IDENTIFYING THE LINGUISTIC BOUNDARIES OF SEX: COURT LANGUAGE CHOICE IN DECISIONS REGARDING THE AVAILABILITY OF SEX AND PROCREATION

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INTRODUCTION

Could *how* we say something mean as much or more as what we actually say? This Note will explore several court decisions regarding sex and procreation, and delve beyond the holdings themselves to examine the choice of language of the decisions. This critique will unearth social and cultural narratives imbedded in legal conceptions of sex. Court decision language explains who possesses greater access to sex, and in what forms, and sheds light on resistant forms of sexual discrimination and stereotypes imbedded in court decisions, and by extension, society as a whole. This offers insight into how these strangleholds can be identified and discarded.

The cases examined deal with medical procedures or prescription drugs associated with sexual activity and/or identity. Often leaning on the term "medically necessary,"[1] the courts in these decisions make the choice whether a claimant is entitled to the procedure or prescription requested. Analysis of these cases will uncover the different ways courts come to terms with a crucial decision: whether certain sexual rights are medically necessary and should be granted to the claimant. By examining both the bare legal decisions and the language used to explain those decisions, a richer subtext of understanding emerges. Looking beyond the decisions themselves presents an analysis of how a judge can limit both the claimant's and society's access to that desired sexual activity.

Part I introduces language as a means of exploring the influence behind the decision in a court opinion. Part II begins the analysis of court decisions, with contraception being the first area of exploration. Part III examines subtext in decisions regarding access to infertility treatment, and Part IV explores court

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[1] *See, e.g.*, Mario v. P & C Food Markets, Inc., 313 F.3d 758, 765 (2d Cir. 2002). "Medically necessary" is a phrase a court can draw upon to try and make a division, however arbitrary, between what is considered required, and what is superfluous.

language in decisions for access to sexual-reassignment surgery. In the Conclusion, the results evidenced by analysis of the decisions in these various areas are synthesized to construct patterns of how language is used as a tool to unearth the reasons behind limiting access to sex.

I. IMPORTANCE OF LANGUAGE IN COURT DECISIONS

A. *How Language Speaks Beyond What the Court Says*

Often in law, the emphasis when reading an opinion is to ascertain the holding, or the court's final rule of law which may be precedential over other similar fact patterns.[2] "[T]he holding is the basis for the decision, the thing(s) on which the result turned."[3] The holding ends up in law students' briefs, lawyers' memoranda, and future opinions. Before the deciding judge came to that all-important holding, he or she needed to base it on reasoning, the support for the final holding.[4] This can be supported by referring to a variety of sources, including other judicial opinions, which are part of the body of law from which a new opinion must draw.[5] Dicta, the opinion's "passing observations,"[6] are not "necessary to the resolution of the case"[7] but can say much about "the mood, the tone, [and] the intellectual foundation"[8] of the case.

Yet the words on the page evidence more than the holding, reasoning, or facts: "[T]he medium of linguistic expression *is* the meaning."[9] Through language, judges intellectually develop and present their ideas;[10] language is their tool.[11] Judges must "merge . . . style and substance"[12] for legal rules cannot exist without accompanying rhetoric.[13] Judges leave their lasting impression in words,[14] and inherent to any writing is some kind of "creative narration."[15] Since a judge will present "the facts and legal arguments in the manner most supportive of the court's

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2 "The holding, the ratio decidendi, of a . . . case is its central feature from the point of view of those who come later and are trying to determine 'the law'; it is what descends from one case to the next." EVA HANKS ET AL., ELEMENTS OF LAW 89 (1994).

3 *Id.* at 90.

4 *See id.* at 91.

5 *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 2 (1993).

6 HANKS ET AL., *supra* note 2, at 90.

7 *Id.*

8 *Id.*

9 *Id.* at 65.

10 *See* WAYNE V. MCINTOSH ET AL., JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 9 (Greenwood Press 1997).

11 *Id.* at 116.

12 HANKS ET AL., *supra* note 2, at 65.

13 *See id.* at 70.

14 "[J]udicial power in the long run is linguistically grounded." *Id.* at 65.

15 *Id.* at 69. "In all narrative pursuits, the effective use of style achieves more than mere adornment. As the only way in which the author's message can be conveyed, style determines the stature of the utterance." *Id.* at 70.

view,"[16] these words can show how the judge was thinking about the case. As a judge knows that the opinion speaks to the world, "form and language will assist the correct result not only to emerge, but to gain authority."[17] Therefore, no judge is above using linguistic technique to ensure that his or her ruling is properly received; in order to obtain "persuasive force, [an opinion needs] . . . alliteration and antithesis, or the terseness and tang of the proverb, and the maxim . . . [to] win its way."[18] Interest in and support for an opinion will translate into authority.[19]

A judge is especially challenged to present his or her holding authoritatively in a difficult case, one with a close decision.[20] When the law is unsettled judges must use their power carefully, and speak decisively.[21] By focusing on the reasoning of his or her decision, a judge can craft a forceful, seemingly obvious conclusion for the case.[22] Reasoning is the support for an opinion's conclusion, and serves to protect the judge's conclusion from attack while at the same time "constrain[s] the judiciary's exercise of power."[23]

Carefully chosen words can be evocative, creating "a unified stream of imagery"[24] and an opinion with lasting impact. But carefully chosen words can also try and mask the judge's true feelings, in an attempt to make a controversial opinion more definitive and neutral.[25] A judge must strike a careful balance. By putting too much overt feeling into an opinion, the judge risks losing legitimacy, but an opinion devoid of explanation will be equally ineffective.[26] The word chosen may be the best, but it also carries its own residual connotation, and as impartial as a judge may try to be, the word carries its own baggage, and that baggage cannot be discarded. Judicial opinions do more than just report the holding, and therefore a judge's choice of language and discussion can be examined to determine not just what the judge said, but what he or she actually meant.[27]

No matter how carefully a judge may construct his or her opinion, inevitably some words appear without significant conscious thought.[28] Simply by being human, a judge,[29] like any of us, uses basic knowledge of language as a necessary,

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16 *Id.*

17 HANKS ET AL., *supra* note 2, at 70.

18 *Id.*

19 *See id.*

20 *See* SOLAN, *supra* note 5, at 2.

21 *See id.*

22 *See id.*

23 David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

24 HANKS ET AL., *supra* note 2, at 71.

25 *See* SOLAN, *supra* note 5, at 4.

26 *See id.* at 7.

27 MCINTOSH ET AL., *supra* note 10, at 4.

28 *See* SOLAN, *supra* note 5, at 10.

29 All judges "are subject to human limitations." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 143 (1921). Therefore, no matter how well-reasoned and carefully constructed an opinion may be, its source must never be forgotten. *See* SOLAN, *supra* note 5, at 14-15.

often subconscious tool in any writing.[30] In deciding a case, a judge uses his or her innate knowledge of language to interpret the disputed writing, perhaps a statute or contract, and then in turn uses that knowledge of language to express his or her opinion in writing.[31] A judge's knowledge of language is based on the same as that of any other person, yet the implications of a judge's use and understanding of language carries far greater weight than other people's.[32] Although a judge should base his or her opinion on related authority and "independent neutral principles,"[33] it would be impossible to ever completely separate the personal from the professional; a judge chooses which of several possible appropriate authorities to rely on.[34] A judge is simply not a computer.

No matter how carefully a judge crafts an opinion, the fact remains that the opinion must be made up of words, and every word carries its own connotation.[35] Depending on the result the judge wishes to convey, either consciously or subconsciously, certain words may belie a deeper meaning.[36] Judges decide cases and must explain themselves in the opinion.[37] However, the reasons a judge gives may not be precisely reflective of the actual thought process which brought the judge to his or her conclusion.[38] A judge may need to retrace his or her steps to find a respectable, authoritative path from the problem to the solution first instinct already provided.[39] In the same vein, words can provide a judge means to express deeper, internalized ideas, perhaps an "unattractive truth."[40]

Judges occupy a unique position in American society; although they exercise a great deal of freedom in how they create their opinions, they are still limited by precedent and the need to maintain credibility.[41] In creating his or her opinion, a judge will never be immune to the "political and other realities" surrounding a case.[42] As a constantly changing process, law is "profoundly affected by questions of morality."[43] The topic of sex can certainly be classified as such a subject. Therefore, in writing about such a subject, the judge's true intent may not be clear from the facial opinion, but "must be inferred from the statements made."[44] Ideally

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30 *See* SOLAN, *supra* note 5, at 10.

31 *See id.* at 10-11.

32 *See id.* at 185.

33 *Id.* at 15.

34 *See id.*

35 *See id.* at 23.

