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SURROGACY AS RESISTANCE? THE MISPLACED FOCUS ON CHOICE IN THE SURROGACY AND ABORTION FUNDING CONTEXTS


Reviewed by Nancy Ehrenreich*

I. INTRODUCTION

In recent years, feminist legal theorists have been divided on the question of how the law should deal with so-called “surrogacy” contracts, with some endorsing enforcement according to the same rules applied to any other type of contract and others favoring regulation or prohibition of these particular types of agreements. The split in feminist opinion on this issue echoes a broader split in liberal feminist theory, between advocates of sex-blind laws and proponents of sex-specific treatment in certain situations.¹ In the contract parenthood context,² as in many others, the debate over equal versus

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¹ See Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118, 1142-63 (1986) (describing and critiquing that split in the context of the debate over pregnancy disability leave). The pros and cons of each of these approaches have been much rehearsed in the literature, and some analysts have concluded that the debate between them is not only irresolvable but unproductive as well. Id.; see also Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEX. L. REV. 387, 398-99 (1984).

² I prefer to use the term contract parenthood, rather than surrogate motherhood, to refer to any contractual arrangement by which a woman agrees to gestate and bear a child, conceived either with her egg or with another woman’s egg, and then to give that child to its biological father.
special treatment (also called formal and substantive equality, or the "sameness" and "difference" approaches) continues to be framed by the central problem identified by liberal theory—the question of autonomy, or choice.\(^3\)

A recent book about contract parenthood, Carmel Shalev's *Birth Power: The Case for Surrogacy*,\(^4\) is one of the latest examples of the persistence of choice-based frameworks in feminist analyses. While offering an original and sophisticated rendition of the equal treatment position, the book never escapes the unsatisfying terms of the liberal debate.

The purpose of this essay is not only to assess the specific position Shalev presents in her book, but also to illustrate the negative repercussions that the liberal framework she uses can have for women in other contexts. To do so, I will compare Shalev's approach to that used by the Supreme Court in its recent abortion "gag" rules decision, *Rust v. Sullivan*, which upheld federal regulations barring physicians at public clinics from providing their patients with abortion counseling or referrals.\(^5\) I will argue that the foundational assumptions of Shalev's book—a belief in the public/private dichotomy and in the primacy of choice as the determinant of when government should refuse to intervene in the "private" sphere—are the same assumptions that supported the Court's conclusion in *Rust* that low-income women's reproductive choices are not unduly burdened by the Title X regulations.

It is important to note, however, that my point in drawing this comparison is *not* to suggest that the ideological frameworks employed by these respective writers *themselves* produced the writers' positions on the particular issues they address. Rather, I wish to argue that those frameworks are problematic precisely because they seem to account for results when in fact they do not. Employing a dangerous and apologetic vision of the relationship between law and society, choice-based theories hide and legitimate oppressive exercises of social power. By creating the impression that legal issues can be resolved without making difficult decisions about the structure of social life, they divert attention from the substantive discus-
sions that should generate social policy, and legitimate the arid and abstract discourse with which contemporary legal doctrine deals with many social issues. They thereby obscure the unspoken (and perhaps unconscious) factual assumptions and value choices that generate judicial outcomes. Once one succeeds in piercing the veil of choice ideology, it becomes far easier to identify the other factors contributing to legal decisions. Therefore, in addition to critiquing the analytics of Shalev’s book and the Rust opinion, I will also draw attention to the subtle assumptions about women, especially low-income women and women of color, that are obscured by the discourse of choice that frames both works.

In Part II, I briefly outline the two formal and substantive equality positions and identify their strengths and weaknesses. In Part III, I use Shalev’s book to illustrate how those approaches are in irresolvable conflict. In short, I argue that, while her defense of surrogacy can be criticized as unresponsive to important substantive equality concerns, she nevertheless raises problems with the invalidation of parenthood contracts that cannot be easily dismissed. The flaw in her analysis is not, therefore, in her preference for one set of concerns over another but rather in her initial conceptualization of the problem. By accepting the traditional liberal dichotomy between a “free” private world and a regulatable public one, she consigns herself to an analysis that is driven by the question of whether individuals’ choices are freely made. I propose an alternative approach, one that recognizes that such questions merely obscure exercises of power, and calls instead for an explicit consideration of the structuring of, and distribution of resources within, the reproductive realm.

In Part IV, I illustrate how formal equality reasoning of the type employed by Shalev in her analysis of contract parenthood was used to justify disastrous results for women in Rust v. Sullivan. I argue that Rust is not only another illustration of how the concept of “choice” is indeterminate, but also that it demonstrates, as does Shalev’s analysis, the extent to which the entire notion of choice is incoherent. In short, both Shalev and the Rust Court employ a framework that ignores the extent to which private choices are themselves constructed and constrained by governmental power. Rust illustrates how continuing to frame our arguments around the question of choice leaves us open to uses of those same frameworks in ways that clearly harm women.
II. THE LIBERAL FRAMEWORK

The split among liberal legal feminists between the formal equal-
ity or "equal treatment" position, and the substantive equality or
"special treatment" position, is so widely known that it requires only
brief review. Formal equality theorists argue that the legal system
should treat the sexes absolutely identically, and that any distinction
drawn on the basis of gender is therefore highly suspect. Substan-
tive equality theorists, on the other hand, are willing to shape the
law to accommodate women's specific and current needs, even if
that accommodation constitutes a deviation from a rigorous sex-
blind approach.

The perceived pros and cons of these two approaches are similar
in the various contexts in which they arise. The formal equality
branch is said to be best at eradicating negative stereotypes of
women. Because its foundational principle is that there are no
meaningful differences between the sexes, judicial opinions and
other analyses using it are thought to undermine the association of
women with a constellation of devalued traits—weakness, passivity,
emotionality, etc., for white, privileged women and (though less
often noted) strength, aggressiveness, promiscuity, etc., for women
of color and perhaps poor women as well. In contrast, the substan-
tive equality branch, because it advocates differential treatment of
women, can (according to this argument) have the unfortunate side
effect of reinforcing existing assumptions that females are inherently
different from males and that they cannot protect their own
interests.

On the other hand, the formal equality approach is thought to
perpetuate existing inequities, while substantive equality specifically
redresses them. Unlike sex-blind theories, the substantive equality
approach recognizes that existing inequalities are merely perpetu-
at ed by identical treatment—that, to paraphrase Anatole France's
famous statement, forbidding both the poor and the rich to sleep
under bridges disproportionately affects the poor and thus perpetu-

7. See, e.g., ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980).
8. See generally Finley, supra note 1 (workplace context); Olsen, supra note 1 (statutory rape context).
9. France is reported to have said: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread." THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS 149 (Robert Andrews ed., 1989).
ates their subordination. Special treatment policies thus are said to offer the advantage of protecting women from the material and social inequalities of the present, while equal treatment policies offer the advantage of eliminating negative stereotypes so that (so the theory goes) women will be treated better in the future.

In general, both branches of liberal legal feminism tend to emphasize the need to protect women's autonomy, and both evoke traditional images of the proper relationship of the state to society. The notion of individual autonomy, or choice, is of course the primary construct that liberal legal theory uses to define when government is justified in interfering with individual freedom. A consistent theme of liberal ideology is the notion that governmental intervention in the private sphere is justified only when necessary to protect individuals from being overpowered by other private actors. People can be punished for rapes only when their acts of sexual intercourse are nonconsensual, employers are responsible for sexual harassment only if it is "unwelcome," injuries for which people assume the risks are not compensable unless the risk was involuntarily assumed, etc. Freely chosen behaviors are part of the "private" sphere and cannot be interfered with by government; coerced decisions exceed private rights and therefore can, and should, be regulated in the public sphere. Thus, when liberal feminists argue over whether government should intervene in the private sphere to regulate contract parenthood activities, they implicitly accept the notion that there is such a sphere and that government should regulate it only when necessary to protect individuals from the coercive power of others.

Such a brief review of the two positions already suggests the irresolvability of the tension between them. The liberal debate is, ultimately, extremely unsatisfying, precisely because both sides raise important and legitimate concerns yet both also pose serious and seemingly intractable problems. That is why some theorists have ar-

10. The substantive equality position actually encompasses a fairly wide variety of stances. Moreover, many people do not fit neatly into either the equal treatment or the special treatment category. See Finley, supra note 1, at 1143-44 n.111. Thus, not all authors who might be considered special treatment advocates employ the assumptions that I describe here.


argued that we need to escape the dichotomy between choice and coercion and recharacterize the issues at stake in the pursuit of women's equality. Only by conceiving of equality as something other than freedom from governmental bias and constraint can we press beyond the sameness/difference debate.

III. CONTRACT PARENTHOOD AND CHOICE

A. Shalev's Argument for a "Social" Definition of Parenthood

1. Avoiding Harmful Stereotypes

Shalev's defense of contract parenthood illustrates the cat-chasing-its-tail quality of the liberal debate. According to Shalev, invalidating surrogacy agreements "denies the notion of female reproductive agency and reinforces the traditional perception of women as imprisoned in the subjectivity of their wombs." To treat these contracts as coerced, she argues, merely reinforces negative stereotypes of women and thus ultimately undermines their autonomy. While this is a classic equal treatment position, Shalev articulates it in a particularly original way. Rather than merely trotting out the familiar old negative adjectives—passive, weak, indecisive—she presents a much more subtle and provocative picture of the ideological messages that she claims are undermined by enforcing parenthood contracts.

