

## Article

# The Autonomy Hierarchy

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### ABSTRACT

*The U.S. Supreme Court decided two cases in Spring 2015—Young v. United Parcel Service, Inc. and EEOC v. Abercrombie & Fitch Stores, Inc.—under Title VII. The plaintiffs in both cases believed that their employers had discriminated against them because they were members of a protected class—pregnant women in the former and religious believers in the latter. Both plaintiffs were seeking minor modifications to workplace policies as accommodations. And in both opinions, handed down within a few months of each other, the Court used the language of favoritism to discuss whether the plaintiffs should prevail and what analysis should be employed. The manner in which the Court used the language of favoritism, however, could not have been more different. In the case of pregnancy, the Court soundly rejected that pregnant employees were entitled to any favored treatment, bending over backwards to avoid a ruling that pregnant employees were part of a “most favored” class. In the case of religion, the Court took the exact opposite approach, declaring that religious plaintiffs enjoyed “favored treatment.” This is despite the fact that Title VII provides no explicit textual support for such a distinction. In the absence of such a statutory explanation, what is really behind this difference in approach? This paper explores one potential answer to this question—that these decisions reflect the Court’s underlying belief in the*

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*paramount importance of the right to spiritual autonomy over and above the importance of a right to physical autonomy. Further, it explores how allowing such a hierarchy, between a right to spiritual autonomy on the one hand and a right to physical autonomy on the other, to animate judicial decisions is both inherently gendered and disproportionately harms women. It concludes by analyzing whether such a hierarchy of rights is reflective of lived experience and discussing possible alternative frameworks for analyzing such claims.*

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## INTRODUCTION

Two Supreme Court cases decided in Spring 2015—*Young v. United Parcel Service, Inc.*<sup>1</sup> and *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*<sup>2</sup>—dealt with plaintiffs claiming the protection of Title VII. Both plaintiffs believed that their employers discriminated against them because they were members of a

<sup>1</sup> 135 S. Ct. 1338 (2015).

<sup>2</sup> 135 S. Ct. 2028 (2015).

protected class—pregnant women in the former and religious believers in the latter. And in both opinions, handed down within a few months of each other, the Court used the language of favoritism to discuss whether the plaintiffs should prevail and what analysis should be employed.

The way the Court used the language of favoritism, however, could not have been more different. In the case of pregnancy, the Court soundly rejected the claim that pregnant employees were entitled to any favored treatment, bending over backwards to avoid a ruling that pregnant workers were part of a “most-favored-nation” class of employees.<sup>3</sup> In the case of religion, the Court took the exact opposite approach, noting that plaintiffs seeking accommodation for religious beliefs or practices enjoyed “favored treatment.”<sup>4</sup> While both plaintiffs ultimately prevailed, the difference in the Court’s use of the language of favoritism is striking. The fact that the Court came to such different conclusions about whether each plaintiff was entitled to favored treatment under the law is particularly glaring when considered in light of the fact that both plaintiffs brought suit under the same overarching statute (Title VII), were seeking a minor accommodation to workplace policies, and were from classes of people specifically protected under the statute.<sup>5</sup> And it creates the uniquely perverse truth that if Peggy Young had gone to her employer and asked for a *religious accommodation* based on her sincerely-held religious belief that pregnant women should not lift more than 20 pounds, her employer may have been compelled to afford such a request special consideration, while it was not necessarily required to afford such special consideration to a request based on the advice of Ms. Young’s doctor.

What accounts for the dramatically different conclusions about favored treatment under Title VII reached by the Court in these two decisions from the same term? In the following sections, this paper will explore the potential reasons that the Court came to such divergent conclusions about whether certain classes of Title VII plaintiffs are entitled to favored treatment under the law and whether such divergence is warranted. The observations contained herein grow out of a tradition of critical legal theory that seeks to make explicit the underlying assumptions that animate legal doctrine and how those assumptions often serve to perpetuate systems of inequality. Section I looks closely at the facts underlying the two cases, and how the language of favoritism was employed in both of the decisions. Section II examines whether the underlying statutory texts form a basis for the Court’s conclusions re-

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<sup>3</sup> *Young*, 135 S. Ct. at 1350.

<sup>4</sup> *Abercrombie*, 135 S. Ct. at 2034.

<sup>5</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1)(2012)) (prohibiting discrimination in employment based on the sex or religion of employees).

garding which plaintiffs are afforded favored treatment. After rejecting the textual explanation as a viable reason for the divergent outcomes, Section III explores and then criticizes how the decisions reflect an underlying belief that spiritual autonomy is more important than bodily autonomy and how such a hierarchical ordering disproportionately harms women. Section IV describes one potential outcome when rights to spiritual autonomy and bodily autonomy come into direct conflict with one another. Finally, Section V discusses different approaches to bodily autonomy that courts could adopt that would more meaningfully reflect constitutional and statutory intent while avoiding unnecessarily gendered and outdated ideas.

## I. THE *YOUNG* AND *ABERCROMBIE* DECISIONS

### A. The *Young* and *Abercrombie* Plaintiffs

Peggy Young worked as a part-time delivery driver for United Parcel Service, Inc. (UPS).<sup>6</sup> As an early morning “air” driver, she delivered mostly lighter letters and packages sent via air delivery, generally not weighing more than twenty pounds.<sup>7</sup> The air deliveries were occasionally heavier than twenty pounds, however, and infrequently were in excess of fifty pounds.<sup>8</sup>

Ms. Young became pregnant in 2006.<sup>9</sup> After her physician recommended that she not lift packages greater than twenty pounds for the duration of her pregnancy, she alerted her employer to that fact and inquired into the possibility of light duty work.<sup>10</sup> UPS told her that it did not offer light duty for pregnancy and that company policy prevented her from working with a twenty-pound lifting restriction.<sup>11</sup> UPS policy dictated that it only accommodated “(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA).”<sup>12</sup> In fact, there was testimony from a UPS shop steward that the “only light duty requested [due to physical] restrictions that became an issue” at UPS was

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<sup>6</sup> *Young v. United Parcel Serv.*, No. DKC 08-2586, 2011 WL 665321, at \*1 (D. Md. Feb. 14, 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*1 n.2.

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> *Id.* at \*4–5.

<sup>11</sup> *Id.* at \*5–6.

<sup>12</sup> *Young*, 135 S. Ct. at 1344.

from “women who were pregnant.”<sup>13</sup> According to Ms. Young, one of her supervisors told her “not to come back in the building until [she] was no longer pregnant because [she] was too much of a liability.”<sup>14</sup>

During her period of involuntary leave, Ms. Young received no pay and lost her medical coverage.<sup>15</sup> Two months after giving birth, Ms. Young returned to UPS and resumed her previous position with the company.<sup>16</sup> She brought suit in October 2008, alleging that UPS had violated her rights under several statutes, including Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.<sup>17</sup> The district court granted UPS’s motion for summary judgment, finding that Ms. Young had created no material issue of fact regarding UPS’s proffered, non-discriminatory reason for its treatment of her.<sup>18</sup>

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Samantha Elauf is a practicing Muslim who has worn a head scarf since the age of 13.<sup>19</sup> In 2008, Ms. Elauf applied for a job at an Abercrombie Kids store in her local mall.<sup>20</sup> She was unaware at the time of her application that Abercrombie stores had a “Look Policy” that “requires employees to dress in clothing and merchandise consistent with that sold in the store; requires that male employees be clean shaven; prohibits female employees from wearing necklaces and bracelets; requires employees to wear specific types of shoes; and prohibits ‘caps.’”<sup>21</sup> During her interview for the position, Ms. Elauf was not informed of the “Look Policy,” but was told she must wear clothes that “looked like Abercrombie.”<sup>22</sup>

Heather Cooke, the assistant store manager who interviewed Ms. Elauf, was responsible for recruiting, interviewing, and hiring new store employees.<sup>23</sup> She testified that she believed Ms. Elauf was a good candidate and recommended hiring her.<sup>24</sup> She also testified that she believed that Ms. Elauf wore the head scarf for religious reasons and was unsure at the time of Ms. Elauf’s interview whether wearing a head scarf would violate the “Look Policy.”<sup>25</sup> As a result, she consulted with her district

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<sup>13</sup> *Id.* at 1347.

<sup>14</sup> *Young*, 2011 WL 665321, at \*6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*6–7.

<sup>18</sup> *Id.* at \*15–16.

<sup>19</sup> *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1276 (N.D. Okla. 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1275, 1277.

<sup>22</sup> *Id.* at 1277.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1277–78.

<sup>25</sup> *Id.*

manager, Randall Johnson.<sup>26</sup> Ms. Cooke testified that Mr. Johnson instructed her not to hire Ms. Elauf because she wore a head scarf, even when Ms. Cooke mentioned to him that the head scarf was likely worn for religious reasons.<sup>27</sup> As a result, Ms. Elauf was not offered a job at Abercrombie Kids.<sup>28</sup>

Ms. Elauf filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), alleging that she had been discriminated against due to her religious beliefs in violation of Title VII of the Civil Rights Act of 1964, as amended by the Religious Amendments of 1972.<sup>29</sup> The EEOC, which is authorized to bring suit under Title VII, sued Abercrombie & Fitch Stores, Inc. on Ms. Elauf's behalf, seeking an injunction that would prevent Abercrombie from "engaging in employment practices which discriminate on the basis of religion."<sup>30</sup> The district court originally granted summary judgment to Ms. Elauf, but the decision was reversed by the U.S. Court of Appeals for the Tenth Circuit, which found that there was "no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had particularized, actual knowledge—from any source—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it."<sup>31</sup>

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The U.S. Supreme Court ruled in favor of both Ms. Elauf and Ms. Young.<sup>32</sup> In both cases the Court found that Title VII offered protection against the type of discrimination alleged by the plaintiffs, and that summary judgment on behalf of the employer was therefore inappropriate.<sup>33</sup> In reaching this conclusion, however, the Court employed an analysis of whether each plaintiff was entitled to "favored" treatment under the statute.<sup>34</sup> And despite the fact that both opinions discussed the applicability of a "favored" standard, the outcome of such deliberations was markedly different in the two cases. As the following sections explore, the use of the language of favoritism in these two cases, and the analysis employed

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<sup>26</sup> *Id.* at 1278.

<sup>27</sup> *Id.* at 1278.

<sup>28</sup> *Id.* at 1279.

<sup>29</sup> Complaint at 1, *Abercrombie*, 798 F. Supp. 2d 1272 (No. 09-CV-602-GKF-FHM), 2009 WL 5212081.

<sup>30</sup> *Id.*

<sup>31</sup> *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1128 & n.14 (10th Cir. 2013), *rev'd*, 135 S. Ct. 2028 (2015) (emphasis omitted).

<sup>32</sup> *Abercrombie*, 135 S. Ct. at 2037; *Young*, 135 S. Ct. at 1355–56.

