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Note

LOOKING BACK TO MOVE FORWARD: AN INTERSECTIONAL PERSPECTIVE ON HARRIS v. MCRAE

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**The highest court in the land consistently misunderstands, Realities of interlocking truths, propensities
giving birth to youths, Born to mothers without resources, Questions pondering what the source is.**

**Constant confrontations with social forces, Of course this is too far divorced, From perceptions of
judges filling courts, And writing decisions with legal precision, A class of women equally unprotected,
Subconsciously disconnected, From autonomy over bodies and choices of freedom, This soliloquy
is meant to believe in, breathe in, And exhale hope for poor, Black mothers struggling to cope.**

INTRODUCTION

The wombs of poor, Black women exist within a tangle of social forces. Their reproductive systems stand at the intersection of the multiple identities of race, class, and gender. In the American psyche, young, single, Black mothers maintain associations with particularized cultural images and stereotypes. Racially-coded terms such as “public assistance” and “welfare,” evoke broader notions about impoverished Black women.¹ Most often, poor African-American women lack the political power to influence the public policies and discourses that shape their lives and justify persistent inequalities. Intersectionality, as experienced by Black women, operates to limit their autonomy structurally, politically, and in cultural imagery.²

The subjugation of African-American women has been particularly acute in impingements upon their reproductive rights. These limitations on autonomy began with the experience of having their wombs be at the core of the Slavery system. Since *380 that time, the narrative of reproductive subjugation has continued with experiences of coercive sterilization, the connection between birth control and the eugenics movement, and the unavailability of pre-natal care.³

This paper takes a creative look at the Fourteenth Amendment Equal Protection Clause as a possible remedy for poor, Black women to gain greater autonomy over their bodies. I argue for the creation of an intersectional super-suspect class to analyze claims that a law disproportionately impinges upon the liberty of poor African-American women. This paper builds upon the cultural meaning test of the esteemed Charles Lawrence and argues that Equal Protection jurisprudence should analyze classifications in tandem, rather than in a vacuum. I argue for an intersectional Equal Protection analysis based on race, class, and gender. My contention is that the contours of existing Equal Protection jurisprudence fail to encompass the particularized experiences of poor, Black women. Understanding the social position of poor, Black women in society requires analyzing a myriad of interlocking oppressions framed within the political economy, nuanced by culture and socio-historical formations.⁴

The argument is divided into five sections. Section one, *Super-Suspect Class: Building on the Cultural Meaning Test*, further explains the concept of a “super-suspect class,” by discussing Lawrence's Cultural Meaning Test and Crenshaw's theory of

Intersectionality. Section two, *Revisiting Ain't I a Woman*, discusses cultural representations of Black women as sexually promiscuous, matriarchs, and welfare queens. This section highlights how social constructions of womanhood, nuanced by race and class, are used to justify the unequal distribution of power and resources in society. Section three, *Cultural Meaning in Reproductive Rights Policies*, demonstrates that the failure to use an intersectional approach subjugates Black women's autonomy. The fourth section interrogates the reproductive rights narrative through a race, class, and gender lens, focusing on poor, Black women in America. Section four, *Applying the Test: Harris v. McRae*, is meant to provide a working example of how an intersectional analysis would more adequately provide equality to poor, Black women. The 1980 Supreme Court decision upheld the Hyde Amendment restricting Medicaid funds for abortion.⁵ I use the legislative history of the amendment and amicus briefs filed in the case to illustrate the limitations on the discourse surrounding poor women of color.

I. SUPER-SUSPECT CLASS: BUILDING ON THE CULTURAL MEANING TEST

This section further explains the concept of a super-suspect class and explores the type of judicial review I envision for the class. It discusses the ways that current Equal Protection jurisprudence fails to provide an adequate remedy for poor, African-American women, who can be uniquely and disproportionately impacted by facially *381 neutral laws. The idea of a super-suspect class is grounded in the notion that the law should be more attuned to the voices of those who experience discrimination in order to develop remedies that eliminate those experiences of subordination.⁶ It seeks to develop a more liberatory approach to equal protection; one that explores the “concrete ways in which government policy perpetuates the inferior status of Black women.”⁷ The super-suspect class uses a vision of the Fourteenth Amendment similar to that expressed by Chief Justice Earl Warren in *Hernandez v. Texas* when he writes that, “[W]hen the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment the guarantees of the Constitution have been violated.”⁸

I argue that Equal Protection law should be particularly sensitive to the notion that Black women living in poverty experience severe and constant impingements on their liberty as a result of their intersectional position in society. Current Equal Protection jurisprudence views the classifications of class, gender, and race in a vacuum. Each classification maintains its own standard of review to determine whether or not the government action violates the Fourteenth Amendment. Furthermore, each classification triggers a different level of judicial inquiry. The Court uses a rational basis test to analyze claims arising as a result of membership in the indigent class.⁹ Under rational basis review the Court determines whether or not the government possesses a reasonable basis for pursuing the governmental action or policy. Gender-based claims undergo intermediate scrutiny, which determines whether or not a gender classification maintains an exceedingly persuasive justification.¹⁰ Racial classifications receive the most exacting level of review-- strict scrutiny.¹¹ Strict scrutiny analysis involves a balancing between the burden imposed by the suspect classification and the compelling governmental interest in the action.¹²

Poor, Black women, however, exist at the intersection of class, gender, and race classifications; their experiences arise from multiple identities. Therefore, the use of only one standard of review fails to provide for their Equal Protection under the *382 Fourteenth Amendment. Take for example the Supreme Court's decision in *Maher v. Roe*. In *Maher*, the Court decided whether the Constitution required a state to pay for nontherapeutic abortions when it paid for childbirth.¹³ In that case, the Court determined that there was no discrimination against a suspect class, and that “an indigent woman desiring an abortion does not come within the limited category of disadvantaged classes.”¹⁴ The Court's focus on indigency led to its use of the rational basis test, and it only determined that the policy rationally furthered a “legitimate, articulated state purpose.”¹⁵

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Alternatively, under a super-suspect class analysis, the Court would acknowledge that the limitations on the use of public funds for abortion disproportionately impacts poor, Black women. The limitation on spending would then be contextualized within the particularized history of reproductive rights for this class of women. Experiences arising from an intersection between race, class, and gender have historically led to impingements upon the liberty of poor African-American women, especially in relationship to reproduction. Therefore, the primary inquiry of the supersuspect class is whether or not the government action subjugates Black women as a result of their intersectional position in society.

