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Melanie M. Lee

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DEFINING THE AGENDA: A NEW STRUGGLE FOR AFRICAN-AMERICAN WOMEN IN THE FIGHT FOR REPRODUCTIVE SELF-DETERMINATION

Melanie M. Lee*

I. INTRODUCTION

African American women must work for reproductive self-determination's classification as a human right.¹ Without the ability to determine their reproductive destinies, women will never achieve an equal role in social, economic and political life and will continue to be politically subordinate to and economically dependent upon men.² While feminist thought recognizes the importance of reproductive rights, the feminist definition of reproductive rights is too narrow because it excludes the voices of women of color and divides women in their efforts to achieve reproductive rights.³ Although the feminist movement embraces reproductive rights, it fails to establish a broad reproductive rights agenda around which all women can rally. This article proposes to remedy the under inclusive agenda by reclassifying reproductive self-determination as a human right.⁴ Self-determination is the right of people to freely pursue their economic, social and cultural development.⁵ A human right is neither "engendered" nor race conscience; it is an individual's valid and justified claim on society.⁶ The effect of reclassifying reproductive self-determination as a human right will ultimately provide a unified political platform for women in the struggle for reproductive rights.

* J.D. Candidate, 2001 Washington & Lee School of Law; B.A. 1997, Howard University. The author wishes to thank her family and friends for their love and support, Professors C. Quince Hopkins and L.H. LaRue for their input and guidance, and the editorial board of the Washington and Lee Race and Ethnic Ancestry Law Journal.

1. See, Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 992 (citing utility of self-determination as human right).

2. See Dorothy Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59, 60 (1990) (commenting on importance of reproductive rights to women's liberation).

3. See Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 256 (1992) (challenging readers to accept definition of reproductive freedoms broader than right to abortion).

4. See *infra* notes 139-141 and accompanying text.

5. G.A. Res 2200A (XXI), 21 U.N. GAOR, Supp. No.16 at 52, U.N. Doc. A/6316 (1966).

6. See Louis Henkin, *The Age of Rights, in HUMAN RIGHTS: IDEA AND IDEOLOGY* 2, 2-5 (Louis Henkin et al. eds., 1999) (defining universality of human rights).

In part II, this article traces the history of the mainstream reproductive rights movement and presents non-minority women's perspective of this movement.⁷ Part III explores the impact of slavery on the reproductive rights movement for African American women and argues that the historical horror of that repugnant institution and modern racist motives shape African American women's perspective of reproductive rights.⁸ Part III also examines how the evolution of contraceptives has disproportionately and adversely affected African American women.⁹ Part IV advocates for racial equality in the area of reproductive rights because the current movement is unable to address the needs of African American women.¹⁰ By shaping reproductive rights around abortion and contraception, the current movement ignores the history and unique experience of African American women.¹¹ Classifying reproductive self-determination as a human right will ensure that the reproductive rights of African American women are protected.

II. HISTORY OF THE REPRODUCTIVE RIGHTS MOVEMENT

Understanding the impact of race in the history of the reproductive rights movement allows insight into women's perspectives on reproductive rights. At the center of the mainstream reproductive rights movement is the abortion controversy.¹² The abortion controversy is composed of dueling perspectives on whether life begins at conception or birth.¹³ These competing perspectives of the abortion controversy have coexisted for more than two thousand years.¹⁴ At the dawn of the nineteenth century, no single statute governed abortion in the United States.¹⁵ By 1900, however, every state had a law forbidding the use of drugs or instruments to procure abortion at any stage of pregnancy "unless the same be necessary to save the woman's life."¹⁶ Less than a century later in *Roe v. Wade*,¹⁷ the Supreme Court of the United States

7. See *infra* Part II.

8. See *infra* Part III.

9. See *id.*

10. See *infra* Part IV.

11. See Rutherford, *supra* note 3, at 255 (explaining that "reproductive rights" imply abortion right while African American women's needs require rights broader than abortion right).

12. See Darci E. Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA WOMEN'S L.J. 401, 405-06 (1995) (noting that in United States "reproductive freedom" has been defined largely as right to abortion).