For Shalev, the acceptance of contract parenthood would move society to the last stage of a progression from a "biological" definition of parenthood, based on blood connection, to a "social" definition, based on individual intent. The latter definition is preferable, she argues, for it would free women from the "double standard of sexual-reproductive conduct" that has been the bedrock of gender inequality. That double standard—under which women's sexual behavior is more constrained than men's in order to assure the paternity of their offspring, and women rather than men are assigned the rearing of children because they are thought to be instinctively

13. See, e.g., Olsen, supra note 1, at 430.
14. Many of the ideas presented in this Part were first developed in Nancy S. Ehrenreich, Wombs for Hire, Tikkun May/June 1991, at 71.
15. Shalev, supra note 4, at 121; see also, Marjorie M. Schultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 354-55 (making similar argument).
16. Shalev, supra note 4, at 12.
17. Id. at 15.
suited to the task— is no longer necessary once kinship is defined as unrelated to genetic connection. Such a redefinition not only eliminates the need to control women's sexual activity in order to ascertain paternity but also undermines the reduction of women to their biology—the perception of them as overemotional while pregnant and instinctively maternal afterwards—by reducing the importance of the physical connection between parent and child. Moreover, a legal definition of kinship, in which parental relations are produced by entry into binding contracts, would further undermine harmful stereotypes of women by treating them as independent and responsible moral agents.

Shalev develops her argument through successive chapters on adoption, artificial insemination, contract parenthood, and in vitro fertilization. She claims that the doctrinal frameworks used to regulate each of these areas illustrate contrasting uses of either biological or social definitions of kinship, and that the trend in law is towards adopting the latter. Thus, in the adoption context, she says, the traditional severing of any tie to the biological family upon adoption reflects the importance of biology in defining parent/child relationships. Since biological definitions can envision only one set of parents, in adoption the biological approach necessarily requires the original parents to be completely eliminated before the new ones can be installed. Shalev thus celebrates the move towards open adoption as a move towards legal definitions of kinship.

In contrast to adoption, Shalev argues, artificial insemination is and has been approached by the law under a contract model, "giving binding effect to the primary intentions of the involved parties." Thus, a sperm donor, for example, has no parental obligations to the offspring produced with his sperm while the husband of the woman who is inseminated is usually treated as the legal father. In the in vitro insemination context, Shalev asserts, the absence of a contractual approach has resulted in significant harm to

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18. Id. at 35.
19. Id. at 121.
20. Id. at 11. "It seems to me that the refusal to acknowledge the legal validity of surrogacy agreements implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive activity." Id.
21. Id.
22. Id. at 76-77.
23. Id. at 58.
24. Id. at 77-81.
The many abuses that physicians have committed in the course of developing that technology, such as misinforming women of the risks and discomfort associated with the procedure and generally failing to afford them the protections usually given research subjects, stem from dehumanizing attitudes towards women as mere containers—attitudes that could be eliminated, Shalev believes, by use of an intent-based, contractual approach. Thus, in each context she considers, Shalev concludes that an intent-based definition of kinship would produce salutary results for women. The conclusion she draws from this review is that surrogacy contracts should be enforced, for such enforcement would reinforce the trend towards the use of intent-based definitions.

While Shalev's version of the formal equality argument is one of the most creative and provocative that I have encountered, it is not without its shortcomings. I will focus here solely on her analysis of contract parenthood. The principal problem with Shalev's contention that parenthood agreements should be enforced is her failure to recognize that numerous aspects of such agreements actually resonate with, rather than challenge, patriarchal patterns of thought. For example, enforcing such agreements does not necessarily create an image of women as rational, responsible decision makers rather than instinctive mothers. Given the discourse surrounding this issue, which treats infertility as a human tragedy of immense proportions and child rearing as an inviolable right, enforcing such contracts would seem to suggest that it is absolutely essential for women to become mothers, by whatever means possible. In fact, to the extent that contract parenthood arrangements suggest that women feel an urge to mother even those children whom they do not biologically produce, those arrangements arguably expand the notion that women are instinctive mothers rather than eliminate it.

More importantly, the messages that contract parenthood conveys do not eliminate the biological aspect of the paternal kin connection either. As Barbara Katz Rothman has pointed out, the intent-based definition of parenthood that results from contractual approaches to this issue produces a scheme in which it is the woman's relationship to the biological father of the child that determines whether she is the mother. Thus, if the ovum donor is a stranger to the father and

25. Id. at 105.
26. Id. at 105-12.
the gestator is his wife, in whom the embryo has been implanted, then the gestator is the mother. But if the ovum donor is the wife and the gestator a stranger, as in a recent California case involving a white father and an African-American birth mother, then the ovum donor is the mother. In surrogacy, the biological definition of motherhood is rejected, but the biological definition of fatherhood is left very much intact.

In addition, Shalev's notion that women are devalued and disadvantaged as a result of being thought to be instinctive mothers ignores the disparity between images of white, privileged women, on the one hand, and low-income women and women of color, on the other. She therefore overestimates, perhaps, the positive effect of eliminating that stereotype. While Shalev recognizes that not all women are instinctive mothers in the eyes of the law, her discussion of differential legal treatment is limited to the impact of law on unmarried women. She persuasively contends, for example, that in adoption law unmarried birth mothers are treated as not having any maternal instinct at all. Thus, they are criticized if they consider keeping their children, for it is assumed that the children will be better off elsewhere. Shalev argues that unmarried women who seek artificial insemination are similarly seen as selfish, rather than as understandably desiring to become mothers.

This subtle cultural analysis would have been enriched by attention to the ways in which low-income women and women of color are similarly devalued as mothers and contrasted negatively with white, privileged women. Perhaps such a broader exploration of

28. In that case, the trial court held that the wife of the father, an Asian-American woman who had neither a genetic nor a gestational connection to the fetus, was nevertheless its mother. Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 1991), review granted and opinion superseded by 822 P.2d 1317 (Cal. 1992); see also Janice Raymond, International Traffic in Reproduction, Ms. Mag. May/June 1991, at 31. The case, which in effect pitted two women of color against each other, illustrates, perhaps, the preeminent importance of class factors in the contract parenthood context.


30. Shalev, supra note 4, at 41.

31. Id. at 67.

32. The societal tendency to characterize women as either pure and virtuous or evil and dangerous, as either madonna or whore, is widely recognized. What receives less attention, however, is the way in which who gets put into which category is affected by race and class. For some recent pieces that do explore these connections, see Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419.
the different images of various groups of women in society would have led Shalev to recognize that, for devalued women, subordination comes not from being seen as motherly, but rather from the opposite. Such a focus might have, in turn, allowed Shalev to notice that the discourse surrounding contract parenthood, like that surrounding adoption and artificial insemination, contains both a "bad girl" and a "good girl." In the surrogacy context, the class differences between the "surrogate"—even the term implies the illegitimacy of her claims—and the woman obtaining her services serve to undermine the former's position and create sympathy for the latter.

Thus, for example, Judge Sorkow, the trial judge in In re Baby M, characterized Dr. Stern's unwillingness to risk her health to bear a child as "understandable," but criticized Mary Beth Whitehead for calling her husband's alcohol abuse "his problem." Whitehead was supposed to act as a selfless nurturer to a grown

1436-44 (1991) (women of color); Martha L. Fineman, Images of Mothers in Poverty Discourses, 1991 DUKE L.J. 274 (single and poor women). Since the majority of women of color are low-income, and three-fifths of children of color are born to single mothers, Myron E. Wegman, Annual Summary of Vital Statistics—1988, 84 PEDIATRICS 943, 944-45 (1989), these categories of disparagement overlap and interrelate. Moreover, poverty, singleness, and minority ethnic status tend to be equated in popular perceptions, even when the facts do not support such impressions: "[I]n the public's mind, and despite the overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother." Fineman, supra, at 287-88 (footnote omitted). For general discussions of the intersection of race and gender, see Crenshaw, supra note 29; Harris, supra note 29.

33. See Crenshaw, supra note 29, at 155-58.

34. The class differences exist because, at $25,000 or more per effort, only the relatively wealthy can afford to pay others to birth babies for them, and primarily the relatively impecunious agree to do so for pay. See Susan Buttenweiser, Reprotech and the Law, Ms. Mag., May/June 1991, at 46 (at least forty percent of all "surrogate" mothers are on welfare). Note that, under parenthood contracts, the biological definition of motherhood is in a sense eliminated for the gestational mother, who is defined not as the mother at all. But I would suggest that this does not mean that surrogacy undermines existing categories. Rather, it merely affirms the difference between "good" and "bad" mothers. It is because of society's longstanding unwillingness to recognize the legitimacy of single and low-income women's claims to motherhood, as evidenced not only in the patterns Shalev identifies but also in the general pathologizing of poor families (especially those of color), that many find it so easy to assume that a contract birth mother should be able to give up her child without any difficulty. These women have never been seen as "true" mothers to begin with. See Fineman, supra note 32, at 281-83 (linking the characterization of single mothers as "bad" with the public perception that the poor are undeserving); Jewell H. Gresham, The Politics of Family in America, Nation, July 24/31, 1989, at 116, 117-19 (criticizing the Moynihan Report and the CBS Special Report, The Vanishing Black Family—Crisis in Black America, for their negative treatment of the black family).

man, but Stern did not need to sacrifice her own well-being even for a child.

Thus, while Shalev raises some important questions about whether women will be seen as independent, rational decision makers if their parenthood contracts are not enforced, the universalizing focus of her analysis leaves her assertions open to debate. Nevertheless, her argument about validating women’s agency and competence is ultimately more original and convincing than her argument about preserving their “freedom” to enter into such contracts, addressed below.

2. Protecting Women’s Autonomy

This section will draw on the insights of substantive equality proponents to critique Shalev’s position. I will argue that Shalev’s contention that enforcing parenthood contracts would also preserve women’s free choice fails to consider adequately both the material and the attitudinal context in which the decision to bear a child for money is made.

While she acknowledges that the economic exploitation of “surrogates” is a possibility that should be taken into account, Shalev never takes this concern seriously. Rather, she argues that contractual conception (as contrasted with the pregnancies that result in adoptions) is “deliberate,” and she proceeds from the premise that “in modern society . . . a person may generally acquire social, economic, or political position as an independent agent by means of free agreement or contract with others.”

