THE SEARCH FOR AUTHENTICITY AND THE MANIPULATION OF TRADITION: RESTRICTIONS ON WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES AND EGYPT

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INTRODUCTION

Reproductive rights are the legal rights and freedoms relating to human reproduction and reproductive health. Within this bundle of rights are the right to access reproductive healthcare; the right to reproductive health education, including the right to education about sexually transmitted diseases, contraception, and abortion; the right to birth control; and the right to legal and safe abortions. In *R v. Morgantaler*, the Supreme Court of Canada held that a criminal statute prohibiting abortion violated a woman's constitutional right to security of person. In the decision, Madam Justice Wilson stated:

> '[T]he history of men [is one of] struggling to assert their dignity and common humanity against an overbearing state apparatus.' Meanwhile, the history of women's rights has been a 'struggle to eliminate discrimination to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men . . . not to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes.' *Reproductive control is 'an integral part of modern woman's struggle to assert her dignity and worth as a human being.'*[1]

Although the United Nations recognized the right to marry and start a family as a human right in 1948,[2] the right to reproductive control—and more specifically the right to choose *not* to reproduce or to regulate reproduction—was not

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[1] Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1327-1328 (1991) (quoting Noreen Burrows, cited in *R v. Morgantaler*, (1988) 1 S.C.R. 30, at 171-172, per Madam Justice Wilson (emphasis added)).

[2] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) A (Dec. 10, 1948).

recognized as a human right internationally until 1968.[3] In 1979, Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") made explicit that the right to reproductive control applied with equal force to both men and women when it recognized that women have "[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights."[4] The 1994 United Nations International Conference on Population & Development in Cairo, Egypt reaffirmed the right of all people to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so.[5] In 1995, the Fourth World Conference on Women in Beijing, China declared "[t]he explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility."[6]

Despite international recognition of these rights, women's reproductive autonomy remains greatly restricted throughout much of the world and across many cultures. For example, one proposed law permits doctors to lie to their pregnant patients to prevent them from making the "wrong" decision to abort a fetus with birth defects. The very idea that the law would allow such manipulation seems contrary to the American ideals of independence and individual autonomy. Yet, this law is not being foisted upon cloistered or oppressed women in a country that is controlled by Shari'a law, but rather it was proposed in the United States, specifically the State of Arizona.[7]

Westerners are often rightly charged with an overgeneralized belief that Middle Eastern women are oppressed and marginalized: that they have few rights, if any, and that the rights and freedoms enjoyed by American women are light years ahead of women in countries ruled by Islamic men. Contrary to popular belief, the "War on Women," as pundits and activists have deemed it, is not only taking place in some faraway country; it is also happening on the American home front. The War is one in which women cannot trust even their own doctors; where Republicans in South Dakota proposed a bill that would make it legal to murder a doctor who provides abortion care;[8] where congressional and state lawmakers are

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[3] *See* International Conference on Human Rights, April 22 – May 13, 1968, *Proclamation of Teheran*, U.N. DOC. A/CONF.32/41 (May 13, 1968) (concluding that parents have a "basic human right to determine freely and responsibly the number and the spacing of their children").

[4] *See* Badran, *infra* note 91.

[5] United Nations International Conference on Population & Development, September 5-13, 1994, *Programme of Action of the United Nations International Conference on Population & Development*, ¶7.3, U.N. DOC. A/CONF.171/13 (Oct.18, 1994).

[6] United Nations Fourth World Conference on Women, September 4-15, 1995, *Report of the Fourth World Conference on Women*, U.N. DOC. A/CONF.177/20/Rev.1 (Sept. 15, 1995).

[7] ARIZ. REV. STAT. ANN. § 12-718 (2012).

[8] *See* H.B. 1171, 2011 Leg., 86th Sess. (S.D. 2011). The bill, proposed by Republican representative Phil Jensen would have expanded the state's definition of justifiable homicide to include murder which was committed to prevent harm to an unborn child. *Id.*; *see also* S.D. CODIFIED LAWS §§ 22-16-34, 35 (1939).

pushing to eliminate funds for women's healthcare providers and family planning programs; and where in 2011, legislators across the U.S. enacted ninety-two provisions to restrict access to abortion.[9] This record-breaking number indicates a sharp increase in the amount of legislation aimed at regulating women's health: in the last twenty-five years, there have never been more than forty such provisions passed throughout the country in a single year.[10] In 2012, forty-three abortion restrictions were enacted, as well as an additional seventy-eight provisions related to reproductive health and rights.[11]

This Article posits that the extraordinary number of legislative efforts to restrict women's access to fundamental reproductive healthcare, to contraception, and to abortion in the United States is happening for much the same reason that the rights of women in a number of post-colonial Islamic states are restricted: all of these countries are founded on certain religious beliefs and ideals that are used to justify and maintain a patriarchal social structure. Those in power limit the reproductive rights of women in order to maintain patriarchal societal control, as well as to prove themselves as appropriately preserving their nation's "authentic" culture and religious beliefs, and therefore prove themselves deserving of power. To illustrate this claim, I will focus on the United States and one Middle Eastern Islamic nation in particular, the Arab Republic of Egypt.

Egypt is a country in flux where women have proven themselves as invaluable instruments of change.[12] Yet, in the wake of a new constitution and as power changes hands, it is likely that women will be not just overlooked, but that they will lose advances made in the Egyptian private law in recent years. I predict that conservative parties in power will attempt to prove their "authenticity" through a methodology of cultural essentialism whereby a conservative Islamic view of the rights, duties, and obligations of women, particularly with regard to their reproduction, will be used to strip Egyptian women of their rights. This Article explores this topic by reviewing American laws that restrict access to abortion as well as Egyptian personal status codes that have regulated family law, including reproductive rights, and are likely to be overturned in the future. Drawing comparisons between these two nations, this Article contends that the "search for authenticity" is used by those in power in both Western and non-Western countries alike and that such a justification has deleterious effects on all women across societies. In Part I, this Article discusses the meaning of "authenticity," as well as ideas of cultural essentialism in order to contextualize lawmaking that affects women's reproductive rights and autonomy. Part II provides an overview of the

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[9] *See States Enact Record Number of Abortion Restrictions in 2011*, GUTTMACHER INSTITUTE (Jan. 5, 2012), *available at* http://www.guttmacher.org/media/inthenews/2012/01/05/endofyear.html.

[10] *Id.*

[11] *2012 Saw Second-Highest Number of Abortion Restrictions Ever*, GUTTMACHER INSTITUTE (Jan. 2, 2013), *available at* http://www.guttmacher.org/media/inthenews/2012/04/13/index.html.

[12] Mona El-Naggar, *Equal Rights Takes to the Barricades*, N.Y. TIMES, Feb. 1, 2011, http://www.nytimes.com/2011/02/02/world/middleeast/02iht-letter02.html?_r=2&partner=rss&emc=rss.

law of the land with regard to access to contraception and abortion in the United States, and focuses on informed consent laws being used to control women's reproductive choices at the state level. Part III discusses personal status laws currently governing women's rights in Egypt, including the challenges to such laws. Finally, Part IV presents the argument that lawmakers in the East and West share a common search for identity and authenticity and use the idea of "authenticity" to their advantage as a basis for the limitation of women's reproductive freedoms.

