

PROTECTING THE WOMB: THE MYTH OF PRIVACY IN REPRODUCTION

Karen S. Miller-Potter, University of Kentucky

ABSTRACT

This paper examines the policing of the sexuality of juvenile females, pregnant women and abortion within a framework of the public/private dichotomy using Gerald Turkels typology of Marxian postulates. It explores five primary roles of women under the capitalist system in the United States and relates them to policies directed at women's reproductive rights based on the public/private distinction.

INTRODUCTION

The public-private dichotomy has been utilized to categorize numerous areas of social behavior, thought, and policy. It is central to the analysis and debate of various moral, political and social issues (Weintraub 1997). While many issues are deliberated based on the dichotomy and many policies rest on its foundation, a complete, distinct definition still eludes theorists. Researchers have argued that the dichotomy is "distinction without a difference" (see Klare 1982; Kennedy 1982; Freeman & Mensch 1988) and others argue that the dichotomy is necessary and cannot be abandoned (see Starr 1989; Weintraub 1997). The one issue researchers can agree on, however, is that public and private are very diverse concepts with multiple meanings and components and an ephemeral line divides the two (Weintraub 1997; Starr 1989; Turkel 1988).

According to Weintraub (1997), there are two fundamental approaches to contrasting what is public to what is private. These approaches compare "what is hidden or withdrawn versus what is open, revealed or accessible" and "what is individual, or pertains only to an individual, versus what is collective, or affects the interests of a collectivity of individuals" (Weintraub 1997: 5). These questions are the primary source of confusion over public versus private issues for women. Feminist researchers have argued that the public-private dichotomy has been equated to a public-domestic distinction (Roth 1999). Weintraub (1997) asserts that theorists have advanced three indistinct arguments regarding the public-private dichotomy as it relates to gender. The first concerns treating the domestic sphere as trivial, the second labels the dichotomy as 'deeply gendered' and assigns differing social roles based on biology resulting in the placement of women in inferior positions. Finally, feminists scholars of-

ten argue that the classification of the family and all things domestic as private institutions, shields and facilitates domination and abuse in domestic relationships (Weintraub 1997).

These arguments have been at the heart of the feminist debate over the public-private distinction for decades (Higgins 2000), if not centuries (Pateman 1983). Feminist theorists have utilized the public-private distinction to argue that it offers a dimension of personal privacy that is sheltered from state regulation. This protected zone is further described as personal autonomy in decisional privacy (Dworkin 1996) or spatial privacy, which includes the home and family (Fineman 1995). Issues of reproduction fall into the category of decisional privacy and include a three stage process. According to Ursel (1992), reproduction of human life involves procreation, socialization and daily maintenance. Viewing reproduction as a process is important because it provides an understanding of the state's interest at different points with different issues. The state's interest in potential life does not stop at birth, it continues throughout the woman's child-bearing years. The state needs reproducers of laborers and protects its interest with various laws and policies directed at women who fill this role.

Feminists have long argued that reproduction is an issue of inherent privacy that requires legal privacy, and that the state's only interest in reproduction should be to protect women's privacy (Pateman 1983). The primary problem with this argument is its underlying assumption, that reproduction is a private matter that does not involve the state. In the 1970s, feminists called for the politicization of private domestic matters, in an effort to protect women from violence and to expand reproductive privacy. The end effect of this shift was state and legal regula-

tion of domestic and reproductive matters (Boyd 1997). Due to the unequal power structure of American society, men defined, implemented and enforced those regulations. Since that time, the distinction between what is public and what is private continues to be renegotiated, and men still possess the power to define these boundaries (Landes 1998). The ephemeral line between what is public and private in reproductive issues is not a naturally occurring one, but a political one.

The line between what is public and what is private is inconsistent and intertwined (Starr 1989). It is commonly assumed that what is open, done in public, or has an impact on a greater population is a public issue. At the other end of the spectrum, it is commonly assumed that what is done where access and visibility are restricted are private matters (Starr 1989). Turkel (1988) argues that the public-private dichotomy is more often the foundation for legitimating and reinforcing patterns of power and inequality. Turkel (1988) organizes Marx's three primary approaches to the public-private dichotomy. He argues first, that the distinction offers a framework for legal discourse which "obscures the social relationships among people and their conditions of life" (Turkel 1988 805). Second, he asserts that the laws may recognize private issues, but they ignore the human activity that produces them. Third, he argues that public versus private categorizations define class and social relations as well as "terrains of conflict" (Turkel 1988 807).

Domestic issues, especially reproduction, are as a result, public issues. They are tied to the economy and serve a necessary purpose to the capitalist state. The decisions to have sexual relations, to conceive and to carry a fetus to full-term appear to be private issues, but they have a very public dimension. *Roe v. Wade* (1973) was the culmination of a series of important cases in which the Court recognized a constitutionally protected right to privacy in reproductive matters (see *Griswold v. Connecticut* 1965; *Eisenstadt v. Baird* 1972). One of the primary issues in *Roe*, however, relates to viability of the fetus and measures privacy in terms of trimesters. The Court established a woman's right to reproductive privacy, but only to a certain point. Adding this qualifier obfuscated the line between public and private and defined potential life as being in the state's realm of

interest.

The three postulates utilized by Marx in his writings as described by Turkel (1988) involve reproducing the class based structure of a capitalist society, the inherent exploitation and alienation of workers, and most importantly, structural social inequalities. These postulates have been chosen because of their relevance to the capitalist economic system and their inherent acceptance of political influence. These perspectives will serve as the foundation for exploring three reproductive policies that affect women in the United States: the policing of juvenile females' sexuality, the policing of pregnancy behaviors, and abortion. Each of these issues involve gender-based policies directed at individual choices. They all contain a private dimension, yet political processes and decision-making have propelled them into the public domain. Each of these issues defy the capitalist patriarchal model of what a woman should be and disregard the primary role of women in a capitalist state, reproducers and maintainers of laborers.

