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The Procreation Prescription: Sexuality, Power, and the Veil of Morality

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THE PROCREATION PRESCRIPTION: SEXUALITY, POWER, AND THE VEIL OF MORALITY

Lauren A. DiMartino[†]

INTRODUCTION.....	42
I. THE IMPORTANCE OF CONTRACEPTION COVERAGE FOR WOMEN’S EQUALITY	46
II. TOOLS OF POWER: SEXUALITY AND MORALITY	49
III. THE “PROCREATION PRESCRIPTION”	54
A. <i>The Procreation Prescription Under the 45th President</i>	54
1. Moral Exemption for Providing Birth Control Coverage	55
2. Abstinence-only Education	59
3. Limitations on Title X Funding (Defunding Planned Parenthood).....	61
4. The Reduction of Teen Pregnancy Prevention Programs	62
5. Additional Efforts.....	63
B. <i>Historical Oppression Through Sexuality</i>	64
1. The Power of Consent	64
2. Sexuality as a Means to Maintain White Supremacy.....	65
3. Marriage and the Social Order	69
4. Criminalization of Sex	70
5. Women as Moral Decision-Makers.....	71
6. Purity and Pregnancy	72
CONCLUSION.....	75

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INTRODUCTION

Throughout the history of the United States, morals-based legislation and “romantic paternalism” have placed the idea of female chastity on a pedestal and women in a cage.¹ Legislators have given reasonable—although subjective—rationales to oppose a woman’s control of her own body: the belief that life starts at conception and the interest in protecting that life; the right to protect religious beliefs and ideals; and the health and safety of mothers.² A historical analysis, however, shows that many legislative decisions about controlling a woman’s sexual behavior have passed with no other justification but morality.³ This history, in the context of current “traditional values” based legislation, lifts the veil of morality to reveal the true underlying need for moral regulation: the preservation of power for those in charge.

“We the People” intended to ensure that the legislative branch of government would hear the collective voice of the nation’s people.⁴ Thus, the amount of power held by a particular group is directly correlated to the extent that their interests are represented in the legislature. Although the 116th Congress is the “most racially diverse and most female group” in history,⁵ it remains overwhelmingly male and white.⁶ The percentage of women in the 116th Congress—at 23.4%—is an all-time high,⁷ but is miniscule considering that women are the majority gender.⁸ This leaves

¹ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see Dana M. Northcraft, *A Nation Scared: Children, Sex, and the Denial of Humanity*, 12 AM. UNIV. J. GENDER SOC. POL’Y & L. 483, 510 (2004) (reviewing JUDITH LEVINE HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2002)).

² See, e.g., *Roe v. Wade*, 410 U.S. 113, 138-39 (1973) (describing states that enacted anti-abortion legislation under such rationales); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,551 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,608 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

³ See *infra* Section III.B.

⁴ U.S. CONST. pmbl.

⁵ Catie Edmondson & Jasmine C. Lee, *Meet the New Freshmen in Congress: More Democrats, Diversity and Women*, N.Y. TIMES, <http://perma.cc/7G44-9RQ7> (last updated Nov. 30, 2018). In addition, “[m]ost of the [elected] women . . . replac[ed] men who held these seats before them.” Denise Lu & Keith Collins, *‘Year of the Woman’ Indeed: Record Gains in the House*, N.Y. TIMES, <http://perma.cc/Z98Z-C9Y3> (last updated Nov. 16, 2018).

⁶ The 116th Congress is 76.6% male and 79% white. See Beatrice Jin, *Congress’s Incoming Class Is Younger, Bluer, and More Diverse than Ever*, POLITICO, <http://perma.cc/F4WD-ZNU8> (last updated Nov. 28, 2018, 12:43 PM).

⁷ *Id.*

⁸ Women comprise 51% of the U.S. population. Abigail Geiger & John Gramlich, *The Changing Face of Congress in 5 Charts*, PEW RES. CTR. (Feb. 2, 2017), <http://perma.cc/3WFS-ACYB>. Women only comprised 5.0% of the 101st Congress in 1989, and, until 1993, there

little question as to who holds the power in this country, and therefore, who is in the best position to safeguard their own interests. Maintaining the existing and historical legislature and economic hierarchy ensures that men will continue to control governmental functions and the social structure. Because a women's ability to "participate equally in the economic and social life of the Nation" is reliant on "their ability to control their reproductive lives," the legislature's sexual regulation of women has served at the forefront of its campaign to maintain the traditional power structure.⁹ By relying on "morality," legislators have placed women's sexuality at the center of values-based regulation; they have used it as a key tool to reserve their own decision-making power and to protect certain rights and liberties over others.¹⁰ In light of the 45th presidential Administration's (the Administration) recent actions to curtail women's sexual and reproductive rights, it's important to frame this discussion in context of the government's past efforts to limit these rights, and to expose the government's underlying intentions of passing these regulatory actions.

The regulation of morality was a driving force in American law until the twentieth century, when the judiciary became a key player in shifting the boundaries of moral legislation.¹¹ It is undisputed that the Government, at one time, sought to preserve order and public morals.¹² The issue, however, is that morals change, and subjective human opinion dictates morals. In fact, "public morality"—the public's "widely shared moral sentiment given the force of law"—dictated legislation for a long time.¹³ Under the concept of public morality, laws can shape societal behavior in two ways: it can reduce the occurrence of certain conduct, preventing the formation of undesirable habits, and it can prompt a "complex mixture of forces that contribute to the shaping of people's moral ideas."¹⁴ Conversely, the absence of laws make certain conduct more widespread and

had never been more than two women in the Senate at a time. See BROOKINGS INST., VITAL STATISTICS ON CONGRESS: DATA ON THE U.S. CONGRESS, DEMOGRAPHICS OF MEMBERS OF CONGRESS 55 tbl. 1-19 (2018), <http://perma.cc/T5MF-H38G>. The author recognizes that gender is not limited to "men" and "women."

⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992).

¹⁰ This note uses the term "women," but the author recognizes that said actions also affect people that do not identify as women.

¹¹ See Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 72-73, 92 (2000).

¹² Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 403 (1963).

¹³ Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139, 139 (2012).

¹⁴ Wolfe, *supra* note 11, at 68 (citing HARRY CLOR, *OBSCENITY AND PUBLIC MORALITY* ch. 4 (1969)).

insinuate that such conduct is acceptable.¹⁵ It is not that legislators should never consider moral arguments in governing laws, but, arguably, morality should be reserved to regulate only certain behaviors. Behavior, too, can be private—such as that associated with a woman’s own body—or public in nature.¹⁶ Due process of law warrants that rational governance of societal affairs must be limited to actions that affect one’s neighbor.¹⁷ Therefore, moral arguments should not be used to enforce private morality—the moral code that is specific only to an individual or a group of people. Justice Blackmun articulates this philosophy in his vindicated dissent in *Bowers v. Hardwick*, where he acknowledges the Court’s failure to “see the difference between laws that protect public sensibilities and those that enforce private morality.”¹⁸

Nevertheless, since before the Constitution was drafted, legislators and courts have relied upon threads of private morality to maintain the status quo of a historically white, male dominated power structure.¹⁹ While the law’s evolution has made it more difficult for legislators to rely on morality, the nation is seeing a resurgence of efforts to do so with the Administration’s plans to: defund Planned Parenthood,²⁰ provide moral exemptions for contraception coverage under the Affordable Care Act (ACA),²¹ steeply increase a budget for abstinence-only education,²² and

¹⁵ *Id.*

¹⁶ See Henkin, *supra* note 12, at 403, 406-07.

¹⁷ See *id.*

¹⁸ *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, H., dissenting), *overruled* by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹⁹ See discussion *infra* Section II.

²⁰ H.J. Res. 43, Pub. L. No. 115-23, 131 Stat. 89 (2017) (nullifying a proposed HHS rule that barred states receiving Title X funding from withholding those funds from family planning service providers for any reason other than their ability or inability to provide Title X services); see Jackie Calmes, *Obama Bars States from Denying Federal Money to Planned Parenthood*, N.Y. TIMES (Dec. 14, 2016), <http://perma.cc/ZE6D-RTVU> (regarding Obama’s attempt to bar states from denying federal funds to Planned Parenthood); discussion *infra* Section III.A.iii.

²¹ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,551 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,608 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); see discussion *infra* Section III.A.i.

²² *But see* Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist., No. 12CECG02608, 2015 WL 2298565, at *1 (Cal. Super. Ct. Apr. 28, 2015) (order granting plaintiffs’ motions in part). Compare OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: A NEW FOUNDATION FOR GREATNESS, FISCAL YEAR 2018 34 (2017) [hereinafter FISCAL YEAR 2018] (extending abstinence education) with OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES

abruptly end scientifically-designed programs that aim to reduce teen pregnancy.²³ These regulatory efforts are several among many attacks that have occurred on the federal level under the Administration. The Administration anticipates more initiatives in the upcoming years, particularly given its strong commitment to filling the federal courts with judges that hold pro-life ideologies.²⁴ This note collectively refers to these government actions as the “Procreation Prescription.”²⁵

The Administration’s efforts to regulate certain behavior are shaped by, what Justice Kennedy has said, “conceptions of right and acceptable behavior, and respect for the traditional family.”²⁶ While considering the dark history that links the regulation of women’s sexuality to the Administration’s efforts to restrain women’s political, social, and economic power, this note argues that the Administration is unconstitutionally relying on the veil of morality to regulate sexuality. To provide context on how sexual regulation is a tool of women’s oppression, Section I offers a brief background on the importance of contraception to women’s equality and, thus, a women’s potential for power. Section II lays the groundwork for how power is defined and maintained—particularly through the regulation of sexuality—and elaborates on the Supreme Court’s jurisprudence surrounding the use of morality in decision-making. Section III discusses the then-and-now of the “Procreation Prescription.” Specifically, Section III shares an overview of the federal government’s recent actions to curtail women’s sexual and reproductive freedom, and contextualizes these actions with the government’s prior reliance on different versions of morality to limit women’s sexual autonomy.

GOVERNMENT, FISCAL YEAR 2017 140 (2016) [hereinafter FISCAL YEAR 2017] (eliminating abstinence education, resulting in a savings of \$75 million in 2017-2028); discussion *infra* Section III.A.ii.

²³ Policy & Research, L.L.C. v. U.S. Dep’t of Health & Human Servs., 313 F. Supp. 3d 62 (D.D.C. 2018); Press Release, U.S. Dept. of Health & Human Servs., HHS Announces Proposed Update to Title X Family Planning Grant Program (May 22, 2018), <http://perma.cc/F8GE-DKFG>; see discussion *infra* Section III.A.iv.

²⁴ See, e.g., Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017, 10:02 AM), <http://perma.cc/T7CQ-XRAR>; see also Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017), *cert. granted, and vacating as moot sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018). The list of attacks on women’s sexual health at the state level is beyond the scope of this note.

²⁵ The Administration’s efforts to define “sex” in a way that excludes gender and minimizes the existence of trans-persons is also included, but is beyond the scope of this note. See, e.g., Molly Olmstead, *The Department of Education Will no Longer Investigate Transgender Student Bathroom Complaints*, SLATE (Feb. 13, 2018, 10:01 AM), <http://perma.cc/6FZP-PQQQ>.