<sup>33</sup> *Abercrombie*, 135 S. Ct. at 2033–34; *Young*, 135 S. Ct. at 1355–56.

<sup>34</sup> *Abercrombie*, 135 S. Ct. at 2034; *see Young*, 135 S. Ct. at 1355–56.

using such language, reveals that the Court's sense of whether Title VII affords protected classes of plaintiffs favored treatment depends heavily on the type of right each plaintiff was asserting.

## B. Playing Favorites in Title VII

As an initial matter, it is important to note that the term “favorite” or “favored” appears nowhere in the statutory text of Title VII. Instead, Title VII uses the negative language of discrimination—making it unlawful to “discriminate” or to “limit, segregate, or classify” employees based on their membership in a protected class.<sup>35</sup>

Even though it does not appear in the statutory text, courts have used the language of favoritism as a way to distinguish the purpose of Title VII—equality—from the “favored” treatment that certain groups have historically enjoyed.<sup>36</sup> For example, in *Griggs v. Duke Power Co.*, the Court stated that:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.<sup>37</sup>

In this context, courts have seen themselves as guarding against “favoritism” because they assumed that the individual receiving “favored” treatment was not a member of one of the protected classes enumerated by Title VII, but was instead the member of one of the majority groups, usually a comparator to the plaintiff in that particular case.

It is only recently, however, that the Court has adopted the language of favoritism as a way to describe groups *protected* under Title VII as either “favored” or not. This is a striking shift, as it signals courts’—and society’s—shift from a concern for protecting minority rights to a concern that perhaps minorities are gaining an unfair advantage as a result of anti-discrimination and affirmative action policies.<sup>38</sup>

Despite its absence from the text of Title VII itself, the language of favoritism is front and center in the Court's decision in *Young*. Some

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<sup>35</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>36</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

<sup>37</sup> *Id.* at 429–30.

<sup>38</sup> The use of affirmative action in educational admissions reflects this trend, as the Court's jurisprudence in this area reflects an increasing concern with “favoring” the previously “disfavored” racial minorities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J. & Scalia, J., concurring in part and dissenting in part) (“[A] university may not maintain a high admissions standard and grant exemptions to favored races.”).

incarnation of the term “most favored” is unanimously employed in the opinions of all of the writing Justices—four times in the majority, three times in the concurrence, and twice in the dissent.<sup>39</sup> If there had previously been any doubt about whether plaintiffs bringing claims for pregnancy discrimination under Title VII were afforded any manner of favored treatment, the Supreme Court’s decision in *Young* clearly and firmly answered that question in the negative. While the majority, concurrence, and dissenting opinions reached different conclusions regarding the outcome of the case and the reasoning that should be employed, all of the Justices converged on the underlying premise that the Pregnancy Discrimination Act (PDA) in no way offered pregnant workers favored treatment. Justice Breyer’s majority opinion rejects any implication that the PDA grants pregnant workers a favored position, stating plainly that, “[w]e doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.”<sup>40</sup> Justice Alito agrees in his concurrence, saying that he “cannot accept [a] ‘most favored employee’ interpretation.”<sup>41</sup> And the dissent drives the point home, stating:

Prohibiting employers from making any distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age,

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<sup>39</sup> See *Young*, 135 S.Ct. at 1349 (discussing *Young*’s approach as granting pregnant workers “most-favored-nation” status); *id.* at 1350 (discussing the “most-favored-nation” problem and doubting that pregnant workers enjoyed an “unconditional most-favored-nation status”); *id.* at 1352 (questioning whether the EEOC guidance embraced a “most-favored-nation status” for pregnant workers); *id.* at 1358 (Alito, J., concurring) (stating that he “cannot accept this ‘most favored employee’ interpretation” and discussing the repercussions of the “most favored employee” interpretation); *id.* at n.3 (discussing “implausible results” that would occur under the “most favored employee” interpretation); *id.* at 1362 (Scalia, J., dissenting) (arguing that prohibiting employers from making any distinctions between pregnant and non-pregnant workers would “elevate pregnant workers to most-favored employees”); *id.* at 1363 (Scalia, J., dissenting) (rejecting characterization of the second clause of the Pregnancy Discrimination Act as a “most-favored-employee law”). If you were to include instances where the Court used all variations on the terms “favor” or “disfavor,” the total number of citations increases even further.

<sup>40</sup> *Young*, 135 S. Ct. at 1350. It is particularly interesting that the Court adopted the language of the “most-favored-nation” clause, which has not previously been employed in discrimination cases, but instead was borne out of law governing international treaties and imported into other areas of the law, such as antitrust law. See, e.g., *Heim v. McCall*, 36 S. Ct. 78 (1915) (determining whether state contracts mandating that state residents would be given preference in hiring for transportation and construction projects violated the “most-favored-nation” clause contained in the treaty between the United States and Italy). The use of “most-favored-nation” in employment discrimination cases has the effect of flattening plaintiffs into interchangeable actors in an economic model, ignoring the particular facts and details which make the plaintiffs’ claims viable and compelling. The Court’s adoption of this term—and indeed its reliance on the term—is an interesting departure from the Court’s previous terminology in this area of the law and is worth additional thought in future scholarship.

<sup>41</sup> *Young*, 135 S. Ct. at 1358 (Alito, J., concurring).



it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment.<sup>42</sup>

Indeed, the Court seems to take even the suggestion that pregnant workers be treated as a favored class as an affront to the principles of justice and to the underlying purposes of Title VII.<sup>43</sup> When Justice Breyer says any contrary argument “proves too much,”<sup>44</sup> the reader can almost hear the unspoken sneer at the idea that any serious jurist would suggest that a Title VII plaintiff be afforded favored treatment. In fact, the language of favoritism and references to “favorite employees” in the opinion is used as a sword to attack the Justices in the majority and a type of rhetorical straw man for the majority to disavow—in both cases allowing the Justices to take turns rejecting that such a standard was, is, or should be used.<sup>45</sup>

Compare this to the almost offhand way that the majority opinion in *Abercrombie* assumes that a plaintiff claiming religious discrimination is entitled to such favored treatment.<sup>46</sup> In Justice Scalia’s majority opinion, he states: “Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment . . . .”<sup>47</sup> He does so without citing to any law or precedent other than the text of Title VII itself, apparently assuming the validity of his assertion is so obvious that it needs no additional support.<sup>48</sup> This is despite the fact that in his dissent in *Young*,

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<sup>42</sup> *Id.* at 1362 (Scalia, J., dissenting) (emphasis omitted).

<sup>43</sup> *See id.* (“If a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been “treated the same” as everyone else . . . . It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment.”) (emphasis omitted); Wendy Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345–46 (1984–85) (discussing the Court’s reasoning in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)) (This reasoning has echoes of the earliest Supreme Court precedent involving pregnancy discrimination in the employment context, which treated pregnancy as an “‘extra,’ an add-on to the basic male model for humanity,” and was thus unacceptable because “[e]quality does not contemplate handing out benefits for extras—indeed, to do so would be to grant special benefits to women, possibly discriminating against men.”).

<sup>44</sup> *Young*, 135 S. Ct. at 1349.

<sup>45</sup> This is not necessarily an ineffective approach, as the language of favoritism is essentially verboten in the American discourse of equality of treatment and opportunity; *see* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (“In most social debates, the participants inevitably desire to obtain a rhetorical advantage from the characterization of their positions.”).

<sup>46</sup> *See Abercrombie*, 135 S. Ct. at 2033–34.

<sup>47</sup> *Id.* at 2034; *see id.* at 2034–42 (Only Justice Thomas’ dissent challenged the majority’s position that religious plaintiffs should receive favored treatment. Justice Alito’s concurrence differed from the majority opinion only in its treatment of the standard for the employer having notice of a religious accommodation issue, but did not question the majority’s assertion that religious plaintiffs should be afforded favored treatment.).

<sup>48</sup> *Id.* at 2034. In other contexts, Justice Scalia has signed on to opinions attacking similar “text-free reasoning” as “caus[ing] confusion.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2544 (2015) (Alito, J., dissenting) (criticizing the *Griggs* decision

issued just over two months prior, Justice Scalia explicitly stated that it was “implausible” that a pregnant plaintiff would be afforded favored treatment under Title VII because Title VII *exclusively* guarantees “equal treatment.”<sup>49</sup>

In contrast to the quick determination of the favored status of the plaintiff in *Abercrombie*, the Court in *Young* grappled at length with how employers must treat women under the PDA.<sup>50</sup> Specifically, the Court struggled to articulate the meaning of the phrase “other persons not so affected but similar in their ability or inability to work” and what accommodations the clause obligated employers to provide pregnant employees.<sup>51</sup> The Justices wrestled with whether the clause required an employer to provide a pregnant employee with a benefit when *any other* employee similar in their ability to work received that benefit or only when *all* or *most* other employees similar in their ability to work received it.<sup>52</sup> As Justice Scalia phrased it, it was a question of whether a pregnant mechanic was entitled to the same accommodation as an injured director.<sup>53</sup> This concern was at the heart of the Court’s inquiry, and ultimately no clear standard emerged. Nevertheless, the struggle with the statutory text focused on the idea that it was the Court’s role, at least in part, to ensure that no pregnant employee undeservedly enjoyed “most favored” status.

No such grappling is apparent in the *Abercrombie* decision. In that case, the Court did not seem concerned that by granting the plaintiff “favored” status and thus ensuring that she would be entitled to the workplace accommodations necessary to express her religious beliefs, employers may also have to provide such accommodations—or even more arduous accommodations—to both executive and entry level employees (or both “directors” and “mechanics” in the words of Justice

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and its progeny because the writing Justices failed to “ground their decisions in the statutory text [of Title VII].”)

<sup>49</sup> *Young*, 135 S. Ct. at 1362 (Scalia, J., dissenting) (“It is implausible that Title VII, which elsewhere creates guarantees of equal treatment, here alone creates a guarantee of favored treatment.”). This debate about how to treat pregnant employees was reminiscent of a long-standing debate in the feminist legal theory community between “equality” feminists and the “special treatment” or “asymmetrical equality” feminists. Compare Williams, *supra* note 43, with Littleton, *supra* note 45.

<sup>50</sup> See *Young*, 135 S. Ct. at 1357 (“[The second] clause [of the Pregnancy Discrimination Act] raises several difficult questions of interpretation that are pertinent to the case now before us.”).

<sup>51</sup> *Id.* at 1356–57.

<sup>52</sup> See *id.* at 1350 (“The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term ‘other persons.’ It does not say that the employer must treat pregnant employees the ‘same’ as ‘any other persons’ (who are similar in their ability or inability to work), nor does it otherwise specify which other persons Congress had in mind.”) (emphasis omitted).

<sup>53</sup> *Id.* at 1362 (Scalia, J., dissenting) (“Prohibiting employers from making any distinctions between pregnant workers and others of similar ability would elevate pregnant workers to most favored employees. If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth.”) (emphasis omitted).