Yet the inadequacy of the child-care system in this country, combined with the fact that women earn only two-thirds of what men earn for comparable work, means that women in marriages are almost inevitably the ones to care for the children. Such confinement to the home severely limits their ability to bring in extra in-

36. Shalev, supra note 4, at 151.
37. In fact, Shalev suggests that those concerned with such exploitation are themselves creating a madonna and whore dichotomy, with the “surrogate” mother as the madonna and the wife of the biological father, an accomplice in his act of exploitation, the whore. Id.
38. Id. at 96.
39. Id. at 18. To be fair to Shalev, I should mention that this quote was part of a larger discussion of Sir Henry Maine’s theory that relations in society have progressed from “status” to “contract.” While she seems herself to be endorsing the notion that in modern society status is achieved rather than ascribed, it is possible that she intended this sentence only to be describing Maine’s thought.
40. See infra note 126 and accompanying text (comparing full-time male and female earnings).
come and therefore makes parenthood contracts quite appealing—not inherently, but rather as one of the few jobs that do not require leaving home. For single women, the attractions of surrogacy are even greater: Who, in the strained economic situation so typical of single mothers, would deny the appeal of holding two jobs at once?

Noting that "there is concern that a free market scheme would relegate underprivileged women to a new oppressed and undignified occupation, like prostitutes and wet nurses," Shalev nevertheless dismissively concludes that "it should be obvious that the idea of a free market in reproduction does not attempt as such to rectify existing social inequities."\(^{41}\) What she fails to realize is that her proposal not only does not rectify gender and class inequality, but actually exacerbates it. By endorsing the incorporation of a formerly noncontractual area of human endeavor, reproduction,\(^{42}\) into the world of market transactions, she expands the realm in which women's low economic status could negatively affect their choices.\(^{43}\)

Shalev not only fails to appreciate the importance of economic constraints on women's choices, but also gives insufficient attention to the ideological forces that probably affect surrogacy decisions. While she does recognize that ideological forces affect the behavior of infertile couples, noting that the "cultural pressure on women to realize themselves as mothers might well be a factor in the single-minded compulsion with which many childless couples pursue all available means to establish a family,"\(^{44}\) she does not extend this appreciation for the effect of ideology to the potential surrogates themselves. Women such as Mary Beth Whitehead, who signed her contract with William Stern in order to give the "most loving gift of happiness to an unfortunate couple,"\(^{45}\) are just as likely to be affected by traditional gender roles as are infertile women. The equation of (valued) femaleness with selflessness and motherhood would seem to provide just the motivation necessary to cause a woman to

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41. Shalev, supra note 4, at 159; cf. Schultz, supra note 15, at 352-55 (concluding likewise that such decisions should be left to the individual, but after a much more thoughtful analysis).
42. I say that reproduction was previously noncontractual because contracts for the sale or adoption of children are generally held invalid, and contract parenthood simply has not been practiced to any significant extent until recent years.
43. Admittedly, she also increases the realm of choice for privileged women, for whom market transactions are likely to be advantageous.
44. Shalev, supra note 4, at 151.
enter into a contract that pays the equivalent of $1.57 per hour for nine months of life- and health-endangering, emotionally difficult work.47

Because of her failure to recognize the impact of traditional ideology on potential surrogates, and her conviction that the impact of limited economic resources is not a relevant constraint on women's choices in this context, Shalev never even considers whether parenthood contracts should be removed from the free market system altogether. Yet, given that we already set limits to the legitimate operation of the market—one cannot sell oneself into slavery or buy another's kidney, for example—her argument is incomplete without reaching that question.

In contrast, those examinations of contract parenthood that discuss when interactions should be protected from the distortions of market exchange are more subtle and thoughtful. Margaret Radin has suggested, for example, that both the closeness of contract parenthood to baby selling and the harmful effects of commodifying women's reproductive capacity justify making that capacity inalienable by allowing only unpaid surrogacy arrangements.48 Similarly, Martha Field has proposed that paid parenthood contracts be allowed, but not be enforced against the gestational mother.49 But Shalev, in cleaving to her strictly individualistic approach, fails even to consider the possibility that reproductive capacity, like children and bodily organs, might just be something people should not be allowed to sell. While her decontextualized vision of how people choose to become surrogates is consistent with her conviction that a formal equality stance will validate the responsibility and rationality of women, it provides an impoverished understanding of the motivational dynamics that underlie the decision to enter into a parenthood contract.

46. This figure does not, of course, include the number of hours spent on unsuccessful insemination.

47. See Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 Harv. L. Rev. 384, 390 (1985) (arguing that an individual's act of consent does not necessarily further her own autonomy and well-being or the interests of the community at large).


B. The Inadequacy of the Liberal Framework

1. Irresolvable Dilemmas

The formal and substantive equality positions on contract parenthood fit together like hand and glove. The strengths of each are seen as the weaknesses of the other. Thus, just as I deployed substantive equality concerns above to raise questions about Shalev's conclusions, so it is also possible to use Shalev's concerns themselves to criticize the substantive equality critique. The resulting circularity of argument is one reason why the liberal framework is ultimately not a very satisfying approach.

Despite the reasons raised from a special treatment perspective for why a woman's decision to enter into a surrogacy contract should not be seen as much of a choice, it is very paternalistic to treat a surrogate's act of signing a parenthood contract as not indicative of her "true" intentions. To fail to enforce such agreements clearly conveys the message that the women who sign them are unaware of or unable to determine their own best interests, and thereby reinforces the notion that women are better at sacrificing themselves to others than at making rational judgments or protecting themselves. Moreover, to the extent that the invalidation of a parenthood contract disadvantages the couple that seeks surrogacy services, nonenforcement also suggests that women are irresponsible in a way that harms others.

In addition, the substantive equality position begs the question that inevitably follows from the recognition of economic inequality and the effect it has on market transactions. That is, even if it is true that women's low pay and limited job opportunities create pressure on them to enter into parenthood contracts, the question of what to do about that fact remains. To decide that such contracts should be invalidated is to prevent the individual woman from striking her own balance between entering into an exploitative contractual arrangement and going without needed money. Shalev recog-

50. Shalev, supra note 4, at 121-22.
51. One way to avoid this result, while still protecting women from decisions they regret, is to make the contracts legal but unenforceable against the gestational mother, as Martha Field suggests. Field, supra note 49, at 10-11. However, Field's approach, by only protecting gestational mothers who refuse to perform under the contract, does not address the exploitation inherent in the continued performance of women whose economic circumstances make them feel obliged to follow through with the agreement. On the other hand, it does avoid the paternalism of approaches like Radin's that take the decision completely away from the woman.
nizes this point, suggesting that the people she is most concerned to protect are the ones who would make the unconventional choice: “Legal norms based on assumptions about universal sex-based difference tend to create obstacles for the individual woman who wishes to deviate from traditionally prescribed social roles.” For the woman who is not constrained by economic pressures, or who actually prefers the money even while realizing that she is being exploited, the substantive equality position’s conclusion that these contracts are not freely entered into is, in some sense at least, inaccurate.

Nor is Shalev completely off base when she suggests that economic inequality is irrelevant to the debate about surrogacy. To point out the coercive, choice-constraining effect of distributional disparities is only to make half an argument for invalidating parenthood agreements, for it is still necessary to distinguish these types of agreements from employment decisions, agreements to lease housing, and numerous other choices that are affected by the relative bargaining power of the people who enter into them. To suggest that women should be protected from the unfairness of market transactions without suggesting that others similarly disadvantaged in such transactions should also be protected is to appear to give unfair preferential treatment to women.

Shalev is not unaware of these tensions in liberal theories. In fact, she nicely articulates the Scylla and Charybdis between which the liberal framework requires one to navigate: “How can we accommodate those differences relevant for legal purposes without perpetuating the inferior status of women as a class? The challenge is to reconcile the concepts of equality and difference without falling into

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52. Shalev, supra note 4, at 153-54.
53. Id. at 20.
54. To me, this is the strongest argument that equal-treatment feminists make. For them, it is more important to try to get the whole loaf of bread—economic reform of the entire system, if that is what we are really concerned about—than to settle for half—special protection for women. For a particularly persuasive articulation of this argument, see Williams, supra note 6.

Of course, it is possible to respond to such an argument by contending, for example, that reproductive activity is simply different from other types of activity. E.g., Radin, supra note 48, at 1932 (arguing that procreative activity is central to “human flourishing” and therefore deserves special protection). However, to treat reproduction as different from other types of behavior, such as laboring in the workplace, is to risk idealizing motherhood in such a way as to reinforce traditional and harmful stereotypes of women. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) (justifying exclusion of women from practice of law on grounds that the “paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother”).
the trap of paternalist protectionism." Unfortunately, recognizing the tensions does not lead her to ask whether they might be inevitable and irreconcilable. Rather than consider that the problem lies in the very terms of the debate, Shalev simply returns to her position that the formal equality concerns are more convincing.

2. Apologetic Assumptions

Even if the irresolvability of the conflict between equal treatment and special treatment concerns is not, in and of itself, enough reason to reject the liberal framework, the apologetic nature of the liberal schema raises serious questions about its usefulness. As I pointed out earlier, some versions of both liberal positions seem to assume that it is theoretically coherent to talk about whether women freely agree to become "surrogates." While they differ as to what decisions should be seen as freely chosen, they agree that those that are so chosen are not problematic. Yet by framing the argument in terms of this choice/coercion dichotomy, both liberal approaches legitimate a fundamentally flawed vision of the relation between law and society. To the extent that they consider voluntary decisions to be legitimate and not subject to governmental invalidation, and involuntary ones to justify governmental interference in otherwise private interactions, both approaches accept the foundational liberal notion of a distinction between private and public, and both assume that it is descriptively accurate to say that some choices are "free" and others "coerced."