²⁶ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

Morals are undoubtedly “profound and deep convictions . . . [that] determine the course of [people’s] lives.”²⁷ The importance of moral beliefs in society is not at issue before us, however. The issue is whether the State may enforce a private code of conduct on the whole society through the law²⁸—under the veil of morality—when history clearly sheds light on the discriminatory intent of moral regulation.²⁹ Because society’s understanding of acceptable behavior, including gender-based roles, has evolved over time, it is not sustainable to base legislation specifically on moral justification. Over the past fifty years, courts have increasingly condemned the reliance on morality in shaping the law—although outside of reproductive rights—and this reliance cannot be upheld now in the context of women’s equality.³⁰

I. THE IMPORTANCE OF CONTRACEPTION COVERAGE FOR WOMEN’S EQUALITY

“*Women belong in all places where decisions are being made.*”³¹
– Justice Ruth Bader Ginsburg

The discussion of reproductive rights in mainstream culture often omits that these rights do not exist independently for women. What’s also at stake is women’s right to equally participate in society; to access class mobility, economic security, workforce participation, and educational attainment; and to direct their own upbringing.³² For example, women born in the mid-1940s to the early 1950’s received roughly a one-third increase in their total wage gains because of birth control availability alone.³³

The Administration’s recent regulatory efforts to curtail reproductive rights target more single women and low-income families than women overall. To begin with, women earn disproportionately less than their

²⁷ *Id.* at 571.

²⁸ *See id.*; David B. Cruz, “*The Sexual Freedom Cases*”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 377 (2000) (“If person creation is, constitutionally speaking, such a personal matter subject to such widely differing views, then, arguably, it is inappropriate for government to adopt blanket policies attempting to tax people with conceiving and giving birth as a way of deterring certain sexual conduct.”).

²⁹ *See Lawrence*, 539 U.S. at 575.

³⁰ *See id.* at 559; *Romer v. Evans*, 517 U.S. 620, 635 (1996); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 535 n.7 (1973); *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967).

³¹ Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (May 5, 2009), <http://perma.cc/KG7L-DDSN> (emphasis added).

³² *See* Complaint at 6, *ACLU v. Wright*, No. 3:17-cv-05772 (N.D. Cal. Oct. 6, 2017) [hereinafter *ACLU Complaint*].

³³ *Id.* at 8 (citing Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J.: APPLIED ECON. 225 (2012)).

male counterparts.³⁴ Heterosexual women living in two-income households, presumably those in marriages or serious relationships, and middle-high income single women are much more likely to afford birth control without the support from their employers' health plans.³⁵ Birth control costs have been a major obstacle for women and have played an important role in women's birth control decisions.³⁶ Inconsistent contraceptive use accounts for about forty-one percent of unplanned pregnancies.³⁷ As a result, it is poor women that are most at risk of unplanned pregnancies.³⁸ A country where some women, but not others, have access to control their sexual freedom and their reproductive destiny runs counter to established principles of equality.³⁹

In a woman's life, her "twenties" look much different than they did thirty years ago⁴⁰ due to the availability of contraception. A woman's entry into adulthood was traditionally equated with their marital, maternal, and household duties.⁴¹ The option to wait to marry or to have children, along with the expectation or the desire to enter the workforce, has redefined young adulthood for women. This period is now one of self-growth, education, skill acquisition, networking, and exploration of both job and relationship prospects.⁴² This exploration and self-growth pays off handsomely for families and women in their thirties. It leads to more independent and financially secure women who know what to look for in a mate.⁴³ College educated women who experience this growth are the only group in society whose marriage rates have increased, and whose divorce rates

³⁴ *Id.* at 5 (citing FOOD AND DRUG ADMIN. INST. OF MED., CLINICAL PREVENTIVE SERVS. FOR WOMEN: CLOSING THE GAPS 19 (2011)).

³⁵ *See id.* The Administration has reinforced this idea to support the rule: "If a woman loses coverage of her chosen contraceptive method through her employer, she may still have access to such contraceptive coverage through a spouse's (or parent's) plan. Or she may otherwise be willing and able to pay for contraceptive services out of pocket . . ." Brief for the Federal Appellants at 38, *State of California v. Azar*, Nos. 18-15144, 18-15166, 18-15255, 2018 WL 1831303 (N.D. Cal. Apr. 9, 2018).

³⁶ *See* ACLU Complaint, *supra* note 32, at 8 ("[W]hen cost was not an obstacle, more women chose long acting contraception methods such as IUDs . . .").

³⁷ *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 584 (E.D. Pa. 2017) (order granting a preliminary injunction).

³⁸ *See id.* at 568.

³⁹ *See* Robin West, Hobby Lobby, Birth Control, and Our Ongoing Cultural Wars: Pleasure and Desire in the Crossfires, 26 HEALTH MATRIX 67, 88 (2016).

⁴⁰ *See* Naomi R. Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 58 (2009).

⁴¹ *See id.* at 60.

⁴² *Id.*

⁴³ *See id.*

have decreased, since the period before no-fault divorce and birth control availability.⁴⁴

Genuine and equal access to opportunities, to stability, and to independence reckons that society allow for a woman's adaptability to direct her own upbringing; an adaptability that cannot co-exist with permanent consequences for their early behavior—consequences that derail women of what they envision for themselves.⁴⁵ Motherhood implicitly requires spending time with children, ensuring that children are well-educated, preventing abuse, and providing stable housing—luxuries that may not be equally available to all women and, thus, to all children.⁴⁶ Although poverty does not make for bad parenting—life is much harder without the opportunity to invest in oneself first.⁴⁷

Aside from the government's functional arguments to curtail a woman's reproductive rights, a woman's right to own her sexuality is equally important. Birth control provides a woman with a means to control her own pleasure, granting women the full exercise of their fundamental right to bodily autonomy.⁴⁸ While *Lawrence v. Texas* has not been explicitly extended to women seeking pleasure, it would be a denial of equal protection to argue that its holding only extends to sexual beings who are not at risk of an unplanned pregnancy.⁴⁹ Sexual autonomy, as applied to all, is simple: "People have a right to decide for themselves with whom and under what circumstances to have sex."⁵⁰ As long as women's sexuality can be controlled by the law, it will dominate the conversation about a woman's worth. In discussing the impact of sexism on civil rights work in the 1950s, Dorothy "Dottie" Zellner, activist and elder of the Students Nonviolent Coordinating Committee (SNCC), shared that those outside of her organization often trivialized the work of women because society perceived women solely as sexual beings.⁵¹ Zellner remem-

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ Cahn & Carbone, *supra* note 40, at 64.

⁴⁷ *See id.*

⁴⁸ *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

⁴⁹ *See Cruz, supra* note 28 ("[A]ny sensible view of the subject must recognize the centrality of controls over sexual behavior and maternity as determinants of women's place in society and in the public life of their communities--in short, of women's status as equal citizens.") (quoting KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 53 (1993)).

⁵⁰ Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1379 (2013).

⁵¹ Dorothy Zellner, *Activist & Elder*, Student Nonviolent Coordinating Comm., Talk with the Equality and Justice Clinic of the City University of New York School of Law (Aug. 30, 2018).

bered being contacted by journalists that had a prurient interest in interracial sex, which they assumed was centered in the movement.⁵² Instead of asking about SNCC's meaningful actions, journalists often cared more about "who you f---ed."⁵³ "It was demeaning," Zellner recalled, "sexism was endemic, you couldn't move, it was everywhere."⁵⁴ To allow the judiciary and the legislature —majority male systems—to debate women's sexual rights, in a courthouse or on the Senate floor, perpetuates mainstream society's casual and seemingly acceptable valuation of women because of their chastity rather than their accomplishments. Until society views women as having the same sexual rights as men and, thus, the same power as men, continued inequality is inevitable for women.

II. TOOLS OF POWER: SEXUALITY AND MORALITY

*"The fact that men, myself included, are determining how women may choose to manage their reproductive health is a sad irony not lost on the Court."*⁵⁵ – Carlton W. Reeves, District Judge

The power granted by and to "We the People" directly correlates with who is representing the "We" when making legislative decisions.⁵⁶ The ability for women to be at the table, to be a part of the "We," and to "participate equally in the economic and social life of the Nation" is reliant on "their ability to control their reproductive lives."⁵⁷ In "A People's History of the United States," Howard Zinn describes the United States' system of control as "ingenious," stating that: "With a country so rich in natural resources, talent, and labor power the system can afford to distribute just enough wealth to just enough people to limit discontent to a troublesome minority."⁵⁸ In describing the historical trends to seek quality and distributed power, Barack Obama proclaimed: "Each time we painstakingly pull ourselves closer to our founding ideals, that all of us are

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*; For more narratives from women in SNCC, see FAITH S. HOLSAERT ET AL., HANDS ON THE FREEDOM PLOW (2010).

⁵⁵ Jackson Women's Health Org. v. Currier, No. 3:18-CV-171-CWR-FKB, 2018 WL 6072127, at *7 (S.D. Miss. Nov. 20, 2018) (emphasis added) (citation omitted) (ordering permanent injunction of a regulation banning abortion after 15 weeks), *appeal docketed*, No. 18-60686 (5th Cir. Dec. 17, 2018). In a footnote, Judge Reeves highlights that "women report that 'federal courts are 'places of discrimination' . . . where they feel 'invisible' and face 'pain, isolation, and injury' – especially from men cloaked in the robes of justice.'" *Id.* at *7 n.52 (quoting Sec. & Exch. Comm'n v. Adams, No. 3:18-CV-252-CWR-FKB, 2018 WL 2465763, at *2 (S.D. Miss. June 1, 2018)).

⁵⁶ U.S. CONST. pmb1.

⁵⁷ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).

⁵⁸ HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 570-71 (Longman, 1980).

created equal . . . [t]he status quo pushes back [O]ften . . . manufactured by the powerful and the privileged who want to keep us divided and keep us angry and keep us cynical because that helps them maintain the status quo and keep their power and keep their privilege.”⁵⁹ Essentially, the more uniformity in voices at the table, the more confident that those decision-makers can be that their policies will benefit them the most. Allowing women and people of color to have equal access to the decision-making discussion—a more equitable distribution of power—shakes the reassurance of continued comfort for those historically in charge. Michel Foucault, an influential philosopher, historian, author, and social theorist, eloquently describes power not as an institution, structure, or strength that one is naturally endowed with, but rather as a “complex strategical situation in a particular society.”⁶⁰ If power, as Foucault suggests, is only created and maintained through the use of language and discourse, then it ultimately manifests in the law—and in what the law defines as right and wrong.⁶¹ It is the government’s binary system that defines power as “licit and illicit, permitted and forbidden,” and, therefore, the purest form of power resides in the reason of the legislator.⁶²

Although sexuality is not the most easily governed tool, Foucault argues that it has the broadest use.⁶³ The use of sex as a tool, under Foucault’s theory, was an intentional decision—a strategy—to reinforce a desirable hierarchy. The power of sex falls within the binary system; it lies in sex’s “negative relation”: “rejection, exclusion, refusal, blockage, concealment,” withdrawing consent, and the ability to not consent.⁶⁴ As history shows, morality has served as the veil and the vehicle for men to use this sexual power to rule over women.⁶⁵ By convincing society that the morals identified were in public’s best interest, the men in power did not have to show their hand to reveal their underlying desire to retain control. Recently, the Southern District of Mississippi criticized the State legislature for “gaslighting” by professing one rationale, but clearly representing “the old Mississippi” that is “bent on controlling women and minorities.”⁶⁶ As demonstrated throughout Section III-B, the subjective nature

⁵⁹ Transcript of Barack Obama’s Sept. 7 Speech at the University of Illinois, INSIGHT NEWS (Sept. 7, 2018), <https://perma.cc/E358-VRP6>.