Scalia).<sup>54</sup> The Court did not appear concerned that under its analysis, Ms. Elauf was entitled to an accommodation in the form of a modification to a company-wide policy, despite the fact that she was not even an employee at all, but merely an applicant for an entry-level retail position.<sup>55</sup> Her entitlement to an accommodation was based on the fact of her religious belief and her position in the company or a concern for how such an accommodation may affect other workers was not considered. The Court thus created a rule that entitled religious plaintiffs, because of their “favored” status, to accommodations—full stop.<sup>56</sup> How such favored status played out in a workplace did not seem to cause the Justices any concern, and it was not discussed in the opinion.

## II. THE STATUTORY TEXT EXPLANATION

This extreme difference in how the Court employed the language of favoritism in *Young* and *Abercrombie* warrants further attention. Such a divergence in approach in two opinions which seem as though they *should* be more similar would be noticeable in any context, but the temporal proximity of the two decisions makes the difference that much more glaring.

One obvious source for the different conclusions the Court draws in *Young* and *Abercrombie* regarding which plaintiffs are entitled to favored treatment is the underlying statutory text that the Court was interpreting. While it is true that both plaintiffs were proceeding under Title VII of the Civil Rights Act of 1964, they were doing so specifically under different amendments to Title VII, each containing slightly different statutory language.

Both the Pregnancy Discrimination Act of 1978 (PDA) and the 1972 religious amendments serve double-duty by defining the terms “sex” and “religion” more explicitly than in the original statute<sup>57</sup> and also incorporating—explicitly or implicitly—a mandate that employers make accommodations to individuals in each of these categories.<sup>58</sup> Just

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<sup>54</sup> *Id.*; *Abercrombie*, 135 S. Ct. at 2033 (“If the applicant actually requires an accommodation of [a] religious practice, and the employer’s desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII.”).

<sup>55</sup> *Abercrombie*, 135 S. Ct. at 2033 (“An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”).

<sup>56</sup> *Id.* at 2033–34 (“[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.”).

<sup>57</sup> See 42 U.S.C. § 2000e(j), (k) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief. . . . The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . .”).

<sup>58</sup> See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986) (“The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.”).

as in the main text of Title VII, neither amendment uses any form of the term “favored” in the statutory language.

The plaintiff in *Young* was proceeding pursuant to the PDA, which amended Title VII to make clear that pregnancy discrimination was sex discrimination. The PDA, in pertinent part, reads:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>59</sup>

In essence, the law requires that pregnant employees be offered workplace accommodations to the same extent that other employees are offered workplace accommodations for non-pregnancy related injuries or conditions. Despite the Court’s struggle with interpreting the language of the PDA in *Young*, commentators have remarked that “[w]hen read by itself, the PDA appears to be straightforward and easy to understand.”<sup>60</sup> The first clause makes it clear that sex discrimination includes discrimination based on pregnancy, and the second clause “informs employers that the relevant measure of pregnancy, in comparison with other medical conditions, is its effect on the employee’s ability to work.”<sup>61</sup>

When it enacted the PDA, Congress was careful to avoid an outcome that would place an additional burden on employers by requiring them to expand the type of workplace accommodations they already offered.<sup>62</sup> More specifically, Congress drafted the legislation to ensure that employers would not be forced to include new types of previously unaccounted for accommodations, and it mandated only that employers include pregnancy as another type of condition that entitled a worker to an already-available accommodation. It did this by tying accommodations for pregnant workers to the population of employees “not so affected but similar in their ability or inability to work.” Through this language, Congress ensured that an employer was not forced to offer a new workplace

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<sup>59</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

<sup>60</sup> Mary DeLano, *The Conflict Between State Guaranteed Pregnancy Benefits and the Pregnancy Discrimination Act: A Statutory Analysis*, 74 GEO. L.J. 1743, 1747 (1986).

<sup>61</sup> *Id.*

<sup>62</sup> See 123 CONG. REC. S15035-60 (daily ed. Sept. 16, 1977) (“The whole purpose of this bill is to say that if a corporation, a business is to provide disability that they cannot discriminate against women because of the unique character of disability that might confront them and thus we are talking about those disabilities that are attendant to the child-bearing potential of women.”).

accommodation or one that would unduly burden its business; the law limited the types of accommodations that employers had to provide to those they were already accommodating.

Does the statutory text applied in *Abercrombie*—the 1972 amendments—vary so wildly from that of the PDA that it supports an interpretation that plaintiffs experiencing religious discrimination should be treated as a “most favored” class of employees? The religious amendments clarified the definition of “religion” in Title VII, stating that:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.<sup>63</sup>

Therefore, the 1972 amendments basically require that employers accommodate workers’ religious beliefs or practices unless doing so would be unduly burdensome.<sup>64</sup>

Both statutes boil down to a requirement that employers accommodate workers if it is possible to do so. While Congress phrased this requirement using slightly different language in each statute, the functional work of the statute is the same. Religious workers should be accommodated to the extent that doing so does not require too much from the employer. Pregnant workers should be accommodated to the extent that other workers are accommodated; the fact of this alternate accommodation to a non-pregnant worker in this context signals that it is possible to provide the particular type of accommodation without placing too much burden on the employer. In other words, if the employer already accommodates non-pregnant employees in a particular way, it has already conceded that it is not unduly burdensome to do so. At the very least, the text of the two amendments to Title VII does not, on its face, support an interpretation that one group of employees is clearly entitled to favored treatment while another group is clearly not entitled to such treatment.

Nevertheless, the two amendments to Title VII are, unavoidably, worded differently. If Congress had intended them to have the exact same effect, it could be persuasively argued that it would have employed the exact same language.<sup>65</sup> To the extent that the different text of the two

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<sup>63</sup> 42 U.S.C. § 2000e(j).

<sup>64</sup> *Rodriguez v. City of Chi.*, 156 F.3d 771, 775 (7th Cir. 1998) (“Under Title VII, therefore, an employer must reasonably accommodate an employee’s religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer’s business.”).

<sup>65</sup> The relative temporal proximity of the enactment of the statutes could be used to argue both sides here. On one hand, the fact that the statutes were enacted a mere six years apart could absolutely support an argument that Congress would likely have employed the same language in each if it

statutes mandates that plaintiffs proceeding under the two amendments are treated differently, it is not clear that plaintiffs proceeding under the PDA get the proverbial short end of the stick. In fact, the PDA—and not the 1972 amendments—contains more explicit textual support for treating pregnant workers as “favored” under the statute.

The 1972 amendments mandate that employers accommodate their employees’ religious beliefs and practices unless it would impose an “undue burden” on the business of the employer. The statute did not define what constituted “undue burden,”<sup>66</sup> nor did it specify in what circumstances an accommodation was required.<sup>67</sup> The Court has subsequently found, however, that an employer experiences an undue burden when it is forced to bear anything more than a “*de minimis* cost” as a result of the accommodation.<sup>68</sup> This interpretation explicitly protects employers from having to undertake any major accommodations, such as providing paid leave, break time, or significant restructuring of the physical work space because such accommodations would invariably involve costs that rose above the level of “*de minimis*.” For instance, courts have held that employers are not required by Title VII to alter a “neutral” scheduling system,<sup>69</sup> to offer accommodations that would create safety concerns,<sup>70</sup> or to allow employees to decline to perform some portion of their job duties.<sup>71</sup>

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intended plaintiffs to be treated equally under each. It is not as if language had evolved so dramatically in the intervening six years as to warrant a different explanation of equality under Title VII. Alternately, it could be argued that Congress was aware of the interpretation problems following the passage of the 1972 amendments, and sought to clarify—not change—the operation of Title VII as it applied to workplace modifications when it enacted the Pregnancy Discrimination Act. The Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74–75 (1977), noted that:

[The 1972 amendments provide] no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of § 701(j) is likewise of little assistance in this regard. The proponent of the measure, Senator Jennings Randolph, expressed his general desire “to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,” 118 Cong.Rec. 705 (1972) but he made no attempt to define the precise circumstances under which the “reasonable accommodation” requirement would be applied.

<sup>66</sup> *Hardison*, 432 U.S. 63, 74 (“[T]he statute provides no guidance for determining the degree of accommodation that is required of an employer.”).

<sup>67</sup> *Id.* at 75 (noting that the legislative history “made no attempt to define the precise circumstances under which the ‘reasonable accommodation’ requirement would be applied”).

<sup>68</sup> *Id.* at 84.

<sup>69</sup> *Murphy v. Edge Mem’l Hosp.*, 550 F. Supp. 1185, 1189 (M.D. Ala. 1982) (“[T]his court will evaluate reasonable accommodation in light of an employer’s ability to accommodate an employee within the existing framework without denying the benefits of the scheduling system to other employees or incurring a greater than *de minimis* cost.”).

<sup>70</sup> See *EEOC v. Oak-Rite Mfg. Co.*, 2001 WL 1168156 (S.D. Ind. 2001) (rejecting employee’s argument that she should be permitted to wear ankle length skirt instead of pants in manufacturing plant where the employer stated such skirt would present a safety hazard); *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383–84 (9th Cir. 1984) (finding that employer did not have to accommodate employee’s request that he be permitted to wear a beard where company had legitimate safety concern that beard would prevent airtight seal of mask in the event of exposure to toxic gas and allowing beard would expose company to potential liability under California safety regulations).

<sup>71</sup> *Bruff v. N. Mississippi Health Servs., Inc.*, 244 F.3d 495, 503 (5th Cir. 2001) (holding that employer hospital was not obligated to excuse counselor from her counseling duties when such counsel-

In contrast, the PDA could obligate an employer to provide accommodations to pregnant workers that result in more than a *de minimis* cost to the employer, assuming the employer provided such accommodations to other non-pregnant workers. Such accommodations could include providing leave or changes in schedule or work assignments—accommodations which would not be required under the 1972 amendments because of the cost to the employer.

Therefore, even assuming that Congress intended to create different standards for accommodating pregnant and religious employees within the larger framework of Title VII, it is not clear from the text of the statutes that it intended to “favor” religious plaintiffs. If anything, it seems likely that the statutory text is intended to “favor” pregnant plaintiffs by affording them access to a wider range of potentially costly, employer-provided accommodations than religious employees are entitled to under the 1972 amendments. Nevertheless, the Court was compelled to reach a contrary conclusion in the *Young* and *Abercrombie* cases. The following sections will examine one potential reason this was the case.

### III. THE AUTONOMY HIERARCHY

If a statutory text explanation for the different outcomes in *Young* and *Abercrombie* does not survive careful scrutiny, then what explanation does? The answer may lie not in the statutory text, or even in the differences between the plaintiffs themselves, but instead in the fundamental nature of the rights at issue in the two cases.