This vision is flawed because it fails to appreciate both the indeterminacy of the concept of choice and the extent to which individual preferences are themselves socially constructed. The indeterminacy point does not require much elaboration. It is fairly uncontroversial to point out that people differ as to which choices they consider to be freely made and which ones they consider coerced. The debate between equal and special treatment proponents itself illustrates the fact that different definitions of choice can be held by different people. To some, signing a parenthood contract because you desperately need money is merely the free market at

55. Shalev, supra note 4, at 154 (citation omitted). Shalev also talks about the "tension between treating women as a disadvantaged group of victims and as individual autonomous agents." Id.

56. As I noted previously, however, it is difficult to generalize about all substantive equality proponents. See supra note 10.
work; to others, it is the epitome of coercion. Thus, judicial determinations that contracts (or sexual relations or criminal conspiracies) were freely entered into are not determinations about "what happened," but rather they are value-based decisions about what should be considered choice. If this is so, however, then the concept of choice cannot, itself, serve as the boundary line between the public and the private—the indicator of whether government should intervene to protect someone from coercion or refuse to intervene in deference to private freedom. In short, in deciding when enforcing a certain contract or type of contract will facilitate individual freedom, and when it will undermine freedom, courts are defining rather than effectuating individual choice. As a result, contract law inevitably chooses, and institutionalizes, a particular vision of the private world. It defines the private rather than merely protecting it.

Not only is the definition of choice that is used to assess private behavior a product of governmental value choices, but also private behavior itself is affected by the state. While Shalev recognizes this at one level, pointing out many aspects of law that affect social attitudes towards various areas of reproductive activity, she draws from those insights only the implication that the attitudes, and hence the law, should be changed. What she fails to see is that her

57. See Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 581-83 (1982). This point might seem to some to be merely restating the by now obvious Realist insight that law reflects policy choices. Nevertheless, I think it is not unimportant that despite this insight the discourse of legal opinions still reinforces the old formalistic vision of the relationship between law and the individual. Courts talk, for example, in terms of whether someone has freely chosen rather than in terms of whether it benefits society to characterize her conduct as chosen. See, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (holding that the question of whether plaintiff "voluntarily" entered the workplace is relevant to whether she has legitimate hostile environment sexual harassment claim), cert. denied, 481 U.S. 1041 (1987); In re Baby M, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987) ("Each had what the other wanted. A price for the service each was to perform was struck and a bargain reached. One did not force the other."); see also Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177 (1990) (critiquing concept of choice within a discussion of Rabidue and hostile environment sexual harassment law).

58. And choice is not so much a determinant of results as it is a vehicle for justifying them. See Peller, supra note 12, at 1226-40 (discussing Realist critiques of "choice").

59. She points out, for example, that legal rules and practices surrounding both adoption and artificial insemination have imposed very traditional roles upon women by stressing the importance of childbearing and rearing for those who are married, while denying the existence of any maternal interests on the part of those who are not. Shalev, supra note 4, at 41-42, 67.

60. For example, one reason that she applauds the recent interest in open adoption is that it revalues single mothers. Id.
concern for protecting the right of individual women to choose surrogacy assumes that their choices are somehow arrived at separate and apart from the culture in which they exist. Yet the ideological messages conveyed by years of state regulation of reproductive activity, and the economic constraints imposed by pervasive state regulation of economic relations and property ownership, mean that the government, and law, are inevitably implicated in such decisions. By structuring the society in which choices are made, the state fundamentally affects those choices.

If this is true, then the crucial questions that demand our attention are not whether the state should intervene in particular “private” decisions—it is clearly implicated in all individual decisions—but rather what should be the conditions under which those decisions are made. If law does not facilitate private choices, but rather defines and constructs them, then we should not be talking about how to preserve private freedom. Instead we should be talking about how to structure humane and fulfilling contractual and reproductive relations in our society.

Therefore, to me, the most compelling treatments of the contract parenthood issue are those that take the broader perspective, asking what societal conditions account for the shortcomings of the various solutions that have been proposed and how those conditions can be changed. For instance, we must first ask why infertility is thought

61. See supra note 32 and accompanying text.
62. From a legally enforced regime of private property that makes most people’s survival depend on wage labor, to a publicly structured wage system that fails to give equal pay to women for work of comparable worth to that performed by men, to a definition of wage labor (that is, work for which people are entitled to be paid) that excludes domestic work in one’s home, the law establishes a background that severely constrains women’s economic power and choices.
63. This critique of the public/private dichotomy is somewhat in tension with the commodification argument I mentioned previously. Supra note 48 and accompanying text. That is, the market arguably constructs and constrains nonmarket relations, just as law and government construct individual decisions. The same critique can be used against both of these two versions of the public/private dichotomy. See generally Frances Olsen, The Family and the Market, 96 HARV. L. REV. 1497 (1983); Peller, supra note 12, at 1222, 1233-36.
64. In other words, the notion of a separate “private” sphere of individual interaction unaffected by governmental power is incoherent.
65. Of course, I do not mean to say that individual preferences about reproductive behavior would necessarily be irrelevant to such a restructuring. The point is that it is precisely in how we structure the conditions under which reproductive activity takes place that we really increase human freedom and fulfillment.
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to be such a problem. Once we realize that it is probably the elevation of biological kinship over nonblood relations—along with, no doubt, the resistance to adoption of "imperfect" babies, such as minority and special-needs children—that accounts for the notion that infertility is a national tragedy, the irony in Shalev's position becomes clear. For, while Shalev argues that allowing women to enter into parenthood contracts will improve their status by eliminating biological definitions of kinship, she fails to recognize that it is the biological definitions of kinship themselves that produce the demand for "surrogates" in the first place. Since enforcing parenthood contracts reinforces this concern with perpetuating the male line, it might be a very shortsighted way to address the problem of infertility.

Instead, infertility might be more profitably addressed by attacking the underlying causes of the phenomenon, both attitudinal (preference for blood-based paternity, resistance to adoption of existing children) and external (sexually transmitted diseases, workplace hazards such as chemicals and radiation, unconsented sterilization of low-income women). Such a focus on the causes, rather than the effects, of the infertility phenomenon would not only benefit all people who cannot reproduce biologically (as opposed to only those who can afford to pay $25,000 or more for procreative services), but would also help to undermine several troublesome dichotomies (natural/adopted, normal/special needs, fertile/infertile) that establish harmful hierarchies between individuals. Moreover, these efforts would produce a fertile society without treating women as breeders whose bodies can and should be used for the benefit of either other individuals or society at large.

67. See Copelon et al., supra note 66, at 221, 229.
68. Id. at 229.
69. For example, William Stern, the biological father in the Baby M case, preferred contract parenthood over adoption because he wanted to perpetuate his genetic line. In re Baby M, 525 A.2d 1128, 1139 (N.J. Super. Ct. Ch. Div. 1987). Of course, the fact that Stern's parents were the only members of his family to survive the Holocaust, leaving him as the sole person capable of continuing his line, makes his desire particularly understandable to many. Nevertheless, such special cases aside, it seems highly likely that the impulse to use surrogacy rather than adoption will usually reflect simply a more straightforward interest in biological connection.
70. Copelon et al., supra note 66, at 205.
71. See generally Adele Clarke, Subtle Forms of Sterilization Abuse: A Reproductive Rights Analysis, in TEST-TUBE WOMEN 188 (Rita Arditti et al. eds., 1984) (discussing sterilization abuse and other practices that affect women's reproductive lives).
IV. LIBERAL ARGUMENTS IN THE ABORTION CONTEXT

A. Introduction

In Part III, I argued that Shalev's focus on whether parenthood contracts are chosen or coerced suffers from two flaws. First, it obscures (and therefore reinforces) patriarchal ideology—including the madonna/whore dichotomy, with the "surrogate" mother defined as the "bad girl." Second, it takes the position that parenthood contracts are uncoerced, thereby legitimating the notion that it is meaningful to think of behavior as "really" free willed or not, separate and apart from how we choose to view it. As such, her approach obscures the fact that it is the desirability of the conditions under which reproductive activities are carried out, the substantive vision of how to construct a humane society, that is at issue in surrogacy cases—not whether the particular woman's choice was voluntary.

The majority opinion in Rust v. Sullivan\(^72\) illustrates the problems that these analytical flaws can produce in other contexts. As I explain in Part IV(D) below, that opinion, like Shalev's book, subtly relies upon (and reproduces) the good girl/bad girl distinction, identifying women who seek abortions as bad. Moreover, as I discuss in Part IV(E), it asks the same wrong question that Shalev asks, focusing on whether governmental failure to fund abortion counseling and referrals constrains individual choice rather than on whether the conditions under which women live their reproductive lives are acceptable. To begin with, I will illustrate the indeterminacy of the Rust majority's choice/coercion analysis by presenting an argument to the effect that the Title X "gag" rules\(^73\) actually do burden women's reproductive choices. My point here will not be, however, to suggest that the Court's mistake was in failing to conclude that the rules are in fact coercive. Rather, its mistake was in failing to recognize that, given the irresolvability of the debate about whether they are, the choice/coercion question is the wrong one to be asking.