FIVE-ROLES OF WOMEN IN A CAPITALIST STATE

In order to understand the public nature of reproductive 'privacy' issues, it is necessary to explore the roles of women in a capitalist society. These roles perpetuate gender discrimination, maintain the male power structure, and facilitate gendered socialization practices. The public-private distinction of reproductive issues, facilitates the roles of women in United States society by allowing privacy to a certain degree and then writing and enforcing policy that treats it as public. From a Marxian perspective, women fill five primary roles: reproducer/maintainer, surplus labor, alienated workers, commodity, and human capital. A diagram of these roles would indicate a cyclical pattern of facilitation. While some roles directly cause another, they are all facilitated by the others. The reproductive/maintenance role directly causes and facilitates the continuation of women as a surplus labor supply. The surplus labor role leads directly to alienation, which leads directly to the commodification of women. Commodification leads directly to women as human capital which completes the circle and leads back to women as reproducers and maintainers of laborers.

In *Bradwell v. State of Illinois* (1873), Jus-

tice Miller summarized U.S. society's view of the primary role of women, that of domestic laborer, when he stated: "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." The most important role for women in the United States continues to be that of domestic laborer, or reproducers and maintainers of laborers (see Gatson 1997 for a discussion of fetal protection labor policies). Biology delegated to women the primary reproductive role, but men imposed the maintenance role (Engels 1970). As capitalism developed in the United States, a gendered division of labor simultaneously evolved. Production moved out of the home and men were designated the role of laborer. It became a woman's job to maintain the household and to assure that the man was ready and able to perform his tasks (Chafetz 1997; Sapiro 1999). The most important part of this domestic function is reproduction which assures that a supply of new labor will always exist.

An important consequence of women as domestic laborers is found in the second role of women, that of surplus labor. A surplus labor population, or a "mass of human material always ready for exploitation" is fundamental to a capitalist economy (Marx 2000a 517). In the United States, women overwhelmingly constitute the surplus labor supply, the underemployed and unemployed. Maintaining this surplus is advantageous to the capitalist state because it can be utilized as a threat to keep male wages low, and because it keeps women relatively powerless. The third role of women in a capitalist system, and caused by the surplus labor role is women as alienated workers. Women entered the workforce in the 1960s and 1970s in unprecedented numbers, and over the decades those numbers have grown. While they predominate pink-collar positions (*Statistical Abstract of the US* 2001), they are nonetheless laborers and as such, they are alienated (Marx 2000b). As wage laborers, in addition to their unpaid domestic labor, women are victims of a capitalist economic system. The more they produce, the less they can consume; the more value created through her labor, the less value she has (Marx 2000b). As Marx (2000b) describes, laborers become alienated from their craft, the act of working, their product and their fellow workers. For women however, their alien-

ation takes an additional form. Female laborers are biologically delegated the primary reproductive role and are still expected to assume the maintainer role. Her alienation, therefore, is compounded by the fact that she is an unpaid laborer in the time away from her paying job.

The fourth role delegated to women by the capitalist state which is facilitated by the alienation of women is that of commodity (Parenti 1994). The previously discussed roles of women in a capitalist society are also facilitated by the commodification of women, the presentation of women as objects to be desired, possessed, exploited and purchased. This is achieved through advertising campaigns directed at men and through societal norms (Stephen 1992; England & Gardner 1983). While the intersection of commodification and domestic laborer greatly impact the role of women as human capital. The commodification of women leads to women as property. Historically, women have been viewed and treated as human capital, the property of their fathers and then husbands (Brownmiller 1975). The patriarch had final authority on all issues involving the family and women were treated as and considered to be chattel property (Schwendinger & Schwendinger 1982). The early role of women under capitalism was that of indentured servant (Engels 1970), which was solidified through various laws. For example, women could not own property until the mid-1800s depending on the state of residence (Chused 1985). In contemporary American society, women are still viewed and treated as the property of husbands, and laws continue to solidify this notion. Husbands who rape their wives are still exempt from prosecution under a variety of circumstances in 33 states (National Clearinghouse on Marital and Date Rape 1998; Ryan 1995). Domestic violence is still viewed by many as a private matter not worthy of the level of attention given to stranger assaults (Miller 2000; Smith 1987). The idea of women as human capital or property leads back to the role of women as reproducers and maintainers of laborers. The notion of women as property is further complicated when reproductive issues enter the equation. While a woman is owned by her husband, her womb is owned by the state and that ownership takes precedence.

These roles of women enable the capital-

ist state to interfere in a woman's life and especially her reproductive freedom. It is vital to the capitalist state that women continue to reproduce future laborers. The reproductive role of women is the core reason that intimacy and pregnancy are public issues. The state's policies and initiatives relating to abortion, drug use during pregnancy, and the policing of female juveniles' sexual behavior speak to this. These policies and reactions are indicative of the view of women as a dangerous class in need of control. They are indicative of the state's vested interest in women as a tool of reproduction, as incubators for future laborers. The roles of women in a capitalist society are necessary to both the capitalist structure and to the public-private divide. Defining the roles of women assists in obscuring social relations, intensifies alienation, and maintains structural inequalities. The roles of women compounded by the public-private debate surrounding reproduction prevents women from penetrating all areas of employment, political and social endeavors. This obscures social relationships by focusing on certain political or moral issues rather than inequality and exacerbates alienation by forcing women to be both wage and domestic laborers. It camouflages both the boundary between public and private and the ways in which this public-private divide differentially affects women. The combination of these factors work to maintain structural inequalities which is vital to the capitalist system. It is necessary that the system maintain a surplus labor supply, protect private property through inheritance, assure no redistribution of wealth, and keep women as the maintainers of laborers. These things are facilitated by the public-private debate over reproduction and the roles of women in a capitalist society.

POLICING THE SEXUALITY OF JUVENILE FEMALES

The United States has a long history of suppressing and policing the sexual behavior of juvenile females. This is usually done under the guise of protecting the girl's morality and character (Shelden 2001). The state's real interest, however, is the protection of the womb and state resources. Most young mothers are viewed as a burden on the state. They are more likely than older, married women to lack health insurance and need financial assistance (Caldas 1994; Drowns & Hess

2000). It is, therefore, in the state's interest to prevent teen pregnancy. Reproductive education and access to birth control are the logical means to this end, but both are hindered by the current political climate in the United States. Instead, the state most often protects its interests through the juvenile justice system.

