regret but also frame it, impose it, and reinforce it. Although one would not necessarily expect courts, given their limited third-branch role, to refashion otherwise controlling legislation, nonetheless these courts sometimes must interpret statutes with considerable wiggle room (as in *D.N.T.*),[287] must create common law from scratch (as in *Baby M*), or must respond to constitutional challenges (as in *Gonzales* and *Dubay*). In exercising such authority, these courts envision law either as a reason to leave a party as they find her or him, with regret as a seemingly natural burden to bear, or they treat law as a means of relieving regret, but they never consider law as a possible source of regret itself, advancing the state's own regulatory agenda.

D. Controlling Frozen Preembryos: Regret as Reconsideration

These preliminary insights about gender, sex, and law's role gain depth through the analysis of a scenario in which—as in *Baby M*—the courts have had an opportunity to write upon a relatively clean slate. Here, the progenitors of frozen embryos dispute their appropriate disposition at some later time. In such controversies, emerging rules of contemporaneous consent validate regret, privileging reproductive second thoughts over earlier decisions and commitments. This approach, which we might call "regret as reconsideration" or which we might think about as "the reconsideration model of regret," contrasts sharply with the responsibility model in *Dubay*. This difference, then, limits to cases of sexual intercourse (or a sexual encounter with another) any

287. For a view of the wiggle room inherent in these statutes, see the concurring and dissenting opinions in that case. 843 So. 2d 690, 712 (Miss. 2003) (Cobb, J., concurring); *id.* at 716 (McRae, J., dissenting).

general principle that a male risks legal fatherhood and child support obligations each time he ejaculates, regret notwithstanding.

The disputes that provide this lens for examining regret arise because the refinement of assisted reproductive technologies (ARTs) has produced a medical protocol that includes a woman's drug-induced superovulation, the surgical collection of numerous ova from her body as well as a man's provision of semen via ejaculation in a cup, the mixing of such genetic materials to facilitate fertilization in vitro (IVF), and—most significantly for purposes of this case study—the cryopreservation of any (often many) preembryos not immediately transferred to the woman for implantation.[288] Sometimes those who created the frozen preembryos develop different preferences over time, frequently because of changing family circumstances. In one common fact pattern, the couple who created the preembryos during marriage disagree about their disposition upon divorce or separation, with the former wife typically seeking to use them to produce children while the husband seeks to destroy them or donate them for scientific research. Men have usually won in these disputes,[289] despite several compelling arguments why the woman might prevail (the teleology of the original effort, her greater "sweat equity" in making the embryos, and the different effect of the passage of time on women's fertility, compared to men's).[290] Several courts have balanced the competing interests and decided that the right to avoid parenthood trumps the right to procreate, even with one's own genetic material.[291]

Against this background, a number of authorities signaled early on that agreements entered by the parties and the clinics at the time of the initial IVF procedure would prevent litigation by directing in advance the subsequent

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288. As the result of such practices, "as of 2003 there were slightly less than 400,000 cryopreserved preembryos in storage in the United States . . . ." Cohen, *supra* note 201, at 1118. In contrast to the United States, some other countries, such as Italy, avoid this problem by limiting the number of embryos created and requiring immediate use of them all. *See, e.g.*, June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL OF RTS. J. 1015, 1051 (2010); Urska Velikonja, Note, *The Costs of Multiple Gestation Pregnancies in Assisted Reproduction*, 32 HARV. J.L. & GENDER 463, 494-95 (2009).

289. *E.g.*, *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

290. *See, e.g.*, Kass v. Kass, 1995 WL 110368 (N.Y. Sup. Ct. 1995), *rev'd*, 663 N.Y.S.2d 581 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998); Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063 (1996); Anne Dochin, *Toward a Gender-Sensitive Assisted Reproduction Policy*, 23 BIOETHICS 28 (2009); Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not To Be a Parent,"* 12 COLUM. J. GENDER & L. 128 (2003); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989 (2001); *see also* Nahmani v. Nahmani, C.F.H. 2401/95 (ruling in favor of the woman in this Israeli case because, inter alia, she would have no other opportunity for genetic motherhood); Helene S. Shapo, *Frozen Pre-Embryos and the Right To Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 79 (2002) (discussing *Nahmani*).

291. *E.g.*, *Davis*, 842 S.W.2d 588; *Witten*, 672 N.W.2d 768; *see also* J.B. v. M.B., 783 A.2d 707 (N.J. 2001) (determining that the balance tips in favor of the former wife, who in this case did not want the embryos to be used for procreation).

disposition of the preembryos.[292] That is, these authorities saw "pre-commitments" as a means of resolving future disputes and eliminating the need to rely on post-hoc judicial balancing.[293]

Not so, decided the Supreme Judicial Court of Massachusetts in *A.Z. v. B.Z.*,[294] a case with the typical facts described above. In this case, the spouses had previously entered an agreement (though not one free from questions)[295] stating that, in the event of the couple's separation, the preembryos would go to the former wife for implantation. The court declined to enforce the agreement. Embracing an analysis championed by Carl Coleman[296] and departing from a then-emerging conventional wisdom, the opinion in *A.Z.* emphasizes the importance of being able to change one's mind in family matters. The opinion surveys a variety of legal developments, from the abolition in many jurisdictions of the cause of action for breach of promise to marry to the establishment of a four-day post-birth waiting period for infant surrenders for adoption, and then concludes:

> We glean from these [authorities] that prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions. This enhances the "freedom of personal choice in matters of marriage and family life."[297]

Under one reading, *A.Z.* tracks those past cases that expressly balanced competing interests.[298] Without explicitly articulating a balance, *A.Z.* signals that the interest of one who wishes to avoid a familial relationship should always prevail, regardless of prior agreements. According to *A.Z.*'s stated reasoning, however, autonomy gives regret its legal force and makes the case for reconsideration. This rationale for a requirement of contemporaneous mutual consent nonetheless remains controversial. For example, John Robertson, a consistent advocate for procreative liberty in all its

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292. *Davis*, 842 S.W.2d at 590.

293. *See, e.g.*, Mark P. Strasser, *You Take the Embryos But I Get the House (And the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1180-83 (2009).

294. 725 N.E.2d 1051 (Mass. 2000).

295. Here, the court points out a number of problems with the alleged agreement, which was a form provided by the clinic and which the wife had the husband sign in blank. Further, it was not a separation agreement nor did it unambiguously apply upon divorce. 725 N.E.2d at 1053-54, 1056-57.

296. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55 (1999); *see A.Z.*, 725 N.E.2d at 1055 n.13.

297. 725 N.E.2d at 1059. The court then cites Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-640 (1974)). A footnote, however, limits the holding: "We express no view regarding whether an unambiguous agreement between two donors concerning the disposition of frozen preembryos could be enforced over the contemporaneous objection of one of the donors, when such agreement contemplated destruction or donation of the preembryos either for research or implantation in a surrogate." 725 N.E.2d at 1058 n.22.

298. *See supra* note 291 and accompanying text.

instantiations,[299] argues that autonomy values cut the other way. According to Robertson, "[a] main argument for enforcing precommitments for disposition of frozen embryos is the importance of the freedom that it provides individuals at Time A to control or restrain future reproductive choices at Time B."[300] As Jeremy Blumenthal points out, the competing autonomy-based claims pose "the question of which is a party's 'true' feeling: that expressed at $Time_1$, at the time of the advance agreement, or that expressed at $Time_2$, the time at which a contemporaneous decision must be made."[301] Given the data on the inaccuracy of affective forecasting, Blumenthal would go with the Time 2 preference,[302] as in *A.Z.* and in contrast to Robertson.[303]

But why stop at Time 2? If people tend to look ahead inaccurately, then they might also look back inaccurately; hindsight might even distort judgment. Moreover, at Time 3 even a Time 2 choice might be experienced as regrettable, even more regrettable than the Time 1 decision.

Bracketing such questions and following any reading, however, *A.Z.* diverges from *Dubay*, in which a man's post-ejaculation regret counts for nothing. The divergence is all the more striking to the extent that autonomy remains an influential value because in *Dubay*, by hypothesis, the parenthood-averse party made his position clear at the outset, so his regret reflects no change of mind, while in *A.Z.* the embryos exist only because the party now seeking to avoid parenthood participated in their creation and did so with only one imaginable purpose, reproduction.[304] Put differently, according greater

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299. *E.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994).

300. Robertson, *supra* note 290, at 1038-39. In addition, Robertson notes, enforcement of precommitments promotes efficiency, relieving the courts of the burden of resolving such controversies. *Id.* at 1039. *See, e.g.*, Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006); Cahill v. Cahill, 757 So. 2d 465 (Ala. Civ. App. 2000); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002); *see also In re* Marriage of Dahl, 194 P.3d 834 (Or. Ct. App. 2008) (enforcing a provision designating the divorcing wife as decisionmaker). For additional support of a contractual approach, see Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065 (2002-2003); Amanda J. Smith, J.B. v. M.B.*: New Evidence that Contracts Need To Be Reevaluated As the Method of Choice for Resolving Frozen Embryo Disputes*, 81 N.C. L. REV. 878 (2002-2003); Karissa Hostrup Windsor, Note, *Disposition of Cryopreserved Preembryos After Divorce*, 88 IOWA L. REV. 1001 (2002-2003).

301. Blumenthal, *supra* note 83, at 217.

302. *Id.*

303. Glenn Cohen stakes out a middle ground, urging a default rule of non-use or a right to avoid genetic parenthood, subject to individual waiver in advance, while leaving open the possibility of more nuanced rules applicable when one party has no other opportunity to become a genetic parent. Cohen, *supra* note 201.

304. True, one can imagine that one spouse agreed primarily to humor or mollify the other, with more consequential negotiations and the ultimate decision put off until later. *Cf. In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 294 n.22 (Ct. App. 1998) (finding the former husband to be the child's father, over his objections, and observing: "And while it may be true that John's consent to the fertilization, implantation and pregnancy was done as an accommodation to allow Luanne to surmount a formality, who knows what relationship he may develop with Jaycee in the future? Human relationships are not static; things done merely to help one individual overcome a perceived legal obstacle sometimes become much more meaningful.").

deference to the *purposeful* progenitor's Time 2 preference to avoid parenthood while ignoring the *unintended* progenitor's similar and ongoing preference seems counterintuitive under an autonomy rationale.[305]

Further, whatever weight *Dubay* places on the interests of other parties—whether the child, the mother, or the public fisc[306]—the cases like *A.Z.* do not find such concerns compelling. In *A.Z.*, of course, the former wife had wanted to use the preembryos, consistent with the provisions of the agreement. In an even more telling illustration from the European Court of Human Rights, Grand Chamber, Natalie Evans sought to preserve her fertility in the face of a diagnosis of precancerous tumors, which would require the removal of her ovaries. [307] Upon medical advice that frozen unfertilized ova have a lower reproductive success rate than frozen fertilized ova,[308] Evans's partner, J., agreed to provide semen for IVF, which produced six preembryos that were frozen for future use. Pursuant to British law, which requires contemporaneous mutual consent, both Evans and J. were advised that either could withdraw consent to use the preembryos at any time. After the parties' relationship deteriorated, J. withdrew consent and asked that the preembryos be destroyed. Evans sued, claiming that contemporaneous-consent requirement violated the Human Rights Convention by imposing an obstacle to her last and only opportunity to procreate with her own genetic material.[309] A majority of the Grand Chamber ruled against her, upholding the application of the requirement of contemporaneous mutual consent. Presumably, given British law, the same result would follow even if the original agreement had specified that Evans would be able to control the preembryos.