I. DEFINITIONS & LITERATURE REVIEW

To define "authenticity," "modernity" is juxtaposed against "tradition" in such a way that for one to be "authentic," one must often rally against what is "modern." The modernity versus tradition discourse is used to theorize post-colonial states across the Eastern Hemisphere, including Egypt.[13] The discourse is "structured across the polar confines of pre-colonial 'tradition' on the one hand and post-colonial 'modernity' on the other," focusing on the tension between the conception of what was, what is, and what should be.[14] The ultimate goal of this discourse is often to answer essential questions of identity. Amr Shalakany stated that "the basic dilemma addressed by the discourse is fundamentally existentialist, namely whether it is possible to live 'authentically' in today's Arab world."[15] However, rather than asking if it is possible to live "authentically," certain policymakers go beyond passive theorizing by demanding that their country's citizenry live "authentically" and these policymakers use the law to enforce their own ideas of how one lives in such a fashion.

Modernity, as opposed to tradition, is presumed to be necessarily inauthentic. More directly, in the post-colonial context, "modernity" is equated with Western society and is thereby viewed as alien to pre-colonial traditions. "Modernization therefore means the loss of 'authenticity' in favor of social structures, cultural performances, value systems, and political institutions, which are of alien (read Western) extraction."[16] Where women are concerned, the debate as to what is authentic and what is inauthentic intensifies as those in power use cultural essentialism to enforce specific, patriarchal ideals that disfavor women:

> As an ideology, essentialism rests on two assumptions: (1) that groups can be clearly delimited; and (2) that group members are more or less alike. The idea of authenticity gains its force from essentialism, for the possibility

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[13] *See* Amr Shalakany, *The Origins of Comparative Law in the Arab World, or How Sometimes Losing Your Asalah Can Be Good for You*, *in* INTRODUCTION: THE PROJECTS OF COMPARISON, 152-188 (Annelise Riles ed., 2001); *see also* Ratna Kapur, *A Love Song to our Mongrel Selves: Hybridity, Sexuality and the Law*, 8(3) SOC. & LEGAL STUD. 353 (1999).

[14] Shalakany, *supra* note 13, at 155.

[15] *Id.*

[16] *Id.*

> of a 'real' or 'genuine' group member relies on the belief that what differentiates 'real' members from those who only pretend to be authentic is that the former, by virtue of biology or culture or both, possess inherent and perhaps even inalienable characteristics [which are the] criteria of membership.[17]

In post-colonial states, religiously motivated conservative movements tend to vilify women's independence more generally and their sexuality or reproductive autonomy more specifically, "as some kind of cultural contaminant that has arrived from the 'decadent West.'"[18] Sexuality, particularly in the context of female sexuality, is characterized as something that is "inglorious to our collective Third World, postcolonial health."[19] As explained by Professor Ratna Kapur, this attitude results from the fact that stories about sex are tied to "an essentialist understanding of culture."[20] Kapur writes in the context of India and states that in India, "issues such as Sati, widow remarriage or the age of consent to marry were cast as cultural issues beyond any legitimate political intervention by the colonial state. In the discursive strategies of the 19th century nationalists, women's sexuality and Indian culture came to be constituted as inseparable."[21] In post-colonial societies, "cultural nationalists," as coined by Professor Kapur, assert that Western cultural contaminants continue to invade their homes and threaten to destroy what is understood in patriarchal terms as the ideal family and the ancient cultural values and traditions that have cemented it together.[22]

Likewise, Professor Leila Ahmad has addressed how the rights and freedoms of women in the Islamic context have also become intertwined with concepts of culture, tradition, and authenticity, wherein the private sphere of the home has become an imagined space where culture in its pure, authentic form can remain uncontaminated by Western colonialists.[23] In Islamic cultures, the honor of men resides in the chastity of women and where that honor is threatened by external, colonialist—*e.g.*, Western—forces, the creation of ever more restrictive modesty codes to uphold honor has resulted in the deprivation of women's spiritual, social, and intellectual lives.[24]

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17 Mary Bucholtz, *Sociolinguistic Nostalgia and the Authentication of Identity*, 7 J. OF SOCIOLINGUISTICS 398, 400 (2003), *available at* http://www.linguistics.ucsb.edu/faculty/bucholtz/articles/MB_JofS2003.pdf.

18 Kapur, *supra* note 13, at 355.

19 *Id.* at 357.

20 *Id.*

21 *Id.*

22 *Id.*

23 LEILA AHMAD, WOMEN AND GENDER IN ISLAM (Yale University, 1992).

24 *See generally*, Tirza Visser, *Islam, Gender Reconciliation: Making Room for New Gender Perspectives*, *in* RELIGION, CONFLICT AND RECONCILIATION: MULTIFAITH IDEALS AND REALITIES 186 (Jerald Gort, et al. eds., 2002); VALERIE J. HOFFMAN, SUFISM, MYSTICS, AND SAINTS IN MODERN EGYPT (1995).

As is evidenced in the Indian and the Islamic context, dominant conservative groups use cultural nationalism to create a vision of society where one can only be a fully integrated member of society if he or she mirrors the one, fixed and timeless ideal that is represented in their vision. However, to assume that this discourse, and the essentialists who use the creation of a common identity as a way to forge political alliances, only affect post-colonial women or post-colonial societies is a kind of gender and cultural essentialism all its own.

The idea of culture itself, but more specifically the idea of what it means to be culturally authentic, is often invoked[25] by Americans who seek to push forward an agenda which limits women's reproductive freedoms—to delegitimize sexual conduct, sexual freedoms, the decision to have children and if so, when and how many. Although the religious right in America cannot blame its woes on the inevitably evil "West," members of this group also speak in the modernity discourse by blaming the American equivalent of the "West," liberals, and reconstructing history to create nostalgia for the "good old days" when women had less independence because the family was a priority. This Article seeks to explore how the essentialist search for and understanding of identity is one common to all people and how this discourse can work to the disadvantage of all women's reproductive freedoms.

II. LAW IN THE UNITED STATES

A. Overview of Federal Law Impacting Reproductive Autonomy

The word "God" does not appear in the United States Constitution, yet, according to a statement made by John McCain during his 2007 presidential campaign, the Constitution "established" the United States of America as a "Christian nation."[26] Indeed, throughout American history, it has been Christian ideals that have provided the fundamental structure of our government and our families, our ways of interaction, and our understandings of morality, including whether it is moral to individually regulate reproduction. Within the confines of Christianity, the majority religion in this country, a woman's role traditionally has been restricted to the domain of the home, and her worth measured by her ability to reproduce. Her desire to control this ability has mattered little.

In spite of this, the United States government first legitimized the right to reproductive control less than fifty years ago in *Griswold v. Connecticut*, wherein the Supreme Court of the United States ruled that although the Constitutional Bill

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[25] The idea of authenticity is not just invoked by conservatives, religious or otherwise. These concepts are often invoked from all sides to tell the story they wish and legitimize the cause they further. I however, focus on the conservative retelling of this idea of authenticity.

[26] Dan Gilgoff, *John McCain: Constitution Established a 'Christian Nation'*, BELIEFNET (June 2007), *available at* http://www.beliefnet.com/News/Politics/2007/06/John-Mccain-Constitution-Established-A-Christian-Nation.aspx#extndVer.

of Rights does not explicitly mention a right to privacy, this right could be found in the "penumbras" and "emanations" of other constitutional protections.[27] In *Griswold*, the Supreme Court invalidated a Connecticut law that prohibited the use of contraceptives on this basis, finding that the statute violated the "right to marital privacy."[28] Subsequently, the Court expanded this right to unmarried couples in *Eisenstadt v. Baird*.[29] In *Eisenstadt*, the Supreme Court struck down a Massachusetts law that prohibited the distribution of contraception to unmarried people, reasoning that because the law could not be enforced against married couples under *Griswold*, the law was irrationally discriminatory toward unmarried people and therefore violative of the Equal Protection Clause of the Fourteenth Amendment.[30]

Just a year later, the Court extended its reasoning in *Griswold* and *Eisenstadt* in *Roe v. Wade*.[31] In *Roe*, the Court held that a woman had a constitutional right to terminate her pregnancy under the right to privacy within the liberty interest of the Fourteenth Amendment.[32] The Court found that a pregnant woman's right to an abortion was a fundamental right and that violations of that right were subject to the strict scrutiny test.[33] To survive a strict scrutiny assessment, the burden is on the state to prove that the statute restricting a woman's right to an abortion serves a compelling state interest and that the statute is narrowly tailored to achieve that compelling interest.[34]

At the same time litigants were testing the constitutionality of restrictions on reproductive autonomy, the Republican Party began to use the "abortion issue" to cause a political realignment and ensure Republican success in the 1972 presidential election.[35] Until 1971, the Nixon Administration dictated that the

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[27] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[28] *Id.* at 485. In Justice Harlan's concurring opinion, he rejected the majority's "penumbra of rights" reasoning and argued that the right to privacy is protected by the due process clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. *Id.* at 500. The right to privacy line of cases, including *Roe v. Wade*, have since adopted Justice Harlan's reasoning. *See* Roe v. Wade, 410 U.S. 113 (1973).