36 *See* SOLAN, *supra* note 5, at 23.

37 *See id.* at 173.

38 *See id.* at 175.

39 *See id.*

40 *See id.* at 176. "[J]udges . . . want to convince the parties to the case being decided and the public as well that the theory is the actual reason for the decision. And they do this to keep up the impression that each decision is made on the basis of a discoverable rule of law that governs the situation." *Id.*

41 *See* MCINTOSH, *supra* note 10, at 8.

42 *See* Shapiro, *supra* note 23, at 731.

43 *Id.* at 749.

44 *Id.* at 733.

a judge's true intent will match the conclusion of his or her judicial opinion,[45] but in difficult cases, such as those involving sensitive topics such as sex, a judge may employ subtler means of expressing an idea.

B. *Availability of Sex as It Speaks to American Culture*

Law and society cannot exist independently of each other, and social reality has increasingly taken a role in judicial opinions.[46] "The legal system is largely viewed as the most potent tool in realizing and protecting American equality."[47] Decisions regarding serious social conflicts can influence American society as much as any other factor.[48] Judges are at the forefront of the system, and strain to maintain an appearance of neutrality.[49] Ingrained preconceived notions, however, may sway a judge's opinion negatively,[50] and by extension, sway American opinion. Therefore, the law may mold and change behavior and ideas, including ideas about sex,[51] a moral and political stumbling block.[52]

In the 1960s, ideas about sex dramatically changed.[53] Sexual inhibition eased, which translated into a greater sexual freedom for both men and women.[54] Despite these changes, however, sex continues to be a touchy area, surrounded by moral issues which stem from long-held cultural beliefs, archaic medical advice, and religious tenets.[55] The United States still clings to preaching abstinence as the best way to prevent pregnancy and sexually transmitted disease.[56] Sex is obviously a common part of adult life, but such gatekeepers as health insurance companies resist admitting to that reality.[57] The stigma and disapproval associated with sexual

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[45] *See id.* at 750.

[46] Lauren Walker, Foreword, LANGUAGE IN THE JUDICIAL PROCESS viii (Judith N. Levi & Anne Graffram Walker, eds., 1990).

[47] Janine M. DeManda, Comment, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 510 (2002).

[48] *See* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513 (2003).

[49] *See id.* at 510.

[50] *See id.* at 511. A judge waging an internal battle with his or her own conscience may come out on either of two sides of the debate. A seemingly heartless result may reflect a judge's socialized negative attitude towards a certain sexual practice, but an overcompensating, sympathetic opinion may stem from the same prejudices. *See id.*

[51] *See id.* at 529.

[52] *See* Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You To Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 121 (1998).

[53] *See* Karst, *supra* note 48, at 530.

[54] *See id.*

[55] *See* Beh, *supra* note 52, at 123.

[56] *See* ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 290 (2001). Abstinence has long failed as a comprehensive means to prevent sexually transmitted diseases for wartime soldiers; the need for sex cannot be overcome. *See* Beh, *supra* note 52, at 124.

[57] *See* Beh, *supra* note 52, at 125. Health insurance companies often classify sexual activity as "voluntary, negative, and controllable conduct" and therefore outside of the range of medical needs requiring coverage. *See id.* at 126. Yet, such companies routinely cover other areas of medical needs due to voluntary human behavior; sexual behavior, long seen as immoral, seems to be in a class by itself. *See id.* at 176.

activity for the American public provide the health insurance companies with the basis to exclude benefits relating to sexual health.[58]

It hardly needs mentioning that interest in sex is high in America, as evidenced by everything from high demand for sexual and reproductive health care,[59] to gossip about Britney Spears. But as much as the Declaration of Independence tells us the pursuit of happiness is an inalienable right,[60] Americans cannot always get what they want. Different people (including different judges) will disagree on whether access to sexual activity is necessary.[61] While the Supreme Court has declared that reproduction can be considered a "major life activity,"[62] on the whole the Supreme Court has not been quick to allocate government resources to the promotion of sexuality.[63] Judges, arguably like most Americans, may have no trouble finding loopholes to exclude women from the same sexual rights as men,[64] thereby upholding ingrained notions of sexual propriety.

American culture presents an anomaly of sexuality: while Americans pride themselves on a society of freedom of thought and speech[65] and support such measures as contraceptive coverage for prescription drug plans,[66] Americans also cling valiantly to certain unshakable notions of Puritanism.[67] Double standards for men and women also reveal problems in how Americans think about sex.[68] Mixed in with these polar ideas is Americans' tendency to differentiate between themselves and others.[69] Americans use sex as a means of labeling and separating people; transsexual people suffer from American's prejudice and stereotyping of such individuals because their sexual identity does not fit in the mainstream.[70] Transsexual people do not fit in the parameters Americans are accustomed to, and lack of understanding leads to distaste of such a lifestyle and distrust of the

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58 *See id.* at 127.

59 *See id.* at 130.

60 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

61 *See* Kathryn Kindell, Comment, *Prescription for Fairness: Health Insurance Reimbursement for Viagra and Contraceptives*, 35 TULSA L.J. 399, 413 (2000).

62 Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

63 *See* Kim H. Finley, Comment, *Life, Liberty, and the Pursuit of Viagra? Demand for "Lifestyle" Drugs Raises Legal and Public Policy Issues*, 28 CAP. U. L. REV. 837, 862 (2000).

64 *See id.* at 866.

65 U.S. CONST. amend. I.

66 *See* Jennifer N. White, Note, *The Contraceptive Misconception: Why Prescription Contraceptives Should Be Covered by Employer Insurance Plans*, 31 HOFSTRA L. REV. 271, 296 (2002).

67 *See* DeManda, *supra* note 47, at 511. Even just the word "sex" makes Americans embarrassed, as does the idea of discussing genitalia. This bashfulness can be explained by residual Puritanical notions in American culture. *See id.*

68 *See* Finley, *supra* note 63, at 839. *See* Section II.B, *infra*, for further discussion of unequal coverage for drugs related to sex for men and women as one example of how women are held to a double standard.

69 *See* Karst, *supra* note 48, at 542.

70 *See* Anita C. Barnes, Note, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 625 (1998).

transsexual person.[71] Mainstream ideas of what gender and sex (and sexual activity) should be affects many notions about social relations, and these ideas typically lurk below the conscious level.[72]

Judges who want to try and share ideas with the American public can do so with a written opinion, and such judicial activity can be a driving force behind movement and change.[73] An opinion may be a judge's balance between his or her own preferences and the compromise the situation requires.[74] Although a judicial opinion may not directly affect the American public, the judgment will trickle down and affect the common person's perception of the subject.[75]

II. CONTRACEPTIVE DRUGS: CONTROLLING THE AVAILABILITY OF SEX TO WOMEN

A. *General Background of Oral Contraception*

The high demand for contraception demonstrates that despite religious or societal concerns, preventing pregnancy is important to many people.[76] Arguably one of the greatest inventions of the twentieth century, oral contraception has sparked controversy and won accolades since its Food and Drug Administration approval in 1960.[77] By the mid-1960s, oral contraception needed no other introduction than simply "the Pill."[78] Today, the Pill continues to be widely used.[79] The Pill gave women control over their bodies and their sexual lives.[80] The ability to have sex without fear of unwanted pregnancy let women decide when and if to get pregnant, and this empowered women's sense of self: Sex for women was no longer just about getting pregnant.[81] Taking the Pill meant being an active

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71 *See* Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 20 (2003). As much as Americans may be confused over what they consider deviant gender identities, the heart of the "ick" factor surrounding transsexuals may be the "widespread and visceral disgust most people experience when they contemplate a man who cuts his penis off to try to become a woman." *Id.* at 30.

72 *See* Karst, *supra* note 48, at 520.

73 MCINTOSH ET AL., *supra* note 10, at 5.

74 *See id.* at 114-5.

75 *See id.* at 10 (paraphrasing Cardozo: "[o]nly the experts perhaps may be able to gauge the quality of his [a judge's] work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith."). The idea of law as an "omnipresent teacher" suggests that society may absorb the lessons from a judicial opinion without consciously realizing it. *See* Karst, *supra* note 48, at 525.

76 *See* Beh, *supra* note 52, at 163. Sixty percent of women of childbearing age (fifteen to forty-four) either rely on a reversible form of contraception (such as the Pill), have been sterilized, or have a sexual partner who has been sterilized. *See also* White, *supra* note 66, at 275. Seventy percent of American women in that same age group are sexually active, but do not currently wish to become pregnant.

77 *See* TONE, *supra* note 56, at 203.

