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## Marriage Equality and The “New” Maternalism

Cynthia Godsoe\*

April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability *all* mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.

--*Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) (emphasis added).

The battle over same-sex marriage centered on children, with both sides claiming to be the guardians of children’s welfare.<sup>1</sup> Opponents’ arguments were based on faulty science<sup>2</sup> and, as Justice Kennedy noted in *Obergefell*,

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1. Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. (forthcoming 2015) (outlining these arguments). Justice Kennedy also noted the harm that same-sex marriage bans cause children: “Without the recognition, stability, and predictability marriage offers, the[] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents. . . .” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

2. The arguments about the outcomes of children raised by same-sex parents were not emphasized in the Supreme Court, likely because the Sixth Circuit decision on appeal focused on arguments about institutional roles and who should decide the issue of same-sex marriage. The welfare of these children, however, dominated the lower court cases, including one of the cases the Sixth Circuit reversed. The only two federal courts holding hearings on this issue both discredited the experts and research purporting to claim that children raised by same-sex parents fare any worse than other children. *See, e.g., DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014). The court in this case found defendant’s sociologist Mark Regnerus and his research “entirely unbelievable and not worthy of serious consideration” and defendant’s other experts

belied by the real-world experience of thousands of lesbian, gay, bisexual, and transgender (LGBT) families.<sup>3</sup> Certainly, marriage equality represents a victory for diverse families. Yet the focus on children has also had the detrimental impact of imposing a traditional parenthood paradigm. Specifically, *Obergefell* reflects a maternalist philosophy wherein a woman's perceived natural and limited role is as an all-sacrificing mother virtually inseparable from her children.<sup>4</sup> Despite deciding against opponents of same-sex marriage, the opinion inadvertently endorses their gendered parenting arguments.<sup>5</sup> Indeed, Justice Kennedy's praise for the ideal motherhood of DeBoer and Rowse carries disturbing echoes of his prior opinion restricting access to abortion in *Gonzales v. Carhart*.<sup>6</sup>

Motherhood remains one of the most powerful and vigorously enforced social roles.<sup>7</sup> “[L]oaded with normative content,” the term evokes a “prototype, which serves as a measure by which real-life mothers in all their diversity are judged.”<sup>8</sup> The ongoing salience of idealized maternity for gender roles calls

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“largely unbelievable,” concluding that defendants’ experts “clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields.” *Id.* at 766–68. The district court also noted that Regnerus’s research “has been widely and severely criticized by other scholars” and that his own institution, the University of Texas, distanced itself from Regnerus and supported the plaintiffs’ view of the research on children raised by same-sex parents. *Id.* at 766. In contrast, the court found all of the plaintiffs’ expert witnesses “highly credible” and accorded their testimony “considerable” or “great” weight. *Id.* at 761–65; *see also* Perry v. Schwarznegger, 704 F. Supp. 2d 921, 946 (N.D. Cal. 2010) (declining to treat defendant’s only witness on children raised by same-sex parents as an expert and finding his testimony “inadmissible” and “essentially [of] no weight”).

3. *See, e.g.*, 135 S. Ct. at 2600 (“As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. . . . This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”).

4. *See* Anita L. Allen, *Atmospherics: Abortion Law and Philosophy* (defining maternalism as an “assumption that bearing children and caring for others is the natural and optimal role of women”), in *ON PHILOSOPHY IN AMERICAN LAW* 184, 186 (Francis J. Moontz III ed., 2011). There is wide variation in the definition of maternalism. Some feminists, for instance, embrace women’s purported caregiving virtues as a beneficial counterpoint to the dominant masculine focus on reason and justice. *See Feminist Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. Apr. 1, 2014), <http://plato.stanford.edu/entries/feminism-political> [<http://perma.cc/YJ8L-G8MS>] (describing the social difference feminism of Carol Gilligan and others). Here, I focus on the less positive aspects of maternalism, as well as maternalism imposed on women rather than asserted by them.

5. Opponents of same-sex marriage have argued that dual-gendered parenting is important for child welfare, and thus can justify bans on same-sex marriage. *See, e.g.*, Brief for Respondents at 39, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-571) WL 1384104 (“Men and women are different, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea. . . . [M]others and fathers provide different benefits . . . to children”); *see also id.* at 33 (“Michigan’s marriage policy tries to maximize the likelihood that every child will know and be raised by his or her mother and father whenever possible.”).