The first juvenile court system in the United States was established in 1899 through the Illinois Juvenile Court Act (Siegel & Senna 2000). By 1920 all but three states had developed juvenile courts. Since that time, the system has been utilized to identify and punish sexually active teen girls. An early study of this practice examined several hundred cases in the Wayward Minor Court in New York City in the late 1930s and early 1940s (Tappan 1947). Tappan (1947: 33) concluded that many of these young women were being charged with sexual activity or were brought in because they were in "danger of becoming morally depraved". He questioned the legitimacy of this practice and argued that it allowed "unlimited" judicial discretion. He contended that judges in these cases were provided the opportunity to punish these girls based on their own beliefs about appropriate behavior, not on the basis of statute (Tappan 1947).

A study comparing the practices of the Los Angeles Juvenile Court for the years 1920 and 1950 revealed similar patterns (Odem & Schlossman 1991). In 1920, 65 percent of female status offenders in this court were arrested for "immoral sexual activity." It is important to note that a large majority of these girls were not arrested for prostitution, but for having sexual relations in a monogamous relationship. Furthermore, in 1920, girls who had contracted a venereal disease were more likely to be subjected to pre- and post-hearing detention. In 1950, only the labels had changed in the Los Angeles Juvenile Court. Odem and Schlossman (1991) found that roughly 50 percent of female status offenders had been referred for "sexual misconduct," again for activity in monogamous relationships. While overall rates of venereal diseases had declined, the presence of a disease still negatively impacted the decision to incarcerate.

In the 1960s, roughly nine out of ten offenses resulting in commitment for juvenile females were related to behavior defined as or threatening to be sexual misconduct (Davis

& Stasz 1990). The rate for boys was two out of ten even though self-report surveys indicated that boys reported higher rates of sexual offenses than girls (Gold 1970). The women's movement initially had little impact on these policies as evidenced by Meda Chesney-Lind's (1973) classic study in Honolulu, Hawaii. She found that police were likely to arrest and incarcerate female juveniles for sexual activity, but ignored the same behavior among males. The Honolulu police and courts charged 74 percent of the females, but only 27 percent of the males with sexual activity or incorrigibility, and the sentences for girls averaged three times that of boys (Chesney-Lind 1973).

This double standard in juvenile referrals and detentions is still present in juvenile courts. A recent review of practices in Honolulu, Hawaii indicates that little has changed. MacDonald and Chesney-Lind (2001) reviewed all family court case records from 1980 to 1991 and concluded that girls were still more likely to receive harsh dispositions for relatively minor offenses. A review of Illinois juvenile court practices involving probation violators found similar results. Beger and Hoffman (1998) found that females receive harsher treatment within the system for less serious offenses than their male counterparts. Female juveniles are still more likely than males to be formally processed (Bishop & Frazier 1992), and incarcerated for status offenses (Rhodes & Fischer 1993). Females continue to be referred more often than males for less serious offenses and sometimes even for their own victimization (Kempf-Leonard 1998). Juvenile justice system functionalities are more likely to include physical descriptions in case files of females than males, and male decision makers are still in positions to utilize their discretion in determining proper behavior of female juveniles (Rosenbaum & Chesney-Lind 1994).

The fact that these practices exist across the country is not surprising. It is in the state's interest to control the behavior of young women. These practices have a long history and continue with little interruption for one primary reason, the ability of the capitalist state to reproduce its own hegemony. The women's movement of the 1960s and 1970s allowed women more opportunity to participate in the labor market, especially in areas previously closed to them. It did not, however, eliminate bias and discrimination. It did

not decrease the state's dependency on women to perform certain roles as previously discussed. It is vital that the capitalist state sustain women's primary role as maintainers of laborers. The policies directed at juvenile females are indicative of this interest. The state must prevent teen pregnancy to assure a future population of effective maintainers and surplus labor. This interest became abundantly clear in 1996 when officials in Gem County, Idaho arrested a 17 year old pregnant woman and charged her under a 1921 "anti-fornication" statute (American Civil Liberties Union 1996). While the statute was designed to include fornication outside marriage, Idaho officials have only charged teens. The juvenile charged in this particular instance gave birth the day following her arrest. She received a \$100 fine and three years probation. Her boyfriend was not charged.

The juvenile justice system is the formal mechanism that regulates the sexuality of juvenile females. The informal mechanisms, however, are just as important. Socialization is the

process of guiding people into socially acceptable behavior patterns through the distribution of information, approval, rewards, and punishments. (Siegel & Senna 2000 165)

It is also the process of learning gender appropriate behavior. In the United States, girls are socialized differently. Males are taught to value independence, while females are taught to equate their selfworth with their ability to sustain relationships (Siegel & Senna 2000). Boys are socialized to be more aggressive than girls, yet girls are supervised more closely (Loeber & Hay 1997). It is also more common for adults to take formal action when girls behave in an inappropriate manner while simultaneously ignoring similar behavior of boys (Siegel & Senna 2000). Adults, parents in particular, have very different expectations of their children based on gender. Society accepts this and reinforces it, often through the media. Gender based differences in socialization patterns and expectations of behavior are indicative of the ability of the capitalist state to reproduce its ideological hegemony.

One example of this phenomenon is found in movies directed at teenagers. Holly-

wood's recent focus on teen "gross-out" movies often have teen sexuality as their foundation. The characters are presented in very different ways depending on gender. For example, the movie *American Pie* is about a group of male high school seniors who vow to lose their virginity before graduation. The movie focuses on their exploits which predominately include attempts to convince female characters to have sex. While the female characters are scantily clad and sexually provocative, only two are presented throughout the movie as having embraced their sexuality. One is presented as very sexual and the other is a minor character who is never dressed provocatively or presented in a sexual situation. The other female characters must be convinced or persuaded to have sexual relations. Numerous other films exist with similar plots and story lines. All are directed and marketed at teens, and all appear to contain the same messages. They teach boys that they should want sex regardless of emotion and teach girls that they must suppress their sexuality until they are in a loving monogamous relationship, preferably marriage.