13. See KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 4-10 (1984) (providing history of abortion).

14. See *id.* at 11-12 (noting historical perspectives of abortion).

15. See *id.* at 15 (providing history of abortion laws).

16. See *id.*

17. 410 U.S. 113 (1973).

invalidated state laws restricting abortion.¹⁸ After *Roe*, reproductive rights and right-to-life movements expanded.¹⁹ Many people joined the pro-life movement in response to *Roe* to advocate for the personhood of infants and to reaffirm a positive perception of women who choose to have children.²⁰

Prior to *Roe*, the illegality of abortion made its access a real, private, and dangerous dilemma.²¹ Deaths and casualties resulting from illegal abortions shaped the abortion controversy for women.²² Many women joined in the reproductive rights movement because of direct or indirect experiences with illegal abortions.²³ The right to open, accessible and free abortion became *paramount* for most feminists in the fight for reproductive rights.²⁴ Therefore, the mainstream reproductive rights movement championed abortion as the key issue to reproductive self-determination.²⁵ However, in framing the reproductive rights movement around abortion, the movement's leaders ignored the needs of minority and poor women.²⁶ In particular, leaders surrendered in the fight over federal funding for abortions and failed to pursue minority representation on the National Abortions Action League.²⁷

In the mainstream reproductive rights movement, contraceptive rights are second only to abortion in importance.²⁸ The traditional utility of white women in society was to have children for white men, specifically sons.²⁹ In challenging this role, the struggle for contraceptive rights is a form of social rebellion.³⁰ The birth control pill, and later the IUD, offered women a highly

18. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding there is constitutional right to abortion within first trimester of pregnancy and any infringement upon right is unconstitutional). In *Roe*, the Supreme Court recognized that the constitutional right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. *Id.* at 153. According to the *Roe* Court, when certain fundamental rights are involved, the regulation limiting these rights may only be justified by a compelling state interest. *Id.* at 155. The legislative enactments concerning those rights must be narrowly drawn to express only the legitimate state interest at stake. *Id.*

19. See Luker, *supra* note 13, at 144-145 (describing change to right to life movement after *Roe*).

20. See *id.*

21. See *id.* at 1 (introducing topic of effect of illegal abortions before *Roe*).

22. See *id.* at 102-109 (telling stories of women who experienced horrifying illegal abortions and noting that many women joined reproductive rights movement after their experience with illegal abortions).

23. See *id.*

24. See *id.* at 92-125 (providing history of women's interest groups and abortion controversy).

25. See *id.*

26. See Rutherford, *supra* note 3, at 255 (suggesting reality that access to rights requires finances).

27. See Burrell, *supra* note 12, at 408 (quoting Fawn Vrazo, *Minorities are Joining Fight for Abortion Rights*, PHILA. INQUIRER, Mar. 10, 1993, at C3).

28. See generally LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA* (1990) (outlining importance of contraception to reproductive rights.)

29. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 268 (1997) (noting that for white women being faithful to their husbands by having only white children meant being faithful to their race). Moreover, antimiscegenation laws worked to ensure that white women only bore genetic offspring for white husbands. *Id.*

30. See Gordon, *supra* note 28, at 186 (describing effect of contraceptive rights on sexual revolution and society). See also *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing privacy right in

effective birth control method that could be used apart from sexual intercourse.³¹ Birth control allows women to approach sex with similar risks as men.³² Therefore, to white women birth control is an emblem of reproductive liberty.³³ However, contraceptives have failed to represent reproductive liberty for African American women.³⁴

III. HERSTORY OF DIFFERENCE

Although abortion and contraceptive rights are important to women regardless of race, the historical lack of abortion access and contraception primarily shapes non-minority women's perspective of reproductive rights.³⁵ In addition to these historical obstacles faced by all women, slavery and economic oppression shape the perspective of women of color, specifically African American women.³⁶ Reproductive rights have a very different meaning, for African American women, than for non-minority women.³⁷ For African American women, reproductive rights are *not* synonymous with the right to an abortion.³⁸ Reproductive issues for African American women have included coercive sterilization, unavailable pre-natal care, unsafe living and working conditions, and poor quality health care.³⁹ African American women recognize the importance of reproductive rights and have traditionally fought to secure these rights.⁴⁰ However, African American women are recognizably absent from the mainstream movement that primarily focuses on the abortion right and ignores the unique history of African American women.⁴¹ The absence of concern for the issues faced by African American women is

married couples decision to use contraceptives); *Eisendadt v. Baird* 405 U.S. 438 (1972) (recognizing privacy right in single persons decision to use contraceptives). When the Supreme Court decided these cases, birth control was already available to most women.

31. *See id.* at 485 (commenting on evolving technology of birth control).

32. *See id.*

33. *See Roberts, supra* note 29, at 56 (stating importance or significance of birth control for white women).

34. *See id.*

35. *See id.*

36. *See id.* at 300 (commenting on different interpretations of reproductive rights for women depending on race).

37. *See Rutherford, supra* note 3, at 256 (noting importance of broad range of issues for African American women in reproductive rights forum).