6. 550 U.S. 124 (2007). For further discussion, see *infra* notes 57–63.

7. JODI VANDENBERG-DAVES, *MODERN MOTHERHOOD: AN AMERICAN HISTORY* 164 (2014) (“Again and again, Americans have infused motherhood with cultural and political significance.”).

8. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 286–87 (2d ed. 2003).

into question the real novelty of any type of maternalism. Instead, various iterations of maternalism implement what Reva Siegel has termed “preservation through transformation.”<sup>9</sup> *Obergefell* continues this trend. The focus on the female plaintiffs’ maternity, in contrast to the focus on the male plaintiffs’ occupations, mirrors the nineteenth century concept of separate spheres; women are guardians of the private home sphere while men dominate the public professional and civic sphere. When women, like DeBoer and Rowse, enter the public sphere, they do so as an extension of their maternal role to safeguard children and families. The description of three plaintiff couples in *Obergefell* reinscribes this essentialist and gendered paradigm.<sup>10</sup>

This Essay explores the maternalism infusing the *Obergefell* opinion and argues that it expresses a traditional view of women’s place in the family and in the public sphere. Part I outlines the long history of maternalism and its dual harms of limiting all women’s roles while ignoring many women, particularly low-income women and women of color, who do not fit the ideal mother paradigm. Part II connects *Obergefell* to the more obvious sex-stereotyping in *Carhart*, drawing parallels between the idealization of motherhood in the two opinions. To be clear, I do not purport to engage in a comprehensive discussion of Justice Kennedy’s jurisprudence or of the Supreme Court’s treatment of mothers.<sup>11</sup> Nor am I arguing that *Obergefell* should have come out differently. On the contrary, I wholeheartedly support the recognition of same-sex marriage as a fundamental right.<sup>12</sup> Rather, I am making the limited, but important, point that we cannot assume that a progressive decision is inherently feminist.<sup>13</sup> Traditional assumptions about male and female roles continue to permeate many aspects of family law, particularly parenthood. The ongoing gendered stereotypes embedded in *Obergefell* limit marriage equality’s egalitarian power, ultimately restricting options for all families.

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9. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2119, 2184 (1996).

10. See *infra* notes 59–62 (outlining how the court describes the female plaintiffs with almost exclusively terms of maternity, while the numerous male plaintiffs who are fathers are ignored).

11. Commentators have noted that Justice Kennedy “essentializes maternity” in at least one other opinion. See, e.g., Hiram Perez, *How to Rehabilitate A Mulatto: The Iconography of Tiger Woods* (describing *Nguyen v. INS*, 533 U.S. 53 (2001), where Justice Kennedy upheld different rules for nonmarital children born abroad to a U.S. mother from those born to a U.S. father), in *ASIAN AMERICAN STUDIES NOW: A CRITICAL READER* 405, 417 (Jean Yu-Wen Shen Yu & Thomas Chen eds., 2010). Here, I focus on *Carhart* and *Obergefell*, the two cases where motherhood is most discussed.

12. By this support, I do not intend to endorse *Obergefell*’s failure to recognize LGBT people as a suspect or quasi-suspect class deserving of heightened Equal Protection scrutiny. As others have argued, such a holding would have best protected the rights of LGBT people in the future. See, e.g., Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIR. 137 (2015).

13. Feminism has many variations. I use it here broadly to describe, inter alia, a theory about the subordination of women and a struggle against that subordination. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 17–20 (2006).

I.  
MATERNALISM

Historically, a woman's role as mother has served as both a pedestal and a prison.<sup>14</sup> A cult of domesticity beginning in the post-Civil War and Victorian eras revered women's maternal "dedication to her family and selfless support of the domestic sphere."<sup>15</sup> Motherhood was conceived of both as a woman's essential nature and as her public and private role in the highly gendered separate spheres arising out of the Industrial Revolution.<sup>16</sup> Deemed essential to the healthy development of future male citizens, "mother-love" served as a "fundamental pillar of the nation's social and political order."<sup>17</sup> Accordingly, women's function in the home determined their public role, not as workers or citizens, but as the guardians of the next generation.