Of course, *Dubay* and the frozen-embryo cases are not identical. Yet, any two situations differ, and the question becomes which differences law chooses to make important. One immediately apparent distinction focuses on pregnancy: Matthew Dubay lost the opportunity to actualize his post-ejaculation regret, that is, to reconsider, once Lauren Wells became pregnant, and her physical integrity prevented him from doing anything to halt his becoming a father. Yet a woman's physical integrity is not entirely irrelevant in the frozen-embryo cases, as Natalie Evans's predicament poignantly illustrates. Put differently, should sexual conception and alternative methods of conception in which no pregnancy has yet occurred necessarily give rise to such different legal responses?[310] Instead of emphasizing pregnancy, law could

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305. *See* Strasser, *supra* note 293, at 1192-93.

306. *See supra* notes 227-285 and accompanying text.

307. Evans v. United Kingdom (No. 6339/05), 2007-XV Eur. Ct. H.R. Grand Chamber.

308. Technological advances might have begun to ameliorate this problem. *See* Jennifer Ludden, *Egg Freezing Puts Biological Clock on Hold* (NPR radio broadcast May 31, 2011).

309. *Evans* invoked Articles 2, 8, 12, and 14 of the Human Rights Act. Evans v. United Kingdom (No. 6339/05), 2007-XV Eur. Ct. H.R. Grand Chamber.

310. Likewise, in both settings, the prevailing legal principle appears to preserve the status quo—be it the pregnancy or the absence of pregnancy, although pregnancy itself always presents a self-executing

choose to emphasize the actor's purpose—which was definitely not conception in *Dubay* but was in *A.Z.*[311] From this perspective, binding the actor only in the former case is not the only plausible approach.

These observations, in turn, invite two possible explanations. First, a public policy against "forced parenthood" arguably supports outcomes like those in *A.Z.* and *Evans*.[312] Of course, that was one of the arguments unsuccessfully advanced in *Dubay*, albeit overwhelmed not only by respect for the pregnant woman's control over her body but also by the strength of the policy that keeps dependency private.[313] These cases ignore the possibility that genetic parentage need not entail legal parentage and its economic obligations. Thus, a legal rule that takes effect *before* the transfer of the cryopreserved embryos for gestation arguably obviates the problem presented in *Dubay*. In other words, this rule is efficient for a state preoccupied with "deadbeat dads": no child, no support—no enforcement difficulties.

Second, this case study offers a positive test of the hypothesis that unaddressed regret might operate as a "price of pleasure" exacted for sexual encounters.[314] Surrendering birth mothers and accidental fathers deserve to feel regret; they all presumably conceived sexually. The same is likely true for aborting women—though sometimes law may purport to protect them even while promoting regret. Apparently, any sexual encounter with another counts, whether oral sex, sex with a condom, or even unconscious sex,[315] but the masturbation necessary for men to provide semen for assisted reproduction does not. Those who do not conceive sexually, surrogate mothers and those who created frozen embryos, do not merit this regret penalty. Medical intervention apparently purifies the reproductive process in such situations: no sex, no pleasure—no problem.

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challenge to the status quo. Moreover, under the British version of the contemporaneous consent requirement, one party's objection to the use of the embryos compels their destruction, not the maintenance of the status quo. *Id.* at para. 19.

311. This was precisely the path that *Baby M* declined to follow. *See In re* Baby M, 537 A.2d 1227,1248-49 (N.J. 1988); Shultz, *supra* note 198, at 323 (criticizing *Baby M*: "Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."). Alternatively, law could emphasize the comparative opportunities for future reproduction, in light of health crises like Natalie Evans's illness or women's decreasing fertility as they age. *See supra* note 290 and accompanying text.

312. *See* Cohen, *supra* note 201 (arguing for recognition of the right not to be a genetic parent, but concluding the right should be subject to waiver in advance). *But see* Susan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent*, 39 FAM. L.Q. 663, 675 (2005) (arguing that a lack of present intent should not defeat parenthood for one who purposely contributed to the creation of frozen embryos at an earlier time); Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1030 (2004) (arguing "that the burdens of 'forced parenthood'—usually claimed by men—are not sufficiently weighty, and that the investments of the procreation-seeking party—usually the woman—are not sufficiently weak to justify" consistent judicial rulings in favor of the former).

313. *See supra* notes 223-285 and accompanying text.

314. *See supra* notes 267-287 and accompanying text.

315. *See supra* notes 225, 283-285 and accompanying text.

The cases, then, line up to yield a sex/no sex distinction. Accordingly, they reveal the limits of *Lawrence v. Texas*[316] and *Eisenstadt v. Baird*[317] before it, to the extent that both might have promised protection for sexual activities outside marriage.

E. Sperm Donation: Regret as Respect

The divide between the sex and no-sex cases gains additional strength in disputes about the status of sperm donors for alternative insemination.[318] These disputes show that family law does not invariably attach significance to genetic ties—even when doing so would address regret and also would advance the state interest in ensuring private support for already born children. Instead, these cases often elevate respect for advance agreements, whether express or implied from a default rule, over competing values. A pair of cases arising from alternative insemination with the sperm of a known donor exemplifies what I call "regret as respect" or the "respect model of regret."

In *In re K.M.H.*,[319] a divided Kansas Supreme Court applied and upheld a state statute treating a sperm provider as "not the birth father," absent a written agreement to the contrary with the woman. In this case, Daryl Hendrix (a gay man reportedly hopeful about the opportunity to become a parent) alleged an oral understanding with a friend, Samantha Harrington (an attorney), that he would provide sperm to her for insemination; according to Hendrix's version of the facts, they agreed that he would be involved in the resulting child's life, and she assured him that they need not put anything in writing.[320] Despite his original misunderstanding of the law (at Time 1), his subsequent regret (at Time 2), and his constitutional challenges to the statute (which he took all the way to the United States Supreme Court),[321] Hendrix's failure to secure a written agreement from Harrington naming him as birth father precludes him from paternal status as to the resulting twins. Thus, in this no-sex case, Hendrix is left to suffer his regret about his actions,[322] whether for entering an agreement with an untrustworthy woman or failing to memorialize his expectations in writing.

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316. 539 U.S. 558 (2003); *see supra* note 159 (noting limited readings of *Lawrence*).

317. 405 U.S. 438 (1972).

318. This section focuses on sperm donors, although contemporary practices of assisted reproduction invite similar controversies involving ova donors. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (limiting the reach of the understanding of an ova "donor").

319. 169 P.3d 1025 (Kan. 2007), *cert. denied sub nom.* Hendrix v. Harrington, 555 U.S. 937 (2008).

320. *See Man Fights for Parental Rights*, KCTV5-KANSAS CITY, Nov. 23, 2007.

321. The Court denied certiorari. 555 U.S. 937 (2008).

322. *Cf.* Sandi Varnado, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 617-18 (2006) (surmising reasons for possible donor regret).

The court requires respect for his implied precommitment or his constructive choice, based on the statutory default rule. The majority interprets the statute to advance state interests incompatible with legal recognition of second thoughts: "predictability, clarity, and enforceability."[323] Explaining that the statute afforded Hendrix an opportunity to bargain for parental rights *before* providing his semen for Harrington's insemination, the majority asserts that "the male's ability to insist on father status effectively disappears once he donates sperm."[324] This reasoning recalls *Dubay*'s responsibility model[325] in two important ways, even though the cases are mirror images. First, both courts emphasize that the challengers should have acted sooner to secure their objectives; their regret comes too late. Second, parentage is a legal construction. Hendrix's genetic tie to the twins is irrelevant because the law makes it so, given his failure to comply with the statutory requirements for "opting in" to parental status. He represents not only a variation on the theme of the thwarted father in adoption cases[326] but also a litigant who, like Matthew Dubay, challenges the way the state has chosen to define "father."[327] To the extent that *K.M.H.* makes the time of the sperm donation controlling, it also contrasts with *A.Z.*,[328] which allows for a change of mind even after the man has relinquished the sperm.[329]

In a complementary case to *K.M.H.*, *Ferguson v. McKiernan*,[330] a divided Pennsylvania Supreme Court enforced a pre-insemination agreement in which Joel McKiernan promised to provide sperm for IVF for Yvonne Ferguson, his former lover, so long as he would not be responsible for child support. Here, after twins were born, it was their mother, Ferguson, who had second thoughts and subsequently sought child support from McKiernan. The majority acknowledges the interests of others—particularly the children. It concedes that support obligations would certainly follow conception by sexual intercourse (à la *Dubay*'s responsibility model), but sees a "commonsense"[331] and "self-evident"[332] distinction between such sexual conduct and "the non-

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323. 169 P.3d at 1039. For a thorough analysis of the case and underlying policy issues, see Elizabeth E. McDonald, *Sperm Donor or Thwarted Father? How Written Agreement Statutes Are Changing the Way Courts Resolve Legal Parenting Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340 (2009).

324. 169 P.3d at 1039.

325. *See supra* notes 223-287 and accompanying text.

326. *See, e.g.*, Oren, *supra* note 201, at 160-70 (describing cases in which the birth mother, seeking to place a newborn for adoption, purposely thwarted the birth father's efforts to establish a relationship with the child, a step necessary to establish his right to a pre-adoption notice and hearing).

327. *See* Stanley v. Illinois, 405 U.S. 645, 649-50 (1972) (finding a violation of due process in the state's exclusion of unmarried fathers from the statutory definition of "parents").

328. 725 N.E.2d 1051 (Mass. 2000).

329. *See supra* notes 294-297 and accompanying text.

330. 940 A.2d 1236 (Pa. 2007).

331. *Id.* at 1245. *See* Straub v. B.M.T., 645 N.E.2d 597 (Ind. 1994) (disallowing a man from invoking the status of sperm donor, instead of father, when the insemination occurred by sexual intercourse).

332. *Ferguson*, 940 A.2d at 1246.

sexual clinical options for conception that are increasingly common in the modern reproductive environment."[333] The court fails to explain why except to suggest that this resolution of the controversy enhances women's reproductive options: a rule of unenforceability for such agreements "would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child"[334]—leaving her no choice but to resort to anonymously donated semen.

With respect to anonymously donated semen deposited at sperm banks, the prevailing approach has long excluded the donor from paternal status and treated his identity as confidential, per agreement.[335] Early legal responses to donor insemination assumed as the paradigm a married heterosexual couple with an infertile husband; indeed, the focus on the husband led some authorities once to regard the process as adultery.[336] Under the traditional presumption of legitimacy, as well as principles of estoppel, the husband would be the legal father of any resulting child and the donor would have no legal status.[337] Little thought apparently was given to the possibility of unmarried women using the process, which has now become common practice.[338]

Today, in the United States sperm banks provide various options for selection in advance, including anonymity and "identity release."[339] Recent reforms in the United Kingdom allow those conceived with donor gametes (both sperm and ova) to obtain, when they turn 16, nonidentifying information about their genetic parents and their donor-conceived siblings and, when they

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333. *Id.* at 1245. For another illustration of this principle, see *In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010). *See infra* notes 488-490 and accompanying text (discussing this case).

In rejecting the application of a strict intent test, however, to resolve a parentage dispute between former lesbian partners, when one contributed ova and the other gestated the pregnancy, the California Supreme Court has suggested the method of conception should not matter:

> Usually, whether there is evidence of a parent and child relationship . . . does not depend upon the intent of the parent. For example, a man who engages in sexual intercourse with a woman who assures him, falsely, that she is incapable of conceiving children is the father of a resulting child, despite his lack of intent to become a father.