Suppressing the sexuality of juvenile females, while presenting them in a sexual manner relates to three roles of women in America: reproducers of laborers, commodities and surplus labor. Juvenile females are the future incubators of laborers and the state has a vested interest in protecting the womb. This is accomplished by arresting and incarcerating females for embracing and acting on their sexual feelings, while ignoring the same behavior in boys. The informal methods of social control are just as important in this regard, and teen females are presented with a paradox. They are taught to suppress their sexuality until love and marriage through formal and informal social control mechanisms, yet they are presented as sexual commodities. They are guided toward the patriarchal model of what a woman should be, yet they are presented in the media, especially advertisements, as sexually desirable (Shields 1997; Stephen 1992; England & Gardner 1983). The primary reason for these conflicting representations relates to the fact that sexuality, as a commodity, is more valuable if it is restricted. If all juvenile females were acting on their sexual impulses, presenting them in a sexual way would not enhance the value of the product to which they

are attached. These young women will also both become and reproduce surplus labor in adulthood. The practice of policing the sexuality of juvenile females benefits the state in two ways: it suppresses the behavior of young girls which aids the state in reproducing female roles that are necessary for the capitalist state, and they serve a profit-producing mechanism. The combination of these efforts results in maintaining the relative powerlessness of women and perpetuates the roles of women in the United States.

POLICING PREGNANCY BEHAVIORS

Pregnancy appears to be a private issue. It, however, has a very public dimension. Pregnancy is a matter of state interest and various policies have reflected this interest. In the eyes of the state, the woman is producing a future laborer and that takes precedence over her right to privacy. The state has forced women to undergo unwanted Caesarean sections (Gallagher 1984; Chrisler 2000), and blood transfusions that violated their religious views (*Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* 1964; *Jefferson v. Griffin Spalding County Hospital Authority* 1981). It has also prevented abortions and generally policed the behavior of pregnant women (Gallagher 1984; Siegel 1997; Chrisler 2000). One of the most telling examples of the state's interest in reproduction is its response to drug use during pregnancy.

In the 1980s, the media focused its attention on babies born to women who had used drugs, especially crack, during pregnancy (Gomez 1997; Roberts 1997). Images were broadcast of babies suffering from delirium tremens and in general poor health. This focus led to concern among citizens and alteration of legislation by policy makers. Pregnant women became the target of punitive drug enforcement policies as a result of misleading stories. The reports were sensationalized and often inaccurate, they were not supported by medical research, and greatly exaggerated the consequences of cocaine on the developing fetus (Lyman & Potter 1998). This barrage of media stories prompted eighteen states to amend child welfare laws to include drug use during pregnancy (Coffin 1996; Sagatun-Edwards 1998). These modifications, as well as policies implemented at the local level resulted in the prosecutions of more than 200 women in 30

states (Coffin 1996). The majority of cases involved overzealous prosecutors misusing law (Sheldon 2001). Prosecutors have charged drug using women with assault with a deadly weapon, drug trafficking (for delivery through the umbilical cord), homicide, and various forms of child abuse (Azimov 1991; Daniels 1993; Siegel 1997; Levinson 1998; Sheldon 2001). The convictions of these offenses have led to long prison sentences, probation, and loss of parental rights and custody (Siegel 1997; Sheldon 2001).

While most appellate and state supreme courts reversed these convictions and found many laws to be unconstitutional, one state supreme court did not. The South Carolina Supreme Court consistently upheld the convictions of women under a policy that allowed hospital staff to test the urine of women in labor for illicit drugs (Levinson 1998). Thirty women were arrested under this policy, but most had charges dropped upon agreeing to enter drug treatment (*Register-Guard* 2001). The policy under which these women were arrested was the result of a collaboration between the General Counsel of Medical University of South Carolina (MUSC), the Charleston County Solicitor and the Charleston Police Department. The General Counsel of MUSC contacted the County Solicitor offering hospital services to facilitate the arrest and prosecution of women who tested positive for drugs at the time of birth (Paltrow 1998). At the time the policy was implemented and arrests were made, the city of Charleston had no treatment programs available for pregnant women and no efforts were initially made to this end (Paltrow 1998; Levinson 1998). Eventually, the women affected by this policy were given the choice between immediate arrest and drug treatment. This policy was clearly designed and implemented for the purposes of prosecution and punishment, not treatment or rehabilitation. Eventually, ten women arrested under this policy filed a lawsuit against the city of Charleston (*Ferguson et al v. City of Charleston et al* 2001).

In March, 2001, their lawsuit made it to the United States Supreme Court. The Court ruled that the policy under which these women were arrested violated their Fourth Amendment protection against unreasonable search and seizure, because without a warrant or consent, the drug tests were unconstitutional searches (Lane 2001). While

South Carolina was responsible for the test case before the United States Supreme Court, it was not the only state to implement such policies. Twenty-two state appellate and supreme courts struck down or reversed various statutes and/or convictions (Center for Reproductive Law and Policy 1998). While these cases were winding their ways through the court system, women across the nation were suffering because of these policies. Women were incarcerated, lost custody of their children, and were publicly ridiculed because of mandatory drug testing policies. The South Carolina Supreme Court has not abandoned its goal of controlling women's bodies and privacy during pregnancy; in 1997 it declared a viable fetus a "child" in *Whitner v. State* (1997). Cornelia Whitner admitted that she smoked crack during her third trimester of pregnancy, and drug testing of her newborn son revealed cocaine metabolites in his system. Whitner was convicted of child abuse and sentenced to eight years in prison (Risk Management Foundation 1996).

Other states have varying degrees of fetal-child protection policies. For example, the Ohio Supreme Court allowed a newborn who tested positive for drug exposure to be declared an abused child under the state's civil child abuse law and allowed the termination of parental rights based on this 'abuse' (Dailard & Nash 2000). In New Jersey, a mother cannot be charged with child abuse, but the presence of illegal drugs in an infant's blood can be considered in the decision to terminate parental rights. Iowa, Minnesota and Virginia require health care professionals to test some or all pregnant women or newborns for prenatal drug exposure while Kentucky law requires the notification of a woman prior to drug screening. In Kentucky, however, these results may not be used for prosecutorial purposes (Dailard & Nash 2000).

These various policies have been designed and implemented to seek illegal drug-using mothers. These policies do not, however, test for alcohol or tobacco use. A plethora of evidence exists to indicate that cigarette smoking and alcohol consumption during pregnancy are very dangerous to the developing fetus (Messer, Clark & Martin 1996; Lyman & Potter 1998). Fetal Alcohol Syndrome (FAS) is a very serious condition that results from consuming alcohol during pregnancy. While research indicates that higher rates of consumption affect the possibility of

FAS, small amounts can still be dangerous to the developing fetus (Centers for Disease Control 1995; Messer et al 1996). The problems of FAS children are numerous, ranging from learning disabilities to facial abnormalities, but the media and policy makers have not provided equitable attention to this issue. Instead, the problem of FAS has led to an educational campaign, not punitive measures.