To trigger the super-suspect class analysis, a claim would need to establish that a government policy disproportionately impacts poor, Black women based on their race, class, and gender position in society. Current Fourteenth Amendment jurisprudence makes it extremely difficult to prevail on an Equal Protection claim where the law is facially-neutral, because of the intent-based focus established by the 1976 decision *Washington v. Davis*.¹⁶ Furthermore, most laws will not specifically single out poor African-American women as a classification. Therefore, I argue in favor of Professor Lawrence's cultural-meaning test that acknowledges the subconscious operation of racism in American society.¹⁷ The standard of review granted to the supersuspect class would deploy a cultural meaning test, particular to the experience of intersectionality. It would utilize the same approach that Lawrence advocates for in his article, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*. It would review "governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance."¹⁸ "A finding that the culture thinks *383 of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors."¹⁹

Such an interpretation of a governmental action requires the court to review the socio-historical text surrounding the challenged state action and interrogate the system of social symbols associated with it.²⁰ The following section discusses the cultural imagery surrounding poor, Black women. It outlines the various social symbols, grounded in race, gender, and class from which government action may arise.

II. REVISITING AIN'T I A WOMAN

In American society, there are particular shared cultural attitudes about Black women that express themselves in cultural symbols.²¹ One needs only to turn on the television to see the barrage of portrayals of Black women as matriarchs, welfare queens, and sexual deviants. Both historically and in contemporary times, the intersectional position of Black women profoundly shapes cultural representations of them and their structural and political position in society. This section reviews three predominate cultural images surrounding Black women and the structural realities that underpin the stereotypes.

A. The Myth of the Matriarch

Black women's prominent role in the African American community as providers and sustainers of their families since Slavery has served as a means of resistance, yet also stands as a point of ideological contention.²² Due to the prominent role of Black women in their families and communities, they are often referred to in terms that suggest power: strong, domineering, emasculating, and matriarchal.²³ Rather than being viewed as a source of survival for Black families in a racially hostile climate, the disproportionate number of female-headed households and eminence of Black women in their families is attributed to a mythical matriarchal structure.²⁴

*384 In his 1965 report, New York Senator Daniel Moynihan argued that the source of oppression in the Black community resulted from the tangle of pathology created by the absence of male authority.²⁵ Because working mothers spend a great

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deal of time away from home, the public criticizes working Black women for emasculating their sons and defeminizing their daughters.²⁶ Dorothy Roberts, writing 30 years after Moynihan, argued that the concept of a “tangle of pathology” is still associated with single-headed households. Poor, Black mothers receive blame for “perpetuating social problems by transmitting defective genes, irreparable crack damage, and a deviant lifestyle to their children.”²⁷

The myth of matriarchy operates in a way that bolsters patriarchal social order. This myth casts Black women as enfeebling their lovers and husbands due to an overly aggressive posturing.²⁸ These cultural images become simplistic, racially-coded explanations for the structural realities of women disproportionately heading households as the primary caretakers for their children. The ideological representation of Black women as matriarchs dismisses structural foundations as the primary cause of poverty in the Black community.²⁹

The insecurity of Black male employment stands as a primary contributor to the prominence of Black women in family affairs. A 2007 study released by the Urban League estimated that Black men were more than twice as likely to be unemployed as White men and earn only 74 percent as much each year.³⁰ In the post-emancipation era, the continued designation of Black men as “boys” reflected their inability to execute fatherly responsibilities.³¹ Although Black males found it difficult to secure employment, Black women commonly participated in the labor market, but as domestics.³²

Today, Black women continue to disproportionately hold low-level service positions including housekeepers, nursing assistants, school cafeteria workers, and other *385 similar jobs.³³ For poor, Black women, the structural realities of the labor market are inextricably linked with conceptions of womanhood and motherhood. Historically, their status as laborers excluded Black women from the “cult of womanhood.” Sojourner Truth's revolutionary speech, *Ain't I a Woman*, addressed this phenomenon.³⁴ Womanhood required piety, purity, submissiveness, and domesticity. Yet, as Patricia Hill-Collins argued, the “cult of domesticity” and motherhood as a “privatized female occupation” never predominated in Black communities.³⁵

B. The Welfare Queen

Another cultural symbol associated with Black women is the notion of the infamous welfare queen. The media and dominant social forces paint the picture of a lazy, African-American mother on public assistance, deliberately breeding children at the taxpayers expense in order to increase her monthly state assistance.³⁶ This image finds its roots in the economic realities of the 1970s, an era defined by the axiological shift in political discourse and social reform.³⁷ During that time, the expansive government strategies of the 1960s that sought to solve issues of poverty, housing, and racial discrimination began to fade.³⁸ The welfare debate was pervaded by stereotypes and ideologies rather than statistics and rationally based arguments.³⁹ Negative images of welfare recipients as lazy, idle, and dishonest became racially inscribed during this era, and media images further reinforced the connection between race and welfare.⁴⁰

From 1972 to 1973, the years of heightened discussion of the welfare controversy in popular newsmagazines, “[S]eventy-five percent of the photographs were of *386 African Americans, even though they constituted only 46 percent of welfare recipients.”⁴¹ A 1975 *New Yorker* article by Susan Sheehan recounted the tale of a Puerto Rican mother of nine on welfare, and described, “multiple sex partners, carefree men, out-of-wedlock births, poor housekeeping, drug use, and indifferent attitudes about paid employment, school, and personal morality.”⁴² The welfare debate remains racially encoded; a 1990 study found that 78 percent of White Americans believed Blacks preferred to live on welfare.⁴³

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Discussions on welfare reform use race-neutral terms, but the notion of “welfare queens” as Black women remains implicit.⁴⁴ Arguments favoring welfare reform include attendant ideas that welfare incentives contribute to a deviant family structure.⁴⁵ The argument follows that welfare payments to single mothers perpetuate and encourage a “culture of poverty.”⁴⁶ The welfare queen is “the creator of the pathological, Black, urban, poor family from which all ills flow; a monster creating crack dealers, addicts, muggers, and rapists--men who become those things because of being immersed in her culture of poverty.”⁴⁷

The concept of the welfare queen and its connection to motherhood implicates the structural operation of government institutions and social services provided to impoverished families. “The disproportionate number of Black mothers who lose custody of their children through the child welfare system is a contemporary manifestation of the devaluation of Black motherhood.”⁴⁸ Cultural biases existing within social service agencies deprive poor women of autonomy over their families. Households headed by single mothers fail to meet the standards of a traditional, nuclear family, and create a justification for state interference with their children.⁴⁹

C. The Image of the Jezebel

The representation of Black women as sexually promiscuous beings is an additional cultural image alongside the matriarch and the welfare queen. The dominant conception of Black women as jezebels governed by their sexual desires originated in the sexual abuses perpetuated against them during Slavery.⁵⁰ Recounting this phenomenon, Dorothy Roberts writes: As early as 1736, the South Carolina Gazette described “African Ladies” as women of “strong robust constitution” who were “not easily jaded out” but able to serve their loves “by Night as well as Day.” This ideological construct of licentious *387 Jezebel legitimated [W]hite men's sexual abuse of Black women. The stereotype of Black women as sexually promiscuous helped to perpetuate their devaluation as mothers.⁵¹

The idea of the Black woman as a sexual heathen continues into the twenty-first century and is encompassed by modern representations and popular media, including music videos and movies.