K.M., 117 P.3d at 682. Accordingly, the court decided that the plan to raise the children in the parties' joint home means that the woman who contributed the ova is not a mere donor without parental status. *Id.*

334. 940 A.2d at 1247.

335. *E.g., In re* Adoption of Anonymous, 345 N.Y.S.2d 430 (Sur. Ct. 1973); UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 377 (2001).

336. *See Anonymous*, 345 N.Y.S.2d at 432-33; MAY, *supra* note 111, at 242-43.

337. *Anonymous*, 345 N.Y.S.2d 430; UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 377 (2001).

338. *See* Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 44 (detailing the experiences of several single women who used donor insemination to have children).

339. Reproductive Technologies, Inc., The Sperm Bank of California, http://thespermbankofca.org (last visited Oct. 30, 2011).

turn 18, identifying information.[340] These reforms respect expectations and agreements by taking effect according to a schedule designed to prevent surprise to those who donated before the enactment of the new rules.[341]

The evolution of these practices and legal principles has conceptualized donor insemination as a medical intervention[342]—even though the process is sufficiently simple that do-it-yourself efforts are common, with turkey basters long and widely cited for this purpose.[343] The Kansas statute in *K.M.H.*[344] and the opinion in *Ferguson*[345] both emphasize the clinical or medical, and hence asexual, aspect of the procedure. Further, given the different legal consequences for men depending on the method of conception, the involvement of a physician in donor insemination serves an evidentiary function, helping to establish the process used in a given case. In the absence of such evidence, the controversy about the method of conception and hence the legal status of the genetic father might easily devolve into a "he said/she said" argument.[346]

The principles showcased in *K.M.H.* and *Ferguson* make no room for regret, even at the expense of the policy that prefers two parents for each child, designed to ensure that children's needs will be met privately. In other words, even though these cases resemble *Dubay* in their treatment of regret, one sees a

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340. Human Fertilisation and Embryology Act of 2008, ch. 22, § 24 (U.K.) (§ 31ZA, amending § 31 of the 1990 Act). Arguments against anonymity have started to mount in the U.S. *See, e.g.*, Alessandra Rafferty, *Donor-Conceived and Out of the Closet*, NEWSWEEK, Feb. 25, 2011, *available at* http://www.newsweek.com/2011/02/25/donor-conceived-and-out-of-the-closet.html; Colton Wooten, *A Father's Day Plea to Sperm Donors*, N.Y. TIMES, June 19, 2011, at WK9.

341. See Human Fertilisation and Embryology Act 2008: Explanatory Notes 24 (explaining that "[d]onor conceived people will be able to request identifying information about their donor from 2023 onwards, in relation to donors who donated identifiably from April 2005" or earlier for donors who re-registered as identifiable), available at http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080022_en.pdf.

342. *See* MAY, *supra* note 111, at 242-43; Bernstein, *supra* note 219, at 1079 (citing the medical profession as "a major mobilizing force behind the growing acceptance" of donor insemination); *see also* Moon v. Michigan Reproductive & IVF Ctr., 2011 WL 4503310 (Mich. Ct. App. 2011) (holding that fertility services constitute medical treatment that cannot be withheld, under state nondiscrimination statute, from single women).

343. Renate Duelli Klein, *Doing It Ourselves: Self Insemination*, *in* TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 382 (Rita Arditti, Renate Duelli Klein & Shelley Minden eds., 1984); Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991).

344. 169 P.3d 1025, 1029 (Kan. 2007) (quoting the statute, KAN. STAT. ANN. 38-1114(f), which requires "semen provided to a licensed physician").

345. 940 A.2d 1236, 1246 (Pa. 2007) ("Indeed, the parties could have done little more than they did to imbue the transaction with the hallmarks of institutional, non-sexual conception by sperm donation and IVF.").

346. For examples of these arguments about the father's legal status, see Adams-Hall v. Adams, 3 A.3d 1096 (Del. 2010), and *In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010). *See also* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 984 (2009) (criticizing the requirement of a licensed physician while explaining its evidentiary purpose). Although the 1973 version of the Uniform Parentage Act included the requirement of a physician, the drafters removed the requirement in the 2000 version. UNIF. PARENTAGE ACT § 702 cmt. (2002), 9B U.L.A. 62 (Supp. 2011) ("The new Act does not continue the requirement [in the 1973 version] that the donor provide the sperm to a licensed physician.").

sharp contrast on an axis of child support and privatized dependency.[347] On this axis, *K.M.H.* and *Ferguson*, both no-sex cases, diverge sharply from *Dubay*, a sex case demonstrating unwavering adherence to the responsibility model of regret. These no-sex cases emphasize instead respect for choices (or constructive choices) made at Time 1, whether memorialized in an agreement, as in *Ferguson*, or imposed because of failure to depart from the default rule, as in *K.M.H.* This reliance on preconception intent accords with recommendations of intent-based parentage for assisted reproduction that scholars have offered, noting that assisted reproduction always constitutes a purposive and deliberate choice, unlike much sexual procreation.[348]

True, we could see the glass as half empty instead of half full, especially when reading these cases against *Baby M*[349] and *A.Z. v. B.Z.*,[350] two no-sex scenarios in which one participant's later regret carries the day. Moreover, in *Baby M*, regret is deployed to allow one who had originally disclaimed parental rights to reclaim them, precisely the effort that failed in *K.M.H.*, while in *A.Z.* regret operates to permit someone who had precommitted to genetic parenthood (and provided sperm solely for that purpose) subsequently to reconsider that that choice.

Gender may well have some explanatory value here. Although men prevail in some of the no-sex cases (*A.Z.* and *Ferguson*) but women win in others (*Baby M* and *K.M.H.*), together, these cases suggest that courts are more willing to exclude men from parental status than women (given that sperm donors are always men).[351] Put differently, we might find in the no-sex cases that a man's decision to waive parenthood typically receives recognition, whether expressed at Time 2 (as in *A.Z.*) or at Time 1 (as in *K.M.H.* and *Ferguson*), but a women's waiver is subject to second thoughts (as in *Baby M*). Although gestation might explain the different treatment, the contrasting results in the sex cases suggest that the "price of pleasure" provides an even more compelling rationale. In sex cases, courts decline to permit a surrendering birth mother's requested reconsideration of waiver of her parental rights (in the adoption cases), just as they decline to respect an unintended father's effort to avoid parental status (in *Dubay*).

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347. *See K.M.H.*, 169 P.3d at 1051 (Hill, J., dissenting) (criticizing the majority for ignoring the children's best interests); *Ferguson*, 940 A.2d at 1249 (Eakin, J., dissenting) (criticizing the majority for allowing the parents to bargain away the children's interests).

348. *See also, e.g.*, Lewis, *supra* note 346, at 982-83; Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law*, 44 DUKE L.J. 524, 552-54 (1994).

349. 537 A.2d 1227 (N.J. 1988).

350. 725 N.E.2d 1051 (Mass. 2000).

351. The *K.M.H.* court explicitly sees the statute as drawing a gender-based line between female sperm recipients and male sperm donors, but decides that the governmental objectives of predictability, clarity, and enforceability satisfy the requirements of equal protection. 169 P.3d at 1039. The California Supreme Court's decision to recognize the would-be egg donor as a parent in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), arguably supports the generalization. *See supra* note 333 and accompanying text (summarizing this case).

Despite these straightforward readings of the respect model of regret, I would add one more perspective, emphasizing the potentially radical ramifications of this approach. First, this model suspends many of the usual principles of family law, including the requirement of two parents for each child as a means of protecting the state from supporting needy children.[352] Similarly, this model takes pains to distance itself from the family law exceptionalism so evident in *A.Z.*'s recitation of all the situations in which family law permits reconsideration that would not be permitted elsewhere.[353] *K.M.H.* and *Ferguson* simply treat the precommitments as binding, pursuant to ordinary contract law, echoing an incipient trend in cases that enforce prenuptial agreements.[354] In doing so, these courts seem less constrained by gender norms[355] than those in the other case studies, even if gender can never be averted entirely. Finally, these courts seem to embrace the nontraditional ways of forming families that the *Baby M* court resists.[356] Accordingly, the respect model validates the observations made years ago by Judge Posner about donor insemination, which he saw as "rich with social implications."[357] This is so because donor insemination "places lesbian custody beyond the reach of governmental regulation," "allows women to escape having to share parenting rights with men," and thereby "accelerates the shift in economic power from men to women."[358]

III. REPRODUCING REGRET

With regret emerging from these case studies as malleable, slippery, and chameleonic, one might feel tempted to ignore it as an empty placeholder without distinctive meaning. Whether opportunistically or simply without appreciation of the contrasting models that this Article has sought to emphasize, courts have shaped regret to serve several different purposes: reproach, redemption, resistance, responsibility, reconsideration, and respect. Even if a shapeshifting placeholder, however, regret offers access to

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352. Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005).

353. *See supra* note 297 and accompanying text (quoting *A.Z.*, 725 N.E.2d at 1059). On family law exceptionalism, see *supra* note 7.

354. *E.g., In re* Marriage of Pendleton & Fireman, 5 P.3d 839 (Cal. 2000); Simeone v. Simeone, 581 A.2d 162 (Pa. 1990).

355. In upholding prenuptial agreements, pursuant to the emerging trend, some courts expressly reject the argument that gender-based inequalities in financial resources and bargaining power should limit enforceability. *E.g.*, *Simeone*, 581 A.2d at 165.

356. *See* Bernstein, *supra* note 219, at 1097-118 (tracing how artificial insemination, when used by single women and in surrogacy arrangements, "rocked the boat," unsettling the legal and social acceptance this medical practice had attained); Mary L. Shanley & Sujatha Jesudason, *Surrogacy: Reinscribing or Exploding the Nuclear Family?* (APSA 2011 Annual Meeting Paper, Aug. 1, 2011), *abstract available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901304.

357. RICHARD A. POSNER, SEX AND REASON 421 (1992).

358. *Id.*

assumptions, values, and objectives at work when judges resolve controversies about reproduction or family law more generally.

Gonzales is certainly not the only recent case in which the Supreme Court has tackled a family law issue without full appreciation for histories and nuances that those familiar with the field take for granted.[359] Suppose the *Gonzales* Court had considered reproduction and regret as a recurring problem previously addressed in case law, instead of a newly discovered phenomenon. Having a range of models before it, the Court might have decided that regret is not a helpful analytical tool because of the indeterminacy of its implications, shown by the array of judicial treatments. Alternatively, the Court might have eschewed its own truncated and conclusory use of regret in favor of one of the other models or some combination thereof—even though some of these are flawed as well. It might have found that judicial *disapproval* of the underlying conduct or choices often manifests itself in judicial *approval* of regret, which then can function as a punishment or a deterrent. Thus, if *Gonzales* had followed the path illustrated by the redemption model depicted in the adoption surrenders[360] or *Dubay*'s responsibility model,[361] the opinion would have embraced regret as well-deserved pain for disfavored decisionmaking, rather than limiting options for the avowed purpose of preventing regret. Alternatively, *Gonzales*'s reproach model might have found a useful reference in *Baby M*'s resistance model, in which generalizations about women's emotions were used to rationalize a rule of law restricting their reproductive choices.[362] Indeed, *Gonzales* shifts power from the individual to the state in an effort to halt behavior regarded as objectionable, mimicking *Baby M*'s approach without acknowledging this precedent.