A large majority of women affected by policies directed at drug using pregnant women are poor, minority women (Roberts 1997), yet research indicates that a majority of women who use alcohol during pregnancy are white (Centers for Disease Control 1995; Mathias 1995). The policing of pregnancy behaviors is directed at low income, minority women for one primary reason, to maintain the status quo. The media campaign that spurred these policies presented drug using women as bad mothers. They were presented as prostitutes (Gomez 1997) or "promiscuous, uncaring, and self-indulgent" (Roberts 1997 156). They were the opposite of the patriarchal model of a good wife and mother, and therefore were threatening to the state. For these policies to have the desired effect, the state had to convince its citizens that these new policies were in their best interest. By focusing on a segment of the population already viewed as a dangerous class, the state assured that these policies would be embraced by a majority of citizens. In this regard, these policies contributed to the legitimization of domination and the maintenance of women as a relatively powerless class.

The state successfully argued that these policies were in the best interest of the child. In doing so, it assured its continued ability to infringe upon the privacy rights of women and to define the terms of discourse. The state has essentially argued that birth defects in these situations are the fault of the mother. It has demonized these women by presenting them as a drug users with little concern for the welfare of developing fetuses, which has redirected focus from the issues of prenatal care and poverty. Adequate prenatal care and drug treatment are rarely available to poor pregnant women and it is becoming exceptionally clear that "crack babies" is a misnomer (Siegel 1997). Crack exposed infants are actually "poverty babies;" they are often born to homeless, poor women who had little

or no prenatal care, poor nutrition, no access to drug treatment, and were often in abusive relationships (Parker 1988; Azimov 1991; Potter, Klein, Valiante, Stack, Papageorgiou, Stott, Lewis, Koren, & Zelazo 1994; Siegel 1997; Frank, Augustyn, Knight, Pell, & Zuckerman 2001; Annas 2001).

With the assistance of the media, the state set the tone for the discourse surrounding the issue of drug use during pregnancy. It successfully convinced researchers, policy makers and citizens that the problems confronting these babies were the result of cocaine consumption during pregnancy. In doing so, it effectively assured that a majority of citizens would overlook the social inequalities and injustices faced by these women. While the concern over crack babies has subsided, the policies directed at their mothers have evolved. For example, a 26 year old woman in Kentucky was recently charged with criminal abuse for allegedly illegally injecting OxyContin while pregnant (Estep 2002). In continuing these policies, the state is avoiding the issues of health and prenatal care. This serves the states interest by maintaining the status quo, reinforcing prejudice and discrimination, and categorizing people and their rights by perceived differences. The culmination of these factors aids the state in maintaining the relative powerlessness of women by maintaining a surplus labor population and focusing on the role of women as reproducers of laborers.

POLICING CHOICE: ABORTION

The third reproductive issue with both a public and private dimension is abortion. It is by far the most contentious issue and directly defies the reproductive role of women in a capitalist society. It has been debated in academic and social settings, fought in the courts, and has even led to violence. Abortion is undoubtedly an issue of great controversy. Prior to *Roe v. Wade* in 1973, approximately two-thirds of states banned abortion except to save a woman's life. These bans did not completely prevent abortion, but forced many women to seek illegal termination of their pregnancies (Cates 1982; Dellinger & Sperling 1989). Prior to *Roe v. Wade* (1973), the Court made a series of rulings that recognized a constitutionally protected right to privacy. The rulings in *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972) recognized that individuals have a right to

privacy in deciding whether or not to conceive a child. These cases involved accessibility to birth control, but the ruling in Roe used them as its foundation.

While Roe was clearly an advance for women's privacy rights, it also set limitations and restrictions on privacy. The Court quite clearly defined the state's interest in potential life by defining privacy of choice until fetal viability. Advocates of women's rights recognized this restriction, but were still generally pleased with the ruling. What has often been overlooked, however, is the reason for the state's interest in the fetus. The success of capitalism rests on its ability to expand, which is largely dependent on the presence of laborers to exploit (Marx 2000a). Effective contraceptives and abortion are widely available in the United States today. They are most available to women of means while women in the lower socioeconomic strata have far less accessibility. The issue of accessibility has been heavily impacted by the Supreme Court's ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).

In *Casey* (1992), the court reaffirmed the Roe (1973) decision but narrowed its protections. The Court allowed states to impose restrictions on access to abortion as long as they do not unduly burden women seeking abortions. The Court failed to define the issue of an undue burden, and in doing so effectively provided states a broad, underinterpreted set of guidelines to justify and permit restricting access to abortion. The ruling has not only allowed, but possibly encouraged states to produce legislation relating to waiting periods, educational counseling, and parental notification (Muraskin 2000). These 'informed consent' laws place an undue burden on certain segments of the population, primarily poor, minority women and juveniles. The notion of informed consent varies by state, but there are numerous commonalities in the statutes. The Pennsylvania law central to the *Casey* (1992) decision included a lecture regarding: the procedure, the gestational age of the fetus, medical risks, and alternatives to abortion followed by a 24 hour waiting period. The law also called for juveniles to inform parents or guardians or judicial authorities who would subsequently determine if the young woman was capable of making the decision to abort her fetus. The Pennsylvania law also required signed consent from the woman's spouse,

fortunately the Supreme Court struck down this portion of the law (Muraskin 2000).

The Kentucky law, passed in 1998, also requires parental notification and informed consent followed by a 24 hour waiting period. This unduly burdens women in rural parts of the state. Kentucky has only three abortion clinics, and all are in Lexington (Fayette county) or Louisville (Jefferson county). In 1996, these clinics performed 6,990 abortions, the other ten were at hospitals across the state (Muhs 1997). Women who reside in counties across the state accounted for 60 percent of the abortions performed. This is clearly indicative of the 'undue burden' placed on these women by a 24 hour waiting period. It is likely that many of these women traveled from rural counties in eastern Kentucky. The drive for many would have been several hours. In addition to the decision to abort a fetus, these women faced the added burden of a second trip to the clinic and were likely forced to pay for overnight lodging. Female juveniles confront the additional burden of parental consent or notification. Clearly, these laws are just as burdensome for women facing a difficult decision as they are designed to be. Essentially, by preventing abortion for poor and minority women, the state is assuring a surplus labor supply.