38. *See id.*

39. *See id.*

40. *See id.* (noting that several groups fight for reproductive rights of poor women and women of color). Some of the organizations that advocate for the reproductive rights of poor women and women of color include the National Black Women's Health Project, the National Latina Health Organization, the Women of Color Coalition of Planned Parenthood Southern Pennsylvania, and the NAACP Legal Defense and Educational Fund, Inc.

41. *See id.*

evident in the exclusive white-woman led and defined reproductive rights movement.

Different cultural histories create a 'definitional divide' in social understandings of reproductive rights.⁴² Historically, women or "womanhood" has held certain legal implications not available to women of color.⁴³ 'Real' women were expected to be pious, pure, submissive, domestic, middle-class and white.⁴⁴ Because it was impossible for African-American women whether slave or free to meet this standard, they had no reproductive rights or womanhood to protect.⁴⁵

During slavery, black women were not viewed as mothers but as breeders.⁴⁶ Black women were essential to the slave system for their labor and their reproductive capacities.⁴⁷ After the abolition of the international slave trade, children born to slave women became necessary for the perpetuation of the slave population.⁴⁸ To increase the slave labor force, female slaves were encouraged and often forced to engage in sex, both with other slaves and with their masters.⁴⁹ Slave mothers had no legal claim to their children.⁵⁰ Slave masters owned not only black women but also their offspring.⁵¹ The master's ownership of these children was automatic and immediate.⁵² Children born to slave women were often sold away by their master.⁵³ A 1662 statute held that "children got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother"⁵⁴ The effect of the law was not to preserve motherhood by keeping the child with the mother, but to allow slaveowners to replenish their slave population through sexual exploitation of

42. See Roberts, *supra* note 29, at 300 (commenting on need to account for racial differences in understanding reproductive rights).

43. See Burrell, *supra* note 12, at 416. See also *Muller v. Oregon* 208 U.S. 412 (1907) (stating that gender discrimination was permissible because of delicate nature of women).

44. See *id.* at 416 (quoting Patricia Hill Collins, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 71 (1990)).

45. See *id.* at 419.

46. See *id.*

47. See *id.* at 417 (stating connection of black women to slave system (quoting Angela Y. Davis, *Racism, Birth Control, and Reproductive Rights, in WOMEN, RACE, & CLASS* 202 (1981))).

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See Roberts, *supra* note 29, at 33 (noting history of reproduction in slavery).

53. See *id.*

54. See Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEO. L.J.* 1967, 1971 (1989) (noting that statute was created to ensure that children born of white males and slave mothers could not claim citizenship). Though "it was contrary to English tradition for children to inherit the status of their mothers, but since the [mixed-race] children who posed the problem were almost certainly illegitimate, it may also have been contrary to English tradition for them to inherit a position or status from their fathers." *Id.* at 1971 n.20.

female slaves.⁵⁵ 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.⁵⁶ Historically, reproductive rights were measured by a woman's capacity to conceive and bear children; and these rights were granted based only on the *status* of motherhood.⁵⁷ Because black women were not viewed as women they were not treated as mothers.⁵⁸ Therefore, African American women never received equal reproductive rights. It is within the confines of slavery that the abortion issue was shaped for African American women.⁵⁹ Black women have been aborting themselves since the earliest days of slavery.⁶⁰ Abortions and infanticides commonly occurred in slavery as one of the earliest forms of rebellion from African American enslaved women.⁶¹ Slave women chose abortion and infanticide over reproducing to increase the slave population.⁶² The historical legacy of slavery and oppression has forever stamped the African-American woman's definition of reproductive rights.⁶³

In addition to the historical legacy of slavery, racism has created inequalities in African American women's struggle to obtain reproductive rights.⁶⁴ Therefore, to African American women, reproductive rights are civil rights.⁶⁵ Reproductive freedoms are as important as the freedom to choose a seat on a public bus, to attend a public school, or to live or work without

55. See also Roberts, *supra* note 29, at 27 (describing that "white masters . . . could increase their wealth by controlling their slaves reproductive capacity").

56. See Burrell *supra* note 12, at 418 (quoting Barbara Omolade, *Hearts of Darkness, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 350, 354 (Ann Snitow et. al ed., 1983)).

[H]er head and her heart were separated from her back and her hands and divided from her womb and vagina. Her back and muscle were pressed into field labor where she was forced to work with men and work like men. Her hands were demanded to nurse the white man and his family as domestic servant whether she was technically enslaved or legally free. Her vagina, used for his sexual pleasure, was the gateway to the womb, which was his place of capital investment—the capital investment being the sex act and the resulting child the accumulated surplus, worth money on the slave market.

Id.

57. See *id.* at 404-405 (arguing that reproductive rights of African American women were devalued because motherhood of African American women was devalued).