[29] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[30] *See id.* at 447.

[31] *Roe*, 410 U.S. 113.

[32] *Id.* at 154.

[33] *Id.* at 154-55.

[34] While the Court specifically held that a woman does not have an absolute right to privacy during the first trimester at least, the decision of whether to obtain an abortion rested solely with the pregnant woman and her doctor. During the first trimester, the State could make no regulations restricting abortions because the State's interest of protection the "potentiality of human life" was not yet as compelling as the fetus, since life could not be sustained outside the mother's womb. The *Roe* court based the trimester distinction on the concept of viability which doctors had determined at that point as approximately 28 weeks. During the second trimester, states could regulate abortions in such a manner that would protect a mother's health. After viability states were allowed to regulate or even ban a woman's right to an abortion with exceptions for the preservations of the mother's health and life because a state's interest in protecting human life became compelling. *Id.* at 164-165.

[35] Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2052-53 (2011).

Department of Defense could conduct a therapeutic abortion in any military hospital, no matter the laws of the state where the hospital was located. In 1971, President Nixon changed his position on abortion and rescinded this policy, since "abortion on demand was incompatible with his personal belief in the sanctity of human life—including the life of the yet unborn. The rights of the unborn, he said, are surely recognized in law."[36] Nixon's departure was part of a deliberate effort to use abortion to divide Democrats so that normally staunchly Democratic Catholics and Southern Democrats, along with other social conservatives, would defect to the Republican Party.[37] "Attacking abortion was now a way of expressing disapproval of 'permissive' youth who challenged traditional role morality in the making of war and family."[38]

The "abortion issue" became the dividing line between the "moral majority" who stood for traditional values, and the feminists, the hippies, the so-called sexual deviants—*e.g.*, the "liberals" of their day. Nixon established himself as the moral, culturally authentic candidate and roundly trounced his opponent, whom Nixon was successful in casting as the cultural "other."[39] This realignment strategy was immensely successful and can be seen just as clearly forty years later in the 2012 presidential election.

The Supreme Court had occasion to reconsider *Roe* in *Webster v. Reproductive Health Services*, and the societal shift over reproductive rights can be seen quite clearly.[40] Although the Court declined to explicitly overturn *Roe*, it limited the holding and the impact of the *Roe* opinion by upholding a Missouri law that imposed restrictions on the use of state funds, facilities, and employees in performing, assisting with, or counseling on abortions.[41] Specifically, the Court limited *Roe* by holding that the right to abortion "was a liberty interest protected by the Due Process clause" subject to any restriction that would permissibly further a rational state interest such as the protection of potential life.[42] In his dissent, Justice Blackmun wrote that the plurality's approach would effectively overturn *Roe* since it would allow a statute to restrict access to abortions in any way so long as it was rationally related to the promotion of potential life.[43]

The Court reconsidered *Roe* once again a mere three years later in *Planned Parenthood v. Casey*.[44] While the Court decided not to overturn *Roe*, the Court's ruling in *Roe* was nevertheless gutted. The Court upheld the premise in *Roe* that a

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[36] *Id.* at 2053 (internal citations omitted).
[37] *Id.* at 2054.
[38] *Id.* at 2057.
[39] *Id.* at 2058.
[40] Webster v. Reprod. Health Svcs., 492 U.S. 490 (1989).
[41] *Id.* at 491.
[42] *Id.* at 494.
[43] *Id.* at 538 (Blackmun, J., dissenting).
[44] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

woman has the right to an abortion prior to fetus viability.[45] However, while the Court in *Roe* held that states could regulate abortions only in certain trimesters, *Casey* rejected the "rigid" trimester framework and modified the concept of viability established in *Roe*.[46] Finally, the *Casey* Court held that states may enact regulations to ensure that a woman's decision is thoughtful and informed prior to viability, laying the groundwork for many of the state law restrictions being enacted today.

The Court adopted the undue burden standard under which a pre-viability state regulation on abortion would be upheld if it did not "have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[47] Along with the new undue burden standard, the *Casey* Court also placed the burden of proving the standard on those challenging the law, rather than on the government, as required by *Roe*. *Casey* did not explain how to use the standard other than the "substantial obstacle" language.[48] Effectively, the *Casey* court upheld little except for the general concept that women have the right to choose whether to have an abortion and also upheld the general standard in *Roe* that "ensure[s] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[49]

The holding of *Roe*, its progeny, and the right to abortion have been challenged continuously since 1972 as the "abortion issue" has consistently been used by politicians to establish their authenticity as moral, traditional Americans

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[45] *Id.* at 872. In *Casey*, Planned Parenthood challenged a Pennsylvania statute because it placed restrictions on pre-viability abortions. The provisions of the statute required a physician to give a woman seeking an abortion information that advocated childbirth over abortion in order to obtain informed consent and to wait at least twenty-four hours after the information was given before an abortion was performed. The statute further required physicians to obtain parental consent for minors seeking an abortion, to ensure a married woman notified her husband of her decision to obtain an abortion, and to record specific information regarding every abortion. *Casey* effectively did away with Roe's strict scrutiny standard of review regarding a state's interest prior to viability.

[46] *Id.* at 873.

[47] *Id.* at 877.

[48] *Id.* The Court held that the provision in the PA law requiring a woman to notify her husband of her intention to obtain an abortion was an undue burden and therefore unconstitutional. *Id.* at 921. The Court upheld the provision requiring unemancipated minor females to obtain a parent or guardian's consent prior to any abortion because the statute contained a judicial bypass option. *Id.* at 970. The Court also upheld the statute's recordkeeping and reporting provisions. *Id.* at 900. The Court found the informed consent and mandatory waiting periods to be constitutional as they were not an undue burden. *Id.* at 886-87. The physician was required to inform the woman of the risks of an abortion and information about the fetus. *Id.* at 882. The woman also had to certify that the physician or qualified abortion provider had informed her of her right to view state-offered material regarding alternatives to abortion. *Id.* at 871.

[49] *Casey*, 505 U.S. at 872. The Court held that if a state "enact[s] legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion," it would not be an undue burden as the state would be merely promoting its interest in potential life. *Id.* at 883. A provision that affects cost or makes it more difficult to obtain an abortion does not necessarily create an undue burden, however at some point an increased cost could and that is a factor for a court to consider. By way of explanation, the Court only explained that "particularly burdensome" is not unduly burdensome. *Id.* at 886-887.

against reproductive autonomy and worthy of political power. However, it appears from all accounts that never has a woman's right to reproductive autonomy in the United States been challenged more fiercely, more offensively, and on so many fronts as it is today. For example, Georgia representative Terry England, while arguing in favor of an abortion prohibition which would prevent women whose babies die in utero or are going to be stillborn from obtaining an abortion after twenty weeks, compared women to cows and pigs who deliver stillborn calves and piglets.[50] Former Republican presidential primary candidate Rick Santorum has repeatedly argued that *Griswold* should be overturned. As he insisted, states should be able to ban birth control because of "the dangers of contraception in this country. It's not okay. It's a license to do things in a sexual realm that is counter to how things are supposed to be."[51] Contrary to Santorum, I would argue that the "dangers of contraception" stem from the threatened ability of women in the United States to assert their dignity and control over their own beings. This danger has never been greater.