⁶⁰ 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 93 (Robert Hurley trans., Vintage Books 1990).

⁶¹ *See id.* at 92.

⁶² *Id.* at 83.

⁶³ *See id.* at 103.

⁶⁴ *Id.* at 83.

⁶⁵ *See discussion infra* Section III.B.

⁶⁶ *Jackson Women’s Health Org. v. Currier*, No. 3:18-CV-171-CWR-FKB, 2018 WL 6072127, at *3 n.22 (S.D. Miss. Nov. 20, 2018), *appeal docketed*, No. 18-60686 (5th Cir. Dec. 17, 2018).

of morality provides those in power with an opportunity to contour morals into a shape that fits their needs.⁶⁷

By the twentieth century, the judiciary became influential in shifting the boundaries of moral legislation. Morality once upheld laws prohibiting obscenity, the prohibition of alcohol, no-fault divorce, and fornication, and then, at a later point, was considered insufficient. “Racial integrity”⁶⁸ was once considered an acceptable legal ground for upholding miscegenation laws because racial purity was, what courts have recently referred to as, a “sincerely held moral conviction.”⁶⁹ A woman’s destiny to be a wife and a mother justified laws that forbade women from certain careers.⁷⁰ Since a multitude of laws were grounded in morality, the Court upheld them because, otherwise, courts would be “too busy” invalidating laws that represent moral choices under the Due Process Clause.⁷¹

The pendulum has shifted, however, towards an acknowledgement that morality is an insufficient legal basis for decision-making. As a result, courts have mostly overturned precedent that relied morality as part of a substantive legal argument.⁷² Some scholars argue that the Due Process Clause intervened in the government’s authority to regulate public morals.⁷³ In her rewrite of *Lawrence v. Texas* from a feminist perspective, Constitutional Law Professor Ruthann Robson highlights sexual autonomy as a right protected by the Due Process Clause.⁷⁴ She argues that where morality coincides with other interests, each of those interests must be able to stand on its own.⁷⁵ Similarly, Louis Henkin, Professor of Law and of International Law and Diplomacy at Columbia University, argues that legislation based on private morality poses three issues. First, due process demands that laws have “an apparent, rational, utilitarian social purpose,” and may not be used “merely to preserve some traditional or prevailing view of private morality.”⁷⁶ Second, legislation cannot be

⁶⁷ See discussion *infra* Section III.B.

⁶⁸ *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

⁶⁹ *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017).

⁷⁰ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

⁷¹ See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

⁷² See *Lawrence*, 539 U.S. at 559; *Romer v. Evans*, 517 U.S. 620, 635 (1996); U.S. Dep’t. of Agric. v. *Moreno*, 413 U.S. 528, 535 n.74 (1973); *Loving*, 388 U.S. at 11 n.11.

⁷³ See Henkin, *supra* note 12, at 405.

⁷⁴ Ruthann Robson, *Lawrence v. Texas*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 490 (Linda L. Berger et al. eds., 2016).

⁷⁵ *Id.*

⁷⁶ Henkin, *supra* note 12, at 402.

founded on “assumptions about character and its corruption,” and, rather, must be reasonably related to a proper public interest purpose.⁷⁷ Last, “morals legislation is a relic in the law of our religious heritage.”⁷⁸ These rationales for forbidding moral legislation are apparent in a movement that increasingly requires the government and the judiciary to be reasonable and rational.⁷⁹ Increasingly, Supreme Court decisions seem to agree with Robson and Henkin’s rationale. While it was once considered acceptable to rely on the condemnation of immoral practices,⁸⁰ the Court in *Lawrence* overturned the government’s right to enforce those ethical standards.⁸¹ Justice Kennedy’s majority decision in *Lawrence* almost explicitly struck down public morality as a legitimate government interest: “Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”⁸²

Justice Kennedy did not deny that *Bowers* made an accurate point: Homosexual conduct had been condemned as immoral for centuries,⁸³ but he added that “[the Court’s] obligation is to define the liberty of all, not to mandate [its] own moral code.”⁸⁴ To this sentiment, Robson proposes an extension of *Pierce v. Society of Sisters*—holding that the fundamental right to liberty precludes the government from standardizing its children.⁸⁵ Thus, living autonomously in the way that *Lawrence*, *Romer*, and *Griswold* intended implies that adults should also be free from the government’s same moral standardization.⁸⁶

The Court’s elaboration on the arbitrary nature of right and wrong is perhaps most clear in *Roe v. Wade*.⁸⁷ Justice Blackmun opens his opinion in *Roe* by quoting *Lochner v. New York*’s “now-vindicated dissent”: “[The Constitution] is made for people of fundamentally differing views,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.* at 407 (theorizing that morals cannot be judged by standards of reasonableness and rationality and, therefore, should not be within the government’s domain to regulate).

⁸⁰ *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁸¹ *See Lawrence*, 539 U.S. at 571, 578.

⁸² *Id.* at 582; *see Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”).

⁸³ *Lawrence*, 539 U.S. at 571 (referring to *Bowers*, 478 U.S. 186).

⁸⁴ *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)); *see Romer v. Evans*, 517 U.S. 620, 645 (1996) (noting that even if an act was morally wrong, enforcing laws against the act involves intruding into the private lives of citizens).

⁸⁵ Robson, *supra* note 74, at 491.

⁸⁶ *See id.*

⁸⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”⁸⁸ The opinion highlights that the criminalization of abortion is a relatively new phenomena and was not traditionally as ostracized as the State of Texas made the public believe.⁸⁹ The common law did not have penalties for early abortions, suggesting that philosophical, theological, and civil and canon law concepts thought that life did not begin until the fetus became ‘formed’ or recognizably human.⁹⁰ Christianity adopted this line of thought, first articulated by Aristotle and reflected in the writings of St. Augustine.⁹¹ In those writings, St. Augustine explicitly states that humans did not have the power to determine the distinction between the possession of life and a soul during fetal development.⁹² This is in stark contrast with the current moral justification for criminalizing abortion: life begins at conception.⁹³ Justice Blackmun exposed when this argument shifted. Since the common belief was not always that life began at inception, early anti-abortion laws—that perhaps *not-so-coincidentally began* once enslaved persons became free—were justified for medical safety.⁹⁴ At the time, abortion procedures were hazardous for women, and the concern could have been genuine.⁹⁵ Upon the modernization of medicine, however, the abortion procedure was relatively safe for women.⁹⁶ The convenience of morality then arose; the argument to maintain anti-abortion laws shifted from the protection of the woman to the protection of the fetal life.⁹⁷ This argument—as the Court points out—has no basis in legislative or social history.⁹⁸ These examples show the capricious nature of moral narratives as grounds for law. At what point—and by whom—was it decided that life began at conception?

⁸⁸ *Id.* at 117 (alteration in original) (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

⁸⁹ *See id.* at 129.

⁹⁰ *Id.* at 133. In a footnote, the Court noted that “[e]arly philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female.” *Id.* at 133 n.22 (citations omitted).

⁹¹ *Id.* (citation omitted) (“Aristotle’s thinking derived from his three-stage theory of life . . . vegetable stage was reached at conception, the animal at ‘animation,’ and the rational soon after live birth. This theory . . . came to be accepted by early Christian thinkers.”).

⁹² These theories were seemingly drawn from the religious text Exodus 21:22. *Id.*

⁹³ *See Roe*, 410 U.S. at 148, where Justice Blackmun highlights that, despite never being taken seriously, pro-life arguments continue to justify anti-abortion laws as “the product of a Victorian social concern to discourage illicit sexual conduct.”

⁹⁴ *Id.* at 134, 148.

⁹⁵ *Id.* at 148-49.

⁹⁶ *Id.* at 149.

⁹⁷ *Id.* at 151.

⁹⁸ *Id.*

When professionals in medicine, philosophy, and theology cannot come to a consensus as to when life begins, the government is “not in a position to speculate as to the answer.”⁹⁹

Morality can serve as the veil for the government’s power moves because moral norms are not static. This flexibility allows those in control to—under Foucault’s theory—create and to recreate the binary system that defines power: redefining the “licit and illicit, permitted and forbidden” behavior as the times demand it.¹⁰⁰ Let’s not forget, however, that discriminatory and oppressive governmental action often wears the ugly mask of morality. Historically, principles of morality, tradition, and “divine ordinance” were used to justify discrimination and criminalization for behavior that was considered unacceptable.¹⁰¹ As time has shown, however, those masks can—and will—be removed, and the unconstitutional efforts to maintain power will be exposed.

III. THE “PROCREATION PRESCRIPTION”

A. *The Procreation Prescription Under the 45th President*

Taken individually, free speech, religious liberty, and budget priorities justify many of the Administration’s actions surrounding reproductive rights.¹⁰² As with all rules, however, these justifications do not exist in a vacuum. Collectively, the actions, along with the surrounding circumstances of the imposed rules, tell a much richer story of the Administration’s intended moral code.¹⁰³ Thus, to fully understand the current Administration’s actions in context of the historical regulation of women’s sexuality, several of the recent actions must be considered together. The “Procreation Prescription” suggests a clear theme that encourages abstinence and ensures women will be held accountable if they do not follow this standard. This section provides an overview of the Administration’s regulatory actions about women’s sexuality from 2016 to 2018: moral exemptions for providing birth control coverage; a significant increase in

⁹⁹ *Roe*, 410 U.S. at 159.

¹⁰⁰ FOUCAULT, *supra* note 60, at 83.

¹⁰¹ *See, e.g., Bradwell v. State of Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

¹⁰² Several of the promulgated rules or regulatory changes align with the goal of the Administration’s May 4, 2017 Executive Order—“Promoting Free Speech and Religious Liberty.” Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

¹⁰³ In *Doe 1 v. Trump*, the Court declared that courts must consider the circumstances surrounding the announcement of a President’s policy when determining whether animus motivated a law. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017). The Court determined that even if the actions alone would be sufficient for a court to conclude a constitutional violation, taken together they are highly suggestive of a constitutional violation. *See id.*

budgetary and program support for abstinence-only sexual education; an increase in limitations on Title X funding; the reduction of teen pregnancy programs; and several reductions in support for global initiatives.

