"LOVE FOR SALE"*—SEX AND THE SECOND AMERICAN REVOLUTION

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I. INTRODUCTION

"Love for Sale"—the title of one of Cole Porter's most beautiful songs. Written in 1930, its lyrics were banned from public performance for many years because they dealt none too subtly with prostitution. But by the 1960s the ban had disappeared, and today the lyrics would hardly raise an eyebrow. If one wonders what happened, the answer is that from the end of World War II to the present, this country has undergone a sexual revolution. Why this revolution came when it did, or so rapidly, isn't easy to say. But in a little over half a century, the sexual landscape of America has been profoundly transformed. Love is still for sale: the question today is at what price.

My aim here is to trace the history of this revolution and to raise some of its implications for men and women struggling to come to terms with issues of sexuality—issues bound up with their private lives, with religion, morality, home and family, the workplace, and the political process.

The subject is a delicate one. Unlike the French, for example, Americans aren't exactly comfortable talking about it. There is a prudish streak in Americans still, a leftover, perhaps, from our Puritan heritage, or from nineteenth-century Victorian morality, as witness the furor over the appearance on national television of Janet Jackson's breast. Most people, I suspect, recognized that the public outcry was more an exercise in political correctness than anything else and dismissed it as such, for we are now all children of the sexual revolution. Breasts appear on television and in movies all the time. Yet factitious or not, the outcry is an indication of just how important the subject is, and how ambivalent Americans are about it.

The sexual revolution, like most revolutions, has left an array of issues that did not exist before.[1] Some of these are among the most divisive and hotly debated of the day and not surprisingly have found their way into the legal system. We should not pretend that the answers the system will give—answers given ultimately and most importantly by the Supreme Court—will be "legal" other than in form. They will be political decisions at the most fundamental of levels. No matter how hard judges struggle to rationalize their opinions, there is

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* COLE PORTER, *Love for Sale*, *in* THE NEW YORKERS (E. Ray Goetz producer, 1930).

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1. "[T]he very term revolution suggests a fundamental break with past habits, attitudes and public policies." Thomas Friedman, Op-Ed., *Live Bad, Go Green*, N.Y. TIMES, July 8, 2007, at WK12.

no escape from the reality that they are human beings: their decisions are always warped by the necessarily idiosyncratic way in which they see the world. Despite Justice Scalia's protestations,[2] the judicial branch of our government is, and for most of our history has been, a political institution.[3] It holds the power, for example, to determine whether *Roe v. Wade*[4] will survive, and, if it does, what content will be given to Justice O'Connor's problematic "undue burden" abstraction announced in *Planned Parenthood v. Casey*.[5] What will the Court do with same-sex marriage when that issue finally reaches it,[6] or when the constitutionality of the Defense of Marriage Act[7] appears on its agenda? For the first time in our history, five members of the Court are Roman Catholics—Roberts, Scalia, Thomas, Kennedy, and Alito. Will their religious beliefs consciously or unconsciously affect their decisions?[8] This is obviously a sensitive subject, but it is already being discussed in the media and elsewhere.[9]

As important as these overtly legal issues are, they are only pieces of a larger societal phenomenon. As an example, consider that in my entering class

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2. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 3, 9-14 (Amy Gutmann, ed. 1997).

3. *See, e.g.*, Harold P. Southerland, *Theory and Reality in Statutory Interpretation*, 15 ST. THOMAS L. REV. 1, 56-59 (2002); *cf., e.g.*, Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right To Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001).

4. 410 U.S. 113 (1973).

5. *See* 505 U.S. 833, 877-79 (1992).

6. The Court will probably have to choose between the antipodal approaches of the Massachusetts Supreme Judicial Court and the New York Court of Appeals. *Compare* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding no rational basis for denying same-sex couples the right to marry), *with* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (finding a rational basis for restricting marriage to heterosexual couples and leaving question to the legislature).

7. Defense of Marriage Act, 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996). In addition to allowing any state to deny full faith and credit to a marriage valid where entered into, the act defines "marriage" as a union between one man and one woman and disbars the federal government from recognizing same-sex or polygamous marriages for any purpose whatsoever.

8. Many years ago Oliver Wendell Holmes gave a profound answer to this question:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

9. *See, e.g.*, Robin Toner, *The Supreme Court's Catholic Majority*, N.Y. TIMES, April 25, 2007, *available at* http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?_r=1&oref=slogin, (noting that the five justices in the majority in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), were the Court's five Roman Catholics, and that the propriety of discussing the justices' religion at all was widely debated following the Court's decision in that case). In *Carhart*, the Court upheld the constitutionality of a federal statute barring partial-birth abortions. For a thoughtful essay on how religious beliefs might affect the decisions of a Catholic judge in abortion, parental bypass, and death penalty cases, see Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters* (2007), *available at* http://ssrn.com/abstract=965600.

at the University of Wisconsin in 1963, there were only two women. In the years since, the number of women in law schools has steadily increased and has for the past several decades approximated half of each entering class. This profound shift in gender composition, mirrored in business and other professional schools, was made possible by the determined efforts of second-wave feminists—the women's liberation movement—who fought their battles in the 1960s and '70s and ended by gaining for women the right to participate in most life activities on an equal footing with men.[10] The performance of women in law schools has been indistinguishable from that of men, and I suspect this has also been true of other disciplines.

The presence of women in such numbers in professional schools stands in stark contrast to their numbers in the professions themselves. Why are women not yet represented in anything like the proportions one would expect? As of 2005, only 17 percent of partners in major law firms around the country were women,[11] and there has probably been little change since. Under-representation exists in judgeships—notably the Supreme Court (and its clerks[12])—and in tenure-track teaching positions in the academic world. The same is true of their representation in Congress, state legislatures, and corporate hierarchies. Only a few women have become CEOs or key players in the business world.[13] Larry Summers, erstwhile president of Harvard University, controversially remarked their under-representation in the world of science.[14] What is happening to all these talented and well-credentialed women?

This is one question the sexual revolution has forced us to consider. Another, closely related, is whether gender really matters. Everyone knows that men and women are different, but does the difference cut deeper than anatomy? Would a Supreme Court with four or five women decide cases differently from today's Court, on which only one woman sits? What would the legal profession look like if half its active membership were women?[15] Would the world of

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10. First-wave feminists were the women who, in the late 19th and early 20th centuries, fought for and finally won in 1920 the right to vote.

11. Timothy L. O'Brien, *Up the Down Staircase*, N.Y. TIMES, March 19, 2006, § 3, at 1.

12. Linda Greenhouse, *Supreme Court Memo; Women Suddenly Scarce Among Justices' Clerks*, N.Y. TIMES, Aug. 30, 2006, at A1 (noting that only 7 of 37 clerkships went to women despite the roughly equal gender make-up of law-school classes).

13. *See* Julie Creswell, *How Suite It Isn't: A Dearth of Female Bosses*, N.Y. TIMES, Dec. 17, 2006, § 3, at 1 ("[O]nly about 16 percent of corporate officers at Fortune 500 companies are women . . . [and] [t]he numbers are even sparer at the top of the pyramid: women fill only nine, or less than 2 percent, of the chief executive jobs at Fortune 500 companies.").

14. *See* Cornelia Dean, *Women in Science: The Battle Moves to the Trenches*, N.Y. TIMES, Dec. 19, 2006, at F1. Summers said, Dean states, that women are handicapped as scientists "because they are somehow innately deficient in mathematics." The remark ignited a firestorm that played a central role in his resignation as president of Harvard University.

15. I am not entirely alone in believing that the world of law—and by extension other worlds also—would be a kinder, gentler place if women were in charge. *See* Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, *in* 3 LAWYERS IN SOCIETY: COMPARATIVE THEORIES 220-39 (Richard L. Abel & Philip S.C. Lewis, eds., 1989); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); *see generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). For a striking, if hardly conclusive, example, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295-412 (2007). The authors find gross

business be different if women were present in management-level and executive positions in proportion to their numbers? What of Congress or, intriguingly relevant today, the office of the President? Men made an ungodly mess of the twentieth century, as witness its history of insensate slaughter.[16] Would women have done it differently? Had a woman been president, would we be mired in Iraq today?[17] The counterfactuals can be multiplied endlessly.

Drawing on the images emanating from Abu Ghraib, the historian and social critic Barbara Ehrenreich argues that perceived differences between women and men are situational. In other words, a woman in a man's world will act like a man. She recalls that several decades ago

> [w]e had a lot of debates over whether it was biology or conditioning that gave women the moral edge—or simply the experience of being a woman in a sexist culture. But the assumption of superiority, or at least a lesser inclination toward cruelty and violence, was more or less beyond debate. After all, women do most of the caring work in our culture, and in polls are consistently less inclined toward war than men.
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> If that assumption had been accurate, then all we would have had to do to make the world a better place—kinder, less violent, more just—would have been to assimilate into what had been, for so many centuries, the world of men. We would fight so that women could become the generals, CEOs, senators, professors and opinion-makers—and that was really the only fight we had to undertake. Because once they gained power and authority, once they had achieved a critical mass within the institutions of society, women would naturally work for change. That's what we thought, even if we thought it unconsciously—and it's just not true. Women can do the unthinkable.[18]

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disparities in the judging of asylum cases in the nation's 54 immigration courts, which have 169 male and 78 female judges. One of the most significant factors in determining whether asylum is granted, the authors find, is gender. Female judges grant asylum 44% more often than their male counterparts. *Id.* at 377. The authors cannot confidently explain this startling difference, but they speculate that personal experience, prior work history, and innate empathy may be relevant factors. *See id.* at 376-377.

16. *See, e.g.,* Harold P. Southerland, *Law, Literature, and History,* 28 VT. L. REV. 1, 11-27 (2003) (documenting the unnecessary deaths of over 200 million people in the most deadly century in history). *See generally* NIALL FERGUSON, THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST (2006); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

17. *See* David Brooks, *All Politics Is Thymotic,* Op-Ed., N.Y. TIMES, March 19, 2006, § 4, at 12. Plato divided the soul into three parts: reason, desire, and thymos, or the hunger for recognition, Brooks says. Thymos drives men "to seek glory and assert themselves aggressively for noble causes. It drives them to rage if others don't recognize their worth. Sometimes it even causes them to kill over a trifle if they feel disrespected." *See also* Adam Liptak, *On the Job; Stop the Clock? Critics Call the Billable Hour a Legal Fiction,* N.Y. TIMES, Oct. 29, 2002, at G7. Thymos would seem at play in the billable-hour-obsessed world of law practice that Liptak describes. It is a world designed by men for men and still predominantly populated by them.

18. Barbara Ehrenreich, *Feminism's Assumptions Upended,* L.A. TIMES, May 16, 2004, at M1. Her argument is intriguing but not entirely convincing. Women have never proportionally assimilated into any of the traditionally all-male environments, so who knows what the effect would be? Three of 7 soldiers at Abu Ghraib is a small sample from which to draw a very large conclusion. She does not say what it is that women should consciously fight to change; a uterus, she says, is not a

She goes on to assert that "[w]hat we need is a tough new kind of feminism without illusions. Women do not change institutions simply by assimilating into them, only by consciously deciding to fight for change."[19] Is she right? What insights can a history of the sexual revolution offer into these and other vexing questions?

II. THE SEXUAL REVOLUTION: FROM PROCREATION TO PLEASURE

A. Family Values: The "Proper" Roles of Men and Women

In 1800, societal norms in the newly minted United States were those of the prevailing orthodoxy of Puritan Protestant religious beliefs, given added legitimacy by the civil and penal codes of every state.[20] The only acceptable form of sexual expression was that between a man and a woman in a marital relationship.[21] Anything else—adultery, fornication, prostitution, polygamy, homosexuality—was sinful and strictly forbidden.[22] Behind these formal expressions of morality and expectations of right behavior lay a certain amount of practical wisdom. Everyone knew that men and women were physically attracted to one another,[23] that physical attraction could easily lead to sexual intercourse, and that that, in turn, could lead to pregnancy and childbirth. Only women could bear children, and only women were biologically equipped to feed and nurture them in their infancy. Nature had apparently designed women as the progenitors of the race. Men were the obvious choice to perform the task

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substitute for a conscience. If conscience is an issue, how are women to acquire one before assimilating? The idea of conscience would seem to apply equally to men. Certainly any number of organizations—companies like the now-defunct Enron, for example—seem to be in need of subversion from within. Judith Warner, the *New York Times*' resident expert on gender and family matters, also dismisses the belief of essential difference as old-fashioned, common among feminists several decades ago. She thinks "the boundaries between the worlds of men and women are dissolving." Instead of calling for a "new feminism," as Ehrenreich does, she prefers the term "humanism," in recognition of the fact that each individual, whether man or woman, is a human being. *See* Judith Warner, *Escape from the Gender Ghetto,* N.Y. TIMES, May 3, 2007.

19. Ehrenreich, *supra* note 18.

20. *See* JAMES A. MORONE, HELLFIRE NATION 31-161 (2003).

21. For an extended scholarly treatment of the American institution of marriage, see JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997); FAMILY TRANSFORMED: RELIGION, VALUES AND SOCIETY IN AMERICAN LIFE (Steven M. Tipton & John Witte Jr. eds., 2005).

22. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 60-65, 179-86 (1973). For a well-known literary example, see NATHANIEL HAWTHORNE, THE SCARLET LETTER (Bantam Classic ed. 1986) (1850).

23. The nature of this attraction is complex and not fully understood; nor is it known whether the nature of the attraction is essentially the same in women as in men or different in some qualitative way. That genetics is involved has been suggested by recent research. *See* Nicholas Wade, *In Chimpanzee DNA, Signs of Y Chromosome's Evolution,* N.Y. TIMES, Sept. 1, 2005 at A15 ("Frans B.M. de Waal of the Yerkes National Primate Research Center in Atlanta said he agreed with fossil experts that the human pair bonding system probably evolved 1.7 million years ago"); Olivia Judson, *Is He More Attractive if She's on the Pill?,* N.Y. TIMES, June 12, 2006 (describing the set of genes called the major histocompatibility complex and speculating on the role that smell may play in sexual attraction).

of providing sustenance and a secure environment in which the perpetuation of the race could go on.

Hence the "proper" roles of men and women.[24] Regardless of their talents and abilities, women were chained to the rock of home and child-rearing while men were expected to use their strength, talents, and abilities as productively as possible in the wider world. These were the deeply rooted social attitudes of the largely homogeneous population of five million people who contemplated a vast and undeveloped continent in 1800. And they are still what many people have in mind today when they speak of "family values."

The three hundred million people who populate the United States today are no longer a homogeneous group, and views of the appropriate roles for men and women have undergone drastic transformation. The term "family values" has become the mantra of a vocal segment of the population which longs for an earlier time when women were wives, mothers, and homemakers and men were husbands and breadwinners. This vision has been shattered by the prevalence of women in the workplace. It has been shattered, too, by the ready availability of divorce, which something like half of all married couples have availed themselves of. And it has been shattered by the demand of women for the right to control their reproductive function through access to birth-control measures and abortion if necessary. More recently it has been threatened by the movement to redefine the institution of marriage itself to permit same-sex couples to marry and to rear children if they wish.

Alice Kessler-Harris, professor of American history at Columbia University, gives a good sense of these changes and suggests their implications:

> As it turned out, moving toward, even achieving, equality at work proved to be the beginning, not the end of the battle. Each step on the road to equality—equal pay, an end to discrimination in hiring and training, access to promotion—exposed a deeply rooted set of social attitudes that tried to preserve women's attachment to the home and hindered a commitment to the job world. To work freely, women required control over their own reproduction and sexuality. They felt entitled to sexual gratification, as men had always been, and to access to birth control and to abortion if necessary. Economic independence encouraged freer life styles, reducing the dependence of women on men and permitting a genuine choice of life partners—male or female. Women who earned adequate incomes could choose not to have children or among a variety of child-care arrangements if they had them. Freedom for women to live without men, to live with them without benefit of legal marriage, to create two-career families, or to live without families at all posed staggering challenges to traditional values.
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> . . . [W]hen the majority of women moved into wage work . . . the contradictions between the two soon threatened the traditional organization of the family and the power relationships that derived from it.[25]

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24. *See* GARY S. BECKER, A TREATISE ON THE FAMILY 30-53 (1981) (pointing out the economic efficiency in such arrangements).

25. ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 315-16, 319 (1982).

The world she describes is a world cut adrift from its familiar moorings in "traditional values." Change came quickly, in hardly more than half a century. The right to abortion on demand was recognized in 1973.[26] Abortion, intertwined with religious convictions and hopelessly at odds with traditional values, remains today the single moral issue on which Americans are most bitterly divided. The demand of gay and lesbian couples for marriage—for societal and legal recognition of their commitment—threatens to prove equally contentious. The second-wave feminist movement exploded in the 1960s and '70s and aimed at eliminating gender discrimination and giving women the opportunity to participate in life activities on an equal footing with men. That goal may have been reached in theory, but in practice there are still disparities: salary differentials[27] for one, and subtle vestiges of discrimination. But most striking by far is the absence of women in the numbers one would expect in many important arenas. Why?

This question was central to a front-page article in the *New York Times* which reported that "[m]any women at the nation's most elite colleges say they have already decided that they will put aside their careers in favor of raising children."[28] The article, written by Louise Story, clearly touched nerves.[29] Linda

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26. *See* Roe v. Wade, 410 U.S. 113 (1973).

27. *See* Warren Farrell, Op-Ed, *Exploiting the Gender Gap,* N.Y. TIMES, Sept. 5, 2005, at A21. The author acknowledges that women are paid "only 76 cents to men's dollar for the same work." He argues, though, that this statistic is misleading: "[a]fter years of research, I discovered 25 differences in the work-life choices of men and women. All 25 lead to men earning more money, but to women having better lives." Women are less motivated by money than men and "put a premium on autonomy, flexibility (25-to-35 hour weeks and proximity to home), fulfillment and safety." The differential, he concludes, is more about tradeoffs than outright discrimination and "[c]omparing men and women with the 'same jobs,' then, is to compare apples and oranges." Farrell's is one point of view. Linda Hirshman, citing a May 2007 report of the American Association of University Women, states that in the first year after college, women working full-time make 20 percent less than their male classmates. Ten years after graduation, Hirshman says, the wage differential is 69 percent. Women, she believes, "could make decisions that keep them even with their male classmates. But they don't. The biggest decision any student keeping an eye on the bottom line can make is the choice of a major." Linda Hirshman, *You're Not Earning as Much as the Guys? Here's Why,* WASH. POST, June 3, 2007, at B1. *See also* David Leonhardt, *The New Gender Divide: One Stubborn Gap,* N.Y. TIMES, Dec. 24, 2006, § 1, at 1 ("Largely without notice, however, one big group of women has stopped making progress: those with a four-year college degree. The gap between their pay and the pay of male college graduates has actually widened since the mid-'90s."). The latest estimate of the raw wage gap, as of 2004, is just over 18%. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap,* THE ECONOMISTS' VOICE 1, 1 (June 2007). It remains to be seen just how much the pay gap will be worsened by the Court's recent 5-4 decision in Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007). This case, Jeffrey Toobin writes, "seemed almost designed to infuriate [Justice Ginsburg]. . . . For years, the courts said that if a woman sued within 180 days of her last offending paycheck, she received compensation for the entire period she had suffered discrimination. But in *Ledbetter*, the five conservatives ruled that plaintiffs could be paid for discrimination only within the six-month statute of limitations." JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 330 (2007).

28. *See* Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood,* N.Y. TIMES, Sept. 20, 2005, at A1. The *Times* has broached this subject on several occasions, perhaps most notably in Lisa Belkin's article "The Opt-Out Revolution," published in 2003. This lengthy essay also ignited sharp controversy. It was the most e-mailed article of the year. *See* Lisa Belkin, *The Opt-Out Revolution,* N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42.

Hirshman, the well-known author and second-wave feminist, responded with a lengthy essay in *The American Prospect*.[30] She believes that second-wave feminism has morphed into third-wave or choice feminism.[31] In her view and that of other second-wave feminists, the vision of women competing on equal terms with men simply hasn't been realized. As to why, Hirshman says that she stumbled across the answer in 2002 while doing research for a book on marriage after feminism:

> I found that among the educated elite, who are the logical heirs of the agenda of empowering women, feminism has largely failed in its goals. There are few women in the corridors of power, and marriage is essentially unchanged. The number of women at universities exceeds the number of men. But, more than a generation after feminism, the number of women in elite jobs doesn't come close.
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> Why did this happen? The answer I discovered—an answer neither feminist leaders nor women themselves want to face—is that while the public world has changed, albeit imperfectly, to accommodate women among the elite, private lives have hardly budged. The real glass ceiling is at home.[32]

The "glass ceiling" is the familiar trope for the barriers of discrimination and bias that women have had to face in moving into powerful and influential positions in a formerly all-male world: senior managers and corporate executives, high-level officials in government, politicians, senior partners in law firms, and the like. No one any longer doubts the talent and ability of women; some have clearly shattered the glass ceiling, but as with men, only at the sacrifice of important aspects of their personal lives, particularly child rearing, spousal relationships, and some semblance of a normal home life.[33] What dismays Hirshman is that these élite young women, educated and groomed for positions of power, influence, and leadership, are choosing motherhood and home life before they've even begun their careers. In her view they've quit before they've started.

Both Hirshman and the author of the *Times* article are writing about a rather select group of women: those with sparkling résumés from the most prestigious colleges and universities, obvious candidates for challenging jobs or for graduate schools and professional careers. These women assume they have

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29. *See, e.g.*, Maureen Dowd, *What's a Modern Girl to Do?*, N.Y. TIMES, Oct. 30, 2005, § 6 (Magazine), at 50; David Brooks, Op-Ed., *The Year of Domesticity*, N.Y. TIMES, Jan. 1, 2006, § 4, at 8; Judith Warner, *Domestic Disturbances*, N.Y. TIMES (*Are You In, or Out?*, Jan. 16, 2006); (*Opting Out, the Sequel: The Vacuum of Marriage*, Jan. 18, 2006); Judith Warner, Op-Ed., *The Parent Trap*, N.Y. TIMES, Feb. 8, 2006, at A21.

30. *See* Linda Hirshman, *Homeward Bound*, THE AMERICAN PROSPECT, Nov. 21, 2005, at 20.

31. For an instructive introduction to the phenomenon of third-wave feminism, see Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007).

32. Hirshman, *supra* note 30, at 22.

33. *See, e.g.*, Julie Creswell, *How Suite It Isn't: A Dearth of Female Bosses*, N.Y. TIMES, Dec. 17, 2006, § 3, at 1 (describing the difficulties women face in achieving high-level positions in corporations); Lyndsey Layton, *Mom's in the House, With Kids at Home*, WASH. POST, July 19, 2007, at A1 (reporting on the difficulties and hardships faced by Congress's record number of 10 women members with children under 13).

the luxury of choice.[34] Compare Maureen Dowd's subtly different reaction to Story's article. She writes that

> a professor of American History at Yale[ ] told Story that women today are simply more "realistic," having seen the dashed utopia of those who assumed it wouldn't be so hard to combine full-time work and child rearing.
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> To the extent that young women are rejecting the old idea of copying men and reshaping the world around their desires, it's exhilarating progress. But to the extent a pampered class of females is walking away from the problem and just planning to marry rich enough to cosset themselves in a narrow world of dependence on men, it's an irritating setback. If the new ethos is "a woman needs a career like a fish needs a bicycle," it won't be healthy.[35]

Obviously Dowd's "pampered class of females" comprises a relatively small cohort. These women won't be around long enough to rise to positions of power in the professions or in corporate organizations, no matter how talented they are. They may have a lot to do, though, with the perception that well-credentialed women are apt to work only until they have children. This perception is bound to affect hiring decisions, especially when women compete with men for the same job. The result is a particularly insidious form of gender discrimination—insidious because virtually undetectable. But it has the vraisemblance of rationality: from the point of view of a managing partner or an executive in charge of personnel, women are all too likely to be here today and gone tomorrow. The real contribution of the Ivy League élite is to disadvantage those women who aren't pampered and who are prepared to make the sacrifices that a full-time career demands.

Of course women opt out of the workplace for any number of reasons. There are some who are dissatisfied or bored with their chosen career paths and find it easy to choose home and family over work. There are women who feel "maternal desire"—the apparently irresistible impulse not just to bear a child but to rear it also.[36] In the best spirit of the "mommy wars,"[37] there are women

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34. Elizabeth Kolbert pointedly notes that "[t]he tradition of lament that began with Friedan is . . . based on an assumption of privilege." *Mother Courage*, THE NEW YORKER, March 8, 2004, at 85, 87.

35. Dowd, *supra* note 29.

36. *See* Kolbert, *supra* note 34, at 85 (reviewing Daphne De Marneffe's book *Maternal Desire: On Children, Love, and the Inner Life*, published in 2004). De Marneffe, a psychologist, writes that when she left home for the office, she felt an " 'invisible tether' drawing her back. 'I couldn't bear to leave our baby; when I was away I ached.' " *Id.* This, Kolbert says, is "maternal desire." *Id.* Some of the women in Congress interviewed by Lyndsey Layton reported similar feelings and, doubling the emotional pain, some of their children did too. *See* Lyndsey Layton, *supra* note 33.

37. The "mommy wars" pit the working mother with children against the stay-at-home mom. The rhetoric is vicious. *See* Judith Warner, *Words That Wound the Working Mother*, N.Y. TIMES, May 24, 2007, *available at* http://warner.blogs.nytimes.com/2007/05/24/words-that-wound-the-working-mother/. Warner decries "the level of insulting and idiotic verbal pollution that creeps into the discourse of our everyday lives," the "vile discrimination against working mothers," the "foul poison of working-mother-hate," the "cultural hysteria over working motherhood." But the mommy wars, E.J. Graff asserts, are largely an invention of the media, conceived and propagated because it is a topic that sells. She notes that the percentage of working mothers with infants is 53.5 percent, a figure that hasn't changed since 2000, and that of mothers with school-age children, 75 percent are in the workforce. "Most women today have to work," she says. "A new college-educated generation

who are made to feel guilty for entrusting the rearing of their children to someone else. There are women who have become disillusioned with the high-pressure nature of the professional or corporate world, the seventy-hour weeks and in law firms the obsession with billable hours and no vacations. They prefer to sacrifice both money and the exhilaration that comes with the exercise of power for a less-driven life with time for spouse and children and other leisure-time activities.[38] And there are women who genuinely see raising children and being a full-time mother as by far the most important and rewarding of careers, soccer practice notwithstanding.[39]

Whatever the motivation, the net effect has been a dearth of talented, well-qualified women in positions of power, influence, and leadership in politics, corporations, and the professions. All the talented women who deliberately choose home over a career, Hirshman implies, are betraying Betty Friedan and the cause of second-wave feminism. They are far from being all that they can be. And she is right to note that paradoxically each year sees the ratio of women to men in many colleges approaching or exceeding 60 to 40.[40] Increasing numbers of these women will either find good jobs or go on to graduate or professional schools. Are they just marking time until the right man comes along? Hirshman seems to think so and probably wonders why they bother since they plan to opt out of the workplace as soon as possible.[41] Dowd is more sanguine, dismissive of

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takes it for granted that women will both work and care for their families—and that men must be an integral part of their children's lives. It's a generation that understands that stay-at-home moms and working mothers aren't firmly opposing philosophical stances but the same women in different life phases . . . ." E.J. Graff, *The Mommy War Machine*, WASH. POST, Apr. 29, 2007, at B1. Probably none of the women Graff surveyed were graduates of Yale.

38. For a novel illustrating this point (although with a man), very popular and influential in its day, see SLOAN WILSON, THE MAN IN THE GRAY FLANNEL SUIT (1955).

39. *See* Rebecca Mead, *The Wives of Others*, THE NEW YORKER, Apr. 16, 2007, at 158, 160 (reviewing *The Feminine Mistake* by the journalist Leslie Bennetts, published in 2007). Bennetts, Mead says, "barely considers the possibility that a woman might clear-sightedly find the rearing of her children the most rewarding work she can do, not out of a sense of self-sacrifice but out of a sense of personal fulfillment, a position eloquently characterized a few years ago in the book "Maternal Desire" by the psychologist Daphne de Marneffe." *Id.* Nor does Bennetts consider, Mead says, "whether the flight from the workplace might be a justified rejection of a culture that assumes that parenting can be dealt with in the margins of one's work life. . . . For many women, a contented life of motherhood and homemaking, even given the uncertainties [of death or divorce], may offer better odds of satisfaction than the guaranteed stress of unloved work and the difficulties, emotional and practical, of surrendering to another the task of caring for one's children." *Id.*

40. *See* David Brooks, Op-Ed., *Mind Over Muscle*, N.Y. TIMES, Oct. 16, 2005, § 4, at 12. Brooks says that 133 women will graduate for every 100 men; among African-Americans, 200 women will graduate for every 100 men. The disparity has probably widened since Brooks wrote.