58. See *id.*

59. See Roberts, *supra* note 29, at 46 (commenting on history of abortion within slavery).

60. See Angela Y. Davis, *Racism, Birth Control and Reproductive Rights, in FROM ABORTION TO REPRODUCTIVE FREEDOM* 15 (Marlene Gerber Fried ed., 1990) (commenting on history of slavery and abortion).

61. See Roberts, *supra* note 29, at 48 (noting that many slave women refused to bring children into slave chaste system and telling story of woman who is convicted of killing her infant child).

62. See *id.*

63. See *id.*

64. See Rutherford *supra* note 3, at 256-257 (stating difference of African-American women's perspective of reproductive rights).

65. See *id.* at 256 (arguing that reproductive freedoms are civil right's issues for African-American women).

restriction.⁶⁶ African American women view reproductive rights as a struggle against the oppressive forces that denied them other civil rights.⁶⁷

While not all African-American and other women of color are poor, a disproportionate number of these women either live near or below the poverty line.⁶⁸ A lack of financial resources often hinder poor women from obtaining some reproductive options⁶⁹ Congress reenforced this inequity by denying poor women federal funds for abortions.⁷⁰ In addition, a lack of finances can bar access to many contraceptive devices and basic reproductive health care.⁷¹ Thus, regardless of the status of the law, or or the “legally” available reproductive options, the financial resources needed to secure reproductive rights limit, and often prohibit, African American women from obtaining the reproductive rights to which all women are “entitled”.⁷²

In addition to facing obstacles in achieving equal reproductive rights, African American women also must consider racist motives for the imposition of reproductive policies.⁷³ Contraception from its conception was viewed as a means to improve the liberty of white women.⁷⁴ In the early 1900's, Margret Sanger began her contraception campaign.⁷⁵ She viewed women's ability to control their own reproduction as essential to their freedom and equal participation in society.⁷⁶ According to Sanger, “no woman can call herself free who does not own and control her own body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.”⁷⁷ However, like the rest of the feminist movement, Sanger's vision of reproductive freedom did not extend to African Americans as women or as

66. *See id.* at 257.

67. *See id.*

68. *See id.* at 257 nn.8-9 (citing BLACK AMERICANS: A STATISTICAL SOURCEBOOK 285 (Alfred N. Garwood ed., 1992)). In 1990, 29.3% of all African American families had incomes below the poverty level. In comparison, only 8.1% of white families had incomes below the poverty level; and only 10.7% of families of all races had incomes below the poverty level. *See id.* Even African American women with higher incomes tend to be ideologically closer to poorer women than to white women within their socioeconomic level.

69. *See id.* at 528 (explaining connection between reproductive rights and financial resources).

70. *See* Rutherford, *supra* note 3, at 280 (indicating support for Hyde amendment that mandates federal ban on use of federal Medicaid funds for abortions).

71. *See id.*

72. *See id.* at 258 (showing connection between finances and reproductive rights).

73. *See* Roberts, *supra* note 329, at 300 (quoting that “black women . . . especially those who are poor, must deal with a whole range of forces that impair their choices”).

74. *See id.* at 56 (noting importance of contraception while discussing its racist motives).

75. *See id.*

76. *See id.* at 57 (noting Sanger's original defense of birth control centered on emancipation of women).

77. *See id.*

mothers.⁷⁸ Sanger's used the Eugenics movement, that centered around the theory of creating a supreme or elite race, to support the birth control movement.⁷⁹ Toward the end of the century, the birth rate of white women suffered a significant decline while the birth rate of minority and immigrant women, or "unfit" women, increased.⁸⁰ White Americans began to fear "race suicide," because native-born white women bore fewer children than minority and immigrant women.⁸¹ Some feared that *yankee stock* would be overwhelmed, numerically and hence politically, by immigrants, nonwhites and the poor.⁸² Thus, Sanger used this political climate to promote birth control as a tool to gain "more children from the fit, less from the unfit."⁸³ In particular, the movement targeted African-American women as unfit and worked to prevent their reproductive freedom.⁸⁴ Sanger's organization, the American Birth Control League, used African American ministers to lead birth control committees.⁸⁵ By using community leaders to promote their message, the League concealed its real purpose of population control through the guise of promoting reproductive rights with false compassion.⁸⁶ In this manner, the feminist movement and white society used contraception devices to promote genocide⁸⁷ within the African American community, while simultaneously increasing the reproductive liberty of white women.

The use of contraception as a means of committing genocide upon African Americans increased with the introduction of Norplant.⁸⁸ On December 10, 1990, the United States Food and Drug Administration (FDA) approved the contraceptive Norplant for use in the United States.⁸⁹ Celebrated as a

78. See Burrell, *supra* note 12, at 420 (stating that even President Theodore Roosevelt encouraged Anglo-Saxon American women to have more children for the good of the nation (citing DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 88 (1985))).