1. Moral Exemption for Providing Birth Control Coverage

The Affordable Care Act (ACA) was passed in 2010 with the intention of providing rights and protections to make healthcare more affordable, fair, and accessible to understand.¹⁰⁴ Immediately following the ACA's passage, the Women's Health Amendment (WHA) to the Act was created to address the gender disparities in out-of-pocket health care costs and to further women's ability to be equal participants in society.¹⁰⁵ The final product required coverage for women's preventive care and screenings in alignment with the guidelines developed by the Health Resources and Services Administration (HRSA) and the Department of Health and Human Services (HHS).¹⁰⁶ The final product included other services, such as screenings for gestational diabetes in pregnant women, counseling for domestic violence, preventative care visits, and providing the "full range" of FDA-approved contraceptive methods.¹⁰⁷ The WHA—upon the review and the consideration of over 600,000 comments on the proposed rules—included its own accommodations and exemptions for houses of worship and religious employers.¹⁰⁸ The Administration extended the accommodations and the exemptions, in a guidance document, to for-profit entities with objections based on religious grounds under the ruling in *Hobby*

¹⁰⁴ *Patient Protection and Affordable Care Act*, HEALTHCARE.GOV, <http://perma.cc/E8TC-R3S7> (last visited Dec. 22, 2018); see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1001, 2713(a), 124 Stat. 119, 130-32 (2010) (codified as amended at 42 U.S.C. § 300gg-13) (2018).

¹⁰⁵ ACLU Complaint, *supra* note 32, at 4, 6.

¹⁰⁶ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,839-40 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

¹⁰⁷ First Amended Complaint for Declaratory and Injunctive Relief at 10, *Washington v. Trump*, No. 2:17-cv-01510 (RBL) (W.D. Wash. Jan. 2, 2018) [hereinafter *Washington v. Trump* Complaint]. Contraceptives include oral contraception, rings, patches, barrier methods, injections, emergency contraception drugs, intrauterine devices (IUDs), and sterilization. *Id.*

¹⁰⁸ Complaint at 14, *Shiraef v. Hargan*, No. 3:17-cv-00817 (N.D. Ind. Oct. 31, 2017) [hereinafter *Shiraef v. Hargan* Complaint] (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013)) (plaintiffs voluntarily dismissed without prejudice); see also Press Release, Ams. United for Separation of Church & State, Declaring Victory For Plaintiffs, Groups Withdraw Lawsuit Against Trump Administration's Harmful, Discriminatory Birth Control Rules (Feb. 2, 2018), <http://perma.cc/2JJ2-3Y6P>.

Lobby.¹⁰⁹ This exemption and accommodation feature allowed “an objecting entity either to sign a one-page form stating its objection to providing contraceptive coverage and to submit that form to the federal government, or to notify the entity’s insurance company.”¹¹⁰ The insurance company would then administer and directly pay for the contraception coverage of the individual employees or students by communicating directly with them, which eliminated the objecting entity as a middle man.¹¹¹ This accommodation process ensured that women could access affordable FDA-approved contraception.¹¹² As a result of these requirements, eligible organizations filed lawsuits throughout 2014 and 2015, claiming that filling out the required one-page form was a “trigger” to women receiving contraceptive coverage and, therefore, violated their rights.¹¹³ The U.S. Supreme Court, consolidating the cases in *Zubik v. Burwell*, directed that the parties “be afforded an opportunity to arrive at an approach” that protected both parties.¹¹⁴ The Departments of Treasury, Labor, and HHS (“the Departments”) sought solutions from the public and received over 54,000 comments, but no feasible solution was found.¹¹⁵ HHS responded with updated guidelines specifying that coverage should also include the instruction of fertility awareness-based methods for women who desire an alternative to contraception.¹¹⁶

On May 4, 2017, the President signed an Executive Order—“Promoting Free Speech and Religious Liberty”—directing agencies to “consider issuing amended regulations, consistent with applicable law, [and] to address conscience-based objections to the preventive-care mandate promulgated under Section 300gg-13(a)(4) of title 42, United States Code.”¹¹⁷ As a result, the Departments issued Interim Final Rules (IFRs),

¹⁰⁹ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,842; *Shiraef v. Hargan* Complaint, *supra* note 108, at 14-15.

¹¹⁰ *Shiraef v. Hargan* Complaint, *supra* note 108, at 15 (citing 26 C.F.R. § 54.9815-2713A(a), (c)–(d) (2018)).

¹¹¹ *Id.* at 15.

¹¹² *See id.* at 14.

¹¹³ *See, e.g., Little Sisters of Poor House v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

¹¹⁴ *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

¹¹⁵ Marcia Coyle, *54,231 Comments Later, A Contraceptive Coverage Dispute Is Still Unresolved*, NAT’L L.J. (Jan. 10, 2017, 2:45 PM), <http://perma.cc/4VNQ-2CX7>.

¹¹⁶ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,844 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

¹¹⁷ Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017).

which were effective as of October 6, 2017.¹¹⁸ The IFRs broadened the entities eligible for an exemption, so that any private university, non-profit, for-profit business, or other non-governmental employer may refuse to cover contraception in its group health insurance plans *without notifying* the government or anyone else.¹¹⁹ One rule also broadened the permissible reasons to seek an exemption, moving beyond “sincerely held religious beliefs” to include “sincerely held moral convictions.”¹²⁰ Further, the accommodation process became optional for objecting entities, which previously required and ensured that employees and students would continue to receive seamless contraceptive coverage.¹²¹ The Departments justify these changes by focusing on the FDA’s coverage of certain types of contraception—such as the IUD and other emergency contraceptives—that go beyond fertilization prevention to potentially prevent embryo implantation.¹²² This action reveals that the Administration’s real issue with birth control is that, even within a marriage, it represents the “willful splintering” of sex from its “moral end or goal”: to reproduce.¹²³ The “pro-life” rules fail to consider, though, that the contraception coverage requirement was associated with a historic decrease in the abortion rate.¹²⁴ After the Departments proposed the IFRs, the State of Pennsylvania successfully received a preliminary injunction in December 2017, preventing the enforcement of the rules, with Judge Beetlestone

¹¹⁸ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,838.

¹¹⁹ See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,799, 47,806-07, 47,817; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,850-51.

¹²⁰ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,844.

¹²¹ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,806; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,856.

¹²² Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,794, 47,894-95; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,840-41. This argument is illogical for two reasons. First, Plan B is currently available over the counter without a prescription, making insurance coverage irrelevant. Second, if the genuine issue was with two types of contraception, the IFR should be narrowly tailored to exclude those types of contraception. Instead, the IFRs allow for objecting organizations to opt out of all types of contraception coverage.

¹²³ See West, *supra* note 39, at 72.

¹²⁴ Washington v. Trump Complaint, *supra* note 107, at 20.

stating that “[i]t is difficult to comprehend a rule that . . . intrudes more into the lives of women.”¹²⁵ The Northern District of California followed and issued a preliminary injunction only six days later, finding that “the 2017 IFRs transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer’s discretion.”¹²⁶

In response to these injunctions, the Administration made several immaterial changes to the 2017 IFRs. The Final Rules were each promulgated on November 15, 2018, and are set to take effect on January 14, 2019.¹²⁷ Namely, “the Final Rules place increased emphasis on the availability of contraceptives at Title X family-planning clinics as an alternative to contraceptives provided by women’s health insurers.”¹²⁸ This is ironic given the Administration’s efforts to decrease Title X funding and services.¹²⁹ As a result, the plaintiffs in *California v. Health and Human Services* filed a second amended complaint and a motion seeking to enjoin the January implementation of the Final Rules.¹³⁰ The motion was granted, but only for the Plaintiff States.¹³¹ The following day, Judge Beetlestone reviewed *Pennsylvania v. Trump* once again; this time, however, the State of Pennsylvania, now joined by New Jersey, filed a motion also seeking to enjoin enforcement of the Final Rules.¹³² Judge Beetlestone

¹²⁵ *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 585-87 (E.D. Pa. 2017), *appeal docketed*, No. 17-1253 (3d Cir. Feb. 15, 2018) (issuing a preliminary injunction because: (1) the plaintiff was likely to succeed on the merits of their claims that (a) the administration did not follow proper procedures, namely the notice and comment period, under the APA when issuing the IFRs, and (b) the IFRs are arbitrary and capricious, as they are contrary to established law; and (2) the plaintiffs were found likely to suffer irreparable injury without a preliminary injunction).

¹²⁶ *California v. Dep’t of Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017), *aff’d in part, vacated in part, remanded sub nom.* *California v. Azar*, 911 F.3d 558 (9th Cir. 2018).

¹²⁷ *California v. U.S. Dep’t of Health & Human Servs.*, No. 17-cv-05783-HSG, 2019 WL 178555, at *8 (N.D. Cal. Jan. 13, 2019). To review the Final Rules, see Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

¹²⁸ *California v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 178555, at *8.

¹²⁹ *See infra* Section II.A.iii.

¹³⁰ *California v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 178555, at *9.

¹³¹ *Id.* at *6, *25. Plaintiffs are the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, and Washington, the Commonwealth of Virginia, and the District of Columbia. *Id.* at *9.

¹³² *Pennsylvania v. Trump*, No. 17-4540, 2019 WL 190324, at *6 (E.D. Pa. Jan. 14, 2019) (issuing a nationwide preliminary injunction).

found that enjoining the implementation of the Final Rules nationwide was the only way to provide the Plaintiff States with “complete relief” and to protect its citizens from the harm of losing their contraceptive coverage.¹³³

Now that the accommodation process—which once required insurance companies to cover contraception expenses—is optional, employers that opt out will effectively make a statement that they will only employ women that comply with their moral codes. In turn, this change introduces privacy issues for women during the job search process. Specifically, it requires women—who rely on contraception coverage—to expose their view of sexual liberty in the interview by asking if the company covers contraception. This shift reemphasizes that the workplace is inherently male-defined; it reinforces that a woman is inseparable from her role as a potential or an actual mother, while fatherhood is not considered in assessing a man’s suitability as an employee in the workplace.¹³⁴

2. Abstinence-only Education

Another major action that must be considered, alongside the Moral and Religious Exemption Final Rules, is the Administration’s shift towards, and increased budget for, abstinence-only sex education. The President’s budget in 2018 outlined an increase of \$271 million in funding for *abstinence-only* education through 2022; this budget was significantly reduced from \$204 million in 2008 to \$10 million in 2016.¹³⁵ Abstinence-only education is partly funded through the Title V State Abstinence Education Grant Program (SAE). The SAE program’s purpose is to address teen pregnancy rates among adolescents who are most likely to bear children out of wedlock.¹³⁶ HHS outlines the program’s design, “as defined by Section 510(b) of the Social Security Act,” as having the “exclusive purpose” of teaching adolescents: the benefits of “abstaining from sexual activity,” that “abstinence from sexual activity outside marriage” is “the *expected standard*,” “that a mutually faithful monogamous relationship in

¹³³ *Id.* at *32-33 (explaining that, among other things, limiting an injunction to Pennsylvania and New Jersey was insufficient because the injunction would not reach citizens who work or attend schools across state borders).

¹³⁴ Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 162 (1996).

¹³⁵ FISCAL YEAR 2018, *supra* note 22; *compare* FISCAL YEAR 2017, *supra* note 22 with OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, DEP’T OF HEALTH & HUMAN SERVS. 72 (2007).