The Court's ruling in *Roe v. Wade* (1973) has evolved over three decades and continues to be debated and eroded. Legislatures continue to propose and pass legislation designed to make it difficult for women to seek abortion. The 2002 session of the Kentucky legislature involved at least three bills that would restrict a woman's access to abortion (Gerth 2002). One involves providing more counseling to women seeking abortion, one seeks to ban RU-486, the morning after pill, and one seeks to have a fetus declared a person. While laws continue to be written, women are still precluded from consideration. As Roslyn Muraskin (2000 375) discusses in her review of abortion law, in the cases heard by courts across the country "in no instance is reference made to women's rights." The laws are passed, they are argued in the courts, and are reviewed on the basis of a constitutional theory of the right to privacy (Muraskin 2000). This theory is highly subjective and open to interpretation. While the Supreme Court has recognized zones of individual privacy, these rights are not outlined specifically in the Constitution (Roth

1999).

As with the policing of pregnancy behaviors, the state and anti-abortion groups have set both the tone and the jargon. They have successfully made abortion about babies, not women's privacy. The state set this tone with its ruling in *Roe v. Wade* (1973) and abortion opponents have utilized it successfully. This has allowed the debate to continue. Using the idea of human life versus potential life offers policy makers a safe position. If women continue to allow men to set the agenda for this issue, *Roe v. Wade* will one day be invalidated. Medical technology is advancing to the point that fetal viability is greatly expanding. In-utero exams, diagnosis and surgeries, as well as post-natal advances are making fetuses viable at much earlier stages in the gestational process. Therefore, if fetal viability remains central to legal abortion, the issue will be devoid of privacy. Policy changes may include limited access, bans in many states except in dire circumstances, and abortion could be illegal during most of the gestational period. Essentially the United States could revert to pre-*Roe* laws and policies.

Abortion relates to the primary role of women in American society, reproducers of laborers. The state needs women to produce future laborers. The expansion of capitalism depends on the exploitation of labor. Women are the providers of these laborers. In controlling this "privacy" issue, the state facilitates the other roles of women. Men predominate power positions and as a result, men write laws. These laws are designed to maintain the relative powerlessness of women. This lack of power facilitates the maintenance of women as: a surplus labor supply, human capital, commodities and alienated workers. The fact that men are overwhelmingly in positions of political power greatly affects this issue through the laws that are written and the court rulings that declare them constitutional. The fact that a woman's right to privacy is dependent upon state permission is clearly indicative of the fact that abortion is not a private matter, but a public one. The state's jargon and its interest in potential life of future laborers has successfully diverted attention away from the real issues, including access to proper health care, prenatal care, contraception, child care, and comprehensive sexuality education. These issues are also at the heart of abortion and deserve

attention. It is, however, in the state's interest to avoid providing these services, particularly for poor and economically marginal women. Maintaining social classes is the foundation of capitalism.

CONCLUSION

The line between what is public and private is perpetually evolving and open to considerable debate. Turkel's (1988) three part typology of Marx's ideas on the distinctions between public and private issues is useful for understanding women's reproduction in the United States. The policies directed at policing and regulating female reproduction appear to involve exploitation, alienation, and inequality. According to Turkel (1988) the first Marxian postulate relates to the public-private distinction as a force that complicates social relations between people and their conditions of life. This is true of the reproductive issues examined herein. Pregnancy is presented as private to a certain point, but it then becomes a public matter. This allows interference into women's lives and acts as a dividing force among women. It enables women to overlook the oppression and disadvantages faced by other women. It allows society to demonize disadvantaged women who harm their fetuses instead of demanding better social conditions for all women.

Marx's second postulate regarding the public-private distinction relates to exploitation and alienation (Turkel 1988). While Marx had many ideas relating to alienation of workers, the one most important to this discussion is the idea that laborers become alienated from their fellow human beings (Marx 2000a). The debates over abortion, teen sexuality, and pregnancy behaviors have forced a divide between those who support reproductive privacy and those who do not. These debates, abortion in particular, have led to a stalemate. Potential lawmakers, judges, and nominees are still faced with questions relating to their positions on reproductive issues as moral issues, not issues of public health. The public-private debate has also allowed the continued exploitation of women in American society. Women who work for small businesses can still be fired for being pregnant. Economic opportunities are still closed to women because they can become pregnant. Women still earn fewer wages than men because they continue to serve as a surplus labor supply (see Nelson &

Bridges 1999 for a discussion of pay inequality).

The final postulate, according to Turkel (1988) describes the public-private dichotomy as useful for defining class relations and principles for conflict. With regard to the issues examined herein, this is abundantly true. The state has a vested interest in potential life and this interest relates to the viability of capitalism. The sexuality of teenage women is policed to protect state resources and to assure healthy future resources. It also assures that some number of women will evolve into the patriarchal model of the family, which is vital to capitalism. The policing of pregnant women's behavior is a matter of state interest because healthy laborers are necessary for the continued expansion of capitalism, and the state must divert attention from social inequalities. The abortion debate is utilized to control the behavior of women. It is vital to the state that women who do not have easy access to these procedures do not gain access. The babies born of these women are the next group of exploited laborers and are vital to the expansion of capitalism.

Abortion, policing the behaviors of pregnant women, and controlling the sexuality of juveniles are most importantly means of defining class relations. The legal institution, which is central to these policies, is an institution that is controlled by men and is utilized to control women (Lerner 1986). While the subordination of women has existed throughout history under all economic models, capitalism has perfected it. Capitalism depends heavily on the accumulation of wealth through the exploitation of labor, and gender biases facilitate this (Parenti 1994). It rewards

impulses of exploitation, accumulation, competitiveness, ruthless self-interest, ...and indifference to the sufferings of the disadvantaged. (Parenti 1994 149)

The capitalist system in the United States has utilized reproductive issues to divert attention from issues of inequality. This has enabled the state to continue to define reproduction in terms useful to its cause. The idea that a woman has a right to privacy is a fallacy. The fact that women's rights are defined by lawmakers, judges, and courts are indicative of the fact that these private issues

are actually public matters and that public-private is a false dichotomy.