78 *See id.*

79 *See* Beh, *supra* note 52, at 163 (indicating that 29% of women use oral contraceptives). This makes oral contraceptives the most common form or birth control used in the United States. *See* White, *supra* note 66, at 276.

80 *See* Karst, *supra* note 48, at 534.

81 *See id.* at 529, 534.

participant in one's own sexual life, rather than a passive receptor of male will.[82] Having a child can change a woman's entire life, therefore access to the Pill also allowed women to exert more control over their career because women could choose when and if to have a child.[83] As an additional benefit, use of the Pill prevents a wide range of serious health problems for women, including ovarian cancer and pelvic inflammatory disease.[84]

The Pill met with opposition from conservatives,[85] stemming from unfounded fears of increased female promiscuity and unswerving Catholic opposition to any mode of birth control.[86] Yet American women overwhelmingly took matters into their own hands, and decided to choose what was right for them.[87] Two landmark Supreme Court cases, *Griswold v. Connecticut*[88] and *Eisenstadt v. Baird,*[89] held that contraceptives could no longer be illegal. As a further source of support, the Pill may also be a possible rallying point for both pro-life and pro-choice advocates.[90]

Oral contraception entered the American consciousness at an opportune time: In the 1960s, the Women's Movement was hitting its modern stride.[91] The day-to-day changes in consciousness brought on by developments in women's rights were bound to show up in judicial opinions, which are, after all, written by people, both men and women, who lived through these social changes.[92] Judges experience and internalize profound changes in social awareness (such as those produced by the Women's Movement) like everyone else.[93]

Despite the Pill's advantages, it is an imperfect solution since women are primarily responsible for purchasing it.[94] Available only by prescription, the Pill requires a trip to a doctor and a pharmacy and enough money to pay for both.[95]

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[82] *See id.* at 529-30.

[83] *See* Julia Bruzina, Note, *Erickson v. Bartell: The "Common Sense" Approach to Employer-Based Insurance for Women*, 47 ST. LOUIS U. L.J. 463, 506 (2003).

[84] JAMES OWEN DRIFE, THE BENEFITS AND RISKS OF ORAL CONTRACEPTIVES TODAY 23 (2d ed. 1996).

[85] *See* TONE, *supra* note 56, at 236.

[86] *See id.* at 236-37.

[87] *See id.* at 237.

[88] 381 U.S. 479 (1965) (holding that privacy rights of married couples allow them to use contraceptives).

[89] 405 U.S. 438 (1972) (extending *Griswold* rights to unmarried couples). *See* TONE, *supra* note 56, at 238.

[90] Since oral contraception prevents unwanted pregnancy, it can drive down the number of abortions. *See* Megan Colleen Roth, *Rocking the Cradle With* Erickson v. Bartell Drug Co.: *Contraceptive Insurance Takes a Step Forward*, 70 UMKC L. REV. 781, 782 (2002); *see also* Beh, *supra* note 52, at 165 (moral concerns over abortion should encourage coverage of alternative means of contraception).

[91] *See* Karst, *supra* note 48, at 519.

[92] *See id.* at 518-19.

[93] *See id.* at 523.

[94] *See* White, *supra* note 66, at 271-72 (unequal coverage for women's health coverage is a long-suffered problem, rooted in a multitude of inequalities borne by women).

[95] *See You and the Pill*, PLANNED PARENTHOOD FEDERATION OF AMERICA, *at*

Although relatively nominal in time and money spent, gaining access to the Pill can still be difficult. While certain organizations provide such services free of charge, most women rely on their own doctor and pharmacy, and by extension, their own health insurance coverage, to assist them in covering these costs.[96] Without such coverage, women are unjustly denied true equality in the workplace, for they are denied access to a tool which can help place them on equal footing with men.[97] Unequal access that different women have to the Pill reflects a wider inequality between the sexual rights of men and women.[98] The Pill benefits both men and women, and it is unfair that women shoulder the burden of payment.[99] Reproductive control allows women to "participate equally in the economic and social life of the Nation."[100] By continuing to place the onus of preventing pregnancy on women, while supporting Viagra (and other brands of erectile dysfunction treatment) for men, American culture fosters the negative message that "boys will be boys and girls will be responsible."[101]

B. *Fueled Interest in Gaining Contraceptive Benefits with Rise of Viagra*

When Viagra, the anti-impotence drug, came onto the market in 1998, it was an instant success.[102] Some health insurance companies were initially caught in the act of covering Viagra while still denying women coverage for the Pill.[103] Women were shocked when prescription drug plans readily covered Viagra, while routinely excepting the Pill from coverage for nearly forty years since it was approved.[104] It was inequitable that health insurance plans would help men have sex, but not provide women with the same opportunity.[105] The parallels between Viagra and the Pill are apparent: both facilitate the user access to sex,[106] and participation in sex at will.[107]

About half of all health insurance companies choose to cover Viagra.[108] Some of the companies that choose to deny coverage for it rationalize that allowing

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http://www.plannedparenthood.org/pp2/portal/medicalinfo/birthcontrol/pub-contraception-pill.xml (last visited Jan. 19, 2005).

96 *See id.*

97 Pregnancy is more than just a health concern, for its consequences will affect a mother's life from that moment on. Without the ability to control their own ability to work, women will remain disadvantaged. *See* Bruzina, *supra* note 83, at 506.

98 *See* Finley, *supra* note 63, at 867.

99 *See id.*

100 Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992). Since women bear the brunt of the childrearing responsibilities, unintended pregnancy can be a severe detriment to the career of a professional woman. *See* Kindell, *supra* note 61, at 415.

101 *See* Finley, *supra* note 63, at 868.

102 *See* Kindell, *supra* note 61, at 399. Everyone from former U.S. Senator Bob Dole to Hugh Hefner extolled the virtues of the new pill. *See* Finley, *supra* note 63, at 837-38.

103 *See* Kindell at 399.

104 *See* Roth, *supra* note 90, at 788. *See also* TONE, *supra* note 56, at 291.

105 *See* TONE, *supra* note 56, at 291.

106 *See* Kindell, *supra* note 61, at 399.

107 *See id.* at 419.

108 *See* White, *supra* note 66, at 281.

coverage would lead to overuse and abuse of the drug.[109] Another reason for denying coverage is Viagra's obvious connection to sexual activity.[110] By characterizing Viagra as a "lifestyle" drug, insurance companies can deny its coverage on the grounds that it is not medically necessary—the same reasoning used to deny coverage of birth control pills.[111] Just like birth control pills, Viagra does not cure any disease, and like allergy medications, it provides temporary relief from a condition.[112] Like birth control pills, Viagra provides control over sexual intercourse.[113] However, unlike Viagra, which focuses only on the sexual act itself, birth control provides a much more comprehensive benefit to its user.[114] For example, the use of birth control can reduce the possibility of having an abortion by 85%.[115]

Women already suffer disproportionately to men with regard to health coverage, mainly due to women's particular medical needs.[116] Insurance companies use the term "medically necessary" to limit their coverage of items related to sexual health, presumably due to the voluntary nature of sexual activity. Companies' interpretations of "medically necessary" vary widely,[117] yielding unusual outcomes, such as covering a woman's pregnancy and delivery at a cost of around $10,000, but precluding coverage of a one-year supply of birth control pills, which costs only about $300.[118]

C. *When Coverage Is Granted*: Erickson v. Bartell Drug Co.[119]

With this legal background and Viagra coverage as a rallying point, it seemed that the scene was finally set for women to seek coverage of their oral contraceptives.[120] The controversy burst onto the legal radar when a Seattle district court heard the case of *Erickson*. Jennifer Erickson, a twenty-seven year old pharmacist working for Bartell, sued her employer because its otherwise comprehensive health insurance policy did not provide coverage for

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109 *See* Beh, *supra* note 52, at 128.

110 *See id.* at 125.

111 *See id.* at 145.

112 *See* White, *supra* note 66, at 281.

113 *See id.*

114 *See id.* at 291 ("[H]alf of all pregnancies are unintended, resulting in approximately 1.22 million unplanned births, 1.43 induced abortions, and 390,000 miscarriages.") These numbers show that birth control can be a soberingly important part of most women's lives.

115 *See id.* at 294.

116 *See* Beh, *supra* note 52, at 131 (Women's out-of-pocket health care expenses are approximately sixty-eight percent more than men's, largely due to poor insurance coverage for matters of sexual and reproductive health."). *See also* White, *supra* note 66, at 278.

117 *See* Beh, *supra* note 52, at 133.