Yet, what Santorum and many other politicians have avoided overtly expressing is the conservative Christian beliefs upon which their desire to restrict women's reproductive autonomy are founded. The U.S. Constitution did not create a Christian nation, but instead provided for religious freedom.[52] Although the Constitution was designed as a shield against religious intolerance, as politicians become ever more emboldened, they are increasingly using the First Amendment as a sword to pierce through the right of women to control their reproductive destiny. This can be seen most explicitly in the context of proposed bills such as the Blunt Amendment, which, purportedly aimed at protecting the "conscience" of employers, would allow them to opt out of providing medical coverage that goes against their religious convictions.[53] The irony of this, of course, is that the First Amendment was designed to protect against the establishment of a state-sponsored religion, not to allow religious individuals to avoid their obligations as citizens and impose their religious beliefs upon others.

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[50] *Terry England, Georgia Republican Lawmaker, Compares Women to Farm Animals*, HUFFINGTON POST (Mar. 9, 2012), http://www.huffingtonpost.com/2012/03/09/terry-england-farm-animals_n_1335976.html

[51] Santorum stated that "[Sex] is supposed to be within marriage. It's supposed to be for purposes that are yes, conjugal . . . but also procreative. That's the perfect way that a sexual union should happen . . . This is special and needs to be seen as special." Igor Volsky, *Rick Santorum Pledges to Defund Contraception: 'It's Not Okay, It's a License to Do Things'*, THINKPROGRESS.ORG (Oct. 19, 2011), http://thinkprogress.org/health/2011/10/19/348007/rick-santorum-pledges-to-defund-contraception-its-not-okay-its-a-license-to-do-things/?mobile=nc .

[52] U.S. CONST. amend. I.

[53] The "Blunt Amendment," proposed by Missouri Republican Senator Roy Blunt, would have allowed any employer with moral objections to the Obama Administrations' birth control coverage rule to opt out of the coverage requirement. The amendment was voted down early in 2012 at a vote of 51 to 48, largely along party lines. *See* N.C. Aizenman & Rosalind S. Helderman, *Birth Control Exemption Bill, The 'Blunt Amendment,' Killed in Senate*, WASH. POST, March 1, 2012, http://www.washingtonpost.com/national/health-science/birth-control-exemption-bill-the-blunt-amendment-killed-in-senate/2012/03/01/gIQA4tXjkR_story.html

Of course, apart from constitutional limitations on laws regulating abortion, contraception, or other facets of reproductive autonomy, and certain wide-sweeping healthcare reform, federal law plays a limited role when it comes to restrictions on the right to reproductive autonomy placed on women today in the United States.[54] Rather, it is in the states where the battle for reproductive autonomy is most often waged. Reviewing state laws and proposed state laws is helpful in focusing on how women's sexuality and right to reproductive autonomy are being used as measures of conservative, or Christian, ideals of authentic American culture.

B. Focus on State Laws Restricting Women's Reproductive Rights

Until lately, since the Supreme Court's decision in *Eisenstadt*, states have mostly stayed away from limiting women's access to contraception, choosing instead to focus on the abortion battle.[55] Thirty-six states have limited where an abortion may be performed and by whom.[56] Forty states have prohibited abortion, except when necessary to protect the life of the mother, after a specified point in the pregnancies.[57] Eighteen states have prohibited so-called "partial-birth" abortions—and the Supreme Court has upheld a federal partial-birth abortion ban.[58] Forty-six states allow individual health care providers to refuse to participate in an abortion and forty-three states allow institutions to refuse to perform abortions.[59] Nineteen states mandate that a woman be given counseling before an abortion.[60] Twenty-six states require a woman seeking an abortion to wait a specified period of time between when she receives counseling and when the procedure is performed.[61] Thirty-seven states require some type of parental involvement in a minor's decision to have an abortion.[62]

Despite the numerous restrictions on women's reproductive rights already in place, 2010, 2011, and 2012 saw an unprecedented surge of restrictive bills being pushed through state legislatures. Particularly popular were so-called "Women's

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[54] *But cf.*, the Freedom of Choice Act, an unsuccessful bill designed to codify *Roe* in response to its substantial erosion in the holdings of *Webster* and *Casey*. The bill sought to preserve the "strict scrutiny" standard of review over *Casey*'s undue burden rule, and instead require the state to show its compelling state interest. Freedom of Choice Act, No. 103-42 (Apr. 29, 1993). The bill was opposed by the Department of Justice.

[55] Nevertheless, some states have restricted access to contraception by excluding emergency contraception from state Medicaid family planning eligibility expansions or contraceptive coverage mandates, or by allowing pharmacists or pharmacies to refuse to provide contraception. Further, in 2011 and 2012 congressional legislators opposed a healthcare mandate that insurance companies fully cover birth control expenses, eliminating co-pays and deductibles.

[56] GUTTMACHER INSTITUTE, *supra* note 9.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] GUTTMACHER INSTITUTE, *supra* note 9.

Right to Know" Acts.[63] These Acts generally require abortion providers to perform an ultrasound several hours in advance of an abortion procedure, during which time the provider must make the images produced from the ultrasound visible to the patient and must describe to the patient the images seen on the ultrasound.[64]

These laws have been challenged in federal district courts on constitutional grounds to mixed success. For example, in *Texas Med. Provs. Performing Abortion Svcs. v. Lakey, M.D.*, women and abortion providers who challenged the 2011 amendments to the 2003 Texas Women's Right to Know Act were denied an injunction on Equal Protection Clause grounds, but the district court found that the law likely violated the First Amendment and granted a preliminary injunction on that basis.[65] The amendments to the Texas Women's Right to Know Act required the following as prerequisites for a woman's informed and voluntary consent to an abortion: (1) the physician who is to perform the abortion, or a certified sonographer agent thereof, must perform a sonogram on the pregnant woman; (2) the physician must display the sonogram images "in a quality consistent with current medical practice" such that the pregnant woman may view them; (3) the physician must provide, "in a manner understandable to a layperson," a verbal explanation of the results of the sonogram images, including a variety of detailed descriptions of the fetus or embryo; and (4) the physician or certified sonographer agent must "make [] audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provide [], in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation." The amendments allow a woman to "opt out" of viewing the sonogram images or hearing the heart auscultation but require all women to receive the sonogram and hear the detailed verbal description of the sonogram images except in cases of sexual assault, incest, and other limited, enumerated circumstances.[66]

In *Lakey*, the district court summarily dismissed the plaintiffs' argument that the amendments violated the Equal Protection Clause of the Constitution.[67] Quoting *Romer v. Evans*, the court stated, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end."[68] The court went on to find that "the State has legitimate interests from the outset of pregnancy in

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[63] *See, e.g.*, N.C. GEN. STAT. sec. 90-21.80-92 (2011).

[64] *Id.*

[65] Texas Med. Provs. Performing Abortion Servs. v. Lakey, 806 F.Supp.2d 942, 975 (W.D. Tex. 2011); *see also* Stuart v. Huff, No. 1:11CV805 2011 WL 5042110 (M.D.N.C. Oct. 25, 2011) (granting a preliminary injunction after finding that the compelled speech of the Women's Right to Know Act violated the First Amendment).