REFERENCES

- American Civil Liberties Union 1996 Idaho Sex Law Sends Pregnant Teens to Court. [Http://www.aclu.org/news/w102896a.html](http://www.aclu.org/news/w102896a.html)
- Annas GJ 2001 Us: testing poor pregnant women for cocaine - physicians as police *New England J Medicine* 344 22 1729-1732.
- Azimov B 1991 Regulation of maternal behavior: an attempt to punish pregnant women who use drugs or alcohol *J Juvenile Law* 12 1-15.
- Beger RR & H Hoffman 1998 Role of gender in detention dispositioning of juvenile probation violators *J Crime Justice* 21 1 173-188.
- Bishop D & C Frazier 1992 Gender bias in juvenile justice processing: implications of the JJDP Act *J Criminal Law Criminology* 82 1162-1186.
- Boyd S 1997 *Challenging the Public-Private Divide: Feminism, Law, and Public Policy* Toronto, Ontario, Canada: U Toronto Press.
- Bradwell v. State of Illinois* 1873 83 U.S. (16 Wall.)130.
- Brownmiller S 1975 *Against Our Will: Men, Women and Rape* NY: Simon and Schuster.
- Caldas SJ 1994 Teen pregnancy: why it remains a serious social, economic, and educational problem in the US *Phi Delta Kappan* January 402-405.
- Cates W Jr 1982 Legal abortion: the public health record *Science* 215 March 1586.
- Centers for Disease Control and Prevention 1995 Update: trends in fetal alcohol syndrome—United States, 1979-1993. *Morbidity Mortality Weekly Rep* 44 13 April 262-263.
- Center for Reproductive Law and Policy 1998 Updates on court activity against pregnant women using illegal drugs by States [Http://www.crlp.org/](http://www.crlp.org/)
- Chafetz JS 1997 Feminist theory and sociology: underutilized contributions for mainstream theory *Ann Rev Sociology* 23 97-120.
- Chesney-Lind M 1973 Judicial enforcement of the female sex role: the family court and the female delinquent *Issues Criminology* 8 51-59.
- Chrisler JC 2000 Whose body is it anyway? Psychological effects of fetal-protection policies. Pp 377-380 in R Muraskin ed *It's a Crime: Women and Justice* 2nd ed. Upper Saddle River, NJ: Prentice Hall.
- Chused RH 1985 Late nineteenth century married women's property law: reception of the early married women's property acts by courts and legislatures *Amer J Legal History* 29 1 3-35.
- Coffin P 1996 *Cocaine and Pregnancy: The Truth about Crack Babies* NY: The Lindesmith Center.
- Dailard C & E Nash 2000 State responses to substance abuse among pregnant women *Guttmacher Rep Public Policy* 3 6 December.

- Daniels CR 1993 *At Women's Expense: State Power and the Politics of Fetal Rights* Cambridge: Harvard U Press.
- Davis NJ & C Stasz 1990 *Social Control of Deviance: a Critical Perspective* NY: McGraw-Hill.
- Dellinger W & GB Sperling 1989 Abortion and the Supreme Court: the retreat from Roe v. Wade *U Pennsylvania Law Rev* 83 November 117.
- Drowns RW & KM Hess 2000 *Juvenile Justice* 3rd ed Belmont, CA: Wadsworth/Thomson Learning.
- Dworkin R 1996 *Freedom's Law: the Moral Reading of the American Constitution* Cambridge, MA: Harvard U Press.
- Eisenstadt v. Baird* 1972 405 U.S. 438.
- Engels F 1970 The origin of the family, private property, and the state. Pp. 191-334 in K Marx & F Engels eds *Selected Works* Moscow: Progress Publishers.
- England P & T Gardner 1983 Sex differentiation in magazine advertisements: a content analysis using log-linear modeling *Current Issues Research Advertising* 6 1 253-268.
- Estep B 2002 Wayne grand jury indicts woman who injected oxycontin during pregnancy *Herald-leader* Friday, Feb 22 1.
- Ferguson et al. v. City of Charleston et al.* 2001 186 F.3d 469.
- Fineman MA 1995 *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* NY: Routledge.
- Frank DA, M Augustyn, WG Knight, T Pell, & B Zuckerman 2001 Growth, development, and behavior in early childhood following prenatal cocaine exposure: a systematic review *J Amer Medical Assoc* March 28 285 1613-1625.
- Freeman A & B Mensch 1988 The public-private distinction in American law and life *Tikkun* 3 March-April 24-30.
- Gallagher J 1984 The fetus and the law: whose life is it anyway? *Ms* 13 Sep 62-66, 134-135.
- Gatson SN 1997 Labor policy and the social meaning of parenthood *Law Social Inquiry* 22 2 277-310 Spring.
- Gerth J 2002 Abortion foes rally, support bills legislation tackles counseling rule, dispensing of pills *The Courier-journal* Thurs, January 31.
- Gold M 1970 *Delinquent Behavior in an American City* Belmont, CA: Brook.
- Gomez L 1997 *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* Philadelphia: Temple U Press.
- Griswold v. Connecticut* 1965 381 U.S. 479.
- Higgins TE 2000 Reviving the public-private distinction in feminist theorizing *Chicago-Kent Law Rev* 74 847-867.
- Jefferson V. Griffin Spalding Country Hospital Authority* 1981 274 Se 2d. 457. Pp. 456-466 in S Rodgers 1986 Foetal rights and maternal rights: is there a conflict? *Canadian J Women Law* 1
- Kempf-Leonard K 1998 Equity and juveniles: what is justice? *Corrections Management Qtrly* 2 1 25-34.
- Kennedy D 1982 The stages of the decline of the public-private distinction 130 *U Pennsylvania Law Rev* 1349.
- Klare KE 1982 The public-private distinction in labor law. 130 *U Pennsylvania Law Rev* 130 1358-1422.
- Landes JB 1998 *Feminism: The Public and Private* NY: Oxford U Press.
- Lane C 2001 Forced drug tests for pregnant women struck down *The Washington Post* March 21.
- Lerner G 1986 *The Creation of Patriarchy* NY: Oxford U Press.
- Levinson A 1998 Crack mom doing time as her children grow *Standard-Times* April 26.
- Loeber R & D Hay 1997 Key issues in the development of aggression and violence from childhood to early adulthood *Ann Rev Psychology* 48 371-410.
- Lyman MD & GW Potter 1998 *Drugs in Society: Causes, Concepts and Controls* 3rd Ed Cincinnati, OH: Anderson.
- Marx K 2000a Capital. Pp. 452-546 in D McLellan ed *Karl Marx: Selected Writings* 2nd ed NY: Oxford.
- Marx K 2000b Economic and philosophical manuscripts. Pp. 83-121 in D McLellan ed *Karl Marx: Selected Writings* 2nd ed NY: Oxford.
- Macdonald JM & M Chesney-Lind 2001 Gender bias and juvenile justice revisited: a multiyear analysis *Crime Delinquency* 47 2 173-195.
- Mathias R 1995 NIDA survey provides first national data on drug use during pregnancy *J Women Drug Abuse* 10 1 Jan/Feb.
- Messer K, KA Clark, & SL Martin 1996 Characteristics associated with pregnant women's utilization of substance abuse treatment services *Amer J Drug Alcohol Abuse* 22 3 403-420.
- Miller S 2000 Arrest policies for domestic violence and their implications for battered women. Pp 287-310 in R Muraskin ed *It's a Crime: Women and Justice* 2nd ed Upper Saddle River, NJ: Prentice Hall.
- Muhs A 1997 Abortion in Kentucky: a look at the numbers sheds light on debate *Herald-leader* October 26 A1.
- Muraskin R 2000 Abortion: is it a right to privacy or compulsory childbearing? Pp 396-376 in R Muraskin ed *It's a Crime: Women and Justice* 2nd ed Upper Saddle River, NJ: Prentice Hall.
- National Clearinghouse on Marital and Date Rape 1998 *1998 State Law Chart* Berkeley, CA: Author Publishing.
- Nelson R & W Bridges 1999 *Legalizing Gender Inequality* NY: Cambridge U Press.
- Odem M & S Schlossman 1991 Guardians of virtue: the juvenile court and female delinquency in early 20th-century Los Angeles *Crime Delinquency* 37 186- 203.