B. The Interference/Noninterference Distinction

Before directly addressing the Rust arguments, it is first neces-
sary to explore the choice/coercion dichotomy as it plays out in the abortion context. There, as in contract parenthood, the public/private dichotomy plays a central role in the discourse. But, unlike in surrogacy, in abortion the only type of coercion that is considered illegitimate is governmental coercion. That is, courts considering parenthood contracts have doctrinal mechanisms for prohibiting such agreements in order to protect women from "private" coercive factors; they can, for instance, declare them void as against public policy, as the New Jersey Supreme Court did in In re Baby M. 74 However, since the abortion right (and the due process analysis upon which it is grounded) has been articulated as a right to freedom only from governmental interference in reproductive decisions, 76 a court's conclusion that a woman's choice is constrained only by private, not public, power effectively precludes her constitutional claim. 76 Thus, since the question of whether the government has interfered with women's reproductive rights can also be phrased as the question of whether women have been coerced by the government, the noninterference/interference line I discuss here could also be called a (private) choice/(public) coercion line. 77

It has been argued that, once the problem is conceptualized as one of how to protect private freedom from governmental coercion, the outcome in such a case is a foregone conclusion. If public coercion is the litmus test, it becomes very difficult to argue that official inaction is itself a violation of reproductive rights. 78 While it is

75. See Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); see also Harris v. McRae, 448 U.S. 297, 317 (1980) ("[T]he liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice ... ").
76. As a result, the failure to recognize the hand of the state in "private" interactions has an even more significant impact on women in the abortion context than in contract parenthood. For example, despite the Supreme Court's occasional refusal to allow a state to put its power at the disposal of a private individual (for instance by requiring spousal consent to abortions, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976)), the Court has never evidenced any concern about the effect of private exercises of power on women's reproductive autonomy absent state involvement.
77. For discussion of the way in which my treatment of the governmental action/inaction dichotomy interfaces with the distinction between positive and negative liberty, see infra note 84.
78. CATHARINE A. MACKINNON. FEMINISM UNMODIFIED 93-102 (1987). MacKinnon argues that, since Roe clearly identified the exercise of governmental power as the wrong from which women were to be protected, it provides no conceptual framework for arguing that women have an affirmative right to governmental assistance in attaining abortion. Id. Nor does it provide a basis for claiming that nongovernmental influences on their ability to choose deprive them of their constitutional rights. Under Roe, if the state has simply stayed out of a woman's decision to terminate her pregnancy (or not to terminate it), that decision is by definition free. The Rust plaintiffs, for
surely correct that the liberal focus on choice is misguided and unlikely to produce beneficial results for women, it is important to point out that the Supreme Court’s conclusion in *Rust* was not inevitable. That is, there is no reason, as a matter of logic, why the Court could not have concluded instead that the withholding of governmental aid in this context constituted unacceptable governmental interference with women’s fundamental rights.79

Thus, in the next section I will briefly articulate an argument that the gag rules constitute affirmative governmental interference with those rights. That argument will illustrate how the formal equality position adopted by the *Rust* Court is subject to substantive equality criticisms analogous to those I raised against Shalev. In the section following, I will then suggest certain attitudes that may have prevented the *Rust* majority from adopting this line of argument, and thus may account for the result it reached. Finally, I will contend that the prevailing conceptualization of the funding issue (as a question of choice or coercion, private freedom or governmental interference), like Shalev’s parallel conceptualization of contract parenthood in choice terms, diverts attention away from those attitudes, thereby hindering the struggle for meaningful reproductive autonomy. In short, the problem with the liberal privacy frame for this issue is not that it *necessarily* produces the wrong results, but rather that it obscures the real determinants of judicial holdings—attitudes towards women and reproduction.

79. In fact, the Court has similarly concluded in other contexts. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (withholding welfare benefits without full procedural protections unconstitutionally violates recipients’ procedural due process rights); Sherbert v. Verner, 374 U.S. 398 (1963) (withholding unemployment benefits from Seventh Day Adventist who refused to work on Saturdays violated her right to free exercise of religion, much as would a fine directly imposed against her); cf. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (conditioning receipt of county-funded medical care on residence requirement unconstitutionally burdens indigents’ right of interstate travel). But see Bowen v. Roy, 476 U.S. 693, 706 (1986) (Burger, C.J., concurring) (concluding that “government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons”).
C. Abortion Law and Women's Autonomy

In a line of cases spanning nearly fifteen years, the Supreme Court has upheld various limitations on the use of state or federal money to finance abortion-related activities, repeatedly asserting that the constraints faced by low-income women seeking abortions are imposed by their poverty, not by the government. Consistent with this body of precedent, the Court held in Rust that the Title X "gag" rules, prohibiting federally funded physicians from discussing abortion with their patients, did not constitute governmental interference with low-income women's reproductive decision making.

As Chief Justice Rehnquist wrote for the majority:

The Government has no affirmative duty to "commit any resources to facilitating abortions," . . . and its decision to fund childbirth but not abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy . . . ." Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services at all.

The Court's position here is analogous to Shalev's argument that a woman's signing of a parenthood contract is not coerced as long as it is only her economic circumstances that caused her to sign it.

80. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (use of clinics that receive public funds for abortion counseling and referral); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (use of public employees or facilities for nontherapeutic abortions); Harris v. McRae, 448 U.S. 297 (1980) (federal support for medically necessary abortions); Beal v. Doe, 432 U.S. 438 (1977) (federal support for nontherapeutic abortions); Maher v. Roe, 432 U.S. 464 (1977) (federal support for nontherapeutic abortions for indigent women). The aspects of the Rust holding discussed here are perfectly consistent with these precedents, and my critique of the line of analysis employed in that case is equally applicable to its predecessors.

81. See, e.g., Maher, 432 U.S. at 474 ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . . . The state may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.").

82. Rust, 111 S. Ct. at 1776-78. The Court also held, in the principal part of the opinion, that the "gag" rules did not violate the First Amendment rights of either the clinics that receive Title X funds or their employees. Id. at 1771-76. While that aspect of the decision is very troubling, and will arguably have far-ranging impact, it is not my concern here.

83. Id. at 1776-77 (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) and McRae, 448 U.S. at 315 (emphasis added)). It is important to note that the Court did not explicitly reject the idea that the woman who cannot afford an abortion is, in some sense, coerced to become a mother. Rather, the Court merely considered such coercion to come from private forces, in particular her poverty, and therefore to be beyond the scope of constitutional protection.

84. Both of these positions also resonate with the established distinction between positive liberty (freedom to) and negative liberty (freedom from). See, e.g., DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-96 (1989). Just as only negative freedom is thought to
Both are formal equality arguments in that both treat the private interaction at issue—signing a parenthood contract or not obtaining an abortion—as no different from other such interactions, and thus as appropriately subject to market pressures. Moreover, both positions can be attacked from within the liberal framework. That is, just as it is possible to use substantive equality concerns to argue that parenthood contracts coerce women, so it is also possible to use such concerns to argue that governmental failure to fund abortions does so as well.85

The Court’s conclusion is informed by a vision of the social setting in which conception occurs that is just as unrealistically individualistic as Shalev’s vision of the social setting in which contract parenthood occurs. Both ignore the crucial importance of the context in which individual choices and governmental “inaction” take place. Thus, a woman’s “consent” to a parenthood contract, against a backdrop of patriarchal culture and limited economic alternatives, is in many senses not at all free.86 Similarly, governmental failure to fund abortion counseling and services, against a backdrop of federal funding of childbirth and extensive state structuring of the economic life of low-income people, constitutes interference.

be protected by the Constitution, so only claims to protection from governmental intrusion in one’s reproductive activity, rather than claims to governmental assistance in engaging in such activity, are thought to be legitimate.

In the argument that I am presenting here, I might appear to be suggesting that access to abortion funding is a negative liberty. Such a proposition would, of course, fly directly in the face of the traditional understanding of that term. My analysis is premised, however, not upon the established distinction between positive and negative liberties, but rather upon a rejection of that distinction as incoherent.

The right to private property and protection of contractual freedom are uncontroversial . . .; but they are fully positive. Their existence depends on the willingness of state officials to enforce trespass laws and contractual arrangements.

These relatively uncontroversial rights are thus positive in character. The rejection of a right to welfare or to freedom from private discrimination cannot rest on a claim that all constitutional rights are “negative” in the sense that they do not require governmental involvement. The line between constitutionally protected rights and unprotected interests depends not on the distinction between negative and positive rights, but on substantive ideas about what government normally or naturally does.

Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 9 (1992) (footnotes omitted). This section, then, should be read as implicitly raising questions about the viability of the negative/positive liberty formulation.

85. For a powerful rendition (with many concrete examples) of the argument that governmental failure to interfere in the private sphere of the family can be seen instead as intervention, see Frances E. Olsen, The Myth of State Intervention in the Family, 18 MICH. J. L. REFORM 835 (1985). See also Olsen, supra note 63.

86. See supra part III.A.2.
The federal government subsidizes birth by providing Title X funds for counseling and referral to prenatal care facilities, as well as Medicaid payments for childbirth. The *Rust* majority held that such a practice, combined with the lack of governmental support for abortion, "'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather ... encourages alternative activity.'" Because the woman has the same *range* of choice with or without government funding, the Court concluded, subsidizing birth does not unduly burden that choice.

This argument assumes that we are in fact dealing with two rights here, a right to terminate a pregnancy and a right to continue it. But clearly there is only one right—that of reproductive decision making. The essence of *Roe* is its protection of a woman's freedom to choose between termination and continuation. A woman has only two options here: Her decision must inevitably be either to end the pregnancy or to carry the fetus to term. Thus, by subsidizing only one side of the decisional equation, the government has undeniably skewed the outcome, making one option more appealing than the other. As Justice Brennan noted in discussing governmental refusal to fund therapeutic abortions, "'[T]here is 'more' than a simple refusal to fund a protected activity in this case; instead, there is a program that selectively funds but one of two choices of a constitutionally protected decision, thereby penalizing the election in the disfavored option.'" The point is equally applicable to *Rust*, where the government selectively funds the provision of information about only one of the two choices.