41. Leslie Bennetts would agree with Hirshman, but for somewhat different reasons, as Rebecca Mead points out in her review of Bennetts' *The Feminine Mistake*. Bennetts thinks that not only should women work but that they should *want* to work because, as Mead paraphrases, "a woman without a job or a career will be in dire economic straits if she loses her provider to death, desertion, or debility. Nor should a woman who leaves the workplace when her children are babies count on being able to rejoin it later; her skills may have become unmarketable, Bennetts warns, and her years off will be counted against her." Mead cites the statistics that so alarm Bennetts:

> Census Bureau data show that 5.6 million mothers stayed home with their children in 2005, about 1.2 million more than did so a decade earlier; a survey of women who graduated from Harvard Business School in the years 1981, 1986, and 1991 revealed that only thirty-eight per cent of those with children remained in full-time employment in

the privileged and pampered few who plan to join the opt-out revolution, supportive of those who want a life that isn't centered on men.

Anyone who regularly looks at women's magazines or the best-selling books on the subject understands how spirited this work-over-home debate is and how seriously it is taken by women. But the "by women" here, I think, is highly revealing: it exposes a dangerous fault line in American society. No one doubts that women who want to pursue full-time careers and also rear children are handicapped in ways that men have never been. Men take for granted that if they put in long hours for six-figure salaries, they can expect to return exhausted from the workplace to a loving spouse, well-behaved children, and an immaculate home. When both spouses work in challenging, full-time jobs, having children and any sort of home life becomes truly problematic. Very well-to-do couples may be able to afford full-time surrogates to look after their children, but even this avenue can conflict with maternal desire and leave a woman guilt-ridden at abandoning her children to someone else. Note that it is women who are guilt-ridden.[42] Real chore-sharing between spouses could help, but Judith Warner tells us that "the gender caste system is still alive and well in most of our households," with working women doing 70 per cent of the household chores.[43] There's the rather rare stay-at-home or flexible husband.[44] Women can sometimes negotiate part-time, flexible schedules with their employers, perhaps with much of their work done from home; but the women who take advantage of such opportunities seldom reach the higher levels of their professions. Those who take a break from their jobs in order to have children often find it difficult to resume their careers, at least at levels comparable to those they abandoned.[45] Again note that at this level, too, it is the

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> 2001. A poll cited in a recent issue of *Psychology Today* claims that forty per cent of today's women would prefer a return to the gender roles of the nineteen-fifties.

See Mead, *supra* note 39, at 158. But Bennetts' argument is not tied just to financial considerations. She believes that women find far more fulfillment in a life that includes both a career and a home and children. *See* Leslie Bennetts, *The Feminine Mistake*, THE HUFFINGTON POST, Mar. 31, 2007.

42. *See* Kolbert, *supra* note 34, at 85 (discussing "maternal desire"); Rebecca Mead, *supra* note 39, at 160 (*semble*).

43. *See* Judith Warner, Op-Ed., *The Parent Trap*, N.Y. TIMES, Feb. 8, 2006, at A21 ("Although it often seems anecdotally to be true that domestic tasks and power are pretty evenly divided in families where both parents are working full-time, the statistics argue quite differently. The fact is, no matter how time- or sleep-deprived they are, working women today do upwards of 70 percent of household chores for their families. The gender caste system is still alive and well in most of our households.").

44. *See* Creswell, *supra* note 13 (husband's flexible schedule as owner of vineyard allowed businesswoman to take advantage of increasingly demanding opportunities).

45. In response to Rebecca Mead's review of Leslie Bennetts' *The Feminine Mistake*, Sylvia Ann Hewlett, president of the Center for Work-Life Policy, counters that Mead

> does not appear to appreciate the price women pay for taking time out from their careers . . . . Bennetts is dead-on: the risks are high, and the penalties are huge. According to survey data gathered by the Center . . . ninety-three per cent of highly qualified women who are currently at home want to get back to work. Seventy-four per cent succeed, but only forty per cent are able to find full-time employment. Undoubtedly there are women who are completely content as stay-at-home wives and mothers. However, the women Bennetts interviewed who profess such fulfillment may be caught up in what I describe as a downsizing cycle: a woman is not able to attain her previous level of employment, and so takes a job for which she is overqualified. She is neither challenged nor promoted and

women who are scrambling around. There seems to be no good solution for well-qualified women who want to both capitalize on the equality of opportunity on offer in the workplace and also rear children.[46]

The easy answer at present is that women can't have it all. Forced to choose, most choose home and child rearing over careers. But oddly enough, men can have it all. They assume they can have it all because they always have. They aren't forced to choose; it is they who are forcing the choices. Is any of this beginning to sound familiar? If you were looking for sex discrimination, you wouldn't have far to look. Why haven't women awoken to this? Why doesn't this subject dominate the Cosmo conversation instead of "should she–shouldn't she." Why aren't women confronting men and calling them to account with the indignation and anger that characterized second-wave feminists?

I believe women should have the same power of choice that men have always had. If that requires some ingenuity or sacrifice on the part of men to work it out, then it's time to give some thought to it. Let the pampered class of women plan their weddings. But let the freedom that second-wave feminists won for all women not turn into a two-edged sword and the world Betty Friedan visualized in *The Feminine Mystique* fail to materialize.[47] Hirshman may be right in saying the glass ceiling is at home. But there is no longer a law of nature decreeing it must be that way. It should be obvious that the framework that appears to box women in is a creation of males, many of whom do not seem to recognize their contribution to the dilemma women face and who feel no obligation to do anything about it. It is time to bridge the divide.

Meanwhile, what of all those women who have no option but to work? Nicholas Kulish points out that "[a]s always, women in lower-income families are going to factories and offices simply because they have to help pay the rent and keep food on the table. And as always, a single woman with children doesn't have the luxury of wondering whether the family can make do on one salary—it already is, and the salary is hers."[48] He continues to say that

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> encounters a glass ceiling. Hence, her toddler becomes much more appealing than her dead-end, unsatisfying job.

Letter from Sylvia Ann Hewlett to *The New Yorker*, *in* THE NEW YORKER, May 26, 2007, at 5, 5.

46. For Linda Hirshman's intriguing and detailed solution to the work-home dilemma, see *supra* note 30. Put briefly, Hirshman recommends first that young women "use . . . [their] college education with an eye to career goals." Secondly, she urges "that women must treat the first few years after college as an opportunity to lose their capitalism virginity and prepare for good work, which they will then treat seriously." Thirdly, on the household side, she exhorts women to avoid taking on more than a fair share of household chores. Finally she says: "Have a baby. Just don't have two. . . . [W]omen who opt out for child-care reasons act only after the second child arrives." *See also* Creswell, *supra* note 13; Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, at 68-84 (2006).

47. Elizabeth Kolbert gives a perceptive sense of the current work-home dilemma: "Today, more than sixty per cent of women with children under the age of six are employed. Among mothers of children between the ages of six and seventeen, that figure rises to nearly eighty per cent. In another way, though, things have turned out to be a lot more complicated than my classmates and I suspected. It's hard to say how many women are weeping in their ironing these days . . . . But the consensus is that the golden age of female fulfillment that Friedan envisioned—'this may be the next step in human evolution,' she wrote—hasn't materialized." Kolbert, *supra* note 34, at 85, 85.

48. Nicholas Kulish, *Changing the Rules for the Team Sport of Bread-Winning*, N.Y. TIMES, Sept. 23, 2005, at A18.

"[e]xpressions like 'choosing to have a career' have misled some women. Not working is no longer a choice for many. It's a luxury—or at a minimum, a serious sacrifice."[49] Kulish might have added that women feel pressured to work to pay for their children's education; they feel pressured to work so their families can have the goods that a prodigal capitalism foists upon them, principally as seen on the endless commercials of television, a medium with which we are amusing ourselves to death, as the late Neil Postman so presciently put it.[50] It is well to keep in mind that the wide world of work is a world of class distinctions based almost entirely on wealth. We understand and accept this because of the abiding faith that anyone can prosper if she just works hard and plays by the rules. But then we also believe in Santa Claus.

Women who have children and who have to work face formidable obstacles. The near instant mobility that Americans enjoy has had a scattering effect on the extended family. Grandparents or other close relatives seldom live in the home anymore or even nearby; they aren't available to look after children. Kids can't walk or ride a bike to activities; the distances are too great, and the world today is far more dangerous than the one I grew up in seventy years ago where no one had ever heard of child predators. Full-time, reliable child-care may be difficult or impossible to obtain.[51] The typical drop-off child-care centers can leave much to be desired, and on-site child care provided by employers is a rarity. Few employers offer paid maternity or paternity leave; few offer paid sick leave.[52] We live in the era of the latchkey—teenagers after school are left to fend for themselves until a parent makes it home at six or seven o'clock. We have no national health-care system as in so many other industrialized nations, and to our shame cannot bestir ourselves to create one.[53] Forty-seven million Americans, nine million of them children, have no health insurance at all. Millions of others find their plans inadequate or ridiculously expensive. Preventive care is lacking in our private, insurance-company-dominated health-care system. Many employers today offer no health-care coverage and no retirement benefits. Somewhere at this moment a child is starving to death while hedge-fund managers try to count to a billion. Millions of workers are left to

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49. *Id.*

50. *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH (Penguin Books 1986) (1985).

51. And it is expensive. For lower-earning families, the average is about 16% of monthly wages. For higher-earning families, the average is about 6%. "American families with mothers make average monthly child-care payments of an estimated 6.9% of their average monthly income." It is usually the second-largest expense after rent or mortgage payments. *See* Linda Giannarelli & James Barsimantov, *Child Care Expenses of America's Families*, URBAN INSTITUTE (Dec. 1, 2000), *available at* http://www.urban.org/publications/310028.html#nat.

52. *See, e.g.*, Judith Warner, *Chipping Away at Family Leave*, N.Y. TIMES, Feb. 8, 2007, *available at* http://warner.dblogs.nytimes.com/?s=Chipping+Away+at+Family+Leaveat XX. Warner notes that the United States is not one of the 168 countries that guarantee women paid maternity leave. In addition, she says, "Eighty-six million working Americans have no paid sick days to use to care for ill children, and nearly one in two workers—59 million in all—has no paid sick leave at all."

53. *See, e.g.*, Michael Moore's *Sicko* (Dog Eat Dog Films 2007), a documentary on the sad state of health care in America.

fend for themselves in the best meritocratic tradition of the richest nation on earth.[54]

Women who want to work and those who have to work could avoid a lot of difficulty if they simply refrained from having children, but that isn't likely to happen. From an evolutionary standpoint, women must carry in their genes some sort of command to propagate in order to ensure the survival of the species. You hear anxious talk by some women about their biological clock ticking as they reach thirty and aren't married. Some women, and some couples, appear positively frantic to have children, as if there were nothing else in life that mattered. Some couples try the fertility clinics or pay large sums to surrogate mothers for a child whom they may or may not get; or they try to navigate the bureaucratic nightmare of adoption, either here or abroad. This sounds like biology, or at least an irresistible impulse, at work. Others have children because it seems like the natural thing to do. Some women feel pressured by their parents, husbands, or the mores of their social milieu. Some couples have children in the belief that it will save their marriage. Something like three million pregnancies a year are unplanned and not necessarily wanted, the result of accident, carelessness, or indifference. About 1,200,000 of these pregnancies are carried to term; only 14,000 are put up for adoption; the rest are aborted.[55]

One way or the other, women are going to have children. As matters now stand, many of those who can afford it are going to put aside careers to rear them. The "home," along with all that that word connotes, is usually blamed for the under-representation of women in the professions and in the business world. The profit-driven, dispiriting nature of the American world of work undoubtedly plays a role: if they possibly can, some men and women drop out for lesser paying jobs, or for the pleasure of doing arts and crafts or growing and selling organic vegetables. But the real culprit, in my view, is a form of gender discrimination so blatant that it is easy to ignore: men are still setting the rules while contributing little to a constructive resolution of the work-and-family problems those rules create. In the meantime, those who have no choice but to work will continue for the foreseeable future to struggle with a fractured, child-unfriendly system, and a government that remains adamantly indifferent to their needs.

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54. *See* Bob Herbert, Op-Ed., *The Divide in Caring for Our Kids*, N.Y. TIMES, June 12, 2007, at A23 ("There are nine million children who lack health care in the U.S. and millions more who are eligible for coverage but fall through the cracks . . . . What's the sense of being the richest nation on the planet if you can't even afford to keep your children healthy and alive?"); Editorial, *Vetoing Children's Health*, N.Y. TIMES, July 22, 2007, § 4, at 9 (estimating 8 to 9 million children without health coverage); Leighton Ku, *Comparing Public and Private Health Insurance for Children*, CENTER ON BUDGET AND POLICY PRIORITIES (May 11, 2007), *available at* http://www.cbpp.org/5-11-07health.htm.

55. *See* Kate Zernike, *Use of Contraception Drops, Slowing Decline of Abortion Rate*, N.Y. TIMES, May 5, 2006, at A21. At the end of her article, Zernike notes that "[o]f 6.4 million pregnancies in the United States each year, half are unintended, according to Guttmacher, and half of those are carried to term. About 14,000 women who carry the pregnancies put the children up for adoption, and 1.3 million have abortions."

B. Sex as Pleasure

Apart from survival, our most basic instincts are for the society of others, for physical and emotional security, and for sex. Power is important because of our instinctive need for the society of other people. Those people don't always behave as they should. Power enables us to control them. Money, closely allied with power, is in part a status symbol but also a way of dealing with fear—of countering threats to our instinctive need for physical and emotional security. But there is no surrogate for the sexual instinct. It can be satisfied only by sex. If biology were all there were to it, the whole business would resemble the prototypical world of *Leave It to Beaver*.[56] At some point, obviously, Ward and June did what was necessary to produce Wally and the Beaver. But beyond that it is a little hard to imagine the two of them ever locked in carnal embrace again.

The reality, of course, is that most people think of sex as an intensely pleasurable activity, one desired for its own sake quite apart from reproductive considerations. Sex in its pleasure aspect is a complex phenomenon, far from fully understood. I suppose one could say that it feels good and let it go at that. But such an off-hand dismissal fails to capture the ubiquity, variety, and intensity of the phenomenon. Why is masturbation so commonplace among boys and girls, men and women? Why do spouses who have sworn fidelity to one another cheat with a mistress or a lover?[57] Why are some men—ostensibly heterosexual—drawn to other men for sexual gratification?[58] Why are a significant number of men and women addicted to pornography?[59] When a man and a woman engage in a typical one-night stand, are they both looking for the same thing—a bit of casual fun and frolic without commitment or consequences?[60] Or are the motivations of each different, perhaps radically so? There is anecdotal evidence to suggest, as in the scenarios of *Sex and the City*,[61] that while a woman may have sex with a number of men, she is really looking for the elusive ideal of the perfect and eternal soul mate.[62]

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56. *Leave It to Beaver*, CBS, 1957-58 (Republic Studio), ABC, 1959-63 (Universal Studio). This half-hour sit-com, immensely popular when it first aired and in constant syndication since, revolves around what the family-values movement would consider the perfect example of a "real" American middle-class family. Ward Cleever, husband and father, works; his wife June keeps an immaculate home and oversees the rearing of their two young sons, Wally and the Beaver.

57. *See, e.g.*, Petula Dvorak, *Inside the Case Files of 'Cheating Season'*, WASH. POST, Feb.14, 2006, at B1 (reporting on the work of private detectives in gathering evidence of infidelity).

58. *See* Corey Kilgannon, *A Sex Stop on the Way Home*, N.Y. TIMES, Sept. 21, 2005, at B1. An account of parking lots in and around New York City where homosexual encounters are common. "The parking lot in Queens seems to be especially popular with men who lead ostensibly heterosexual lives but show up for sex because it is quick, easy to get and secretive, regulars say. . . . 'The vast majority of men who come here are married,' said one longtime parking lot user . . . ."

59. *See* Bridget Crawford, *supra* note 31, at 141-54.

60. *See, e.g.*, Kathleen Deveny with Raina Kelley, *Girls Gone Bad?*, NEWSWEEK, Feb. 12, 2007, at 41.

61. HOME BOX OFFICE, *Sex and the City* (1998-2004) (a contemporaneous account of the struggles of four young career women in New York City to find sex, romance, and love (not necessarily in that order and not necessarily all to the exclusion of one)).

62. *See* Ross Douthat, THE AMERICAN SCENE, *The Future of Monogamy*, Sept. 21, 2005, *available at* http://www.theamericanscene.com/. In *Sex and the City*, Douthat says, "The women didn't want to have five lovers at once; they wanted to work their way through five lovers, or however many were necessary, in the hopes of finding Mr. Right."

Motivations in this area defy generalization and are probably as diverse as the individuals themselves. What does seem clear is that in its pleasure aspect, sex belongs, like power and money, to the realm of ego—to selfishness and self-centeredness. History is rife with examples of lives ruined by the drive for sexual gratification: a thousand ships launched for a face; disastrous wars fought; religions created; the course of history altered; marriages broken; political, professional, and business careers wrecked. The laundry list of mischief and damage is a long one.

1. The Beginning of the Sexual Revolution.

The sexual revolution in America dates to the end of World War II in 1945. There was no sudden eruption, no memorialized date to mark its beginning. It seemed to occur little by little, but by the end of the century the nation's sexual landscape had been drastically transformed.

There has always been a glaring gap between what people say they believe and how they actually behave. Some would call this hypocrisy, although ambivalence might be the more descriptive word. For much of our history, religious beliefs, social mores, and legal edicts spoke with one voice in condemning prostitution, adultery, fornication, homosexuality, and anything else that fell beyond the pale of monogamous marital sex. Yet all of these activities went on. We can only guess at their extent with nothing but anecdotal accounts of those who lived in particular eras and spotty courthouse records[63] to go on. People today still cluck disapprovingly as lurid accounts of President Kennedy's sexual escapades surface in the media; the disclosure of Gary Hart's adulterous affair with Donna Rice forced his withdrawal from the 1988 presidential race;[64] Bill Clinton's well-publicized sexual proclivities crippled his presidency and very nearly ended his political career; and Congress, of course, is still pondering what to do about Janet Jackson's breast. America has experienced a sexual revolution, but our badly conflicted, ambivalent notions about sex are still on display.

The Second World War was seminal in several respects. Millions of able-bodied men were serving in the military; out of necessity women moved into industrial and factory jobs which had previously been the province of men only. In the process, women demonstrated to the nation, but more importantly to

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63. Probably the most well-documented record of unconventional sex can be found in the hundreds of cases prosecuting 19th-century Mormons, who sought the right under the free exercise clause to practice polygamy as part of their religion. *See* THOMAS F. O'DEA, THE MORMONS 111 (1957) (estimating the number of *convictions* for polygamy at 573 by 1890); Kenneth Driggs, *The Prosecutions Begin: Defining Cohabitation in 1885*, 21 DIALOGUE: A JOURNAL OF MORMON THOUGHT 109, 120 (1988) (estimating the number of prosecutions at somewhere between 970 and 1300). The courts, the Supreme Court in particular, were ruthless in suppressing this essay in the unconventional. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (upholding conviction for polygamy against defendant's free exercise claim that his conduct was religiously motivated); Davis v. Beason, 133 U.S. 333 (1890) (upholding statute making membership in the Mormon Church, without more, a crime).

64. *See* R.W. Apple Jr., *The Morality Factor; Critical Ingredient in American Character, Sometimes Resisted, Works Against Hart*, N.Y. TIMES, May 8, 1987, at A1 ("Hart's reported decision to withdraw from the 1988 Presidential campaign because of disclosures, both recent and anticipated, of his associations with women other than his wife, Lee, demonstrated once again that a basic belief in fidelity and truthfulness remains strong in America . . . .").

themselves, that they could do almost any kind of work that a man could; their role in society didn't necessarily have to be played out in the home. And it was the end of the war in 1945 that ushered in an era of prosperity so fecund as to be astonishing: it seemed that people were entitled to whatever they wanted. Consumer goods flooded the country. Privation has always been a fact of life in America, but never more so than in the period which began in 1929 with the Great Depression and continued throughout the war. Suddenly that came to an end. As George Will puts it, "mass affluence, a phenomenon without precedent in the human story, exploded upon postwar America."[65] The phrase "without precedent" is critical. The children born to returning veterans in the 1940s and 1950s—those we call the baby boomers—were unique in being the "first generation that knew only a condition that no other generation had ever known—the absence of scarcity."[66] It was this generation, coming of age in the 1960s and '70s, that could take for granted the satisfaction of material wants, even disdain them, and look beyond for something more—a something which included sexual gratification. It was this generation that would launch the great countercultural movement in the 1960s in which having sex became as unremarkable as eating.[67]

Other forces may have been in play. It is possible that the revolution was simply an idea whose time had come. It may have been one of those perspectival shifts that happen in societies from time to time and that really cannot be explained—like the disappearance in a single generation of the millennia-old foot-binding custom among Chinese women.[68] The *New York Times* op-ed columnist David Brooks perceptively observes that

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65. George F. Will, *Land of Plenty*, N.Y. TIMES BOOK REIVEW, June 10, 2007, *available at* http://www.nytimes.com/2007/06/10/books/review/Will-t.html?_r=1&oref=slogin (reviewing Brink Lindsey's book *The Age of Abundance: How Prosperity Transformed America's Politics and Culture*).

66. *Id.*

67. One of Lindsey's examples is particularly telling: "'More than two-thirds of women who turned 18 during the '50s,'" Lindsey says, "claimed to have slept with only one man by their 30th birthday. By contrast, only 2 percent of women who reached adulthood during the '70s would admit similar restraint.'" *Id.* (quoting Brink Lindsey).

68. *See* Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES, Jan. 1, 2006, at 30. The Ghana-born Princeton philosopher argues in a long and thoughtful essay in the *New York Times* for what he calls "contamination" as the best way of resolving cultural disputes. "The ideal of contamination," he writes,

> has few exponents more eloquent than Salman Rushdie, who has insisted that the novel that occasioned his fatwa "celebrates hybridity, impurity, intermingling, the transformation that comes of new and unexpected combinations of human beings, cultures, ideas, politics, movies, songs. It rejoices in mongrelisation and fears the absolutism of the Pure. Mélange, hotch-potch, a bit of this and a bit of that is how newness enters the world." No doubt there can be an easy and spurious utopianism of "mixture," as there is of "purity" or "authenticity." And yet the larger human truth is on the side of contamination—that endless process of imitation and revision.

Id. (quoting Salman Rushdie). Contamination may be at work in blurring the line between the roles of men and women in society. Change will not come overnight. Appiah stresses that evolution from "purity into contamination . . . is more a gradual transformation from one mixture to a new mixture . . . ." *Id.* As examples of the sort of "perspectival shift" he has in mind, he cites the disappearance of foot-binding in China in almost a single generation, the new freedom of women in the Western world, and the acceptance here and in other countries of the open presence of gays and

> the most important changes in our society are not planned. They are not the ones organized by political leaders. They are the ones that happen organically, through some intellectual or cultural shift. They are the spontaneous result of millions of people consciously or unconsciously changing their attitudes or behaviors or mental frameworks.[69]

Perhaps the time was simply ripe for Americans to reevaluate their ambivalent attitudes towards sex and to narrow the gap between what they professed to believe and how they actually behaved.

2. Tracking the Progress of the Revolution.

Explaining why the revolution began when it did may be problematic, but its progress is fairly easy to chart. In 1948, Alfred Kinsey both shocked and titillated the nation with the publication of *Sexual Behavior in the Human Male*, followed in 1953 by *Sexual Behavior in the Human Female*.[70] Kinsey was a scientist, and the aura of scientific rigor surrounding his famous *Reports* lent them verisimilitude. In any case, their impact was certainly profound. He awoke the nation to how vast the gulf was between professed beliefs and actual behavior. His research showed, for example, that half of the women he studied had engaged in premarital sex and that one-quarter of them had had extramarital affairs.[71] He documented the prevalence of homosexual behavior in both men and women in the population.[72] And perhaps most intriguingly, his research revealed that the sexual response of women was much closer to that of men than had previously been supposed. In contrast to the orthodox view, women were not merely vessels for the reproduction of the species or objects for the pleasure of men. They were sexual beings in their own right, every bit as capable as men at taking pleasure in sex.[73] One of the major effects of his work was to begin a polarization that has become increasingly paralyzing over time—a contentious divide between those who cling to traditional values and those who welcome the new freedom that Kinsey's insights seemed to presage.

In 1960, hard on Kinsey's work, came the next great development, the advent of "the pill." With Enovid, women for the first time were offered a simple, safe, and highly effective means of controlling their reproductive function, freeing them to choose whether to have children and when, and thus to have sex without fear of pregnancy.[74] In giving women control over their

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lesbians in public life. People simply got used to these things, he says, and reason alone can't explain why old customs gave way to new. *Id.*

69. David Brooks, Op-Ed., *The Way We Live Now: Welcome*, N.Y. TIMES, Sept. 18, 2005, *available at* http://brooks.page.nytimes.com/b/a/200518.htm?p=1.

70. *See generally* ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); ALFRED C. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

71. *See* DISCOVERY HEALTH, *Alfred C. Kinsey—Contributions to American Sexuality*, Oct. 1, 2005, *available at* http://health.discovery.com/centers/sex/sexpedia/alfredckinsey.html.

72. *Id.*

73. *Id.*

74. *See* Sharon Snider, *The Pill: 30 Years of Safety Concerns*, FDA CONSUMER (1990) (discussing the development of Enovid and its subsequent history), *available at* http://www.fda.gov/bbs/topics/CONSUMER/CON00027.html. Condoms, of course, had long been available under the counter in most drug stores, but from the male point of view they left something to be desired. Nor were they

reproductive function, the pill made possible the second-wave feminist movement—the demand for an end to gender discrimination and for access to life activities on an equal footing with men. With control over childbearing, women were realistically free to compete for jobs that had hitherto belonged to men. They felt able to answer the call to arms sounded by Betty Friedan in her book *The Feminist Mystique*, which was published in 1963.

The appearance of pantyhose a little later brought about startling changes in women's fashions—preeminently the provocative mini-skirt. Suddenly it seemed that women were on offer—in school, in the office, and at home—and that the era of free love so ardently dreamed of by men, and perhaps by women too, had finally arrived. Books like John Updike's *Couples* and Philip Roth's *Portnoy's Complaint* topped the best-seller lists, electrifying in their radically open and graphic depiction of sexual behavior in the 1960s.[75] A new consciousness was in the air, but it was left to Erica Jong to capture its essence in a single unforgettable phrase—"the zipless fuck." Her novel *Fear of Flying* appeared in 1973; in a new introduction prepared in 1995, she wrote that "the fantasy of 'the zipless fuck' was what caught the fancy of a generation. Before I named it, women were not presumed to *have* it. *Fear of Flying* became a rallying cry for women who wanted the right to have fantasies as rich and raunchy as those of men."[76]

This vision of free love—fundamentally one of a license for pleasure—was reinforced by the countercultural movement that swept the nation during the 1960s and '70s. In this so-called hippie era, the young people of the post-World War II generation revolted not only against what they saw as an absurd war in Vietnam but also against the hypocrisy, complaisance, and preoccupation with material things of their elders.[77] Fueled by dope, acid, and alcohol, high on the music of groups like *The Doors* and the *Jefferson Airplane*, these young people did not hesitate to suit action to words in implementing the famous slogan, "Make love, not war."[78] There was no need to fear pregnancy, and the spectral presence of AIDS was just a nightmare hovering on the brink of reality.

Kinsey had focused primarily on the relative frequency of sexual behavioral patterns. In 1966, the idea that sex was as much about pleasure as

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always available when moment and mood became propitious. *See generally* AINE COLLIER, THE HUMBLE LITTLE CONDOM: A HISTORY (Prometheus Books 2007).

75. *See* JOHN UPDIKE, COUPLES (1968); PHILIP ROTH, PORTNOY'S COMPLAINT (1969). Updike and Roth were held in high regard by the literati, as was James Gould Cozzens, whose 1957 novel *By Love Possessed* not only topped the best-seller list for the year but in its graphic description of sex in the suburbs prefigured the work of Updike. And a hungry, newly liberated audience devoured Grace Metalious's *Peyton Place*, which appeared in 1956. Though panned by most critics, the book was wildly popular and was considered a blockbuster by the publishing industry. *By Love Possessed* and the less elegantly written *Peyton Place* were door-openers in a very real sense.