¹³⁶ *See* FAMILY & YOUTH SERVS. BUREAU, NAT’L CLEARINGHOUSE ON FAMILIES & YOUTH, FACT SHEET: STATE ABSTINENCE EDUCATION GRANT PROGRAM 1 (2017) [hereinafter STATE ABSTINENCE EDUCATION GRANT PROGRAM], <http://perma.cc/NV5L-QPFG>.

the context of marriage is the *expected standard* of human sexual activity,” that sexual activity outside of wedlock is “likely to have harmful psychological and physical effects,” and “how to reject sexual advances.”¹³⁷ It should be noted, however, that the legislature amended the statute—effective on March 23, 2018—to remove the aforementioned language and to change “abstinence education” to “education on sexual risk avoidance” that is “medically accurate and complete,” “age-appropriate,” and “culturally appropriate.”¹³⁸

Abstinence-only education encourages gender stereotypes, contains questionable scientific assertions, and ultimately compromises people’s ability to exercise their legal sexual rights.¹³⁹ It perpetuates the government’s historical use of marriage as a means to control women, and sets a foundation for the government’s regulation of sexuality, denying women ownership of their bodily autonomy.

In 2015, California was the first state legislature to declare that abstinence-only education is unlawful on the grounds of medical inaccuracy and bias.¹⁴⁰ In response to the legislature’s implementation, parents, on behalf of their children, challenged Clovis Unified School District’s biased and inaccurate curriculum.¹⁴¹ The California Superior Court issued an order granting the plaintiffs’ request for attorney fees.¹⁴² The court cited evidence that indicates the type of hetero-normative and morally-charged materials that public schools use in their classrooms, including videos that: compared “a woman who is not a virgin to a dirty shoe,” stated “boys and men are physically unable to stop themselves once they become sexually excited,” and claimed that “something bad will happen” if they engaged in sex outside of marriage.¹⁴³ A deposed teacher attested to reinforcing gender stereotypes by presenting a “timeline of sexual arousal which asserted that men become aroused at French kissing, but that women become aroused later, at ‘heavy petting.’”¹⁴⁴

¹³⁷ *Id.* (emphasis added) (citing Social Security Act, 42 U.S.C. § 710(b)(2) (2017) (amended 2018)).

¹³⁸ *See* Social Security Act, 42 U.S.C. § 710(b)(2) (2018).

¹³⁹ *See, e.g.,* *Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608, 2015 WL 2298565, at *1 (Cal. Super. Ct. Apr. 28, 2015) (“[P]arents . . . sued over [school’s] failure to provide comprehensive, medically accurate, objective and bias-free sexual health and HIV/AIDS prevention education . . .”).

¹⁴⁰ Required Comprehensive Sexual Health Education and HIV Prevention Education, CAL. EDUC. CODE art. II §§ 51933(b), (d)(4) (West 2018).

¹⁴¹ *Am. Acad. of Pediatrics*, 2015 WL 2298565, at *1.

¹⁴² *Id.* (granting, in part, the plaintiffs’/petitioners’ Motion for Attorneys’ Fees and granting the plaintiffs’/petitioners’ Motion to Strike Memorandum of Costs).

¹⁴³ *Id.* at *14.

¹⁴⁴ *Id.*

In addition to imposing a moral standard, abstinence-only education is not an evidence-informed practice. A 2007 congressionally-mandated study of federal abstinence programs found that abstinence-only education does not decrease the rate of sexual activity among teens.¹⁴⁵ In fact, states whose sexual education programs emphasize chastity and abstinence for teenagers have higher teen pregnancy rates, more “shot gun” marriages, and lower average ages of marriage and first births.¹⁴⁶ These effects are associated both with lower income and higher divorce rates.¹⁴⁷ On the other hand, students that participate in medically-accurate, comprehensive sex education programs are more likely to delay the initiation of sex and to use condoms when they do engage in sex.¹⁴⁸ Governmental actions that counter research and studies are more likely to be considered “overbroad generalizations” that are not substantially related to their important objectives under intermediate scrutiny in constitutional law.¹⁴⁹

3. Limitations on Title X Funding (Defunding Planned Parenthood)

To essentially defund Planned Parenthood, HHS has proposed a rule that statutorily prohibits giving Title X funding to any family planning program where abortion is offered as an option.¹⁵⁰ HHS proposed this rule in response to a “Joint Resolution Providing for Congressional Disapproval” that nullified a 2017 resolution barring states from withholding Title X from family planning service providers for any reason other than their ability or inability to deliver Title X services.¹⁵¹ Among other elements, a key feature of the rule includes:

¹⁴⁵ Complaint at 7-8, *Amer. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608 (Cal. Super. Ct. Aug. 21, 2012) [hereinafter *American Academy Complaint*] (citing CHRISTOPHER TRENHOLM ET AL., MATHEMATICA POLICY RESEARCH, INC., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS (2007) (submitted to the U.S. Department of Health & Human Services)).

¹⁴⁶ See Cahn & Carbone, *supra* note 40, at 61.

¹⁴⁷ *Id.*

¹⁴⁸ See *American Academy Complaint*, *supra* note 145, at 2 (citing Douglas B. Kirby, *The Impact of Abstinence and Comprehensive Sex and STD/HIV Education Programs on Adolescent Sexual Behavior*, 5 SEXUALITY RES. & SOC. POL’Y 18, 24 (2008)).

¹⁴⁹ See, e.g., *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 212 (D.D.C. 2017) (stating that the government’s reasons for excluding transgender service members from the military seemed hypothetical and extremely overbroad).

¹⁵⁰ Compliance With Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502, 25,502 (proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59); Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces Proposed Update to Title X Family Planning Grant Program (May 22, 2018), <http://perma.cc/F8GE-DKFG>.

¹⁵¹ Joint Resolution Providing for Congressional Disapproval, Pub. L. No. 115-23, 131 Stat. 89 (2017) (disapproving Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients, 91 Fed. Reg. 91,852, 91,852 (Dec. 16, 2016)).

“Protecting Title X health providers so that they are not required to choose between the health of their patients and their own consciences, by eliminating the current requirement that they provide abortion counseling and referral. The proposal would not bar non-directive counseling on abortion, but would prohibit referral for abortion as a method of family planning.”¹⁵²

The rule also seeks to “protect” women and children who have been victims of sexual assault by “[p]roviding counseling to minors on how to resist attempts to coerce them into sexual activities.”¹⁵³ This change disregards the Administration’s previous efforts to decouple funding from the political climate or religious beliefs.

4. The Reduction of Teen Pregnancy Prevention Programs

The Administration has also attempted to nullify \$213.6 million in funding for 80 institutions across the country that have scientifically-designed programs aimed at preventing teen pregnancy.¹⁵⁴ The Teen Pregnancy Prevention Program (TPP)¹⁵⁵ was enacted through the Consolidated Appropriations Act of 2010 and was reauthorized in the Consolidated Appropriations Act of 2018.¹⁵⁶ Under the program, \$101,000,000 was authorized for “competitive contracts and grants to public and private entities to fund medically accurate and age appropriate programs that reduce teen pregnancy.”¹⁵⁷ The 2015 award cycle issued grants for a five-year project cycle that was set to end in June of 2020.¹⁵⁸ In July of 2017, however, program recipients received an annual notice

¹⁵² Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces Proposed Update to Title X Family Planning Grant Program (May 22, 2018), <http://perma.cc/F8GE-DKFG> (discussing the key elements of Compliance With Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502).

¹⁵³ *Id.*

¹⁵⁴ Jane Kay, *Trump Administration Suddenly Pulls Plug on Teen Pregnancy Programs*, REVEAL (July 14, 2017), <http://perma.cc/2G54-DCQ3>. Programs that lost their funding include: the Choctaw Nation’s efforts to combat teen pregnancy, Johns Hopkins University, the University of Texas’ guidance for youth in foster care, the Chicago Department of Public Health’s counseling and testing for sexually transmitted infections, the University of Southern California’s workshops for teaching parents how to talk to kids about delaying sexual activity, and the Children’s Hospital of Los Angeles. *Id.*

¹⁵⁵ For more information about the Teen Pregnancy Prevention Program, see Office of Adolescent Health, *About the Teen Pregnancy Prevention Program*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://perma.cc/Q4FB-4CQ2> (last visited Dec. 8, 2017).

¹⁵⁶ Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018); *Policy & Research, LLC v. U.S. Dep’t of Health & Human Servs.*, 313 F. Supp. 3d 62, 69 (D.D.C. 2018).

¹⁵⁷ Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, 386 (2018); *Policy & Research, LLC*, 313 F. Supp. 3d at 69.

¹⁵⁸ *Policy & Research, LLC*, 313 F. Supp. 3d at 70.

of grant award from HHS indicating that their project period would end on June 30, 2018.¹⁵⁹ According to an HHS Press Release entitled “Teen Pregnancy Prevention Program Facts: False Claims vs. The Facts,” HHS proclaimed that the program’s funding ended because “rigorous evaluation studies” found that TPP was not working, “cannot be the reason for the drop in teen birth rates,” and was a “waste of taxpayer money.”¹⁶⁰ In a suit brought by the Public Citizen Litigation Group, the District Court for District of Columbia found that HHS’s early termination of the TPP’s funding was in violation of the Administrative Procedure Act (APA).¹⁶¹

5. Additional Efforts

Other administrative actions have flown under the radar for the average media consumer. Additional initiatives include removing U.S. funding from the United Nations Populations Fund, which supports reproductive health, family planning, HIV/AIDS prevention, and infant and maternal health across the globe.¹⁶² The Administration also re-expanded the “gag rule,” a Reagan-era policy that denies U.S. funding or aid to organizations that counsel on or make referrals for abortion, both domestically—for Title X receiving organizations—and abroad.¹⁶³ The Administration’s unprecedented expansion of the rule, also known as the “Mexico City Policy,” “banned US family planning funds from going to foreign non-governmental organi[z]ations (NGOs) that provide abortion services, counselling, or referrals, or advocate for liberali[z]ation of their country’s abortion laws—even if they use non-US government funds for these activities.”¹⁶⁴ Additionally, HHS created a new “Conscience and

¹⁵⁹ *Id.*; Kay, *supra* note 154.

¹⁶⁰ Press Release, U.S. Dep’t of Health & Human Servs., Teen Pregnancy Prevention Program Facts: False Claims vs. The Facts (Aug. 28, 2017), <http://perma.cc/8H87-WZD2>.

¹⁶¹ *Policy & Research, LLC*, 313 F. Supp. 3d at 83.

¹⁶² *US Ends Funding for United Nations Population Fund*, AL JAZEERA (Apr. 3, 2017), <http://perma.cc/3JG4-RV3U>.

¹⁶³ The Mexico City Policy, 82 Fed. Reg. 8,495 (Jan. 25, 2017); Compliance With Statutory Integrity Requirement, 84 Fed. Reg. 7714,7758, 7758-59 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59) (“A Title X project may not perform, promote, refer to, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion.”); Ann M. Starrs, *The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid*, 389 LANCET 485, 485 (2017) (stating that the rule’s stated purpose, to “reduce abortion” is actually inapposite to its results).

¹⁶⁴ Starrs, *supra* note 163. “By expanding the gag rule to the full scope of US global health aid, hundreds more national and local NGOs will be forced to choose between drastic funding cuts (if they decline to sign the gag rule) or denying their patients the information and services that are their right (if they sign, and can no longer provide or discuss abortion). Millions of women living in low-resource settings may now be unable to obtain the care they need, when they need it.” *Id.* at 486.