Through Title X and its regulations, the government has actively interfered in the private sphere: It has established a family planning program that makes it more difficult for a woman to decide to terminate a pregnancy than it would be if no such program existed at all. Deciding to abort is more difficult because, without any family planning program, a woman would necessarily have to spend some of her own money to deal with her pregnancy, either to terminate it or to bear a child. Since she would have to pay either way, her pov-

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88. *Id.* at 1776-77 (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980)).
89. *Id.* at 1777.
90. *McRae*, 448 U.S. at 336 n.6 (Brennan, J., dissenting).
91. The "gag" rules clearly have "both the purpose and the effect of manipulating [a woman's] decision as to the continuance of her pregnancy." *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting).
erty would not make it any harder for her to choose one option or the other. Under the program established by the *Maher*-to-*Rust* line of cases, however, it becomes more difficult for her to choose abortion because that is the only course of action that requires her to spend her own limited funds. Thus it is precisely the existence of the federal program that causes her poverty to burden her reproductive choice.92

The Title X regulations burden a woman's decision not only because they expressly support childbirth but also because they remove this one area of health care—abortion—from the otherwise encompassing web of governmental subsidies. As Mark Tushnet has stated in discussing *Maher* and *McRae*:

[Those decisions assume that] the basic rule is that goods are allocated by market processes. If the government allocates some or many goods, relegating some particular good to the market isolates that good from the rest, presumably because the government wishes to see less consumption of the good. . . . And actions designed to discourage consumption place burdens on the decision to consume in any reasonable understanding. In our society, the government allocates most of the goods that poor people consume. Their shelter is subsidized in public housing, their consumption of food is subsidized by food stamps, their use of most medical services is subsidized by Medicaid, and they have few remaining resources to devote to purchases of unsubsidized goods. Thus, they are in precisely the situation described, where a decision not to subsidize constitutes a burden.93

This point is equally applicable to the "gag" rules, which similarly burden low-income women by excluding abortion counseling and referral from the otherwise comprehensive obstetric and gynecological services subsidized by the government under Title X.94

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92. See *McRae*, 448 U.S. at 333-34 (Brennan, J., dissenting).

The Court's willingness to uphold laws whose apparent injustice is thought simply to reflect the world's own cruelty . . . seems most vivid in a case like [*McRae*] . . . .

In [*Roe*], abortion was not perceived as involving the intensely public question of . . . . the subordination of the poor to the rich through the instrument of coerced childbirth for those unable to afford medical procedures placed by the state on an ability-to-pay basis.

. . . .

[If the issue had been so stated], then even the state's use of selective funding to encourage the birth of unwanted children might resemble a program to foster involuntary servitude more closely than an exercise of government's prerogative to set its own priorities.

94. See *Rust*, 111 S. Ct. at 1781 n.2 (Blackmun, J., dissenting). My point is not that govern-
Finally, one could argue that governmental interference in women's abortion decisions is in fact unavoidable. Frances Olsen has pointed out, in another context, that governmental refusal to criminalize spouse abuse does not preserve the state's neutrality towards the family, because courts will still have to rule on whether the past abuse should be a mitigating or excusing factor when the victimized spouse kills the abuser.\textsuperscript{95} Similarly, even if the government fails to fund abortion services, it must still decide how to treat people's responses to that policy—as, for example, when a woman steals the money to pay for an abortion and then raises the defense of necessity.

In summary, then, it makes just as much sense to see a refusal to subsidize abortion services and counseling for low-income women as governmental interference in reproductive decision making—and the births that result as instances of forced motherhood—as it does to see nonfunding as noninterference. In fact, the Court's conclusory equation of state inaction with noninterference reflects an abstract and highly debatable conceptualization of coercion that is totally inattentive to the circumstances in which reproductive decisions are made.\textsuperscript{96} Nevertheless, my point here is not that the Court's decisions were illogical, but rather that they simply were not inevitable. The

\textsuperscript{95} Olsen, supra note 63, at 1509.

\textsuperscript{96} It is arguable, of course, that the interference position just presented—the argument that governmental failure to fund abortion information and services interferes with women's reproductive freedom—reflects and reinforces negative images of women. Here, as in the contract parenthood context, the suggestion that a woman should be protected from the pressures of the marketplace could seem to imply that women are incapable of making their own decisions and protecting their own interests in the competitive "public" sphere. Moreover, providing affirmative governmental aid to pregnant, low-income women (like refusing to enforce their parenthood agreements) could generate resentment by others who are equally coerced into harmful decisions by their lack of access to economic resources. In addition, asserting that reproductive activity is especially deserving of protection from marketplace pressures could, arguably, reinforce the idealized image of motherhood that justified women's oppression for over a century.

Interestingly, I have seen little concern about these possible ill effects of the anti-\textit{Rust} position expressed by feminist writers. \textit{But cf.} Jed Rubenfeld, \textit{The Right of Privacy}, 102 \textit{Harv. L. Rev.} 737, 777 (1989) (claiming that traditional arguments for the abortion right reinforce sexism by treating reproduction as central to women's identity); Frances Olsen, \textit{Unraveling Compromise}, 103 \textit{Harv. L. Rev.} 105, 112 n.32 (echoing Rubenfeld's concerns). Perhaps an understanding of the amount of explicit sexual coercion in women's lives and an appreciation of the practical importance of the abortion option for women override the more theoretical concerns often expressed about the symbolic messages that coercion-styled, special-treatment-type arguments convey.
doctrinal discourse allows one to argue either that failure to fund the exercise of a constitutional right is burdensome or that it is not.\textsuperscript{97}

Why then, has the Court repeatedly refused to find that failure to fund in the reproductive realm burdens fundamental rights, despite its (at least occasional) willingness to do so in other contexts?\textsuperscript{98} In the next section, I show how the conclusion that an abortion decision constitutes a choice, and the conclusion that the governmental failure to subsidize it is noninterference, are based upon a belief in the same patriarchal images of women that Shalev's analysis of contract parenthood unintentionally supports. I argue that it is only by unearthing the hidden assumptions about women and reproductive roles that inform decisions like \textit{Rust} that we can come to understand what makes the jurists deciding those cases conclude that the behaviors they are assessing are chosen rather than coerced.

\textbf{D. Abortion Law and Images of Women}

To the extent that it treats the situation of low-income women with unwanted pregnancies as freely chosen, the \textit{Rust} line of cases assumes that women deserve their pregnancies (and their poverty), implying that these women's situations are somehow the result of their own irresponsibility.\textsuperscript{99} Thus, at the most obvious level, such

\textsuperscript{97} Note, by the way, that the suggestion here that the "gag" rules could be seen as imposing a burden on women does not challenge the public/private dichotomy or the liberal belief in choice. The substantive equality argument presented in this section merely changes the definition of what constitutes governmental coercion; it does not question the coherence of the concept of coercion itself.

\textsuperscript{98} See supra note 79.

\textsuperscript{99} The most blatant example of this attitude is reflected in Justice White's dissenting opinion in \textit{Doe v. Bolton}, 410 U.S. 179 (1973), where he characterizes the Court's holding in \textit{Roe} as signifying that "the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus." \textit{Id.} at 221 (White, J., dissenting). \textit{But see} \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) (sympathetically describing burdens unwanted children can impose on women).

The "bad girl" image conjured up in Justice White's dissent is reiterated in public funding cases. In cases such as \textit{Maher} and \textit{Webster}, for example, the government's decision to withhold funding is characterized as a legitimate "value judgment favoring childbirth over abortion." \textit{Maher v. Roe}, 432 U.S. 464, 474 (1977); \textit{Webster v. Reproductive Health Servs.}, 492 U.S. 490, 506 (1989) (citing \textit{Maher}). By describing a refusal to financially support abortions as an acceptable "value judgment" in favor of childbirth, the Court implicitly raises questions about the morality of a woman whose "values" cause her to choose termination of her pregnancy over carrying it to term.

Dorothy Roberts has argued that the disproportionate number of criminal prosecutions of women of color for using drugs or alcohol during pregnancy constitutes punishment of those women for having carried their pregnancies to term. Roberts, \textit{supra} note 32, at 1445-50. However,
cases rely upon and perpetuate negative stereotypes of women, or perhaps just of low-income women, as immature, unreliable, and overemotional individuals to whom important moral decisions about life and death should not be delegated. But more subtle messages are presented by these cases as well.

For instance, it is interesting to note how differently women who are thinking of aborting their fetuses and women who are thinking of putting their children up for adoption are treated. In both situations the woman is faced with an unwanted pregnancy. In either situation, her lack of money might cause her to do something she does not want to do—give up the baby or carry the pregnancy to term (and keep the child). Yet in the adoption situation the law takes great pains to protect her from being coerced by her circumstances into making a decision she will later regret. In virtually all states, adoptions are closely regulated to prevent private “sales,” and many states also protect women with required waiting periods during which they cannot consent to termination of their parental rights. In contrast, Rust and its predecessors reveal that neither Congress nor the Supreme Court sees any need to insulate a woman’s decision about whether to continue a pregnancy from market pressures.

Why is the law so willing to conceive that a woman might be coerced by indigency into giving up a child but not that a woman might be coerced by indigency into bearing one? It is hard to escape the conclusion that the coerced loss of a child through adoption is considered a harm to women, but forced motherhood is not. Once again, the good girl and the bad girl emerge. The fact that the law treats relinquishing one’s child for adoption as an injury both reflects and reinforces the notion that being a woman means being

when considered in combination with state refusal to fund abortions for low-income women of color, such prosecutions suggest to me that what is really being punished is the initial act of conception rather than the failure to abort.

100. Many people argue, of course, that contract parenthood situations should be treated as analogous to adoption. See, e.g., FIELD, supra note 49, at 84-89.

101. See id. at 84-85, 90. “In an adoption situation, no state in this country binds a mother to give up her child because of a consent to adoption or a contract with prospective adoptive parents that was executed before the child was born.” Id. at 84.