While both plaintiffs were seeking minor modifications to workplace policies to accommodate their needs, Peggy Young was seeking a modification to accommodate a physical need associated with her pregnancy, while Samantha Elauf was seeking a modification to accommodate a spiritual need arising out of her religious beliefs. In other words, Ms. Young was seeking an accommodation to exercise her right to bodily autonomy, while Ms. Elauf was seeking an accommodation to exercise her right to spiritual autonomy. While both rights to bodily autonomy and spiritual autonomy have significant underpinnings in both common and constitutional law doctrines,<sup>72</sup> the Court did not hesitate to hold that the spiritual autonomy Ms. Elauf sought afforded her favored status under the law, while the bodily autonomy that Ms. Young sought afforded her no such status. Reviewing these two decisions together suggests that the Court is influenced by an implicit hierarchy which affords

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ing conflicted with her personal beliefs regarding homosexuality and extramarital sexual relationships).

<sup>72</sup> See *infra* Section III.a.i-ii.

spiritual autonomy favored treatment under the law while denying such favored treatment to bodily autonomy. The plaintiff in *Abercrombie* was entitled to spiritual autonomy, and the accommodations essential to exercise that autonomy, but the plaintiff in *Young* was not necessarily entitled to the accommodation that would have been required for her to safely exercise her bodily autonomy—in this instance, the right to bear a child. The following sections explore why such a hierarchy may be present in the Court’s reasoning.

### A. Autonomy in American Legal Thought

As an initial matter, it is important to define the terms “bodily autonomy” and “spiritual autonomy” as used throughout this article,<sup>73</sup> as well as to briefly trace the historical approach to autonomy in American jurisprudence. In the most basic terms, autonomy describes an individual’s ability to make choices about his or her own experience and identity, as well as the process of effectuating those choices.<sup>74</sup>

While various terms have been used to describe what I am referring to here as bodily autonomy—including bodily integrity, self-determination, and bodily freedom—I use the term bodily autonomy because it best expresses the right to be free from unwanted invasion of an individual’s physical body as well as the right for that individual to make independent decisions about their body—what to do with it and how to use it.<sup>75</sup> The same is true for spiritual autonomy, which, as the term is used in this paper, encompasses both an ability to be free from forced belief or religion as well as the affirmative right to believe, express, and practice

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<sup>73</sup> The term “autonomy” is defined herein not only to educate the uninitiated, but also because there is not a generally accepted definition of the term “autonomy” such that any one author can employ the term without further specifying their meaning. See generally Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U. L. REV. 1217, 1246 (2004) (detailing three competing conceptions of autonomy).

<sup>74</sup> See *Autonomy*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining autonomy as “[a]n individual’s capacity for self-determination.”). The concept of autonomy, including its history and value as a legal concept, has been extensively written about by numerous legal scholars. See generally Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992) (examining justifications for valuing autonomy).

<sup>75</sup> See Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L. REV. 1, 14 (2009) (describing bodily autonomy as a “fundamental right to control over one’s own body or its parts” which would “not only protect the body from unwanted intrusion, but also would protect one’s right to modify one’s body, choose to accept or reject medical treatment, and the like,” as well as the right to “contract one’s autonomy away”). But see Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, U. ILL. L. REV. 1059, 1063 (2014) (defining bodily integrity as the right to repel bodily intrusions and make affirmative decisions about the body, including the decision to use contraception, to choose a sexual partner, or to seek a particular medical treatment).



one's own conception of spiritual truth.<sup>76</sup> Thus, the concept of autonomy covers the range of rights that are associated with an individual's spiritual and physical self, the right to exclude unwanted interference and to seek desired actions and interactions.<sup>77</sup>

### i. Bodily Autonomy in the Law

The principle of bodily autonomy has deep roots in the American legal imagination,<sup>78</sup> which can be traced back to at least the founding of the United States, if not much earlier. The right to bodily autonomy is enshrined in common law tort concepts such as assault<sup>79</sup> and battery.<sup>80</sup> John Locke based many of his ideas about property rights on the original concept of ownership of the physical body.<sup>81</sup> And the concept of informed consent and the right to choose appropriate medical treatment are likewise rooted in a right to bodily autonomy.<sup>82</sup>

The principle of a right to bodily autonomy is also contained indirectly in the Constitution. For instance, the Fourth Amendment protects bodily autonomy by prohibiting unreasonable bodily searches as well as stating that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>83</sup> The Eighth Amendment likewise protects bodily autonomy from the power of the state by prohibiting the state from im-

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<sup>76</sup> See Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 142–149 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) (discussing the intertwined nature of spiritual belief and the actions associated with those beliefs).

<sup>77</sup> For an in-depth critique of using the concept of autonomy as the basis for individual rights in the human body, see Ramachandran, *supra* note 75 at 24–27.

<sup>78</sup> See generally Ramachandran, *supra* note 75 (discussing the importance of the right to bodily integrity in much of legal thought, as well as the different bases for recognizing such a right).

<sup>79</sup> 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND \*120 (defining assault as “an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him.”).

<sup>80</sup> *Id.* (defining battery as “the unlawful beating of another” and noting that “[t]he least touching of another’s person wilfully, or in anger, is battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner”).

<sup>81</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367 (2000) (“The image of the body as a form of property possessed by its ‘owner’ dates back at least to John Locke, whose influential theory of property derived all ownership from the property possessed by individuals in their own persons.”).

<sup>82</sup> See *Stuart v. Camnitz*, 774 F.3d 238, 251 (4th Cir. 2014) *cert. denied sub nom. Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015) (“Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has the information she needs to meaningfully consent to medical procedures.”) (internal quotations and citations omitted).

<sup>83</sup> U.S. CONST. amend. IV.

posing “excessive bail” or “cruel and unusual punishments.”<sup>84</sup> Others have recognized a right to bodily autonomy enshrined in the Thirteenth Amendment’s prohibition of slavery<sup>85</sup> or the Fourteenth Amendment’s guarantee of due process before the deprivation of “life, liberty or property.”<sup>86</sup> The U.S. Supreme Court’s jurisprudence on the right to privacy also situates a basic right to bodily autonomy in a collection of rights contained in the Constitution.<sup>87</sup>

Courts have also recognized a basic common law right to bodily autonomy. As early as 1891, the Court held in *Union Pacific Railway Co. v. Botsford*<sup>88</sup> that a federal court could not compel a tort plaintiff to undergo a medical examination to determine the extent of her injuries, stating that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>89</sup> Courts have upheld the legality of individuals’ rights to bodily autonomy, even when imposing on such a right may achieve the more morally defensible outcome.<sup>90</sup>

Despite the concept of bodily autonomy having a long and rich history in American jurisprudence, an absolute right to bodily autonomy is far from guaranteed under current legal frameworks.<sup>91</sup> The Court’s

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<sup>84</sup> U.S. CONST. amend. VIII.

<sup>85</sup> U.S. CONST. amend. XIII.

<sup>86</sup> U.S. CONST. amend. XIV.

<sup>87</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (“*Roe v. Wade*], however, may be seen not only as an exemplar of *Griswold v. Connecticut*] liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”).

<sup>88</sup> 141 U.S. 250 (1891).

<sup>89</sup> *Id.* at 251.

<sup>90</sup> In the case of *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Pa. Ct. Pl. 1978), the court found that the plaintiff could not legally compel the defendant to provide bone marrow, even though such a donation was likely the plaintiff’s only chance for survival. In the words of the court:

“Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another. Many societies adopt a contrary view, which has the individual existing to serve the society as a whole. In preserving such a society as we have, it is bound to happen that great moral conflicts will arise and will appear harsh in a given instance. In this case, the chancellor is being asked to force one member of society to undergo a medical procedure which would provide that part of that individual’s body would be removed from him and given to another so that the other could live. Morally, this decision rests with defendant, and, in the view of the court, the refusal of defendant is morally indefensible. For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.” *Id.*

<sup>91</sup> It is interesting to note that the language used to discuss bodily autonomy varies greatly with *which* bodies are being discussed. Not only gender, but race, class, physical ability and other characteristics have a large impact on the way that courts discuss bodies and an individual’s right to bodily

stance on the constitutional right of an individual to be free from state intrusions on their physical body is “murky and equivocal.”<sup>92</sup> Many of the most divisive political issues that courts have been asked to decide are related to this concept of when, how and why an individual’s physical autonomy can be undermined—including the “right to die” cases,<sup>93</sup> the right of the chronically ill to access experimental drug therapies,<sup>94</sup> and the right to abortion.<sup>95</sup> Thus, while bodily autonomy is arguably one of the fundamental principles of Western legal thought, the exact boundaries of a right to bodily autonomy are far from clear.<sup>96</sup>

## ii. Spiritual Autonomy in the Law

Spiritual autonomy has a similarly illustrious pedigree in American legal jurisprudence. Indeed, according to some scholars, the right to believe in the religion of one’s choice without state intervention “represents one of America’s great contributions to Western civilization.”<sup>97</sup> Thomas Jefferson called it “the most inalienable and sacred of all human rights.”<sup>98</sup> The belief in religious liberty grew in part out of the experience of religious persecution by the earliest European settlers<sup>99</sup> and was en-

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autonomy, going back to some of the earliest cases which discuss the bodies of those held as slaves. See *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1856) (finding that the African-American plaintiff was not a “citizen” for purposes of the Constitution, as they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race”); see also Borgmann, *supra* note 75, at 1065 (discussing slavery as the “flagrant exception” to the right to be free of bodily intrusions). Indeed, there are likely interesting parallels to be drawn between the historical expansion of *which* bodies get rights and the parallel constriction of courts’ understanding of the fundamental nature of bodily autonomy, although this is a topic for future scholarship.

<sup>92</sup> Borgmann, *supra* note 75, at 1061 (noting the “Court’s tendency to place bodily intrusions into compartments that focus too narrowly on the type of intrusion involved or the government’s reasons for intruding”); see also Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEXAS L. REV. 277 (2007) (noting that the Court has not consistently deferred to the state in constitutional cases regarding medical treatment decisions, but instead based its level of deference on “largely superficial determinations about what type of case is before it”).

<sup>93</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990), *Washington v. Glucksburg*, 521 U.S. 702 (1997).

<sup>94</sup> See, e.g., *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703 (D.C. Cir. 2007) (en banc) (addressing the right of the chronically ill to access experimental drugs).

<sup>95</sup> See *Roe v. Wade*, 410 U.S. 113 (1973), *holding modified by Casey*, 505 U.S. 833.

<sup>96</sup> See Rao, *supra* note 81, at 363 (“The law of the body is currently in a state of confusion and chaos. Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights.”).

<sup>97</sup> Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1560 (1989).

<sup>98</sup> Thomas Jefferson, *Freedom of Religion at the University of Virginia (Oct. 7, 1822)*, in *THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS* 957, 957–58 (Saul K. Padover ed., 1969).