118 *See* Bruzina, *supra* note 83, at 510-11. Similarly, although abortion is not always covered by a health insurance plan, a first trimester abortion costs around $450, also more expensive than an entire year of birth control pills. Covering birth control pills would surely seem to be in the best interests of insurance companies. *See id.*

119 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

120 *See* Finley, *supra* note 63, at 840. It is unclear why women did not push for oral contraceptive coverage earlier, but Viagra's instant acceptance supplied more than enough impetus. *See id.*

contraception.[121] District Court Judge Robert S. Lasnik granted her motion for summary judgment in a move that made headlines.[122] Judge Lasnik held the exclusion of contraceptive drugs from health insurance plans was unlawful discrimination under Title VII, which forbids discrimination on the basis of sex or pregnancy.[123] As the news media took interest, commentators could not help but draw the distinction between Viagra and the Pill.[124] Despite all the media discussion of the two drugs, however, Bartell's plan did not cover Viagra.[125]

Erickson argued that Bartell discriminated against its female employees on the basis of sex by not covering contraceptive drugs and devices.[126] The Civil Rights Act of 1964 provides for protection from discrimination on the basis of sex, and the 1978 amendment to that law clarified that pregnancy would also be protected.[127] Congress passed the Pregnancy Discrimination Act in direct response to the Supreme Court's ruling in *General Electric Co. v. Gilbert*.[128] The majority opinion of that case limited the scope of Title VII protections against pregnancy-related discrimination, but the dissent chose to follow the guidelines suggested by the Equal Employment Opportunity Commission, which called for benefits to cover pregnancy-related needs.[129] Dissenting, Justice Brennan pointed out that while General Electric's plan covered procedures only needed by men, it failed to cover needs specific to women.[130] When Congress passed the Pregnancy Discrimination Act, Justice Brennan's dissent provided guidance.[131]

More than twenty years after Congress made discrimination on the basis of pregnancy illegal, a judge had to decide whether this required companies to cover medical care related to pregnancy.[132] Erickson had filed the lawsuit "on behalf 'of all female employees of Bartell who at any time . . . were enrolled in Bartell's Prescription Benefit Plan . . . while using prescription contraceptives.'"[133] But she also unofficially took these steps on behalf of all women whose plight she shared.[134] Although the district court in Washington state may be ahead of the curve on a number of social issues, it is a momentous step for all women that

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121 *See* Roth, *supra* note 90, at 785.

122 *Erickson*, 141 F. Supp. 2d at 1277; *see also* Jennifer M. Saubermann, Case Note, *Erickson v. Bartell Drug Co. 141 F. Supp. 2d 1266 (W.D. Wash. 2001)*, 10 AM. U.J. GENDER SOC. POL'Y & L. 233 (2001).

123 *See* Bruzina, *supra* note 83, at 509.

124 *See Contraceptives Controversy*, RISK MANAGEMENT, Feb. 14, 2001.

125 *See* Bruzina, *supra* note 83, at 507. The fact that Bartell's plan did not include Viagra only creates a stronger position for women using this case to influence their own health insurance plan to include oral contraceptives. Although Viagra may have sparked the controversy over coverage of the Pill, Viagra coverage is not a prerequisite for successfully seeking coverage of the Pill. *See id.*

126 *See id.* at 504.

127 *See id.*

128 429 U.S. 125 (1976). *See* White, *supra* note 66, at 287.

129 *See* White, *supra* note 66, at 288.

130 *See Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting).

131 *See* Bruzina, *supra* note 83, at 488.

132 *See id.* at 505.

133 *Erickson*, 141 F. Supp. 2d at 1268.

134 *See* Bruzina, *supra* note 83, at 492.

without even sending the case to trial, the judge concluded that Erickson was entitled to health coverage for prescription contraception.[135]

The *Erickson* decision came out favorably for the plaintiff and represented a breakthrough in women's fight to achieve equality in reproductive rights and healthcare benefits, but the language of the opinion presents certain problems. Certain words and phrases Judge Lasnik chooses for his opinion could be representative of deeper misgivings about his decision and may evince some lingering prejudices.[136]

The opinion begins in earnest with an overview of the history of Title VII of the Civil Rights Act, which deals with discrimination in the workplace.[137] The Judge alludes to the unlikely beginnings of sexual discrimination as an element of this part of the Act, which would have otherwise dealt solely with race and not gender.[138] The Judge offers the explanation that "sex" was added to the Act as a means of sabotage by a Congressman from Virginia seeking to poison the bill and prevent its passing.[139] "The two hours of humorous debate on the amendment has since been described as 'Ladies Day in the House.'"[140] That the Judge chooses to bring up this tidbit of legislative history speaks to his handling of the issue. True as it may be that this portion of the debate can be referred to "Ladies Day in the House" or that maybe, to some, it might even have been "humorous," the fact remains that the Congress kept "sex" in the wording, and the foundations of women's legal equality in the workplace in this country deserves more substantial recognition than the Judge's language here warrants. The Judge does conclude this comment with the note that "all future attempts to remove [the addition of "sex" to the law] or limit it were defeated."[141] This modifier gives some semblance of stability and legitimacy to the inclusion of sex in the law, but the Judge chooses to explain this law by pointing to its more dubious beginnings, and not the legitimacy many others might argue.[142]

When the opinion delves into the application of Title VII to sex discrimination cases dealing with reproductive issues, the Judge discusses the Supreme Court case *General Elec. Co. v. Gilbert,*[143] which was essentially

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135 *See* White, *supra* note 66, at 300; *Erickson*, 141 F. Supp. 2d at 1268.

136 *See generally, supra* section I-A, for a discussion of a judge's choice of words.

137 *Erickson*, 141 F. Supp. 2d at 1268-69. "Title VII makes it unlawful for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Id.* at 1268 (quoting 42 U.S.C. § 2000e-2(a)(1)).

138 *Id.* at 1268-69.

139 *Id.* at 1269.

140 *Id. But see* Karst, *supra* note 48, at 524 (choosing not to refer to the history of this legislation by such a title, but rather seeking to explain how women's growing role in the American workplace prompted recognition of the need for legal equality).

141 *Erickson*, 141 F. Supp. 2d at 1269.

142 *See* Karst, *supra* note 48, at 524.

143 429 U.S. 125 (1976).

overruled by Congress.[144] Congress sided with the Supreme Court's dissenters in that case, who would have held that the exclusion of benefits was discriminatory against women.[145] In discussing the resulting legislation following the unsatisfactory majority opinion in *Gilbert*, the *Erickson* judge tries to connect it with the case he is currently deciding. Since the Pregnancy Discrimination Act (PDA) does not directly discuss the issue he deals with, he must develop some parallels to connect them. His choice of words in doing so, however, displays an almost sheepish attitude, as if he himself is not sure of how well they match. After noting that the PDA only deals with "overt discrimination toward pregnant employees," the Judge attempts to make his connection:

> Not surprisingly, the amendment makes no reference whatsoever to prescription contraceptives. Of critical importance to this case, however, is the fact that, in enacting the PDA, Congress embraced the dissent's broader interpretation of Title VII which not only recognized that there are sex-based differences between men and women employees, but also required employers to provide women-only benefits.[146]

The phrase "not surprisingly" sticks out. A cynic might be inclined to propose that Congress would obviously not include prescription contraception in the PDA. The idea would be that any Congress giving out benefits and rights to women would never go further than it had to. However, the language the Judge uses creates a presumption that this attitude is indeed the case. Therefore, instead of crafting an interpretation that makes it easier to draw the connection, the Judge sets up his own argument as one that might fail; even though it succeeds, it suggests that he is not entirely on board with his theory. The other word which deserves attention in this small selection is "embraced." While Congress did choose to follow the reasoning of *Gilbert*'s dissent, the word "embraced" engenders the facts. Instead of using "accepted" or "followed" or "used" the Judge chooses embraced, which conjures up emotional, sexual images. Perhaps this word was carefully chosen as a pun on the subject matter, but whether or not it was intentional, it displays a level of playfulness perhaps not appropriate for such an opinion.

A less playful and more stereotypical description of women's need for reproductive medical treatment appears later in the opinion. In trying to square his own opinion with the Supreme Court opinion, the Judge describes how that holding

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[144] *Erickson*, 141 F. Supp. 2d at 1269. Congress enacted the Pregnancy Discrimination Act in 1978, amending Title VII so that sex discrimination included "discrimination because of 'pregnancy, childbirth, or related medical conditions.'" *Id.* (quoting 42 U.S.C. § 2000e(k)). This was in response to the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), which held that "an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage did not discriminate on the basis of sex." *Erickson*, 141 F. Supp. 2d at 1270.

[145] *Erickson*, 141 F. Supp. 2d at 1270.