76. *See* ERICA JONG, FEAR OF FLYING, at xiv (Signet, 1995) (1973).

77. Again, dramatized in films such as *The Graduate* (Embassy Pictures Corp. 1967) and *Rebel Without a Cause* (Warner Bros. Pictures 1955).

78. *See, e.g.*, JOAN DIDION, *Slouching Towards Bethlehem*, *in* SLOUCHING TOWARDS BETHLEHEM 84, 84-128 (Delta 1967) (an account of the author's experience in the Haight-Ashbury district of San Francisco in 1967). There is of course a mass of detailed information available on the Web about the famous Woodstock Festival of 1969. *See, e.g.*, WOODSTOCK FESTIVAL AND CONCERT, http://www.woodstock69.com/.

reproduction gained added impetus with the work of William Masters and Virginia Johnson. In their book *Human Sexual Response*,[79] they built on Kinsey's *Reports* and explored the psychological and physiological nature of sexual response in men and women. Their findings were startling. Women, they reported, found as much pleasure in sex as men and were capable of achieving orgasm, even multiple orgasms.[80] They concluded that sex was "a healthy and natural activity that could be enjoyed as a source of pleasure and intimacy."[81] The work of Kinsey and Masters and Johnson forced many Americans to reorient their thinking and dealt a further blow to the orthodox view of the appropriate roles of men and women in matters of sex and, more broadly, in society. These developments, in turn, reinforced, and were reinforced by the women's liberation movement—the demand of women for recognition as persons in their own right and for access to all significant life activities on equal footing with men, including sex on their own terms. In 1972, Alex Comfort's *The Joy of Sex*[82] appeared and was an instant best seller. It was a how-to-do-it manual that, in its detailed and illustrated openness, showed just how far the nation had come in a short period of time.

3. A Struggle of a Different Sort.

In 1969, a struggle of a different sort broke out. When the New York police raided the Stonewall Inn, a gay bar, the protests and riots that followed brought many gays and lesbians into the open for the first time. Stonewall is widely seen as marking the start of the gay-rights movement[83]—a common catch-all term for the struggle of gays, lesbians, bisexuals, and transsexuals for recognition, acceptance, and for equal treatment—freedom from discrimination based on their sexual orientation.

When gays and lesbians came out, they found that they were members of a distinct minority group. Though they were not readily identifiable by skin color, religious beliefs, or ethnic characteristics, they discovered that they were "different" in a way that really mattered to many mainstream, heterosexual Americans. Being honest and open about sexual orientation was to put jobs and careers at risk and often to forfeit the love and support of families and friends.[84] Reactions were typical of the nation's long history of intolerance for those who

79. *See* WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, HUMAN SEXUAL RESPONSE (1966).

80. WIKIPEDIA, *Masters and Johnson* (2005), http://en.wikipedia.org/wiki/Masters_and_Johnson.

81. *Id.*

82. *See* ALEX COMFORT, THE JOY OF SEX: A GOURMET GUIDE TO LOVE MAKING (1972).

83. *See* WIKIPEDIA, *Stonewall* (2005), http://en.wikipedia.org/wiki/Stonewall ("the clash was a watershed for the worldwide gay rights movement, as gay and transgender people had never before acted together in such large numbers to forcibly resist police"). The witch hunts of the McCarthy era, though aimed primarily at Communists, targeted homosexuals with almost equal fervor. For an excellent fictionalized account of this climate of fear, see THOMAS MALLON, FELLOW TRAVELERS (2007).

84. The point was well made in dramatic form in the movie *Philadelphia* (Clinica Estetico 1993), starring Tom Hanks and Denzel Washington.

are different: fear, hatred, discrimination, persecution, and frequently violence, sometimes lethal.[85]

Being gay or lesbian since Stonewall has not been easy. The AIDS epidemic struck in 1981 and at first seemed to affect only gay men. It was the judgment of God, proclaimed the righteous in that sizable segment of the population that believed that homosexuality was unnatural, even sinful.[86] The public became seriously concerned only when it became apparent that AIDS affected heterosexuals also. Since 1981 over five hundred thousand persons have died from a terrible disease that still has no cure.[87] For the last ten years, cases and deaths have dropped somewhat with the disciplined use of condoms and the development of combination antiretroviral therapy; still, in 2004, almost sixteen thousand Americans died from the disease.[88] Despite the evidence that the nation was caught in the throes of a pandemic, President Ronald Reagan managed to avoid the subject altogether until he was persuaded by Elizabeth Taylor towards the end of his presidency to publicly acknowledge the problem. More than a million people in this country, it is estimated, are living either with HIV infection or AIDS.[89] The situation in other countries—especially those where drug therapy is unavailable or too expensive—is much bleaker. Worldwide, the death toll from AIDS exceeds 25 million, and as of 2005, over 40 million people were living with the disease.[90]

When gays and lesbians began to openly acknowledge their homosexuality, a hot dispute broke out between those who believed that sexual orientation was a matter of choice—that it could, like any other psychological malady, be "treated," even reversed—and those who insisted that sexual orientation was somehow an inherent, immutable quality. Scientists thus far do not claim to know much about what determines sexual orientation; their view appears to be that it is an exceedingly complex phenomenon, probably multi-factorial in nature, by which they mean that it results from some combination of inherited or innate qualities and early environmental experiences.[91] There is, however, much anecdotal evidence to suggest that sexual orientation is not something one voluntarily chooses or can voluntarily change, with or without

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85. There readily comes to mind the second-class citizenship enforced on blacks by a white majority from emancipation to the present and, again, the relentless suppression of the religious beliefs of the Mormons in the latter half of the 19th century.

86. The rhetoric of the late Jerry Falwell, the famous televangelist, minister and leader of the erstwhile Moral Majority, is illustrative. *See, e.g.*, Hans Johnson & William Eskridge, Op-Ed., *The Legacy of Falwell's Bully Pulpit*, WASH. POST, May 19, 2007, at A17 ("'AIDS is not just God's punishment for homosexuals . . . . It is God's punishment for the society that tolerates homosexuals.'"); Frank Rich, Op-Ed., *The Reverend Falwell's Heavenly Timing*, N.Y. TIMES, May 20, 2007, § 4, at 13 ("AIDS [is] the 'wrath of a just God against homosexuals.'").

87. *See* AVERT, *United States HIV & AIDS Statistics Summary* (May 8, 2006), http://www.avert.org/stat sum.htm.

88. *Id.*

89. *Id.*

90. *See* AVERT, *World HIV and AIDS Statistics* (2005), http://www.avert.org/worldstats.htm.

91. *See, e.g.*, NATIONAL ASS'N FOR RESEARCH & THERAPY OF HOMOSEXUALITY, *Is There a "Gay Gene"?*, Sept. 21, 2004, *available at* http://www.narth.com/docs/istheregene.html; Jeffery Satinover, *Is Homosexuality Innate and Inherited?* (Catholic Educator's Resource Center 2000), *available at* http://www.catholic education.org/articles/homosexuality/ho0024.html.

medical treatment. For example, in an op-ed article in the *New York Times*, a gay man, after noting that "evangelical Christians . . . have invested a decade and millions of dollars promoting the notion that gay men can be converted to heterosexuality, or become 'ex-gay,'" writes that "if anyone reading this believes that gay men can actually become ex-gay men, I have just one question for you: Would you want your daughter to marry one?"[92]

In 1974 the American Psychiatric Association removed homosexuality from its category of mental disorders in the Diagnostic and Statistical Manual of Mental Disorders, and the Public Health Service—charged with determining what is or is not a psychopathic personality—revised its rule so as not to include homosexuals. After a good deal of initial resistance and considerable litigation, the INS finally receded from its view that homosexuality was a psychopathic personality disorder falling under the medical grounds of exclusion.[93]

There has been a decided perspectival shift in societal attitudes towards gays and lesbians, although recognition thus far has been grudging at best. In *Griswold v. Connecticut*[94] and *Roe v. Wade*,[95] the Supreme Court showed a disposition to protect privacy in matters having to do with intimate sexual matters. It broke with that trend in 1986 in *Bowers v. Hardwick*,[96] upholding in a 5-to-4 decision a Georgia sodomy statute as applied to two men who were caught by the police in the act of having sex in the privacy of their home. But then in 2003 in *Lawrence v. Texas*,[97] the Court reversed itself, invalidating a Texas statute criminalizing sodomy. It overruled *Bowers* and removed the criminal stigma from homosexual activity. The statute involved in *Lawrence*, unlike the one involved in *Bowers*, criminalized sodomy only between members of the same sex.[98] Five Justices joined in the majority opinion, which rested on the right to privacy and the due process clause. Justice O'Connor concurred in the result but on equal protection grounds. She did not join the majority in its overruling of *Bowers*.[99]

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92. Dan Savage, Op. Ed., *Don't Let Your Babies Grow Up to Be Ex-Gay Cowboys*, N.Y. TIMES, Feb. 10, 2006, at A25. For an interesting discussion of problems in marriages in which one member is gay, see Katy Butler, *Many Couples Must Negotiate Terms of 'Brokeback' Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5.

93. *See* RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW 54 (2d ed. 1992); THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 425 n.32 (4th ed. 1998). For cases dealing with this issue, see Matter of Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); Hill v. INS, 714 F.2d 1470 (9th Cir. 1983); Lesbian / Gay Freedom Day Comm. v. INS, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd*, 714 F.2d 1470 (9th Cir. 1983).

94. 381 U.S. 479 (1965). In this case, Justice Douglas, writing for the majority, created from "penumbral" emanations from the first, third, fourth, and ninth amendments the still-controversial "right to privacy." As to a married couple and the doctor and staff of a birth-control clinic, the Court found this new right infringed by a Connecticut statute forbidding "[a]ny person . . . [to use] any drug, medicinal article or instrument for the purpose of preventing conception" or to aid and abet such use. CONN. GEN. STAT. §§ 53-32, 54-196 (1938).

95. 410 U.S. 113 (1973).

96. 478 U.S. 186 (1986).

97. 539 U.S. 558 (2003).

98. *See id.* at 566.

99. *See id.* at 578.

Sexual orientation continues to be a highly divisive subject. The military establishment has a long-standing policy of barring gays and lesbians from military service on the ground that their presence is detrimental to morale; and there is strong congressional support for this policy. Gays and lesbians do serve in the military, but only under a controversial compromise policy called "Don't ask, don't tell."[100] Openly admitted homosexuality remains a disqualifying defect for enlistment purposes and grounds for discharge for those already in the military. Survey evidence from Iraq shows that the majority of heterosexual servicemen and women are comfortable working around gays and lesbians and that the much-feared deterioration of morale has not occurred. Ironically, some of the most talented and valuable men and women serving in Iraq—linguists in particular—have been discharged under the military's stringent policy.[101]

The Boy Scouts of America's decision to bar gay men from serving as scoutmasters was upheld by a sharply divided Court in *Boy Scouts of America v. Dale*.[102] Only about half of the states permit gays and lesbians to adopt children;[103] Florida expressly prohibits them from adopting.[104] Some states and municipalities have enacted laws or ordinances adding sexual orientation to the familiar list of prohibited grounds of discrimination (race, color, creed, sex, national origin). In 1992, Colorado voters, by a narrow majority, approved a constitutional amendment which forbade the adoption of such protective

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100. When President Clinton tried to lift the military's ban on gays and lesbians, he was met by a firestorm of resistance from the Joint Chiefs of Staff and from Congress. "Don't ask, don't tell" was the best he could do. Meanwhile the issue surfaced in another way as many law schools, viewing the ban as blatantly discriminatory, barred military recruiters from their campuses. Congress responded with the so-called Solomon amendment, which (as further amended) cut off federal funds to any university if it, or any school within it, barred military recruiters. The Solomon amendment was challenged by the Forum for Academic and Institutional Rights (FAIR); in 2004, a divided panel of the Third Circuit held the amendment unconstitutional on first amendment grounds. The Supreme Court reversed and unanimously upheld the statute. *See* Rumsfeld v. FAIR, 547 U.S. 47 (2006). For a more detailed account of this history, see Jeffrey Toobin, *Sex and the Supremes*, THE NEW YORKER, Aug. 1, 2005, available at http://www.newyorker.com/archive/2005/08/01/050801fa_fact.

101. *See* Alan K. Simpson, Op. Ed., *Bigotry That Hurts Our Military*, WASH. POST, Mar. 14, 2007, at A15; Stephen Benjamin, Op. Ed., *Don't Ask, Don't Translate*, N.Y. TIMES, June 8, 2007, at A29. Mr. Benjamin, formerly a petty officer in the Navy, is one of the Arabic translators ousted by the military under the "don't ask, don't tell" policy. In arguing for a repeal of the policy, he makes a persuasive case for its asininity, noting that more than 58 Arabic linguists and 11,000 other servicemen have been discharged since the policy was instituted in 1993. Many closeted gays, he asserts, don't re-enlist because of the pressure the policy puts on them. In a bitter twist, the military establishment, overcommitted and desperate for recruits, is now willing to waive some felony convictions. In an editorial, the *Times* notes the split along party lines: in the June 2007 presidential debates held in New Hampshire, every Democratic candidate was in favor of repealing the policy; every Republican candidate would leave it in place. *See* Robin Toner & Thom Shanker, *For 'Don't Ask, Don't Tell,' Split on Party Lines*, N.Y. TIMES, June 8, 2007, at A1.

102. 530 U.S. 640 (2000) (5-4 decision).

103. *See* About.com: gay life, http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt_.htm. This site subdivides gay adoption into "single," "joint," and "second-parent" and gives the status of all three in each of the 50 states and the District of Columbia. Similar information is provided in a joint publication of the Williams Institute and the Urban Institute. *See* GARY J. GATES, ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (Mar. 2007).

104. *See* FLA. STAT. § 63.042(3) (2005): "No person eligible to adopt under this statute may adopt if that person is a homosexual."

measures. Surprisingly, the Colorado Supreme Court struck down this amendment as unconstitutional. The case went to the Supreme Court, and Lawrence Friedman captures the essence of the great national divide in his mordant discussion of its disposition there:

> [T]he Supreme Court, even more surprisingly, agreed, 6–3. . . . Scalia wrote one of his typically harsh and callous dissents. He made clear his distaste for gay rights, and referred to gays and lesbians as a rich and powerful elite, with "disproportionate political power." This idea (or fantasy) assumed that the social situation had turned upside down in one short generation. Once upon a time, there was racism, sexism, and homophobia; but now these "minorities" were pampered favorites of the law; they had "special privileges"; and it was the majority which now suffered the pangs of disadvantage. Thus the world as seen by Antonin Scalia.[105]

The issue of gay rights has posed particularly vexing problems for religious groups. In 2005, the United Methodist Church defrocked a lesbian minister; and the Vatican issued a letter barring aspirants with discernibly gay proclivities from seminaries and thus from the priesthood.[106] The Episcopal Church in the United States, with a membership of just over two million, is affiliated with the worldwide Anglican Church—the second-largest Christian church in the world, with a membership of 77 million. Because it consecrated a gay bishop in 2003, the Episcopal Church in the United States is currently on the brink of a potentially disastrous schism, both within itself and within its parent Anglican Church. A significant number of the church's hierarchy and parishioners have threatened to defect in protest and affiliate with the Anglican Church worldwide, which opposes the ordination of gays and lesbians.[107]

Most contentious of all, of course, is the question whether same-sex couples should have the right to marry.[108] In 1996, Congress made its view clear, striking back at the demands of gay and lesbian couples for formal recognition of their union by enacting the Defense of Marriage Act.[109] This statute allows any state so inclined to deny full faith and credit to a same-sex marriage, even though the marriage was valid in the state where it was entered into—a signal departure

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105. *See* LAWRENCE M. FRIEDMAN, *supra* note 22, at 530 (footnotes omitted). The case was Romer v. Evans, 517 U.S. 620 (1996).

106. *See, e.g.*, Neela Banerjee, *Episcopalians Divide Again Over Electing Gay Bishop*, N.Y. TIMES, May 5, 2006, at A16 (reporting on the possible consecration of another gay bishop in California).

107. For an extended discussion of this controversy, see Peter J. Boyer, *A Church Asunder*, THE NEW YORKER, Apr. 17, 2006, at 54. If the church splits, there may well be litigation over which branch is the "true" Episcopal Church in the United States and thus entitled to the property and assets of the church. Further controversy was avoided for the time-being by California's recent consecration of a bishop who is not gay. *See* Neela Banerjee, *Election of Episcopal Bishop Avoids Inflaming a Crisis*, N.Y. TIMES, May 7, 2006.

108. For a thoughtful consideration of the institution of marriage and the impact that same-sex unions might have on it, see Adam Haslett, *Love Supreme*, THE NEW YORKER, May 31, 2004, at 76. Some idea of the complex dimensions of this ideology-driven debate can be gained from visiting any of the many Web sites devoted to the subject. *See, e.g.*, Kavan Peterson, *Washington gay marriage ruling looms*, Mar. 29, 2006 (updated Mar. 30, 2006), http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576; WIKIPEDIA, *Same-sex marriage in the United States*, http://en.wikipedia.org/wiki/Same-sex_ marriage in_the_United_States.

109. Defense of Marriage Act, 1. U.S.C. § 7 & 28 U.S.C. § 1738C (1996)

from the familiar conflict-of-laws rule.[110] The act then expressly defines "marriage" for federal law purposes as "a legal union of one man and one woman as husband and wife."[111] The constitutionality of this statute, or more likely of state statutes modeled on it, will almost surely be tested at some point. The posture of the case will be important. The full-faith-and-credit section is problematical.[112] Can Congress override the Constitution on this point by withdrawing certain acts and records from the effect of the clause?[113] Can a state refuse full faith and credit on public-policy grounds? These are difficult questions. If the challenge is to the definition-of-marriage section of the statute, it is easy to see today's Court upholding its constitutionality. But just in case, as it were, proposals have already been floated to amend the Constitution to forbid same-sex marriages, and President Bush has announced his support for such an amendment.[114]

Massachusetts is the only state thus far to recognize the validity of same-sex marriages. In 2004, the Massachusetts Supreme Judicial Court, in a 4-to-3 decision, ruled that there was no rational basis for treating gay or lesbian couples differently from heterosexual couples so far as marriage was concerned.[115] In 2006, the New York Court of Appeals reached the opposite conclusion in a similar case, holding in a 4-1-2 decision that the legislature could reasonably believe children were better off with a father and a mother and that

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110. The traditional rule is that a marriage valid where celebrated is valid everywhere and should be recognized as such. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 289-95 (4th ed. 2001).

111. *See* LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 175 (Harvard University Press 2004).

112. The clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

113. *See* Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1229-30 (1946) (the effect clause "may well be thought to support legislation enlarging the compulsory area of full faith and credit . . . but legislation withdrawing from the compulsory area . . . may stand on a different footing.").

114. *See* Remarks of George W. Bush, *President Calls for Constitutional Amendment Protecting Marriage*, The White House, Feb. 24, 2004 ("Today I call upon the Congress to promptly pass, and to send to the states for ratification, an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife."), http://www.whitehouse.gov/news/releases/ 2004/02/ 200440224-2.html; Robin Toner & Robert Pear, *State of the Union: Domestic Agenda; Ban of Gay Marriages Leads List of Proposals*, N.Y. TIMES, Jan. 21, 2004 (archives); Adam Nagourney, *Wooing Conservatives; Looking to Win in November, with a 2-Year-Old Playbook*, N.Y. TIMES, Apr. 16, 2006, §4, at 1; Matthew Miller, *Bush's same-sex marriage diversion*, Feb. 2004 (Tribune Media Services) ("Most Americans are against same-sex marriage, and a good portion of them seem ready to march against it."), *available at* http://www.progresoweekly.com/friendly.php?pdr=Mar0410_04&progreso=Matthew_miller.

115. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *see also* Toobin, *supra* note 100. Toobin thinks that "[t]he Court will almost certainly be asked to decide whether gay marriages in Massachusetts must be honored by other states. The Solomon Amendment case will be an important clue about which side has the upper hand." *Id.* Since Toobin wrote, the Court unanimously upheld the Solomon Amendment, which withholds federal funds from educational institutions which deny campus access to military recruiters. *See* Rumsfeld v. FAIR, 547 U.S. 47 (2006).

any change in the definition of marriage was the province of the legislature.[116] San Francisco's ordinance permitting gay marriage was invalidated by the California Supreme Court, and Governor Schwarzenegger vetoed a bill granting the right of marriage to gay couples. California, however, recognizes domestic partnerships and gives couples in these unions the same rights and duties as spouses.[117] The New Jersey Supreme Court recently held that gay and lesbian couples were entitled to equal status with heterosexual married couples, leaving the name of such unions to the legislature. The result was "civil unions." These unions were simply merged with existing family law provisions. Vermont and several other jurisdictions also recognize civil unions and confer the rights and duties of spouses on them.[118]

Ironically, even if a state, like Massachusetts, recognizes same-sex marriages, the couples will not be entitled to the many benefits conferred on married couples by federal law, most critically income tax benefits. The Defense of Marriage Act provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[119]

A number of states have either followed the lead of Congress in the Defense of Marriage Act or are considering doing so in refusing to recognize the validity of same-sex marriages. Some of these statutes or constitutional amendments include civil unions as well. Certainly if these laws—and the polls—are any guide, a majority of Americans are opposed to any change in the traditional notion of marriage as a union between one man and one woman.[120]

A related and legally complex issue—one that indirectly implicates same-sex marriage—concerns the adoption and parenting of children by same-sex couples. Eleven states and the District of Columbia permit joint adoptions. In the remainder the right is either unclear or expressly forbidden.[121] About half of the states allow members of same-sex couples to adopt their partners' children.[122] As reported in the *New York Times*, the California Supreme Court ruled in a ground-breaking decision "that both members of a lesbian couple who plan for and raise a child born to either of them should be considered the child's mothers even

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116. *See* Hernandez v. Robles, 855 N.E.2d 1, 7, 34 (N.Y. 2006). *See also* Andrew Cohen, *Same Coast, Different Worlds on Same Sex Marriage*, WASHINGTONPOST.COM, July 24, 2006, .http://www.gaypasg.org/GayPASG/PressClippings/2006/Jul/Same%20Coast,%20Different%20Worlds%20on%20Same%20Sex%20Marriage.htm.

117. *See* CAL. FAM. CODE § 297.5.

118. For New Jersey, see Lewis v. Harris, 908 A.2d 196 (N.J. 2006); for Vermont, see 15 VT. STAT. § 1202 (2007); *see also* LAWRENCE M. FRIEDMAN, *supra* note 111, at 172-79.

119. 1 U.S.C. § 7 (1997).

120. As Friedman notes, "Many states have their own versions forbidding gay marriage . . . ." *See* LAWRENCE M. FRIEDMAN, *supra* note 111, at 221.

121. *See* About.com: Gay Life, *Where is Gay Adoption Legal?*, http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadoptleadopt.htm.

122. *See id.*

after their relationship ends."[123] The article continues to say that the court ruled in three cases "that women whose partners gave birth had parental rights or obligations in all three"—one involving "a request for child support, [the second] a petition to establish parental rights and [the third] an attack on a lower court ruling issued before a child's birth that the child should have two women listed as parents on her birth certificate."[124] Joan Hollinger, a professor of law at the University of California, Berkeley, was quoted as saying that "'[i]t is unprecedented around the country to have a state's highest court recognize that in the absence of an adoption, and even in the absence in some instances of a domestic partnership agreement, that two men or two women could be the full legal parents of a child born through assisted reproduction.'"[125]

There is a cruel irony in this divisiveness. The religious right is violently opposed to both same-sex marriage and abortion. Yet there is little doubt that if same-sex couples were granted full legal recognition of their union, they would be more inclined to adopt some of the orphaned children who are the inevitable by-product of unwanted pregnancies carried to term. The irony is glaringly apparent, but the righteous are more concerned with preserving the traditional notion of "family" and its ideology than with providing loving homes for unwanted children. If those who oppose same-sex marriage could bring themselves to engage in a reasoned conversation across the divide, they might find themselves discovering why, in the face of so much societal disapproval, same-sex couples want to bother with solemnizing their commitment with the formality of marriage at all. And why civil unions, even those as all-inclusive as New Jersey's, are not enough.

On the practical side, according to Dalton Conley, an op-ed contributor to the *New York Times*, "[a]s of 2005, the Government Accounting Office had identified more than 1,000 legal rights and responsibilities attendant to marriage."[126] Among these, he says, are employer benefits, the ability to transfer property and income back and forth tax-free, spousal privilege, medical decision-making, and the right to confer permanent residency on a foreigner.[127] Reasons enough, it would seem, to want a union that is recognized as a marriage.

On the side of principle, civil unions create the status of "separate but equal." History should tell us that such a status will be separate, but it will not be equal. Gays and lesbians will be relegated to a form of second-class citizenship. Certainly this is discrimination based on sexual orientation, and sooner or later the Supreme Court will be asked to choose between the divergent roads taken by the Massachusetts Supreme Judicial Court[128] and the New York

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123. Adam Liptak, *California Ruling Expands Same-Sex Parental Rights*, N.Y. TIMES, Aug. 23, 2005, at A10.

124. *Id.*

125. *Id.*

126. Dalton Conley, Op-Ed., *Spread the Wealth of Spousal Rights*, N.Y. TIMES, May 20, 2007, § 4 at 13.

127. *Id.*

128. *See* Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

Court of Appeals.[129] The question will be whether a state or the federal government,[130] as a matter of equal protection, can constitutionally deny gay and lesbian couples the right to marry. Gays and lesbians have thus far not been dignified by the Court as a protected class of people, so presumably the issue will be decided by the least stringent standard, that of rational basis. It is not difficult to predict how the present Court with its five-member Catholic majority will view this question. All that will be interesting about the case will be the factitious arguments adduced to justify the discrimination. Apart from practical benefits, conferring the right to marry on gay and lesbian couples is a matter of status. Better to have the ability to make health care decisions for an incapacitated partner; to have hospital visitation rights; and to go to a parent-teacher conference or confront the school board as a spouse, not as a "partner."

Those who oppose gay and lesbian marriage cannot seem to realize that these unions are in a real sense "traditional" in a way that many of today's heterosexual marriages are not, and that they may actually be more consonant with the family values the opponents claim to espouse.[131] But for the time being at least, opposition to same-sex marriage is so contentious as to override any consideration of the possible benefits that might result from permitting such unions.

4. The Right to Abortion on Demand and the Coming of No-Fault Divorce.

In the 1970s two critical developments occurred. The first concerned abortion, which had long been illegal in almost every state; the second, the extraordinarily rapid spread of no-fault divorce.

a. Abortion.

In 1973, in *Roe v. Wade*,[132] the Supreme Court gave women, in the name of privacy, a constitutional right to abortion on demand, freeing them from the fear of unwanted pregnancies. Probably the most reliable source of statistics, the Alan Guttmacher Institute, estimates that the number of abortions performed in the United States in recent years is approximately 1.3 million per year, down somewhat from the numbers in the decade or two after *Roe* was decided.[133]

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129. *See* Hernandez v. Robles, 855 N.E. 2d 1 (N.Y. 2006).

130. Assuming that the Court finds, as it did in Bolling v. Sharpe, 347 U.S. 497, 499 (1954), that some denials of equal protection violate the due process clause of the 5th amendment.

131. In considering a constitutional amendment to undo the Supreme Judicial Court's decision that same-sex couples had a right to marry, the Massachusetts legislature in 2005 defeated the proposal by a vote of 157 to 39. *See* Editorial, *The Normality of Gay Marriages*, N.Y. TIMES, Sept. 17, 2005, at A14. "The main reason for the flip-flop," the editors speculated, "is that some 6,600 same-sex couples have married over the past year with nary a sign of adverse effects. The sanctity of heterosexual marriages has not been destroyed. Public morals have not gone into a tailspin. Legislators who supported gay marriage in last year's vote have been re-elected . . . . A Democrat attributed his change of heart to the beneficial effects he saw 'when I looked in the eyes of the children living with these couples.' Gay marriage, it turned out, is good for family values." *Id.*

132. 410 U.S. 113, 164 (1973).