102. Of course, a woman could be coerced by indigency into aborting, too, in order to avoid the expense of raising another child. That constraint on her free choice is not good either, but it is a lot harder to eliminate than coerced child bearing. The only way to do so would be to pay for all costs of childrearing as well, and that would probably be prohibitively expensive, or at least politically unlikely. Thus, if the government pays for both birth and abortion, and childcare perhaps, it arguably does the best it can to make things even.
someone who would love to be a parent and is devoted to her offspring. 103 “Good” girls love their children and thus suffer a harm if they lose them. On the other hand, the fact that the law does not treat bearing an unwanted child as an injury reflects and reinforces the flip side of that message: If all “good” girls love children, then forcing a woman to have a child cannot possibly do her harm. 104 Or, to put it less charitably, a woman who would stray so far from the societal role of devoted mother as to actually perceive having a child as a harm to herself must be “bad,” and therefore is undeserving of state protection. Thus, the existing legal rules protect the woman who conforms to pronatalist gender expectations and punish the one who does not.

To the extent that this pronatalist slant stems from the notion that women are instinctively maternal, abortion doctrine confirms Shalev’s point that biological definitions of kinship are harmful to women. After all, it certainly seems plausible that the Court would be more likely to see coerced motherhood as a harm if women were not thought of as natural mothers. The fact that Shalev’s insights about images of women are vindicated here is not surprising, of course, since the strength of her approach is its focus on ideological reform. The inherent weakness in her argument is also apparent, however, for by accepting the public/private dichotomy and using choice as the determinant of results, Shalev legitimates the Court’s use of the interference/noninterference formula, and thus both facilitates and obscures the operation of the very attitudes she deplores.

103. Of course, one might expect this notion of children’s importance to their mothers to generate the rule that adoption should be banned altogether. However, a corollary to the idea of the loving mother—the idea of the self-sacrificing mother—is deployed to justify adoption when the woman is single and/or has very limited resources, on the grounds that she can thereby provide the child a better life.

Thus, in practice the law often treats certain mothers who are putting their children up for adoption as “bad” girls. As Shalev points out, unmarried mothers (especially low-income ones) are not given special status and are often pressured to give up their children for the latter’s own good. See supra note 30 and accompanying text.

104. I do not mean that a woman who is coerced to bear a child will receive no satisfaction from or will not love the child. I mean that life will be difficult for her and the child because of whatever barriers made her not want to carry the child to term in the first place, such as lack of money or the existence of other children.

Resistance to the idea that being forced to have a child could be a harm is evident not only in the abortion context but also in the unreceptive reaction many courts have had to so-called wrongful pregnancy claims. See, e.g., Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982) (holding that parents could not sue doctor who negligently performed vasectomy for costs of raising their normal child).
E. Public Power and Reproductive "Choice"

Given the indeterminacy of the distinctions between choice and coercion, noninterference and interference, the Court's attitudes towards women provide a better explanation for its rulings in this area. But the public/private dichotomy that grounds abortion doctrine hides these negative attitudes, focusing attention and argumentation on whether women's reproductive decisions are burdened by governmental action.\textsuperscript{105} Like Shalev's focus on choice in the contract parenthood context, the traditional formulation of the abortion funding issue diverts attention from fundamental questions about how to structure our reproductive lives and who should bear the burden of reproducing the citizenry. Moreover, it serves an apologetic function here as it does in the surrogacy arena, legitimating a world vision that obscures the operation of state power in the realm of supposedly "private" conduct.

Privacy doctrine assumes that there is a separate and discrete realm of reproductive decision making that is untouched by governmental power. While the two sides of the debate might disagree as to where the line between "private" choice and public coercion should be drawn, both agree that it is that line which marks the difference between legitimate and illegitimate governmental policies. In conceptualizing the problem in this way, however, both positions ignore the extent to which the "private" conditions in which the government is not supposed to interfere are themselves produced by the state. Just as Shalev fails to recognize that governmental policies contribute, at both an ideological and a material level, to women's decisions to become "surrogate" mothers, so the Rust court fails to recognize that the public hand is present in the very pregnancy that makes a woman's reproductive decision necessary.\textsuperscript{106}

What causes unwanted pregnancies? The Supreme Court, and

\textsuperscript{105} The prevailing abortion discourse has a constraining effect even on the dissenting opinions in the funding cases, most of which—perhaps for strategic reasons—also limit their arguments to the choice/coercion framework. For an eloquent articulation of the coercion argument that nevertheless accepts as a given that the appropriate question is whether the government intervened (rather than, for example, how it should intervene), see Harris v. McRae, 448 U.S. 297, 329-30 (1980) (Brennan, J., dissenting).

\textsuperscript{106} Government activity significantly affects the distribution of resources in society as well. Thus, low-income women's poverty could also be said to be a product of state action. Nevertheless, given the Supreme Court's resistance to treating poverty as an ascribed, rather than an earned, status for purposes of constitutional analysis, see San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27-29 (1973), I will not directly address that argument here.
many citizens, believe they are primarily the product of a conscious and irresponsible choice on the part of a woman to engage in unprotected sex—to "take the risk" of getting pregnant.¹⁰⁷ Indeed, the fact that currently proposed abortion prohibitions frequently contain exceptions for rape and incest,¹⁰⁸ as did many pre-Roe statutes, reinforces the notion that all pregnancies that do not fall within those exceptions are freely willed, even if later regretted.¹⁰⁹ This is analogous to the apologetic effect of Shalev's analysis noted above. That is, just as focusing on coercion in the surrogacy context implicitly legitimates all contracts that are not invalidated as coercive,¹¹⁰ so focusing on coercion in the abortion context implicitly legitimates all pregnancies that do not fit whatever the "coercion" categories are. Such a focus thus conveys the notion that most sex in our society is consensual and that most pregnancies are the result of conscious risk-taking. It thereby hides the aspects of sexual interactions and contraceptive practices that many would characterize as neither consensual nor irresponsible, respectively.

Such images severely misunderstand and misrepresent the social etiology of unwanted pregnancies, and completely ignore the state’s contribution to this social problem.¹¹¹ In the same way that a tortious act is said to cause the injury that follows as long as that injury was a foreseeable result of the act, so many pregnancies (and abortions) that occur in this society are caused by the government, in the sense that they are the foreseeable result of its policies.¹¹²

At the most obvious level, the state affects the number of unwanted pregnancies by allowing sexual assaults to persist in the private sphere in alarming numbers. Thousands of women are raped

¹⁰⁷. See supra note 99 (discussing examples of this attitude); see also William F. Buckley, Is Abortion an Act of Responsibility? (copy on file with the DePaul Law Review).


¹⁰⁹. While incest exceptions are perhaps partly aimed at preventing congenital abnormalities thought to be produced by inbreeding, recent awareness of the extent to which children are sexually abused by relatives would suggest that such exceptions speak as much to child protection as to species preservation.


¹¹¹. I call unwanted pregnancies a problem because I assume that most women would probably prefer not to get pregnant at all rather than to get pregnant and then undergo an abortion. There are, of course, a variety of ways to solve such a problem. One way is to eliminate the reasons why women do not want to have a child. Those reasons include financial constraints, lack of childcare, and the social stigma attached to unmarried mothers. Other ways to solve the unwanted pregnancy problem include improving contraception and protecting women from coercive sex.

¹¹². I am indebted to Gary Peller for this point.
each year; only a fraction of those attacks are ever reported.\textsuperscript{113} While it is obviously private actors who actually perpetrate these attacks, the ignominious history of judicial unreceptivity to rape claims,\textsuperscript{114} as well as the explicit doctrinal barriers placed in the way of rape prosecutions,\textsuperscript{115} at a minimum provide a sense of impunity to those attackers and at worst actually legitimate their conduct.\textsuperscript{116} Moreover, some such assaults—rapes by husbands in states that retain the marital rape exclusion—are expressly authorized by the state.\textsuperscript{117} Like rape, incest and child sexual abuse are also severely underreported and difficult to prosecute. As a result, official statistics on these various types of sexual assault do not begin to capture the actual prevalence of such attacks, nor do they provide any realistic means of estimating how many of them result in pregnancies.\textsuperscript{118}

Moreover, governmental programs and policies are implicated in low-income women’s unwanted pregnancies even aside from any question of state-allowed attacks. It is not uncommon for public family planning clinics to be insensitive to the health concerns and comfort of their low-income patients. For example, these clinics consistently prescribe oral contraceptives, which pose more serious health risks and are often accompanied by uncomfortable side effects, rather than safer methods of contraception such as the dia-

\textsuperscript{113} In 1990 alone, 102,555 rapes were reported to the authorities, \textit{Federal Bureau of Investigation, Crime in the United States} 15 (1990), probably less than a quarter of those that actually occurred. \textit{See also} Susan Estrich, \textit{Real Rape} 10 (1987).

\textsuperscript{114} \textit{See generally} Estrich, \textit{supra} note 113.

\textsuperscript{115} \textit{See generally id.}

\textsuperscript{116} \textit{See} Diana Scully, \textit{Understanding Sexual Violence} 110-11, 159 (1990) (study of convicted rapists reporting that overwhelming majority thought they would never be punished for their act, and that they often thought it was a trivial transgression). Moreover, as MacKinnon points out, the discourse of rape trials—in which any behavior not typical of “good girls” makes a rape victim’s testimony immediately suspect—might even discourage women from using contraception, since, for example, evidence that a woman had her diaphragm in when attacked might actually be used to undermine her testimony that she had not consented to sex. \textit{MacKinnon, supra} note 78, at 95.

\textsuperscript{117} \textit{See Note, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment}, \textit{99 Harv. L. Rev.} 1254, 1258-62 (1986); \textit{see also} Estrich, \textit{supra} note 101, at 72-79 (discussing the marital rape exemption).