Likewise, the *Gonzales* Court could have learned something from the models illustrated by the no-sex cases, especially given the medical or clinical

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359. For example, in *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), the Supreme Court's first international family law case, the majority opinion interpreting and applying the Hague Convention on the Civil Aspects of International Child Abduction shows no appreciation for the difficulties presented by child custody cases concerning parental relocation and/or risks of domestic violence—familiar problems in family law. *See, e.g.*, Brief of the University of Cincinnati College of Law Domestic Violence and Civil Protection Order Clinic as Amicus Curiae Supporting Respondent, Abbott v. Abbott, 130 S. Ct. 1983 (2010) (No. 08-645); Brief of Eleven Law Professors as Amicus Curiae in Support of Respondent, Abbott v. Abbott (No. 8-645); Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 J. FAM. L. 791 (1992-1993); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004). Likewise, in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the majority reveals its limited understanding of domestic violence and the historical reluctance of law enforcement to respond, although family law scholars and reformers have long called attention to such problems. *See, e.g.*, Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328 (David Kairys ed., 1998); Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (2007).

360. *See supra* notes 110-177 and accompanying text.

361. *See supra* notes 224-285 and accompanying text.

362. *See supra* notes 178-222 and accompanying text.

settings that intact D & E abortion and ARTs share.[363] True, the *Gonzales* Court might well have found unhelpful in the abortion context the reconsideration model used in *A.Z.*'s treatment of agreements fixing the disposition of frozen embryos at a later time.[364] In past cases, the Court has emphasized both the immediacy of the abortion decision and the irrevocability of that choice as well as the choice to carry to term.[365] Nonetheless, abortion itself can be understood as reconsideration, based on knowledge that a woman acquires about her present circumstances, including her health and that of the fetus. The ability to terminate a pregnancy fits well within the freedom to reconsider intimate relationships that *A.Z.* so fiercely protects.[366] Even beyond this general connection, ARTs and abortion share more particularized links because of the frequency with which IVF produces multi-fetal pregnancies that prompt selective reduction[367] and also because of the occasional change of mind that leads a woman to terminate altogether an IVF-created pregnancy.[368]

The respect model discernible in controversies arising from sperm donation for alternative insemination[369] reflects the most contemporary thinking. The cases demonstrating this model were decided just a few months after *Gonzales*, reinforcing charges that the Supreme Court majority had turned back the clock at the expense of more advanced and cogent reasoning.[370] Like the redemption and responsibility models, the respect model makes no attempt to alleviate regret, but the reasons are utterly different. The respect model emphasizes capacity and agency, it eschews paternalism, and it relies far less on gender norms than the other models.[371] Indeed, we can find traces of the respect model in Justice Ginsburg's dissent in *Gonzales*,[372] which would honor autonomy and individual decisionmaking even if regret sometimes follows. In this sense, the respect model makes the most room for the productive relationship among choice, regret, and personal growth described in the psychoanalytic literature.[373]

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363. For some of the political considerations that led to an abortion-rights strategy rooted in medical and sexual privacy, instead of gender equality, see West, *supra* note 80, at 1423 (noting controversy generated by the then pending Equal Rights Amendment to the U.S. Constitution).

364. *See supra* notes 288-317 and accompanying text.

365. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979).

366. *See supra* note 297 and accompanying text (quoting A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000)).

367. *See, e.g.*, Theresa Glennon, *Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction*, 55 VILL. L. REV. 147, 158 & n.62 (2010); Ruth Padawer, *The Two-Minus-One Pregnancy*, N.Y. TIMES MAG., Aug. 14, 2011, at MM22.

368. *See, e.g.*, Danielle Friedman, *A New Debate Over In Vitro*, THE DAILY BEAST, July 26, 2010, http://www.thedailybeast.com/articles/2010/07/27/can-ivf-women-have-an-abortion.html (reporting, inter alia, data from England's Human Fertilisation and Embryology Authority that, on average, eighty women per year terminate pregnancies achieved by IVF).

369. *See supra* notes 318-358 and accompanying text.

370. *See* Gonzales v. Carhart, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

371. *See supra* notes 352-358 and accompanying text.

372. 550 U.S. at 169-91 (Ginsburg, J., dissenting); *see supra* notes 75-82 and accompanying text.

373. *See supra* notes 55-60 and accompanying text.

Beyond reorienting *Gonzales*, the regulatory moves apparent in the case studies reveal several larger themes that merit more sustained analysis. First, the courts' naturalization of regret belies the state's role not only in constructing regret but also in spurring counter-constructions. Second, gender serves as both an engine and a product of these constructions, which gain strength from certain gender stereotypes and male norms of sexual interactions and pleasures. Finally, regret helps to expose deep doctrinal and policy inconsistencies that family law has failed to confront directly, including the treatment of sex.

A. The State's Role: Before and After Regret

In all the cases and across all the models, courts myopically conceptualize regret as a natural, internal, self-generated emotion, while ignoring any possible contribution the state itself might make to this experience. Yet, the various models illuminate the active production of regret through law. Put differently, the various case studies reveal how law, though often nominally celebrating reproductive and family autonomy, constrains choice, producing regret about decisions made within such constraints. In addition, the models invite examination of a dynamic process in which official constructions of regret set in motion changes in life as well as in law.

1. Regret's Antecedents

The models in the sex cases (the reproach, redemption, and responsibility models) demonstrate most compellingly how courts ignore the state's role in creating and constructing regret. They all treat regret or the prospect of regret as a product of the actor's own misguided decisions, whether choosing an abortion or engaging in risky (i.e., potentially procreative) sex. Moreover, courts then use regret to accomplish specific goals, such as redeeming wayward birth mothers and deterring "irresponsible" reproduction.[374] Yet in each of these scenarios, regret—always exquisitely contextual—arises not in a vacuum but in response to the cultural setting, including governing legal rules.[375] Indeed, the mainstream critique that state intervention to "cultivat[e], shap[e], or script[] emotions" is too intrusive[376] erroneously assumes the absence of law from the ordinary course of affairs and process of affective response.

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374. *See supra* notes 110-177, 224-285 and accompanying text.

375. *See* Abrams, *supra* note 68, at 592 ("[R]egret, like other emotions, emerges in a particular social, political, and cultural context: we receive strong social and cultural cues about the emotions we should feel and the objects that should provoke them."); *see also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (exposing, in a classic article, pervasive constraints on individual freedom derived from background laws, regardless of professed principles).

376. Abrams and Keren note this critique. Abrams & Keren, *supra* note 5, at 2068-69.

A closer look at the adoption-surrender case study,[377] the site of the redemption model, illustrates this pattern. Adoption requirements and procedures are products of state law,[378] reinforced by cultural constructs such as the challenges faced by many single parents and general sex negativity.[379] A different legal approach, such as a preconsent counseling requirement,[380] could minimize regret, just as, more radically, a state with more generous social insurance (in place of insistence on "personal responsibility") might obviate the circumstances, such as economic hardship, that prompt some surrenders in the first place.[381] One could pursue a similar analysis of *Dubay*, the case of the accidental father, in which the regret experienced also stems from this same legal policy of "personal responsibility," implemented by means of an elaborate administrative and judicial system that calculates child support and enforces such obligations.

This dominant thinking crowds out alternative visions in which support of children might constitute a state responsibility, as Martha Fineman and Anne Alstott, among others, have proposed.[382] In addition, the dominant thinking subdues the full impact of the interconnections among these different laws. Thus, as Dubay argued in court, law's protection of a woman's right to have an abortion or carry to term vitiates his own reproductive autonomy.[383] Similarly, but less openly acknowledged today, birth fathers' rights to veto adoptions often work to vitiate the autonomy of birth mothers.[384]

Likewise, if we look for the state's role in the abortion regret cited in *Gonzales*, we find similar factors at work. First, legal requirements involving genetic fathers in the process of surrendering an infant for adoption might well

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377. See supra notes 109-177 and accompanying text.

378. *See* Lofton v. Sec. of Dep't of Children and Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) (emphasizing that "adoption is wholly a creature of the state"), *cert. denied*, 543 U.S. 1081 (2005); *see also* Griffith v. Johnston, 899 F.2d 1427, 1437 (5th Cir. 1990) (rejecting an asserted right to adopt).

379. On sex negativity, see, for example, Rosenbury & Rothman, *supra* note 160, at 812-18.

380. *See* Samuels, *supra* note 173.

381. *See, e.g.*, Wendy Koch, *Struggling Families Look at Adoption*, USA TODAY, May 19, 2009, http://www.usatoday.com/news/nation/2009-05-18-mother_N.htm.

382. *See* FINEMAN, *supra* note 8; Alstott, *supra* note 266; Anne Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006); *see also* West, *supra* note 80, at 1409-10, 1425 (explaining how inadequate social welfare and abortion "choice" make the decision to parent "a chosen consumer good or lifestyle").

True, it is difficult to imagine the possibility of public support in current neoliberal times, but consider how even now we take for granted the state's (taxpayers') responsibility for children's schooling. Of course, deficiencies in the quality of much public schooling today are well known.

383. *See supra* notes 230, 252 and accompanying text.

384. I am grateful to Professor Mary M. Beck, University of Missouri School of Law, for this observation. *See also, e.g.*, *In re* Adoption of Kelsey S., 823 P.2d 1216, 1233 n.11 (Cal. 1992) (noting that a mother's decision to thwart the birth father's efforts to assert parental rights should not imply culpable motives on her part because "in most such cases the mother is acting out of deep concern for her child's best interest").

make abortion a more attractive alternative for some women.[385] Second, there is the absence of ongoing financial support for women who would carry their pregnancies to term if they could afford to rear a child.[386] Empirical evidence shows that a disproportionate number of abortion patients are women of color and poor women,[387] and one cannot seriously suggest that such marginalized members of the population are simply better able to exercise their constitutionally protected right to reproductive autonomy than their white, more economically comfortable counterparts. Corroborating evidence comes from the rise in the abortion rate during the recent economic downturn in the U.S.[388] Indeed, some authorities have voiced concern that unrelenting insistence on "personal responsibility" (i.e., child support) by poor fathers creates incentives for men to encourage their sexual partners to have abortions.[389] Without going so far as anti-abortion activists who claim that most abortions are coerced and that no woman voluntarily chooses abortion,[390] certainly economic pressures—sometimes expressed by men and often experienced by women—operate as a factor in some abortion decisionmaking. Recent congressional efforts to defund Planned Parenthood or to eliminate all of Title X's funding for family planning,[391] if enacted, would certainly exacerbate these problems.

In addition, we can assume state-imposed pre-abortion "informed consent" litanies and ultrasound viewings evoke painful emotional reactions, just as they are designed to do.[392] This hypothesis is consistent with evidence that women who experience the most intense negative feelings after abortion are those who

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385. Email from Professor Mary M. Beck to author, Mar. 4, 2011, 3:22 p.m. CST (based on Beck's experience representing birth mothers); *see also* Smith v. Malouf, 722 So. 2d 490, 502 (Miss. 1998) (Smith, J., dissenting) (expressing concerns that the recognition of rights for birth fathers to participate in decisions about whether an infant should be surrendered for adoption will encourage abortions instead).

386. *See, e.g.*, West, *supra* note 80, at 1409; Charles M. Blow, Op-Ed, *The G.O.P.'s Abandoned Babies*, N.Y. TIMES, Feb. 25, 2011.