Maternalism describes both a vision of women and a related sociopolitical system. It posits women as innately nurturing and morally directive, and accordingly limits their public role to "the 'natural' caretakers and nurturers . . . of the extended social family, or state."<sup>18</sup> This "moral motherhood" philosophy explicitly informed both law and policy from the mid-nineteenth century well into the twentieth.<sup>19</sup> The Supreme Court upheld restrictions on women's labor to protect women's "performance of maternal functions."<sup>20</sup> Historians have described how women's civic activism, centered not only on feeding the poor, but on guiding them morally.<sup>21</sup> The small number of middle- and -upper-middle-class women employed in the early twentieth

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14. Ruth H. Bloch, *American Feminine Ideals in Transition: The Rise of the Moral Mother* (describing how maternity "held a special place of honor" while female activity was simultaneously "contracted into the preoccupations of motherhood"), in 4 *FEMINIST STUDIES* 100, 120 (1978).

15. Carolyn A. Weber, *Maternalism*, in *ENCYCLOPEDIA OF GENDER AND SOCIETY* 523, 523 (J. O'Brien ed., 2009). A fuller outline of this history is beyond the scope of this piece; for such an account, readers can refer to a recent comprehensive history of American motherhood. VANDENBERG-DAVES, *supra* note 7.

16. NANCY F. COTT, *THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780–1835*, at 63 (1977). Social reformers urged middle-class women unable to conceive to adopt children as their civic duty; "[I]f adoptive mothers could not claim status as real mothers, they could at least receive credit as superior citizens." Julie Berebitsky, *Redefining Real Motherhood: Representation of Adoptive Mothers, 1900–1950*, in *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND CULTURE* 83, 86 (Marianne Novy ed., 2004).

17. REBECCA JO PLANT, *MOM: THE TRANSFORMATION OF MOTHERHOOD IN MODERN AMERICA* 4–5 (2010).

18. Weber, *supra* note 15.

19. Bloch, *supra* note 14, at 100 (describing the maternal ideal from its rise in the early nineteenth century, to its strengthening in Victorian times, and finally, to its peak in the mid-twentieth century); see also VANDENBERG-DAVES, *supra* note 7, at 48, 114, 119, 125 (describing how the ideology of moral motherhood began in the nineteenth century and infused social policies and culture through the first half of the twentieth century).

20. *Muller v. Oregon*, 208 U.S. 412 (1908).

21. Two seminal accounts of maternalist social welfare activism are THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992) and LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935* (1998).

century mostly took on the quasi-maternal roles of teachers and social workers.<sup>22</sup>

This model was limited to a particular kind of mother—white, Christian, middle-class. It developed symbiotically with the ideal of a nuclear family, serving both capitalist and racial segregation goals.<sup>23</sup> While “elevating the psychological, spiritual, and even civic contributions of women in the home,”<sup>24</sup> the maternalist ideology excluded vast numbers of women, including working class, African-American, and immigrant women.<sup>25</sup> Unmarried mothers, particularly women of color, were posited as the opposite of the ‘angel in the house,’ unchaste and unworthy of state assistance.<sup>26</sup>

The moral mother icon waned post-World War I, but was reinvigorated in the form of the 1950s housewife.<sup>27</sup> Although feminists had long opposed this biologically determined model, the disaggregation of women from maternity only really gained traction in the 1970s. Psychologists, biologists, and others argued for roles for women outside of the home, for equal parenting from men, and for a recognition of the diversity of mothers that had always existed.<sup>28</sup> Despite gains in this regard, women continue to be defined in large part by their reproductive and caregiving roles. As Martha Fineman argues, “women *will* be treated as mothers (or potential mothers)” regardless of their own desires or other roles.<sup>29</sup> Women who do not mother, by incapacity or worse by choice, continue to be regarded as unnatural.<sup>30</sup>

22. Bloch, *supra* note 14, at 120.

23. VANDENBERG-DAVES, *supra* note 7, at 34, 119; *see also* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–97 (2001) (arguing that parenthood is shaped by capitalism and racism).

24. VANDENBERG-DAVES, *supra* note 7, at 31.

25. ANDREA O'REILLY, TONI MORRISON AND MOTHERHOOD: A POLITICS OF THE HEART 128 (“[O]nly white and middle-class women could wear the halo of the Madonna and transform the world through their moral influence and social housekeeping.”).