133. *See* ALAN GUTTMACHER INSTITUTE, *Abortion Data*, http://www.religioustolerance.org/abo_facts3.htm. According to the *New York Times*, the Institute announced more recently that "[c]ontraception use has declined strikingly over the last decade, particularly among poor women, making them more likely to get pregnant unintentionally and to have abortions . . . . The researchers

These numbers tell us nothing, however, about how many of these abortions fall into the class of "abortions of convenience"—that is, abortion used as just another means of birth control by a woman neglecting to use any of the readily available techniques for preventing conception. The Institute does tell us that nearly half of all abortions are repeat abortions, a woman's second or, in a not-insubstantial number of cases, her third.[134]

Responding to an article in *The New Republic*, Ross Douthat says that "the article's only point . . . is that 'pro-choice liberals must protect women from the poverty and abuse that often lead to abortion as fiercely as they protect the procedure itself,' and that women who have multiple abortions need 'the kind of help and social support that neither side has been willing to give them.' " He concludes that "legal abortion hasn't been all that its advocates once hoped. It isn't 'safe, legal and rare'. . . and it hasn't made 'every child a wanted child.' Instead, it's become what anyone with any sense could have predicted—a rarely-used, much-defended luxury for the wealthy and emancipated, and for everyone else both a symptom and a cause of the largest social tragedy of the last thirty years, the slow collapse of the American family."[135]

Douthat is calling attention to the fact that abortion, especially second and third ones, is far more prevalent among the millions of Americans at the lower end of the socio-economic scale where single-mother households predominate. These abortions have more to do with dire necessity than with a woman's vaunted right to choose. This situation is a part of the larger problem of income disparity—of poverty, not to put too fine a point on it.[136] None of the Bush administration's policies confront this problem; rather they seem calculated to make it worse, as do the laws in many states which make the exercise of abortion rights cumbersome, onerous, and expensive, and in a few states virtually unavailable. The FDA, openly politicized under Bush, took several years to finally approve the over-the-counter sale of the morning-after pill, and then only for women 18 or older. Nicholas Kristof argues persuasively that increased "access to contraception, and in particular [making] the 'morning after' pill available over the counter . . . would be the single simplest step to reduce the U.S. abortion rate, while also helping hundreds of thousands of

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blamed reductions in federally and state-financed family planning programs for declining contraceptive use. They called for public and private insurance to cover contraceptives, and for over-the-counter access to the so-called morning-after pill, which can prevent pregnancy if taken with 72 hours after sex." Kate Zernike, *Use of Contraception Drops, Slowing Decline of Abortion Rate*, N.Y. TIMES, May 5, 2006, at A21 (as corrected on May 9, 2006)). At the end of her article, Zernike notes that "[o]f . . . 6.4 million pregnancies in the United States each year, half are unintended, according to Guttmacher, and half of those are carried to term. About 14,000 women who carry the pregnancies put the children up for adoption, and 1.3 million have abortions."

134. *See* Ross Douthat, *Safe, Legal, and 1.3 Million Times a Year*, THE AMERICAN SCENE, Nov. 22, 2005 (commenting on an article by Garance Franke-Ruta in *The New Republic*).

135. *Id.*

136. *See, e.g.*, Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 463 (2006) ("The 'war on drugs' has become a war on poor women of color and their children, as African-American mothers and Latinas account for the fastest-growing segment of the female prison population.").

women avert unwanted pregnancies."[137] The FDA dragged its feet on this issue, Kristof asserts, "apparently fearing that better contraception will encourage promiscuity."[138] He continues to say that

> [t]hat's one of the paradoxes in the abortion debate: The White House frequently backs precisely the policies that cause America to have one of the highest abortion rates in the West. Compared with other countries, the U.S. lags in sex education and in availability of contraception—financing for contraception under the Title X program has declined 59 percent in constant dollars since 1980—so we have higher unintended pregnancy rates and abortion rates.
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> . . . .
>
> One thought that paralyzes the Bush administration is that American teenage girls might get easy access to emergency contraception and turn into shameless hussies. But contraception generally doesn't cause sex, any more than umbrellas cause rain.
>
> The reality is that almost two-thirds of American girls have lost their virginity by the time they turn 18—and one-quarter use no contraception their first time. Some 800,000 American teenagers become pregnant each year, 80 percent of the time unintentionally.
>
> So we may wince at the thought of a 15-year-old girl obtaining Plan B [the morning-after pill] after unprotected sex. But why does the White House prefer to imagine her pregnant?
>
> Indeed, Plan B may be more important for teenagers than for adults, because adults are more likely to rely on a regular contraceptive. Teenagers wing it.
>
> Granted, making contraceptives available—all kinds, not just Plan B—presents a mixed message. We encourage young people to abstain from sex, and then provide condoms in case they don't listen. But that's because we understand

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137. *See* Nicholas Kristof, Op-Ed., *Beyond Chastity Belts*, N.Y. TIMES, May 2, 2006, at A25. William Saletan, who has written with sensitivity on the abortion debate, argues that "[t]he most widely accepted moral solution, short of abstinence, is contraception taken before sex." William Saletan, *Life After Roe*, WASH. POST, Mar. 5, 2006, at B1. He summarizes the advances in technology now available to avoid unwanted pregnancies. "'[E]mergency contraception'—high-dose birth control pills taken after sex to block ovulation, fertilization or implantation—was almost unheard of a decade ago. By 2002, however, about 10 percent of women between the ages of 18 and 24 had used such pills. Some activists are fighting these pills in many states and at the Food and Drug Administration . . . ." Injectable contraceptives or implants are now available. "Some injectables require refills every three months, but implants have improved considerably. The maker of Implanon, for instance, says that this implant takes barely a minute to insert, begins working within 24 hours, prevents pregnancy for up to three years and can be removed in less than three minutes with a 90 percent probability that a woman will resume ovulating the next month. In clinical trials, says the company, 'no pregnancies occurred during use over approximately 73,000 monthly cycles,' largely because the 'user cannot forget to take the product.'" Saletan concludes that

> [t]he road out of Roe won't be easy. Conservatives are already fighting early abortion pills, morning-after pills, sex education and birth control. But that's a different fight from the one we've been stuck in since 1973. It's a more winnable fight, and a more righteous one. Five hundred years from now, people will look back on our surgical abortions the way we look back on the butchery of medieval barbers. Like the barbers, we're just trying to help people to the best of our ability. But our ability is growing. So should our wisdom, and our ambitions.

138. *Id.*

> human nature. We also tell drivers not to speed, but provide air bags in case they do.[139]

Exploiting the "undue burden" standard announced by Justice O'Connor in 1992 in *Planned Parenthood v. Casey*,[140] various states have adopted a number of ingenious measures which make abortion rights difficult or impossible for many to exercise. In a recent *New York Times* article, Dorothy Samuels notes that there are now more than four hundred such restrictions.[141] Among these are laws "which single out abortion providers for onerous and expensive 'safety' rules enacted for the purpose of harassing existing providers, and deterring the development of new providers"; "[a] shortage of trained doctors and health care facilities offering abortion services;" "[m]andatory waiting periods and demeaning state-scripted 'counseling' sessions that lack a real medical justification and sometimes require two clinic trips on separate days, creating a special hardship for poor women who lack transportation to easily make multiple clinic visits, and who live in areas without a nearby abortion provider;" "[p]arental notification and consent laws that are supposed to improve family communication but actually serve to jeopardize the health and well-being of frightened young women, including victims of incest and other abuse who have good reason not to inform the adults in their life"; and "[l]ongstanding restrictions on the use of Medicaid, and other government money, to help women pay for abortions."[142]

Samuels writes that "[b]y piling restriction upon restriction, Mississippi has all but outlawed abortion in the state. Today, Mississippi currently has just one functioning abortion clinic, down from six just a decade ago. Even that clinic's

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139. *Id.* To the same effect with respect to the FDA's ideological stalling tactics is an editorial by Mary Ann Lindley, the Editorial Page Editor of the *Tallahassee Democrat*. She writes:

> There are no demonstrated health issues or abuse issues that make it necessary for Plan B to be available only by prescription for females of any child-bearing age. Studies in Europe, where morning-after pills have long been used, show there is no real boost in unprotected sex, or abandonment of other forms of birth control.
>
> This whole stalling technique is so backward. Denying access to effective birth control only makes life much more difficult for young people who need it most; it will make unwanted teen pregnancy far more likely—as well as true abortion. Above all it perpetuates the misery of treating young people not with respect—and maybe trying to teach them self-responsibility—but with utter disdain by the moral police, whose primary form of sex ed is finger-wagging.
>
> I look forward to the morning after this era of neopuritanical judgment of women.

Mary Ann Lindley, *Meddlers' lib gets in the way of morning-after pill*, TALLAHASSEE DEMOCRAT, Sept. 4, 2005, at E4.

140. 505 U.S. 833, 877-79 (1992). Although the essential holding of *Roe* was preserved in this complex but essentially 5-to-4 decision, the Court abandoned *Roe*'s three-trimester framework and substituted for it the concept of "viability." *Id.* at 870-73. The opinion allowed states to impose restrictions throughout a pregnancy provided the restrictions did not impose an "undue burden" on a woman's right to an abortion. An "undue burden" exists "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878.

141. *See* Dorothy Samuels, *Talking Points: The Waning Power of Roe v. Wade*, N.Y. TIMES, Nov. 29, 2005, *available at* http://donkeyodtoo.blogspot.com/2005/11/waning-power-of-roe-v-wade.html

142. *Id.*

survival is now in jeopardy."[143] The concept of "undue burden" has not been given much concrete content as yet, but it seems hard to deny that these niggling restrictions—especially the FDA's position on Plan B—have increasingly made the constitutional right granted in *Roe* a right in name only—"nugatory," as a lawyer might say.

Not included in Samuels' survey is the recent adoption in South Dakota of a law criminalizing abortion except where necessary to save the mother's life—an obvious throwing down of the gauntlet to force the Court to reassess *Roe* in light of the change in membership—the appointment by President Bush of two new justices, John Roberts, Jr., now Chief Justice, and Samuel Alito, who replaced Justice O'Connor.[144] Samuels might also have mentioned that teenagers seeking judicial bypass of parental notification are running into judges, at least in Memphis, Tennessee, who recuse themselves on moral grounds from hearing the case.[145] And in Kansas, the state's attorney general has sought to restrict abortions under the guise of combating child abuse. In 2003, he issued an advisory opinion making "mandatory the reporting of every instance of suspected consensual sex among teenagers of similar ages, including any pregnancy, sexually transmitted disease or request for contraception."[146] This bizarre scheme has been blocked for the time being by a federal judge on the ground that the attorney general misconstrued the actual language of the underlying state statute.[147] Samuels concludes her survey with these words: "[a]ttempting to turn back the clock to the days of dangerous back alley abortions, and deny women the reproductive freedom essential to their full participation in the nation's civic life is a moral issue, too.[148]

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143. *Id.*

144. *See* Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe,'* WASH. POST, Feb. 23, 2006, at A1. For a sense of South Dakotans' reaction to the new law, see Cynthia Gorney, *Reversing Roe,* THE NEW YORKER, June 26, 2006, at 46. Though opposed to abortion, many seem troubled by the absence of exceptions for rape and incest, and the new law was placed on the November 2006 ballot for approval or disapproval. (It was disapproved.) South Dakota has only one abortion clinic and no doctors willing to work there. Planned Parenthood flies in doctors from Minnesota once a week. *Id.* at 46-48.

145. *See* Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases,* N.Y. TIMES, Apr. 22, 2006, §1, at 21. Also in the news of late are the pharmacists who refuse on moral grounds to fill prescriptions either for the morning-after pill, the abortion pill (RUD 486), or both. *See, e.g.,* Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight,* N.Y. TIMES, Apr. 19, 2005, at A1.

146. *See* Editorial, *Kiss-and-Tell No More,* N.Y. TIMES, Apr. 22, 2006, at A14.

147. *Id.*

148. Samuels, *supra* note 141. She estimates that were *Roe* overturned, the states would once again have authority to ban abortion, "and a detailed 2004 analysis by the Center for Reproductive Rights, a leading pro-choice advocacy group, suggests as many as 30 states would do so." *Id.* For an indication of what would lie ahead were *Roe* overturned, see Editorial, *Abortion Rights in Latin America,* N.Y. TIMES, Jan. 6, 2006, at A20. ("In most of the region, abortions are a crime, but the abortion rate is far higher than in Western Europe or the United States. . . . In a region where there is little sex education and social taboos keep unmarried women from seeking contraception, criminalizing abortion has not made it rare, only dangerous. Rich women can go to private doctors. The rest rely on quacks or amateurs or do it themselves. Up to 5,000 women die each year from abortions in Latin America, and hundreds of thousands more are hospitalized."). *See also* Judith Warner, *Domestic Disturbances: My Right to Roe,* N.Y. TIMES, Jan. 20, 2006, http://warner.dblogs.nytimes.com/?s=My+right+to+roe ("Decades of abortion-rights restrictions

Abortion, of course, is precisely that—a moral issue. A sizable and increasingly vocal segment of Americans are unalterably opposed to abortion, regarding it as the taking of human life.[149] At the core of the dispute lies the most fundamental of questions: when does "human life" begin? Or, put somewhat differently, what does it mean to be a "human being"? Everyone has an opinion,[150] and medical science has been of limited help thus far in providing a definitive answer. My own belief, not based on religious grounds, is that human life begins at conception and that therefore the aborting of a fetus, even in the early stages of pregnancy, is the taking of a human life.

But today the debate has descended to the level of what "conception" itself means—whether it is the fertilizing of an egg or the moment when the implantation of a fertilized egg on the wall of the uterus is complete, at which point the mother's body begins to supply nurture. The point is obviously crucial. In nature, according to a report published by the Guttmacher Institute,[151] one-third to one-half of all fertilized eggs implant, and implantation is necessary to pregnancy. Implantation begins about five days after fertilization and is usually complete in about 14 days, though it can happen as early as eight days or as late as 18.[152] Both the American College of Obstetricians and Gynecologists and current federal guidelines consider that a "pregnancy is considered to be established only after implantation is complete."[153] That "conception" occurs only when implantation is complete makes logical sense; yet antiabortion forces and some states have reflexively taken the position that "conception" begins with fertilization.[154] This view reflects less common sense than the desperate

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pushed through Congress and the statehouses by wily abortion opponents with the acquiescence—indeed, the encouragement—of the public have made the right to choose granted by Roe an empty promise for large numbers of American women.").

149. The lengths to which some pro-lifers are willing to go in stopping abortions are well known: they range from picketing abortion clinics, bombing them, intimidating those who use them, threatening doctors who perform abortions, and in some cases killing them. *See, e.g.*, Eyal Press, *My Father's Abortion War*, N.Y. TIMES, Jan. 22, 2006, at 57 (a moving account of the murder of an abortion doctor in Buffalo, a colleague of the author's father).

150. For a thoughtful synopsis of the spectrum of views on this question, see Stephen L. Carter, *Strife's Dominion*, THE NEW YORKER, Aug. 9, 1993, at 86 (reviewing Ronald Dworkin's *Life's Dominion* (1993)). Dworkin's pro-choice leanings, Carter says, rest on his belief "that a fetus lacks the biological aspects of the human being and cannot possess 'rights or interests of the kind that government might have a derivative responsibility to protect,' because such derivative rights, by his definition, attach only to human beings." *Id.* at 92. By this, Dworkin means that " '[i]t is very hard to make any sense of the idea that an early fetus has interests of its own, in particular an interest in not being destroyed, from the moment of its conception . . . [because until] some point relatively late in its gestation [the fetus lacks] the neural substrate necessary for interests of any kind.' " *Id.* at 88-89.

151. *See* Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, The Guttmacher Report, vol. 8, no. 2 (May 2005), *available at* http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html.

152. *Id.* at 1.

153. *Id.* at 2.

154. *See id.* at 6-8. Contrast the view of Yuval Levin, a fellow at the Ethics and Public Policy Center and former executive director of the President's Council on Bioethics: "It is a simple and uncontroverted biological fact that a human life begins when an embryo is created. That embryo is human, and it is alive; its human life will last until its death, whether that comes days after conception or many decades later surrounded by children and grandchildren." Yuval Levin, *A Middle Ground for Stem Cells*, N.Y. TIMES, Jan. 19, 2007, at A23. From this premise he argues that

politics of abortion. How can a couple "conceive" a child, for example, unless implantation occurs? Has a woman destroyed a human being if she blocks ovulation with the pill? When a man masturbates, has he killed thousands of human beings? What is the status of all the fertilized eggs that in nature do not implant? Where does this twisted debate end?[155]

Human life, I believe, falls on a continuum—one that begins with implantation and ends with death. In the normal course of events—that is, absent medical complications or outside interference—an implanted egg develops into a fetus that grows during the nine months of pregnancy and emerges as something that everyone can agree is a human being. Yet a one-day-old child is as defenseless as a twelve-week-old fetus; it is incapable of surviving on its own without a great deal of nurture and care. Given that care, and again barring accident or outside interference, it will in the normal course of events evolve into a toddler, a teenager, then into a young adult, into middle age, and eventually into a very old person, perhaps blind, senile, and virtually helpless, incapable of caring for itself. From the moment of birth to old age, no lines are drawn; yet why can these helpless and dependent creatures at either end of the birth-death spectrum not be disposed of with the same impunity as an eight-week-old fetus? What if some of these human beings are abnormal, heartaches for loved ones and drains on society? So far, and to our credit, we have been unwilling to draw lines using criteria such as "helplessness," "usefulness," or "normality." Perhaps there are too many nightmare echoes of eugenics and the policies of Nazi Germany during Hitler's regime. Yet we are quite willing to draw lines at various points during the continuum of pregnancy itself. Is this simply the case where convenience outweighs morality? And if so, by what logic?

It may be easy and comforting for some in the pro-choice movement to think of a fetus in the early stages of pregnancy as just a mass of cells, a sort of tumor that a woman has an obvious right to divest herself of like any other growth—warts, perhaps, or an ingrown toe nail. But the insistence of some women on the unfettered right to do as they please with their bodies strikes me as self-centered sophistry, little more than a circular rationalization of the "my body, my choice" refrain so commonly heard since *Roe* was decided—a constitutional right, no less. The abortion decision is a serious one, and I hold the no-doubt controversial view that it should not be taken without discussion with the man involved (assuming of course that his identity is known). I believe that the ultimate decision should be the woman's. I readily concede that many

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"when the biology and politics have been stipulated away, the stem cell debate is not about when human life begins but about whether every human life is equal. The circumstances of the embryo outside the body of a mother put that question in perhaps the most exaggerated form imaginable, but they do not change the question."

155. The contentious issue of "fertilization" versus "implantation" arises also in connection with the mechanism of Plan B—the so-called morning-after pill. Exactly how Plan B works is not completely understood. In 2004, the FDA "was explicit in describing [Plan B's] method of action: 'Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation).' " *See id.* at 6. The importance of these distinctions is in deciding whether Plan B prevents pregnancy (like a condom) or acts as an abortifacient.

men are either absent or simply don't care, in which case discussion would be either impossible or pointless. The discussion I have in mind would be voluntary, not required by law but only encouraged. I would certainly not go so far as to allow a putative father to obtain an injunction blocking an abortion, as one writer has suggested.[156] But discussion doesn't strike me as unduly burdening a woman's right to choose. A concerned man should at least be heard before the decision is taken.

To draw the line at the constantly changing point of "viability" is as arbitrary as the trimester framework devised by Justice Blackmun. It is a necessary compromise for a society that can't make up its mind on the fundamental question of what human life is and when it begins. Fortunately, studies tend to show that only a minority of women think of abortion on demand as a convenient method of birth control. Given the amount of anecdotal evidence that exists, there can be little question that the decision to terminate a pregnancy is difficult, agonizing, and traumatic for some women.[157] In today's climate, whether the decision should be dictated by a gaggle of self-righteous lawmakers or by the conscience and circumstances of the individuals themselves is the critical question. Assuming that *Roe* survives, it seems obvious that that decision should be left to the individuals who will otherwise have to deal with the consequences of an unwanted pregnancy—consequences which include, of course, the bringing of unwanted children into the world. This is a sad eventuality with which this society is woefully ill-equipped to deal.[158]

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156. *See* Dalton Conley, Op-Ed., *A Man's Right to Choose*, N.Y. TIMES, Dec. 1, 2005, at A23 (making this argument but adding that "[i]f a father is willing to legally commit to raising a child with no help from the mother he should be able to obtain an injunction against the abortion of the fetus he helped to create"). *But cf.* Planned Parenthood v. Casey, 505 U.S. 833, 895-98 (1992): "A husband has no enforceable right to require a wife to advise him before she exercises her personal choices." *Id.* at 898.

157. Emily Bazelon reports that the most rigorous scientific studies have shown thus far that the majority of women who have had abortions do not suffer from post-abortion syndrome. "[T]he scientific evidence strongly shows that abortion does not increase the risk of depression, drug abuse or any other psychological problem . . . . The American Psychological Association . . . [concluded] that 'well-designed' studies showed 76 percent of women reporting feelings of relief after abortion and 17 percent reporting guilt. Notwithstanding, a number of women's self-help groups with quite contradictory views have sprung up around the country and are using what little clout they have in the anti-abortion movement. . . . At the current rate, about one-third of women nationally will undergo the procedure by age 45. While the number of abortion-counseling women is small, Yale Law Professor Reva Siegel sees them emerging as a political force: 'These women were minority voices for a long time, and now they are gaining traction within the anti-abortion movement.' " Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6, at 41. These groups will certainly gather strength from Justice Kennedy's condescending majority opinion in Gonzales v. Carhart, 127 S. Ct. 1610, 1619 (2007).

158. Adoption procedures in many states are fraught with bureaucratic difficulty. To ensure the suitability of an adoptive setting, some states conduct rigorous and invasive investigations that may take years. Everyone's standard is the familiar "best interests of the child," but what that is, exactly, is widely disputed. Some black social workers, for example, are opposed to interracial adoptions; some people insist that religious beliefs should play a role. Birth mothers have windows of time, varying in length from state to state, within which to change their minds. For an example of the pitfalls in adoption, see Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 56. This case involved an extended legal battle over the validity of a private adoption where the birth mother had lied about the true identity of the father. The adoption was eventually rescinded, even

Still another related and contentious issue is that of federal funding for stem-cell research—something to which President Bush is adamantly opposed and has steadfastly refused to approve. It is hardly a secret that a significant part of this president's constituency consists of the so-called religious right and that many of its members are opposed to such research on the ground that each microscopic embryo destroyed in the process is a human life. Nor is it a secret, as the historian Arthur Schlesinger, Jr., has written, that "George W. Bush is the most aggressively religious president Americans have ever had. American conservatives applaud his 'faith-based' presidency, an office heretofore regarded as secular."[159] It is hard not to see in this raging debate the overt politicization that has come to dominate so many issues since Bush's assumption of the presidency in 2000. It is hard not to see in Washington's present political climate the struggle for raw power as the point of our politics, with governance in the public interest something of an afterthought.[160] Consider that the religious right has had little to say about the thousands of embryos which now exist in the country's many reproductive clinics. These embryos, the by-products of the assisted reproduction process, are frozen, held for a time, and then discarded. If there were any logic in the president's position and that of his base, these clinics and their practices ought to be condemned as the killing centers of the twenty-first century. The columnist Michael Kinsley nails the point succinctly:

> Bush, as we know, believes deeply and earnestly that human life begins at conception. Even tiny embryos composed of a half-dozen microscopic cells, he thinks, have the same right to life as you and I do. That is why he cannot bring himself to allow federal funding for research on new lines of embryonic stem cells or even for other projects in labs where stem cell research is going on. Even though these embryos are obtained from fertility clinics, where they would otherwise be destroyed anyway, and even though he appears to have no objection to the fertility clinics themselves, where these same embryos are manufactured and destroyed by the thousands—nevertheless, the much smaller number of embryos needed and destroyed in the process of developing cures for diseases such as Parkinson's are, in effect, tiny little children whose use in this way constitutes killing a human being and therefore is intolerable.[161]

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though it seemed clear that the "best interests" of the child would have been better served by leaving her with her adoptive parents. Courts have agreed that biological fathers of children put up for adoption by the birth mother have rights, but the mechanism for enforcing these rights varies from state to state and in some approaches the level of the kafkaesque. *See* Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES, Mar. 19, 2006, § 1, at 1. Significantly, there does not appear to be a long line of pro-life advocates waiting to adopt unwanted children. These are the same advocates who refuse in many states to allow gay and lesbian couples to adopt. These children are thus consigned to an unhappy fate: either to live in an orphanage or with foster parents, hoping for the right couple to come along, or to live in homes where they cannot be cared for adequately, or where they are unwanted, unloved, and often subjected to abuse, sexual or otherwise.

159. Arthur Schlesinger, Jr., *Forgetting Reinhold Niebuhr*, N.Y. TIMES, Sept. 18, 2005, § 7, at 12.

160. As George Orwell aptly put it, "All issues are political issues, and politics itself is a mass of lies, evasions, folly, hatred, and schizophrenia." GEORGE ORWELL, *Politics and the English Language*, *in* THE ORWELL READER 355, 363-64 (Harcourt, Brace ed., 1956) (1946).

161. *See* Michael Kinsley, Op-Ed., *Bush's Conception Conflict*, WASH. POST, Sept. 29, 2006, at A21.

Assuming that these frozen, soon-to-be discarded embryos are tiny children, then America's many fertility clinics are death camps. The logic of frustrating potentially life-saving techniques for the millions suffering from incurable diseases while permitting fertility clinics to throw away thousands of little people every year is hard to fathom. It can be explained, if at all, only by the peculiar politics of the Bush administration.

b. The Coming of No-Fault Divorce.

The second critical development came in 1970, when California rewrote its laws to eliminate the traditional fault-based grounds for divorce. With no-fault divorce, all a married couple, or one of them, had to say was that the marriage was "irretrievably broken." Iowa quickly followed suit, and by 1974, forty-five states had adopted the no-fault procedure, joined by the rest within the decade,[162] with the notable exception of New York.[163]

It would be difficult to overestimate the significance of this change. As Lawrence Friedman puts it,

> [c]ompanionate marriage lay at the base of consensual divorce: marriage as partnership. But there was an even more "advanced" concept of marriage, a concept that went beyond companionate marriage: marriage as an aspect of the journey toward self-realization, a stage on the road to individual fulfillment. A person's job in life is to choose a course that is personally satisfying; and he or she has the right to change the course of life, if necessary for personal growth. If that means molting spouses like a lizard molts skin, so be it.[164]

Millions have availed themselves of this quick and easy out. A commonly heard estimate is that half of the marriages in this country will end in divorce. The stigma and shame once associated with it have all but disappeared. For the first time in our history, the number of households headed by married couples has dropped below 50 percent, steadily decreasing from 84 percent in 1930.[165] These numbers suggest that at some level there has been a fundamental rethinking of the institution of marriage as traditionally understood. It is hard not to believe that ease of divorce has played a role in this change.

A married couple may decide to split up for any number of reasons. Yet some, perhaps many divorces, are rooted in one form or another of real or perceived sexual dissatisfaction. "Love," in the name of which a lot of people think they are marrying, may turn out to be nothing more than lust, and lust tends to have a short lifespan. For some, sex exclusively with the same person for a lifetime soon becomes a daunting prospect, somewhat like eating a steady diet of steak three times a day. Partners may find themselves yearning for someone new, different, and exciting.[166] It is easier to think of divorce as a

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162. LAWRENCE M. FRIEDMAN, *supra* note 1101, at 440.

163. *See* Danny Hakim, *Panel Asks New York to Join the Era of No-Fault Divorce*, N.Y. TIMES, Feb. 7, 2006, at A1.

164. LAWRENCE M. FRIEDMAN, *supra* note 111, at 441.

165. *See* Sam Roberts, *It's Official: To Be Married Means to Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, § 1, at 22 (as of 2005, according to the U.S. Census Bureau).

166. So-called open marriages, where a couple has sex with each other and by mutual agreement with any number of other people, certainly exist; these arrangements may not be common, but they

solution since the coming of no fault. Curiously, many couples who divorce, one or both, soon find themselves in another committed relationship that ends in marriage. Fifty percent of women remarry within five years of a divorce and seventy-five percent within ten.[167] At a guess, the rate of remarriage is even higher for men. What the radical change in divorce law has made much easier is the phenomenon of serial monogamy.[168] The phrase "starter marriage" has crept into the language, as if in recognition of the fact that the first marriage is apt not to be the last. Many people still want to be married, but they want their marriage to be the one of their dreams, and so we now not uncommonly have divorce followed by remarriage—a sort of trial-and-error approach until couples finally get it right.[169] Couples can still believe in the until-death-do-us-part ethic, but it is easier to take these solemn vows in good faith if they know in the back of their minds that there's a handy, socially acceptable escape hatch at hand if things don't work out. And easier, too, if one or both already has the next "eternal" soul mate in view.