[146] *Id.*

could relate to his own.[147] In describing what the Supreme Court there held, Judge Lasnik uses words which turn pregnancy and reproductive issues into clinical, unemotional side effects of being a woman. "[T]he court focused . . . on unique, sex-based characteristics, such as the capacity to bear children."[148] The choice of the words "unique, sex-based characteristics"[149] is crisp and no-nonsense and seems to reduce women to laboratory specimens. Its tone is perhaps an attempt to avoid tone altogether, and therefore ends up sounding sterile and cold. The other frigid phrase, "capacity to bear children,"[150] also downplays the human side of women's sexual identity by reducing reproduction to an animal reality unattached to emotional nuance.

In the very next paragraph the opinion abruptly takes on a different tone. Here the Judge completes his discussion of the legislative and judicial history the decision draws upon, and concludes that "Bartell's exclusion of prescription contraception from its prescription plan is inconsistent with the requirements of federal law."[151] The language then shifts, bringing in unlikely, illustrative word choices:

> The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant . . . . [I]t is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment.[152]

The first word to stand out from this selection is "begrudging."[153] Usually this word is associated with an uncooperative child, or a miser forced to release his money. Using this word to describe an act of Congress presents a startling personification of an otherwise completely inanimate, disembodied concept. A law is not a thing, let alone a human being or even an animal. Yet by using this word, the Judge breathes life into a law and refreshingly connects his decision to an established line of accepted history and interpretation. Any commitment to this choice is short-lived, however, for the sentence ends with the phrase "women who happen to be pregnant."[154] At first glance this phrase is shocking, for it treats pregnancy and by extension, any element of women's reproductive identity, as an inconsequential and haphazard state. Although this diminutive language is apparently meant to be tongue-in-cheek in an attempt to draw attention to the fact that the law can be extended to cover reproductive rights for women beyond

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147 *Id.* at 1271 *See also* Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991).

148 *Erickson*, 141 F. Supp. 2d at 1271.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Erickson*, 141 F. Supp. 2d at 1271.

pregnancy, the tactic is at the expense of a sensitive, and often overwhelming subject for women.[155]

The judge in *Erickson* does not examine the motive behind Bartell's policy. This is because intent does not matter in a civil rights violation if the policy itself is inherently discriminatory, as the Judge concludes here.[156] Judge Lasnik does offer his thoughts as to why Bartell's policy excluded birth control pills from its coverage, but the discussion is limited to a footnote, which reduces some of the good sentiments. "The most reasonable explanation for the current state of affairs is that the exclusion of women-only benefits is merely an unquestioned holdover from a time when employment-related benefits were doled out less equitably than they are today."[157] Two parts of this sentence are troubling. The phrase "merely an unquestioned holdover"[158] avoids investigating what the true source of the discriminatory healthcare plan might be. Even if it truly is "an unquestioned holdover"[159] of an earlier era, the modifier "merely"[160] suggests a casual attitude towards that subject and delegitimizes any suffering because of this policy. The phrase "doled out"[161] similarly plays down the problems this case ends up solving. The words "doled out"[162] are a playful way of saying "distributed" and by using such a phrase, the Judge continues to minimize the importance of the very decision he is making.

The Judge makes a well-meaning attempt to characterize his holding as not only constitutional, but also in society's best interests. In addressing the defendant's argument that contraceptives are not for treating "illness and disease normally treated with prescription drugs,"[163] the Judge valiantly tries to show that prescription contraception does serve a legitimate purpose in helping maintain women's health and, as an extension, society's well-being as a whole.[164] In describing how these contraceptives will actually serve to benefit society, the Judge chooses some notable language. First, he explains that "affordable and effective contraceptives . . . can help to prevent a litany of physical, emotional, economic, and social consequences."[165] He continues to reason that "[u]nintended

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155 *See* Bruzina, *supra* note 83, at 510-11 (pregnancy is mentally, emotionally, and physically taxing).

156 *Erickson*, 141 F. Supp. 2d at 1271-72. "Where a benefit plan is discriminatory on its face, no inquiry into subjective intent is necessary." *Id.* at 1271 n.7.

157 *Id.* at 1271 n.7.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Erickson*, 141 F. Supp. 2d at 1271 n.7.

162 *Id.*

163 *Id.* at 1272.

164 *See also* EGON DICZFALUSY, THE CONTRACEPTIVE REVOLUTION: AN ERA OF SCIENTIFIC AND SOCIAL DEVELOPMENT 188 (1997) (women's reproductive health should be a top priority in that it reaches into so much of society).

165 *Erickson*, 141 F. Supp. 2d at 1273.

pregnancies . . . are shockingly common in the United States."[166] Both these statements reflect an awareness of the importance of providing women with access to prescription contraception, but the language the Judge uses is worth analyzing further. First, the Judge uses the word "litany"[167] when introducing his list of problems contraception can help to avoid. While this word properly introduces a group of some kind, its connotation is that this list of factors which follows could not be avoided in any other way. By using the word "litany,"[168] the Judge, as he often does, belittles the very things he is supposedly seeking to make more important by the nature of his ruling. The types of items which follow the word "litany"[169] should not be as serious as what can befall women with no access to healthcare. Equally troubling is the Judge's use of the phrase "shockingly common"[170] to discuss unintended pregnancies in the following sentence. Something about this usage does not seem proper. Certainly the statistic that over half of all pregnancies in this country are unintended[171] is, on some level, shocking. However, using that phrase to describe such a serious problem fails to encompass the true nature of the statistic. A man discussing serious health and reproductive issues might be better off finding an alternative to expressing this fact. That the Judge finds the statistic shocking does not mean that is the best way of sharing the numbers with those reading his opinion.

The Judge explains the benefits of including prescription contraceptives in comprehensive healthcare plans in rebutting the defendant's argument that such prescription drugs should not be covered because they are preventative and do not cure a disease or illness.[172] The defendant apparently considered pregnancy a "'natural' state,"[173] and therefore a prescription to avoid such a state would not need to be covered. The Judge attempts to nobly dispense with that argument by explaining that pregnancy, "though natural, is not a state that is desired by all women or at all points in a woman's life. Prescription contraceptives, like all other preventative drugs, help the recipient avoid unwanted physical changes."[174] It is true that not all women want to be pregnant all the time, and that access to prescription contraceptives should be as convenient as access to all other covered prescriptions, including preventative prescriptions. However, by drawing the direct parallel between medications which prevent diseases and contraceptives which prevent pregnancy, the Judge turns pregnancy into something unhealthy and

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166 *Id.* Although half of all pregnancies in the United States are unintended, it remains open to debate whether or not that is actually shocking, given American society's tendency to turn a blind eye towards sex. *See* Kindell, *supra* note 61, at 415 (three million unintended pregnancies every year).

167 *Erickson*, 141 F. Supp. 2d at 1273.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* at 1273 n.10.

172 *Id.* at 1273.

173 *Erickson*, 141 F. Supp. 2d at 1273.

174 *Id.*

undesirable. It is called an "unwanted physical change,"[175] which conjures up images of freakish third limbs or an extra head. Although the intention is obviously to put prescription contraceptives on the same level of validity as vital medicines that prevent serious medical problems, the way the Judge constructs his explanation ends up making pregnancy sound like the plague. This is not to suggest that pregnancy ought to be forced on all women, or even desired by all women. Perhaps to some women, being pregnant would not be any better than having the plague. But part of the reason for allowing access to prescription contraceptives is that it presents women with a choice, and it means they do not have to be discriminated against in making that choice. In granting validity to prescription contraceptives, the Judge should not have to resort to belittling pregnancy.

The final piece of language worth evaluating in this decision is in a footnote supporting the Judge's explanation of how leaving out prescription contraceptives from Bartell's healthcare plan cannot be justified by the defendant's reasoning that the plan neutrally and unilaterally does not cover anything which falls under the category of "family planning."[176] The defendant argued that since the plan does not cover prescriptions or procedures such as Viagra and infertility treatments, failing to cover prescription contraceptives is not discriminatory.[177] However, the Judge points out that the plan contains no such sweeping "family planning" exclusion; rather, the plan does cover such items as prenatal vitamins and abortions.[178] The troubling language surrounding this argument stems from that footnote explaining how the defendant does, in fact, cover abortions in "all circumstances."[179] In his attempt to drive home his point and punch holes in the defendant's argument, the Judge ends up undermining his own good intentions: "Abortion is, after all, the quintessential 'family planning' measure."[180] This sentence is glib and overconfident about a sensitive subject. The use of that phrasing may surprise the reader into realizing the absurdity of covering a procedure such as an abortion but not providing any assistance for access to prescription contraceptives. It serves its purpose. However, using such phrasing also could disgust the reader, and make him or her think that the Judge crafting this opinion is careless about the gravity of abortion, both as a social debate, and as an essential safeguard for the reproductive rights of women.