[66] Tex. Health & Safety Code Ann. § 171.012 (West 2011).

[67] *Lakey*, 806 F.Supp.2d at 957.

[68] *Id.* (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

protecting the health of the woman and the life of the fetus that may become a child."[69] The court also found that protecting the life of the fetus justifies "singling out" abortion providers and their patients.[70] In dictum, the court questioned whether the law, in discouraging qualified providers from performing abortions, would actually put the health of mothers at risk.[71] However, the court stated, "if the Texas Legislature *wishes to prioritize an ideological agenda over the health and safety of women, the Equal Protection Clause does not prevent it from doing so* under these circumstances."[72]

The court went on to analyze plaintiffs' argument that certain provisions of the Texas Women's Right to Know Act compelled physicians to engage in speech in violation of the First Amendment. The court found that the Act required physicians "to advance an ideological agenda with which they may not agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen."[73] On that basis, the court held that the Act violated the First Amendment's right to be free from compelled speech and granted a preliminary injunction.[74]

In the case of the Texas Women's Right to Know Act and numerous other similar state law Right to Know Acts, states have enacted these laws under the auspices of "informing" women. It is clear that those who have enacted such laws do not believe women are informed or capable of making the "correct" decision regarding their health and reproduction, so the state must take drastic measures to ensure that these women receive the "right" information. Moreover, as stated by the district court in *Lakey*, those in power seek to enforce a specific, patriarchal, conservative view of the appropriate role of women—as mothers—and will go to great lengths to do so, even if that means that the women are subjected to unwanted speech and risks to their health and safety. Although the Fifth Circuit Court of Appeals later held that the government-mandated speech was not ideological and was permissible so long as it is truthful and non-misleading,[75] there has been an influx of legislation requiring abortion providers to provide false information to women in an effort to discourage them from undergoing an abortion procedure.[76]

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[69] *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992)).

[70] *Id.; see also* Vernon's Tex. Stat. & Code Ann. § 171.011, et seq.

[71] *Lakey*, 806 F.Supp.2d at 957.

[72] *Id.* at 957-958 (emphasis added).

[73] *Id.* at 975.

[74] *Id.* at 976. On appeal, however, the Fifth Circuit reversed the district court and found that the required information was "not ideological, but rather, truthful and non-misleading, and provisions were within State's power to regulate the practice of medicine." Texas Med. Provs. Performing Abortion Servs. v. Lakey, 667 F.3d 570, 574-76 (5th Cir. 2012). The circuit court went on to find that the Act did not fall under "the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny." *Id.* at 576.

[75] *Lakey*, 667 F.3d at 574-76. *See supra* note 74.

[76] *See, e.g.*, H.R. 1659, 2012-2014 Leg., 2012 Sess. (N.H. 2012) (requiring that abortion providers tell women that abortion increases the risk of breast cancer, a claim disputed by the National Cancer Institution, the World Health Organization, and the American Congress of Obstetricians and

However, these efforts to restrict women's reproductive rights and force them to comply with state-structured social norms are not limited to laws which require physicians or abortion providers to misinform women seeking abortions. Because the great majority of abortions occur during the first trimester, ultrasound requirements mean most women will be forced to have a transvaginal procedure, since an ultrasound image so early on cannot be produced through any other method.[77] A law that was proposed in Virginia required such a procedure and also required that if a woman refused to "avail herself of the opportunity" to view the ultrasound image or listen to the fetal heartbeat that a note would be placed in her medical record—whether she wants it there or not.[78] Providers are thereby required to perform a medically unnecessary procedure upon a woman which violates clear medical ethics and under any other circumstance would likely violate state and federal law.

Under the guise of providing women with more information so they might understand the implications of aborting a fetus, women are shamed and violated so that they will not transgress certain conservative social ideals or cultural norms. During floor debates on the Virginia bill, Del. C. Todd Gilbert stated his belief that most abortions are a matter of lifestyle convenience, as though a woman should not be permitted to make decisions based on whether her lifestyle is best suited for childrearing.[79] Other lawmakers stated that women had already made the decision to be "vaginally penetrated when they got pregnant" which is in line with the patriarchal belief that once a woman is no longer chaste, she has no rights.[80] That is the same logic that animated the bill's sponsor in the House of Delegates, Del. Kathy J. Byron, who insisted that, "if we want to talk about invasiveness, there's nothing more invasive than the procedure that she is about to have."[81] Decoded, that means that if you are willing to submit to sex and/or an abortion, the state should be allowed to penetrate your body as well.[82]

It was no coincidence there was a statistically significant influx of these and similar laws aimed at restricting women's rights during the run-up to the 2012 elections. Conservatives proposed these laws, the more extreme the better, to prove

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Gynecologists). *See also, Is Abortion Linked to Breast Cancer?*, AMERICAN CANCER SOCIETY, http://www.cancer.org/Cancer/BreastCancer/MoreInformation/is-abortion-linked-to-breast-cancer (last visited June 22, 2012); H.B. 2598 (KS 2012) (requiring the same type of misinformation).

[77] *See e.g.*, H.B. 462, 2012 Leg., CH 131 (Va. 2012).

[78] *Id.*

[79] John Celock, *Virginia Ultrasound Bill: Republican Lawmaker Calls Abortion 'Lifestyle Convenience'*, HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/virginia-ultrasound-bill-republican-abortion-lifestyle-convenience_n_1276799.html.

[80] Dahlia Lithwick, *Virginia's Proposed Ultrasound Law is an Abomination*, SLATE (Feb. 16, 2012), http://www.slate.com/articles/double_x/doublex/2012/02/virginia_ultrasound_law_women_who_want_an_abortion_will_be_forcibly_penetrated_for_no_medical_reason.html.

[81] *Id.*

[82] Olympia Meola, *House Gives Preliminary OK to Abortion Ultrasound Bill*, RICHMOND TIMES-DISPATCH (Feb. 13, 2012), *available at* http://www2.timesdispatch.com/news/2012/feb/13/house-gives-preliminary-ok-to-abortion-ultrasound--ar-1685957/.

themselves as "protecting the family" and establish their pro-America ideals. Although proponents of such laws say the purpose of these and similar laws is to ensure informed consent, in reality they exist to psychologically torment and physically and emotionally abuse a woman who seeks an abortion in order to prevent her from exercising a legal right, and to control her behavior to comport with social norms promulgated by a patriarchal system whereby men propose the laws and seek to control women's behavior. By doing so, politicians prove themselves as worthy of election or re-election.

III. LAW IN EGYPT

A. Overview of Egyptian Laws Impacting Women

Article 2 of the new Egyptian Constitution states, "Islam is the religion of the state and Arabic is its official language. Principles of Islamic Shari'a are the principle source of legislation."[83] Article 4 of the new Constitution states that "Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law."[84] Al-Azhar is a mosque and university in Egypt and Sunni Islam's highest authority. Article 219 specifies that "[t]he principles of Islamic Shari'a include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."[85] Further, the first article of the Civil Code of 1948 stipulates that "in the absence of an applicable legal provision," the competence of the judge is to give a ruling "according to custom and, in its absence, according to the principles of the Shari'a."[86] Accordingly, Islamic law is both *the* main source of modern legislation in Egypt as well as the source for legal interpretation in matters of first impression in Egyptian courts. "In Egypt, we have a mixed legal system: statute law is applied and Shari'a is applied. The Shari'a is the basis on which statute law rests."[87]

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[83] The new Constitution of the Arab Republic of Egypt was signed into law by President Mohamed Morsi in December 26, 2012 after it was approved by the Constituent Assembly and passed in a referendum. *Egypt's President Morsi Hails Constitution and Urges Dialogue* (Dec. 26, 2012) BBC NEWS, *available at* http://www.bbc.co.uk/news/world-middle-east-20846014. The new Egyptian Constitution replaced the 2011 Provisional Constitution of Egypt, adopted in 2011 following the Egyptian Revolution. Article 2 of the new Egyptian Constitution is substantively the same as Article 2 of Egypt's previous constitutions. That provision has been used as grounds to claim that laws which arguably contradict Islamic tradition are unconstitutional. An official English language version of the Constitutional Declaration 2011 is *available at* http://www.egypt.gov.eg/english/laws/constitution/default.aspx (last visited Jan. 30, 2013). An unofficial English language version of the new Egyptian Constitution is *available at* http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated (last visited Jan. 30, 2013).