79. See *id.* at 421-422 (describing how Sanger framed her birth control campaign in eugenic terms to show how birth control was essential to America's racial betterment).

80. See *id.*

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.* (discussing use of black ministers to promote birth control). In a letter concerning the 'Negro Project', a program that solicited black ministers to promote birth control, Sanger wrote that, "We don't want word to get out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members." *Id.* (quoting Angela Y. Davis, *Racism, Birth Control, and Reproductive Rights*, in *WOMEN, RACE, & CLASS* 202 (1981)).

87. G.A. Res. 260, U.N. GAOR, 3rd Sess., Part 1, at 174, U.N. Doc. A/810 (1948) (defining genocide as imposing measures intended to prevent births within national, ethnical, racial, or religious group).

88. See Burrell, *supra* note 12, at 416 (describing Norplant as contraceptive device that consists of six, match-size, silicon tubes that release steady stream of synthetic hormone called levonorgestral, similar to progestin used in some birth control pills, into bloodstream to prevent pregnancy.)

89. See *id.*

revolutionary advance in reproductive technology, the device offers women a convenient, reliable, and long-acting birth control option.⁹⁰

After the approval of the drug, several classist, racist, and controversial proposals of the use of the drug surfaced.⁹¹ Several states quickly moved to incorporate Norplant into their welfare systems.⁹² Many state proposals provided that the state would reimburse the costs of the device for women on AFDC or women who agreed to the injection.⁹³ Some courts have used Norplant as a criminal penalty in abuse and neglect cases, as well as in drug cases.⁹⁴ These coercive uses of Norplant prompted an undertone of genocide throughout the African American community.⁹⁵ The Norplant issue serves as an example of reproductive abuse targeting African American women.⁹⁶ Therefore, in the area of contraception, African American women unlike white women balance racism against reproductive liberty.⁹⁷ This balance shapes the African American woman's perspective and perception of reproductive rights.⁹⁸

IV. A NEW AGENDA

Feminists have defined the fight for reproductive freedom around access to contraception and the right to a safe and legal abortion.⁹⁹ This narrow definition, ignores general health issues that are important to African American women.¹⁰⁰ In general, most minority women view the abortion

90. See *id.* (describing insertion and effectiveness of Norplant, which protects a woman from pregnancy for five years). The failure rate of device rate is only 1%. Recorded side effects of Norplant include irregular and prolonged Menstral cycles, hair loss, and acne. However, Norplant is safer than many birth control methods. *Id.*

91. See Roberts, *supra* note 29, at 133-136 (describing coercive incentives for Norplant).

92. See *id.* at 108 (noting that states had spent \$34 million on Norplant-related benefits by 1994).

93. See *id.*

94. See *id.* at 151 (quoting Judgment Proceeding *People v. Johnson*, No. 29390 (Cal. Super. Ct. Jan. 2, 1991)). In *Johnson*, a twenty-seven year old mother without counsel agreed to the option of receiving Norplant in order to lower a seven-year prison sentence to one year in prison sentence and three years parole. *Id.* The Judge refused to change the order after the defendant learned from an attorney that her diabetes, high blood pressure, and other health problems made it dangerous for her to use Norplant and that the order might violate her constitutional rights. *Id.*

95. See *id.* at 110-111 (commenting that race lurks behind Norplant inducement programs, which disproportionately affect black women).

96. See Burrell, *supra* note 12, at 99 (arguing that Norplant is used as tool for racist reproductive policies).

97. See Roberts, *supra* note 29, at 300 (describing balance between reproductive freedoms and racism that minority women must consider).

98. See *id.*

99. See Rutherford, *supra* note 3, at 258 (commenting on current classification of reproductive rights).

100. See *id.*

rights movement to be “white woman-led and white woman-defined.”¹⁰¹ Consequently, the ‘colored’ reproductive rights movement has fought to expand the feminist movement’s definition of reproductive rights and to include women of color in the mainstream reproductive rights movement.¹⁰² Critical race feminist scholars have long petitioned for a broader definition of reproductive freedom that includes the ability of women to bear children, to conceive, to carry a fetus, to have an abortion, to deliver a baby, and to care for a child.¹⁰³

Similarly, African American women involved in reproductive health issues propose that reproductive rights for African American women must encompass a broad definition of reproductive health issues, rather than a narrow focus on access to abortion services.¹⁰⁴ They contend that providing all women with reproductive freedom necessitates addressing concerns about sterilization, medical treatment, and access to fertilization, to access prenatal care, and access to per-natal care.¹⁰⁵ This broader definition called upon by many scholars demands that race and class be considerations in the fight for reproductive rights.¹⁰⁶

The call for a broader definition of reproductive rights implicates a wider scope of issues.¹⁰⁷ Moreover, this new definition will require white women’s organizations to fight for causes that do not *directly* affect affluent white women.¹⁰⁸ While understanding how reproductive rights affect all women are essential to a unifying movement, a movement is only unified when all parties find a common thread or platform. Therefore, the definition of reproductive rights must change before the reproductive rights movement can address the needs of poor women and women of color.