26. GORDON, *supra* note 21 at 45 (noting that other single mothers, particularly widows, were contrasted as “deserving and ‘innocent’ supplicants” for state aid). The ‘angel in the house’ is a popular cultural construct of Victorian womanhood as devoted to husband and children, passive, and “above all, pure.” *See* Alexandra Cheira, *From the Angel in the House to the Babe in Total Control of Herself: A Critique of the Cultural Constructions of Female Power(lessness)*, in *Women Past and Present: Biographic and Multidisciplinary Studies* 106, 106 (Maria Zina Goncalves de Abreu and Steve Fleetwood eds., 2014).

27. VANDENBERG-DAVES, *supra* note 7, at 182 (describing depictions of domestic goddesses like Harriet Nelson of the popular sitcom *Ozzie and Harriet*).

28. To cite just one influential example, Nancy Chodorow debunked the myth that mothers are inherently better caregivers than men. This demonstrated that maternity is largely transmitted through culture and psychology rather than biology. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

29. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 38 (1995).

30. Franke, *supra* note 23, at 185.

Indeed, the idolatry of motherhood still permeates our culture and legal system.<sup>31</sup> Jennifer Collins has documented how the criminal justice system continues to romanticize the mother-child relationship, or at least that of certain mothers.<sup>32</sup> One particularly lasting stereotype is the mother as all-sacrificing caregiver.<sup>33</sup> Dorothy Roberts and others have pointed out that mothers who do not meet this or other feminine stereotypes, often those who are minority or poor, are punished most severely.<sup>34</sup> Perversely, mothers who “appear pathetically weak or deranged” and, as a result, do not protect their children are treated more leniently than those who resist their gendered subservience and appear strong.<sup>35</sup> Maternal status not only creates criminal liability but also leads to particularly harsh sanctions.<sup>36</sup> Permeating family law too, “[t]he fantasy of the perfect and all powerful mother” prioritizes women’s caregiving over more public roles, and blames less-than-perfect mothers for every childhood problem.<sup>37</sup> Even women’s civic presence is often still defined by maternity. To take just one example, Mothers Against Drunk Driving (MADD) successfully harnessed the moral authority of motherhood to reform criminal law.<sup>38</sup>

Commentators have noted the recent rise of a robust new form of maternalism. Naomi Mezey and Cornelia Pillard describe how political activists from both the right and the left engage in a “revived veneration of motherhood and female domesticity.”<sup>39</sup> Coupled with increased cultural pressure for parents to be perfect, this “new” maternalism hinders women in numerous ways.<sup>40</sup> It impedes them at the workplace, and rolls back gains in

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31. See VANDENBERG-DAVES, *supra* note 7, at 282 (arguing that, although the moral motherhood ideal “has never been attainable for the majority of Americans[,] . . . it has had a tenacious hold on American culture.”).

32. Jennifer Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131 (2007).

33. See, e.g., ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 152 (2000).

34. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993).

35. Dorothy E. Roberts, *Mothers Who Fail to Protect Their Children*, in *MOTHER TROUBLES* 31, 40 (1999).

36. Naomi Cahn, *Policing Women: Moral Arguments and the Dilemma of Criminalization*, 49 DEPAUL L. REV. 817, 818 (2000) (“Because women are so closely identified with their children, they are treated particularly harshly for alleged crimes against [them].”).

37. Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 366 (1996).

38. Numerous examples abound including Sarah Palin’s “Mama Grizzly” campaign to mobilize conservative women or the EcoMom alliance for environmental activism. See Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 246, 250–51 (2012).

39. Mezey & Pillard, *supra* note 38, at 232.

40. See, e.g., Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1230 (2011) (describing these pressures and their harms). The pressures of helicopter parenting are not, of course, limited to women. But mothers still bear the biggest brunt. See *id.*

shared caregiving with fathers.<sup>41</sup> The “Tiger Mom” is praised while the ‘free-range’ mom and the woman who publicly declares to love her husband more than her children are pilloried.<sup>42</sup> Although the new maternalism depicts a “hip, empowered, confident, and appealing version of ‘Mom’” rather than a traditional and demure housewife, it continues to ignore the majority of mothers.<sup>43</sup> The denigration of non-normative single mothers, usually poor, has not abated.<sup>44</sup> Yet even the affluent are not exempt from judgment. The portrayal of working women as callous and selfish reflects the ongoing restrictions on choices even for privileged women.<sup>45</sup>