<sup>99</sup> See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214 (1963) (“Nothing but the most telling of personal experiences in religious persecution suffered by our forebears . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage.”) (citations omitted); see also Scharffs, *supra* note 73, at 1230 (“The pursuit of religious liberty was one of the

shrined in the Constitution much more explicitly than the right to bodily autonomy in the form of the First Amendment,<sup>100</sup> which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>101</sup> Justice Goldberg articulated the underlying purpose of this constitutional mandate as “promot[ing] and assur[ing] the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”<sup>102</sup> Judges and scholars have often advocated that religious belief is entitled to special protection because it is distinct from other types of rights.<sup>103</sup>

The enduring primacy of the right to spiritual autonomy can also be witnessed through the passage of modern legislation such as the Religious Freedom Restoration Act of 1993 (RFRA).<sup>104</sup> RFRA reinstated a strict scrutiny test to determine whether a federal rule of general applicability nevertheless burdened the free exercise of religion. Its companion legislation, the Religious Land Use and Institutionalized Persons Act,<sup>105</sup> prohibits the federal government from burdening prisoners’ rights to practice religion and preventing land owners from using their property in ways that burden their religious beliefs and practices.

Just as in the case of bodily autonomy, the right to spiritual autonomy is seen by many as a fundamental right and a “cornerstone of a free society.”<sup>106</sup> It is likewise a right whose exact boundaries remain unclear; jurists have not been able to consistently delineate the exact boundary between the state’s mandated neutrality towards religion and its duty to afford religious belief and practice special protection.<sup>107</sup>

most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic.”).

<sup>100</sup> E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 486 (2009) (“The First Amendment contains a separate clause addressing the free exercise and nonestablishment of religion, thus distinguishing religious freedom from freedoms of speech, press, assembly, and petition.”).

<sup>101</sup> U.S. CONST. amend. I. See generally Adams & Emmerich, *supra* note 97, at 1560 (discussing the historical and philosophical basis for the establishment clause). However, using the First Amendment as a basis to assert that religious rights are afforded special protection is a problematic argument as well. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 572–73 (2006) (noting the tension inherent in the First Amendment’s mandate of religious neutrality alongside its apparent grant of special protection to religious practices).

<sup>102</sup> *Schempp*, 374 U.S. at 305 (1963) (Goldberg, J., concurring).

<sup>103</sup> See Koppelman, *supra* note 101, at 572 (noting judicial decisions and scholarly publications that argue for religion’s special and primary place in the American system of legal rights).

<sup>104</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

<sup>105</sup> 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

<sup>106</sup> See Adams & Emmerich, *supra* note 97, at 1598–1600 (discussing the views of religious liberty as “inalienable” and rooted in God’s law).

<sup>107</sup> See Koppelman, *supra* note 101, at 577–78, 589–90 (“The text [of the First Amendment] is vague, and the doctrine is confused.”).

## B. Spirit/Body Dualism

Human beings love a good dichotomy.<sup>108</sup> Whether the dichotomy describes moral concepts such as good and evil, natural concepts such as night and day, or artistic concepts such as highbrow and lowbrow, for much of the history of human thought, we have used dichotomies to explain and understand the world around us.<sup>109</sup> As Frances Olsen has noted:

Since the rise of classical liberal thought, and perhaps since the time of Plato, most of us have structured our thinking around a complex series of dualisms, or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/ emotion; culture/nature; power/sensitivity; objective/ subjective; abstract/contextualized; principled/personalized. These dualistic pairs divide things into contrasting spheres or polar opposites.<sup>110</sup>

Legal thought is not immune from this dualistic thinking, and legal scholars have explored the use of dualisms in contexts as varied as copyright law, criminal law, tax law, tort law, and property law.<sup>111</sup>

One of the oldest dichotomies in Western thought is that between body and spirit.<sup>112</sup> This dichotomy divides the self into two distinct and separable elements—the thinking, feeling soul or mind, and the physical, natural body.<sup>113</sup> While this dichotomy is most famously associated with

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<sup>108</sup> PAUL BLOOM, *DESCARTES' BABY: HOW THE SCIENCE OF CHILD DEVELOPMENT EXPLAINS WHAT MAKES US HUMAN* xii (2004) (“We can explain much of what makes us human by recognizing that we are natural Cartesians—dualistic thinking comes naturally to us.”).

<sup>109</sup> SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 2 (1970) (“The division Yin and Yang pervades all culture, history, economics, nature itself.”).

<sup>110</sup> Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453, 453 (David Kairys, ed., 1990).

<sup>111</sup> See generally DOV FOX & Alex Stein, *Dualism and Doctrine*, 90 *IND. L.J.* 975, 977 & n.15 (2015) (discussing the presence of dualism in legal doctrines and collecting legal scholarship which examines the role of dualism in particular fields of legal thought).

<sup>112</sup> I use the word spirit here for sake of consistency, but could just have easily substituted other words, such as “soul,” “mind,” “intellect,” or “ego.” Each of these words encapsulates the idea of the non-physical element or essence of an individual person.

<sup>113</sup> See Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 *CARDOZO J.L. & GENDER* 234 & n.154 (2005) (noting that “[a]ccording to th[e] traditional conception the self is not a unified whole but instead is comprised of two parts; a soul (or mind) and a body” and citing philosophers such as Kant, Aristotle and Plato’s who shared this notion).

seventeenth-century French philosopher Rene Descartes,<sup>114</sup> it is clearly articulated much earlier—at least as early as ancient Greece.<sup>115</sup>

Legal thinkers have been heavily influenced by the concept of the fundamental separateness of the body and spirit or mind.<sup>116</sup> This distinction has been used to differentiate between the unconstitutional compulsion of the criminally accused's thoughts or memories and the constitutional compulsion of bodily, physical evidence, such as blood samples.<sup>117</sup> As Adam Benforado stated in the introductory text of his article on embodied cognition:

There is the body. There is the mind. They are separate and distinct. This is the language of the law and the core of our culture. This is the discourse of Western existence. *Mens rea* and *actus reus*; mind over matter; body and soul.<sup>118</sup>

Like many other dichotomies, the split between spirit and body is not an equal one; the spirit is elevated over the body.<sup>119</sup> Humans have long believed that it is the human soul or spirit that elevates them above animals<sup>120</sup> and connects them to a higher power or supreme being.<sup>121</sup> Our souls are, in essence, what make us human.<sup>122</sup> On the other hand, the

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<sup>114</sup> “Cartesian dualism” is the philosophical theory that the mind and body are two distinct ontological entities. See RENE DESCARTES, *DISCOURSE ON METHOD AND MEDITATIONS* 112 (Dover Pubs. 2003) (“Although . . . I possess a body with which I am very intimately conjoined . . . it is certain that this I [that is to say, my soul by which I am what I am], is entirely and absolutely distinct from my body, and can exist without it.”); Marya Torrez, *Combating Reproductive Oppression: Why Reproductive Justice Cannot Stop at the Species Border*, 20 *CARDOZO J.L. & GENDER* 265, 270–71 (2014) (discussing Cartesian dualism and its connection to both the human/animal dichotomy and the male/female dichotomy).

<sup>115</sup> See Elizabeth Spelman, *Woman as Body: Ancient and Contemporary Views*, 8 *FEMINIST STUDIES* 109, 111 (1982) (discussing the use of the mind-body dichotomy in Plato’s *Symposium* and the *Apology*).

<sup>116</sup> See Fox & Stein, *supra* note 111, at 979 (noting the “pervasiveness” in the law of the division between mind and body that “much of our doctrine . . . treats mind and body as if they work and matter in critically different ways”).

<sup>117</sup> See *id.* at 993–97 (discussing *Schmerber v. California*, 384 U.S. 757 (1966) and the Court’s distinction between protection for mental compulsion as opposed to physical compulsion).

<sup>118</sup> Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 *ST. LOUIS U. L.J.* 1185, 1187 (2010).

<sup>119</sup> See Matambanadzo, *supra* note 113, at 234 (noting that the understanding of a mind/soul distinction “[t]raditionally . . . privileges the soul (mind) over the body, claiming that the soul constitutes the ‘real’ self, and at best, the body merely houses the soul. The ‘real’ self is considered separate from the needs and peculiarities of the body, and some believe that the body often hinders the progress and development of the soul.”).

<sup>120</sup> Letter from René Descartes to Marquess of Newcastle, (Nov. 23, 1646) in DESCARTES: *PHILOSOPHICAL LETTERS* (Anthony Kenny ed. & trans., Oxford: the Clarendon Press) (contrasting rational and intelligent man with animals, which he argued were controlled by instinct and thus more akin to machines).

<sup>121</sup> See Matambanadzo, *supra* note 113, at 234 n.154 (noting that mind-body dualism “is also an aspect of Judeo Christianity, where freedom from the body is sought in order to achieve grace or enlightenment for the soul”).

<sup>122</sup> BLOOM, *supra* note 108, at 190–91 (“To my knowledge, nobody has systematically asked people about the more general premise of a body/soul duality . . . . Do you believe that you are (A) a

body is often written about negatively, as a hindrance to the soul.<sup>123</sup> As Bordo writes: “[t]he body as animal, as appetite, as deceiver, as prison of the soul and confounder of its projects: these are common images within Western philosophy.”<sup>124</sup> The American legal system, too, explicitly privileges rights to spiritual belief in some instances where physical autonomy is afforded no such privilege. For instance, both Congress and courts have long held that religious or spiritual objections to war are sufficient to excuse compulsory military service, whereas a physical concern for the safety of the body is not seen as a sufficient reason to avoid service.<sup>125</sup>

Indeed, throughout history this dichotomy between spirit and body has been utilized to divide people into two groups—those with moral or spiritual worth and those that are “just bodies” and thus not entitled to the same protection or care—often to disastrous effect.<sup>126</sup> Various groups of “disfavored” people have been associated with the physical body generally or with the parts of the physical body that are considered undesirable. As Martha Nussbaum articulates:

[T]hroughout history, certain disgust properties—sliminess, bad smell, stickiness, decay, foulness—have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior human status. Jews, women, homosexuals, untouchables, lower-class people—all these are imagined as tainted by the dirt of the body.<sup>127</sup>

This tendency is also apparent in the hyper-sexualization of black bodies, which serves the dual purpose of associating the black body with an

machine or (B) an immaterial soul? (B) is the aesthetically appealing choice . . . . We do not feel as if we *are* bodies; we feel as if we *occupy* them. Some might wish to answer ‘all of the above,’ self-identifying as both a body and as a soul. But only a small minority would choose just (A).”

<sup>123</sup> See Matambanadzo, *supra* note 113, at 234–35 (discussing how in the soul/body dichotomy “[t]he body is merely a hindrance as it clouds the soul’s judgments with needs and desires”).

<sup>124</sup> SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 3 (1993).