Modern welfare reform debates continue to adopt the cultural image of Black women as sexually loose beings. The call for personal responsibility arising from social conservatives asks welfare mothers to “modify their sexual and familial behavior” by avoiding “out-of-wedlock pregnancies, preferably by avoiding pre-marital sex.”⁵² The first George W. Bush administration focused on strengthening families through greater enforcement of outstanding child support payments and by channeling funds to a specified list of marriage related activities.⁵³ The 2005 Personal Responsibility, Work, and Family Promotion Act reflected “the assumption that marriage will cure societal problems by ‘civilizing’ poor women, especially women of color, who depend on public assistance.”⁵⁴

Rather than acknowledge the structural realities tied to race and class that create large numbers of single-headed households, public policy debates focus on the perceived sexual promiscuity of Black women as the root cause of children being born out of wedlock. The jezebel image of promiscuity “drive[s] assumptions that poor women have children by mistake.”⁵⁵ Cultural representations of the sexually immoral, deviant mother become enmeshed with the epistemological framework supporting systemic efforts to regulate the reproductive rights of poor women of color.⁵⁶

In the 1962 case *In re Simpson*, Judge Gary ordered the sterilization of an 18-yearold African-American female named Nora Ann Simpson.⁵⁷ The court referred to Ms. Simpson as a “physically attractive young woman,” and noted that she had already

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bore one child out of wedlock. The court determined that sterilization was appropriate because her sexual promiscuity and feeble-mind would lead her to become pregnant repeatedly and bear children that would rely on public assistance.⁵⁸

The three images of African-American women--the matriarch, welfare queen, and jezebel--are precisely the types of racially coded cultural symbols that have a shared meaning. These stereotypes often arise within the context of public policy debates regarding seemingly neutral government actions such as limiting or increasing public assistance. Oftentimes, as we will see later on in this article, the racial implications remain unspoken. The next section explores how these symbols and *388 negative cultural images have profoundly impacted reproductive rights for Black women.

III. CULTURAL MEANING IN REPRODUCTIVE RIGHTS POLICIES

The symbolic imagery and cultural representations of African-American women profoundly impact public debate and government policy related to their reproductive rights. The stereotypes of Black women as matriarchs, welfare queens, and jezebels are the types of thoughts and feelings that subconsciously arise to justify impingements upon their liberty. This section looks at the various ways in which the reproductive autonomy of Black women has been profoundly impacted by Slavery, the birth control movement, and sterilizations.

A. Slavery

Since the inception of Black women into the fabric of American society, their reproductive choices have been controlled by a culture based “on discrete gender, class, and race distinctions.”⁵⁹ “The Black woman was viewed not as a woman but as a fragmented commodity, with every part of her body, including her womb, subject to the master's control.”⁶⁰ Rather than a mother, slave women were classified as ‘breeders,’ “and their infant children could be sold away from them like calves from cows.”⁶¹ Their bodies represented the economic core of the economic system of Slavery, and hypo-descent laws used their very wombs to perpetuate enslavement. Black women suffered from systematic sexual abuse during Slavery, rape was used as “a weapon of oppression, whose covert goal was to extinguish slave women's will to resist, and in the process to demoralize their men.”⁶² Self-imposed abortions and infanticide during slavery represented desperate acts motivated by the oppressive conditions of slavery.⁶³ “Many slave women refused to bring children into a world of interminable forced labor, where chains and floggings and sexual abuse for women were the everyday conditions of life.”⁶⁴

B. Birth Control

Racial and class biases pervaded the American birth control movement from its inception. The dominant strain of discourse viewed birth control as a ““right” for affluent White women to pursue activities outside of the home, and as a “duty” for poor, Black women to limit the size of their families.⁶⁵ In the late nineteenth century, privileged White women advocated for ““voluntary motherhood”--a concept allowing *389 for careers and personal development outside of marriage.⁶⁶ This logic, however, failed to reflect the experiences of poor and working-class women of color, who historically worked outside of the home.⁶⁷ In the early 1900s, prominent feminist Margaret Sanger tied the eugenics movement to her promotion of access to birth control for the “unfit” in order to create a supreme or elite race.⁶⁸ In her 1922 book, *Pivot of Civilization*, Sanger utilized the study of eugenics to demonstrate that “uncontrolled fertility is universally correlated with disease, poverty, overcrowding, and transmission of hereditary traits.”⁶⁹

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Despite its links to racism, Black women were already practicing birth control when the birth control movement began.⁷⁰ In the early 1900s, a discourse emerged in the Black community tied to birth control and was discussed widely in the Black press, public lectures, and Black women's fiction and poetry.⁷¹ Writing in his 1932 article in the *Birth Control Review*, George S. Schuyler noted the ubiquity of pregnancy prevention devices for sale in Black communities ...”⁷²

In the early 1970s articles appeared in the Black Panther Party's newspaper condemning birth control as a genocidal tool against the Black race.⁷³ One article entitled *Birth Control* rejected the notion that Blacks should concern themselves with fertility limitation before seeking economic change to alleviating systemic poverty.⁷⁴ Assertions by male Black power leaders presented Black women's wombs as a colonized entity, where motherhood becomes a physically practiced experience for women, defined and given value by the core concepts of patriarchal ideology.⁷⁵ Black Power leaders used Black women's fertility as a means for achieving liberation, yet through the course of this very process also denied Black women liberation over their own bodies.

During this era, however, Black women continued to assert their right to birth control, despite the push to define the practice as genocide. In the 1970s members of the Black Women's Liberation Group in Mt. Vernon, New York, actively supported the use of birth control.⁷⁶ In an anthology entitled *Sisterhood is Powerful*, they wrote:

Poor [B]lack sisters decide for themselves whether to have a baby or not to have a Baby Black women are able to decide for themselves, like poor people all over the world, whether they will submit to genocide.