Religious Freedom Division” in its Office for Civil Rights (OCR).¹⁶⁵ This addition expands and creates a mechanism to enforce moral, conscience, and religious protections for healthcare providers that are opposed to particular services;¹⁶⁶ this will severely impact and undermine women’s bodily autonomy.

The aforementioned attacks are among many others that have occurred on a federal level, and more are anticipated in the upcoming years.¹⁶⁷ Developing a collective understanding of the Administration’s efforts to impose the Procreation Prescription must be done in the context of the Prescription’s historical development, as described in the next section.

B. *Historical Oppression Through Sexuality*

1. The Power of Consent

Until the late 1700s, it was commonly believed that women were not fully realized humans, and that women did not possess a different and complete biological make-up.¹⁶⁸ Female genitalia were considered to be the same as male genitalia except internal rather than external,¹⁶⁹ justifying the argument that women were inferior to men. When anatomists first illustrated a distinctly female skeleton, they proved that men and women had basic, unique, and arguably equal biological structures.¹⁷⁰ This discovery uprooted the reliance on divine order to justify the patriarchal family structure that had existed for millennia.¹⁷¹ When the biological argument that women were inferior to men no longer sufficed, consent became the basis to maintain unequal human relationships.¹⁷² Indications of power over women’s sexuality were clear in the consistent messaging that men were unable to control themselves around women, and, thus, the onus

¹⁶⁵ Press Release, U.S. Dept. of Health & Human Servs., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), <http://perma.cc/5GER-ZPN3>.

¹⁶⁶ *See id.*; *see generally* Alison Kodjak, *Trump Admin Will Protect Health Workers Who Refuse Services On Religious Grounds*, NPR (Jan. 18, 2018, 10:53 AM), <https://perma.cc/M6AS-293W> (discussing the creation of the Division of Conscience and Religious Freedom to protect health care workers who refuse to take part in abortion or other procedures based on moral or religious objections).

¹⁶⁷ *See, e.g.*, Berman, *supra* note 24; *see also* Garza v. Hargan, 874 F.3d 735 (D.C. Cir. Oct. 24, 2017), *vacated as moot sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018). The list of attacks on women’s sexual health at the state level is beyond the capacity of this note.

¹⁶⁸ *See* LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 69 (1998).

¹⁶⁹ *Id.* at 69-70.

¹⁷⁰ *See id.* at 69.

¹⁷¹ *Id.* at 69-70.

¹⁷² *Id.* at 70.

was on women to resist.¹⁷³ Many social policies in the 20th century were based on women's power, or lack of power, to say no to men, until the movement for women's sexual liberation escalated in the 1920s.¹⁷⁴ At that point, women's power to say yes quickly lost them their previous power to say no,¹⁷⁵ illustrating Foucault's "negative relation theory."¹⁷⁶ As a result, the movement prompted an uptick of divorces where men claimed that their wives were not interested enough in sex or were not exciting enough;¹⁷⁷ a shift that exemplifies the power granted by sexual freedom.

In a society built around the needs of white men and with no accommodations for pregnancy in the workplace, contraception bans in the 1950s successfully ensured that women could only engage in the public sphere if they had restraint.¹⁷⁸ For instance, entering the workforce required women to "both abstain[] from engaging in sexual activity with men *and* . . . [to] successfully fend off any unwanted sexual advances from male colleagues;"¹⁷⁹ a message that the Administration echoes currently.¹⁸⁰

2. Sexuality as a Means to Maintain White Supremacy

Women's sexuality was used to maintain not only the power of men over women, but also the power of white over non-white. At a time when property owners were almost exclusively white, customs and laws forbidding white women from having sex with non-white men protected control of property and family wealth through marital acquisition and inheritance.¹⁸¹

To further the goal of maintaining white supremacy, the regulation of reproductive rights shifted back and forth, depending on the purpose that it served. In 1803, when Great Britain outlawed slavery, and America

¹⁷³ See HIRSHMAN & LARSON, *supra* note 168, at 122-23.

¹⁷⁴ See *id.* at 165.

¹⁷⁵ *Id.*

¹⁷⁶ FOUCAULT, *supra* note 60, at 83.

¹⁷⁷ HIRSHMAN & LARSON, *supra* note 168, at 165.

¹⁷⁸ Laura Rosenbury, *Griswold v. Connecticut*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* 105 (Linda L. Berger et al. eds., 2016).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ See, e.g., Tal Kopan, *Kellyanne Conway: If Women, Men Had Equal Strength, 'Rape Would Not Exist'*, CNN: POLITICS (Aug. 31, 2016, 6:13 AM), <http://perma.cc/2L5V-PB3S> ("If [women] were physiologically -- not mentally, emotionally, professionally -- equal to men . . . as strong as men, rape would not exist . . . You would be able to defend yourself and fight him off."); see also STATE ABSTINENCE EDUCATION GRANT PROGRAM, *supra* note 136 (citing the Social Security Act, 42 U.S.C. § 710(b)(2) (2017) (amended 2018) (stating that a goal of the program is teaching young people ways to reject sexual advances)).

¹⁸¹ HIRSHMAN & LARSON, *supra* note 168, at 70.

and France both refused “to join in blockading the coast of Africa,” Britain used war ships to create an 8,000 foot long barrier “to prevent slave ships from leaving Africa with their terrible cargo.”¹⁸² Because of this effort, there was a “vast shortage of new slaves coming to America,” so “slave owners were forced to start slave breeding farms.”¹⁸³ This horrific practice involved “the strongest and biggest buck” being paired with a virgin, fertile girl in a “crude hay-filled pen” to be “bred” while others looked on.¹⁸⁴ At this time, a blind eye was turned away from the “traditional” morals that are touted today because property owners—those running the labor camps of enslaved people—believed reproduction was necessary to create a workforce when manpower was limited.¹⁸⁵

Years later, in the late 1800s, the government was concerned about low-income and immigrant populations “outbreed[ing] Anglo-Saxons.”¹⁸⁶ As a result, the acceptance and encouragement of oral contraceptives was either morally sound or discredited based on the demographics. For instance, some South African leaders claimed that birth control was being peddled in black communities for the purpose of “black genocide,”¹⁸⁷ while historians credit the same fears for fueling the birth control bans in the United States.¹⁸⁸ The criminalization of contraception—based upon moral-based grounds—therefore played a crucial role in preventing “race suicide” among middle and upper class whites.¹⁸⁹ This is also apparent in the timing of the criminalization of abortion—an accepted practice in most states until after the Civil War.¹⁹⁰

Anti-miscegenation laws relied on morality to maintain white supremacy until *Loving v. Virginia* outlawed them in 1967.¹⁹¹ Stemming

¹⁸² Lest We Forget Museum of Slavery, Traveling Exhibit at the City University of New York School of Law (Mar. 2018) [hereinafter Traveling Exhibit], <http://perma.cc/2NQJ-YES2> (providing information alongside preserved artifacts and drawings).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 345, 348 (2007) (“The [government’s] rage involved fears about reproduction: that . . . ‘the ignorant, lawless, idle and dangerous overflow of all other Countries’—would outbreed Anglo-Saxons . . . [and] that promiscuous immigrant cultures would erode masculinity and femininity in middle-class America.”) (quoting Tammany politician George W. Curtis).

¹⁸⁷ Megan Gibson, *The Long, Strange History of Birth Control*, TIME (Feb. 2, 2015), <http://perma.cc/C28T-3J6S>.

¹⁸⁸ See Rosenbury, *supra* note 178, at 105.

¹⁸⁹ Francoeur, *supra* note 186, at 349; see Gibson, *supra* note 187.

¹⁹⁰ See *Roe v. Wade*, 410 U.S. 113, 138-39 (1973).

¹⁹¹ *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

from the Racial Integrity Act of 1924 and arising from the “extreme nativism which followed the end of the First World War,”¹⁹² such laws forbade the marriage of white persons to non-white persons to “preserve the racial integrity of its citizens,” and to prevent “the obliteration of racial pride” and “the corruption of blood.”¹⁹³ In *Naim v. Naim*, the Supreme Court of Virginia upheld Virginia’s anti-miscegenation statute because marriage had “more to do with the morals and civilization of a people than any other institution.”¹⁹⁴ The Court’s perspective in *Naim* must be viewed in the context of *Skinner v. Oklahoma*: “Marriage and procreation are fundamental to the very existence and survival of the race [Power] [i]n evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”¹⁹⁵ Thus, the laws in place for a significant portion of the 20th century relied on morality as an explicit “endorsement of the doctrine of White Supremacy”—as Justice Warren stated in declaring the anti-miscegenation statutes as unconstitutional.¹⁹⁶

While white men were not allowed to marry women of color, they were allowed to target them as release for sexual aggression. Laws that protected girls from sexually predatory men were generally not enforced against African-American and Mexican-American girls.¹⁹⁷ Since the group in power considered these girls to be “morally inferior,” they were proper sexual targets for men.¹⁹⁸ This concept allowed an “acceptable” space in the social order for, what naturalists considered to be, a predisposed biology of men as sexual predators;¹⁹⁹ in addition, this space for perversion was accommodated during the “breeding” of enslaved people.²⁰⁰

The government’s use of sexuality and motherhood, as a means for control and furtherance of white mainstream culture, is further exhibited by the historical and the current trend of removing black and brown children from their families and their mothers’ homes. “Jane Crow Laws,” the crisis in black communities where children are taken away from their

¹⁹² *Id.* at 6.

¹⁹³ *Naim v. Naim*, 197 Va. 80, 90 (1955), *overruled by Loving*, 388 U.S. 1.

¹⁹⁴ *Naim*, 197 Va. at 83 (citing *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

¹⁹⁵ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹⁹⁶ *Loving*, 388 U.S. at 7 (citing *Naim*, 197 Va. at 90).

¹⁹⁷ HIRSHMAN & LARSON, *supra* note 168, at 129-30.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* A fundamental sexual predation was believed to exist in men’s biology, and the social order should create room for it. Therefore, legislators in the south declared young women of color as having “loose morals” and reaching sexual maturity earlier, and thus were not considered to deserve the same moral respect or protections of white women. *Id.*

²⁰⁰ Traveling Exhibit, *supra* note 182.

biological mothers at disproportionate rates,²⁰¹ date back to the slave era, when those in charge used the sale of family members to separate owners as a strategy to oppress and to disempower enslaved people. With the enactment of the Indian Child Welfare Act, Congress acknowledged the impact of child removal: “[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”²⁰² Native American children were removed from their parents and placed with white families at unprecedented rates, a practice that was instrumental in whitewashing and attempting to eradicate Native American culture.²⁰³ The Indian Child Welfare Act has played a significant role in the protection of Native American mothers and children, but is now at risk of being dismantled.²⁰⁴

The removal of children from their homes has dramatically increased in recent years and has seemingly punished mothers who are relying on few resources.²⁰⁵ These practices have been—and remain—in place because it is easier to control a person that has been both physically and emotionally burned. Children have served as a tool for evoking fear and for dictating obedience to the sought after behavior. This is seen with the Administration’s ramped up immigration policy, separating thousands of children from their parents at the border and placing them in shelters.²⁰⁶ Former Attorney General recently justified this practice on biblical

²⁰¹ See Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

²⁰² Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, 3069 (codified at 25 U.S.C. § 1901(3) (2018)); see also B. J. Jones, *The Indian Child Welfare Act: In Search of A Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 449 (1997) (citations omitted) (“The federal legacy of the treatment of Indian children is a sad and sordid one and laid the groundwork for the situation in 1978 that caused Congress to pass ICWA.”).