The freedom offered by the change in divorce law can be seen as a healthy thing: couples no longer trapped by society's mores in a dull and stultifying relationship for eternity. It can also be seen as unhealthy: hurtful if the desire to part isn't mutual and severely traumatic if children are involved. No fault divorce, as Friedman suggests, has made it easier for individuals to put personal satisfaction and personal growth first—to seek "self-actualization" in the jargon of the self-help books. Healthy or not, divorce has become a glaring part of the societal landscape.

5. A Nation Saturated with Sex.

America is awash in sex. What has happened in the last fifty years has been a phenomenal change in how a large segment of the population thinks about the pleasure aspect of sex. More importantly, there have been profound corresponding changes in how people act on those perceptions. The gap of hypocrisy has not disappeared, but it has narrowed sharply. Sex purely for pleasure and personal gratification has assumed something like the status of an entitlement, much like eating.[170]

Perhaps only those who lived through this revolution can appreciate the magnitude of the change. In the 1930s, '40s, and '50s, strict Hollywood codes

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have their advocates and their exemplars. *See, e.g.*, RONALD MAZUR, THE NEW INTIMACY: OPEN-ENDED MARRIAGE AND ALTERNATIVE LIFESTYLES (2000). The relationship of Jean-Paul Sartre and Simone de Beauvoir readily comes to mind. *See* William Grimes, *The Value and Complexities of an Existential Love Affair*, N.Y. TIMES, Oct. 5, 2005, at E9.

167. *See* Mead, *supra* note 41, at 160.

168. *See* Douthat, *supra* note 62. Douthat argues that "high divorce rates may look like a sign that people are rejecting monogamy—but in fact people usually divorce not because they want to enjoy a subsequent parade of lovers, but because they want to get married and be monogamous *again*, but with someone else this time, someone who is actually 'the one' that their first spouse turned out not to be."

169. *See* PAMELA PAUL, THE STARTER MARRIAGE AND THE FUTURE OF MATRIMONY (Villard Books, 2002).

170. *See* Tamar Lewin, *Nationwide Survey Includes Data on Teenage Sex Habits*, N.Y. TIMES, Sept. 16, 2005, at A12 (reporting on the release of the National Center for Health Statistics comprehensive survey of American sexual practices).

excluded much that was sexually suggestive from movies, then our most popular entertainment medium. Even an ostensibly married couple could not be seen in the same bed; only twin beds would do. About the most you were treated to was the jaw-breaker style of kiss followed by a fade-out, with whatever happened next left to the imagination. In the infancy of talking pictures, Hollywood toyed with titillation, which today we would call "reality." Barbara Stanwyck's early movies in particular were on the steamy side.[171] The movie critic Anthony Lane writes that "[t]here is a case for saying that Alfred E. Green's 'Baby Face' [in 1933, starring Stanwyck] . . . didn't just predate the Hays Code; it actually brought the code crashing down onto Hollywood heads."[172] Yet even her pre-Hays Code films seem tame today compared to what routinely appears on the big screen—*Basic Instinct*,[173] for example, or *Fatal Attraction*.[174] Some actors and actresses still insist on a modicum of decorum, but the barrier has been steadily lowered, maintained with questionable effectiveness by a rating system designed to protect the very young from the sexually explicit. But the sexually explicit is what you get on the big screen and on television these days,[175] and if for some people that's not explicit enough, there's always the product of the thriving industry of "adult" films and pornography ready to fill the demand.[176]

Other media have followed suit. In comparison to Marcel Proust—who after all chronicled a great deal of sexual activity[177]—today's novels are almost embarrassing in the wealth of clinical detail they provide in describing sexual encounters. On network television, anything short of nudity goes; on the premium channels the line is drawn just short of the pornographic. Almost anything having to do with sex can be found on the internet—a medium which children are far more adept at manipulating than their parents. Pornographic rings are numerous, and children have been seduced into becoming pornographic objects. Long-distance sexual relationships are common,[178]

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171. In a retrospective on Barbara Stanwyck, Anthony Lane cites *Night Nurse* (1931), *Ladies They Talk About* (1933), and *Baby Face* (1933). *See* Anthony Lane, *Lady Be Good*, THE NEW YORKER, Apr. 30, 2007, at 40, 45.

172. *Id.*

173. *Basic Instinct* (TriStar Pictures 1992).

174. *Fatal Attraction* (Paramount Pictures 1987).

175. *Basic Instinct 2* has just been released, again starring Sharon Stone, who in this version appears naked on screen. *See* FoxNews.com, *Sharon Stone: I Have No Problem Doing Nude Scene*, MARCH 22, 2006, *available at* http://www.foxnews.com/story/0,2933,188798,00.html.

176. *See* PAMELA PAUL, PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES (Times Books, 2005).

177. *See* MARCEL PROUST, REMEMBRANCE OF THINGS PAST (C. K. Scott Moncrieff & Terence Kilmartin, trans., 1981). The convoluted publishing history of Proust's masterpiece is traced in volume 1 of this edition in Notes on the Translation, at ix–xii. Proust was still correcting the proofs of the last installment of this massive novel at his death in 1922.

178. *See* Kurt Eichenwald, *Through His Webcam, a Boy Joins a Sordid Online World*, N.Y. TIMES, Dec. 19, 2005, at A1 (a detailed account of a 13-year-old boy who hooked his webcam up to the internet and soon found himself "undressing, showering, masturbating and even having sex—for an audience of more than 1500 people who paid him, over the years, hundreds of thousands of dollars"); Maria Newman, *27 Accused of Running Child Pornography Web Site*, N.Y. TIMES, Mar. 15, 2006, *available at* http://www.nytimes.com/2006/03/15/national/15cnd-porn.html (Attorney General Gonzales "said that prosecution of cyber crime, 'especially those that target children,' is a

complete now with pictures.[179] All one needs is a webcam. On some sites college girls pose provocatively. It's all there, and more, with the click of the mouse or the press of a button. To see titillating images in the old days, you had to make do with the fine art work in the early version of *Esquire*, or a bit later with the centerfolds of *Playboy* and its imitators.[180]

An interesting aspect of these changes, apparent not only in motion pictures but in other media as well, is a phenomenon that might be called "graphic creep." In the name of some euphemism such as artistic freedom or realism, but actually, I suspect, in the economic interest of attracting large audiences, the visual media in particular have grown ever more graphic in their depiction of sexual interactions and violence. Each year, it seems, brings images more delectable and more blood spattered than the year before. The producers know, of course, that what titillates or horrifies audiences today is apt to leave them yawning tomorrow. What it is possible to show has been enormously enhanced by technical advancements in the art of creating virtual reality. There are today, virtually, virtually no limits. While no one knows for sure what effect this so-called realism has had on the vast audience of consumers, especially the young and impressionable, it seems likely to me that it has produced a generation inured to violence and intimately familiar with most of the plays in the sex-game playbook.[181]

The advertising industry hawks many of its products with seductively dressed and posed women. For men, the message is clear: to attract a woman who looks like this, buy this car or drink this beer. For women, the message is even clearer: better to look like this if you want to be attractive to the opposite sex. Except for specialty gay publications, the emphasis is almost always on women. There may now be general agreement that women are entitled to equal treatment in most of life's endeavors, including sexual pleasure on their own terms. Yet can this long-overdue recognition justify the virtual industrialization

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top priority for the Department of Justice. 'The Internet must be a safe place for all Americans, particularly our children.' ").

179. *See* Matt Richtel & Michael Mariott, *Ring Tones, Cameras, Now This: Sex Is Latest Cellphone Feature*, N.Y. TIMES, Sept. 17, 2005, at A1 ("The cellphone . . . is adding a steamier offering: pornography.").

180. *See, e.g.*, Joan Acocella, *The Girls Next Door*, THE NEW YORKER, Mar. 20, 2006, at 144 (reviewing Gretchen Edgren's *The Playmate Book: Six Decades of Centerfolds* (2006)). *Playboy* was launched in 1953 by Hugh Hefner, and its trademark centerfolds began to appear about a year later. Acocella writes that "[i]n response to the *Playboy* centerfolds, *Esquire* eliminated its own pinups, the celebrated George Petty and Alberto Vargas drawings. . . . By the end of the sixties, one-fourth of all American college men were buying his magazine every month." *Id.* The raunchier *Penthouse* became a serious competitor in the 1970s. *Id.*

181. *See* Jane E. Brody, *Children, Media and Sex: A Big Book of Blank Pages*, N.Y. TIMES, Jan. 31, 2006, at F7. In this article, Brody discusses an important supplemental report of the journal *Pediatrics* entitled "Impact of the Media on Adolescent Sexual Attitudes and Behaviors." She writes: " 'Approximately 47 percent of high school students have had sexual intercourse.' Each year, nearly 900,000 teenage girls . . . become pregnant (340,000 are 17 or younger). The rates of sexually transmitted diseases are higher among teenagers than among adults, and 35 percent of girls have been pregnant at least once by age 20.' . . . The risks don't end with pregnancy and disease," she says. " 'Data suggest that sexually active adolescents are at high risk for depression and suicide. . . . Early sexual experience among adolescents has also been associated with other potentially health-endangering behaviors, such as alcohol, marijuana, and other drug use.' "

of sex which turns women into sex objects? I find this flagrant and ubiquitous exploitation degrading, and I suspect others do too.

Where our notions of beauty or sexual allure come from isn't easy to say, but the projected imagery of "beautiful people" has had a profound impact on women's perception of themselves. A multi-billion-dollar industry in fashion, weight control, so-called beauty products, cosmetic surgery,[182] and gym memberships has grown up to enable women to conform to what they are told they have to be if they want to be sexually attractive. Ironically, the more sexually attractive a woman, the more she needs to worry about fending off unwanted advances or, more seriously, sexual assault. That "she was asking for it" is still a common refrain at rape trials because it obviously has some resonance, however spurious, with juries. A woman may dress provocatively; she may be looking for a sexual encounter, but it should be obvious that she is not sending a message to the whole world. She is free to select the man of her choice, and she is free to say "no" to those in whom she's not interested. How, then, can dress tell us anything about sexual encounters? Men are hardly exempt either: there's the lithe and youthful body to worry about, and Viagra and similar products have become a multi-billion dollar industry. Date rape seems to have become a collegiate pastime. Enough Ecstasy and a deranged and mindless woman can't say no.

The sexualization of girls, in particular, has begun to occur at earlier and earlier ages, as Judith Warner, an astute observer of the family scene, chronicles in the *New York Times*: ("[t]hongs for tweens and makeover parties for 5-year olds").[183] She discusses a report from the American Psychological Association on the "dangers of the 'sexualization' of girls."[184] The report, she says,

> takes aim at the music lyrics, Internet content, video games and clothing that are now being marketed to younger and younger kids, and correlates their smutty content with a number of risks to girls' well-being. It finds that sexualization—turning someone into "eye candy"—is linked to eating disorders, low self-esteem and depression in girls and women. Adopting an early identity as a "Hot Tot" also has, the researchers wrote, "negative consequences on girls' ability to develop healthy sexuality."[185]

Warner faults the report, however, for passing too lightly over the roles that mothers may be playing in all of this. Increasingly, she asserts, with the aid of gyms, plastic surgery, and the like, older women are trying to look and dress like 18-year-olds; and these efforts are not lost on their young daughters, many of whom find this behavior "embarrassing."[186] "Our girls see right through our

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182. *See, e.g.*, Kate Zernike, *To Do: Make Dr.'s Appointment; The Unveiling*, N.Y. TIMES, Oct. 23, 2005, § 6, at 70 (treatment by Manhattan dermatologist offering "personalized packages promising perfect wedding skin"); Ross Douthat, *Lady Bathory, Call Your Office*, THE AMERICAN SCENE, Oct. 17, 2005, http://www.theamericanscene.com/2005/10/17/lady-bathory-call-your-office-noted (website currently being overhauled; included at author's request) ("Britons desperate to halt the ageing process are being injected with the stem cells of aborted foetuses at a clinic that charges £15,000 for a controversial new cosmetic treatment.") (quoting Amy Welborn without comment).

183. *See* Judith Warner, Op-Ed., *Hot Tots, and Moms Hot to Trot*, N.Y. TIMES, Mar. 17, 2007, at A15.

184. *Id.*

185. *Id.*

186. *Id.*

righteousness. And they hear the hypocrisy, too, when we dish out all kinds of pabulum about a 'positive body image,' then go on to trash our own thighs."[187] Warner knows what many of us know: that children pay little attention to what we say, but they watch what we do. The more sexually attractive mothers try to make themselves, the more they influence the behavior of their daughters. And what role are fathers playing in the sexualization of their daughters?

Meanwhile, school children think nothing of engaging in oral sex with one another, more often than not with the girl going down on the boy. Teenage pregnancies are common.[188] Young couples have been known to drop their newborns in trash cans as an unwanted inconvenience.[189] Couples live together openly without benefit of matrimony. No one notices. For the first time in our history, married couples as heads of households have dropped below fifty percent.[190] In 1930, only 14 percent of women were living without a spouse; in 1950, the number was roughly a third; today it has risen to slightly more than half.[191] It is almost unnecessary to say that one-night stands and casual flings have become so commonplace as to be unremarkable.

America today is a place where the Marquis de Sade, like a vampire, could find enough flesh to sate his appetites. In the selfish quest for sexual gratification almost anything goes. The ill-conceived symbol of early twentieth-century American morality, the Mann Act, has been finally and inconspicuously laid to rest.[192] Laws prohibiting fornication, adultery, and sodomy have mostly

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187. *Id.*

188. *See* Brody, *supra* note 181. The situation in the nation's capital is particularly grim, according to op-ed columnist Colbert E. King. Washington, D.C., he says, is "a city in which only 22 percent of households consist of families headed by married couples—lowest in the nation." He adds that Washington is a city "with an HIV death rate 10 times the national average and a school system in which 62 percent of the children are eligible for free or reduced-price lunches." Colbert E. King, Op-Ed., *The Breakdown That Really Needs Fixing*, WASH. POST, Dec. 9, 2006, at A19.

189. *See* Abby Goodnough & Bruce Weber, *The Picture of Ordinary; Before Prom Night, a Suspect Was the Girl Next Door*, N.Y. TIMES, July 2, 1997, at B1. An 18-year-old young girl gave birth in the bathroom at her prom. A maintenance worker discovered the baby wrapped in plastic shortly thereafter. The young girl claimed that the baby was born dead and that she just panicked. The country prosecutor, however, believed that the child had been born alive and charged the young girl with murder.

190. *See* Roberts, *supra* note 165.

191. *See* Roberts, *supra* note 165. *51% of Women Are Now Living Without Spouse*, N.Y. TIMES, Jan. 16, 2007, *available at* http://www.nytimes.com/2007/01/16/us/16census.html?_r=1&oref=slogin.

192. This Ozymandias-like edifice—erected by white males as a tribute to what Oliver Wendell Holmes privately and derisively called "the sacredness of Woman," *see* 1 HOLMES–LASKI LETTERS 42 (Mark DeWolfe Howe ed. 1953)—responded to a largely chimerical, almost hysterical public belief that gangs of white-slavers belonging to "organized crime"—the Irish, Italian, and Jewish mafias—were enticing or kidnapping young girls and women and forcing them into a life of prostitution, using the instrumentalities of interstate commerce to move the women from one red-light district to another. The statute, officially denominated "the White-slave Traffic Act," was enacted in 1910. In a singularly awkward formulation, it forbade the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." Though ostensibly aimed at commercialized vice, the statute was applied by the Supreme Court in 1917—in what was probably the most sensational case of the decade—to criminalize the conduct of two married men who were willingly accompanied by two young women, not their wives, on a trip from Sacramento to Reno where they engaged in consensual sex. *See* Caminetti v. United States, 242 U.S. 470 (1917). There was no hint of commercialism in this escapade nor any element of force,

disappeared from the statute books and, where they still exist, are seldom enforced.[193] I hold no brief for a return to the Puritan-inspired moral hypocrisy of an earlier time. Attempts to legislate morality have never been conspicuously successful in our history and all too often are driven by widespread fear of change and the political expediency that panders to it.[194] In my view, moral beliefs are a matter for the conscience of the individual and have meaning only to the extent that one believes in and acts on those beliefs. Efforts to impose morality from above by legislators—many of whom routinely violate the laws they enact—are hot-button political issues that pander to the deep-seated fears and prejudices of the electorate; but they are popular because they are proven vote getters. The solutions are invariably expensive, and usually result in unintended consequences worse than the problems they were designed to solve.

III. THE BACKLASH: THE POLITICS OF SEX

A. Putting the Sex-for-Pleasure Genie Back in the Bottle

With all revolutions, there is apt to be backlash, and the sexual revolution is no exception. As divisive as the same-sex marriage and abortion debate is, it is increasingly clear that these issues are only part of the larger agenda of the family-values movement.[195] Ten years ago, for example, one thing that both the pro-life and pro-choice sides seemed able to agree on was the desirability of avoiding unwanted pregnancies. For that purpose, contraception seemed like

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coercion, or enticement. The act was later applied to those the government disapproved of, such as Jack Johnson, the great heavyweight champion; Frank Lloyd Wright; rock-and-roll singer Chuck Berry; and the actor Charlie Chaplin. It was also a tool of blackmail in divorce proceedings. In 1986, the law was quietly amended by Congress with the substitution of "any sexual activity for which any person can be charged with a criminal offense" for the old formulation of "debauchery or any other immoral purpose." For a superb account of the entire history of this pernicious statute, see DAVID J. LANGUM, CROSSING OVER THE LINE (The University of Chicago Press 1994).

193. State statutes criminalizing sodomy were declared unconstitutional in Lawrence v. Texas, 539 U.S. 558 (2003).

194. The Mann Act, the 13-year experiment with Prohibition, the on-going War on Drugs, and the factitious War on Terror are the most striking examples. All have failed, and all have had unintended consequences that have done more damage to society than the problems they were crafted to solve. As to the Mann Act, see *supra* note 192. For the classic account of Prohibition, see ANDREW SINCLAIR, ERA OF EXCESS (Harper Colophon ed., Little, Brown and Company 1964) (1962). The difficulties of enforcement—indeed the impossibility of winning the War on Drugs—are graphically depicted in ELAINE SHANNON, DESPERADOS (Viking 1988). The Machiavellian politics underlying President Nixon's creation of the Drug Enforcement Agency are explored in EDWARD JAY EPSTEIN, AGENCY OF FEAR (Putnam 1977). The costs and consequences of waging this war are summarized in Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935 (2001). For the War on Terror, read the newspaper.

195. In referring to the counter-revolution, I use the term "family-values movement" as perhaps the least inaccurate for describing those who are now advocating chastity, abstinence, and fidelity and who oppose the use of all contraceptive measures. Almost any term—whether "Republicans" or "conservatives" or "the religious right" or "evangelical Christians"—will include people who do not subscribe to all or part of the new agenda. George Will rightly condemns the media for promoting the term "values voters" to mean social conservatives and makes clear that careless terminology in a badly fractured nation can be treacherous. *See* George Will, Op-Ed., *Who Isn't a 'Values Voter'?*, WASH. POST, May 18, 2006, at A23.

the obvious and unobjectionable answer. But today even that subject has become the focus of heated controversy. The familiar mantra of family values has taken on a new and radically different complexion, for what the movement's goal has now become is nothing less than putting the sex-for-pleasure genie back in the bottle.

Russell Shorto, writing in the *New York Times*, gives an unusually thorough account of this new dimension in the great debate.[196] He dates the shift in orientation from George W. Bush's election in 2000.[197] Aided by the administration's politicization of the FDA and other federal agencies and programs, the core notion of the family-values contingent in matters of sex is no longer education and contraception but rather abstinence and chastity. No one is making a secret of this, as Shorto's interviews with prominent members of the movement make clear:

> Edward R. Martin, Jr., a lawyer for the public-interest law firm Americans United for Life . . . told me: "We see contraception and abortion as part of a mind-set that's worrisome in terms of respecting life. If you're trying to build a culture of life, then you have to start from the beginning of life, from conception, and you have to include how we think and act with regard to sexuality and contraception." Dr. Joseph B. Standford, who was appointed by President Bush in 2002 to the F.D.A.'s Reproductive Health Drugs Advisory Committee despite (or perhaps because of) his opposition to contraception . . . [said] in a 1999 essay . . . [that] "[s]exual union in marriage ought to be a complete giving of each spouse to the other and when fertility (or potential fertility) is deliberately excluded from that giving I am convinced that something valuable is lost. A husband will sometimes begin to see his wife as an object of sexual pleasure who should always be available for gratification."
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> As with other efforts—against gay marriage, stem cell research, cloning, assisted suicide—the anti-birth-control campaign isn't centralized; it seems rather to be part of the evolution of the conservative movement. The subject is talked about in evangelical churches and is on the agenda of the major Bible-based conservative organizations like Focus on the Family and the Christian Coalition. . . .
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> R. Albert Mohler, Jr., president of the Southern Baptist Theological Seminary [and] considered one of the leading intellectual figures of evangelical Christianity in the U.S. . . . wrote: "The effective separation of sex from procreation may be one of the most important defining marks of our age—and one of the most ominous. This awareness is spreading among American evangelicals, and it threatens to set loose a firestorm. . . . A growing number of evangelicals are rethinking the issue of birth control—and facing the hard questions posed by reproductive technologies."
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196. *See* Russell Shorto, *Contra-Contraception*, N.Y. TIMES, May 7, 2006, (Magazine) *available at* http://www.nytimes.com/2006/05/07/magazine/07contraception.html.

197. *See id.* Shorto writes that "[i]t is difficult to state precisely when this rethinking began, but George W. Bush's victory in 2000, which was aided mightily by social conservatives, came around the same time that the abortion pill and the emergency contraception pill reached the market, and that convergence of events might be seen as the beginning of a new chapter in the culture war."

> Many Christians who are active in the evolving anti-birth-control arena state frankly that what links their efforts is a religious commitment to altering the moral landscape of the country. In particular, and not to put too fine a point on it, they want to change the way Americans have sex. Dr. Standford, the F.D.A. adviser on reproductive-health drugs, proclaimed himself "fully committed to promoting an understanding of human sexuality and procreation radically at odds with the prevailing views and practices of our contemporary culture." Focus on the Family posts a kind of contraceptive warning label on its Web site: "Modern contraceptive inventions have given many an exaggerated sense of safety and prompted more people than ever before to move sexual expression outside the marriage boundary."[198]

By this logic, Shorto writes, contraception "encourages sexual promiscuity, sexual deviance (like homosexuality) and a preoccupation with sex that is unhealthful even within marriage. It may be news to many people that contraception as a matter of right and public health is no longer a given, but politicians and those in the public health profession know it well."[199]

> "The linking of abortion and contraception is indicative of a larger agenda, which is putting sex back into the box, as something that happens only within marriage," says William Smith, vice president for public policy for the Sexuality Information and Education Council of the United States. Siecus has been around since 1964 . . . but its mission has changed in recent years . . . to, now, fighting to maintain the very idea of birth control as a social good. "Whether it's emergency contraception, sex education or abortion, anything that might be seen as facilitating sex outside a marital context is what they'd like to see obliterated," Smith says.[200]

Senator Olympia Snowe of Maine, an abortion-rights Republican, says that "'[t]wo decades or more ago, I don't think there was much of a divide on contraception and family planning . . . . It was one area both sides could agree on as a way to reduce unwanted pregnancies. Now it becomes embroiled in philosophical disputes.'"[201] The Guttmacher Institute "has also felt the shift. 'Ten years ago the fight was all about abortion,' says Cynthia Dailard, a senior public policy associate at Guttmacher. 'Increasingly, they have moved to attack and denigrate contraception. For those of us who work in the public health field, and respect longstanding public health principles—that condoms reduce S.T.D.'s, that contraception is the most effective way to help people avoid unintended pregnancy—it's extremely disheartening to think we may be set back decades.'"[202]

Others whom Shorto interviewed spoke with unabashed frankness about the conservative movement's new philosophy of chastity and abstinence rather than contraception. Kimberly Zenarolla, a recently converted Catholic and director of strategic development for the National Pro-Life Action Center, said:

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198. *Id.* Implicit in much of the talk about "reproductive technologies" is the question of what "conception" means—whether fertilization or implantation. *See supra* notes 151-55 and accompanying text.

199. Shorto, *supra* note 196.

200. *Id.*

201. *Id.*

202. *Id.*

> "I tell people I became a Catholic because of the church's teaching on contraception. We are opposed to sex before marriage and contraception within marriage. We believe that the sexual act is meant to be a complete giving of self. Of course the purpose is procreation, but the church also affirms the unitive aspect. It brings a couple together. By using contraception, they are not allowing the fullness of their expression of love. To frustrate the protection potential ends up harming the relationship."[203]

And Mohler again, president of the Southern Baptist Theological Seminary:

> "I cannot imagine any development in human history, after the Fall, that has had a greater impact on human beings than the pill. . . . It became almost an assured form of contraception, something humans had never encountered before in history. Prior to it, every time a couple had sex, there was a good chance of pregnancy. Once that is removed, the entire horizon of the sexual act changes. I think there could be no question that the pill gave incredible license to everything from adultery and affairs to premarital sex and within marriage to a separation of the sex act and procreation."[204]

Shorto observes that "[t]he idea of promoting abstinence over comprehensive sex education (which includes information on various forms of contraception and how to use them) gets to the core of the expanded conservative approach to birth control issues. It really is all about sex."[205] Robert Rector, a senior research fellow at the Heritage Foundation, told Shorto that "'[t]here are two philosophies of sexuality. . . . One regards it as primarily physical and all about physical pleasure. Therefore, the idea is to have lots of physical pleasure without acquiring disease or getting pregnant. The other is primarily moral and psychological in nature, and stresses that this is the part of sex that's rewarding and important.'"[206]

Shorto thinks that where the Bush administration stands in this dispute is eloquently expressed by the fact that in July 2006, "a group of Democrats in Congress, led by Representative Carolyn Maloney of New York, sent the first of four letters to the president asking outright: 'Mr. President, do you support the right to use contraception?' According to Representative Maloney's office, the White House has still not responded."[207]

It remains to be seen how effective the family-values movement's radical expansion of its agenda will be. It represents a vision of family values in its purest form, not unlike the Puritan morality of four hundred years ago with its settled view of the appropriate societal roles of men and women and the place of sex in the equation of marriage.[208] To some, this new orientation may seem like an understandable reaction to the sex-saturated climate of America today. But it takes no account of the place women have won for themselves in the workplace and of their right of access to life activities on an equal footing with men. It takes

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203. *Id.* Query: does Ms. Zenarolla mean to include by "contraception" the Natural Family Planning approved by the Church: namely, abstinence and fertility awareness?

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See, e.g.*, JMORONE, *supra* note 20, at 31-116.

no account of the practical reality that many women have to work. Deprived of control over their reproductive function, they will inevitably be forced out of jobs and careers and once again relegated to their traditional role as vessels of procreation, fated to stay at home and see to the nurture and care of children perhaps neither planned for nor wanted. To say that women should have a choice of either working or staying home with children is one thing; to force them to stay at home is another. It is possible to see in this movement a none-too-subtle attempt to restructure the family along traditional paternalistic lines: women shackled to the home and children, and men bringing home the bread.

In its rigid insistence on substituting abstinence and chastity for contraception, the family-values movement asks too much of human nature, particularly in the case of young people. Like it or not, teenagers are going to experiment. No one knows what effect, if any, the "say no to drugs" campaign launched by Nancy Reagan in the 1980s had on the behavior of teenagers. It is known that from then until now a significant number have experimented with illegal drugs. In like fashion, many are going to experiment with sex, advice to the contrary notwithstanding.[209] Contraception, coupled with education in the proper use of contraceptives, has proven to be the most effective way of avoiding unwanted pregnancies.