- Paltrow L 1998 Punishing women for their behavior during pregnancy: an approach that undermines the health of women and children. In CL Wetherington & AB Roman eds *Drug Addiction Research and the Health of Women* National Institute on Drug Abuse.
- Parenti M 1994 *Land of Idols: Political Mythology in America* NY: St. Martin's Press.
- Parker S 1988 Double jeopardy: the impact of poverty on early child development *Pediatric Clinics of North America* 35 1227-1240.
- Pateman C 1983 Feminist critiques of the public-private dichotomy. Pp 281-303 in SI Benn & GF Gaus eds *Public and Private in Social Life* NY: St. Martin's Press.
- Planned Parenthood of Southeastern Pennsylvania v. Casey* 1992 505 U.S.
- Potter S, J Klein, G Valiante, D Stack, A Papageorgiou, W Stott, D Lewis, G Koren, & PR Zelazo 1994 Maternal cocaine use without evidence of fetal exposure *J Pediatrics* 125 652-654.
- Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* 1964 42 N.J. 421, 201 A.2d 537, 377 U.S. 985.
- Register Guard* 2001 Justices rule against secret tests for drugs. March 22.
- Rhodes J & K Fischer 1993 Spanning the gender gap: gender differences in delinquency among inner city adolescents *Adolescence* 28 880-889.
- Risk Management Foundation 1996 Legal report: reporting in vitro child abuse. Harvard Medical Institutions. <http://www.rmhf.harvard.edu/publications/resource/legal-reports/>
- Roe v. Wade* 1973 410 U.S. 113.
- Rosenbaum JL & M Chesney-Lind 1994 Appearance and delinquency: a research note *Crime Delinquency* 40 250-261.
- Roberts D 1997 *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* NY: Pantheon Books.
- Roth LM 1999 The right to privacy is political: power, the boundary between public and private, and sexual harassment *Law & Social Inquiry* 24 1 45- 72 Winter.
- Ryan RM 1995 The sex right: a legal history of the marital rape exemption *Law & Social Inquiry* 20 4 Fall.
- Sagatun-Edwards IJ 1998 Crack babies, moral panic, and the criminalization of behavior during pregnancy. Pp 107-121 in EL Jensen & J Gerber eds *New War on Drugs: Symbolic Politics and Criminal Justice Policy*
- Sapiro V 1999 *Women in American Society* 4th ed Mountain View, CA: Mayfield.
- Schwendinger J & H Schwendinger 1982 Rape, the law, and private property *Crime Delinquency* April 271-291.
- Shelden RG 2001 *Controlling the Dangerous Classes: a Critical Introduction to the History of Criminal Justice* Boston: Allyn and Bacon.
- Shields VR 1997 Selling the sex that sells: mapping the evolution of gender advertising research across three decades *Communication Yearbook* 20 71-109.
- Siegel L 1997 Pregnancy police fight the war on drugs. Pp 249-259 in C Reinman & HG Levine eds *Crack in America: Demon Drugs and Social Justice*.
- Siegel L & J Senna 2000 *Juvenile Delinquency: Theory, Practice, and Law* 7th Ed Belmont, CA: Wadsworth/Thomson Learning.
- Smith DA 1987 Police responses to interpersonal violence: defining the parameters of legal control *Social Forces* 65 3 767-782.
- Starr P 1989 The meaning of privatization. Pp 14-48 in A Kahn & S Kamerman eds *Privatization and the Welfare State* Princeton, NJ: Princeton U Press.
- Statistical Abstract of the United States* 2001 Washington, DC: USGPO.
- Stephen CR 1992 The effect of television day part on gender portrayals in television commercials: a content analysis *Sex Roles* 26 5/6 197-211.
- Tappan P 1947 *Delinquent Girls in Court* NY: Columbia U Press.
- Turkel G 1988 The public-private distinction: approaches to the critique of legal ideology *Law & Society Rev* 22 4 801-823.
- Ursel J 1992 *Private Lives, Public Policy: 100 Years of State Intervention in the Family* Toronto, Ontario, Canada: Women's Press.
- Weintraub J 1997 The theory and politics of the public-private distinction. Pp 1-42 in J Weintraub & K Kumar eds *Public and Private in Thought and Practice* Chicago, IL: U Chicago Press.
- Whitner v. South Carolina* 1997 492 Se.2d 777.

Author Note

The author would like to thank Dr. Brian K. Gran for introducing to her the public/private debate and for his valuable feedback, direction and guidance.