For us, birth control is the freedom to fight genocide of [B]lack women and children.⁷⁷

***390** Assaults against Black women's reproductive autonomy related to the use of birth control surfaced again with the phenomenon of tying Norplant⁷⁸ to public assistance funds. Touted as a revolutionary advance in reproductive technology,⁷⁹ Norplant became a form of birth control specifically targeted at poor, Black women either incarcerated or living on welfare. Many state proposals during the early 1990s provided reimbursements for women who agreed to the injection.⁸⁰ According to Pamela Bridgewater, arguments favoring Norplant placed Black women's reproductive systems at the center of public policy to further the objectives of society.⁸¹ Welfare reform lobbyists and legislators argued for tying birth control to public assistance funds because they believed doing so would end the “cycle of poverty.”⁸² Lawmakers argued that in ending generational poverty, Norplant could also lighten constituent tax burdens.⁸³ An article in the *Philadelphia Inquirer* blamed Black poverty on Black women bearing children they are unable to support, and proposed Norplant as the solution.⁸⁴

C. Sterilization

In the post-World War II era and through the early 1980s, Black women fell victim to widespread involuntary sterilizations by government-paid doctors.⁸⁵ Medicaid created financial incentives for surgeons to perform the more extensive operational procedure of a hysterectomy rather than a tubal ligation,⁸⁶ despite the twentyfold risk of killing the hysterectomy patient.⁸⁷ Famed Civil Rights Movement leader Fannie Lou Hamer was among the many Southern Black women sterilized through trickery or deceit.⁸⁸ After entering the hospital for the removal of a small uterine tumor, Hamer received a hysterectomy without her knowledge or consent.⁸⁹

During the 1970s, sterilization became the most rapidly growing form of birth control in the United States, rising from 200,000 cases in 1970 to in excess of ***391** 700,000 in 1980.⁹⁰ According to Dr. Bernard Rosenfeld of Los Angeles County Hospital,

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in 1973 it was common practice for “doctors in some cities [to] cavalierly [subject] women, most of them poor and [B]lack, to surgical sterilization without explaining either potential hazards or alternate methods of birth control.”⁹¹ In one South Carolina town, the sole obstetrician insisted that, “pregnant welfare women ‘will have to submit to voluntary sterilization’ if they wanted him to deliver their babies.”⁹² He received \$60,000 in taxpayer's money for sterilizations.⁹³ During 1974, a federal district court in Alabama found an estimated 100,000 to 150,000 poor women had been sterilized through federally funded programs.⁹⁴

Responding to infringements on the reproductive rights of women, the Committee for Abortion Rights and Against Sterilization Abuse (CARASA) published *Women Under Attack*. This work acknowledged the structural pressures created by placing limitations on public funding for abortions. The publication discusses the economic realities causing poor, Black women to disproportionately relinquish their ability to bear children:

Some 300,000 women a year who seek abortions are entirely dependent on Medicaid and other public funds for medical care; the average cost of a private abortion was \$280, which is higher than the average monthly welfare payment for an entire family; the federal government continues to pay 90 [percent] of the costs of sterilization so that denying abortion funds puts women who cannot afford more children under increased pressure to become sterilized.⁹⁵

The reproductive right experiences of Black women evidence both a call for full autonomy over one's own body and subjugation resulting from government decisions, anti-racist, and feminist movements. Structural realities explained away by fundamentally racist social constructions of Black women as Matriarchs, Welfare Queens, and Jezebels create further limitations on reproductive choice in the name of public policy. This is precisely what Lawrence spoke of when he wrote about the cultural meaning of an action that “derives from a long-term and pervasive association of certain feelings or thoughts with that action.”⁹⁶ The history of Black women's reproduction viewed through a lens of intersectional cultural meaning creates the case for creating a new super-suspect class for Constitutional Equal Protection jurisprudence.

IV. APPLYING THE TEST:HARRIS V. MCRAE

The purpose of this article is to provoke thought about how the Equal Protection Clause can provide a more comprehensive vision of freedom, particularly for poor, *392 Black women. This section uses a historical case to look at how the intersectional cultural meaning test would operate, if it were applied to the legal text surrounding *Harris v. McRae*.

A. The Hyde Amendment&Harris v. McRae

Since deciding *Roe v. Wade* in 1979, privacy is the fundamental right the Supreme Court uses to uphold abortion's legality for all women in the United States. In this flagship abortion case, the Court held the right of privacy was “broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”⁹⁷ Wade grounded the right to abortion in liberties protected by the Fourteenth Amendment and Fifth Amendment Due Process Clause. Although considered a nonenumerated right, the right to privacy represents a freedom of personal choice in certain matters of marriage and family life.⁹⁸ Subsequent cases, however, detracted from the broad Constitutional grant of abortion by limiting access through restrictions on funding. Following Wade, the Court upheld state and federal statutes impeding the ability for poor women, and disproportionately women of color, to obtain abortions. The 1976 Hyde Amendment, named after the senator who introduced it, represented a federal restriction on the expenditure of public funds for abortions.⁹⁹

In *Harris v. McRae*, the Supreme Court held that the funding restrictions of the Hyde Amendment violated neither the Fifth Amendment Due Process Clause, nor the First Amendment Establishment Clause.¹⁰⁰ The Court reasoned that the Amendment placed no governmental obstacle in the path of a woman seeking an abortion, and that the government owed no positive right to fund an abortion in order to grant freedom of choice.¹⁰¹ The Fifth Amendment Due Process approach in *Harris* inadequately protected the reproductive rights of poor women of color. Here, the Court's analysis of negative and positive rights fails to consider the cultural meaning of government action that limits the reproductive autonomy of poor women of color.

A super-suspect class approach to Equal Protection would acknowledge how government action impacts freedom of choice because of the intersection between gender, class, and race. The Commission on Civil Rights, quoted by Senator Fraser during debates on the Hyde Amendment, claimed that the legislation was unconstitutional under the equal protection clause of the Fourteenth Amendment because, "it would restrict the right of privacy of poor women, who are disproportionately also members of racial minorities."¹⁰²

393 B. Intersectional Analysis of *Harris v. McRae

The following is a description of how the intersectional cultural meaning test can be applied to *Harris v. McRae*. The amicus briefs in *Harris v. McRae* and the legislative history of the Hyde Amendment can be analyzed for the cultural symbols that arise from those legal texts. Under a super-suspect class analysis, the question is whether or not society attaches a race, class, and gender significance to those cultural symbols. More specifically, this section explores the particular intersectional associations arising from the discourse surrounding the limitations on public funding for abortions. In particular, the cultural images of the Matriarch, Welfare Queen, and Jezebel can be found within these texts, and these cultural symbols maintain significance from an intersectional perspective. The various arguments from different sources, both for and against providing public funding for abortions, reflect a diversity of notions regarding reproductive rights for poor, African-American women. At their core, these multiple texts exemplify the process by which Black women's autonomy over their bodies becomes suppressed and limited by social forces.