[84] An unofficial English language version of the new Egyptian Constitution is *available at* http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated (last visited Jan. 30, 2013).

[85] *Id.*

[86] Baudoin Dupret, *A Return to the Shari'a? Egyptian Judges and the Reference to Islam, in* MODERNIZING ISLAM: RELIGION IN THE PUBLIC SPHERE IN THE MIDDLE EAST AND EUROPE, 72-97, 84 (Esposito, Burgat, ed., 2003).

[87] *Id.* at 80 (interview with lawyer, October 1994).

In addition to constitutional limitations, personal status laws are governed by sectarian law, or the principle of the religious personality of laws. In Egypt, as in most countries in the Middle East and North Africa, personal status laws govern family life, including but not limited to, questions of marriage, divorce, paternity, and succession.[88] Each religious community has its own laws to govern the "realm of the family" and whichever law is applicable will depend upon the confessional affiliation of the parties involved. Shari'a courts heard all cases involving personal status issues between Muslims until 1955, at which time they were abolished by law 462 promulgated by the Egyptian legislature.[89] Those cases are now adjudicated by specialized chambers of ordinary courts.[90]

Until the 19th century, Egypt was governed by Islamic law. In the late 19th and early 20th centuries, Islamic law was displaced by secular and European-based civil and criminal codes.[91] The only exception to this was family law, which preserved its Islamic origins even though it was formally codified in the Western legal fashion.[92] The transplantation of secular civil law from the West, which largely displaced the historically Islamic legal system, hinged the debate on the nature of Egypt's cultural identity on law: its creation and interpretation. "Egyptians were at once members of a religious community (*ummah*) and citizens of a secular nation-state (*watan*), albeit one in which Islam was the official religion."[93] Because personal status laws continue to be governed by religious laws, their reform has been a battlefield for conflicting interpretations of the sacred law in which each group refers to the same body of religious rules, but adopts different readings of them. The different readings of the law are presented as being the result of an internal renovation within the Shari'a by using talfiq—a legislative technique that allows courts to draw on the rules pertaining to the four Islamic schools of law—and takhayyur—another legislative technique that allows courts to choose the rules among the different solutions provided by the four Islamic schools of law—to show that each group's reforms are consistent with religious law and are supported and endorsed by eminent religious authorities.[94] Nevertheless, despite

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[88] Nathalie Bernard-Maugiron, *From Jihan to Susanne: Twenty Years of Personal Status Laws in Egypt*, *in* RECHT VAN DE ISLAM 1-19 (2002).

[89] *See Codification and Nationalization of Family and Personal Status Laws from Sharia Principles*, ISLAMOPEDIA ONLINE, *available at* http://www.islamopediaonline.org/country-profile/egypt/islam-and-legal-system/codification-and-nationalization-family-and-personal-st (last visited Jan. 30, 2013).

[90] *Id.*

[91] *See* Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth and Twentieth Century Egypt*, *in* WOMEN, ISLAM AND THE STATE 201 (Deniz Kandiyoti ed., 1991).

[92] Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate* in ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 183 (Yvonne Yazbeck Haddad ed., 2004).

[93] Margot Badran, FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT 10 (1995).

[94] *Id.* Note that this Article does not make any predictions as to how Article 4 of the new Egyptian Constitution, which requires the courts and Parliament to consult Al-Azhar Senior Scholars on all matters pertaining to Islamic law, or Article 219, which broadens the scope of what constitutes a

clashing interpretations, Egypt has made some revisions to its personal status laws and has taken a more liberal view towards restrictions to women's reproductive rights in the last thirty years.

The revision of these laws is highly politicized. Campaigns led by former Egyptian First Ladies Jihan Sadat in the 1970s and Suzanne Mubarak in the 2000s tried to mobilize reformist activists and womens' organizations. However, the Egyptian legislature, faced with staunch opposition from the conservative segments of the population and the religious establishment, virulently fought against such changes. Despite steps forward, when legal or social changes have been challenged as un-Islamic or religiously or cultural inauthentic, the restrictions on women have strengthened rather than relaxed.

B. Focus on Introduction of Laws to Legalize Abortion

Since 1998, Egyptians have been debating whether to legalize abortion in cases of rape.[95] In 2007 and 2009, MP Mohamed Khalil Quetta introduced bills in the Egyptian Parliament that would grant such rights for victims of rape.[96] MP Quetta argued that the increase in the number of women raped in Egypt necessitated "the right of raped women to [a safe, legal] abortion."[97] The law would also have included a number of other guarantees to victims of rape, including a modification the current personal status law to allow the use of DNA to prove a man's relationship to a child.

The 2009 draft law, similar in substance to the 2007 draft, was endorsed by the Islamic Research Academy, Al-Azhar and the Egyptian Initiative for Personal Rights, as well as the New Women's Foundation.[98] Those in favor of the law argued that "establishing the right of women to choose to terminate a pregnancy resulting from exposure to rape, is a humanitarian necessity, not only a juridical principle."[99] Furthermore, they insisted that the continued deprivation of these women's rights "reflects the dual failure of the state authorities, which failed first in the protection of women from the heinous crime of rape, and fail[ed] in maintaining the dignity of women and mental and physical health through giving them the right to terminate a pregnancy resulting from the crime."[100] The Islamic Research Academy approved a draft law on December 30, 2007; the Commission

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"principle of Islamic Shari'a," will impact the ability of courts to interpret personal status laws in ways which expand women's rights.

95 *See Women, Children, and Human Rights*, INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, Vol. 12, Nos. 1-2, Dec. 1998, *available at* http://www1.umn.edu/humanrts/iwraw/ww12-1-98.html.

96 *Egypt Calls for Law to Give Rape Victims Abortion Rights*, EGYPT NEWS (Nov. 11, 2009), *available at* http://news.egypt.com/en/200911118125/news/-egypt-news/egypt-calls-for-law-to-give-rape-victims-abortion-rights.html.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

on Proposals and Complaints of the People's Assembly approved it in April 2008, and then referred it to the Constitutional and Legislative Committee of the Council.[101] However, the draft law was frozen in session in 2009 by the head of the Egyptian Parliament, Ahmed Sorour.[102]

In 2010, an even broader law was introduced which would have actually legalized abortion for health and financial reasons and would also have legalized voluntary sterilization procedures; the passage of such legislation would have shifted Egyptians closer to the idea that the right to abortion should be a matter of personal choice made for reasons not dictated by the government.[103] Of course, the law would only allow abortion or sterilization of a woman where the husband and wife both agreed and where the couple had the consent of a medical committee made up of three doctors.[104] In the case of an abortion for health reasons, a report would have had to be filed stating that the woman could not go through a pregnancy due to health conditions or that she carried a disease which might result in serious harm to the fetus, including deformity.[105] In cases of poverty, the Ministry of Social Affairs would have been required to issue a report on the financial situation of the woman and her family in order to determine whether to approve the abortion or sterilization on that basis.[106]

This law was actually passed by the Health Committee at the People's Assembly, Egypt's lower house of Parliament.[107] Nevertheless, the draft law—just as the abortion proposals that came before it—was soundly rejected.[108] Religious Scholars from Al-Azhar labeled the law un-Islamic and argued that abortion and sterilization are procedures which could only be carried out in cases of emergency where the woman's life was in imminent danger. "Unless the woman's life is in real danger, abortion and sterilization should never be done and are considered against the teachings of Islam," said Dr. Souad Saleh, Professor of Islamic Jurisprudence at Al-Azhar University.[109] "This law is un-Islamic because it is considered an intervention in God's will," she told Al Arabiya.[110] Hamed Abu Taleb, Dean of the Faculty of Islamic Law at Al-Azhar University, agreed with Saleh and argued that anyone involved in this law would be considered a sinner.[111] "Abortion and sterilization of women because of poverty is definitely against

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101 *Id.*

102 *Egypt Calls for Law to Give Rape Victims Abortion Rights*, *supra* note 96.