Although the holding of *Erickson* is positive, it should not be blindly accepted as completely supportive of the rights it endorses. The case will be helpful for women seeking to petition their companies for the same benefits the plaintiff here sought, but its long-term effects will not be known for some time.

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175 *Id.*

176 *Id.* at 1274-75.

177 *Id.* at 1275.

178 *Erickson*, 141 F. Supp. 2d at 1275 n.13.

179 *Id.*

180 *Id.*

III. INFERTILITY: REMEMBERING THAT SEX MEANS BABIES

A. *It Takes Two, But It's a Woman's Problem*

Infertility can be one of the more heart-wrenching problems a couple faces, and is a prevalent problem for a significant portion of the population.[181] Although not actually a threat to physical health, it can have a serious impact on mental and social well-being.[182] When it appears that an otherwise normal, healthy couple cannot have a baby, the news can be devastating.[183] However, modern science can pinpoint and correct certain problems, making natural live birth a real possibility.[184] Obtaining those procedures to correct infertility, however, can be difficult. Expense is the biggest obstacle for many to overcome.[185] If a health insurance plan is a couple's only means of obtaining the necessary procedures, and that plan does not cover the required expenses,[186] a couple may be left with few options.[187] In spite of the Supreme Court's statement in *Bradgon v. Abbott* that reproduction is a major life activity,[188] infertility treatments are yet to be recognized as necessary in order to prevent discrimination.[189]

Although infertility can be caused by either partner's physiology, statistically it is more common for the woman to be the infertile partner.[190] Even though a man may be disappointed that no child will carry on his family name and genes, infertility psychologically affects women more strongly.[191] Infertility not only affects the relationship, it affects the woman herself.[192] Because of the nature of

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181 *See* Ellen Olshansky, *A Theoretical Explanation for Previously Infertile Mothers' Vulnerability to Depression*, JOURNAL OF NURSING SCHOLARSHIP, Sept. 22, 2003 (infertility affects about 15% of women of childbearing age).

182 *See* DICZFALUSY, *supra* note 164, at 192.

183 *See* Olshansky, *supra* note 181 (infertility can negatively affect relationships, and lead to a sense of isolation); *see also* Karen Robert, *Shame: As Cause of Emotional Problems*, THE ATLANTIC, Feb. 1992 at 40 (advancing the argument that infertility is on the same plane as such difficult personal events as abortion, physical incapacitation, disease, and job loss).

184 *See* Justin Martin, *A Baby or Your Money Back*, FORTUNE, Nov. 10, 2003, at 198 (the national success rate for in vitro fertilization is 25%).

185 Susan Horsburgh and Giovanna Breu, *Multiple Choice: First Twins, Then Triplets? For Some Couples, the Quest for Fertility Brings an Embarrassment of Riches*, PEOPLE, Aug. 25, 2003 at 115 (in vitro fertilization costs around 10,000 dollars for each attempt); *see also* Martin, *supra* note 184 (expenses for in vitro fertilization ranges from $7,000 to $15,000, and only about 15% of those who attempt it are covered by insurance).

186 *See* Beh, *supra* note 52, at 135 (insurance companies often classify infertility treatments as "experimental" in order to deny coverage).

187 *See* Martin, *supra* note 184 (couples desperate for a baby are willing to take risky measures, such as maxing out their credit cards and taking second mortgages on their home).

188 524 U.S. 624, 638 (1998).

189 *See* Finley, *supra* note 63, at 859.

190 *See* Erin Lynn Connolly, Note, *Constitutional Issues Raised by States' Exclusion of Fertility Drugs From Medicaid Coverage in Light of Mandated Coverage of Viagra*, 54 VAND. L. REV. 451, 460-61 (2001). Infertility also affects a disproportionate number of women belonging to lower socioeconomic classes, demonstrating an even stronger need for financial assistance in battling infertility. *See id.*

191 *See* Olshansky, *supra* note 181.

192 *See id.*

medical procedures usually performed and societal expectations, women in infertile relationships experience more disruption in their daily lives and experience more depression than their partners.[193]

B. *Attempts to ease the bad news*: Saks v. Franklin Covey Co.[194]

Of less news-worthiness than *Erickson*, but still important, the case of *Saks* presents insight into court battles over infertility treatment costs. In this case, an infertile wife underwent treatment in an attempt to conceive a child. The wife was an employee of the defendant, and unsuccessfully attempted to have the various procedures she used in trying to become pregnant covered by the company's health insurance.[195] At the district court level, the defendant argued, and the court agreed, that the defendant's failure to cover the plaintiff's surgical procedures did not violate Title VII in that the exclusions of such procedures affect women and men equally.[196] The plaintiff appealed to the Second Circuit, which upheld the lower court's determination, although it offered its own reasoning for the affirmation.[197]

Chief Judge John M. Walker[198] wrote the opinion for the Second Circuit. His language reflects sympathy for the plaintiff and her husband. However, the Judge needs to support his conclusion that the defendant's decision to deny the benefits is not sexual discrimination. In order to do this, the Judge explains that this is a gender-neutral decision, and consequently presents infertility in terms that avoid the gendered aspects of the problem.

In his statement of the facts, the Judge tries to show that he is not immune to the emotional implications of infertility. He reminds the reader that the plaintiff here is married,[199] perhaps as a matter of factual accuracy, but also, perhaps, to lend additional legitimacy to her claim. He lists the various procedures she tried, and also lists the failed pregnancies.[200] The volume of the procedures reminds the reader of how exhausting infertility treatment must be. When the Judge mentions her failed pregnancies, he writes: "[U]nfortunately each pregnancy ended in a miscarriage."[201] This choice of words is not dripping with pity, but it serves as a reminder that what is at stake here is a new human life, and that this plaintiff's suffering is a large part of this case. It is also notable that the Judge did not simply say that her pregnancies never resulted in a live birth. He uses the word "miscarriage,"[202] a more weighted word that carries connotations of real loss.

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193 *See id.*
194 Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003).
195 *Id.* at 341-42.
196 *Id.* at 342.
197 *Id.* at 343.
198 *Id.* at 340.
199 *Id.* at 341.
200 *Saks*, 316 F.3d at 341.
201 *Id.*
202 *Id.*

However, in spite of any sympathy the Judge possesses for the plaintiff, his reasoning tries to draw her problems into a territory outside of suffering and into reason. By determining that the defendant's policy of not covering surgical infertility treatments is "gender neutral,"[203] he avoids the issue that infertility is mostly a woman's problem. The language the Judge draws upon is steady and unemotional from this point on. He describes Title VII analysis as looking for "sex-specific conditions,"[204] a phrase which both sounds clinical and cacophonous and leaves little room for emotional construction.

When the Judge dispenses with the plaintiff's argument that the Pregnancy Discrimination Act covers more than just pregnancy and therefore also covers infertility,[205] the Judge describes the plaintiff's argument in terms that seem to belittle the hypothesis. The Judge paraphrases her argument and writes "the statutory language [of the PDA] clearly embraces more than pregnancy itself."[206] Just as the judge in *Erickson* used the term "embraced,"[207] the use here engenders the writing and uses emotional attachment as a way of belittling the meaning of the communication. The judge in *Saks* is deciding a case which deals with a couple trying to have a baby, trying to experience the ultimate embrace, both sexually and then as the familial hug with their still yet to be conceived child. The Judge uses this word when setting up the plaintiff's argument, which he will reject. He then adds weighted, emotional words that add salt to the plaintiff's wounds. This shows the reader that despite the earlier attempts at sympathy, the Judge is not in favor of indulging in any shoulder-patting.

The Judge draws upon statistics to show that infertility is, in his final analysis, a gender neutral problem: "Infertility is a medical condition that afflicts men and women with equal frequency."[208] However, this is incorrect.[209] This cold conclusion may rely on statistics the Judge properly obtained. But simply using that statistic ignores the social ramifications infertility can have on women as opposed to men.[210] By not looking beyond the numbers, the Judge reduces infertility to just another disease, instead of acknowledging the jumble of emotions it can cause for women. He continues this line of thought in holding that "because the exclusion of surgical impregnation procedures disadvantages infertile male and female employees equally, Saks's claim does not fall within the purview of the PDA."[211] Shortly thereafter the gist of this sentence reappears: "Because male and female employees afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures, we conclude that the Plan does not

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203 *Id.* at 343.

204 *Id.* at 344.

205 *Id.* at 345.

206 *Saks*, 316 F.3d at 345.

207 *See supra* text accompanying note 146.