The arguments can be divided into four main categories. First, arguments in favor of the public funding, arising from the amicus briefs submitted by the National Organization of Women (NOW) and the New York Attorney General's Office, promote abortion as a tool for combating poverty. Second, arguments contained within the legislative history from Senators and Representatives invoke the racially-coded imagery of the young, single mother on welfare. Third, arguments opposing the proposed limitations on public funding couch the restrictions on abortion funding in terms of genocide against African-American people. Finally, this section concludes with an exploration of what I contend is the most liberatory approach to the issue, presented by the Committee for Abortion Rights and Sterilization Abuse (CARASA).

First, the predominately White, affluent feminist organization NOW and the Attorney General of New York reject the Hyde Amendment. The amicus briefs submitted by those entities argue that the funding for abortions is a tool in combating poverty. Yet, these arguments are problematic because they neglect to capture the structural realities faced by poor, Black women arising from their historical experiences of intersectionality. Arguments in favor of continuing the funding for access to abortions assumes that having fewer children could create more opportunities in employment, health care, and housing.¹⁰³ This rhetoric mirrors early abortion rights campaigns, comprised of predominately White women, that implicitly assumed legal abortions provided a viable alternative to impoverishment. The notion of restricting the size of one's family to improve one's position in society also harkens back to arguments made in the inception of the birth control movement.

The brief submitted by NOW claimed that restrictions on abortion funding, "interferes with [the indigent woman's] ability to fully participate in our society. Her opportunities to escape poverty through education and job training, already limited because

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she is poor, are further restricted because she is a woman. Institutionalized *394 sex discrimination in our society confines women to low status, low-paying jobs.”¹⁰⁴ Implicit in this statement is the problematic idea that impoverished women should be able to terminate a pregnancy in order to create more opportunities for themselves. NOW continued by arguing in its brief that “Carrying a pregnancy to term can cause severe deprivation to indigent families Her energies may be so drained by the birth and new childcare responsibilities that she will be unable to provide the emotional support needed by her own children and family members.”¹⁰⁵

This approach incorporates both class and gender, yet fails to fully interrogate the lack of resources plaguing impoverished communities constraining class mobility and its ties to racism. Remember, as mentioned earlier in the article, it is poor, Black women that disproportionately work in the lowest-paying, lowest-level service sector jobs. A racialized and genderized labor market profoundly impacts the experiences of poor African-American women. Furthermore, the conception that carrying a pregnancy to term causes severe deprivation to indigent families fails to acknowledge the lack of adequate social support services for poor, Black women that also leads to deprivation. Here, abortion is cast as the remedy for ending the stresses and strains placed on families living on public assistance. However, the tie between structural realities and the constraints they place on poor, Black women's reproductive choice maintains a long history.

During Slavery, some women chose abortions and infanticides over rearing children under the brutal economic system that stripped them of humanity. Because the structural position of Black women as commodified laborers remained virtually unchanged in the post-emancipation era, abortion persisted as an avenue for preventing the suffering of one's offspring and greater strain on one's households. The risk of the procedure to a woman's health bolsters Angela Davis' argument that, “When Black and Latina women resort to abortions in such large numbers, the stories they tell are not so much about their desire to be free from pregnancy, but rather about the miserable social conditions which dissuade them from bringing new lives into the world.”¹⁰⁶

The Attorney General of New York highlighted the medical health risks associated with poverty and the impact of unplanned pregnancy on the mental health of impoverished women.¹⁰⁷ Similar to the NOW brief, the financial ability to access abortions became a solution for avoiding inadequate medical and mental health services. Additionally, the brief of the New York Attorney General paints an image of a single, teenage mother as the woman on public assistance seeking abortions.¹⁰⁸ An unspoken race, class, and gender image underlying the briefs and legislative debate is that the woman on public assistance seeking an abortion is the deviant “Welfare Queen.”

The legislative history of the Hyde Amendment reflects the idea that the government *395 conduct of restricting funds on abortion maintains racial significance in that it invokes the symbolism of poor women of color creating a drain on public coffers. In one particular exchange, Senator Brooke, who opposed the Amendment, invoked the image of a promiscuous woman seeking to use government funds as birth control. He claims, “I do not believe that a woman can just be promiscuous and have children and get rid of those children by abortion. I think that is immoral I do not think abortion is to be used for birth control.”¹⁰⁹ The comments by Senator Brooke maintain a racial significance, especially when one considers the long-historied images of the African-American Jezebel and Welfare Queen.

Another comment reflected in the cultural imagery and symbolism tied to poor, Black single mothers as deviating from socially acceptable family structures. Senator Pastore proclaimed, “the idea that some poor girl who maybe is married or not married, I do not know, becomes pregnant, and after [six] months or so she decides she wants to have an abortion, now, if she is on Medicaid the public coffers are going to pay for it, is that right?”¹¹⁰ The Senator never speaks in racial terms, however, the idea of a single-headed household brings to mind the image of the African-American matriarch, responsible for the tangle of

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pathology like that discussed in the Moynihan Report. Invoking these representations of Black women using neutral cultural symbolism also fails to acknowledge the particular structural position creating large numbers of single-headed households.

Even the exceptions created to the Hyde Amendment reflect particularized notions about Black women's sexual practices and the circumstances surrounding conception for poor women living on public assistance. Pursuant to the Amendment, Medicaid provided funds for abortion when two physicians determined the mother's life was endangered and that she would suffer severe and long-lasting health damage. Also, if a woman fell victim to rape or incest and reported it to a law enforcement agency or public health service within 60 days of the crime, Medicaid would fund the abortion.¹¹¹ These exceptions are associated with the notion that irresponsible sexual practices surround poor, Black women's acts of conception. The reasons for abortion become acceptable, because rape and incest are disconnected from the imagery of an unchaste woman.