103 Mustafa Suleiman, *Azhar Scholars Reject Egypt Abortion Draft Law*, AL ARABIYA (Mar. 22, 2010), *available at* http://www.alarabiya.net/articles/2010/03/22/103775.html.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 Suleiman, *supra* note 103.

110 *Id.*

111 *Id.*

Islam," he told Al Arabiya.[112] "Those who drafted the law as well as those who will apply it are sinners."[113]

It was also argued that the law would not just violate Islamic principles, but would also thereby violate Egypt's constitution.[114] "According to the constitution, Islamic law is the main source of legislation and since the new law violates Islamic law, it violates the constitution."[115] Sheikh Ali Abul Hassan, former head of Al-Azhar's Fatwa Committee, argued that a woman is allowed to carry out an abortion only when her life is threatened.[116] As if to demonstrate Egyptian society's liberal nature, Sheikh Hassan stated, "several religious scholars have even allowed women to postpone pregnancy if they are worried about their beauty and figure, but getting an abortion because of poverty is out of question."[117]

Like their counterparts in the United States, government or political figures in Egypt express a desire to strictly police and control women's reproductive choices based on religious teachings that promote the sanctity of life and control the role and the worth of women. In Egypt, not even a law allowing the government to determine on a case-by-case basis whether to grant the most dire requests for abortion or sterilization was stringent enough to pass muster with the controlling religious authority.

C. Focus on "Suzanne's Laws" and Current Backlash

Although draft legislation to grant greater reproductive freedoms to women in Egypt has not passed into law, it is important to note that the discussion of these sorts of freedoms has increased and that a substantial number of those in power, mostly men, are in favor of increasing these freedoms. Moreover, there have been improvements to Egypt's Personal Status Code in the last several years. As mentioned earlier, despite various attempts at legal reform, it was not until 1979 that any substantive changes to the Egyptian Personal Status Law were made. In that year, President Sadat unilaterally issued an emergency decree passing Law No. 44/1979, commonly referred to as "Jihan's Law," after the First Lady who had advocated for changes to Egyptian family law.[118] This controversial amendment introduced extensive changes to the two Egyptian Laws of Personal Status of 1920 and 1929. The reforms included the following: a woman's right to seek a divorce if her husband took an additional wife without her consent; the right to be informed if her husband divorced her; the right to retain custody of her children (boys up to the age of ten and girls up to the age of twelve); the right to receive alimony; and the

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112 *Id.*
113 *Id.*
114 *Id.*
115 Suleiman, *supra* note 103.
116 *Id.*
117 *Id.*
118 Bernard-Maugiron, *supra* note 88, at 4.

right to retain the marital home until she remarried or until the period of child custody ended.[119]

Yet, the law was subject to endless criticism both for its contents and the manner of its passage. Opponents, of which there were many, argued the changes were un-Islamic and unconstitutional. Soon after President Sadat's assassination, the law was challenged. In May 1985, the High Constitutional Court of Egypt struck down the law.[120] The High Court declared the law to be *ultra vires* to the Egyptian Constitution; the initial emergency decree issued by President Sadat had been issued in the absence of a true state of emergency and so was deemed invalid.[121]

A few months after the verdict, a Personal Status (Amendment) Law, Law No. 100/1985, was enacted to revise the 1920 and 1929 Laws on Personal Status.[122] A number of the changes made by the 1979 law were reintroduced by the new President Mubarak over the objections of leading Islamist figures. However, a few of the more "controversial" elements were conspicuously missing. For example, under the 1985 legislation, a wife no longer had an automatic right to divorce her husband if he married polygamously.[123] This was done as a concession to religious conservatives who also demanded that there be no presumption of injury and that a wife have to prove that she was harmed by her husband's polygamous union if she wished to divorce. Furthermore, the wife only had a year from the time of her husband's polygamous marriage to petition for divorce on that basis.[124] Additionally, under the new legislation, the former husband had exclusive rights over the marital home and was not required to pay rent.[125] This was a change from the previous law that granted the divorced wife custody of minor children and exclusive right to the marital home so long as she retained custody, unless the former husband provided an alternative dwelling.

A number of other revisions were made to the personal status laws affecting women in 2000 and 2005.[126] Collectively, these revisions are known as "Suzanne's Laws," owing to the efforts Suzanne Mubarak expended, as head of the National Council for Women, in helping their passage. Among the amendments was an increase in the age mothers have custody over their children from the age of nine to the age of fifteen, the creation of a right for mothers to have a say in

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[119] *Id.* at 8-9.

[120] *See id.* at 4; *see also* ISLAMIC FAMILY LAW: POSSIBILITIES OF REFORM THROUGH INTERNAL INITIATIVES, *available at* http://www.law.emory.edu/ifl/index2.html (follow "Legal" hyperlink; then follow "Egypt" hyperlink); Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate* 16 YALE J.L. & FEMINISM 145, 182 (2004).

[121] Bernard-Maugiron, *supra* note 88, at 4.

[122] *Id.*

[123] *Id.* at 7.

[124] *Id.* at 8.

[125] *Id. at* 9.

[126] *Id.* at 11; *see also* ISLAMIC FAMILY LAW, *supra* note 120.

determining guardianship, and the establishment of a khul law of divorce, which gives a woman the right to ask for a divorce if she returns the amount of money her husband paid to her.[127] In 2010, another change to Egyptian law that benefited women was the institution of a quota system whereby at least 64 of the 518 seats in parliament must go to women.[128]

After Mubarak was driven from power in February 2011, many conservative forces began rallying to demand the repeal of Suzanne's Laws, arguing that the passage of amendments to the personal status codes was un-Islamic and that they harmed both Egyptian families and Egyptian men. "[M]any men—especially members of the Egyptian Men's Revolution and similar organizations—perceive the ousting of the [secularist] Mubarak regime as a wonderful opportunity to 'regain their rights.'"[129] Because of the unpopularity of the former regime, the illegitimacy argument over the personal status laws is even more forceful.[130] Organizations such as "Coalition to Protect the Family," "Save the Family Association," and "Egyptian Men's Revolution" are attempting to abolish the khula, cancel recent amendments extending the child custody age to fifteen, revoke Egypt's signatory status to the CEDAW, and revoke the quota requirement for women in the Egyptian parliament.[131]

Restrictions on women's access to power and the limitation of their voices are already being achieved. The quota system was revoked in 2011 as the new government was elected. Female representation moved from 64 seats to 5 seats in Parliament.[132] Additionally, the government excluded women from the constitutional review committee who were appointed last year to ensure free and fair elections and create democratic safeguards.[133] The amendments it proposed, which were approved by referendum in March 2011, made no reference to gender equity.[134] When then-Prime Minister Essam Sharaf fired twenty governors, no women were named as replacements.[135]

Further regressive measures seemed unavoidable as the conservative Muslim Brotherhood and the newly formed, ultraconservative Nour Party won by a large margin in the first post-Mubarak parliamentary elections.[136] Both parties seek to

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127 Bernard-Maugiron, *supra* note 88.