<sup>125</sup> See Koppelman, *supra* note 101, at 582 (discussing *Welsh v. United States*, 398 U.S. 333 (1970) and *United States v. Seeger*, 380 U.S. 163 (1965), and concluding that “[t]he Court avoided privileging religious over nonreligious claims, but some privileging was going on. The argument should by now be familiar. Those who objected to going to war for family reasons, or even just because they did not want to risk getting hurt, had no constitutional claim at all. Once one has decided to give exemptions to some but not all claims, one is already privileging.”)

<sup>126</sup> See BLOOM, *supra* note 108, at 177 (“Disgust is a response to people’s bodies, not to their souls. If you see people as souls, they have moral worth: You can hate them and hold them responsible; you can view them as evil; you can love them and forgive them, and see them as blessed. They fall within the moral circle. But if you see them solely as bodies, they lose any moral weight. Empathy does not extend to them.”).

<sup>127</sup> Martha Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies and the Law*, in *THE PASSIONS OF LAW* 19, 29 (Susan Bandes, ed. 1999).

animal-like physicality and attempting to justify the oppression of black people through such association.<sup>128</sup>

### C. Gendered Dualism

Many would situate this tendency to break the world into two opposite but complementary concepts on the supposedly binary nature of the sexes,<sup>129</sup> particularly the difference between the male and female roles in the reproductive process.<sup>130</sup> As the two physical sexes are such a large part of the human experience, the argument goes, we are therefore more likely to view the world as full of similar binaries.<sup>131</sup>

Western legal thought, as well, is based on the idea of two—and only two—dichotomous sexes.<sup>132</sup> Sex has historically been used as the primary determinant for many legal rights—including those of political participation<sup>133</sup> and property ownership<sup>134</sup>—and continues to form the

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<sup>128</sup> See BORDO, *supra* note 124, at 9–10 (discussing the racist images and ideology that constructs black women and men as more “bodily” than white people and how such a construction has been used to oppress people of color and justify slavery).

<sup>129</sup> Olsen, *supra* note 110, at 453 (1990) (“The division between male and female has been crucial to this dualistic system of thought. Men have identified themselves with one side of the dualisms: rational, active, thought, reason, culture, power, objective, abstract, principled. They have projected the other side upon women: irrational, passive, feeling, emotion, nature, sensitivity, subjective, contextualized, personalized.”). I say “supposedly” binary nature of the sexes because, as we now understand, physical sex is not a perfect binary, but instead a rich continuum in which a large portion of people are not entirely physically male or entirely physically female. This nuanced understanding of physical sex is relatively contemporary and dependent at least in part in the ability of modern medicine to reveal markers of physical sex that were invisible to us before. See MERRY E. WIESNER-HANKS, *GENDER IN HISTORY: GLOBAL PERSPECTIVES* 13 (2d. ed. 2011) (“Despite the presence of third and fourth genders, intersexed people, and transgendered individuals, most of the world’s cultures have a system of two main genders in which there are enormous differences between what it means to be a man and what it means to be a woman”). Because of the nature of inquiry in this paper, I assume the binary nature of physical sex. This is not to say that I agree with such a binary or think it is correct, but only that it continues to inform the majority of Western thought, including legal thought. See Matambanadzo, *supra* note 113, at 213 (“The dichotomous sexual tradition constructs the Anglo-American legal landscape . . . [M]any legal distinctions depend on there being two and only two sexes.”).

<sup>130</sup> Firestone, *supra* note 109, at 8 (stating that “biology itself—procreation—is at the origin of the dualism” and that the reproductive functions of men and women are inherently unequal, setting up the domination of one sex by the other).

<sup>131</sup> Also, the prevalence of binaries in nature (sun/moon) has led some cultures to perceive these binaries as divinely created, and thus to also see divine intent in the male/female dichotomy. See WIESNER-HANKS, *supra* note 129, at 13. (“Some of these dichotomies, such as sun/moon and light/dark, are naturally occurring and in many cultures viewed as divinely created . . .”).

<sup>132</sup> See Matambanadzo, *supra* note 113, at 218 (“Anglo-American law constitutes/is constituted by a conception of legal sex that assumes that sex is gendered, dichotomous, easily determined and fixed.”).

<sup>133</sup> See U.S. CONST. amend. XIX (granting women the right to vote).

<sup>134</sup> See Elizabeth Cady Stanton, *Declaration of Sentiments* (1848) (“He has taken from her all right in property, even to the wages she earns.”).



basis for certain legal rights and obligations even today.<sup>135</sup> The legal system, as many scholars have persuasively argued, is simply not equipped to engage with individuals whose sex is not easily understood as either male or female.<sup>136</sup>

The primacy of the male/female dichotomy, moreover, can also be witnessed through its incorporation into other dichotomies.<sup>137</sup> Even dichotomies that don't have any obvious connection to gender are nevertheless gendered—for instance, the sun and the moon.<sup>138</sup> Thus, a “natural” division between male and female becomes the basis for cultural divisions that are equally gendered.<sup>139</sup> Take, for instance, the public/private dichotomy. Women are traditionally associated with the private world and as a result have historically been expected to focus on domestic and family life. Men have traditionally been associated with the public world and as a result have historically participated more actively in the world outside the home, including in professional and political realms.<sup>140</sup> Beyond our historical and cultural associations, however, there is not anything obviously connecting the female body with one sphere or the other, and the same can be said for the male body. However, the connection between women/private and men/public works both ways; it both encourages certain behaviors in men and women and works to gender particular spaces. The home becomes associated with feminine characteristics such as warmth and care, while the public square becomes associated with masculine characteristics such as ambition and independence. In this way, gender is imprinted onto other, not-obviously

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<sup>135</sup> See Military Selective Service Act, 50 U.S.C. § 3802 (2012) (“Except as otherwise provided in this chapter . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.”).

<sup>136</sup> See generally Matambanadzo, *supra* note 129.

<sup>137</sup> See WIESNER-HANKS, *supra* note 129, at 13 (“This dualistic gender system has often been associated with other dichotomies, such as body/spirit, public/private, nature/culture, light/dark, up/down, outside/inside, yin/yang, right/left, [and] sun/moon . . .”).

<sup>138</sup> *Id.* (“This dichotomy, along with others with which it was associated, has generally been viewed as a hierarchy, with the male linked with the stronger and more positive element in other pairs (public, culture, light, right, sun, etc.) and the female with the weaker and more negative one (private, nature, dark, left, moon, etc).”).

<sup>139</sup> FIRESTONE, *supra* note 109, at 175 (noting that the biological dualism of the sexes for purposes of reproduction is then transferred into other cultural divisions, such as the association of men with the sciences and women with the arts).

<sup>140</sup> See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”).

gendered dichotomies, and those dichotomies, in turn, become associated with gender.<sup>141</sup>

The public/private divide is only one of a large list of dichotomies that is gendered such that women are associated with one half of the dichotomy and men the other. Predictably, the less-favored half of the dichotomy is the one generally associated with femaleness.<sup>142</sup> Women are the dark to men's light, the feminine passive to the masculine active. This is not simply "a matter of men taking the best for themselves and assigning the rest to women," but instead, "perceiving the 'worst' as being whatever women are perceived to be."<sup>143</sup> As a result, the gendered dichotomies are not just a division of the world into two, complementary halves, but instead make up a hierarchy in which the thing associated with the masculine half is exalted over the thing associated with the female half.<sup>144</sup>

Thus, the human tendency towards dualistic thinking that is either explicitly or implicitly gendered often reinforces existing hierarchies, which place feminine characteristics and female bodies in subordinate positions to male characteristics and bodies.

#### D. Spirit/Body, Male/Female

The dichotomy between body and spirit described above is also understood as deeply gendered.<sup>145</sup> Under this worldview, women are associated with the physical body while men are associated with the non-

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<sup>141</sup> See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* 69 (H.M. Parshley ed. and trans., Vintage Books 1989) ("Man never thinks of himself without thinking of the Other; he views the world under the sign of duality which is not in the first place sexual in character.").

<sup>142</sup> See Littleton, *supra* note 45, at 1280 ("A history of almost exclusive male occupation of dominant cultural discourse has left us with more than incompleteness and bias. It has also created a self-referencing system by which those thing culturally defined as 'male' are more highly valued than those identified as 'female,' even when they appear to have little or nothing to do with either biological sex.").

<sup>143</sup> *Id.*

<sup>144</sup> See Olsen, *supra* note 110, at 454 ("The system of dualisms is hierarchized. The dualisms do not just divide the world between two terms; the two terms are arranged in a hierarchical order. Just as men have traditionally dominated and defined women, one side of the dualism dominates and defines the other. Irrational is considered the absence of rational; passive is the failure of active; thought is more important than feeling; reason takes precedence over emotion.").

<sup>145</sup> See Matambanadzo, *supra* note 129, at 234 ("Since dualism's introduction into Western Civilization, its anti-somatic attitudes have often been misogynistic. Western thought has associated women with the body and men with the soul.").

physical spirit or soul.<sup>146</sup> As in other gendered dichotomies, the female half of the dichotomy is assigned the less favored position—the body.<sup>147</sup>

This gendered dichotomy between body and soul is discussed in works by both Plato<sup>148</sup> and Aristotle.<sup>149</sup> It is woven through literature both ancient<sup>150</sup> and modern.<sup>151</sup> Early medical understandings of the reproductive process attributed the “spark of life” exclusively to the male sperm, whereas the female body was merely the physical matter from which the fetus was created.<sup>152</sup> Even with a modern, medical understanding of reproduction, women’s particular role in reproduction continues to contribute to, and support, the concept of a gendered mind/spirit dichotomy.<sup>153</sup> Women’s association with the physical is also, in part, one of necessity. The physical needs of the body—food, care, comfort—must be attended to by someone or some group of people. By associating women with these base physical needs, men are freed from the necessity of attending to such matters and can therefore focus on matters of the mind and spirit.<sup>154</sup>

Religious beliefs have also supported the concept of a gendered spirit/body dichotomy. Scholars of Christianity have understood the story of Adam and Eve to embody the soul/body hierarchy, as “Adam and Eve present both an ideal and a counter-ideal” and it is “the weakness of Eve

<sup>146</sup> See BORDO, *supra* note 124, at 11 (“This duality of active spirit/passive body is also gendered, and it has been one of the most historically powerful of the dualities that inform Western ideologies of gender.”); Adam Thurschwell, *Radical Feminist Liberalism at the Heart of Freedom: Feminism, Sex, & Equality*, by Drucilla Cornell (Princeton University Press 1998), 51 *RUTGERS L. REV.* 745, 765 (1999) (“The hierarchical dichotomy between ‘mind’ and ‘body’ (like that between ‘culture’ and ‘nature’) has long been associated with the gender hierarchy between ‘man’ and ‘woman.’”).