208 *Saks*, 316 F.3d at 346.

209 *See* Connolly, *supra* note 190, at 461 (it is usually the female partner who is infertile).

210 *See generally, supra* Section III. A.

211 *Saks*, 316 F.3d at 346.

discriminate on the basis of sex."[212] Similar to his earlier language in the opinion, these two sentences also are clinical and redact any emotional connection from the realities for infertility. Instead of using the more human "man and woman," the Judge chooses to call the sexes "male and female,"[213] which tends to put the suffering parties on the same footing as animals.

C. *No Way Around the Rules*: United States v. Lauersen[214]

Oddly enough, language which betrays a sentiment about infertility can be found in a criminal case: *Lauersen*. Although the bulk of the opinion deals with the fraud crimes the defendants are being charged with, due to the nature of the crimes, there is a reference worth mentioning. The defendants, medical doctors, were charged with crimes relating to their practice. They had been swindling insurance companies into paying for infertility treatments which otherwise would not have been covered.[215] Therefore, the language which otherwise might only be found in civil cases finds its way into a criminal opinion.

In rejecting various arguments presented by the defense in an attempt to mitigate the illegality of their actions, the Judge, William H. Pauley,[216] specifically rejects one in particular. The defendants argued that the infertility treatments should have been covered by the insurers anyway, as a matter of civil rights and Title VII.[217] This self-help defense does not fly with the court, who makes the telling remark worthy of mention: "While this Court is sympathetic to the plight of Dr. Lauersen's patients who were struggling to achieve the miracle of birth, such hardships do not justify the fraudulent conduct alleged in the Indictment."[218] The choice of language in this sentence borders on mockery. Although the Judge is writing in the context of a criminal case and is not dealing with the same atmosphere as a judge in a civil case such as *Saks*, similar themes remain. The Judge chose to use the phrase "miracle of birth"[219] in a context that seems to sneer at the problems faced by the defendant doctors' patients. The Judge's characterization of himself as "sympathetic"[220] does little to counteract the effect of his colloquial use of "miracle of birth"[221] in such a context.

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212 *Id.* at 347.

213 *Id.*

214 United States v. Lauersen, No. 98 CR. 1134, 1999 U.S. Dist. WL 637237 (S.D.N.Y. Aug. 20, 1999).

215 *Id.* at *1.

216 *Id.*; *see also* Judges, United States District Court, Southern District of New York *at* http://www.nysd.uscourts.gov/judges.htm#District (last visited Jan. 19, 2005). (Used to determine the District Court judge's entire name.)

217 *Lauersen*, 1999 WL 637237 at *2.

218 *Id.* at *4.

219 *Id.*

220 *Id.*

221 *Id.*

IV. CHOOSING GENDER: MEDICAL PROCEDURES/TREATMENTS FOR TRANSSEXUALS

A. *Court Confusion and Sympathy over the Power to Control Sexual Identity*

Most people take their gender and sexual identity for granted, but for transgendered individuals, defending their place in American society is a daily struggle.[222] Gender is largely a construct of society, which creates roles and stereotypes based upon biology.[223] Americans are only beginning to come to terms with the reality that gender identity does not necessarily follow from biological sex,[224] and that a person can in fact choose his sex and gender.[225] The idea that gender and sex really are not the same may confuse some Americans who are unschooled in such terminology.[226] By extension, any judge may also find himself or herself equally confused, as well as uncomfortable.[227] If a judge is unfamiliar with the particular issues affecting transgendered people, he or she may react just like any other similarly situated person: with ignorance, indifference, or hostility.[228] But in order for transsexuals to obtain equal rights under the law, the legal community must appreciate that anatomy does not necessarily determine gender, and that gender identity does not necessarily stem from biological sex.[229]

Undergoing sexual reassignment surgery is possibly the most serious step a person can take to claim sexual identity, for it requires a long, dedicated process.[230] Medical practitioners have determined that hormone therapy and sex reassignment are the proper forms of treatment for transsexuals, and that psychotherapy and counseling alone are not successful.[231] But like most procedures involving sex, health insurers are hesitant to extend coverage for these procedures,[232] although some courts are beginning to realize that sex reassignment surgery is both reasonable and "medically necessary."[233] Since courts are expected to be the place where effective societal change can be made, judicial opinions should not reflect ingrained stereotypes and disgust.[234] Yet culture is hard to shake off, and society's

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222 *See* DeManda, *supra* note 47, at 507.

223 *See* Barnes, *supra* note 70, at 606.

224 *See* DeManda, *supra* note 47, at 515 (male sex organs do not necessarily make their owner act masculine, and vice versa).

225 *See id.* at 524.

226 *See id.* at 518.

227 *See id.*

228 See *id.* at 522.

229 *See* Barnes, *supra* note 70, at 603-4.

230 *See* Kirkland, *supra* note 71, at 19. Sexual reassignment surgery cannot be entered into lightly; access to the surgery requires convincing several specialists that this is the correct choice for the patient. *Id.*

231 *See* Barnes, *supra* note 70, at 610.

232 *See* Beh, *supra* note 52, at 158.

233 *See* Barnes, *supra* note 70, at 611-12 (quoting Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980)).

234 *See* Larry Cata Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law, in* LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185, 195 (Leslie J. Moran et al. eds., 1998).

norms of heterosexuality remain the baseline.[235] Like any flawed human being, judges cannot always hide their prejudices,[236] and the law can be a hostile place for those who are different.[237] Judges' response to confrontation with a transgendered litigant can range from sympathy to contempt,[238] and judges often show an unwillingness to step beyond the traditional norms of society and see that sex and gender are different things.[239] Sympathy for a plaintiff comes from perceiving transsexuals as sick, disabled people in need of help, while contempt stems from the common opinion that transsexuals are repugnant.[240]

Judges, by virtue of their voice, speaking through their opinions, are in a position to redraw the cultured stereotypes and respect identities outside of the norm.[241] With a reasonable, respectful approach that is cognizant of human differences, this can be a reality.[242] Because judicial opinions speak more broadly than just the final rule of law, an opinion leaves behind a residue of tone and thought which remains attached to the law.[243] A judicial decision that grants the requested procedure or service but does so in a way that remains bound to traditional sexual norms compromises the long-reaching outcome of the case.[244] In the two cases discussed below, the courts come to different conclusions when asked to solve slightly different problems, but both reflect a mixture of pity, confusion, and a bemused disposition.

B. *Clinging to "medically necessary:"* Mario v. P & C Food Markets, Inc.[245]

In *Mario*, a recent Second Circuit case, a claimant sought reimbursement for the sexual reassignment surgery cost incurred while employed by the defendant.[246] The claimant undertook a series of steps to achieve the desired alteration from a female to a male. He chose hormone therapy, a mastectomy, and hysterectomy.[247] Since he was covered by his employer's health insurance plan, the claimant sought to have his costs reimbursed. The defendant denied the claim on the grounds that the procedures lacked the required "medical necessity."[248] The plaintiff sued, but his claim was dismissed on summary judgment. He appealed.

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235 *See id.* at 188.

236 *See* DeManda, *supra* note 47, at 523.

237 *See* Kirkland, *supra* note 71, at 2.

238 *See id.* at 3.

239 *See id.* at 9.

240 *See id.* at 3. Judicial sympathy can result from a belief that transsexuals cannot help the way they are. *See id.* at 9.

241 *See* Backer, *supra* note 234, at 196.

242 *See* DeManda, *supra* note 47, at 526, 527.

243 *See* Kirkland, *supra* note 71, at 10.

244 *See id.* at 7.

245 Mario v. P & C Food Markets, Inc., 313 F.3d 758 (2d Cir. 2002).

246 *Id.* at 762.

247 *Id.*

248 *Id.*

In an opinion written by Judge Guido Calabresi,[249] the court affirms the district court's decision, and concludes that the procedures the petitioner underwent were not covered by his employer's health plan and that the plaintiff failed to make out a prima facie case of discrimination.[250] Because the court must only ensure that the defendant followed its own health plan, thereby following Employee Retirement Income and Security Act (ERISA) procedure, the court first struggled with the proper standard of review the district court, and by extension, the appellate court, should employ.[251] After comparing the merits of either a de novo or "arbitrary and capricious" standard of review, the court finds that arbitrary and capricious is the proper standard, but essentially moots this point by concluding that the claim would fail under either the stricter or more interpretive standards.[252] In summing up this conclusion, the language of the opinion demonstrates a level of detachment from the claimant's situation. The Judge declares that there is no real conflict in this case, because by no standard could the claimant's procedures be considered "medically necessary."[253] The Judge uses the word "luckily" to begin a paragraph in which he writes that no matter what the standard is that is used, this claim will not be successful.[254] This light-hearted choice in the midst of a discussion that should be seriously considering a claimant's problem shows lack of concern. A judge should not let emotions decide the case, and neither should a judge be casual.