## II.

### OBERGEFELL AND CARHART

Two-thirds of the *Obergefell* plaintiffs, including one hundred percent of the female plaintiffs, have children.<sup>46</sup> This is much higher than the below eighteen percent of same-sex couples who are parents.<sup>47</sup> The plaintiffs’ children have received much fanfare; they have been interviewed and

41. Mezey & Pillard, *supra* note 38; at 272-73, 277-78; see also David Leonhardt, *A Labor Market Punishing to Mothers*, N.Y. TIMES (Aug. 3, 2010), [www.nytimes.com/2010/08/04/business/economy/04leonhardt.html](http://www.nytimes.com/2010/08/04/business/economy/04leonhardt.html) [<http://perma.cc/CK5D-V33N>] (noting that while women have made strides in the labor market, mothers continue to be penalized, and remarking that the three recent male nominees to the Supreme Court have had children, while the last three women have all been childless).

42. For example, law professor Amy Chua’s book *BATTLE HYMN OF THE TIGER MOTHER* (2011) was a best-seller and, although igniting controversy, earned much praise. By contrast, when journalist Lenore Skenazy wrote a column describing letting her nine-year-old ride the subway alone—a common parenting practice in the 1970s and 1980s—she was criticized as “the World’s Worst Mom.” See *Are Modern Kids Coddled*, NEWSWEEK (Apr. 20, 2008), <http://www.newsweek.com/are-modern-kids-coddled-85739> [<http://perma.cc/KCY8-35JE>] (describing the controversy). Finally, when a writer declared her love for her husband over her children, again something that historically was quite mainstream, she prompted a tidal wave of angry responses and criticisms of her mothering and herself. Ayelet Waldman, *Truly, Madly, Guiltily*, N.Y. TIMES (Mar. 27, 2005), <http://www.nytimes.com/2005/03/27/fashion/truly-madly-guiltily.html> [<https://perma.cc/BVL3-D7L2>] (and comments).

43. Mezey & Pillard, *supra* note 37 at 271 (describing the effect on lower-income and minority mothers); see also Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (describing the erasure of the many families who engage in caregiving arrangements not centered on the isolated nuclear family).

44. See generally Karyn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013) (outlining the ongoing persecution of low-income mothers, particularly those receiving public assistance).

45. See generally Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (describing the continuity of a paradigm of selfless motherhood and its contribution to gender inequality).

46. Godsoe, *supra* note 1, at n. 6–7.

47. See GARY J. GATES, WILLIAMS INST., *DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSIS OF THE 2013 AMERICAN COMMUNITY SURVEY* (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [<http://perma.cc/3CQN-E6SA>].



photographed hundreds of times.<sup>48</sup> Undoubtedly, the same-sex marriage decision and the numerous plaintiffs who are fathers erode stereotypes of men, particularly gay men, as uninterested in family or even predators.<sup>49</sup> Parenthood remains very gendered, disadvantaging both men and women, and the disproportionately high number of fathers in *Obergefell* helps “unsex” parenthood.<sup>50</sup> Nonetheless, the parents most featured in the case, and particularly the opinion, are a lesbian couple whose motherhood dominates their story.<sup>51</sup>

April DeBoer and Jayne Rowse originally challenged Michigan’s same-sex adoption prohibition, only later adding a challenge to the marriage ban.<sup>52</sup> The couple have adopted four foster children with special needs. One was so disabled that doctors predicted he would die, but he is now thriving thanks to a combination of what Rowse describes as “God and a mother’s love.”<sup>53</sup> The media and pleadings have centered almost exclusively on the couple’s parenting; most photos depict the couple surrounded by their children.<sup>54</sup> Lower