A better agenda for African American women in the struggle for reproductive rights is to fight for reproductive self-determination to be classified as a human right.¹⁰⁹ Several reasons exist for classifying

101. See Burrell, *supra* note 12, at 407 (quoting Fawn Vrazo, *Minorities are Joining Fight for Abortion Rights*, PHILA. INQUIRER, Mar. 10, 1993, at C3).

102. See Rutherford, *supra* note 3, at 258-259 (stating issues important to minority women regarding reproductive rights). The phrase ‘colored’ is used to indicate any movements that have occurred outside of the mainstream reproductive rights movement’s fight for the abortion right and contraception.

103. See Roberts, *supra* note 29, at 62 (stating meaning of reproductive rights to minority women).

104. See Rutherford, *supra* note 3, at 258-259 (discussing importance of broad definition of reproductive health issues).

105. See Roberts, *supra* note 29, at 62 (describing issues important to minority women involved with reproductive rights).

106. See *id.*

107. See Rutherford, *supra* note 3, at 258 (listing reproductive right issues of concern to minority women).

108. See *id.* (stating that white women’s organizations have failed to address broader definition of reproductive choice and that these groups only focus on abortion).

109. See *infra* notes 134-58 and accompanying text.

reproductive self-determination as a human right. First, if African American women work for a broader definition of reproductive rights within the current feminist structure, then they are jumping on a sinking ship.¹¹⁰ The reproductive rights movement is “sinking” because its abortion right foundation is endangered of being lost.¹¹¹ It is unlikely that a reproductive rights movement based on the abortion controversy will succeed in unifying the movement.¹¹² Second, even if women of color are successful at broadening the definition of reproductive rights within feminism, reproductive harms that result solely from racism and classism will go unaddressed.¹¹³

The mainstream reproductive rights movement lost political steam after abortion became legal.¹¹⁴ The Supreme Court in *Roe v. Wade*¹¹⁵ held that women have a constitutional right to choose abortion and that any restriction upon this right during the first trimester of pregnancy is unconstitutional.¹¹⁶ The Court classified the abortion right as a privacy right.¹¹⁷ However, subsequent Supreme Court decisions have slowly dismantled *Roe* by allowing legislatures to deny poor women abortion funding and hospital access.¹¹⁸ Furthermore, the Court modified the constitutional test for access to abortion by allowing restrictions on access by states unless those restrictions pose an “undue burden” to women seeking abortion.¹¹⁹ The “undue burden” test preserved the basic appearance of an abortion right, but severely restricted a woman’s access to an abortion.¹²⁰

The anti-abortion politics of the Supreme Court keep the abortion issue in a pending state of danger.¹²¹ The abortion movement took a fatal blow in

110. See Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 17 (1991) (noting that feminist movement was unsuccessful at having women’s right to control childbearing viewed as fundamental aspect of women’s liberty rather than privacy issue).

111. See *id.* (discussing fall of negative right of privacy and its ability to protect women’s reproductive rights).

112. See Roberts, *supra* note 29, at 5 (discussing different view of abortion within black community and that difference makes abortion unlikely unifying issue).

113. See *id.*

114. See Marlene Gerber Fried, *Transforming the Reproductive Rights Movement: The Post-Webster Agenda*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 1, 4-5 (Marlene Gerber Fried ed., 1990) (describing fall of abortion movement after *Roe*).

115. See *Roe v. Wade*, 410 U.S. 113, 115 (1975) (recognizing constitutional protection of first trimester abortions).

116. See *id.*

117. See *id.* at 153.

118. See Copelon, *supra* note 110, at 17 (stating how Supreme Court changed protections granted by *Roe* without overruling it).

119. See *id.*

120. See *id.*

121. See *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989) (Blackmun, J., concurring in part and dissenting in part) (discussing changing politics of his colleagues).