When relating some of the medical findings the Judge relied upon in supporting his conclusion that the claimant is not entitled to reimbursement for these procedures, the Judge's language again displays a level of dismissive, playful detachment: "Dr. Fras opined that the surgical removal of healthy organs, for no purpose other than gender dysphoria, would fall into the category of cosmetic surgery, and would therefore not be 'medically necessary.'"[255] The use of the word "opined"[256] seems somewhat out of place. Used in this context, it seems that the Judge was trying to show some level of sympathy for the claimant, in that his explanation of the doctor's report does not simply say what the doctor concluded, but he also chose to use such a word as "opined"[257] in presenting this fact. The word suggests some sort of playful sympathy, indicative of the tone of the entire opinion.

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[249] *Id.* at 761; *see also* United States Court of Appeals, Second Circuit, *at* http://www.ca2.uscourts.gov/ (last visited Jan. 19, 2005).

[250] *Mario*, 313 F.3d at 767.

[251] *Id.* at 763-66.

[252] *Id.* at 765.

[253] *Id.*

[254] *Id.*

[255] *Id.* at 766. *But see supra*, Section IV.A for the proposition that gender identity disorder can require surgery for proper treatment.

[256] *Mario*, 313 F.3d at 765.

[257] *Id.*

The opinion concludes with one final dismissive swipe at the claimant. Commenting on the failure of the claimant's Title VII claim, the Judge recaps the claimant's argument:

> Here, Mario claims that he was discriminated against not because he is a transsexual, but because he failed to conform to gender stereotypes, which he claims is a form of sex discrimination . . . Without passing on the logic of this argument, we note that it is not clear that the denial of benefits, without more, constitutes an adverse employment action.[258]

If the judge sincerely believes that this argument is without merit, he is free to comment briefly on it, discard it, and move on. However, in this instance, the Judge feels the need to include nuanced language which not only dispenses with the argument, but laughs in its face. By specifically opting to not wade into the "logic of this argument,"[259] the Judge effectively decrees that the argument has no logic, and is not worthy of consideration.

C. *Recognizing Inadequacy of Prison Responses*: Brooks v. Berg[260]

Prisoners with gender identity issues face problems with the law in many ways, but when a transgendered person is in prison, the problems grow exponentially.[261] Even though courts have determined that sexual reassignment surgery can be medically necessary, prisons tend to rely on antiquated approaches such as counseling, which medical experts have acknowledged to be futile when used alone.[262] Without proper treatment, transgendered people are at great risk for depression, self-mutilation, and suicide, which only adds to the stress of the prison environment.[263]

Mark L. Brooks, a prisoner in New York State, who also identifies himself as Jessica M. Lewis,[264] filed this lawsuit in an attempt to secure treatment for gender identity disorder.[265] After seeking help directly from the prison system without success, he turned to the courts.[266] When the defendants moved for summary judgment, the Judge denied and granted different parts of the motion.[267]

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258 *Id.* at 767.

259 *Id.*

260 Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003).

261 *See* Kirkland, *supra* note 71, at 6. Prisoners are often denied hormone replacement therapies in prison. A male-to-female transsexual prisoner faces life-threatening injuries when placed in a prison population of men, caused by beatings and rape. The isolation of a transsexual in prison is also a troubling issue, combined with the reality that such a person dangerously stands out. *See also* Barnes, *supra* note 70, at 625, 632.

262 *See* Barnes, *supra* note 70, at 613, 637.

263 *See id.* at 637.

264 *Brooks*, 270 F. Supp. 2d at 303. Although the court may be wrong in choosing to use masculine pronouns to identify the plaintiff, this analysis will do so as well, since the name of the case refers to the plaintiff's masculine name.

265 *Id.* at 304.

266 *Id.*

267 *Id.* at 313.

District Judge Lawrence E. Kahn wrote the opinion,[268] and his attitude to the plaintiff's situation is evidenced as early as the first footnote, in which he acknowledges the plaintiff's preference to be referred to with feminine pronouns, but instead decides to use the masculine pronouns.[269] The cavalier decision to ignore an issue so central to the plaintiff's case betrays an attitude of disrespect from the very beginning.[270] Nonetheless, the Judge then admonishes the defendants for having misconstrued the plaintiff's complaint as little more than frivolous.[271] The Judge clearly explains that the plaintiff is not requesting a sex reassignment surgery, but rather simple medical attention to his concerns.[272] In an honorable attempt to drive home his point, the Judge writes: "the Court emphasizes that . . . Plaintiff is asking the Court to force Defendants to allow him to see a doctor."[273] When the Judge puts the case in such a way, it would be hard for the prison to think it is an unreasonable request.

The Judge continues to explain that gender identity disorder is indeed a serious medical need, and as such, ignoring it would violate the Eighth Amendment.[274] Although the Judge uses very little of his own language, instead relying mainly on citations from other cases, the phrases he chooses to cite are indicative of an open and neutral handling of the situation. The Judge takes care to emphasize that the steps taken for gender identity disorder are not unsupervised or experimental, but rather serious, medical treatments, used under careful watch.[275] The Judge continues to use deliberate language to ensure that the medical steps taken will be legitimate. In discussing how the defendants have failed to seriously respond to the plaintiff's complaint, the Judge uses such words as "sound medical judgment," and describes the plaintiff's health as "jeopardized."[276]

The Judge shifts gears somewhat towards the end of the opinion. Although the Judge continues to state that medical treatment for gender identity disorder must be made available to prisoners, his language in describing this necessity is less forceful. The Judge writes: "Prison officials are thus obliged to determine whether Plaintiff has a serious medical need and, if so, to provide him with at least some treatment."[277] This use of minimalist language belies a deeper truth in the Judge's opinion. The words "obliged" and "at least"[278] conjure up an image of an

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268 *Id.* at 302.

269 *See id.* at 304 n.1.

270 *See* DeManda, *supra* note 47, at 523.

271 *See Brooks*, 270 F. Supp. 2d at 305.

272 *Id.* at 306.

273 *Id.*

274 *Id.* at 309 ("[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976))).

275 *See id.* at 310 ("[C]ourts have held that the treatment plan for an inmate with GID must be formulated by a medical professional.").

276 *Id.* at 310.

277 *Brooks*, 270 F. Supp. 2d at 312.

278 *Id.*

especially unwilling prison system which would never be willing to seriously address the plaintiff's needs. The Judge's sudden waffling may represent a realization that the general opinion about transsexuals is not overwhelmingly positive, and in order to ensure that his order is followed, some kind of diminution is necessary.

The Judge's choice of words in this opinion is interesting. Because the Judge denied and granted different parts of the defendant's motion for summary judgment, the plaintiff's case was allowed to continue, at least in part. However, the linguistic effect of the judicial opinion is less clear. While the Judge used certain terms which are undoubtedly indicative of a strong agreement with the plaintiff's situation, the Judge nonetheless held back at the end and relied on more uncertain words to express his opinion. Society's uncertainty about how to address the issues of transsexuals can be seen in this opinion.

V. CONCLUSION

Sexual and reproductive health is a serious, worldwide concern, and should not be dismissed lightly.[279] The cases analyzed above show a mixed sample of how society and preconceived notions infiltrate judicial opinions. Whether these flagged words were used consciously or not, the words show a need for concern for the equality of groups in minority status before the law. The tone of a judicial opinion can affect how the direct message is conveyed, and can, in turn, affect the reception of the decision. The words a judge chooses do more than convey the final decision in regards to the immediate parties. Those words can leave a psychological impact on the reader, and can affect how the reader feels about the sensitive issues the opinion handles. Too often judges mitigate or qualify their own decisions by using words which invoke connotations counterproductive to the decision. Especially when writing decisions regarding culturally important issues, such as the availability of sex and procreation, judges have a responsibility to ensure that their writing does not take on any ulterior motives, lest the opinion stand for more than one result.

The availability of sex for those in positions of societal power (heterosexuals, biological men) will continue to differ from those in minority positions (women, non-traditionally gendered people). Courts occupy a unique role in society, and can use their mouthpiece of judicial opinions to narrow the gap between these groups, when supported by law. Judges need to not only interpret the law correctly and fairly, they need to do it with honesty and support. A judicial opinion with words that fail to fully support the holding sends a mixed message to society about who has access to sex. Failing to address the reality of the power of words will only stunt the development of the law, and disadvantage those relying upon it.

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[279] *See* DICZFALUSY, *supra* note 164, at 188.