The arguments against the Hyde Amendment are also problematic, in that they make poor, Black women's wombs a tool of liberation. Advocates favoring the legislation submitted briefs that mirror the arguments made by Black Power leaders admonishing women for practicing birth control. The Coalition for Human Justice claims in its amicus brief that "by isolating pregnancy and birth as impediments to health, the Medicaid abortion program literally forces pregnant women to act as scapegoats for society's brutal and often deliberate neglect of the poor."¹¹²

Although this brief highlighted the structural conditions and cultural representations *396 of poor women, it failed to factor in the notion that Black women seek autonomy in reproductive choice free from government interference. The brief advocates for upholding the Hyde Amendment, and states, "As long as the poor are denied access to the basic necessities of life, abortion providers will claim that poor women are medically unfit to procreate. As long as abortions are--in a way--justified by social neglect, genuine economic reform will be seriously jeopardized."¹¹³ This argument, while valid, perpetuates a lack of reproductive choice for Black women by placing their wombs at the crux of a push for systemic economic reform. While acknowledging the reproductive history of poor women, the argument fails to recognize that Black women ultimately seek autonomy over their bodies and wish access to all forms of family planning.

Similarly, while advocating for the Amendment, Senator Hyde adopted arguments originating from Black male leaders defining abortion as genocide against people of color.¹¹⁴ Quoting Jessie Jackson, Dick Gregory, and even the Dred Scott decision, the Senator declared, "[A]ll of us should have a particular sensitivity to the word genocide. In NYC last year for every 1,000 minority births, there were 1,034 minority abortions. That is one way to get rid of the poverty problem, get rid of poor people."¹¹⁵ Senator Paul made arguments comparable to that of Senator Hyde, when he argued, "The sickest argument for abortion is that the poor, Black population needs to be reduced. Keep them off the welfare rolls some conservatives argue. Frequently abortion is performed at the desire of an aggressive social worker who fears food may become scarce and for various other personal prejudices."¹¹⁶

The arguments in favor of the Hyde Amendment, couched in anti-racist political rhetoric, are illusory in consideration of the structural impact of the legislation. First, limiting public funding on abortions disproportionately limited the ability of AfricanAmerican women to make their own reproductive choices, continuing a legacy of restrictions on the reproductive autonomy of Black women. Furthermore, in arguing that abortions equate to genocide, Senator Hyde failed to acknowledge that although the government limited public funds for abortion, "sterilizations funded by the Department of Health, Education and Welfare remained free on demand."¹¹⁷ As a result, the autonomy of Black women remained restricted and economic circumstances persisted as a compulsion to relinquishing "the right to reproduction itself."¹¹⁸

An intersectional approach to Equal Protection would recognize arguments like that of the Committee for Abortion Rights and Against Sterilization Abuse (CARASA) in which it calls for the Court to strike down the Hyde Amendment for its invidious

*397 discrimination against poor and minority women to choose sterilization.¹¹⁹ CARASA argued, “Consent is involuntary when given in default because other reasonable choices are foreclosed.”¹²⁰ This critical perspective acknowledges the necessity for full autonomy in reproductive decision-making. The funding of abortions in addition to greater funding for preventive and pre-natal health care, public school systems, and affordable housing become the means by which Black women may begin to exercise freedom of choice. CARASA eloquently described this comprehensive vision of reproductive rights for women of color:

Reproductive rights include abortion rights, freedom from sterilization abuse, available child-care, living wages or adequate public assistance, access to decent health care, safe, effective, cheap contraception, freedom to be a lesbian and live without discrimination, housing and anything else that gives real support to enable them to choose freely.¹²¹

CONCLUSION

The discourse surrounding *Harris v. McRae* shows the process by which cultural symbolism with race, class, and gender significance shapes law and public policy. It also shows the ways in which intersectionality operates to strip impoverished African-American women of their right to reproductive choice. The creation of a supersuspect class, which acknowledges the operation of race, class, and gender in tandem, is meant to shape the Equal Protection Clause as a tool for poor, Black women's autonomy over their own bodies. In *McRae*, the Court denounced a positive right for the government to protect a woman's access to abortion through funding based on Fifth Amendment Due Process. An intersectional approach arising from the Fourteenth Amendment acknowledges the constant assault Black women face from government institutions, social structures, and political movements, as well as the need for Equal Protection from the law.

Historical social constructions of class, gender, and race unintentionally influence the epistemological framework producing government action. A decision to limit public funding for abortion subconsciously grounds itself in representations of Black women as “Matriarchs,” “Welfare Queens,” and “Jezebels.” An intersectional approach seeks to create a counter-hegemonic discourse to traditional notions of Black women as the creators and sustainers of a “culture of poverty.” Based on these fundamentally flawed cultural notions, the autonomy of Black women over their reproductive systems becomes subordinate to social policy.

For poor women of color, the right to privacy in making a choice about whether to bear a child results from her structural position in society. Her reproductive capacities are not merely constrained to the private sphere, and since Slavery, have been integrated with the racialized economy. Culturally biased social service agencies *398 often justify government invasion into the private realm without fully redressing the structural conditions of the family. Through limitations placed on reproductive choice from multiple fronts, Black women unequally bear the impact of positive government choices shaped by class, gender, and race.

An intersectional super-suspect class approach requires an analysis of discriminatory legislative acts by looking at interlocking forms of discrimination. It takes a step above the intent-focused strict scrutiny review applied to racial groups because the impact of certain policies on Black women is often not intentionally produced,¹²² but “frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”¹²³ A primary example is the reciprocal relationship between limits on public expenditures for abortion and increased sterilizations. In debating the Hyde Amendment, one senator in particular acknowledged the interconnectedness between limiting abortion funds and the lack of social services provided to poor families. Senator Fraser stated, “[w]e do not have a perfect society. None

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of us intended to build the pattern of de facto employment, housing, and educational discrimination that we are committed to destroying. But if we pass this amendment, we will be intentionally continuing the pattern of oppression.”¹²⁴

The suggestion of a super suspect class is meant to open the door for understanding how the unique position of Black women in society results in constant impingements upon autonomy over their bodies from a multiplicity of sources. At its core, an intersectional test possesses the intention of interrogating representations of Black women as sexually deviant, morally corrupt, welfare queens responsible for the demise of the Black community. In essence, it is intended to develop a more comprehensive vision of equality for poor, African-American women.