Thus, “not with a bang, but a whimper,” the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who

Webster v. Reproductive Health Services.¹²² The *Webster* Court balanced a strong or "compelling state interest" in protecting fetal life against the woman's weak individual "liberty interest."¹²³ There is no discussion in *Webster* about the fundamental right of privacy.¹²⁴ The Court failed to explain why abortion does not constitute a fundamental right.¹²⁵ In effect, the Court transformed abortion from a privacy right into a privilege and laid the foundation for the practical overruling of *Roe*.¹²⁶ The Court returned the abortion right to the list of luxuries enjoyed only by wealthy, privileged women.¹²⁷ As a result, the mainstream abortion movement is in danger of *sinking* due to its inability to redefine the abortion right as more than a privacy interest.

In addition, the current structure of the reproductive rights movement ignores the societal harms of racism and classism that affect reproductive rights.¹²⁸ However, merely changing the definition of reproductive rights within the existing doctrine of feminism will not change society or the current patrician power structure.¹²⁹ Therefore, any new approach must account for the feminist movement's limited ability to change wider society.¹³⁰ Currently, the reproductive rights movement only reacts when abortion or contraceptive rights are threatened.¹³¹ In effect, by ignoring racist and classist attacks, the mainstream reproductive rights movement devalues the reproductive rights of poor and African American women.¹³² A human rights agenda would eliminate racial divisions within the feminist movement.¹³³

had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

Id.

122. *See id.*

123. *See* Copelon, *supra* note 110, at 34 (analyzing *Webster* decision).

124. *See id.* By this time, the right to privacy was a matter of *stare decisis*.

125. *See id.* at 35.

126. *See id.*

127. *See id.*

128. *See* Roberts *supra* note 29, at 300 (noting that primary concerns of white, middle class women center on laws that restrict choices otherwise available to them, such as statutes that make it more difficult to obtain abortions).

129. *See id.*

130. *See id.*

131. *See id.* (noting that pro-choice movement remained relatively complacent about effective denial of access to abortions for poor women).

132. *See id.*

133. *See infra* notes 134-39 and accompanying text.

The Agenda

The feminist movement should classify reproductive self-determination as a human right.¹³⁴ This classification will benefit women regardless of race and will establish an agenda around which all women can rally. Furthermore, a unified reproductive rights movement will increase the political power and voting strength for women's issues.¹³⁵

To diversify the mainstream movement, African American women must ensure that their voices are not diluted. Thus, coalition building¹³⁶ is an invaluable tool for African American women because it promotes a universal agenda without compromising distinct groups individualism.¹³⁷ Although the number of women of color joining mainstream pro-choice organizations has grown in the past decade, most women of color will continue to join their own political formations.¹³⁸ African American women traditionally believe in inter-racial coalitions, not inter-racial organizations.¹³⁹ A coalition working for a human rights agenda would aid all women in pursuing reproductive rights.

Why A Human Rights Agenda?

Human rights are rights of individuals in society.¹⁴⁰ Classifying reproductive self-determination as a human right would guarantee the basic conditions necessary for reproductive autonomy.¹⁴¹ A human right does not require the assertion that the benefits of reproductive freedom are desirable or necessary.¹⁴² The term "right" implies that it is the duty of society to provide benefits or respect the immunity of the right.¹⁴³ Under a human rights theory, society must respect the reproductive autonomy and liberty of women as a matter of entitlement.¹⁴⁴

134. See Cook, *supra* note 1, at 992 (applying human rights to reproductive self-determination).

135. See Deborah L. Rhode, *Feminism and The State*, 107 HARV. L. REV. 1181, 1182 (1994) (noting that factors that can divide women can be basis for enriching analysis and building coalitions). It should be noted that a human rights platform is politically neutral. Under this theory, women can push within their own political parties for change on the issue of women's reproductive rights.

136. See Loretta Ross, *Raising Our Voices*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 139, 143 (Marlene Gerber Fried ed., 1990) (defining coalition building as separate groups working together for common goal).

137. See *id.*

138. See *id.*

139. See *id.*

140. See Henkin, *supra* note 6, at 6 (defining human rights for individuals).

141. See Cook, *supra* note 1, 993 (arguing that reproductive self-determination as human right would necessitate governmental protection of women's reproductive autonomy).

142. See *id.*

143. See *id.*

144. See *id.* at 6.

The theory of human rights is important because of the rhetorical power it would give a political strategy for the reproductive rights movement. By reclassifying reproductive self-determination, the reproductive rights movement will gain a more effective political strategy to effectuate change concerning the treatment of reproductive rights. A strong political strategy is important because in the area of reproductive rights the courts often follow the social and political arenas.¹⁴⁵ Even if a constitutional argument exists, the concept must first gain political acceptance. Therefore, the reproductive rights movement must adopt a two fold approach. First, the movement must move internally for a stronger political strategy. Second, the movement must advocate for a constitutional remedy.