²⁰³ Jones, *supra* note 202, at 449-50 (citation omitted) (“The beginning of the destruction of Indian families lies in the assimilation period of the late 1800s and early 1900s when the federal government was attempting to assimilate Indian families into the non-Indian mainstream.”).

²⁰⁴ Portions of the Indian Child Welfare Act were declared unconstitutional by the Northern District of Texas Court in October 2018. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 545-46 (N.D. Tex. 2018).

²⁰⁵ See Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 458 (1997) (“[T]he number of children in foster care has increased two-thirds in the last ten years . . .”).

²⁰⁶ See Mica Rosenberg, *Exclusive: Nearly 1,800 Families Separated at U.S.-Mexico Border in 17 Months Through February*, REUTERS (June 8, 2018, 4:40 PM), <http://perma.cc/B9LX-K9CK> (estimating that between October 2016 and February 2018 approximately 1,800 families were separated at the U.S.-Mexico border).

grounds.²⁰⁷ These laws, policies, and practices further strip women of color of their autonomy and their power as a familial unit. In addition to being told when and how to have sex and to procreate, women are prescribed to comply with an “expected standard”²⁰⁸ of parenthood and behavior. Otherwise, they are further punished for what has historically been referred to as “moral inferiority.”²⁰⁹

Although the Thirteenth Amendment outlawed slavery, the Reconstruction Amendments collectively failed to remove the vestiges of slavery as intended. Regulating sexuality, reproduction, and motherhood was, and still is, a primary tool for white supremacists to retain power in the American caste system.

3. Marriage and the Social Order

Given that HHS is currently touting the concept of marriage, it is unnecessary to review history to know that the government dictates “a mutually faithful monogamous relationship in the context of marriage [as] the *expected standard* of human sexual activity.”²¹⁰ For centuries, though, placing a value on a woman’s chastity has been the primary means of encouraging the cornerstone of society: marriage. The prospect of unrestrained sexuality was a threat because it removed the need for marriage, a key instrument in maintaining social order.²¹¹ The use of marriage, in creating alliances—amongst kingdoms and within castes—and in retaining wealth and influence, was at the heart of how the world operated.²¹² In more modern times, removing the need for marriage has been concerning because of the large role it plays in capitalism and, more generally, the public good.²¹³ Husbands were, and still are, expected to conform to the social and legal obligations of their wives.²¹⁴ Specifically, men were, and still are, expected to provide financial support to their families, which

²⁰⁷ Julia Jacobs, *Sessions’s Use of Bible Passage to Defend Immigration Policy Draws Fire*, N.Y. TIMES (June 15, 2018), <http://perma.cc/Y8TW-DERW> (“Many were concerned that Mr. Sessions’s chosen chapter, Romans 13, had been commonly used to defend slavery and oppose the American Revolution.”).

²⁰⁸ Social Security Act, 42 U.S.C. § 710(b)(2) (2017) (amended 2018).

²⁰⁹ See HIRSHMAN & LARSON, *supra* note 168, at 41.

²¹⁰ STATE ABSTINENCE EDUCATION GRANT PROGRAM, *supra* note 136 (citing Social Security Act, 42 U.S.C. § 710(b)(2) (2017) (amended 2018)).

²¹¹ See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 42 (2012).

²¹² See FOUCAULT, *supra* note 60, at 106 (“It will be granted no doubt that relations of sex gave rise, in every society, to a development of alliance: a system of marriage, of fixation and development of kinship ties, of transmission of names and possessions.”).

²¹³ Murray, *supra* note 211, at 30.

²¹⁴ *Id.*

requires them to be steadily employed and to avoid criminality.²¹⁵ Marriage and procreative sex equate to a more secure labor force, a concept that Former House Speaker Paul Ryan fully embraced.²¹⁶

Marriage was also the primary means to strip women of their power, ensuring that men remained at the top of the social hierarchy. Once married, a woman could no longer exercise legal rights on her own behalf, removing her right to enter into contracts, to own property in her name, or to direct her career path.²¹⁷ In New England, the Puritans often accused an unmarried women who owned property of witchcraft and, as a result, she was executed.²¹⁸ Today—as acknowledged in *Obergefell v. Hodges*—the government continues to incentivize marriage with numerous rights and benefits, including tax benefits, immigration rights, medical decision-making authority, and property rights.²¹⁹ The government’s incentivization of marriage highlights its underlying desire to maintain the social order.

4. Criminalization of Sex

Additionally, criminalization played a large role in discouraging behavior that countered the sanctity of marriage. Seduction laws, for instance, criminalized “seduc[ing] and ha[ving] illicit connection with an unmarried female of previous chaste character [under] a promise of marriage.”²²⁰ By relying on the creation and reinforcement of gender norms, the government sold the idea that the “chaste woman” was too weak to resist sex when pitted against powerful and determined men.²²¹ A defense to the seduction crime perpetuated this idea: to claim that the victim was not of “previously chaste character,” which some states retained until the

²¹⁵ *Id.*

²¹⁶ In his weekly briefing, Former House Speaker Paul Ryan told press that, to conquer current economic challenges in the U.S., “we need to have higher birth rates in this country” to increase the working population. *House Speaker Weekly Briefing*, (C-SPAN television broadcast Dec. 14, 2017), <https://www.c-span.org/video/?438578-1/speaker-ryan-representative-farenthold-made-right-decision-retire>.

²¹⁷ HIRSHMAN & LARSON, *supra* note 168, at 71.

²¹⁸ *See id.* at 68.

²¹⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (“[T]hroughout our history [the government] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.”).

²²⁰ Murray, *supra* note 211, at 5 (internal quotations omitted) (citing N.Y. Penal Code § 330 (Albany, Weed, Parsons & Co., 1865)).

²²¹ *See id.* at 20.

1990s.²²² Although Rape Shield Laws forbid this defense in the courtroom,²²³ vestiges of this sentiment are still seen today with the media's regular use of character attacks to counter rape and assault accusations.²²⁴

Sexuality was also criminalized through fornication laws that punished women for having consensual sex outside of marriage.²²⁵ In contrast with seduction laws, fornication laws at least recognized a women's sexual agency.²²⁶ The enforcement of fornication laws was arbitrary, but these laws, similar to "anti-sodomy" laws, sent a "symbolic message of disdain" to those engaging in behavior that was considered to be immoral.²²⁷ Many of these laws, with the intention to mandate a traditional moral code and to criminalize non-marital and non-procreative sex, remained in existence until the 1970s.²²⁸

5. Women as Moral Decision-Makers

The lack of deference given to women as moral decision makers, as is clear from the opinions of Justices throughout time, served as the foundation of seduction and fornication statutes.²²⁹ When the Supreme Court first stated that a woman may be "unmarried and not affected by any of the duties, the complications, and the incapacities arising out of the married state," they made sure to clarify this statement as an exception to the general rule.²³⁰ Even in opinions that could be presented as seemingly furthering women's rights—or, at the very least, protecting them—the Justices regularly undermine the rights of women and speak of them as agents of offspring production. In *Muller v. Oregon*, the opinion clarified that the legislative protection—limiting women to a ten hour work day—"was not designed to further women's economic interests, power or role

²²² Olivia Horton, Note, *Mind the Gap: Theorizing Asymmetry Between Parental Involvement and Statutory Rape Laws*, 28 YALE J.L. & FEMINISM 171, 175 (2016) (citing CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 11-12 (2004)).

²²³ See FED. R. EVID. 412.

²²⁴ See, e.g., Clare Foran, *Donald Trump's Cynical Exploitation of Rape Culture*, ATLANTIC (Oct. 13, 2016), <http://perma.cc/ZJ9D-UCAD>.

²²⁵ Murray, *supra* note 211, at 20.

²²⁶ See *id.* (explaining that seduction statutes viewed women as victims to men's flattery).

²²⁷ See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1468 (2004).

²²⁸ See *id.* at 1470. While "laws criminalizing seduction on promise of marriage, adultery, and fornication" were repealed in 1974, homosexual sex remained criminalized. *Id.*

²²⁹ See generally *Bradwell v. Illinois*, 83 U.S. 130 (1873); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

²³⁰ *Bradwell*, 83 U.S. at 141-42 ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.").

in the workplace.”²³¹ Instead, the laws were argued as protections of women’s reproductive organs and maternal functions,²³² dissipating the idea of the woman as a whole.²³³ The law views *women-as-independent-and-moral-decision-makers* secondary to *women-as-potential-or-actual-mothers*.²³⁴

The precedent underlying this notion could have faded into the background of history, but, instead, a circuit court upheld this idea as recently as 1989.²³⁵ In *U.A.W. v. Johnson Controls*, the Seventh Circuit upheld a company’s policy that pregnant women or women “capable of bearing children” cannot be placed in jobs with lead exposure.²³⁶ The policy defined “women . . . capable of bearing children” as “all women except [for] those whose inability to bear children [was] medically documented.”²³⁷ One petitioner in the case chose to be sterilized to avoid losing her job.²³⁸ In overturning this decision, the Supreme Court finally—in 1991—acknowledged that focusing on women as a reproductive beings is a problem and strips them of equal employment opportunity.²³⁹

The rationale used to limit women’s reproductive rights has focused on women as incapable of making moral decisions for themselves. Rather than trust a woman to decide what is best for her and her future, courts prefer to strip women of that burden to avoid increasing her anxiety.²⁴⁰

6. Purity and Pregnancy

Once the laws and the structures that shunned and criminalized women who engaged in sex outside of marriage no longer had power, the focus shifted to deterring pregnancy. The societal view of contraception use has shifted back and forth since the modern inception of the condom in 1861 and the FDA’s approval of the birth control pill (“the pill”) in 1960.²⁴¹ By 1965, almost 6.5 million women in America were on the

²³¹ Reilly, *supra* note 134, at 164.

²³² *Id.* (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

²³³ *Id.* at 164-65 (“The whole woman disappeared, replaced by her function as family maker and child bearer/rearer.”).

²³⁴ *See id.* at 158.

²³⁵ *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *rev’d*, 499 U.S. 187 (1991).

²³⁶ *Id.* at 898-99.

²³⁷ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991).

²³⁸ *Id.*

²³⁹ *See id.* at 211 (“Concern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.”).

²⁴⁰ *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 801 (1986) (White, J., dissenting) (stating that receiving certain information about the abortion procedure would increase a woman’s anxiety and influence her ability to make a decision).