387. Three quarters of women who have abortions say they cannot afford a child. Thirty percent of abortions occur to non-Hispanic black women, 36% to non-Hispanic white women, 25% to Hispanic women and 9% to women of other races," and women below the poverty level have significantly higher abortion rates than others. GUTTMACHER INSTITUTE, IN BRIEF, FACTS ON INDUCED ABORTIONS IN THE UNITED STATES (May 2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. For a historical examination, see Loretta J. Ross, *African-American Women and Abortion*, *in* THE ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, at 161 (Rickie Solinger ed., 1998).

388. *See, e.g.*, David Crary & Melanie S. Welte, *Doctors See Economic Impact on Abortion, Birth Control*, USA TODAY, Mar. 24, 2009, http://www.usatoday.com/news/health/2009-03-24-family-planning_N.htm.

389. *See* State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting).

390. Thus, anti-abortion campaigns often claim that abortion must be restricted because most women are forced to have the procedure. *See, e.g.*, Stop Forced Abortion, FORCED ABORTIONS IN AMERICA, http://www.stopforcedabortions.org/docs.forcedabortions.pdf.

391. *See* Eckholm, *supra* note 246; Steinhauer, *supra* note 68.

392. *See* Abrams & Keren, *supra* note 5, at 2055, 2063-64; Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 27. For a thoughtful analysis of the questions posed by pre-abortion ultrasound requirements, see Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008).

made their decision by deferring to others[393] and that in the long run omissions (failures to act) produce greater regret than actions.[394] Such evidence suggests a thorough examination of regret must include women who respond to such legal requirements by forgoing abortion. Considering these women along with those who choose abortion despite such requirements, it should come as no surprise that rising concerns about abortion-related regret coincide with the advent of such laws, some of which now compel reciting to the patient that her abortion "will terminate the life of a whole, separate, unique, living human being" with whom the woman shares an existing and constitutionally protected relationship.[395] Such laws both reflect and shape social forces that become part of the background for the emotional experience, with abortion decisions having "unusual cultural salience," as observers have pointed out.[396]

The problems persist even if we focus only on the late-term abortion procedure (intact D & E) targeted by the legislation upheld in *Gonzales*. The procedure in question typically had been used by two quite different groups of women, women with advanced, wanted pregnancies who discovered a devastating fetal anomaly and young, poor women who did not know they were pregnant earlier or encountered economic or structural problems (perhaps a parental involvement requirement[397]) preventing a timely abortion.[398] The statutory prohibition upheld by the Court does nothing to ease the emotional pain felt by the former (in fact, it aggravates it[399]) and does nothing to alleviate the difficulties experienced by the latter. In sum, *Gonzales*'s promise that law can rescue the vulnerable among us from feelings of regret fails to acknowledge the role of both law and culture in creating reasons why we experience such feelings in the first place, just as it fails to acknowledge how the abortion options that remain often present greater risks and trauma than the procedure proscribed.

These insights make especially meaningful and provocative several recent empirical investigations. These include an extensive study, published in 2011, of over 84,000 Danish women and girls who had first-time first-trimester

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393. *See* Matthew T. Crawford et al., *Reactance, Compliance, and Anticipated Regret*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 56, 60 (2002) (finding that compliant behavior results in greater retrospective regret); Patterson, *supra* note 68, at 687-88 (finding the most negative experiences of abortion regret in cases in which women followed the desires of others rather than choosing abortion themselves); *supra* note 68 (citing other studies).

394. *See* Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379 (1995).

395. N.D. CENT. CODE § 14-02.1-02 (2009); S.D. CODIFIED LAWS § 34-23A-10.1 (2005); Planned Parenthood v. Rounds, 530 F.3d 724 (8th Cir. 2007) (en banc).

396. Abrams, *supra* note 68, at 592.

397. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 899-900 (1992) (joint opinion).

398. *See, e.g.*, Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle Over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397 (1998).

399. *See supra* note 68 and accompanying text.

abortions, whom the investigators compared with those who gave birth.[400] The researchers found that the processes of carrying to term and giving birth have a closer association with seeking psychiatric treatment than did having an abortion. These findings coincide with recent guidelines published in the United Kingdom by the Royal Society of Obstetricians and Gynaecologists, under which women should be advised that abortion is generally safer than carrying to term and that most women do not experience adverse psychological effects from abortion.[401] The Danish data also largely corroborate U.S. researchers' 2009 conclusions, using materials from the American Psychological Association's Task Force on Mental Health and Abortion, which determined that most adult women who have abortions experience no mental health problems, although some do.[402] To the extent that seeking psychiatric treatment and having mental health problems serve as proxies for regret or the so-called post-abortion syndrome posited in Sandra Cano's brief,[403] the Danish data and the other studies challenge *Gonzales*'s premises. However, they also leave room for the possibility that the legal and societal hurdles to abortion in the U.S. make a study of Danish women or British guidelines not fully applicable here, reinforcing the significance of legal and cultural constructions of regret. Ongoing empirical research, probably sparked at least in part by *Gonzales*, is exploring such questions by investigating how women experience abortion given the attitudes they encounter in their communities, the media, and the public discourse.[404]

2. Regret's Progeny

Just as culture, law, and government policies construct and shape regret, however, experiences of regret have sparked new practices and legal approaches. First, in place of the "choicelessness"[405] that many surrendering birth mothers in Fessler's book reported experiencing,[406] the decreased stigma of unmarried motherhood opens possibilities for unmarried parents to rear their children.[407] The excruciating pain that surrendering birth mothers have

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400. Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332 (2011).

401. *See UK: New RCOG Guidance Highlights Advances in Abortion Care*, ABORTION REV., Jan. 26, 2011, *available at* http://www.abortionreview.org/index.php/site/article/909/.

402. Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOL. 863 (2009).

403. *See supra* notes 44-45 and accompanying text.

404. *See Social and Emotional Aspects of Abortion*, ANSIRH (Advancing New Standards in Reproductive Health), University of California at San Francisco, http://www.ansirh.org/research/aspects.php (last visited Oct. 30, 2011).

405. *See supra* note 114 and accompanying text (quoting Rickie Solinger on "choicelessness").

406. *See supra* notes 112-125 and accompanying text.

407. Recall that the earlier pressure to surrender focused on the birth mothers of white babies, given the "demand" among prospective adopters for such children. *See supra* note 111 and accompanying text. Census data show that today almost ten percent of white children live with unmarried parents or never-

reportedly experienced has prompted adoption reforms, although recent cases like *D.N.T.*[408] show that more work remains before the demise of the redemption model. In place of the closed adoptions and secrecy that prevailed before *Roe*,[409] open or cooperative adoption, in which birth parents maintain some communication with the child and the adoptive family, has become commonplace today.[410] Authorities attribute the rise of this approach[411] to several factors, including the increasing number of older children (with established ties to their biological families) placed for adoption; the change in the adoption "market" following *Roe*'s legalization of abortion and the resulting ability of birth parents to demand enhanced placement conditions; and the growing sensitivity of experts to the damaging effects of secrecy on adoptees, birth parents, and adopters.[412] Although open adoption has generated its own controversies[413] and *D.N.T.* illustrates possible pitfalls of open relationships between birth and adoptive families,[414] evidence indicates that open adoption has decreased some of the negative emotions that birth parents once felt in closed adoptions. The rise of the relatively new practice of open adoption offers additional choices to birth parents, softening the "all or nothing" decision they once faced.[415] Thus, law reform can play a salutary role—but removing an option, as *Gonzales* does, seems far less likely to prevent a painful look back than to produce one.[416]

Baby M,[417] a no-sex case,[418] also launches a story about legal change, showing both the development of the resistance model of regret and its ultimate failure in achieving its goals. Instead of preserving the legal status quo, *Baby M* inspired new arrangements designed to circumvent its restrictions both technologically and geographically. The development of IVF now permits

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married mothers. *America's Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, Table C3, *available at* http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (last visited Oct. 30, 2011).

408. *In re* Adoption of D.N.T., 843 So. 2d 690 (Miss. 2003).

409. Roe v. Wade, 410 U.S. 113 (1973).

410. *See, e.g.*, Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483 (1996); Reuben Pannor & Annette Baran, *Open Adoption as Standard Practice*, 63 CHILD WELFARE 245 (1984).

411. Open adoption was introduced in the literature in 1976 in an article noting a tradition of open adoption in Hawaiian culture. Annette Baran et al., *Open Adoption*, 21 SOC. WORK 97 (1976).

412. JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851-1950, at 173-76 (2000). Both birth mothers and adoptees have played significant roles in the rise of open adoption. *See* SHANLEY, *supra* note 137, at 21; Sanger, *supra* note 114, at 489-91.

413. *See, e.g.*, Groves v. Clark, 982 P.2d 446 (Mont. 1999).

414. Recall that Camille and Diane moved into the home of Carol and Rick, who were hoping to adopt a baby. *See supra* notes 128-133 and accompanying text.

415. *See* FESSLER, *supra* note 112, at 189. Fessler goes on to note, however, how the situation of surrendering birth mothers has worsened in recent years, with several states now offering shorter time periods for post-birth consent and others making consent irrevocable. *Id.*

416. *See supra* notes 75-82 and accompanying text.

417. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

418. *See supra* notes 314-317 (finding a sex/no-sex distinction in the cases).

collaborations that have eclipsed the traditional surrogacy arrangement used in *Baby M*, in which the surrogate provides both genes and gestation. Some women facing fertility challenges now use donor ova.[419] Alternatively, gestational surrogacy arrangements use ova from the intended mother (i.e., the woman who intends to rear the child as her own)[420] or from a third-party donor,[421] but not from the woman who will gestate the pregnancy.

Although more costly than traditional surrogacy, gestational surrogacy has evoked a more supportive legal response for intended parents than traditional surrogacy in some jurisdictions, in part because the usual criteria for identifying "the mother" do not easily apply in such cases, given the split between genetic and gestational functions, in turn altering the legal consequences if a surrogate changes her mind.[422] As a result, infertility clinics now routinely use gestational surrogacy.[423] True, not all courts observe legal distinctions between traditional and gestational surrogacy, as recent controversies in New Jersey illustrate.[424] Still, some courts have helped gestational surrogacy realize its potential to transform long-held understandings of family—even ruling that, when a man is the sole intended parent, such arrangements may produce a child with only a father, but no legal mother.[425] Others have generously interpreted choice-of-law analysis to make restrictions like those in *Baby M* easy to evade.[426] Today, reproductive tourism takes many Americans across the globe to engage "gestational carriers" for lower rates and with fewer legal hassles than they would find at home.[427] Despite *Baby M*'s resistance, then, the use of assisted

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419. Peggy Orenstein, *Your Gamete, Myself*, N.Y. TIMES MAG., July 15, 2007, *available at* http://www.nytimes.com/2007/07/15/magazine/15egg-t.html.

420. *E.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

421. *E.g.*, Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

422. *See Johnson*, 851 P.2d 776*; see also, e.g.*, Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) (upholding a gestational surrogacy agreement and recognizing the intended father and his partner as parents, without requiring adoption); *In re* Roberto d.B., 923 A.2d 115 (Md. 2007) (recognizing the intended father as the only legal parent at the birth of a child born pursuant to a gestational surrogacy agreement).

423. *See* UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 75 (Supp. 2011) (prefatory cmt. to Art. 8); *see also* ABA, MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY, Article 7, Feb. 2008 (offering a similar model), *available at* http://apps.americanbar.org/family/committees/artmodelact.pdf.