128 Ines Bel Aiba & Agence France-Presse, *Women Candidates Test Egypt's New Quota System*, ABC-CBN NEWS, (Nov. 25, 2010), *available at* http://www.abs-cbnnews.com/global-filipino/world/11/25/10/women-candidates-test-egypts-new-quota-system.

129 Aliaa Dawood, *Backlash Against 'Suzanne Mubarak laws' Was Inevitable*, AL ARABIYA NEWS (Nov. 8, 2011), *available at* http://www.alarabiya.net/views/2011/11/08/176045.html.

130 *Id.*

131 *See id.*

132 Rob L. Wagner, *Arab Spring Democracy: A Win for Women?*, JERUSALEM POST (March 8, 2012), *available at* http://m.jpost.com/HomePage/FrontPage/Article.aspx?id=92260978&cat=1.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Egypt's Islamist Parties Win Elections to Parliament*, BBC NEWS (Jan. 12, 2012), *available at*

expand Islamic law. The Salafis, who dominate the Nour Party, seek to impose laws similar to those in Saudi Arabia that require women to be veiled. The success of these parties is, in part, in backlash to the secular methodology of Mubarak's government.

A new parliament is likely to be elected in April 2013. Given waning public support for the Muslim Brotherhood, it is unclear if the Islamic conservatives will be able to recreate an Islamic-led parliament once the next round of elections occurs.[137] Nevertheless, it is clear that individual rights are neither a high priority for the Islamic parties nor for what is left of the former autocratic regime.[138] The outcome of the next round of parliamentary elections is critical to Egypt's future. This is particularly true as the new parliament will be instrumental in interpreting and filling in the gaps in Egypt's new constitution. In light of the election of President Morsi, a member of the conservative Muslim Brotherhood, and the overwhelming support for that party in the previous election, it is entirely possible that the make-up of the next parliament will be primarily the same. No matter the outcome of the elections, as Nabil Abdel-Fattah, a senior researcher at the state-sponsored Al-Ahram Center for Political and Strategic Studies, said, "the conflict will be over the soul of Egypt."[139]

IV. DRAWING COMPARISONS BETWEEN THE US AND EGYPT

As is evidenced above, women's rights, particularly those related to control over their own bodies, are in the cross hairs of politicians and other powerful figures in Egypt and the United States at a time of changing political power. It is crucial to relate the virulent debate on reproductive rights, which takes place across states, across religions, and across cultures, with another debate, one revolving around identity. The constitution of a cultural identity can only come about through the construction of a cultural otherness, and when it comes to restrictions on reproductive autonomy, law and politics play a major role.[140] In the United States and Egypt, cultural otherness, whether framed in terms of something arriving

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http://www.bbc.co.uk/news/world-middle-east-16665748. The Supreme Constitutional Court of Egypt later found that the law that governed Egypt's elections was unconstitutional and the People's Assembly was dissolved. Hamza Hendawi & Sarah El Deeb, *Egypt's Parliament Dissolved by Court; Election Ruled Unconstitutional*, HUFFINGTON POST (June 14, 2012), http://www.huffingtonpost.com/2012/06/14/ egypts-parliament-dissolv_n_1596609.html. Just days after taking office, President Morsi issued a decree ordering the People's Assembly to reconvene. *Egypt: Who Holds the Power?*, BBC NEWS (Dec. 10, 2012), *available at* http://www.bbc.co.uk/news/world-middle-east-18779934.

[137] David D. Kirkpatrick, *Support for Egypt's Muslim Brotherhood Erodes in an Islamist Bastion*, N.Y. TIMES (Dec. 21, 2012), *available at* http://www.nytimes.com/2012/12/22/world/middleeast/in-islamist-bastion-support-ebbs-for-egypts-brotherhood.html.

[138] Hendawi & El Deeb, *supra* note 136 ("[T]he military-appointed government gave security forces the right to arrest civilians for a range of vague crimes such as disrupting traffic and the economy[.]").

[139] Sarah El Deeb, *Islamists Sweeping in Egypt*, USA TODAY (Dec. 5, 2011), *available at* http://www.usatoday.com/USCP/PNI/NEWS/2011-12-05-PNI1205wir-egypt-elections_ST_U.htm.

[140] *See* Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 YALE J.L. & FEMINISM 145, 146 (2004).

from the decadent West or factions within the West, is created using the legal order to influence culture and set "legitimate" norms, oftentimes to further a specific political agenda.

In Egypt, this is done by emphasizing and focusing on an authentic version of Islamic Egyptian society, which is different from Westernized, Christian, and other societies. Egyptian society has been more secularized than other nearby Middle Eastern nations, yet there can be found an undeniable longing for a more properly "authentic" Egyptian, Islamic state:

> Islamic law constitutes one of the aspects of our faith and we feel towards it a need similar to thirst for water or hunger for food. It is the backbone of the Islamic system of civilization. If the backbone of the system snaps, it is the Islamic civilization that disappears and becomes an altered reflection of the Western, Buddhist, or other civilizations.[141]

> We think that the shari'a is one of the visible signs of the expression of our independence towards the Western project . . . such is the conflict today. It lies in the fact that it is our right as a community that has a history and a heritage to be governed and educated according to our history and our heritage.[142]

In the United States, where explicit reference to religion as a guiding force in the creation and interpretation of law is usually frowned upon, this is done by reference to the concept of tradition. Whether referring to an ancient Islamic tradition, or an American version of the "good old days," tradition is constructed and then reconstructed to create an "authentic" history and point of reference—a place to get back to, a place that one can only get back to by reverting to the patriarchal order.

Egyptian feminists who advocate reform of Egyptian family law are often charged with supporting changes that are un-Islamic. Likewise, American feminists who have advocated for inclusion of contraception in universal healthcare laws have been charged as infringing on the right of religion and proponents of the right to abortion have been charged with being anti-American. Those in power or those who seek power use the promulgation or abolition of laws to prove themselves as authentic within their society. "Law thus serves to build a unity based on 'a process of division and a practice of exclusion.'"[143] Cultural essentialists, like Richard Nixon or Rick Santorum, use this process of division and exclusion to their advantage such that attachment to medieval patriarchy has come to mean attachment to the authentic Egyptian or the authentic American.

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[141] *See* Dupret, *supra* note 86 (interview with lawyer, October 1994).

[142] *Id.* at 81 (interview with lawyer and former magistrate, June 1994).

[143] *Id.* at 87.

CONCLUSION

Whether through a virginity test or a transvaginal ultrasound, the goal of patriarchal power in both the United States and Egypt is to silence women and to maintain the "authentic," traditional social order. Women's sexuality and their individualized control of their sexuality and reproduction are seen as dangerous to the maintenance of that power. Where women and men have fought for reproductive freedom, those in power or those who seek to gain power seize on the opportunity to maintain social order and control by labeling those men and women as the cultural "other" and as opponents to genuine cultural norms and ideals. This is true whether we are examining the United States in the West or Egypt in the East.

Indeed, "reproductive control is 'an integral part of modern woman's struggle to assert dignity and worth as a human being.'"[144] That struggle is one that is common to all women, across religions and cultures. The roadblocks that women face to gaining reproductive control are often the same in concept, though not in kind, no matter their geographic location. Understanding this is critical to the establishment and enforcement of laws protecting the human right to regulate reproduction in diverse societies across the globe.

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[144] MacKinnon, *supra* note 1, at 1328.