<sup>147</sup> Alison M. Jaggar & Susan R. Bordo, *Introduction to GENDER/BODY/KNOWLEDGE* 4 (Alison M. Jaggar & Susan R. Bordo, eds., 1989) (“The body, notoriously and ubiquitously associated with the female, regularly has been cast, from Plato to Descartes to modern positivism, as the chief enemy of objectivity.”).

<sup>148</sup> See generally Spelman, *supra* note 115, at 109–31 (discussing the gendered mind-body dichotomy and its use in Plato’s *Symposium* and *The Apology*).

<sup>149</sup> SARAH E. JOHNSON, *STAGING WOMEN AND THE SOUL-BODY DYNAMIC IN EARLY MODERN ENGLAND* 8 (2014) (“Both Platonic and Aristotelian schools of thought hierarchize the components of soul and body in a way that corresponds and contributes to early modern notions of gender hierarchy.”).

<sup>150</sup> See generally *id.* at 1–26 (discussing the “traditional gendering of the rational soul as masculine and the body as feminine” in early modern English literature).

<sup>151</sup> ROSALIE OSMOND, *MUTUAL ACCUSATION: SEVENTEENTH-CENTURY BODY AND SOUL DIALOGUES IN THEIR LITERARY AND THEOLOGICAL CONTEXT* 157–61 (1990).

<sup>152</sup> EVE KELLER, *GENERATING BODIES AND GENDERED SELVES: THE RHETORIC OF REPRODUCTION IN EARLY MODERN ENGLAND* 112 (2006).

<sup>153</sup> See generally BORDO, *supra* note 124, at 11–14, 71–97 (discussing how women’s role in reproduction often causes society to view them only as “bodies,” not as embodied persons); FIRESTONE, *supra* note 109, at 8 (discussing that “biology itself—procreation—is at the origin of the dualism” and that the reproductive functions of men and women are inherently unequal, setting up the domination of one sex by the other).

<sup>154</sup> See ROBIN WEST, *CARING FOR JUSTICE* 112 (1997) (“Someone must tend to the body’s very real, earthbound, and contingent needs if the mind is to be freed for transcendental and political deliberations. So long as women disproportionately tend to those earthly, bodily needs, they are that much less equipped for the duties of citizenship—as citizenship has been traditionally understood.”).

. . . that is analogous to the flesh.”<sup>155</sup> This take on the Genesis story has sometimes been explicitly taught by Christian leaders.<sup>156</sup>

This association of women with the natural, physical body has been discussed from the earliest days of the feminist movement.<sup>157</sup> Feminists disagree sharply over whether such a dichotomy has any basis in reality, and whether women’s association with the natural and physical is inherently harmful to the cause of women’s equality or could be viewed as a source of special power.<sup>158</sup> But whether or not this association *could be* turned into something positive for women, it is clear that up to this point in history that it has primarily served to cement women’s inferiority.<sup>159</sup> As persuasively stated by Susan Bordo:

The cost of such projections to women is obvious. For if, whatever the specific historical content of the duality, *the body* is the negative term, and if woman *is* the body, then women *are* that negativity, whatever it may be: distraction from knowledge, seduction away from God, capitulation to sexual desire, violence or aggression, failure of will, even death.<sup>160</sup>

Thus, the Court’s use of a hierarchy which preferences spiritual autonomy over bodily autonomy—even if it is applied evenly to all people—is deeply problematic because such a hierarchy is inherently gendered.<sup>161</sup> The hierarchy is inherently gendered for a number of inter-

<sup>155</sup> OSMOND, *supra* note 151, at 158.

<sup>156</sup> See, e.g., JEREMY TAYLOR, XXV SERMONS PREACHED AT GOLDEN GROVE: BEING FOR THE WINTER HALF-YEAR, BEGINNING ON ADVENT-SUNDAY, UNTIL WHIT-SUNDAY 172 (1673) (“The dominion of a man over his Wife is no other than as the Soul rules the body . . .”).

<sup>157</sup> See generally DE BEAUVOIR, *supra* note 141 at 37 (discussing, in part, how “the body of woman is one of the essential elements in her situation in the world”).

<sup>158</sup> See generally Ynestra King, *Healing the Wounds: Feminism, Ecology, and Nature/Culture Dualism*, in GENDER/BODY/KNOWLEDGE, *supra* note 147, at 115, 115–134 (discussing differing reactions to the natural/cultural dichotomy by liberal feminists, cultural feminists, radical rational feminists, ecofeminists, socialist feminists, the women’s spirituality movement, and ecofeminism).

<sup>159</sup> G. Kaplan and Lesley J. Rogers, *The definition of male and female: Biological reductionism and the sanctions of normality*, in FEMINIST KNOWLEDGE, CRITIQUE AND CONSTRUCT 209 (S. Gunew, ed., 1990) (“Feminine virtues have been celebrated by men for thousands of years—without much evidence of gaining women any more rights or freedoms”). Similar patterns are evident in the association and subsequent degradation of people of color with the physical body. See BORDO, *supra* note 124, at 9 (“[R]acist ideology and imagery that construct non-European ‘races’ as ‘primitive,’ ‘savage,’ sexually animalistic, and indeed more *bodily* than the white ‘races’ extends to black women as well as black men.”); CHRIS SHILLING, *THE BODY AND SOCIAL THEORY* 49 (2d ed. 2003) (“[B]lack peoples represented ‘dangerous others’ and were viewed as uncivilized, uncontrollable sexual and physical beings who constituted a threat to the moral order of Western civilization.”). This association was used to bolster the moral case for slavery. *Id.* at 51 (indicating that a focus on the black body was widely used as a justification for slavery).

<sup>160</sup> BORDO, *supra* note 124, at 5 (emphasis in original).

<sup>161</sup> This argument—that the Court’s use of a hierarchy which preferences spiritual autonomy over bodily autonomy is inherently gendered—should not be confused with an argument that the Court’s opinion in either *Young* or *Abercrombie* are themselves sexist. After all, the plaintiffs in both cases

related reasons. First, as women have traditionally been associated with the physical body while men have been associated with the mind or spirit, any hierarchy that places one type of autonomy over the other recreates the hierarchy between men and women generally by placing the thing associated with femaleness (the body) in an inferior position to the thing associated with maleness (the spirit).<sup>162</sup> Such a hierarchy necessarily brings along with it a parallel understanding of a hierarchy that places maleness over femaleness.<sup>163</sup> Moreover, women are more likely to experience threats to their bodily autonomy because of their unique role in the reproductive process and their historical subjugation as a sex—thus making robust legal protections for bodily autonomy inherently more valuable to women.<sup>164</sup>

Although there may be compelling reasons for the law to preference spiritual autonomy, it should not go unnoticed that such a system recreates an already existing system of gender privilege. Such an unexamined reinforcement of existing systems of privilege runs the risk of unintentionally perpetuating a hierarchy between the advantaged and disadvantaged group—even when such groups are not obviously implicated on the face of legal principles.

### E. Women's Investment in Bodily Autonomy

The harm created through the use of a hierarchy which preferences legal rights to spiritual autonomy over legal rights to bodily autonomy is not merely a philosophical harm, however. As this section explores, such a hierarchy is problematic for women for reasons more immediate and practical.<sup>165</sup> Specifically, women's greater investment in legal protec-

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were women, and both plaintiffs ultimately prevailed. Instead, this argument is based in a deeper critique of the fundamentally gendered understanding of which rights are worthy of protection and why.

<sup>162</sup> See BORDO, *supra* note 124, at 11 (“This duality of active spirit/passive body is also gendered, and it has been one of the most historically powerful of the dualities that inform Western ideologies of gender.”).

<sup>163</sup> The recognition of an underlying hierarchy in legal thought which preferences rights to spiritual autonomy over rights to physical autonomy in no way undermined the fact that the rights to spiritual autonomy are often inappropriately curtailed by private and state actors, as well. Of course, there are countless examples of religious oppression and discrimination that have occurred throughout the course of American history. The presence of this discrimination against religious believers does not undermine that, taken as a whole, rights to spiritual autonomy are still afforded a more favored position than rights to physical autonomy in much of legal thought and precedent.

<sup>164</sup> See WEST, *supra* note 154, at 102 (“When a woman suffers violence or threats of violence from an intimate she loses not only her sense of security against physical assault, but also her privacy—both the privacy of her body and the privacy of the dwelling in which the abuse occurs.”).

<sup>165</sup> See Littleton, *supra* note 45, at 1316 (attributing “[t]he inequality of women in their lived-out experience” to the infringement of “having everything that is associated with women defined as less valuable, less necessary to consider, less important.”).

tions for bodily autonomy guarantee that they experience greater harm when such protections are absent or subordinated to other types of rights.

How can this be when men, too, would benefit from robust protection for bodily autonomy? Indeed, all people share an interest in a right to bodily autonomy. Many would describe bodily autonomy as a fundamental human right—at the very heart of human dignity. The ability for an individual to be free from unwanted physical intrusions, as well as the freedom to use their body to move through the world in the way they choose, is vitally important to both men and women.

Marginalized individuals, however, have an even more vested interest in the preservation of the importance of bodily autonomy in legal systems because absent this protection such people are more in danger of experiencing violations of their bodily autonomy. It could thus be persuasively argued that a paramount right to bodily autonomy is equally important to every individual whose body differs in any meaningful respect from those bodies that are societally favored—i.e., any bodies which are not white, male, cisgender, able-bodied, etc.<sup>166</sup> Those with “favored” bodies need legal protections much less often because, to a large extent, the law assumes the presence of these types of bodies and their centrality. For instance, laws regarding the housing and treatment of prisoners assume cisgender bodies and may have negative consequences for transgender prisoners whose bodies do not conform to society’s expectation for their gender.<sup>167</sup> Likewise, it is obvious that laws mandating that public spaces be accessible to those in wheelchairs are more vital to individuals who require wheelchairs than those individuals who are not in wheelchairs.<sup>168</sup> Thus, laws that protect or promote bodily autonomy are inherently more important to those with disfavored bodies because absent these laws, these individuals encounter additional obstacles that those with favored bodies need not contend with.

The autonomy of women’s bodies is more consistently undermined than the bodies of men.<sup>169</sup> Whether because of the realities of human

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<sup>166</sup> See SHILLING, *supra* note 159 at 53 (“Historically, the practice of equating an individual’s worth with their body has favoured dominant groups in society. Locating the causes of social inequalities in the unchanging, natural, biological body serves to make protests against the status quo appear both futile and misguided.”).

<sup>167</sup> Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 176–77 (2006) (“Upon incarceration, transgender individuals find themselves at the mercy of a hyper-gendered system: prisoners are sorted into sex-segregated facilities where traditional gender roles are strictly enforced.”).

<sup>168</sup> See Koppelman, *supra* note 101 at 598 (“Primary goods have different value for different people. The same bundle of goods will give much more freedom to a healthy young man than it will to a pregnant woman or a paraplegic.”).