424. For example, courts in New Jersey, where *Baby M* supplies the controlling principles, have recognized the surrogate as the mother of twins even though the ova came from a donor. *In re* Parentage of a Child, 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011); *see* DiFonzo & Stern, *supra* note 183; Stephanie Saul, *Building a Baby with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1; *see also* A.G.R. v. D.R.H, No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. 2009), *available at* http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

425. *E.g.*, *Roberto d.B.*, 923 A.2d 115*; see Raftapol*, 12 A.3d 783 (recognizing two men as parents upon birth, without adoption).

426. *E.g.*, Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004).

427. *See, e.g.*, DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006); Audi & Chang, *supra* note 197; MADE IN INDIA, *supra* note 197. Reproductive tourism has attracted intended parents from foreign countries to the United States and other countries. *See, e.g.*, *France: Surrogacy Ban Affirmed*, N.Y. TIMES, Apr. 7, 2011, at A7 (reporting a French judicial opinion refusing to grant French citizenship to twins born to a surrogate in the United States for French intended parents).

reproduction has flourished largely without significant legal regulation. *Baby M*'s treatment of regret has played an important part in directing this trajectory.

3. Reshaping Regret

Acknowledging the role of law in inciting regret raises normative questions about what stance the state should take. Of all the models, the respect model most successfully escapes the critiques and observations evoked by the others. Although *Ferguson v. McKiernan*[428] cites specific policy reasons for enforcing agreements regarding a sperm donor's status (enhancing women's options in selecting donors[429]), *K.M.H.*[430] signals a different approach. The court seems less wedded to a particular default rule than to the value of having *some* default rule.[431] The *K.M.H.* court defers to the legislature's choice and the availability of private ordering for those who prefer an alternative arrangement. The court embraces autonomy while conveying that it appreciates how law shapes individual choices. The court does not allow allegations of ignorance of the law or of future feelings to trump previous decisions and actions.[432] The court's objective is practical, not ideological or punitive.

Significantly, the *K.M.H.* court's general approach would have remained applicable had the legislature chosen a different default rule that would have recognized the donor as the father as long as he did not opt out. Nonetheless, the particular default chosen, requiring those seeking to be fathers to *opt in*, challenges the familiar construction of fatherhood as natural and its financial obligations as inextricable. This approach invites us to reimagine motherhood too—a process that has been unfolding since *Baby M* in 1988, as various legal authorities have sought to develop principles to govern surrogacy arrangements.[433] Conceptualizing motherhood so that it would require opting in[434] would fundamentally change the assumptions underlying the *Gonzales* majority's understanding of abortion. A seed from which this understanding might have developed appears in the Supreme Court's early reproductive rights jurisprudence, specifically the articulation of a "decision whether to bear or

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428. 940 A.2d 1236 (Pa. 2007).

429. *See supra* notes 330-334 and accompanying text.

430. 169 P.3d 1025 (Kan. 2007), *cert. denied*, 555 U.S. 937 (2008).

431. *Id.* at 1039-44; *see supra* note 323 and accompanying text.

432. *Id.* at 1044.

433. *E.g.*, *Raftopol*, 12 A.3d 783; *Roberto d.B.*, 923 A.2d 115; Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225 (1998).

434. In fact, a feminist (self-help) trade book uses this idea in its title. AMY RICHARDS, OPTING IN: HAVING A CHILD WITHOUT LOSING YOURSELF (2008). Scholarly literature has recently explored the concept of "choice architecture." *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). This term refers to the way that choices are framed and the impact of framing on individual decisions—for example, default rules that allow opting in versus those that allow opting out in light of a perceived socially desirable goal. *See, e.g.*, Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

beget a child" in granting constitutional protection for access to contraception in *Eisenstadt v. Baird*.[435] The *Gonzales* majority opinion includes no trace of this once important rhetoric.[436]

Under the respect model, the legal significance of regret does not evaporate, but leaves the individual to decide what weight to accord to the possibility of subsequent second or later thoughts, within the constraints of applicable default and background rules.[437] This approach makes room for the psychoanalytic vision of choice and regret as ingredients in personal growth.[438] With its simplistic statement about regret,[439] the *Gonzales* majority missed an opportunity to explore this more complex relationship among autonomy, regret, and legal regulation.

B. Engendering Regret

Although the respect model stands out as a possible exception,[440] regret performs gendered work in all the case studies. Many of the initial critiques of *Gonzales* emphasize this aspect of the case,[441] which finds considerable support in the other models of regret as well. Placing *Gonzales*'s model of regret in dialogue with alternative approaches reveals new facets of the underlying assumptions about women, men, and sexualities.

1. Regret and Gender Scripts

Taken together, we might discern in the different models of regret a continuum of maternal self-sacrifice. When faced with an unwanted pregnancy, a woman should give birth and surrender the child for adoption, no matter the regret and emotional pain she might suffer as a result; she will be rewarded with redemption. If she cannot live up to this ideal, then we would expect a self-sacrificing mother to keep and rear the child despite the impact on the

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435. 405 U.S. 438, 453 (1972).

436. Although the *Gonzales* majority omits all reference to *Eisenstadt*, Justice Ginsburg does cite *Eisenstadt* in her dissent. 550 U.S. at 170 (Ginsburg, J., dissenting).

437. *See* Abrams, *supra* note 68, at 586:

> [A] focus on regret seems ill-suited to a liberal democracy, which venerates the ostensibly unencumbered choices of its citizens. If citizens have been afforded the opportunity to make their choices, their second thoughts—a reflection of their broader responsibility for those choices—are their own business, not matters of public concern.

438. *See supra* notes 55-60 and accompanying text. For a recent example from popular culture, see Kassi Underwood, *A Lost Child But Not Mine*, N.Y. TIMES, July 31, 2011, at ST6 (reflecting on a past abortion in the "Modern Love" column).

439. *See supra* note 24 and accompanying text.

440. *See supra* notes 349-358 and accompanying text.

441. *E.g.*, Gonzales v. Carhart, 550 U.S. 124, 183-84 (2007) (Ginsburg, J., dissenting); Manian, *supra* note 27.

woman's own life and future. In both cases, the woman puts the would-be interests of the child ahead of her own. A woman who chooses abortion (just like a woman who enters into a surrogacy contract[442]) falls at the wrong end of the continuum, showing insufficient concern for her child-to-be.

This construction overlooks a primary reason that women have turned to the particular abortion procedure banned by the law upheld in *Gonzales*. Intact D & E has often been used by women who learn about a devastating fetal anomaly during an advanced and wanted pregnancy.[443] For these women, ending the pregnancy represents a choice steeped in love and self-sacrifice, with intact D & E giving them the opportunity to hold the lifeless body after delivery and to mourn the loss.[444] The pain of regret constitutes the self-sacrifice that these women have chosen to endure, as they see it, in the interests of the might-have-been child and often other children in the family, too.[445]

Most scholarly responses to *Gonzales*'s regret rationale condemn the Court's paternalistic depiction of women who choose abortion.[446] Jody Madeira offers a richer understanding of the depiction of women as reproductive decisionmakers by contrasting the *Gonzales* critiques and their opposition to increased regulation of abortion with the scholarship on IVF and other ARTs.[447] According to Madeira, the IVF scholarship portrays fertility-challenged women as desperate consumers of every imaginable medical intervention, constructing them as irrational and overly emotional decisionmakers oblivious to health risks and bent on motherhood at all costs—and hence in need of increased legal regulation.[448]

Both Madeira's and the *Gonzales* critics' accounts are instructive but incomplete. In setting their sights on the problematic construction of women as reproductive decisionmakers, they leave unexplored the construction of men as

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442. *See* Sanger, *supra* note 114, at 450-64.

443. *See supra* notes 49, 398 and accompanying text.

444. Some of the briefs filed in *Gonzales* document these attitudes and this practice. Brief of Amici Curiae American Medical Women's Association, American Public Health Association, et al. in Support of Respondents at 15 n.10, Gonzales v. Carhart 550 U.S. 124 (2007) (No. 05-1382); Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as Amici Curiae in Support of Respondents at 6-13, 22-24, Gonzales v. Carhart 550 U.S. 124 (2007) (No. 05-1382).

445. For a more general argument about how motherhood informs women's abortion decisions, see Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008).

446. *See supra* notes 25-32 and accompanying text.

447. Jody L. Madeira, *Woman Scorned?: Resurrecting Infertile Women's Decision-Making Autonomy*, 70 MD. L. REV. (forthcoming 2012) (on file with author).

448. Regulation might take the form of ARTs restrictions, such as a limitation on the number of embryos that may be transferred at any one time, as imposed in a number of foreign countries. *See, e.g.*, Velikonja, *supra* note 288, at 494-95. Alternatively, regulation might take the form of pro-ARTs measures, such as insurance coverage mandates for IVF (which might discourage high risk moves, such as the creation of multifetal pregnancies, in an effort to beat the odds without breaking one's personal bank). *Compare*, *e.g.*, *id.* at 489, *with* I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485 (2010).

reproductive decisionmakers—the implied but essential antithesis that shapes the stereotype. Indeed, the two constructions are mutually constitutive.[449] While the personal-responsibility cases (illustrated by *Dubay*) put the fatherhood-averse male in the limelight,[450] leaving the maternal figure in the background,[451] disputes about frozen embryos created from IVF (as in *A.Z.* and *Evans*)[452] expressly present these males and females as fully developed subjects, in direct opposition to one another, pursuing incompatible reproductive agendas that typify their very different roles in society. According to this gendered understanding, men seek to avoid parenthood and all attendant responsibilities, both emotional and material, while women harbor such a powerful desire to mother that they are willing to take these men to court if necessary to achieve that goal.[453] Read in this light, the reproach in *Gonzales*, then, reflects the majority's disapproval of deviation from the script.[454]

2. Re-examining the "Price of Pleasure"

The construction of gender extends beyond the stereotypes of women and men in the case studies and conveys assumptions about sexual experience, sexual performance, and sex itself. In the sex cases (as distinguished from the no-sex cases), regret often functions as a legally sanctioned "price of pleasure," as illustrated by both the adoption-surrender cases' redemption model and *Dubay*'s responsibility model. Here, regret's regulatory function takes a punitive turn. Despite the stereotypes and even double standards that run through the case studies, there is surprisingly little attention paid to commonly understood but legally undertheorized differences in female and male sexualities, behaviors, anatomies, and pleasures. Put differently, in making regret the currency with which both men and women pay for engaging in heterosexual sex, courts take a gender-blind approach and thus assume a male norm.[455]

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449. *See generally, e.g.*, NANCY DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE (2010) (explaining why the examination of manhood and masculinities is important to feminist legal theory).

450. *See supra* notes 262-285 and accompanying text.

451. Although the litigation is styled *Wells v. Dubay*, 506 F.3d 422 (6th Cir. 2007), the case against Dubay was prosecuted by the attorneys for the county and state, which would have had to provide support for the child if Dubay could not be made to do so.

452. *See supra* notes 288-315 and accompanying text.

453. This stereotype is reinforced by what Madeira calls "stock narratives" of infertile women. Madeira, *supra* note 447. Of course, one can find exceptions to the stereotype. For example, in *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001), the man sought to use the frozen preembryos that he had helped create, over the objection of his former wife, who had contributed the ova. The court ruled in her favor.

454. Disapproval of such departures from familiar gender scripts also help explain judicial reluctance to conclude that a child may be born with no legal mother. *See Roberto d.B.*, 923 A.2d at 132-37 (Cathell, J., dissenting).