As Shorto notes, the vast majority of parents understandably want teenagers to postpone sexual intercourse until later. But they are just as strongly in favor of education about contraceptives and their use.[210] There would seem to be little harm in combining approaches, but to insist on abstinence and chastity to the exclusion of contraceptive education verges on the ridiculous. There is no evidence thus far to show that abstinence-only programs work,[211] nor is there any evidence to support the view that the availability of contraceptive measures promotes rampant sexual promiscuity. Quite the opposite in the Netherlands, where the pregnancy rate is among the lowest in the world. A Dutch administrator says, "'we've found that when you educate people, they don't have sex earlier. They think about it. So you're not promoting sex, you're helping them to be rational about it.'"[212] The attempt of the family-values movement to create a Sunday-school world is likely to produce three effects,

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209. *See* Brody, *supra* note 181.

210. *See* Shorto, *supra* note 196 (citing a 2004 poll conducted by National Public Radio, the Kaiser Family Foundation, and Harvard's Kennedy School of Government, which showed that "95 percent of parents think that schools should encourage teenagers to wait until they are older to have sex, and also that 94 percent think that kids should learn about birth control in school").

211. *See* Associated Press, *Abstinence Classes are Found Ineffective*, N.Y. TIMES, Apr. 15, 2007, § 1, at 20 ("Students who participated in sexual abstinence programs were just as likely to have sex as those who did not, according to a study ordered by Congress."). In a later article, the *Times* reports that the 9-year-long study was conducted by Mathematica Policy Research at a cost of $8 million. Robert Rector, a fellow at the Heritage Foundation, "wrote the first bill that legally defined abstinence education, and got it attached as a stowaway to the 1996 welfare overhaul, backed with $50 million for the states." Congress has continued to fund the programs since. Abstinence education was Rector's visionary way of shoring up marriage. Health departments in 11 states have rejected abstinence education this year, and legislatures in three others have passed laws "that could kill, or at least wound, its presence in public schools." *See* Laura Beil, *Abstinence Education Faces an Uncertain Future*, N.Y. TIMES, July 18, 2007, at A1.

212. Shorto, *supra* note 196.

none of them desirable: first, an increase in sexually transmitted diseases; second, an increase in the number of abortions; or third—considering the barriers to abortion erected in many states, especially for teenagers—an increase in the number of children consigned to orphanages and foster care. Given our proven inability to provide loving and secure environments for many of these children, the "say no to sex" movement seems irrational.[213] The new ideological agenda finds its most naked expression in what is called the federal abstinence initiative. The 2007 federal guidelines for program financing state: "'It is required that the abstinence education curriculum teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity.'"[214]

B. Politicizing Sex and Religion: Damn the Constitution—Full Speed Ahead

Societal change, especially when rapid, is disconcerting. In almost the blink of an eye the country has gone from Bette Davis in a dress to Sharon Stone wearing nothing; from the closet to the open presence of gays and lesbians in public life; from marriage to men and women living openly together without benefit of clergy; and from back alleys and coat-hangers to abortion clinics. The content of movies and television flirts with virtually all of the traditional taboos relating to sex and breaks many of them.[215]

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213. There is yet another tragic dimension to this dementia. Under President Bush, funds for our overseas AIDS program have commendably been increased. But a recent General Accountability Office study "found that in many countries administrators were forced to cut funds intended to fight mother-to-child H.I.V. infection in order to finance abstinence programs," and to give disproportionate attention to abstinence over condoms. *See id.* In a scathing editorial calling this practice "indefensible," the *Times* said:

> The elevation of ideology over both science and local needs is deadly in this case. A new report by the Government Accountability Office, an investigative arm of Congress, finds that efforts to stem the AIDS pandemic are being undermined by the insistence of Republican Congressional leaders and the administration that an unduly large portion of the funds be used to emphasize sexual abstinence and fidelity.
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> Because of a very bad amendment tagged onto the law financing global AIDS efforts, fully 33 percent of prevention funds must be used for abstinence-until-marriage and fidelity programs.

See Editorial, *Ideology Only*, N.Y. TIMES, May 13, 2006, at A16. For moving, on-the-ground accounts of the effect of the worldwide AIDS epidemic on people in Africa, see Nicholas D. Kristof, Op-Ed., *At 12, a Mother of Two*, N.Y. TIMES, May 28, 2006, § 4, at 11 (12-year-old girl cares for her two younger sisters, all that is left of her extended family) (AIDS will kill almost three million people this year with a new victim being infected every eight seconds); Nicholas D. Kristof, Op-Ed., *A Plague of Orphans and Lonely Grandmothers*, N.Y. TIMES, May 30, 2006 at A19. Kristof writes that "[t]he life expectancy in Swaziland, which has the highest infection rate in the world, with nearly 40 percent of adults infected, has fallen from 55 to 34. A $4 dose of a medicine called nevirapine mostly blocks mother-to-child transmission of H.I.V. during childbirth, and yet because of poverty and governmental incompetence, at last count only 10 percent of pregnant African women with the virus got such a drug." It is indeed hard to imagine a "family-values" calculus that can sacrifice innocent lives in order to reshape the sexual landscape not only of America, but of the rest of the world, too.

214. Shorto, *supra* note 196.

215. For example, consider the comments at a recent gathering of prominent televangelists: all condemned "'commercial television as evil.'" Rodney Parsley of the World Harvest Church in Columbus, Ohio, said that "'[t]elevsion has become America's drug of choice, an electronic

Fear and anger are the reactions to such change, and frightened and angry people tend to circle the wagons around their most fundamental values. The dismay of many Americans at the legalization of abortion, the rank commercialization of sex, the rise of the gay-rights movement, and the creation of a climate in which almost anything goes began to take the form of organized protest in 1980.[216] The pace has increased steadily since, and has become exponential with the presidency of George W. Bush.

1. Turning Sex into a Wedge Issue.

What is remarkable is the way in which this fear and discontent have been played upon and manipulated by the Bush administration. Ably abetted by his chief strategist Karl Rove, Bush has managed to mold a sizable portion of the population—particularly white conservative evangelical Christians—into so-called values voters, a lock-step phalanx which backs him and the Republican party unthinkingly because its members believe that he and his administration share their evangelical Christian values.[217] These voters may well have swung the 2000 and 2004 elections in Bush's favor.[218] The president, himself a born-again Christian, has declared that his guidance in decision making comes from the Almighty.[219] The historian Arthur Schlesinger, Jr., accounts him "the most aggressively religious president Americans have ever had."[220] He has supplied the rhetoric and through his actions has managed to bring about a significant shift in the always delicate balance between church and state.

Valium.' " David Cerullo, chief executive officer of Inspiration Networks, said that " 'most secular television today has gone beyond the bounds of good entertainment and good information into what the Bible would describe as spiritual darkness.' " Associated Press, *Religion News in Brief: Ministers christen home of N.C.-based Christian broadcast center*, N.Y. TIMES, NOV. 9, 2006 *available at* http://www.nytimes.com/aponline/us/AP-Religion-Briefs.html?pagewanted=pr. These quotations are not used sarcastically. There is food for thought in them.

216. "In 1981, Gary North, a leader of the Christian Reconstructionist movement—the openly theocratic wing of the Christian right—suggested that the movement could achieve power by stealth. 'Christians must begin to organize politically within the present party structure,' he wrote, 'and they must begin to infiltrate the existing institutional order.' " Paul Krugman, Op-Ed., *For God's Sake*, N.Y. TIMES, Apr. 13, 2007, at A19.

217. *See* DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION (Free Press, 2006). In this book, David Kuo describes the politicization of the White House Office of Faith-Based and Community Initiatives. Deputy director of this agency from 2001 to 2003, he recounts the administration officials' behind-the-back description of some of the nation's most prominent evangelical leaders as "ridiculous," "out of control," and just plain "goofy." *Id.* at 230. Jonathan Larsen, *Countdown* producer, said: "More than five years after President Bush created the Office of Faith-Based Initiatives, the former second-in-command of that office is going public with an insider's tell-all account that portrays an office used almost exclusively to win political points with both evangelical Christians and traditionally Democratic minorities." Jonathan Larsen, *Tempting Faith*, MSNBC Countdown (Oct. 13, 2006).

218. *See* E.J. Dionne Jr., Op-Ed., *Christians Who Won't Toe the Line*, WASH. POST, Mar. 16, 2007, at A21 ("Since 1980, white evangelical Christians have been seen primarily as a Republican voting bloc. They delivered more than three-quarters of their ballots to President Bush in the 2004 election.").

219. *See* George Packer, *Not Wise*, THE NEW YORKER, May 8, 2006, at 23, 24. Arthur Schlesinger, Jr., writes that "[o]bservers describe Bush as 'messianic' in his conviction that he is fulfilling the divine purpose." Arthur Schlesinger Jr., *Bush's Thousand Days*, WASH. POST, Apr. 24, 2006, at A17.

220. Schlesinger, Jr., *supra* note 159.

During the Bush presidency, a particular version of Christianity has been insinuated into almost every echelon of government. Paul Krugman, a columnist for the *New York Times* and professor of economics at Princeton University, writes that "[t]he infiltration of the federal government by large numbers of people seeking to impose a religious agenda—which is very different from simply being people of faith—is one of the most important stories of the last six years."[221] The televangelist Pat Robertson founded Regent University to educate Christian leaders who could change the world. The university now has 150 of its graduates working in the Bush administration. "Unfortunately for the image of the school, where Mr. Robertson is chancellor and president," Krugman says, "the most famous of those graduates is Monica Goodling, a product of the university's law school. She's the former top aide to Alberto Gonzales who appears central to the scandal of the fired U.S. attorneys . . . ."[222] Krugman thinks that the story of the infiltration tends to go underreported "perhaps because journalists are afraid of sounding like conspiracy theorists. But this conspiracy is no theory. The official position of the Texas Republican Party pledges to 'dispel the myth of the separation of church and state.' And the Texas Republicans now running the country are doing their best to fulfill that pledge."[223] Krugman asserts that "unqualified people were hired throughout the administration because of their religious connections"; most reporting, he believes, "fails to convey the sheer extremism of these people."[224]

The sheer extremism of the policies dictated by the Bush White House, however, has been unabashedly placed on public view. In addition to a vast amount of newspaper coverage, his policies have been sharply debated on television's talking-head shows. Perhaps the most prominent and controversial example was Bush's decision to deny federal funding for potentially life-saving embryonic stem-cell research—a decision taken on patently religious grounds. In a 2001 speech, Bush said that "'[l]ike a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being.'"[225] Using these soon-to-be-discarded stem cells is the moral equivalent of abortion, in other words, even though no one can agree on when human life begins and despite the federal government's position that pregnancy begins only with implantation.[226]

The decision has had a profound effect on American science, putting us far behind other countries in developing stem-cell-based therapies. At our foremost

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221. Krugman, *supra* note 216.

222. *Id.* Shortly after Krugman wrote, Monica Goodling, with a grant of immunity, testified under oath before a congressional committee that "she had 'crossed the line' in considering the political beliefs of applicants for nonpartisan legal jobs . . . favoring applicants with Republican credentials." David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring,* N.Y. TIMES, May 24, 2007, at A1.

223. Krugman, *supra* note 216.

224. *Id.*

225. Michael Specter, *Political Science,* THE NEW YORKER, Mar. 13, 2006, at 58, 67.

226. Specter writes: "According to repeated polling, a majority of Catholics, Protestants, and evangelical Christians believe that stem cells from embryos should be used for research, yet there is no consensus on the question of when life begins, or on the relative value of embryos and living human beings." *Id.* at 67.

research centers, scientists have been hamstrung by red tape, forced to demonstrate that no forbidden research has been carried out using anything—laboratories, laboratory equipment, buildings, supplies—funded in whole or part by federal dollars; nor can any privately funded research be shared with other scientists working in or with federally funded facilities or equipment.[227] In an interview with Alan Leshner, chief executive officer of the American Association for the Advancement of Science, Michael Specter was told that "'[w]hat we are seeing is the empowerment of ideologues who have the ability to influence the course of science far more than ever before.'"[228] And Nobel laureate Paul Nurse, president of Rockefeller University, wrote that "'present policies are set to damage a whole generation of young research workers, and the negative impact on recruitment of the next generation of scientists will be seen for years to come.'"[229]

In 2005, the sad case of Terri Schiavo transfixed the nation for weeks. A violent dispute arose when a Florida court ordered (for the third time) that Schiavo's feeding tube be removed, in accordance with her husband Michael's wishes but against those of her parents. The court determined that there was no hope for recovery and that Schiavo would not wish to be kept alive artificially. She had suffered irreparable brain damage in 1990 and was in a vegetative state from which doctors said she would never recover. Her husband had filed his first petition in 1998. When the Florida Supreme Court upheld the trial judge, the Florida legislature passed a bill to reinsert Schiavo's feeding tube; the supreme court declared the law unconstitutional. A Republican Congress thereupon passed emergency legislation ordering that the tube be reinserted. President Bush flew back to Washington from Texas the same night and signed the bill into law. The Supreme Court negated it by refusing to hear the sixth appeal, and Terri Schiavo was finally permitted to die. The president's only comment was that he was "in favor of what he referred to as the 'culture of life.'"[230]

The Bush administration, Michael Specter writes, "has been relentless in its opposition to any drug, vaccine, or initiative that could be interpreted as lessening the risks associated with premarital sex.[231] HPV (human papillomavirus) is the most common of the sexually transmitted diseases, infecting half of all Americans at some point in their lives.[232] It is responsible for cervical cancer, which kills five thousand American women each year, and also for genital warts. A vaccine that prevents these diseases is now under consideration by the FDA; tests have shown it to be almost completely effective if administered to young girls at around the age of ten to twelve, before they

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227. *Id.* at 66. "'If we have a postdoc working on a stem-cell project and he needs to spend half an hour a week using a DNA sequencer or something else that costs a hundred thousand dollars, we cannot let him use one owned by the university,' [Steven] Hyman said. 'We might even have to buy a new one.'"

228. *Id.* at 68.

229. *Id.* at 69.

230. *Id.* at 63. Specter adds that "an autopsy supported her husband's contention that she was unaware of her condition and incapable of recovering."

231. *Id.* at 58.

232. *See id.*

become sexually active. Though difficult to believe, here is the administration's position on vaccinations:

> The Bush Administration, its allies on Capitol Hill, and the religious base of the Republican Party are opposed to mandatory HPV vaccinations. They prefer to rely on education programs that promote abstinence from sexual activity, and see the HPV vaccine as a threat to that policy. . . . Many abstinence supporters argue that eliminating the threat of infection would only encourage teenagers to have sex. "I personally object to vaccinating children when they don't need vaccinations, particularly against a disease that is one hundred per cent preventable with proper sexual behavior," Leslie J. Unruh, the founder and president of the Abstinence Clearinghouse, said. "Premarital sex is dangerous, even deadly. Let's not encourage it by vaccinating ten-year-olds so they think they're safe.' "[233]

What are five thousand deaths a year compared to educational programs that promote abstinence and chastity in our youth?

If the Plan B administrative process is any indication, the HPV vaccine may be in for a long and tortuous journey, perhaps ending in disapproval. It will be recalled that Plan B languished in the bowels of the FDA for three years and that when the agency finally did act, it was to withhold over-the-counter sale for women under 18— the group most in need of this method of contraception.[234] The agency's claim was that it did not wish to be seen as encouraging promiscuity among young girls, despite the absence of any evidence showing that this would be the likely effect.[235] And, even if the HPV vaccine is approved, how many states will choose to make vaccination mandatory?

The reaction to Plan B and now to the HPV vaccine is all part of a religiously driven agenda implemented by zealots who have been intentionally placed by President Bush in key administrative positions. Competence doesn't matter, only ideological loyalty. Gifted scientists have been replaced by lesser lights (not to say, in some cases, hacks). For example, Elizabeth Blackburn, a renowned cell biologist at the University of California at San Francisco, was dismissed from the President's Council on Bioethics because she supported embryonic stem-cell research; her replacement was Diana Schaub, a teacher of political science at Loyola College in Baltimore. "Schaub has compared the harvesting of stem cells to slavery, and once said in a speech, 'Every embryo used for purposes of research is someone's blood relative.' "[236]

At the root of these machinations is a simplistic concept: abstinence and chastity until marriage. This policy avoids pregnancies (and thus the need for abortions and *a fortiori* for contraceptive devices and education in their use); it eliminates sexually transmitted diseases and, not incidentally, allows for the instilling of the values of evangelical Christianity in today's young people. Conversely, anything that might conceivably encourage sexual experimentation

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233. *Id.*

234. *See id.* at 60 (prominent scientists resigned, saying "'the agency had decided to place the pursuit of its moral agenda above the facts' ").

235. For a summary of this convoluted history, see Emergency Contraception: Plan B—Plan B and the Bush Administration, http://ec.princeton.edu/pills/plandbhistory.html.

236. Specter, *supra* note 225, at 63.

or promiscuity is reflexively demonized and forbidden. Michael Specter writes that the administration "has made every effort to diminish the use of condoms as a method of birth control in the United States and throughout the world. Government policy requires that one-third of H.I.V. prevention spending go to 'abstinence until marriage' programs."[237] Since Bush became president, he continues, "the United States has spent hundreds of millions of dollars on abstinence programs, and it has cut almost that much in aid to groups that support abortion and the use of condoms as a primary method of birth control."[238]

The insistence on teaching abstinence and chastity to the exclusion of educating young people about contraceptives and their use ignores the fact that the vast majority of parents want their children to have such education.[239] Common sense—at least in those who can remember the raging hormones of their teens and twenties—suggests that this effort to put sex back in the bottle is doomed to failure. It will be no more effective than President Bush's attempt to bring peace and democracy to Iraq or to rebuild New Orleans and the Gulf Coast. If Bush were capable of thinking about the society he governs—one saturated with sex, reaching down ever deeper from teenagers to tweens to in some cases six-year- olds[240]—he might conceivably grasp the fact that it's too late for Sunday-school-like abstinence education.

2. Faith-Based Initiatives: Free Exercise Establishes Religion.

In 2001, impatient at congressional inaction, President Bush created by executive order the White House Office of Faith-Based and Community Initiatives, which in turn created mini-offices in ten of the most important administrative agencies.[241] The overall goal was "to increase significantly the partnerships between the federal government and religious social service providers."[242] No one disputes the good works performed by faith-based groups. They have long received federal funds provided such funds are used for secular purposes only with safeguards in place to ensure this condition is met. Under President Bush, through a flurry of executive orders, rule changes, and other prerogatives of his office, that has changed. The administration understands that

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237. *Id.* at 58.

238. *Id.*

239. *See* Shorto, *supra* note 196.

240. *See* Alexandra Jacobs, *Campus Exposure*, N.Y. TIMES, Mar. 4, 2007, § 6, at 44. Writing about the relatively new phenomenon of student-generated sex magazines, the author says of one of the female editors "that for her and her peers, the question is not why pose nude, but why not? After all, they grew up watching Madonna ('All she was was naked all the time'), parsing the finer points of the Monica Lewinsky scandal and flipping through Calvin Klein ads: sexual imagery was the very wallpaper of their lives . . . ."

241. For an overview of the structure and function of the Office of Faith-Based and Community Initiatives, see Anne Farris, et al., *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY (Aug. 2004) [hereinafter Faith-Based Initiatives]. The ten agencies are the departments of Agriculture, Commerce, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, and Veterans Affairs, as well as the Agency for International Development and the Small Business Community Service. *Id.* *See generally* KUO, *supra* note 217.

242. *See* Faith-Based Initiatives, at 1.

"government funds may not directly pay for worship, religious instruction, or proselytization"—for no "inherently religious activities."[243] By negative implication, however, any activity that is not "inherently religious" may receive federal aid indirectly and does not have to segregate the funds from its "inherently religious" activities.[244] One of Bush's controversial changes permitted a faith-based organization to "prefer its co-religionists for employment."[245] Another was a change in long-standing federal policy prohibiting the use of federal grants to renovate or repair buildings used for religious purposes. Under the new rules, federal grants may now be used for the construction or rehabilitation of structures owned by religious organizations.[246]

With oversight by the White House Office, the mini-offices in the ten administrative agencies have made an enormous number of rules changes. No purpose would be served by attempting to describe them all, but a few in the Department of Health and Human Services are particularly germane. Religious substance-abuse programs now are eligible for grants despite the criticism that "faith-based treatment may rely more heavily on spiritual rehabilitation than on medical treatment."[247] "The department's faith-based partnerships emphasize . . . abstinence-only programs to reduce teen pregnancy and infectious disease . . . ."[248] And "HHS has focused its efforts to work with faith-based and community organizations in . . . [a number of] program areas,"[249] one of which is the following:

> *Abstinence Education:* HHS and the Centers for Disease Control . . . have added an extra emphasis on abstinence only programs in their prevention approach to controlling unwanted pregnancies, HIV/AIDS, and other sexually transmitted diseases among youth. Congress has appropriated over $100 million to organizations that sponsor abstinence-only education while curtailing comprehensive prevention method programs over the past three years. HHS has actively promoted the involvement of faith-based organizations in abstinence programs. For example, the Office of Abstinence and Pregnancy Prevention encouraged faith-based, community, and school-based programs to apply for a share of $350 million in funding for Adolescent Family Life Demonstration Projects, which promote abstinence as the most effective way to prevent unintended pregnancy and sexually transmitted disease.[250]

Many of the traditional barriers to governmental support of religion or religious groups have been changed, overleapt, or ignored. In their executive summary, the authors of the Roundtable report make the following statement:

> While supporters hail these moves as a way of ending the exclusion of certain religious groups from public programs and widening the choice of providers, critics question whether efforts to remove barriers facing faith-based

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243. *See id.* at 8, 9.
244. *See id.* at 8.
245. *Id.* at 8.
246. *See id.* at 13.
247. *Id.* at 22.
248. *Id.* at 21.
249. *Id. at* 22.
250. *Id.* at 22-23.

> organizations have also weakened longstanding walls banning religious groups from mixing spiritual activities with their secular services.
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> . . . .
>
> The report looks beyond a focus on the rhetoric of President Bush's personal beliefs on the role of religious organizations in publicly-funded programs, and shows how this view has been pervasively and methodically implemented in the workings of the federal government.[251]

In the Bush administration, ideology seems invariably to sweep all before it—science,[252] laws, and in particular the Constitution.[253] The lengths to which the administration is willing to go appear tellingly in the congressional testimony of Dr. Richard Carmona, former surgeon general. He said "that the administration would not allow him to speak on the scientific and medical aspects of stem cell research, emergency contraception, [or] comprehensive sex education . . . ."[254]

Thomas Jefferson's storied wall of separation between church and state has sprung some serious leaks. One such leak came to light recently in *Hein v. Freedom from Religions Foundation, Inc*,[255] which involved an establishment clause challenge to some of the activities of the Office of Faith-Based and Community Initiatives—specifically, "conferences held as part of the President's . . . program . . . [at which], among other things, President Bush and former Secretary of Education Page gave speeches that used 'religious imagery' and praised the efficacy of faith-based programs in delivering social services."[256] In a plurality opinion written by Justice Alito, joined by the Chief Justice and Justice Kennedy, and concurred in as to result by Justices Scalia and Thomas, Justice Alito determined that the plaintiffs lacked tax-payer standing under the doctrine of *Flast v. Cohen*[257] to challenge the activities of the Office. This agency was not funded by Congress by statute as in *Flast* but by general executive branch appropriations.[258] No one discussed the merits. Since all of the funds involved came from Congress (and to Congress from taxpayers), the distinction Alito drew would probably baffle anyone but a lawyer.

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251. *Id.* (Executive Summary).

252. For a thorough exploration of this point, see Michael Specter, *Political Science*, *supra* note 225, at 58. He writes: "Despite the official silence, the Bush Administration has been relentless in its opposition to any drug, vaccine, or initiative that could be interpreted as lessening the risks associated with premarital sex." *Id.*

253. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In this case, the Court announced a three-part test which must be met for governmental action to withstand challenge under the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the statute must not foster an excessive government entanglement with religion."

254. Editorial, *Unhealthy Interference*, N.Y. TIMES, July 12, 2007, at A22.

255. 127 S. Ct. 2553 (2007).

256. *Id.* at 2559. Justice Souter's dissenting opinion was joined by Justices Stevens, Ginsberg, and Breyer. Though no one said so, the degree of entanglement between the president's programs and the religious groups and institutions to which money has been funneled would seem to be excessive in the extreme.

257. 392 U.S. 83, 88 (1968).

258. *Hein*, 127 S. Ct. at 2559.

After *Hein*, presumably, there can be no challenge to the president's faith-based initiatives. This can be seen as another in a series of acts aggrandizing the power of the executive, but it can also be seen as the validation of one man's power to impose his particular religious beliefs on others. The decision brings to mind Justice Black's famous dictum in *Everson v. Board of Education*,[259] in which he undertook for the first time to give content to the establishment clause. He said, in part, that the federal government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[260] A decision like *Hein*, parsing language with the aid of a magnifying glass, threatens to drain the establishment clause of all meaning.

Still, it is worth asking who these people are who are reflexively counted as members of the religious right. Are they mindless zealots, America's version of Islamo-facists, a phalanx of lemmings willing to follow their leader over the cliff? Or are they simply American citizens, many of whom have grown disturbed and disillusioned by the policies of the Bush administration, particularly in Iraq? A telling example, reported in the *Times* by Laurie Goodstein, comes from a Minnesota evangelical church with a membership of 5,000 whose minister, Gregory Boyd, "was frequently asked to give his blessing—and the church's—to conservative political candidates and causes."[261]

Boyd consistently refused these requests and finally in frustration delivered a series of sermons called "The Cross and the Sword" in which he said that "'the church should steer clear of politics, give up moralizing on sexual issues, stop claiming the United States as a 'Christian nation' and stop glorifying American military campaigns.'"[262]

The response, Goodstein writes, was "passionate."[263] Some members walked out during the sermons, and in short order Boyd found he had lost one thousand of his members.[264] It is obviously a blow when a church loses one-fifth of its membership. What is a little surprising, however, is that there were not more defectors. Believing that "'[w]hen the church wins the culture wars, it inevitably loses. . . . When it conquers the world, it becomes the world. When you put your trust in the sword, you lose the cross,'"[265] the Reverend Mr. Boyd remains undismayed. To increase his membership, he has reached out with some success to African-Americans and Hispanics.[266] And at least some of his flock who remained have thanked him for saying openly what they believe but have been afraid to voice except in private.[267]

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259. 330 U.S. 1, 15-16 (1947).

260. *Id.*

261. *See* Laurie Goodstein, *Disowning Conservative Politics, Evangelical Pastor Rattles Flock*, N.Y. TIMES, July 30, 2006, § 1, at 11.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

Almost everyone is familiar with Thomas Jefferson's famous dictum that the religion clauses of the First Amendment were intended to erect a wall of separation between church and state. Over time the decisions of the Supreme Court have left this metaphor one of shifting and uncertain meaning, with a hole in the dike here and a finger stuck in there.[268] But Boyd's reason for trying to separate religion from politics and the affairs of civil government draws on a much older and equally distinguished, if less well known, lineage—that of Roger Williams, who warned in his powerful metaphor, the Garden and the Wilderness, of the dangers of entanglements between religion and the affairs of Caesar.[269] In a letter to John Cotton written in 1644, Williams said:

> [T]he faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type and the church of the Christians under the New Testament in the antitype were both separate from the world; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his Garden a wilderness, as at this day. And that therefore if He will ever please to restore his garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto His church or garden.[270]

In Williams' view it was religion, not the state, that would be corrupted by alliances and entanglements. According to Goodstein, the Reverend Mr. Boyd is not altogether alone in his controversial stance:

> Sermons like Mr. Boyd's are hardly typical in today's evangelical churches. But the upheaval at Woodland Hills is an example of the internal debates now going on in some evangelical colleges, magazines and churches. A common concern is that the Christian message is being compromised by the tendency to tie

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268. *Compare, e.g.*, Engle v. Vitale, 370 U.S. 421, 425 (1962) (striking down prayer in public schools), *with* Sherbet v. Verner, 374 U.S. 398, 403 (1963) (requiring work on Saturday for Seventh Day Adventist as condition for unemployment benefits held unconstitutional as a violation of the free exercise clause). *See, e.g.*, Stanley Fish, *The Religion Clause Divided Against Itself*, N.Y. TIMES, Mar. 28, 2007 *available at* http://fish.blogs.nytimes.com/2007/03/18/the-religion-clause-divided-against-itself. Stanley Fish, *Is the Establishment Clause Unconstitutional?*, N.Y. TIMES, Mar. 11, 2007 *available at* http://fish.blogs.nytimes.com/2007/03/11/is-the-establishment-clause-unconstitutional.

269. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (The University of Chicago Press 1965).