48. See, e.g., Amanda Terkel, Kate Abbey-Lambertz & Christine Conetta, *Meet the Couples Fighting to Make Marriage Equality the Law of the Land*, HUFFINGTON POST (June 17, 2015), [http://www.huffingtonpost.com/2015/06/17/supreme-court-marriage-\\_n\\_7604396.html](http://www.huffingtonpost.com/2015/06/17/supreme-court-marriage-_n_7604396.html) [<http://perma.cc/QH4G-58ZE>]. See also Associated Press, *Two Kellys Raising Baby as Loving, If Not Legal, Parents*, DAILY MAIL (Apr. 16, 2015, 12:10 PM), <http://www.dailymail.co.uk/wires/ap/article-3042273/Two-Kellys-raising-baby-loving-not-legal-parents.html> [<http://perma.cc/FV2H-PCMT>] (portraying a couple with their baby); Amanda Terkel & Christine Conetta, *“Just As Boring and Crazy And Loud As Any Other Family,”* HUFFINGTON POST (April 20, 2015, 8:59 AM), [http://www.huffingtonpost.com/2015/04/20/paul-campion-randy-johnson\\_n\\_7057500.html](http://www.huffingtonpost.com/2015/04/20/paul-campion-randy-johnson_n_7057500.html) [<http://perma.cc/XH5A-D2B3>] (interviewing the children of one plaintiff).

49. DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS & THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II* 8 (2013) (outlining these stereotypes).

50. Sixteen percent of gay men have children, versus fifty percent of the *Obergefell* plaintiffs. See Gary Gates and Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP.COM, (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> [<http://perma.cc/7HJY-7WTW>]. I have discussed above the disadvantages to women of these parental gender stereotypes. Men are disadvantaged by assumptions that they are not as good caregivers as women, and that men should be breadwinners. See, e.g., Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J. L. & FEMINISM* 257 (2009) (demonstrating that numerous gendered stereotypes continue to permeate parenthood decisions, often particularly persecuting men); Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 *HARV. J.L. & GENDER* 57 (2012) (arguing for disentangling parenthood roles from biology).

51. Other female couples were also depicted in the media primarily as mothers. See, e.g., Dan Sewell, *Two Kellys Raising Baby As Loving, If Not Legal, Parents*, ASSOCIATED PRESS (Apr. 16 2015), <http://news.yahoo.com/two-kellys-raising-baby-loving-not-legal-parents-170937372.html> [<http://perma.cc/55ZN-U29Y>]. I focus here on Rowse and DeBoer because they are the only female plaintiff couples who Justice Kennedy discusses in the opinion.

52. Godsoe, *supra* note 1.

53. See, e.g., Nina Totenberg, *Meet the “Accidental Activists” of the Supreme Court’s Same-Sex Marriage Case*, NPR (Apr. 2, 2015), <http://www.npr.org/2015/04/20/401007033/meet-the-accidental-activists-of-the-supreme-courts-same-sex-marriage-case> [<http://perma.cc/5JX3-8NDR>].

54. Totenberg, *supra* note 53; see also Jerry Markon, *Meet the Couples Who Will Be Part of History in the Same-Sex Marriage Battle*, WASH. POST (Jan. 16, 2015),

courts have effusively praised both women’s “personal sacrifices” in parenting and detailed how the women, both nurses, “coordinate their work schedules” to care for the children and “attend to their medical needs.”<sup>55</sup> Like female activists of old, Rowse and DeBoer describe their political action as derived exclusively from their maternal role; they were “too busy” parenting and working to “get too involved” in the same-sex marriage debate.<sup>56</sup> They brought suit only to help their children. Rowse portrays them as “just two parents that want to take care of our kids and if that means going for [] marriage, that’s what it is.”<sup>57</sup> DeBoer also emphasizes their intertwined maternal and activist roles: “We’d go home, we’d shed our activism clothes and we put on the mom clothes.”<sup>58</sup>

Justice Kennedy poetically describes the couple’s motherhood. The male plaintiffs he calls out in his opinion are childless. He focuses instead on their relationships with their partners and, in the case of Ijpe DeKoe, on his civic service as a soldier.<sup>59</sup> Justice Kennedy’s depiction of the women, in contrast, could be referring to the mothers of nineteenth century literature (like Mrs. March of *Little Women*) or 1950s television (such as Harriet Nelson of *Ozzie and Harriet*).<sup>60</sup> The women’s professions are mentioned only in passing (although they are both in the predominantly female occupation of nursing). The Court spends a paragraph detailing their fostering and adoption of four children, noting, as did lower courts, that those children were “abandoned” by their biological (read, bad) mothers.<sup>61</sup> There is scant mention of the couple’s relationship, and the couple’s impetus for seeking to marry is framed as driven purely by their maternal love: they want to marry for “the certainty and

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[http://www.washingtonpost.com/politics/meet-the-couples-who-will-be-part-of-history-in-the-same-sex-marriage-battle/2015/01/16/ee4ce490-9dd5-11e4-bcfb-059ec7a93ddc\\_story.html](http://www.washingtonpost.com/politics/meet-the-couples-who-will-be-part-of-history-in-the-same-sex-marriage-battle/2015/01/16/ee4ce490-9dd5-11e4-bcfb-059ec7a93ddc_story.html)  
[<http://perma.cc/K4VZ-59TK>].

55. DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014); *DeBoer*, 772 F.3d at 424 (Daughtrey, J., dissenting). The dissenting Sixth Circuit judge also painstakingly contrasted DeBoer and Rowse with their children’s biological mothers: one a “drug addicted prostitute,” another a homeless, mentally-ill woman who was “unable to care for [the child],” and the third “a 19-year-old girl who received no prenatal care and who gave birth at her mother’s home[.]” *DeBoer*, 772 F.3d at 423–24.

56. Julie Bosman, *One Couple’s Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. TIMES (Jan. 24, 2015), <http://www.nytimes.com/2015/01/25/us/one-couples-unanticipated-journey-to-center-of-landmark-gay-rights-case.html> [<https://perma.cc/47P4-X3BV>]. See *supra* note 21 for a discussion of the maternalist nature of women’s historical activism.

57. Brian Sterling, *Couple’s ‘Accidental Precedent-Setting Case’ for Same-Sex Marriage*, WOOD TV (Apr. 23, 2015), <http://woodtv.com/2015/04/23/couple-at-center-of-same-sex-marriage-suit> [<https://perma.cc/GFU9-KUBE>] (quoting Rowse).

58. Josh Sidorowicz, *MI Plaintiffs on Gay Marriage Ruling: ‘It Doesn’t Feel Real Yet,’* FOX 17 (June 26, 2015), <http://fox17online.com/2015/06/26/mi-plaintiffs-on-gay-marriage-ruling-it-doesnt-feel-real-yet> [<https://perma.cc/P6TX-JEQV>].

59. Obergefell v. Hodges, 135 S. Ct. 2584, 2595, 2606 (2015).

60. See *id.* at 2606 (describing DeBoer and Rowse as desiring “the certainty and stability all mothers desire to protect their children” and lamenting that “for them and their children the childhood years will pass all too soon”).

61. *Id.* at 2595.

stability all mothers desire to protect their children,” rather than to ensure their security as partners or to achieve recognition of their adult relationship.<sup>62</sup>

The opinion thus bolsters the dual-gender parenthood arguments put forth by same-sex marriage opponents, and invokes the public/private spheres distinction. Dual parenthood roles often designate mothers as caregivers and fathers as breadwinners.<sup>63</sup> By ignoring the male plaintiffs’ fatherhood and focusing so heavily on motherhood, *Obergefell* reflects this traditional division of labor. Relatedly, men’s civic participation is framed in terms of their profession, and women’s in terms of their family status. In her seminal history of social policy in the United States, *Protecting Soldiers and Mothers*, Theda Skocpol describes the initial provision of benefits in the United States to two groups deemed worthy, Civil War veterans and mothers.<sup>64</sup> *Obergefell*’s treatment of the male and female plaintiffs retrenches this historic dichotomy. Whereas men merit same-sex marriage as citizens, particularly those who served in the military, women earn government benefits through mothering.

This romanticized view of a mother’s love and protective impulses echoes Justice Kennedy’s opinion in *Gonzales v. Carhart*, which upheld the Partial-Birth Abortion Ban Act of 2003.<sup>65</sup> In restricting access to abortion, Justice Kennedy expresses an essentialist view of women as determined by their ability to procreate and their inherent desire to mother. Accordingly, “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”<sup>66</sup> Despite acknowledging a lack of data on the issue, Justice Kennedy concludes that some women “come to regret” abortion and suffer “[s]evere depression and loss of esteem” as a result.<sup>67</sup> Protecting women from hastily denying their destiny as mothers and suffering for it later thus serves as the main justification for banning partial-birth abortions.

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62. *Id.* at 2606.

63. This description is admittedly overly simplistic, but it still pervades cultural and legal images of parenthood. See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 967–75 (2005) (describing the ongoing salience of the view of fathers as breadwinners rather than caregivers and the concomitant disadvantage of many fathers in custody proceedings).