455. Judith Butler writes:

Justice Ginsburg's *Gonzales* dissent recognizes that some pregnancies and resulting abortion decisions originate in sexual assaults (of women by men). This insight invites a deeper analysis of the interactions, apart from assaults, that precipitate the reproductive consequences in the sex cases. For example, recent data show that women in abusive relationships often find that their partners have sabotaged their birth-control efforts[456] (perhaps rough justice, given the birth control fraud that some women reportedly practice, according to allegations in cases like *Dubay*[457]). But even beyond cases of assault and birth-control sabotage, the legal notion of consensual sex simplifies what is often a much more complicated give-and-take that plays out against a field marked by power imbalances, nonreciprocal dependencies, and affections, including sometimes love.[458] Although Catharine MacKinnon would see all heterosexual intercourse as a reflection of women's subordination,[459] even legal feminists skeptical of this conclusion understand consent to sexual intercourse as something other than a switch that can be only "on" or "off." Of course, Jeannie Suk's controversial examination of *Gonzales*, connecting concerns about consent to sex with concerns about consent to abortion, reminds us of both the success and the hazard of such skepticism and nuance.[460]

Add to these considerations a very brief summary of some of what we have learned from modern sexuality experts: Most (heterosexual) men agree that penetration forms the center of their sexuality.[461] Women, by contrast, report that sensuality, intimacy, closeness, and orgasm are not as successfully achieved by penile-vaginal penetration as by other forms of expression.[462] True, cultural and social forces go a long way toward accounting for these

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> If sexuality is conceived as liberated from gender, then the sexuality that is "liberated" from feminism will be one which suspends the reference to masculine and feminine, reinforcing the refusal to mark that difference, which is the conventional way in which the masculine has achieved the status of the "sex" which is one.

Judith Butler, *Against Proper Objects*, *in* FEMINISM MEETS QUEER THEORY 1, 23 (Elizabeth Weed & Naomi Schor, eds. 1997).

456. *See* Roni Caryn Rabin, *Report Details Sabotage of Birth Control*, N.Y. TIMES, Feb. 15, 2011, at D6.

457. 506 F.3d 422 (6th Cir. 2007); *see also supra* note 283-285 and accompanying text (citing "purloined sperm" cases). For another twist that brings yet additional challenges to our gender stereotypes, see Conor Berry, *Insemination Fight Ends in Wife's Arrest*, THE BERKSHIRE EAGLE, Mar. 9, 2009 (reporting charges of assault and battery against a Massachusetts woman who attempted to inseminate forcibly her wife with her brother's sperm), *available at* 2009 WLNR 5177257.

458. *See, e.g.*, West, *Sex, Law and Consent*, *supra* note 90. For contemporary analyses of love, see, for example, LISA APPIGNANESI, ALL ABOUT LOVE: ANATOMY OF AN UNRULY EMOTION (2011); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008).

459. *See* MacKinnon, *supra* note 89.

460. *See supra* note 91.

461. *See, e.g.*, Alan Riley, *The Role of the Partner in Erectile Dysfunction and Its Treatment*, 14 INT'L J. IMPOTENCE RES. S105 (2002).

462. *See, e.g.*, Annie Potts et al., *The Downside of Viagra: Women's Experiences and Concerns*, 25 SOC. HEALTH & ILLNESS 697 (2003).

contrasting preferences,[463] and women's preferences may reflect adaptations based on apparently limited options.[464] In addition, however, the laboratory studies conducted by William Masters and Virginia Johnson in the 1960s and 1970s revealed that all women's orgasms are clitorally, not vaginally, triggered,[465] thus explaining persistent reports not only of the "orgasm gap" that women experience from conventional intercourse, when compared to men, but also the practice of "faking" orgasm by some women.[466] Further, an emerging literature on "sexual fluidity" shows that women are more likely than their male counterparts to develop satisfying relationships over time with men and with women, defying the familiar identity categories of "straight" versus "gay."[467]

Even if one regards such information as tentative and less than definitively established, it certainly casts doubt on an across-the-board "price of pleasure" basis for regret applicable to women and men alike, as under the redemption and responsibility models. When Shari Motro uses this phrase, "the price of pleasure," she has men in mind, and she seeks to provide a rationale for law to recognize their additional responsibilities for pregnancies that they help cause, beyond child support obligations.[468] The rationale does not hold up well for women, however, despite the similar tone and rhetoric in the adoption cases' redemption model. While men in cases like *Dubay* most likely have experienced the pleasure that the courts assume, the punitive stance in the adoption cases seems too simplistic, especially when one examines the narratives of those young women who surrendered babies in Fessler's book.[469] There one finds negligible evidence of pleasure, but instead pain, misunderstanding, confusion, and fear. These women might well have met the legal standard for consent (although some, given their age, probably failed to do so under statutory rape laws). Indeed, they might have had all sorts of reasons that prompted them to consent to the sexual activities that left them pregnant—such as a desire for affection or popularity or as a way to signal interest or commitment or the wish to please a sexual partner. Consensual sex often reflects a bargain, trade, or perhaps an expression of gratitude, rather than

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463. *E.g.*, Rosenbury & Rothman, *supra* note 160, at 840, 852.

464. Elizabeth Emens has coined the term "adaptive desires" for this phenomenon. *See* Appleton, *supra* note 90, at 300-01 (citing unpublished work by Emens). On the concept of adaptive preferences, see JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1983).

465. WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HUMAN SEXUAL RESPONSE 45-67, 135 (1966); *see* SHERE HITE, THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY 221 (1976) (emphasizing the importance of clitoral stimulation for female sexual pleasure).

466. On the gendered "orgasm gap," see, for example, DOUGLASS & DOUGLASS, *supra* note 90, at 1-38 (2002); ELISABETH A. LLOYD, THE CASE OF THE FEMALE ORGASM: BIAS IN THE SCIENCE OF EVOLUTION 21-43 (2005); and Susan E. Stiritz, *Cultural Cliteracy: Exposing the Contexts of Women's Not Coming*, 23 BERKELEY J. GENDER L. & JUST. 242 (2008).

467. *See* LISA M. DIAMOND, SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE 224-28 (2008); *see also* RITCH C. SAVIN-WILLIAMS, THE NEW GAY TEENAGER: ADOLESCENT LIVES 194-223 (2005) (exploring teens' resistance to labels based on sexual identity).

468. Motro, *supra* note 282.

469. *See supra* notes 110-118 and accompanying text.

a failure to resist temptation or keep passion in check.[470] Indeed, sexuality literature uses the term "sex against desire" for this phenomenon,[471] and legal feminist Robin West has theorized about situations she describes as consensual but unwelcome sex.[472]

Contemporary examinations of "hooking up" also prove instructive, especially given the age at the time of pregnancy and surrender of many of the women featured in Fessler's book. Studies of sexual practices on today's college campuses have found that females and males participate in "hook ups" in equal numbers but males report orgasm and sexual pleasure while females report little enjoyment.[473] Although some critics have looked askance at hooking up because it detaches sex from intimacy,[474] the gendered "pleasure gap" reflected by the data signals a different basis for concern. Even if hooking up entails sex "just for fun," young women apparently are not having nearly as much "fun" as their male counterparts.

With respect to sexual intercourse, the woman's consent tells us very little about whether, for herself, she would have preferred a different type of encounter without the risk of pregnancy and whether she had an orgasm or otherwise found the experience enjoyable. In other words, consent provides an inadequate basis for using regret to exact a price of pleasure on the path to redemption, although it might provide other useful information about the construction of sexuality in contemporary society.

Of course, the state might well seek to regulate sexual conduct in the absence of pleasure, given the possibility of reproductive consequences, as the adoption surrender cases suggest. Yet such reasoning unravels when we consider how courts have responded to regret in cases about technologically assisted reproduction, especially under the respect model.[475] This model indicates that policies purportedly designed to protect children (as well as to privatize their support by ensuring two parents) apply only in sex cases, but not in no-sex cases, in turn making parentage mandatory in sex cases but optional in no-sex cases, an inconsistency that provides the focus of the next part of the analysis.

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470. *See* West, *supra* note 80, at 1429.

471. *See* DOUGLASS & DOUGLASS, *supra* note 90, at 148.

472. West, *Sex, Law and Consent*, *supra* note 90; *see supra* note 90 and accompanying text; *see also* Chamallas, *supra* note 163, at 814-15 (preferring standard of "mutuality," given complications in the concept of women's consent to sex).

473. *See* Paula England et al., *Hooking Up and Forming Relationships on Today's College Campuses*, *in* THE GENDERED SOCIETY READER 531 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008); Shelly Ronen, *Grinding on the Dance Floor: Gendered Scripts and Sexualized Dancing at College Parties*, 24 GENDER & SOC. 355 (2010); *see also* Lisa Belkin, *After Class, Skimpy Equality*, N.Y. TIMES MAG., Aug. 28, 2011, at ST1 (examining the sexualization of women on college campuses and women's apparent acceptance of this culture).

474. *E.g.*, LAURA SESSIONS STEPP, UNHOOKED: HOW YOUNG WOMEN PURSUE SEX, DELAY LOVE AND LOSE AT BOTH (2007) (criticizing hooking up as emotionally harmful to young women); *see id*. at 143 (blaming feminism for this harmful phenomenon).

475. *See supra* notes 319-358 and accompanying text.

C. Family Law Fault Lines: Dependency, Autonomy, and Sex

Regret has functioned as a lightning rod in family law, distracting attention from and thus camouflaging several different doctrinal and policy inconsistencies. For example, family law today expressly embraces gender neutrality (except for the requirement of one man and one woman to enter marriage in most states),[476] but the courts' deployment of regret reproduces familiar gender stereotypes and norms. Similarly, *Lawrence v. Texas*,[477] reaching beyond *Eisenstadt v. Baird*[478] before it, claims not just to liberate sex from the traditional confines of procreation and heterosexual marriage, but even to celebrate it; nonetheless, the models imposing a "price of pleasure" perpetuate the notion that sex merits punishment, even if the penalty is not one imposed by criminal law.

The persistence of family law's interest in regulating sex and sexualities becomes even more visible by juxtaposing *Dubay*'s responsibility model and *K.M.H.*'s respect model. Exposing perhaps family law's most unstable fault line or contact zone,[479] these cases stand out as mirror images about genetic fatherhood, with the responsibility model imposing parentage on an unwilling man and the respect model refusing to recognize one who is willing. In neither case is there a competing candidate (such as the mother's husband or partner) for the role of second parent.[480] Judicial support for an intent-based test for parentage in cases of assisted reproduction typically comes with a note of caution that this approach does not extend to unintended conceptions from sexual intercourse—without a satisfying explanation for the distinction.[481]

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476. *See, e.g.*, Case, *supra* note 21.

477. 539 U.S. 558 (2003).

478. 405 U.S. 438 (1972) (according constitutional protection for access to contraception by unmarried individuals on equal terms with their married counterparts).

479. *See* Mary Louise Pratt, *Arts of the Contact Zone*, *in* NEGOTIATING ACADEMIC LITERACIES 171 (Vivian Zamel & Ruth Spack eds., 1998).

480. *Cf.* Michael H. v. Gerald D., 491 U.S. 110 (1989).