\textsuperscript{118} Thus, the frequently-made “pro-life [argument] that cases of pregnancy caused by rape are so rare as to be irrelevant,” Kristen Luker, \textit{Abortion and the Politics of Motherhood} 234 (1984), is much less convincing when unreported rapes are considered. And even as to reported attacks, the data do not fairly indicate the incidence of pregnancy due to rape because women who report sexual assaults are often given prophylactic treatment to prevent pregnancy, such as the “morning-after” pill or a vacuum curettage of the uterus. \textit{Id.} at 235. Thus, the notion that eliminating the abortion right would affect few rape victims ignores the fact that many such women currently receive abortions as “treatment” for rape and therefore do not get counted in the numbers of those who need abortions for this reason.
They also frequently fail to fully explain a woman's options to her, leading many women to believe that their only safe choice is to use the method recommended or nothing at all. As a result, a significant proportion of women who engage in unprotected sex may be doing so because, due to inadequate and incorrect information about contraception, they know of no other way to protect themselves from health risks and/or significant discomfort. In addition, inadequate sex education programs in public schools prevent teenagers from being fully informed about birth control methods, resulting in many ineffective efforts at contraception.

State power affects sexual relations in much more subtle ways as well, suggesting yet another set of reasons why it is unproductive to ask whether or not government interferes with women's abortion decisions. For example, economic dependence, produced in part by unequal pay scales unaddressed by comparable worth law and by inadequate maintenance awards given at the dissolution of marriages, can cause a woman to accede to her partner's sexual demands because she sees such compliance as a necessary quid for the quo of financial support. In addition, judicial unreceptiveness to

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119. See, e.g., Alexandra D. Todd, Intimate Adversaries 63-64 (1989). Doctors often do this because they believe that their low-income patients will not be able to understand, or will not be willing to comply with, the more detailed procedures required for methods like the diaphragm. However, such beliefs often stem from unexamined negative stereotypes based on race, class, and sex rather than on accurate perceptions of individual patients. Thus, in her study Todd found that the darker a woman's skin and/or the lower her place on the economic scale, the poorer the care and efforts at explanation she received. Women of color and/or an economically poor background were more apt to be seen as "difficult" patients when they asked questions, were more likely to be urged to use birth control pills or the IUD rather than the diaphragm in the clinic, and in the private practitioner's office, where nearly all women received the pill, they were more likely to be talked down to, scolded, and patronized. Id. at 77.

120. And for many people, of course, there simply is no safe and effective form of contraception available. On the inadequacy of available contraceptives, see generally Rosalind Petchesky, Abortion and Woman's Choice 189-90 (1990).

121. E.g., American Fed'n of State, County & Municipal Employees v. Washington, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (holding that state's decision to reject comparable worth theory in setting wages for class of employees, 70% of whom were women, did not give rise to liability under Title VII disparate impact or disparate treatment theories). See generally Mary E. Becker, Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear, 53 U. Chi. L. Rev. 934 (1986).

rape cases has helped to create the current climate in which a concern with not appearing sexually available—whether because such availability is not considered appropriate for women or because it can be used later to support allegations that an individual consented—can prevent a woman from using a contraceptive at all.123

Moreover, governmental policies not only prevent women from avoiding pregnancy, but also prevent them from carrying a pregnancy to term once a child is conceived. In a society where governmentally subsidized childcare is virtually nonexistent and parental leave policies are among the worst in the industrialized world;124 where advancement in many jobs is predicated upon such total "dedication" to the employer as to preclude any meaningful role as a parent;125 in which women as a group earn 68.6 cents for every dollar earned by men;126 and where the major financial, social, and emotional burdens of parenthood still fall, and are thought properly to fall, on women,127 it is not surprising that having a child is not a viable economic option for many women who would otherwise like to have one. These economic realities are not merely the product of private action in the "private" sphere, but are directly related to existing governmental policies. Judicial and legislative resistance to meaningful pay equity reform buttresses existing wage inequalities;

123. See supra note 116.

This is not to say, however, that in an ideal world of enlightened governmental action to protect women and increase reproductive and employment options, the abortion right would no longer be necessary. Rather, in such a world the rhetoric of self-actualization and autonomy currently used to support reproductive rights arguments would be much more meaningful. My point here, then, is merely that the abstract right to choose is not necessarily sufficient, if exercised in a world of limited options.


125. See generally Dowd, supra note 124 (advocating a restructuring of the workplace to resolve conflicts between work and family responsibilities); Deborah L. Rhode, The "No-Problem" Problem: Feminist Challenges and Cultural Change, 100 YALE L.J. 1731, 1763-68 (1991) ("Many women with substantial caretaking obligations have little choice but to drop out of the most demanding positions.").


127. Rhode, supra note 125, at 1748-49.
governmental failure to apply maximum hour legislation to many workplaces allows and legitimates inhumanely long work weeks;\textsuperscript{128} the absence of state-subsidized childcare and medical care—or governmental regulations requiring employers to provide certain basic necessities for workers, such as childcare, health insurance, and nurturing leave—is what makes child rearing prohibitively expensive for many.\textsuperscript{129}

Thus the interference/noninterference debate in the abortion context, like the coercion/choice debate in the contract parenthood context, relies upon the inaccurate assumption that at least some reproductive behavior occurs in a realm of pure choice, unaffected by governmental power. It both assumes and perpetuates the legitimacy of the public/private distinction, thereby deflecting attention from the question of how, rather than whether, government should affect reproductive practices. In so doing, it obscures both the attitudinal explanations for judicial conclusions and the structural constraints on all women's exercises of choice.

V. CONCLUSION

In summary, just as Shalev's endorsement of contract parenthood reinforces, rather than undermines, the biological definition of kin-


\textsuperscript{129} I realize that some might react to this paragraph by saying that I am merely describing governmental failures to act, and that the problems I recount here are the product of private, not governmental, power. Nevertheless, each of the failures to act that I mention occurs in an area that is already characterized by extensive governmental involvement in the "private" sphere—in either the workplace (maximum hour and minimum wage regulation, discrimination prohibitions, occupational safety and health requirements) or the low-income family (AFDC, food stamps, Medicaid). It seems clear to me that the gaps in the regulatory system structure and control the private sphere as much as the affirmative rules in it do. The fact that government allows employers to verbally harass their employees, see Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STAN. L. REV. 1, 1 (1988), has just as much impact on those employees as the fact that the government affirmatively bars employers from imposing serious health risks on workers. The regulatory apparatus is so pervasive that what it allows is as significant as what it prohibits.

Moreover, as the Realists pointed out long ago, the arm of government is present in all "private" economic transactions; for example, government-established private property rules necessarily constrain contractual choice by affecting the relative bargaining power of the parties. See, e.g., Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923); cf. Olsen, supra note 85 (arguing that the state is implicated in "private" family relations).
ship (or at least paternity), so the body of abortion law created by the Supreme Court in the abortion funding cases both relies upon and reproduces the harmful notion that motherhood is an unadulterated benefit to women (and society). Furthermore, just as Shalev's focus on whether women freely sign parenthood contracts obscures underlying questions about why infertility is a "problem" and whether reproduction should be commodified, so the Rust majority's focus on whether the Title X "gag" rules constitute state interference with reproductive rights diverts attention from the underlying question of what we mean by those rights, of why women experience unwanted pregnancies, and of how we should structure sexual and reproductive relations in this society.

Whether one argues that a woman's decisions are freely chosen or coerced, a focus on choice diverts attention from the fundamental questions of substantive justice that should inform social policy. Here, as in the surrogacy context, the focus should not be on whether something or someone actively interfered with women's choices, but rather on what conditions characterize the society in which reproductive activities are carried out. Legal rules about abortion are most likely to produce humane and fulfilling reproductive relations if they result from a focus on how and why women experience unwanted pregnancies, not on whether they "freely chose" them. No one relishes the idea of an abortion. It is a necessary, but not a preferred, option. Protecting women from coerced sex, developing safe and effective contraceptive techniques (as well as providing men and women with the information they need to use them correctly), undermining harmful sex role stereotypes, and restructuring the workplace to accommodate the reproductive and child-rearing activities of both sexes would go far—and certainly much farther than the post hoc, punitive approach legalized by Rust and its predecessors—towards reducing the number of unwanted pregnancies and producing meaningful reproductive lives for all.

130. I do not mean to imply, however, that abortion should be seen as an entirely and inevitably negative event in a woman's life. Women experience abortion in a wide variety of ways, and their reactions to it are closely related both to the particular life circumstances in which they find themselves and to the social climate in which the abortion occurs. See Petchesky, supra note 120, at 155-61 (pointing out that access to abortion has enabled women to gain that control over their reproductive activity that was a crucial prerequisite to career expansion and economic emancipation); Rothman, supra note 27, at 106-07 (describing different ways that women experience abortion); Olsen, supra note 96, at 123-24 n.78 (arguing that the notion of fetus as "living" being is socially constructed belief, not biological fact).
Making choices is clearly emancipatory. Feeling that one has some control over one's life is certainly essential to human dignity. Unfortunately, however, liberal legal thought's preoccupation with choice fails to recognize that choice is always and inevitably socially constructed. All cultures are inherently coercive; they necessarily define reality and constrain choices—although their definitions of coercion may vary widely. It is unproductive, therefore, to use choice as a benchmark of societal success.

Moreover, a choice-based framework is affirmatively harmful as well. Thus, liberal legal thought's elaborately developed theory about the proper relationship of the state to the individual obscures and legitimates, rather than illuminates and attacks, the negative images of women that influence judicial decisions in this area. Given this, it is not surprising that Shalev's approach to contract parenthood, while clearly motivated to help women, nevertheless could have the ultimate (and ironic) effect of legitimating cases like Rust. In retaining the liberal framework for discussion, she fails to challenge the interlocking web of dichotomies that both prompted and allowed the Court to render that decision: dichotomies between choice and coercion, public and private, good girls and bad.