²⁴¹ Gibson, *supra* note 187.

pill.²⁴² The shifts in the pill's acceptance correlate strikingly to the shifts in power that it bestowed, and to whom it bestowed that power. In that same year, *Griswold v. Connecticut* framed the pill's first acceptance as "the right of marital privacy."²⁴³ While this was a step in the right direction, *Griswold* does not declare the rights of all women, but, instead, highlights women's increased accessibility for the men they belonged to. By holding that contraception was allowed in the context of marriage—in an era when marital rape was not criminalized—*Griswold* stripped many women of what little power they had to say no to sex with their husbands.²⁴⁴ While on birth control, women were ripe for the taking at any point in the month—including ovulation—without the repercussion of pregnancy. Defining the marital home as a constitutionally protected "private sphere" was problematic for women in 1965. Privacy in the home—in an era that largely promoted the home as the woman's workplace and domain—served a role in the deregulation of spousal sexual violence.²⁴⁵ Only voluntary motherhood shifted sexual power to women, allowing women to control the timing and the manner of sexual relations with their husbands.²⁴⁶

Although approximately ninety-five percent of people will have sex prior to marriage,²⁴⁷ many politicians continue to advocate for abstinence-only education and for "marriage as the only acceptable realm for sexual expression."²⁴⁸ The "traditional family" agenda invokes fear and perpetuates the shame already associated with women's sexuality.²⁴⁹ Judith Levine, author of *Harmful to Minors, The Perils of Protecting Children from Sex*, argues that these views "plac[e] girls on a pedestal of purity" which is "not the same as respect and only perpetuates the division of the female population into virgins and whores."²⁵⁰ The message sent to girls today is that they should not feel sexual desire. If they do, and act on their sexual desire, then they must deal with the consequences.²⁵¹ This is true

²⁴² *Id.*

²⁴³ *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965).

²⁴⁴ See HIRSHMAN & LARSON, *supra* note 168, at 139.

²⁴⁵ See Rubinfeld, *supra* note 50, at 1389-91, 1395.

²⁴⁶ *Id.*

²⁴⁷ Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 73 (2007).

²⁴⁸ Northcraft, *supra* note 1, at 494.

²⁴⁹ See *id.* at 494-95 (citing LEVINE, *supra* note 1, at 107).

²⁵⁰ *Id.* at 510 (citing LEVINE, *supra* note 1, at 171).

²⁵¹ *Id.* at 512 (citing JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 262-63 (2d ed. 1997)).

even though the sexual education that they have access to—and the rules that are dictated to them—“left out basic, crucial information.”²⁵²

The first movement insisting that sexual desire was as fundamental to a woman’s character as it was to a man’s character arose in the early twentieth century.²⁵³ In alignment with the movement, propaganda attacked what was clearly a fear of women’s control over men.²⁵⁴ The “non-pure woman,” one that was not a criminal, was depicted as immoral, dangerous, and worthy of shunning.²⁵⁵ The era prompted images of women using sex to manipulate men, including the concept of gold-diggers and the seductress that lured good married men into sexual affairs.²⁵⁶ Women’s unleashed sexuality was feared because it was powerful, and a threat to the social order. The contradiction in expectations for men and women rings loud and clear in the current decade. As recently as 2017, a man with a reputation for sexually assaulting minors was heralded as a lead candidate in a Senate race,²⁵⁷ yet powerful and successful women are regularly thrust from their careers after men expose privately taken nude photos of them.²⁵⁸

²⁵² See *id.* These outdated messages continue to be reinforced through government funded abstinence-only education programs. See, e.g., *Amer. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, No. 12CECG02608, 2015 WL 2298565, at *1 (Cal. Super. Ct. Apr. 28, 2015) (stating that the initiated litigation motivated a California school district to alter its sex education curriculum); American Academy Complaint, *supra* note 145, at 7-8 (citing TRENHOLM ET AL., *supra* note 145); see also *supra* Section II.A.ii.

²⁵³ HIRSHMAN & LARSON, *supra* note 168, at 157.

²⁵⁴ See *id.* at 165.

²⁵⁵ See *id.* (describing the developed stereotypes of women who engaged in their newfound sexual freedom).

²⁵⁶ *Id.*

²⁵⁷ The candidate described lost to Senator-elect Doug Jones in Alabama only by a margin of 1.5%, with 70% of white voters voting for the alleged sexual predator. Alexander Burns & Jonathan Martin, *Once a Long Shot, Democrat Doug Jones Wins Alabama Senate Race*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/politics/alabama-senate-race-winner.html>; Summer Meza, *Who Voted for Doug Jones? White Women Backed Roy Moore*, NEWSWEEK (Dec. 13, 2017, 12:08 AM), <https://www.newsweek.com/doug-jones-roy-moore-alabama-senate-race-special-election-results-demographics-746366>.

²⁵⁸ See, e.g., *Judge Lori Douglas’s Offer to Retire Early Accepted by Judicial Panel*, CBC NEWS (Nov. 24, 2014, 10:02 AM), <http://perma.cc/9XDZ-H52A> (outlining the story of a female Judge that was forced to retire after her ex-husband leaked explicit photos of her); Ben Chapman, *Ex-Queens Principal Says Boyfriend, School Leaders Spread Her Nude Pics to Ruin Her Career*, DAILY NEWS (Dec. 16, 2017, 9:35 AM), <http://perma.cc/NF9D-P4AZ> (detailing how a successful female principal lost her position because her ex-husband planted her nude photos on her computer, then was further shamed by her employer and the newspaper). For a more robust discussion on the need for regulation to prevent the disempowerment of women through image based sex abuse, see Annie Seifullah Goldsmith, *A Reasonably Comparable Evil: Extending Title VII to Protect Victims of Revenge Porn*, 22 CUNY L. Rev. (forthcoming 2019).

This narrative—focused on purity and procreative sex—delegates that a woman’s worth is valued by her chastity.²⁵⁹ The historical focus on women’s sexual restraint as a basis for legislation only reinforces the amount of power that their sexuality harnesses.

CONCLUSION

In light of current and historical circumstances, the Procreation Prescription dictates to girls and young women that, in some *ideal* version of morality, sex is wrong, marriage is right, and they—as women—are responsible to resist against men’s impulses. The Procreation Prescription ensures that those girls follow this *expected standard* later in their careers by working for organizations that align with the messages they received in school. As a result, those organizations will further reinforce that message by denying them contraception and ensuring that they are *held accountable* for owning their sexuality. The suppression of organizations, programs, and health providers that offer the full spectrum of information on sexuality furthers the current Administration’s imposed moral regulation. The Administration justifies all of their actions as pro-life and pro-religion, but history, context, and the lack of support for the lives resulting from unplanned pregnancies tells us otherwise.²⁶⁰ It is not a coincidence that the states currently trying to challenge *Roe* and to restrict women’s right to choose have the most “alarming infant and maternal mortality rates,” and were the last to ratify the 19th Amendment, dragging their feet to give women the right to vote.²⁶¹ Women’s obedience to the morals that the Procreation Prescription imposes on them pays off handsomely for the men with the power to make these legislative decisions. The men in charge avoid regulatory burdens, receive tax cuts, and—most importantly—have less competition for their power because their female

²⁵⁹ See Northcraft, *supra* note 1 (citing LEVINE, *supra* note 1, at 171).

²⁶⁰ The Procreation Prescription, in furtherance of the Administration’s arbitrary decision-making, incentivizes organizations to oppose the women’s health services on moral grounds. Under the Final Rules, any company could say that providing these additional health services is against their “morals.” Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). The exemption is available to business owners “based on or determined by [their] individual preference”—Webster’s exact definition of “arbitrary.” *Arbitrary*, MERRIAM-WEBSTER, <http://perma.cc/743Q-YC4H> (last visited Dec. 10, 2018). This behavior is encouraged; the Final Rule states that by exempting organizations with moral objections to contraceptives, they will experience a reduced regulatory burden. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,602.

²⁶¹ See, e.g., Jackson Women’s Health Org. v. Currier, No. 3:18-CV-171-CWR-FKB, 2018 WL 6072127, at *3 n.22 (S.D. Miss. Nov. 20, 2018), *appeal docketed*, No. 18-60686 (5th Cir. Dec. 17, 2018).

counterparts are unable to control their reproductive and economic destinies. A line must be drawn. It should be drawn before employed women must sacrifice the right to exercise their own moral beliefs, while their employers enjoy the fullest exercise of that same right.²⁶² It should be drawn before only women of certain classes or only women who reside in certain states have access to all available information and sexual health options.

As shown throughout history, the only consistent aspect about morality is that it changes. It changes from decade-to-decade, from group-to-group, and from person-to-person. It even changes within an individual from year-to-year.²⁶³ In a country allegedly founded to support the exercise “of fundamentally differing views,”²⁶⁴ the supposed morals of an administration or an organization cannot be relied upon to govern one’s access to their own rights. And, if courts allow moral arguments—as a moral minimum—shouldn’t pregnancy, like sex, be wanted and welcomed?²⁶⁵ Justice Breyer, in his 2018 dissent in *NIFLA v. Becerra*, commented on the law’s role on reproductive rights: “We have previously noted that we cannot try to adjudicate who is right and who is wrong in this moral debate . . . [b]ut we can do our best to interpret American constitutional law so that it applies fairly within a Nation whose citizens strongly hold these different points of view.”²⁶⁶

The desire to maintain a power structure that prioritizes the rights of men—under the veil of morality—dictates that marriage and motherhood remain destinies that women must fulfill.²⁶⁷ Jurisprudence reinforced these destinies and decided that these destinies outweigh the imposed burden on and stolen autonomy of the women whose decisions are being made on their behalf by men. Although *Planned Parenthood v. Casey* was limited in the extent of women’s autonomy it granted, it remains a pioneer

²⁶² Reply Brief for Petitioners at 14, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354).

²⁶³ For example, in 2011 only 30 percent of White Evangelical Protestants felt that an elected official can behave ethically, even if they have committed immoral acts in their personal life. Robert P. Jones & Daniel Cox, *Clinton Maintains Double-Digit Lead Over Trump*, PRRI (Oct. 16, 2016), <http://perma.cc/Z4PV-TVC6>. In 2016, that number rose to 72 percent. *Id.*

²⁶⁴ *Roe v. Wade*, 410 U.S. 113, 117 (1973) (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

²⁶⁵ West, *supra* note 39, at 89.

²⁶⁶ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2388 (2018) (Breyer, J., dissenting).

²⁶⁷ See *Bradwell v. State of Illinois*, 83 U.S. 130, 141–42 (1873) (“The paramount destiny and mission of woman [sic] are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”).

in acknowledging women's right to be their own decision-makers.²⁶⁸ The Justices in *Casey* explicitly state that one may only exercise their moral rights to the extent that "they are not a substantial obstacle to the woman's exercise of the right to choose."²⁶⁹ The Administration's recent actions carefully allow the choice to maintain in their approach towards reproductive health and motherhood, but remove "any vestige[] of power and respect" from the decision-making.²⁷⁰ The delicate dance is not accidental, as the Administration's past and present efforts to regulate the sexual choices of women make it clear that it is "more important to withdraw [women's] power than to overturn the right."²⁷¹

*"I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from off our necks, and permit us to stand upright on th[e] ground"*²⁷²
– Sarah M. Geimke

²⁶⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

²⁶⁹ *Id.*

²⁷⁰ Reilly, *supra* note 134, at 187.

²⁷¹ *Id.* at 187-88.

²⁷² SARAH M. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES, AND THE CONDITION OF WOMAN 10 (BOSTON, ISAAC KNAPP 1838).