Though given the opportunity, the Supreme Court declined to give reproductive rights strong fundamental protection.¹⁴⁶ The constitutional argument for reproductive self-determination is important for the support it lends to a unified political strategy, not for the possibility of its acceptance by the Court.

Under a human rights approach, reproductive self-determination is a liberty interest.¹⁴⁷ The denial of reproductive self-determination as a human right is a direct attack on the liberty of women.¹⁴⁸ Indeed, denying women this liberty violates the due process clauses of the Fifth and Fourteenth Amendments which recognize liberty interests.¹⁴⁹

Traditionally, the Supreme Court has recognized the right of reproductive self-determination for men.¹⁵⁰ In recognizing the right to marry, raise children, and sustain a home within a patriarchal system, the court has fleshed out the right to reproductive self-determination for men.¹⁵¹ However, the court has

145. See Luker, *supra* note 13, at 144 (noting effect of politics on Supreme Court's decisions in reproductive rights cases).

146. See *Roe v. Wade*, 410 U.S. 113, 115 (1973) (noting that privacy right is not absolute and that women do not have absolute right to reproductive choice).

147. See Henkin, *supra* note 6, at 5 (discussing legal definition of human rights and liberty interests).

148. See *id.* A historical argument against reproductive self-determination is weak at best. Many recognized human rights were not given to certain classes of people for various reasons. The enslavement of African peoples is a paramount example. The life and liberty of white men was historically recognized as a human right. However, only within the previous century were the life and liberty rights of all African-Americans recognized.

149. See U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

150. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing that marriage activities are fundamental rights within concept of ordered liberty); *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942) (recognizing right of procreation but not extending this right to childbirth); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (including child rearing and child education in right to keep a home).

151. See *Skinner v. Oklahoma*, 316 U.S. 535, 542 (recognizing fundamental right to procreation). By protecting the right to procreate without extending that protection to childbirth and by protecting the right to keep a home within a patriarchal system, the Supreme Court has perpetuated the right of men to control their reproductive freedom.

failed to fully explore the right to reproductive self-determination for women in the area of childbirth.¹⁵² In denying women the right to determine their destinies, the Court has consequently devalue their personhood.¹⁵³

The challenge for a united coalition of women in the fight for reproductive self-determination is fashioning an appropriate and effective remedy in constitutional law.¹⁵⁴ The main remedy for violations of constitutional rights is not money damages for the victim but a declaratory judgment or an injunction against future violations.¹⁵⁵ Violations of reproductive rights may be found by reviewing how States serve, advance, or retard women's reproductive self-determination.¹⁵⁶ This approach will require fashioning legal remedies that redress group wide damage instead of only individual harms.¹⁵⁷ The implicit change of perspective would give all women regardless of race a new role in a united movement. In order to ensure the rights of all women, policies must be reviewed from the perspective of women as a whole group and within their socioeconomic, educational, and cultural communities.¹⁵⁸

CONCLUSION

In order to carry the fight for reproductive rights into the new millenium, women need a united fight. African American women must work to ensure their needs and issues are addressed by the mainstream feminist movement.¹⁵⁹ An agenda to fight for reproductive self-determination as a human right would meet these goals.¹⁶⁰ African American women should fight for reproductive

152. *See id.* The traditional role of women was to bear children, and a woman's right to reproductive self-determination or autonomy was not recognized by law. However, as with the enslavement of African Americans, customs and laws have changed with the times. Women have worked to assert their right to dignity and equality separate from the sex (biological) role of childbirth.

153. *See generally* Margaret Cerullo, *Hidden History: An Illegal Abortion in 1968*, in *FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT* 87 (Marlene Gerber Fried ed., 1990) (explaining that illegal abortions demonstrate governmental neglect and devaluing of women).

154. *See* Henkin, *supra* note 6, at 255 (explaining need to establish human rights remedy in constitutional law).

155. *See id.*

156. *See* Cook, *supra* note 1, at 986 (commenting on need for state to police violations against women rights).

157. *See generally* Dorothy Roberts, *Why Culture Matters to Law*, in *CULTURAL PLURALISM, IDENTITY POLITICS AND THE LAW* (Austin Sarat & Thomas R. Kearns eds., 1999) (describing relationship of individual rights to fight for reproductive rights).

158. *See id.* at 987.

159. *See supra* notes 136-39 and accompanying text.

160. *See supra* notes 140-44 and accompanying text.

self-determination as a human right because it will best protect their interests by creating a racially neutral unified agenda. Thus, feminism needs to argue that reproductive self-determination is a human right and anything that abridges that right is a violation upon all women.¹⁶¹

161. *See supra* notes 146-49 and accompanying text.