481. *E.g.*, K.M. v. E.G., 117 P.3d 673, 687 (Cal. 2005) (Werdegar, J., dissenting) ("[N]o one, to my knowledge, proposes to apply the intent test to determine the parentage of children conceived through ordinary sexual reproduction."); *cf. In re* Roberto d.B., 923 A.2d 115, 135 (Md. 2007) (Cathell, J., dissenting) ("If a genetic mother and a birth mother [in a gestational surrogacy arrangement] can deny maternity because neither intended to be mothers, men, who at the time of intercourse in many instances do not intend to be fathers either, can certainly present an argument that they are being discriminated against. If genetic and birth mothers can deny all maternity, why cannot genetic fathers and fathers present at birth deny all paternity[?]"). In response to the different legal consequences for each method of conception, some scholars have urged that some sexually conceiving genetic fathers should not bear child support responsibilities to the same extent as other fathers. *See, e.g.*, Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. (forthcoming Mar. 2012) (on file with author); Melanie B. Jacobs, *Intentional Parenthood's Influence: Re-thinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL'Y & L. (forthcoming 2012) (on file with author); Higdon, *supra* note 284 (proposing an exception to child support obligations for fathers who did not consent to the sexual act resulting in conception). Such analysis, however, minimizes the state interest in regulating sex, as emphasized *infra* notes 495-499.

Although both models make regret legally irrelevant, each one crystallizes a different policy or theory claimed to infuse contemporary family law. *Dubay*'s responsibility model exemplifies how family law privatizes dependency. Although this policy was once associated just with family law's aim to channel sex into marriage,[482] it spread beyond marriage after the Supreme Court deemed "illogical and unjust" many distinctions between children born outside versus inside marriage, holding—in the name of equality—that children of unmarried parents have the same right to support from two parents as their marital counterparts.[483] The current vigor with which child support obligations are imposed on and enforced against fathers, regardless of marriage, has reinforced the claims of scholars who identify the privatization of dependency as an organizing principle that runs throughout family law today.[484]

If, in conscripting men like Dubay into fatherhood, the responsibility model of regret demonstrates one ascendant theory of family law, the respect model brings another to the fore. *K.M.H.* and *Ferguson* illustrate a theory of family law that emphasizes privacy, autonomy, and self-determination, with reproductive decisionmaking serving as a central pillar. Some of the Supreme Court's own rhetoric reflects this theory,[485] and it gains strength from reasoning like that in *Ferguson*, which justifies its result by taking for granted a policy favoring expanded reproductive options for women.[486]

Both of these efforts to theorize family law have shortcomings. The responsibility model and the privatization of dependency cannot account for the respect model and the one-parent families that it permits, protects, and sometimes even requires. The respect model cannot account for the limits on family and reproductive autonomy reflected in the responsibility model and its case law, not to mention the constraints imposed by *Gonzales*'s reproach

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482. *See, e.g.*, Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133; Schneider, *supra* note 8.

483. *E.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (ruling that equal protection requires extending the statute of limitations for proving paternity); Gomez v. Perez, 409 U.S. 535, 538 (1973) (ruling that denying children born outside marriage support from their fathers violates equal protection); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (holding that excluding children of unmarried fathers from worker's compensation death benefits violates equal protection).

484. *E.g.*, FINEMAN, *supra* note 8, at 228 ("It is the family, not the state or the market, that assumes responsibility for both the inevitable dependent—the child or other biologically or developmentally dependent person—and the derivative dependent—the caretaker. The institution of the family operates structurally and ideologically to free markets from considering or accommodating dependency."); Alstott, *supra* note 266, at 3 ("[F]amily law rules that establish financial relationships and liability between individuals constitute a form of social insurance"); Rosenbury, *supra* note 8, at 193-94, 224-26 (2007); West, *supra* note 80, at 1409-10; *see* Halley & Rittich, *supra* note 7, at 758, 762-63.

485. *See supra* notes 9-10 and accompanying text. I have previously relied on the connected notions of privacy, autonomy, and liberty to organize family law as a field of study. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS xxvii, xxxi (4th ed. 2010) (setting out the casebook's theme as the tension between privacy or autonomy and state intervention).

486. *See supra* notes 330-334 and accompanying text.

model. Although family law's complexity defies reduction to a single slogan or uniaxial policy,[487] the stark sex/no-sex divide stands out.

A recent Indiana case, *In re Paternity of M.F.*,[488] brings to life this rift. After the mother in this case sought financial assistance for her two children, she and the county sued to establish paternity and collect support from the children's genetic father. The mother had conceived and given birth to both children while in a now-ended long-term relationship with another woman. The court treated the siblings differently because of the presumed difference in their respective conceptions. The court issued a support order for one child because the defendant could not prove his allegation that conception had occurred by donor insemination, thus leaving unrebutted the presumption of sexual intercourse followed by Indiana law. Hence, *Dubay*'s responsibility model of regret controls. In the same case, however, the defendant successfully fended off the claim for support of the sibling, because for this child he produced a semen-donor agreement and evidence that a physician had performed the insemination, pursuant to Indiana law.[489] For this child, the respect model of *K.M.H.* and *Ferguson* governs. When the smoke clears, then, one child has a second parent (a father) and receives state-ordered support from him, but the sibling does not,[490] with the method of conception and its proof determinative. In turn, each sibling personifies a different paradigm of family law.

If either policy, the privatization of dependency or family self-determination, had the theoretical traction often attributed to them, we would expect to see movement toward harmonization. In fact, some such movement is apparent in family law's increasing willingness in child support controversies to recognize nontraditional families, for example, same-sex couples as legal parents regardless of gender and genetic contribution[491] and triadic parentage

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487. *See, e.g.*, Halley, *supra* note 7, at 1 (challenging the categorical distinction between the law of the family and the law of the market); Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 46 (2006) (contending that family law embodies "two foundational principles: Biblical traditionalism and liberal individualism"); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 830-32 (2004) (challenging three prominent themes in family law: the story of progress toward equality; the understanding of family law as local law, not federal law; and the separation of family law and welfare law); Kessler, *supra* note 8 (noting four trends in family law resulting from the decentering of marriage: increased emphasis on the state, increased emphasis on freedom, increased diversity and antiessentialist approaches, and changing disciplinary boundaries).

488. J.F. v. W.M. (*In re* Paternity of M.F.), 938 N.E.2d 1256 (Ind. Ct. App. 2010).

489. This case illustrates the evidentiary value of requiring the participation of a medical professional in conception by donor insemination. *See supra* note 346 and accompanying text.

490. Significantly, the court did not consider as a candidate for parentage the mother's former long-term partner, another woman, with whom she had planned and reared the children until the relationship dissolved. *See In re* Paternity of M.F., 938 N.E.2d at 1257. By contrast, several other authorities would have regarded her as a second parent with support obligations. *E.g.*, *Elisa B.*, 117 P.3d 660 (Cal. 2005); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); *In re* L.B., 122 P.3d 161 (Wash. 2005); AMERICAN LAW INSTITUTE, *supra* note 263, at § 2.03(1) (2002) (formulating criteria for "parent[s] by estoppel" and "de facto parent[s]").

491. *See supra* note 490 (citing authorities).

collaborations[492]—arrangements initially facilitated by access to a menu of reproductive options.

Yet the harmonization goes only so far, and the incongruities illustrated by the contrasting models of regret stubbornly persist. Going forward, the policy of privatizing dependency remains unlikely to unsettle legal rules that permit and foster one-parent families, such as by barring single women from access to ARTs or by requiring sperm donors to be fathers,[493] while the policy of family self-determination remains unlikely to give fathers with second thoughts the "*Roe v. Wade* for men" for which they have pressed.[494]

This impasse, highlighted by the contrasting models of regret, suggests that, as foundations of family law, neither the privatization of dependency nor family self-determination can do all the work asked of them. Neither reaches across the sex/no-sex divide.

Yet, the very sex/no-sex divide that exposes the limitations of each of these oft-cited policies or theories also supplies the bridge. A conceptualization of family law as, first and foremost, a system of sexual regulation helps reconcile the divergent outcomes in the case law and the different models of regret. So understood, family law takes aim at sex, not procreation, as the contrasting opinions in the case studies attest. When procreative activities entail sex, measures ensuring the privatization of dependency constitute an important form of regulation, even if such objectives constrain family self-determination. When procreative activities do not entail sex, family law loses this particular regulatory interest,[495] even if such inattention comes at the expense of other important policies and values, including privatizing dependency.

Family law's often unacknowledged preoccupation with sex[496] and its imposition of sexual discipline offer a coherent explanation of the different legal treatments emerging from the models of regret in the sex cases and the no-sex cases. To characterize family law as a system of sexual regulation is to make a purely descriptive claim, not a normative one. Normative projects

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492. *See* Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (recognizing three legal parents for children in custody and support litigation); Appleton, *supra* note 239.

493. Talk of such legal restrictions in the wake of the notorious "Octomom," an unmarried and unemployed woman who used ARTs to have fourteen children, including octuplets, has all but evaporated. *See, e.g.*, Josephine Johnston, *Judging Octomom*, 39 HASTINGS CENTER. REP. 23 (2009); Kimberly Krawiec, *Why We Should Ignore the "Octomom,"* 104 NW. U. L. REV. COLLOQUY 120 (2009).

494. *See supra* note 226 and accompanying text.

495. Finding that the state interest does not extend to particular fact patterns is reminiscent of some of the methodology of governmental interest analysis for deciding choice of law issues. *See, e.g.*, Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, *in* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963).

496. I have previously documented what I called family law's "sex-centricity." Appleton, *supra* note 90, at 272-76. This analysis of regret strengthens the earlier hypothesis. *See also* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. (forthcoming 2012) (on file with author) (examining "illegitimacy" through the lens of sex). I return to such topics in a new project, *Regulating Sex and Sexualities*.

building on this description might work to decenter sex in family law,[497] to give sex a more positive valence,[498] or to develop other approaches that look past fig leaves like regret to grapple with powerful yet often hidden values and commitments.

IV. CONCLUSION

Once we consider *Gonzales v. Carhart*[499] as merely one in a series of cases about reproduction and regret, the majority opinion becomes less remarkable although no less controversial. In a range of cases, courts, including the *Gonzales* majority, have treated regret as a blank page on which to express assumptions and values about gender, sex, autonomy, and family—even while invoking the often conflicting rhetoric of modern family law, with its emphasis on individual decisionmaking about reproduction and other personal matters, gender equality, privacy, and pluralism.

Although the focus on reproduction that links the cases examined in this Article has always stood out, featuring the less noted shared element of regret offers new insights. By developing this connection and thus viewing *Gonzales*'s use of regret through a wider lens, this Article makes several contributions:

First, it identifies and examines contrasting models of reproduction and regret, providing a contextualized understanding of regret's regulatory function. In turn, these models emphasize the state's participation in constructing regret as well as regret's impact in reshaping law, legal practices, and associated personal experiences; they highlight scripts about gender and sex at work in the different deployments of regret; and they expose regret's role in camouflaging important doctrinal inconsistencies and policy priorities in family law. More particularly, this Article shows how the regulation of sex belongs at the center of family law theory, given this policy's explanatory scope and capacity. Finally, as a methodological matter, by connecting doctrinal and rhetorical dots across the case law, this Article challenges familiar categories and invites explorations of other patterns that such categories so often obscure.

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497. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); *cf.* Rosenbury & Rothman, *supra* note 160, at 811 (urging decoupling of sex and intimacy).

498. *See* Appleton, *supra* note 90 (urging additional attention to women's sexual pleasure in family law); Franke, *supra* note 72 (critiquing legal feminists' sex-negative agenda).

499. 550 U.S. 124 (2007).