Footnotes

- a1 © 2009, Elizabeth Jones. Elizabeth Jones is a 2009 graduate of Georgetown Law Center. She received her Bachelors and Masters from the University of Louisville in 2004 and 2006, respectively. She currently works at the Orleans Public Defender in New Orleans, LA. The author would like to thank her very supportive family as well as the influential professors of GULC including Charles Lawrence, Mari Matsuda, and Sheryll Cashin. Also, most importantly, the phenomenal staff of MCRP, with particular gratitude to Dania Ayoubi for her insightful comments.
- 1 Ellen Reese writes about the racially-coded nature of welfare in her work *BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT*. She discusses the common association between Blacks and welfare “and the racist stereotype that Blacks are lazy” as being “important sources of opposition to welfare spending.” 180 (Berkeley 2005).
- 2 The term “intersectionality” arises from the work of Kimberle Crenshaw. In her article, *Mapping the Margins: Intersectionality, Identity Politics, and Violence*, Crenshaw uses the topic of domestic violence to highlight how women’s experiences are “often shaped by other dimensions of their identities, such as race and class.” 43 *STAN. L. REV.* 1241, 1242 (1991) (discussing the structural, political, and representational aspects of intersectionality).
- 3 Melanie M. Lee, *Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination*, 6 *WASH. & LEE RACE & ETHNIC ANC. L.J.* 87, 90 (2000).
- 4 Helen Nelville & Jennifer Hamer, *We Make Freedom: An Exploration of Revolutionary Black Feminism*, 31 *J. OF BLACK STUD.* 437 (2001).
- 5 *Harris v. McRae*, 448 U.S. 297 (1980).
- 6 Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARVARD L. REV.* 1419, 1455 (1991) [hereinafter Roberts, *Punishing*]. See also Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987) (arguing that lawmakers and judges should consider the claims of those who have directly experienced discrimination).
- 7 Roberts, *Punishing*, *supra* note 6, at 1455.
- 8 *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).
- 9 See *Dandridge v. Williams* 391 U.S. 471 (1970) (finding that Maryland had no duty to provide public assistance, the cap of \$250 monthly for each AFDC (Aid to Families with Dependand Children) family was an economic regulation subject to the rational basis test); *Maher v. Roe*, 432 U.S. 464 (1977) (find that indigent women desiring an abortion is not a suspect class and is subject to rational basis review).
- 10 See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that a policy using the classification of gender must serve an important governmental objective and the means employed must be substantially related to the achievement of those objectives);

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[United States v. Virginia](#), 518 U.S. 515 (1996) (ruling that the all-male admission policy of the Virginia Military Institute does not have an exceedingly persuasive justification and violates the Equal Protection Clause).

11 [See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1](#), 551 U.S. 701 (2007); [Gratz v. Bollinger](#), 539 U.S. 244 (2003).

12 [Gratz v. Bollinger](#), 539 U.S. 244, at 270.

13 [Maher v. Roe](#), 432 U.S. 464, at 466.

14 *Id.* at 470-471.

15 *Id.* at 470.

16 [Washington v. Davis](#), 426 U.S. 229 (1976).

17 The cultural meaning test “posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning.” Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 *Stan. L. Rev.* 317, 324 (1987). *See also*, MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005). Gladwell’s book discusses how the subconscious mind influences our responses to environmental stimuli, there are numerous sections related to race. In one particular passage discussing race he writes about the Harvard-developed Implicit Association Test that measures racial attitudes at an unconscious level. Eighty percent of all those who take the test end up with pro-White associations. *Id.* Furthermore, according to Gladwell, the test “shows that our unconscious attitudes may be utterly incompatible with our stated conscious values.” *Id.* at 84-85.

18 Lawrence, *supra* note 17, at 356.

19 *Id.* at 324.

20 *See id.* at 363. Lawrence discusses the standard of “common knowledge,” that is “evidence of shared cultural attitudes that have expressed themselves in cultural symbols. *Id.* The actions involved could have nothing other than a racial meaning within our society.” *Id.* Lawrence continues by explaining that “[A]s long as the symbols ... retain their meaning, the feelings continue to exist and shape our behavior.” *Id.* The feelings he references are the subconscious association of thoughts with a particular action.

21 *Id.* at 363.

22 *See* ANGELA DAVIS, *WOMEN, RACE, & CLASS* 20 (1995). In her work, Davis discusses how domestic work in the private sphere represented a form of resistance for slave women. She writes, [P]recisely through performing the drudgery that has long been a central expression of the socially conditioned inferiority of women, the Black woman in chains could help lay the foundation for some degree of autonomy, both for herself and her men. Even as she was suffering under her unique oppression as female, she was thrust into the center of the slave community. She was, therefore, essential to the survival of the community. *Id.*

23 Kay Lindsey, *The Black Woman as Woman*, in *THE BLACK WOMAN ANTHOLOGY* 108 (Toni Cade Bambara ed., Washington Square Press 2005) (1970).

24 *See generally* U.S. DEPT. OF LABOR, OFFICE OF POLICY PLANNING & RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) [hereinafter *The Moynihan Report*]; ROBERT STAPLES, *THE BLACK WOMAN IN AMERICA: SEX, MARRIAGE, AND THE FAMILY* (1973); DAVIS, *supra* note 22; KIMBERLY SPRINGER, *LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATION 1968-1980* (2005); LEE RAINWATER & WILLIAM YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY: A TRANS-ACTION SOCIAL SCIENCE AND PUBLIC POLICY REPORT* (1967).

25 DAVIS, *supra* note 22, at 13. In Chapter 4, *The Tangle of Pathology*, Senator Moynihan writes,

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In essence, the Negro community has been forced into a matriarchal structure which, because it is too out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well.

The Moynihan Report, *supra* note 24.

26 DAVIS, *supra* note 22, at 13.

27 Roberts, *Punishing*, *supra* note 6, at 4.

28 DAVIS, *supra* note 22, at 5.

29 *See generally* Nelville&Hamer, *supra* note 4.

30 Haze Trice Edny, *Future of Black Men Critical for American Family*, NEW AM. MEDIA, Apr. 24, 2007, http://news.newamericamedia.org/news/view_article.html?article_id_9fe6f09ad32d74af830322e322e984cbb38a.

31 DAVIS, *supra* note 22, at 17.

32 STAPLES, *supra* note 24.

33 Nelville&Hamer, *supra* note 4.

34 Sojourner Truth, Address at the Women's Right Convention: Ain't I A Woman? (May 29, 1951), *transcript available at* <http://www.fordham.edu/halsall/mod/sojtruth-woman.html>.