64. See SKOCPOL, *supra* note 21.

65. 550 U.S. 124 (2007). I selected these two opinions because Justice Kennedy authored both and discussed maternity quite extensively in each. Interestingly, both abortion rights and same-sex marriage are sometimes seen as issues for more privileged white women, rather than for poor women of color. See, e.g., Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1461 (1991) (arguing that reproductive freedom is an illusion for poor women of color); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 216 (1991) (same); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL OF RTS. J. 1539 (2006) (arguing that the marriage equality movement prioritizes the interests of some segments of the LGBT community over others).

66. *Carhart*, 550 U.S. at 159.

67. *Id.*

This maternalist reasoning was vehemently criticized, both by other Justices and by scholars. In her dissent, Justice Ginsburg connects the majority’s reasoning to “ancient notions about women’s place in the family and under the Constitution—ideas that have long been discredited.”<sup>68</sup> Anita Allen sarcastically describes this “self-evident metaphysics of true womanhood” as “naturally tender” towards children, and primarily, if not exclusively, defined by their roles in the home rather than the public sphere.<sup>69</sup> Those who do not want maternity, who terminate a pregnancy, are deemed deviant; “a true ‘mother’ would recoil at discovering her physician had [performed a “ghoulish” late-birth abortion on] her unborn ‘child.’”<sup>70</sup> The state is thus justified, as Reva Seigel puts it, in restricting women’s access to abortion to “free women to be the mothers they naturally [and by divine-order] are.”<sup>71</sup> Denying the social construction of motherhood, *Carhart* posits maternity as women’s natural state.

My claim here is not that the Court’s praise of DeBoer and Rowse, who do seem to be exemplary parents, is as harmful to women as the veneration of mother-love in *Carhart*. It certainly is not. The very different outcomes of *Carhart* and *Obergefell* further magnify this distinction; the former limits women’s reproductive freedom while the latter expands their opportunity to choose whom they will love. Nonetheless, even well-intended maternalism brings some harm. Reifying motherhood reinscribes women’s purported natural place in the private sphere, cabining them in this secondary realm. Supreme Court decisions are important not only for their outcomes, but also for their reasoning and expressive messages. Even the most beneficial outcomes can bring countervailing costs. *Carhart* immediately inspired, as it should have, robust criticism of both its outcome and its reasoning. The undeniably progressive outcome of *Obergefell* may obscure the drawbacks that accompany it. This Essay is an effort to point out one such drawback—the reinscription of essentialist gender roles in the family and polity.

## CONCLUSION

Rowse and DeBoer married this August. Their children walked down the aisle with Rowse and said their own vows, taking both women as their “legal

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68. *Id.* at 185 (Ginsburg, J., dissenting) (citing long-discredited cases confining women to the private sphere).

69. Allen, *supra* note 4 at 188, 190; see also Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1219–21 (2010) (describing the opinion’s connection of “women’s reproductive functions and mental health” and “women’s special vulnerability to psychological injury . . . related to their capacity to bear children,” but also arguing that *Carhart*’s reasoning comes in part from feminist arguments about female trauma rather than merely gender inequality views).

70. Allen, *supra* note 4 at 188.

71. Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1675, 1688 (2008).

momm[ies].”<sup>72</sup> Guests at the wedding toasted the couple, praising them as “loving parents” and “two mothers . . . heroines of our time.”<sup>73</sup> The newlyweds will take a “familymoon” with their children, rather than a romantic honeymoon.<sup>74</sup>

The wedding is a fitting capstone to the couple’s struggle to adopt and marry. Yet its framing also perpetuates the message that mothers must be perfect, have no apparent intimate life apart from their children, and sacrifice all for them. This story of same-sex marriage embedded in *Obergefell* reflects the ongoing conflation of womanhood with maternity. Concomitantly, it diminishes women’s potential other selves, as lovers, workers, and citizens.

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72. Katrease Stafford, *From Supreme Court to Southfield: DeBoer and Rowse Marry*, DET. FREE PRESS (Aug. 22, 2015), <http://www.freep.com/story/news/local/michigan/oakland/2015/08/22/april-deboer-wedding-gay-marriage/32193359/> [<https://perma.cc/C3Y8-XSDT>].

73. *Id.* Granted, some attendees also praised the couple’s relationship and dedication to each other, but the admiration remained focused on their motherhood.

74. Stafford, *supra* note 72.