270. PERRY MILLER, ROGER WILLIAMS 98 (Athenum 1962) (1953). *See* HOWE, *supra* note 269, at 1-31. Professor Howe writes that

> Jefferson's total concern obviously included a deep anxiety that the liberties of individuals would be endangered if a wall of separation did not stand between them and the state. His concern may even have included some uneasiness about the fate of churches if they were not safeguarded from the authority of government. Yet it is wholly clear, I take it, that the metaphor as it came from the pen of Jefferson carried a very different overtone of conviction from that which it bore in the message of Williams. The principle of separation epitomized in Williams' metaphor was predominately theological. The principle summarized in the same figure when used by Jefferson was primarily political.

Id. at 67.

> evangelical Christianity to the Republican Party and American nationalism, especially through the war in Iraq.[271]

The teachings of Jesus enjoin us not to judge others and to treat them as we ourselves would wish to be treated. His was a message of love, kindness, forgiveness, tolerance, and, above all, of non-violence.[272] It is impossible to square this ethos with the policies of the Bush administration. Through cynical political machinations, Bush has dangled the allure of power and influence before his flock; the temptation for many has proved irresistible, and they have responded with support and votes at the polls. Bush has managed to kill two birds with one stone.

Yet I suspect there are many evangelical Christians who oppose abortion, disapprove of homosexuality and same-sex marriage, and deplore the graphic creep that has made America a sex-saturated society, yet feel no compulsion to force their beliefs on others through the political process.[273] There are certainly many who cannot comprehend our disastrous war of choice in Iraq in which more than three thousand Americans and hundreds of thousands of Iraqis have died, many of them innocent civilians, men, women, and children. Some are surely asking the obvious question: what could the two trillion dollars we will spend on the war in Iraq[274] have done for the underprivileged in this society and elsewhere around the world?

It is the calculated politicization of religion that has played a significant role in polarizing the country, creating a division that good will and reasoned discussion cannot seem to bridge. Religious issues have been turned into political issues—"wedge" issues, they are called. To the Bush administration they are important not so much for the principles involved but because they translate into votes at the polls. Yet many in the religious right have become deeply involved in the fight to preserve the environment and to combat global warming; they have been courageous and generous in the struggle against

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271. Goodstein, *supra* note 261.

272. *See Matthew* 5, 6, 7 (King James); *Mark* 12:30-31 (King James). Whether Jesus was the son of God or simply a great teacher is debatable but for my purposes entirely beside the point. One needn't be a Christian to see the wisdom in these prescriptions. They point to how we ought live if we are to be at peace with ourselves and our fellow human beings. In all of this, Jesus is counseling us to eschew the "eye for and eye" philosophy of the Old Testament and to forgive the harm others do us without thought of retribution or revenge; to forgo fixation on material things; and to live in the present and not in the future in the hope that everything will somehow be all right when some event comes to pass—graduating from law school, perhaps, passing the bar exam, getting a job, acquiring some ardently desired new possession.

273. "The prevailing image of evangelical Christians in America is one of militant churches and politically ambitious leaders, like the Rev. Jerry Falwell and Pat Robertson who have built a national base of like-minded Christians determined to shape public policy, especially on sexual issues. But while Pentecostals strongly oppose abortion and gay marriage, they have a long history of shunning political involvement. Though some notable Pentecostals have run for office—John Ashcroft on the right and the Rev. Al Sharpton on the left—most politicians are seen as agents of the secular world." David Gonzales, *A Sliver of a Storefront, a Faith on the Rise,* N.Y. TIMES, Jan. 14, 2007, at A1 (reporting on the rise of Pentecostal churches in New York City).

274. *See* Joseph E. Stiglitz, *The High Cost of the Iraq War,* Economists' Voice, Mar. 2006, www.bepress.com/ev.

poverty and disease in third-world countries.[275] Some of them, I am sure, want no part of the administration's non-existent or feckless efforts to deal with these problems and perhaps have grown tired of routinely being counted as Republicans and expected to blindly support the president and his policies. The results of the 2006 mid-term elections are some confirmation of this view. They have discovered that with Bush rhetoric is seldom followed by action, and they are dismayed by the disastrous course of the war in Iraq and the lack of real progress in recovering from Hurricane Katrina.[276] For the religious right, the attempt to follow the teachings of Jesus on the one hand and the atavistic policies of George W. Bush on the other has produced only cognitive dissonance.

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275. *See* E.J. Dionne, Jr., Op-Ed., *Message from a Megachurch*, WASH. POST, Dec. 5, 2006, at A29. Dionne recounts the furor over Rick Warren's inviting Barack Obama to speak at a gathering at his megachurch about the AIDS crisis. Dionne also notes the more recent attack of leading evangelicals on the Rev. Rick Cizik, vice president for governmental affairs of the National Association of Evangelicals. Cizik was accused of neglecting the core issues of abortion and same-sex marriage in order to fight global warming. The broadening of the Association's agenda was seen as heresy by many important conservative luminaries. Despite their protestations, the Association backed Cizik, who, according to Dionne, "simply rejects the idea that his environmental commitment runs contrary to his support for the antiabortion movement. 'Tell the parents of children who are mentally disabled because of mercury poisoning—tell them that the environment is not a sanctity-of-life issue,' [Cizik] says." " 'We should be primarily concerned with what the Gospel says,' he insists, 'not whether you're getting off some political train.' Those are the words of a New Reformation. Many evangelicals are boarding a new train. It runs along tracks defined by the broad demands of their faith, not by some party's political agenda." E.J. Dionne, Jr., Op-Ed, *Christians Who Won't Toe the Line*, WASH. POST, Mar. 16, 2007, at A21. And Nicholas Kristof, who certainly knows what he's talking about, writes that

> for all the slaughters in the name of religion over the centuries, there is another side of the ledger. Every time I travel in the poorest part of Africa, I see missionary hospitals that are the only source of assistance to desperate people. God may not help amputees sprout new limbs, but churches do galvanize their members to support soup kitchens, homeless shelters and clinics that otherwise would not exist. Religious constituencies have pushed for more action on AIDS, malaria, sex trafficking and Dafur's genocide, and believers often give large proportions of their incomes to charities that are a lifeline to the neediest.

Nicholas D. Kristof, Op-Ed., *A Modest Proposal for a Truce on Religion*, N.Y. TIMES, Dec. 3, 2006, § 4, at 13.

276. One could start with the unnecessary preëmptive war launched in Iraq by our boy-king, a war in which hundreds of thousands of innocents have died, or with the enormous tax cuts for the very rich. But for an example closer to home, see the poignant series of articles by Bob Herbert on the deplorable conditions that still exist two years later in the areas devastated by Hurricane Katrina. Bob Herbert, Op-Ed., *Descending to New Depths*, N.Y. TIMES, Jan. 15, 2007, at A15; *id.*, *Home in the Ruins*, N.Y. TIMES, Jan. 11, 2007, at A31; *id.*, *The Not Wanted Signs*, N.Y. TIMES, Jan.1, 2007, at A19; *id.*, *The Ninth Ward Revisited*, N.Y. TIMES, Dec. 25, 2006, at A25; *id.*, *America's Open Wound*, N.Y. TIMES, Dec. 21, 2006, at A39; *id.*, *Out of Sight*, N.Y. TIMES, Dec. 18, 2006, at A29; *id.*, *Sunrise and Sunset*, N.Y. TIMES, Dec. 14, 2006, at A41. The promised help in rebuilding has not been forthcoming, nor has the president's expressed determination "to do something about poverty" born any fruit. New Orleans and the Gulf coast have largely been left to fend for themselves in the best meritocratic American tradition—every man for himself, and may the best man win. *See also* Joseph Loconte & Michael Cromartie, Op-Ed., *Let's Stop Stereotyping Evangelicals*, WASH. POST, Nov. 8, 2006, at A27 ("It is surely no thirst for theocracy but rather a love for their neighbor that sends American evangelicals into harm's way: into refugee camps in Sudan; into AIDS clinics in Somalia, South Africa and Uganda; into brothels to help women forced into sexual slavery; and into prisons and courts to advocate for the victims of political and religious repression.").

The two great rallying points of that voluble element of the religious right known as the family values movement have been abortion and same-sex marriage. The movement has already made abortion—still a constitutional right—far more difficult in many states and nearly impossible in some. In this struggle, two points stand out. The first is obvious: the most effective way of dealing with abortion is to eliminate the need for it. The respected columnist E.J. Dionne, Jr., writing in the *Washington Post*, applauds the as yet little-known Ryan bill now pending in Congress.[277] It is compromise legislation that not only "includes a remarkably broad set of programs aimed at reducing teen pregnancy, promoting contraception and encouraging parental responsibility . . . [b]ut . . . also . . . strong measures to offer new mothers full access to health coverage, child care and nutrition assistance."[278] He continues to say that

> [t]he public debate usually ignores the fact that abortion rates are closely tied to income. As the Guttmacher Institute has reported, "the abortion rate among women living below the federal poverty level . . . is more than four times that of women above 300 percent of the poverty level." The numbers are stark: 44 abortions per 1,000 women in the lower income group, 10 abortions per 1,000 women in the higher income group.

In other words, if you truly care about reducing the number of abortions, you have to care about the well-being of poor women.[279]

The Bush administration has done virtually nothing for the forty million Americans who live below the poverty line. Contraceptives and education in their use have not been made freely available to those least able to afford them. Title X, the domestic family-planning program for low-income women, has not been fully funded.[280] The administration's only response thus far has been to de-emphasize contraceptives and education in their use and to substitute an unproven and obviously feckless regimen of abstinence and chastity. A student of mine from the Netherlands wrote the following:

> The Dutch have the lowest abortion rate in the world and also the lowest rates of adolescent pregnancy. This record is attributed to a general stance of openness and acceptance of sexuality as a healthy part of life that emerged in 1965–1975 in response to recognition of the public health impact of unwanted pregnancy. Conservatives in the United States refute this point of view by

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277. The bill is jointly sponsored by Rep. Tim Ryan (D-Ohio), an abortion opponent, and Ross DeLauro (D-Conn.), an apportion rights supporter. *See* E.J. Dionne, Jr., Op-Ed., *An Opening on Abortion*, WASH. POST, Nov. 21, 2006, at A27.

278. *See id.*

279. *Id.*

280. *See* Brian Dixon, *We don't need to super-size America*, TALLAHASSEE DEMOCRAT, Dec. 8, 2006, at E5; Stacy Schiff, *Sex and the Single Minded*, N.Y. TIMES, Jan. 20, 2007, at A11. Schiff writes that the government's $280 million Title X program is "the only federal program 'designed to provide access to contraceptive supplies and information to all who want and need them, with priority given to low income persons.'" Currently in charge of the program at the Department of Health and Human Services is Dr. Erick Keroack, an ob-gyn, who is well-known for his belief "that premarital sex suppresses the hormone oxytocin, thereby impairing one's ability to forge a successful long-term relationship. If forced to mince words you might call this fanciful or speculative. Otherwise you'd call it wacko. 'Really, really scary' and 'utterly hilarious' were the first two reactions I heard from scientists." *Id.*

> arguing that if you promote contraception, you also promote sex as a primarily physical pleasure. The Dutch point of view is, in case people want it that way, why not. The statistics show that this is the best way to handle it.
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> In 2004 the Dutch adolescent pregnancy rate was 7.2 per 1000 women 15 to 19 years old compared to 95.9 per 1000 women in the United States. . . . The Dutch experience suggests that a less ambivalent public approach to sexuality might encourage more responsible reproductive behavior in the United States.[281]

The family-values movement has gone so far as to assert that sexual intercourse is appropriate only in a monogamous, faithful marital relationship between a man and a woman, and only then without the use of any form of contraception. The latter requirement has been justified so far only with vague ideological pronouncements that verge on the metaphysical.[282] Given the intense human hunger for sexual pleasure, this diktat is unlikely to have much effect, even on marital sex.

Obviously the most important effect of implementing the current administration's initiative would be the curtailing of women's ability to control their reproductive function, virtually consigning them to the traditional role of stay-at-home mothers. The initiative ignores the fact that many women have to work, especially single women; and it ignores the fact that many women want to work, having finally achieved something like equality with men in the nation's workplaces. In this society, contraceptive measures are critical. The most tragic cases are those involving teen-agers, who are far more prone to act on the impulse of the moment and think about consequences only when they wake up the next morning. For young girls, over-the-counter availability of Plan B is obviously the most efficacious way to avoid pregnancy. And yet the best this administration has been able to do is to belatedly make Plan B available without prescription only for women 18 years of age or older. What 15-year-old wants to tell her mother that she has succumbed to temptation and needs a prescription for Plan B?[283]

The second point concerns adoption. If we are willing to force young girls and women to carry unwanted pregnancies to term, then society owes the children that result a great deal more than it has thus far been able to deliver. Orphanages and foster-home placements are pathetic substitutes for a system that rapidly and efficiently places young children in homes where they are wanted and loved. If the newspapers can be believed, there are thousands of couples who want to adopt but who are faced with overloaded social workers, reams of paperwork, intrusive home visits, and the difficulty of finding the "right" child—a process that can last for years. Racial and religious objections cloud the picture. Everyone professes to have only "the best interests of the

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281. Nicole van Bunge, *Going Dutch in the American Dream: Medium Versus Small and Large* 1, 19 (July 7, 2006) (unpublished manuscript on file with author).

282. *See supra* text accompanying note 203.

283. As Barack Obama said in his speech at Rick Warren's megachurch, "'We're dealing with flesh-and-blood men and women, and not abstractions' . . . and 'if condoms and potentially things like microbicides can prevent millions of deaths, then they should be made more widely available. . . . I don't accept the notion that those who make mistakes in their lives should be given an effective death sentence.'" E.J. Dionne, Jr., *supra* note 275.

child" at heart, but in the meantime young children wait and hope and often spend years in some form or another of "temporary" foster care. One would think that those who insist on unwanted pregnancies being carried to term would be among the first to volunteer to adopt the children who result, but that does not seem to be the case. The system is broken and shows no signs of being fixed in the foreseeable future. Abortion may be the taking of a human life, but the plight of an unplanned-for and perhaps unloved child can be equally tragic.

This second point has another dimension, and that is the desire of same-sex couples to have children.[284] Some of these children predate the union or are produced artificially in fertility clinics in which one member of a lesbian couple conceives and gives birth; men must find a surrogate mother with all of the practical complications and legal complexities that can infect these relationships.[285] But for most, adoption is the obvious answer. Yet only a minority of states permit same-sex couples to adopt. And would these adoptions not be more socially acceptable and beneficial to the child if the couple were allowed to dignify their relationship with the status of marriage? I have made the point earlier that committed gay and lesbian relationships may actually be stronger than our millions of heterosexual marriages, half of which end in divorce and often misery for any children involved, to say nothing of those born to uncommitted heterosexual couples who just happen to be living together when the woman becomes pregnant.[286]

There are many reasons why gay and lesbian couples might wish to marry,[287] but surely thoughts of child-rearing are among them. There is no reliable evidence that children reared by a gay couple fare less well than those reared by a heterosexual couple; nor is there evidence to substantiate the "great

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284. Linda McClain makes the case concisely for allowing gay and lesbian couples to adopt:

> [I]n 2002, after observing that "a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual," the American Academy of Pediatrics stated its support for legislative and legal efforts to allow co-parent and second parent adoption so children can have the "psychologic and legal security that comes from having two willing, capable, and loving parents." One recent study by an adoption institute reached a similar conclusion about the social science evidence, and urged that "laws and policies that preclude adoption by gay and lesbian parents disadvantage the tens of thousands of children mired in the foster care system who need permanent, loving homes."

Linda C. McClain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. PUB. L., 313, 331 (2006).

285. *See* John Bowe, *Gay Donor or Gay Dad*, N.Y. TIMES, Nov. 19, 2006, *available at* http://www.nytimes.com/2006/11/19/magazine/19fathering.html.

286. Recall that for the first time in our history, married couples as heads of households have become a minority. *See supra* note 165.

287. *See* Editorial, *Legal Convolutions for Gay Couples*, N.Y. TIMES, Mar. 24, 2007, at A12 (commenting on lawsuit by Patricia Ann Spado—the 14-year companion of Olive Watson, the granddaughter of Thomas Watson, Sr., founder of I.B.M.—seeking a share of his estate). Ms. Watson adopted Ms. Spado a year before the couple separated. The *Times* argues that "gay people who want to protect their families should not have to resort to adult adoptions. Nor should they be confined to separate and unequal new legal regimes, like civil unions, or rely on a patchwork of contracts, some of dubious enforceability. One benefit that comes with marriage is a universally understood framework for formally dissolving relationships and settling financial matters." And if same-sex marriages were recognized by Congress, 1,138 additional benefits would accrue to gay unions.

fear"—that such children are more likely to become gay or lesbian themselves under the influence of their parents. Same-sex marriages have not fared well in the legal system thus far. But one can say that no ill effects have yet been experienced in Massachusetts, the only state to permit such unions.[288] There is likewise no reason to believe that ill effects will result from the civil unions that the New Jersey Supreme Court and legislature now mandate, unions in which committed couples have all the rights of married persons except the name itself.[289]

"What's in a name?" Shakespeare reminds us. "That which we call a rose / By any other word would smell as sweet . . . ."[290] Perhaps such full-equality civil unions would mollify many in the religious right, if not those in its extreme element whose ideas of marriage seem four hundred years behind the times. Perhaps such unions would satisfy some gay and lesbian couples. But Shakespeare's famous lines are double-edged: names can matter—Capulet or Montague—and status without name might make a difference to gay and lesbian couples, especially those who want to rear children. Ironically, many heterosexuals have difficulty seeing that committed relationships between gay and lesbian couples may embody the very "family values" they espouse but are not always capable of realizing in their own relationships, as witness the nation's divorce rate. In the meantime, children wait, hoping against hope for the right couple to come along.

These two great issues—abortion and same-sex marriage—have become "political" in the worst sense of the word. There are certainly many who are sincere in their opposition to abortion, in their disapproval of homosexual relationships, and in their opposition to same-sex marriage. But their beliefs have been useful primarily for votes. This calculated, cynical outreach has offered hard-to-resist temptations. These have led not just to the politicization of religion but to its polarization as well. Rational dialogue and intelligent solutions are no longer the point. The point now is a sort of Chris Matthews shouting match in which neither side hears the other: the divide is so wide that no conversation across it seems possible.[291] Few care any longer to make the effort to find a middle ground. At least the Reverend Mr. Boyd appears to recognize that the wilderness is encroaching on the garden of religion.

IV. THIRD-WAVE FEMINISM: LOVE IS STILL FOR SALE

The exponential growth of the pleasure aspect of sex makes it difficult to believe there will be significant retrenchment in the foreseeable future. If anything, the phenomenon of graphic creep is apt to give us more rather than less.[292] Americans are prone to think of more as better, but too many choices in

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288. *See* Editorial *supra* note 131.

289. *See* Lewis v. Harris, 908 A.2d 196, 220 (N.J. 2006) (denying same sex couples "the financial and social benefits and privileges given to their married heterosexual counterparts bears no substantial relation to a legitimate government purpose") (4-3 decision).

290. WILLIAM SHAKESPEARE, ROMEO AND JULIET Act II, scene II (Second Quarto, 1599) (1595).

291. *Compare* Kwame Anthony Appiah,,*The Case for Contamination*, *supra* note 58.

292. *See, e.g.*, Lawrence Downes, Op-Ed., *Middle School Girls Gone Wild*, N.Y. TIMES, Dec. 29, 2006, at A24. Plainly shocked, the author comments on a school presentation by sixth, seventh, and eighth

an area as fundamental as sexual relations are almost bound to produce confusion.[293]

From puberty into middle age and often well beyond, sex is seldom absent from the thoughts of men. The biological impulse of the male is to broadcast his seed as widely as possible. For some men, the perfect wife exists only until someone more perfect comes along. Tales are legion of men caught in the throes of a "mid-life crisis" and who jettison their spouses for someone much younger and more attractive. Of course there are men who marry and remain faithful to their spouses for a lifetime, but it would be interesting to know how many. Are women similarly disposed? Are they likely to be content with a life-long, faithful relationship with just one man? Do they deliberately ignore the richness of choice available to them in this society, putting fidelity ahead of sexual pleasure? Half of the women who divorce remarry within five years, three-quarters of them within ten. And recall that Kinsey, in the early 1950s, found that one-fourth of the married women he surveyed had had extra-marital affairs. It would be interesting to know if that percentage has changed significantly in the years since. The scenarios of *Sex and the City* carry us only so far in understanding a complex phenomenon. Maureen Dowd, op-ed columnist for the *New York Times* and one of the most astute observers of the modern scene, asks a very pointed question: "What's a modern girl to do?"[294] Her article is typically wry and witty, but it raises a serious subject—that of third-wave feminism.

For a sense of what third-wave feminism is all about, consider Bridget Crawford's succinct overview of its evolution:

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graders "where girls in teams of three or four are bopping to pop songs at a student talent show. Not bopping, actually, but doing elaborately choreographed re-creations of music videos, in tiny skirts or tight shorts, with bare bellies, rouged cheeks and glittery eyes."; David Cay Johnston, *Sex-Film Industry Talks of Next Step for Hotels*, N.Y. TIMES, Jan. 17, 2007, at C13 (speculating that "the next step could be the ability to watch live performers from the privacy of a hotel room").

293. Consider, for example, the "hookup" phenomenon, currently the subject of heated debate as to prevalence and harmfulness. That hooking up—oral sex and more—is common today among teenagers and on college campuses is the thesis of Laura Sessions Stepp's new book *Unhooked: How Young Women Pursue Sex, Delay Love, and Lose at Both. See* Jocelyn Novek, *Book on Women's Sex 'Hookups' Draws Fire*, ASSOCIATED PRESS, Mar. 10, 2007, *available at* http://www.pantagraph.com/articles/2007/03/12/wtf/doc45f1f09f142e3789406973.txt (reviewing Stepp's book). Meghan O'Rourke takes sharp issue with the conclusions reached by Stepp. She is critical of the assertion that "sex on campuses for young women today is a series of joyless encounters engaged in without either short-term pleasure or long-term reward. This pointless hedonism turns young women into jaded depressives unable to trust or love anyone, secretly wishing Mr. Right would show up on their doorstep with flowers and a fraternity pin." O'Rourke says Stepp "is convinced that this 'new' habit of playing the field will warp girls' hearts and make it impossible for them to settle down when the time comes. 'It's as if young women are practicing sprints while planning to run a marathon.'" *See* Meghan O'Rourke, *In Defense of "Loose" Women*, SLATE, Feb. 30, 2007, http://slate.com/id/2159995/. But Stepp's anecdotal study may have something to it, and if so, then a further blow will have been struck at the disintegrating nature of traditional love and marriage in this generation and perhaps those to come. *See also* Kathleen Deveny with Raina Kelley, *Girls Gone Bad?*, *supra* note 60, at 41 ("Something's in the air, and I wouldn't call it love. Like never before our kids are being bombarded by images of oversexed, undressed celebrities who can't seem to step out of a car without displaying their well-waxed private parts to photographers.").

294. Dowd, *supra* note 29.

> Feminists are ugly, boring and shrill according to their critics. The popular press stereotypes feminists as anti-beauty, anti-pleasure and anti-fun. Many young women today shun the feminist label, not wanting to be lumped in with the bra-burning, hairy-legged, strident "women's libber" of the 1970s. Young women who do identify themselves as feminists go to great lengths to explain how their brand of feminism is different from the feminism of their mothers. This self-proclaimed "third wave" of feminists consists of women who are too young to have taken part in the "second wave" of 1970s activism, let alone the "first wave" of nineteenth-century advocacy for women's rights. These third-wave feminists bemoan the older generation's perceived monopoly on feminist leadership and its failure to articulate a broadly inclusive (or even relevant) feminist movement. The popular press and academic disciplines other than law have remarked on this incipient body of third-wave feminist writings, but legal scholars have not yet taken notice of it.[295]

Third-wave feminists, also called choice feminists, are markedly different from their second-wave predecessors. Second-wave feminism was a rebellion in which women came together to throw off their stereotypical roles as mothers, homemakers, and sex objects for the gratification of males; they fought for equality of opportunity with men in most of life's activities, including sex on their own terms. It was a unified effort, inspired by the likes of Betty Friedan, Gloria Steinem, and Catherine MacKinnon—a struggle that reinforced and was reinforced by the parallel Civil Rights movement of the 1960s and '70s. In this struggle for emancipation, second-wave feminists broke down doors that had traditionally been closed to women. By the 1990s gender discrimination had diminished and, at least in theory, equal opportunity was on offer in the marketplace.

In contrast, today's third-wave feminists want no part of any movement. What they want, primarily, is the freedom to choose their own individual paths in life. They take for granted the right to control their reproductive function and to sexual gratification on their own terms. They are not particularly concerned with where these freedoms came from.

But life may not be working out according to plan for these women. Maureen Dowd captures the essence of the current dilemma and in the process says much about third-wave feminism:

> I thought the struggle for egalitarianism was a cinch, so I could leave it to my earnest sisters in black turtlenecks and Birkenstocks. I figured there was plenty of time for me to get serious later, that America would always be full of passionate and full-throated debate about the big stuff—social issues, sexual equality, civil rights. Little did I realize that the feminist revolution would have the unexpected consequence of intensifying the confusion between the sexes, leaving women in a tangle of dependence and independence as they entered the 21st century.
>
> Maybe we should have known that the story of women's progress would be more of a zigzag than a superhighway, that the triumph of feminism would last a nanosecond while the backlash lasted 40 years.

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295. Crawford, *supra* note 31, at 100-02 (footnotes omitted).

> Despite the best efforts of philosophers, politicians, historians, novelists, screenwriters, linguists, therapists, anthropologists and facilitators, men and women are still in a muddle in the boardroom, the bedroom and the Situation Room.[296]

Of courtship, Dowd tells us it's back to the 1950s: "in this retro world, a woman must play hard to get but stay soft as a kitten."[297] She must allow a man to think that he is the hunter and she the hunted. "'[W]hen you're with a man you like, be quiet and mysterious, act ladylike, cross your legs and smile. . . . Wear black sheer pantyhose and hike up your skirt to entice the opposite sex!'"[298] Compare that with second-wave feminists who burned their bras, dressed unprovocatively, and refused to shave their legs.

The primary goal of second-wave feminism was equality with men. Second-wave feminists, for example, took pride in paying their own way. It was a way of showing that the old rules—"that a woman's worth in society was determined by her looks, that she was an ornament up for sale to the highest bidder—no longer applied."[299] In today's culture, Dowd warns, the man pays, at least if he wants another date.[300] No matter how much money a woman may be making, "she expects him to pay, both to prove her desirability and as a way of signaling romance—something that's more confusing in a dating culture rife with casual hookups and group activities."[301]

Dowd's observations on power dynamics are particularly germane. She says that

> a primal fear of single successful women . . . [is] that the aroma of male power is an aphrodisiac for women, but the perfume of female power is a turnoff for men. It took women a few decades to realize that everything they were doing to advance themselves in the boardroom could be sabotaging their chances in the bedroom, that evolution was lagging behind equality.[302]

Men, she says, are afraid of talented, intelligent, and high-achieving women and would prefer to marry down: "their secretaries, assistants, nannies, caterers, flight attendants, researchers and fact-checkers."[303] "Women moving up," Dowd says, "still strive to marry up. Men moving up still tend to marry down. The two sexes' going in opposite directions has led to an epidemic of professional women missing out on husbands and kids."[304] One economist "found that 55 percent of 35-year-old career women were childless. And among corporate

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296. Dowd, *supra* note 29.

297. *Id.*

298. *Id.* (quoting THE RULES (1995) ("a dating bible that encouraged women to return to pre-feminist mind games by playing hard to get")).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* Citing a study by psychologists at the University of Michigan, Dowd says "that men going for long-term relationships would rather marry women in subordinate jobs than women who are supervisors. Men think that women with important jobs are more likely to cheat on them. There it is, right in the DNA: women get penalized by insecure men for being too independent."

304. *Id.*

executives who earn $100,000 or more . . . 49 percent of the women did not have children, compared with only 19 percent of the men."[305] This researcher concluded that "'the rule of thumb seems to be that the more successful the woman, the less likely it is she will find a husband or bear a child. For men, the reverse is true.'"[306]

These findings, if accurate, have significant implications, particularly when coupled with articles like Louise Story's in the *Times*. Story found, it will be recalled, that "[m]any women at the nation's most elite colleges say they have already decided they will put aside their careers in favor of raising children."[307] These women seem to believe they can have an interesting, well-paying job for a few years and then abandon it for the traditional role of full-time, stay-at-home mothers. But even finding a husband may prove difficult if Dowd's reading of the modern scene is accurate. The women Story surveyed are all from élite institutions; they are intelligent, high achievers, and obviously capable of competing with men in the professions or the business world. Yet they come to the world of work with a significant handicap: their reservation of the right to opt out of their careers when it pleases them in order to stay at home and care for their children.