35 PATRICIA HILL-COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (1990). *See also* DAVIS, *supra* note 22, at 12 (arguing “An ideology of femininity—a by-product of industrialization—was popularized and disseminated through the new ladies' magazines and romantic novels, while women came to be seen as inhabitants of a sphere totally severed from the realm of productive work.”).

36 DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 17 (1997).

37 *See* PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES 197 (2004). Nadasen writes,

[T]he 1970s ushered in a new political alignment and a new set of assumptions about political reform ... The strategies of expansive government—solving social problems of poverty, a weak economy, and housing shortages and as a regulatory state—faded quickly. In this political climate welfare recipients became convenient scapegoats for economic distress and helped justify a conservative political turn.

Id.

38 *Id.*

39 *See id.* Nasaden explains that, “Many people believed that a vast majority of welfare recipients could, but refused to work, and simply took advantage of government handouts ... people of all social classes believed that welfare recipients were idle and dishonest, and had more children than they actually did.”

40 *Id.*

41 *Id.* at 197.

42 *Id.* at 198.

43 ROBERTS, *supra* note 36, at 17.

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- 44 Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38HOW. L.J. 473, 474 (1995).
- 45 ROBERTS, *supra* note 36, at 18.
- 46 *Id.*
- 47 *Id.*
- 48 Roberts, *Punishing*, *supra* note 6, at 1440.
- 49 *Id.*
- 50 *Id.* at 1438.
- 51 *Id.*
- 52 Brenda Crossman, *Contesting Conservatism, Family Feuds, and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 473 (2005).
- 53 *Id.* at 475-76.
- 54 Angela Onwuach-Willig, *The Return of the Welfare Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1650 (2005).
- 55 Albiston&Nielsen, *supra* note 44, at 481.
- 56 *Id.*
- 57 *In re Simpson*, 180 N.E.2d 206, 208 (Ohio P. Ct. 1962).
- 58 *Id.*
- 59 Pamela D. Bridgewater, *Un/Re/Dis-Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 12 (2001).
- 60 Lee, *supra* note 3, at 92.
- 61 DAVIS, *supra* note 22, at 7.
- 62 *Id.* at 23.
- 63 *Id.* at 205.
- 64 *Id.*
- 65 *Id.* at 210.
- 66 *Id.* at 208.
- 67 *Id.*
- 68 Lee, *supra* note 3, at 93.
- 69 ROBERTS, *supra* note 36, at 73.
- 70 *Id.* at 81.

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- 71 *Id.* at 83.
- 72 *Id.*
- 73 JENNIFER NELSON, BLACKWOMEN AND THE REPRODUCTIVE RIGHTS MOVEMENT 105 (2003).
- 74 *Id.*
- 75 Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L. J. 492, 492 (1993).
- 76 NADASEN, *supra* note 37, at 217.
- 77 *Id.*
- 78 Norplant is a birth control method that involves the insertion of six match-sized capsules underneath the skin in a woman's upper arm. WebMD.com, Sexual Health: Your Guide to Birth Control: Norplant, <http://www.webmd.com/sex/birth-control/birth-control-norplant> (last visited Feb. 16, 2010). The capsules are inserted surgically and prevent pregnancy for up to five years. *Id.* Side effects of Norplant include nervousness, depression, and headaches. *Id.*
- 79 Lee, *supra* note 3, at 95.
- 80 *Id.*
- 81 Pamela D. Brigewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 405 (2000).
- 82 *Id.* at 404.
- 83 *Id.* at 405.
- 84 ROBERTS, *supra* note 36, at 4.
- 85 *Id.* at 89.
- 86 A hysterectomy is an operation that removes the entire uterus of a woman. WebMD.com, Hysterectomy, <http://women.webmd.com/guide/hysterectomy> (last visited Feb. 16, 2010). Tubal ligation involves the severance and sealing of the fallopian tubes. WebMD.com, Tubal Ligation and Tubal Implants, <http://www.webmd.com/sex/birth-control/tubal-ligation-and-tubal-implants> (last visited Feb. 16, 2010).
- 87 ROBERTS, *supra* note 36, at 90.
- 88 *Id.*
- 89 *Id.*
- 90 *Id.*
- 91 *Id.* at 91.
- 92 DAVIS, *supra* note 22, at 217.
- 93 *Id.*
- 94 Roberts, *Punishing*, *supra* note 6, at 1443.
- 95 NELSON, *supra* note 73, at 150.

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- 96 Lawrence, *supra* note 17, at 363.
- 97 [Roe v. Wade](#), 410 U.S. 113, 153 (1973). See also Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 41DUKE L.J. 324, 355 (1991).
- 98 [Harris v. McRae](#), 448 U.S. 297, 312 (1980).
- 99 Brief Amicus Curiae of the Attorney General of the State of New York in Support of Plaintiffs-Appellees et al. as Amici Curiae at 6, [Harris v. McRae](#), 448 U.S. 297 (1980) (No. 79-1268) [hereinafter *Brief of the State of New York*].
- 100 [Harris v. McRae](#), 448 U.S. at 318.
- 101 *Id.* at 299.
- 102 122 Cong. Rec. 26,778 (1976).
- 103 DAVIS, *supra* note 22, at 205.
- 104 Brief Amici Curiae of National Organization for Women et al. at 6-7, [Harris v. McRae](#), 448 U.S. 297 (1980) (No. 79-1268), 1980WL339661.
- 105 *Id.* at 29-30.
- 106 DAVIS, *supra* note 22, at 204.
- 107 *Brief of the State of New York*, *supra* note 99 at 9-10.
- 108 *Id.* at 9.
- 109 122 Cong. Rec. 20, 888 (1976).
- 110 *Id.* at 20, 887.
- 111 NELSON, *supra* note 73, at 135.
- 112 Brief Amicus Curiae of Coalition for Human Justice at 6, [Harris v. McRae](#), 448 U.S. 297 (1980) (No. 79-1268), 1980WL339692.
- 113 *Id.* at 11.
- 114 122 Cong. Rec. 26, 785 (1976) (statement of Sen. Hyde).
- 115 *Id.*
- 116 *Id.* at 26, 787.
- 117 DAVIS, *supra* note 22, at 206.
- 118 *Id.*
- 119 Brief Amici Curiae of The Association of Legal Aid Attorneys of the City of New York, et al., at 15, [Harris v. McRae](#), 448 U.S. 297 (1980) (No. 79-1268), 1980WL339659.
- 120 *Id.*
- 121 NELSON, *supra* note 73, at 149.
- 122 See generally Crenshaw, *supra* note 2.

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123 *Id.* at 1249.

124 122 Cong. Rec. 26, 778 (1976).

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