So perhaps it is not surprising that there is still discrimination in the workplace. Statistics sometimes minimize this element in attempting to explain why women fare less well in hiring, salary, and rank than men. Businesses and the professions were once all male with a men's club mentality and are still predominately so. When hiring, men tend to prefer men in the interests of the club—the golf course, sports, drinks at a strip club. This bias is reinforced by the seldom-mentioned fact that some men are uncomfortable working with women, especially those who are attractive and who show a little cleavage or a lot of leg. A man feels as if he were dealing with two people rather than one: a fellow employee *and* a desirable woman. Such women are a distraction. It is difficult to focus on work in their presence; one has to concentrate instead on not being seen to be looking. Better to avoid the problem than face the puerility of the feeling.

Most importantly, though, men have an edge because of the unstated belief that they are more likely to stay with the organization and be there when needed. Women, the thinking goes, are all too prone to quit to have children, hence inherently unreliable. These biases may be unlawful, yet they exist: subtle, virtually undetectable, perhaps even unconscious. They can have a decided effect on personnel decisions. Women who are either not hired or who are not paid or promoted on the merits may have, at least in part, the perceptions created by the blaring headlines of the opt-out revolution to thank for it.

For the time being, the vision of equality between men and women in the workplace is still a vision. It is not a reality. Dowd remembers her mother's profound observation that true equality will exist only when men and women are biologically the same.[308] Women today predominate in many of our

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305. *Id.*

306. *Id.* (quoting Sylvia Ann Hewlett, economist and author of *Creating a Life: Professional Women and the Quest for Children*, published in 2002).

307. *See* Story, *supra* note 28. *See also* Lisa Belkin, *The Opt-Out Revolution*, *supra* note 28.

308. Dowd, *supra* note 29.

undergraduate institutions and increasingly in professional schools. They consume substantial educational resources. Yet their working careers, which they may enjoy and be very good at, are freighted with that all-important reservation. What is it about the planetary pull of motherhood? Is it biological imperative: the instinct to perpetuate the species, a deeply embedded facet of women's genetic make-up? If so, then the schism between career and home is inevitable and will be difficult to resolve. Life can be especially cruel for those women who discover only after they have children that being a mother and homemaker is not for them. The more highly educated a woman and the more successful she has been in a career, the more frustrated she may feel when cast in the role of a stay-at-home mom. Certainly not every talented woman will find fulfillment in functioning as a cook, housemaid, chauffer, soccer mom, and general factotum in today's world of housekeeping and child rearing.[309]

There is a marked confluence between Dowd's anecdotal descriptions and the scholarly work of Bridget Crawford in her article dealing with third-wave feminism. Dowd writes, for example, that

> [b]efore it curdled into a collection of stereotypes, feminism had fleetingly held out a promise that there would be some precincts of womanly life that were not all about men. But it never quite materialized.
>
> It took only a few decades to create a brazen new world where the highest ideal is to acknowledge your inner slut. I am woman; see me strip. Instead of peaceful havens of girl things and boy things, we have a society where women of all ages are striving to become self-actualized sex kittens. . . .
>
> Female sexuality has been a confusing corkscrew path, not a serene progressive arc. We had decades of Victorian prudery, when women were not supposed to like sex. Then we had the pill and zipless encounters, when women were supposed to have the same animalistic drive as men. Then it was discovered—shock, horror!—that men and women are not alike in their desires. But zipless morphed into hookups, and the more one-night stands the girls on "Sex and the City" had, the grumpier they got.[310]

Crawford focuses on pornography in making much the same point. Drawing on personal narratives that have been published in many forums (though seldom in legal journals), she explores

> third-wave writings on pornography as a way of illuminating third-wave feminist themes and methods. Because pornography was and is a divisive issue

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309. Women who want to continue working after having children face a number of male stereotypical notions, among them the following: women with children don't really want to work; they won't work as much or as assiduously; they won't want to travel; and most judgmental of all, that they should really be at home taking care of their children. Women who take time off to start a family find re-entry difficult; there is no structure in place to facilitate the process for women who want to return. Expensive child care or a good spousal arrangement is necessary for full-time work, neither of which may be available. Mentoring is inadequate. Interaction with male superiors is artificially warped out of an abundance of caution—fear either of office gossip (an affair) or a sexual harassment suit. And women suffer from an inbred reluctance to assert themselves. *See* O'Brien, *supra* note 11; JCreswell, *supra* note 13. For a more detailed account of the hurdles working mothers face.*See* Porter, *supra* note 46, at 55.

310. Dowd, *supra* note 29.

> within feminism, third-wave writings on the subject also highlight the salient differences between second- and third-wave feminism. Third-wave writings on pornography are frank and daring. They celebrate a bold and sophisticated female sexuality. For the most part, young feminists seem to approach pornography from any one or more (or some combination) of four distinct perspectives: (A) pornography is a form of sexual expression; (B) pornography is a type of performance subject to multiple interpretations by both its actors and consumers; (C) pornography is a non-unique way in which women are sexually and economically exploited; and (D) pornography is a healthy part of an overall sex-positive agenda.[311]

The point is an important one. Second-wave feminists objected strongly to the rank exploitation of women for male sexual gratification which the industry of pornography represented.[312] Third-wave feminists, on the other hand, are much more comfortable with this model of exploitation because they see themselves not as the exploited but as the exploiters.[313] Narrative accounts show that some third-wave feminists find pornography sexually arousing. They are also comfortable with exhibitionist behavior, such as stripping, pole-dancing, or prostitution; and they find the work for the most part safe and lucrative.[314] Some pay their way through school with exhibitionism and prostitution. Crawford writes that "[t]he transgressive female is one who asserts her right to profit commercially from her own body and to enjoy her own sensuality. For third-wave feminists, pornography is sexual expression, performance, exploitation, and pleasure all at the same time."[315]

Third-wave feminists, unlike their second-wave predecessors, don't view themselves as part of any movement. Apart from insisting on the freedom to live life as they choose, theirs is a much more amorphous agenda.[316] A critic might chide them for taking for granted the opportunities fought for by their predecessors, but like most of us, they tend to take for granted the world into which they were born. Why should they feel an obligation to their predecessors, and who is to say they should not be free to make their own choices in life? Given that men have always enjoyed the luxury of choice, there may be more equality in the muddle of third-wave feminism than first meets the eye.

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311. Crawford, *supra* note 31, at 139-40 (footnotes omitted). *See also* Alexandra Jacobs, *supra* note 240 (discussing a number of campus sex magazines that border on the pornographic).

312. *See* Crawford, *supra* note 31, at 104. The author discusses the view of second-wave feminist Catherine MacKinnon, who claimed "that pornography 'is a form of forced sex, a practice of sexual politics, an institution of gender inequality.'" *Id.*, quoting Catherine A. MacKinnon, *Not a Moral Issue*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148 (1987).

313. Crawford, *supra* note 31, at 151-52, 153-54 (footnotes omitted).

314. *Id.* at 152-55.

315. *Id.* 154-55 (footnote omitted).

316. *Id.* at 155. Crawford discusses a much-cited book entitled *Manifesta: Young Women, Feminism, and the Future*, written in 2000 by two third-wave feminists, Jennifer Baumgardner and Amy Richards. These authors attempt to codify the goals of third-wave feminism. Crawford says that "[t]he manifesta's educational goals relate mostly to the history of feminism and diversity in self-expression. The authors proclaim a need to "'have access to our intellectual history and women's history; for the classics of radical feminism, and womanism, *mujerista*, women's liberation and all our roots remain in print; and to have women's history taught to men as well as women as a part of all curricula.'" Crawford, *supra* note 31, at 156, quoting *Manifesta*..

Many of today's young women are choice feminists. They think nothing of dressing provocatively without intending thereby to send a coded message of availability or expecting leers or locker-room comments from their male counterparts. They want to paint their nails in the board room if the mood strikes them.[317] They are confident that in the power dynamic of the sexes they hold the upper hand, for they know what men will do for sex. They find pornography, despite its demeaning aspects, a source of arousal. They find nothing disturbing in putting their bodies on display for male gratification—for a price. They take hedonism and the exploration of their own sexuality as a given. These are young women who find little difficulty in mastering whatever discipline they choose. Yet they are not, I suspect, to be found among the pampered élite women of the Ivy League schools who only appear to be making a choice; their choice was made for them, perhaps by witnessing what their parents went through in trying to make a two-career marriage work or perhaps by growing up under the care and tutelage of a stay-at-home mother who chose to opt out of a challenging career.

Third-wave feminists can't be pinned down so easily. Sooner or later, of course, these women may find themselves faced with the Hobson's choice between careers and motherhood. My sense is that these women will have little difficulty in recognizing that this choice is only illusory—that it's not a matter of either-or. We deal here, again, with a dilemma created by men. But for the expectations of men—in the workplace and in their private lives—would today's women feel pressured to choose between careers, on the one hand, and romance, love, marriage, and children, on the other? Why can't a woman, as the saying goes, "have it all"? It is the men in today's world who are sooner or later going to have to learn the lines of a radically different role: the role of stay-at-home fathers, perhaps, or of a whole-hearted, equal sharing in the demands of two-career families. And the predominantly male world of work is going to have to learn to play by a different set of rules.

There are many women who have no choice but to work. They have probably never heard of third-wave feminism and would find it irrelevant if they had. To my knowledge, how they feel about sexuality has not been the subject of any surveys or studies. They would probably feel baffled if they ran into a third-wave feminist, but it may be third-wave feminists who wind up winning for all women equal pay for equal work, paid maternity and paternity leaves, paid sick days, and adequate health insurance and child-care facilities.

V. CONCLUSION

What, then, is one to make of the sexual revolution? For one thing, it is ongoing, a work in progress, and many of its implications remain to be worked out. For the time being women will continue to be under-represented in the business and professional worlds. So far, there seems to be no wholly satisfactory mediator between a rewarding, full-time career and the strong pull of bearing and rearing children. Second-wave feminists made it possible for women to populate the corridors of power in something like their proportion

317. *Id.* at 162.

within the population; but it is a possibility that has not yet been realized. In large part, as I have argued, this failure can be attributed to men, who are still unapologetically reaping the benefits of a paternalistic world which they created and from which, until recently, women have been systematically excluded. It isn't hard to imagine a different sort of world—one in which the benefits and burdens of a relationship, including child-rearing, are equally shared, a relationship in which gender is essentially irrelevant. There have been hints here and there of men and women coming more to resemble one another, making common cause in an effort to reap both the fruits of fulfilling employment and the satisfactions of child rearing. Such a world will require a considerable reorientation of traditional thinking along with a transformation in the way men think of themselves and their roles in their jobs and vis-à-vis women. It may require a sort of affirmative action spearheaded by third-wave feminists who want equality in the workplace: not tokenism but full integration. This may be the direction in which, as a society, we are heading, but the transition from traditional ideas of workplace and family to a new and different model will be difficult and will take time. Who knows what shape this world will take in the future?[318]

Today's talented and well-credentialed young women, the select few from the best schools, don't seem to fall into the category of third-wave feminists; they seem, rather, to be throwbacks to an earlier era. They are choice feminists only in the sense that they think they are exercising the luxury of choice. They may shortly find that snagging the right man to provide the lifestyle they envision is easier said than done. As stellar graduates of business, law, or other professional schools, they may be too smart for their own good. In the meantime, they are doing no favors to the women who want careers and aspire to rise to positions of influence and leadership in politics, government, or the business and professional worlds but who face the biased perception that as soon as they have children, they will opt out of the workforce to tend to home and family.

The Bush administration will pass away in the fullness of time. Disappearing with it, one hopes, will be the insinuation into civic life of a particular brand of religious ideology and its views on sexuality. One hears in this connection the phrase "people of faith," but as Frank Rich, the *Times* cultural op-ed columnist puts it, the phrase is a "duplicitous locution; it's a code word for only one specific and exclusionary brand of Christianity."[319] Rich was commenting on "Justice Sunday," an all-media, highly publicized event staged by leaders of the extreme right wing of Evangelism in America. He is right to note that the beliefs of these zealots "have less to do with the earnest practice of religion by an actual church . . . than with the exploitation of religion by political operatives and other cynics with worldly ends."[320] Religion is a contentious

318. Linda McClain takes a good guess in a reconsideration of the channeling function (love, marriage, and children) in family law. *See* Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2179 (2007) ("there is a good argument that the transformation of family law away from fixed gender roles argues in favor of opening up marriage to same-sex couples").

319. Frank Rich, Op-Ed, *A High-Tech Lynching in Prime Time*, N.Y. TIMES, April 24, 2005, § 6, at 13.

320. *Id.*

subject. Obviously all persons in this country are free to believe or disbelieve what they will; but religion otherwise should play no role in the secular affairs of government. Apart from his disastrous, messianic crusade in Iraq—his religiously inspired vision of spreading freedom and democracy throughout the world[321]—President Bush will be chiefly remembered for his appointments to the Supreme Court.

With Roberts and Alito, the Court now has a majority of Catholic justices for the first time in its history, and a conservative majority at that.[322] It would be a little too obvious were this Court to overrule *Roe v. Wade*. It will survive, I suspect, but in name only. One can easily foresee how the right to abortion will become freighted with so many "not undue" burdens as to become no right at all, certainly unavailable to those who need it most.[323] In some states it is already that today. A single mother living at the poverty line in Mississippi, for example, must risk her job by taking two unpaid days off from work to travel three hundred miles in a car she doesn't have to listen to antiabortion propaganda before she can obtain an abortion. It is dispiriting to find Justice O'Connor in *Planned Parenthood v. Casey*[324] dismissing almost out of hand the burdens that informed-consent and waiting-period requirements place on women in this situation. If these burdens are not "undue," then what burdens would be? About the most one can hope for in the area of church-state relations is that a more enlightened administration will lift the ban on stem-cell research and

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321. Russell Shorto notes the striking similarity between Bush's rhetoric and that of Woodrow Wilson:

> After World War I . . . Wilson . . . proclaimed his belief that the United States had "seen visions that other nations have not seen" and had become not only "a determining factor in the history of humankind" but, echoing the gospel of Matthew, "the light of the world." President Bush hewed to the same theme as he pressed to invade Iraq. "We go forward with confidence, because this call of history has come to the right country," he said in his third State of the Union address. "The liberty we prize is not America's gift to the world; it is God's gift to humanity."

Russell Shorto, *All Political Ideals Are Local*, N.Y. TIMES, Oct. 2, 2005, *available at* http://www.russellshorto.com/articles/AllPoliticalIdeasAreLocal.html. *See also* SCHLESINGER, JR., *supra* note 159 ("[o]bservers describe Bush as 'messianic' in his conviction that he is fulfilling the divine purpose").

322. *See* Jeffrey Toobin, *Five To Four*, THE NEW YORKER, June 25, 2007, at 35. After noting that the "careers of Roberts and Alito have been emblematic of the conservative ascendancy in American law," Toobin concisely summarizes the conservative agenda: "Expand executive power. End racial preferences intended to assist African-Americans. Speed executions. Welcome religion into the public sphere. And, above all, reverse Roe v. Wade, and allow states to ban abortion." *Id.* It is certainly striking how closely the decisions in the term just past—the first full term of the Roberts Court—have hewed to this agenda, with almost every important case decided by a 5-to-4 vote.

323. In Gonzales v. Carhart, 127 U.S. 1610, 1619 (2007) the Court upheld a federal ban on partial-birth abortions, more accurately known as intact dilation and extraction. The procedure is a gruesome one, involving the crushing of the fetus's head, and is used only rarely to protect the mother's health. But second-trimester abortions are still legal and are now performed by dismembering the fetus prior to extraction—an equally gruesome process. Judith Warner thinks that the true intent of the partial-birth ban is clear: "the point is not (in the short term) to stop seemingly brutal fetal deaths, but rather to make all abortions as burdensome, as difficult and as emotionally and physically trying for women—and for doctors—as possible." Judith Warner, Op-Ed., *Poisonous Choices, Women at Risk*, N.Y. TIMES, Aug. 7, 2007, at A19.

324. 505 U.S. 833, 884-87 (1992).

discard the abstinence-and-chastity initiative in favor of making freely available the full range of contraceptive devices, coupled with education in their use.

There are signs that the next generation will take a much more accepting view of same-sex marriage, but it will still take something in the nature of a seismic shock for most states to confer the magic word on gay and lesbian couples. Massachusetts so far is the only exception. There are good reasons for recognizing such unions as "marriages,"[325] but none is likely to prove persuasive in America's present climate. It will be "separate but equal" and thus inherently unequal for some time to come, much as separate-but-equal racial segregation was for over a century. Civil unions will probably proliferate and perhaps by weight of numbers take on something of the dignity now accorded marriage.[326] Whatever such unions are called, it seems critical to me that gay and lesbian couples be permitted to adopt. Surely those who oppose abortion know they are adding to the numbers of the unwanted, and surely they know that many same-sex couples would provide loving homes for these children.[327] Can the family-values movement, a movement consisting largely of self-proclaimed Christians, really afford to put its fear and hatred of homosexuality on such prominent public display?

Perhaps the most pressing, certainly the most intriguing, question which the sexual revolution has left us is whether gender, beyond its obvious biological implications, really matters. Would the world be much different if women were in charge—or at least proportionately represented in the vast institutional territory previously reserved for men? Would they bring to the workplace and governance "the traits of compassion, care, concern, nurturance, identification, and sympathetic attention[?]"[328] Would they turn their faces away from violence, killing, and war?[329] In short, are women inherently different from men, and if so, in what ways? Apart from expressing my own idiosyncratic view, I have made no attempt to answer this question because I do not think there is yet an answer to be given. Those most concerned—socio-biologists, psychologists, biologists, anthropologists, geneticists—have reached no consensus.[330] Since Stanley Milgram's famous experiments in the 1960s and '70s,

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325. *See* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 155-90 (2006). For a persuasive refutation of the asserted justifications for the Federal Marriage Amendment (and thus supportive of same-sex marriage), see MCCLAIN, *supra* note 318.

326. Even if the states called these unions "marriages," the many advantages accruing to married couples at the federal level will be unavailable unless Congress repeals the Defense of Marriage Act.

327. *See* McClain, *supra* note 318, at 331.

328. Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1923 (1988).

329. *Compare* Susan Sontag, *Looking at War*, THE NEW YORKER, Dec. 9, 2002, at 82, 98.

330. The conclusions of leading scientists are somewhat Janus-faced. The father of sociobiology, E.O. Wilson, argued that all animal behavior is influenced by genes and never entirely of free will. *See* E.O. WILSON, SOCIOBIOLOGY (Belknap Press 1975). In later books, he argued that the human mind is shaped by genetic inheritance as much or more so than by culture. *See* E.O. WILSON, ON HUMAN NATURE (Harvard University Press 1979); E.O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 127-28 (Knopf 1998). Studies mapping anatomical differences between the male and female brain abound in today's science-saturated society, but given the extraordinarily complex nature of genetics, it is difficult to attribute physical differences to a genetic cause. *See, e.g.*, D.S. FALCONER, INTRODUCTION TO QUANTITATIVE GENETICS (3d ed. 1989); R. C. LEWONTIN, THE GENETIC BASIS OF

we have known that women are capable of acting to inflict great pain under certain conditions.[331] From Abu Ghraib, we have learned that women are capable of acting to dehumanize other human beings. But perhaps the critical word here is "acting." Situational circumstances can cause almost anyone to behave in a certain way: the women in Milgram's experiments and the women at Abu Ghraib were acting within the authoritarian world of men and playing by men's rules. Whether their actions conformed to their deeper natures cannot be known. Nor can anyone know what a world would look like in which women were proportionately represented throughout. Would there even be male authority figures in starched white lab coats, or abusive prison settings like Abu Ghraib, or, for that matter, an Adolph Eichmann shuffling papers and carrying out the orders of a madman? Giving the commencement address at Williams College in 1971, Barbara Tuchman said that "[w]omen, being child-bearers, have a primary instinct to preserve life. Probably if we had a woman in the White House and a majority of females in Congress, we could be out of Vietnam yesterday."[332]

We have a pretty good idea what a man's world looks like; we've surely had enough experience of it. But no one has the slightest idea what a *woman's* world would look like because the idea has never been tried, at least not in the Western tradition from which we have sprung.[333] Oddly enough, and surely ironically, there is a species closely related to humans that does exist in a matriarchal society. I have in mind the bonobos, perhaps the least well known of the great apes, whose numbers also include chimpanzees, orangutans, and gorillas.[334] The bonobo most closely resembles the chimpanzee, slightly smaller but decidedly more handsome and thoughtful looking. There the resemblances

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EVOLUTIONARY CHANGE (1974); Melissa E. Frederikse et al., *Sex Differences in the Inferior Parietal Lobule*, 9 CEREBRAL CORTEX 896 (1999). Many magnetic resonance imaging studies have been done, however, and have revealed significant differences in the brains of men and women. *See generally* DEBORAH BLUM, SEX ON THE BRAIN: THE BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN (Penguin Books 1998) (1997). Recent MRI research at the University of Pennsylvania purports to show that the major emotional difference between men and women involves the propensity for aggression. Men are more aggressive than women because the sections of the brain known to constrain aggression and monitor behavior is larger in women than in men. *See* Ruben C. Gur et al., 12 CEREBRAL CORTEX 998 (2002).

331. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 1-12 (Harper Colophon ed. 1975) (1974). Milgram wrote the following: "It is the extreme willingness of adults to go to almost any lengths on the command of an authority that constitutes the chief finding of the study . . . . [O]rdinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority." *Id.* at 5, 6.

332. BARBARA W. TUCHMAN, *The Citizen Versus the Military*, *in* PRACTICING HISTORY 264 (Ballantine Books, 1982) (1981). She also said, "Aggression is part of us, as innate as eating or copulating. As a student of the human record, I can say with confidence that peace is *not* the norm. . . ." Continuing, she said, "Freud called it the death wish, meaning self-destruction. It could just as well be called the life wish because it is an active instinct, a desire to fight, to conquer, and if also to kill, then to kill not self but others. The instinct says, 'I shall conquer, I shall live.' It is also a *male* instinct." *Id.* (emphasis added).

333. I am dealing here in broad generalizations, to all of which there are varying degrees of exceptions.

334. The bonobo is by far the least studied of the great apes. For a concise history of the bonobo, see Ian Parker, *Swingers*, THE NEW YORKER, July 30, 2007, at 48.

cease. Jane Goodall's work with chimpanzees made it seem for a time that chimps "had taken on the role of model species for humans—the instructive nearest neighbor, the best living hint of our past and our potential."[335] But then in 1974, she witnessed

> the start of what she came to call the Four-Year War in Gombe. A chimpanzee populations split into two, and, over time, one group wiped out the other, in gory episodes of territorial attack and cannibalism. Chimp aggression was already recognized by science, but chimp warfare was not. "I struggled to come to terms with this new knowledge," Goodall later wrote. She would wake in the night, haunted by the memory of witnessing a female chimpanzee gorging on the flesh of an infant, "her mouth smeared with blood like some grotesque vampire from the legends of childhood."[336]

The documentation of blood lust—genocide and cannibalism—among our closest relatives helped turn scientific attention to the bonobos. These apes are endangered; they are found only in the Republic of Congo in the dense rain forests south of the Congo River. They are shy and elusive and difficult to study. About two hundred exist in captivity. These apes were studied in great detail by Frans de Waal, a primatologist and one of the most influential scientists in the world. De Wald concluded that "'[t]he chimpanzee resolves sexual issues with power. . . . The bonobo resolves power issues with sex. . . . The bonobo is female-dominated, doesn't have warfare, doesn't have hunting. . . . Who could have imagined a close relative of ours in which female alliances intimidate males, sexual behavior is as rich as ours, different groups do not fight but mingle, mothers take on a central role, and the greatest intellectual achievement is not tool use but sensitivity to others?' "[337]

Evolutionary biology is still wrestling with the implications of the dichotomy between chimpanzees with their typically male aggressive tendencies and the far more peaceful, female-dominated society of the bonobos. That humans may have descended from two distinct lines of apes instead of one has created great excitement within the scientific community; but for present purposes what the dichotomy offers is a picture of what a woman's world might look like. And it supports the theory that important components of female behavior are inherited, not learned by playing with Barbie dolls or by other early childhood experiences.

There is much that is healthy in the climate of openness that the sexual revolution has brought about. It has in significant measure enlarged our understanding of human sexuality, altered perceptions and attitudes about what used to be called "deviancy," and swept away at least some of the hypocrisy that has traditionally freighted the subject of sex. The profit-oriented sex industry, in which women are shamelessly exploited and made into sex objects chiefly for male gratification, is ugly; but like any enterprise, it could not flourish as it has without the active participation of women and a mass of consumers eager and hungry for its products. This alone makes plain what we

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335. *Id.* at 53.
336. *Id.*
337. *Id.* at 56.

have known at some level since Adam and Eve partook of the apple in the Garden of Eden—that the instinct for sex exerts a powerful influence on human behavior. Human nature hasn't changed that much; what has changed is that people today feel far freer to act on impulses that once were condemned and kept carefully submerged beneath the bland and unruffled surface of society's view of proper behavior.

On the debit side of the ledger, some would say, lies the revolution's enthusiastic invitation to selfish behavior. Although this subject makes for interesting class discussion, there is probably not much point in warning students of the temptations that lie in wait for them: an ambitious female associate, say, working in close contact with a senior partner willing to exploit the power imbalance, or a male attorney who finds that his attractive secretary isn't averse to sex on the office floor during frequent late-night working sessions. Academic preachment and finger-wagging tend to take on concrete meaning only in retrospect.

Spouses who believe in marital fidelity may find themselves yielding to temptation under the right circumstances, sometimes with unforeseen and unfortunate consequences. Seemingly casual flings can evolve into more serious situations—those in which one party falls in love with the other and starts demanding time and attention apart from the raw sex, or those in which the female partner becomes pregnant and the couple must deal with that situation. Life in this myriad of scenarios can become a complicated schizophrenic juggling act. Those who are married and take their vows seriously, yet succumb to the temptation of the moment, may find they have entered a world of deceit, guilt, and self-loathing and have lost some quality of innocence that can never be regained. And if an affair turns into mutual love necessitating divorce and remarriage, and if there are children involved, then there's the question of what the effect will be on them.[338] How will the "blended family," that relatively new byproduct of serial monogamy, work out?[339]

Of course men and women have done all of these things and more throughout history, long before the sexual revolution erupted. In one sense there's nothing new here, but in another there is. Today's climate, saturated with sex, sexual allusion, and sexual innuendo, has become far more tolerant, far more encouraging of this kind of behavior than ever before.[340] The traditional checks and balances have been relaxed or discarded outright. What many see in

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338. *See* Elizabeth Marquardt, *Just Whom Is This Divorce 'Good' For?*, WASH. POST, Nov. 6, 2005, at B1 (disputing as a myth the in-fashion teaching that if parents "can work out the details of divorce . . . without rancor, they can reduce the pain for the children and pursue their own happiness without a lot of guilt").

339. *See* Tamar Lewin, *Poll Says Even Quiet Divorces Affect Children's Paths*, N.Y. TIMES, Nov. 5, 2005, at A13 (reporting on new survey detailing adverse effects on children even in "good" divorces).

340. *See, e.g.*, Jennifer C. Kerr, *What's on? Sex, sex and more sex*, TALLAHASSEE DEMOCRAT, Nov. 10, 2005, at E1; Jane E. Brody, *supra* note 181. Brody writes that "[t]he sexual content of TV is pervasive and increasing. A Kaiser Family Foundation study found that 'the shows most watched by adolescents in 2001-2002 had "unusually high" amounts of sexual content compared with TV as a whole. 83 percent of programs popular with teens had sexual content, and 20 percent contained explicit or implicit intercourse.' "

consequence is a license for self-indulgence. Sex purely for pleasure has become commonplace, a given, a virtual entitlement. In such a climate it is easy to lose sight of the possible consequences—the damage that can be done to self and to others in the quest for sexual gratification.

But in the meantime, "Follow me and climb the stairs."[341]

341. COLE PORTER, *Love for Sale, in* THE NEW YORKERS (E. Ray Goetz producer, 1930).