<sup>169</sup> Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUMAN RIGHTS QUARTERLY 486, 486–92 (1990) (detailing the various assaults to women’s bodily autonomy worldwide).

biology and reproduction, the prevalence of gender inequality, or the practice of certain religious or cultural traditions, across history women have had less ability to control their physical persons.<sup>170</sup> Further, even those women who have “disfavored” bodies in ways unconnected to their sex must often bear the double weight of these characteristics combined with their status as women.<sup>171</sup> For example, many state statutes mandate that a physically incompetent pregnant woman be kept alive for purposes of protecting fetal life, even when her previously expressed wishes, the wishes of her family or medical power of attorney, or even her healthcare provide otherwise.<sup>172</sup> Thus, while laws protecting individuals’ right to bodily autonomy are critical for every person, these laws are even more critical for women because women’s right to bodily autonomy is more likely to be challenged and undermined—even while it may be challenged on the basis of other identities in overlapping or intersecting ways.

The following sections will examine several ways in which women are uniquely dependent on robust legal protections for bodily autonomy and explore how laws protecting such autonomy correlate to gender equality.

## i. Reproductive Capacity

Legal protections for bodily autonomy are particularly important to women because of women’s unique role in the reproductive process,<sup>173</sup> particularly the demands of pregnancy and childbirth.<sup>174</sup> A woman’s

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<sup>170</sup> *Id.*

<sup>171</sup> Such an intersectional approach, which takes into account the overlapping systems of oppression and how such intersecting identities change the lived experience of an individual, is obviously a worthwhile and necessary project. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). This paper focuses on just aspect of this phenomenon—sex—in order to bring to light the fundamental incorrectness of the soul/body dichotomy and the inappropriateness of its use to determine rights for particular plaintiffs. This focus is entirely the result of time and space constraints, and indeed, the need for a more robust intersectional analysis in future work analyzing the use of such dichotomies is clear.

<sup>172</sup> Katherine A. Taylor, *Compelling Pregnancy at Death’s Door*, 7 COLUM. J. GENDER & L. 85, 93 (1997) (“[T]he advance directive statutes of thirty-six states require that life-prolonging medical care not be withheld or withdrawn from an incompetent pregnant woman, regardless of her own wishes previously expressed in a living will, or, in many states, the wishes of her designated proxy decisionmaker.”).

<sup>173</sup> See WEST, *supra* note 154, at 127 (“Surely the most obvious and perhaps the most significant difference between women and men is the different roles the two parents play in the biology of reproductions. The mother’s biological role in reproduction minimally involves pregnancy, childbirth, and lactation, while the father’s is limited to ejaculation. One consequence of that baseline difference is that women, unlike men, invest a good bit *more* of their material, physical, bodily resources into the development of fetal life.”).

<sup>174</sup> See FIRESTONE, *supra* note 109, at 8 (“[W]omen throughout history before the advent of birth control were at the continual mercy of their biology—menstruation, menopause, and “female ills,”

ability to make decisions about what happens to her body in the childbearing process clearly implicates her right to bodily autonomy; such ability represents a temporal subset of her right to make decisions about her physical body throughout her life. Legal scholars have recognized this fact and tied a woman's right to decide when and how to bear children as fundamental to women's legal autonomy.<sup>175</sup> The U.S. Supreme Court has also anchored the right to abort a pregnancy to "a concept of personal autonomy derived from the due process guarantee."<sup>176</sup>

Despite the supposedly fundamental nature of the right to physical autonomy, pregnancy is a time period in which the legal protections for bodily autonomy are consistently undermined or entirely absent.<sup>177</sup> Historically, women's role in the reproductive process was an accepted legal basis for treating them entirely different than men.<sup>178</sup> And even now, a woman's right to physical autonomy during pregnancy and childbirth is a constantly shifting right, and one that is often dependent on the particular circumstances of her pregnancy, her socioeconomic status, and her geographic location.<sup>179</sup> Pregnant women have been forced to undergo major surgery<sup>180</sup> and receive blood transfusions against their wishes,<sup>181</sup> have been criminally punished for "harm" inflicted on a fetus they were carry-

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constant painful childbirth, wetnursing and care of infants, all of which made them dependent on males (whether brother, father, husband, lover, or clan, government, community-at-large) for physical survival.").

<sup>175</sup> See April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 726 (2004) ("Roe v. Wade is perhaps the most important case decided by the United States Supreme Court furthering women's autonomy, equality, and hence citizenship, in the twentieth century."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984) ("[R]estricting access to abortion dramatically impairs the woman's capacity for individual self-determination.").

<sup>176</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 380-81 (1985).

<sup>177</sup> See, e.g., Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 Harv. Women's L.J. 9 (1987).

<sup>178</sup> See Williams, *supra* note 43, at 333 ("From the beginnings of our Republic until well into the twentieth century, the legal rights and duties of men and women were pervasively and significantly different from each other. The legal distinctions flowed from the central premise that men and women were destined for separate social roles because of innate differences between them, most centrally women's reproductive function.").

<sup>179</sup> Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 592 (2010) (discussing the class-based effect of Supreme Court's ruling in *UAW v. Johnson Controls, Inc.*).

<sup>180</sup> See *Jefferson v. Griffin Spalding Cty. Hosp.*, 274 S.E.2d 457 (Ga. 1981) (per curiam) (affirming a court order compelling caesarian section when physicians testified that vaginal delivery posed a 50% chance of the mother's death and a 99% chance of fetal death, as compared to an almost 100% chance that both would survive with surgery); *In re Madyun*, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. 1986) (requiring caesarian surgery to be performed for the benefit of the fetus); *In re A.C.*, 573 A.2d 1235, \*57-72 (D.C. 1990).

<sup>181</sup> See *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (D.C. 1964) (ordering pregnant woman to undergo blood transfusion over her religious objections to preserve the fetus' life); *In re Jamaica Hosp.*, 491 N.Y.S. 2d 898 (Sup. Ct. 1985) (same).



ing because of their choices during pregnancy,<sup>182</sup> and have been forced to undergo transvaginal sonograms before gaining access to legal abortion.<sup>183</sup>

Women's reproductive capacity doesn't merely serve to undermine women's bodily autonomy only when that capacity is utilized. The state has a long history of impinging on the bodily autonomy of women because of the potential of women's reproduction. Starting with the cases which approved of the use of forced sterilization of women because of "feeble-mindedness"<sup>184</sup> all the way through modern day practices of forcing women to be sterilized before receiving government assistance<sup>185</sup> or as part of criminal plea deals,<sup>186</sup> women's right to control their own bodies has been undermined because of their reproductive capacity whether that capacity is currently being utilized or not.

It is not the case, however, that courts permit the physical autonomy of parents to be undermined—regardless of their sex—for the sake of their current or potential children. Despite the fact that courts regularly undermine women's bodily autonomy because of women's role in the reproductive process, bodily autonomy remains sacrosanct when a challenge to such autonomy would equally affect men and women. For instance, there is no legal duty for a parent to provide life-saving blood or bone marrow to a child because such a requirement would undermine the physical autonomy of the parent.<sup>187</sup> This is in contrast to the simple fact that many abortion restrictions have the exact same effect on a woman's physical autonomy by forcing her to carry an unwanted pregnancy to term.<sup>188</sup>

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<sup>182</sup> Nina Martin, *This Law is Supposed to Protect Babies, But It's Putting Their Moms Behind Bars*, MOTHER JONES (Sept. 23, 2015), <http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war> [<http://perma.cc/EC2M-6TS5>] (discussing state laws which prosecute mothers for child endangerment as a result of prenatal drug use).

<sup>183</sup> See Borgmann, *supra* note 75, at 1122–27 (discussing the increasing use of forced ultrasound examinations on women seeking abortions).

<sup>184</sup> See *Buck v. Bell*, 274 U.S. 200, 205 (1927) (ruling that state law permitting compulsory sterilization of the intellectually disabled did not violate Due Process).

<sup>185</sup> See Pamela D. Bridgewater, *Reproductive Freedom As Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 404 (2000) (discussing the mandated use of Norplant for women in public assistance programs).

<sup>186</sup> See Stacy Barchenger, *A dead baby, an ill mother and a DA's intervention: Sterilization as Bargaining Chip in Child Neglect Case Prompts District Attorney to Take Notice*, THE TENNESSEAN, <http://www.tennessean.com/longform/news/crime/2015/03/17/jasmine-randers-committed/24870929/> [<http://perma.cc/82AR-7XQH>] (discussing how assistant district attorney "would not discuss a plea deal unless [the defendant] agreed to get her tubes tied").

<sup>187</sup> See Susan Frelich Appleton, *Unraveling the "Seamless Garment": Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294, 299 (2005) ("[T]he law never asks the parent of a child to provide, say for example, a kidney or bone marrow for transplantation even if the child would die without the donation, because even recognized duties to rescue steer clear of such physical invasions and risks.").

<sup>188</sup> See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571–73 (1979) (noting that abortion restrictions are often at odds with the general law of samaritanism, which does not require the impingement or forfeiture of your own physical body in order to save another).

Women's unique role in the reproductive process thus makes them more vulnerable to a variety of assaults on their bodily autonomy as the state continues to interfere in the reproductive process in ways that primarily or solely affect women. Women are, therefore, more inherently invested in robust legal protections for bodily autonomy generally, as they are more likely to need such protections in the face of a historical belief that women's bodily integrity is somehow less important as a result of her reproductive capacity or that state intervention in bodily autonomy is permissible in the reproductive context.<sup>189</sup> Legal structures that fail to recognize the importance of such protections to women specifically—such as those that subjugate bodily autonomy to spiritual autonomy—are inherently and unavoidably unfair to women.

## ii. Violence Against Women

Violence against women is a worldwide problem.<sup>190</sup> For many women, physical violence is the rule, not the exception. Over 50% of women in the United States report experiencing physical assault as a child, 17.6% have been the victims of rape, 8.1% of women report being stalked, and 22.1% of surveyed women report being physically assaulted by an intimate partner at some point in their lives.<sup>191</sup>

Both women and men experience violence as a threat to their bodily autonomy, but the nature of violence against women is unique in several important respects.<sup>192</sup> First, women are three times more likely than men to be physically assaulted by an intimate partner.<sup>193</sup> Women are even more likely than men to suffer severe violence at the hands of an intimate

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<sup>189</sup> See WEST, *supra* note 154, at 96 (noting that harms that are particular to women “often do not ‘trigger’ legal relief in the way that harms felt by men alone or by men and women equally do” and that women are thus doubly injured—first by the harm itself and second by the lack of legal response to such harms).

<sup>190</sup> See generally U.N. DEP’T OF ECON. & SOC. AFFAIRS, THE WORLD’S WOMEN 2010: TRENDS AND STATISTICS (2010), [http://unstats.un.org/unsd/demographic/products/worldswomen/WW\\_full%20report\\_color.pdf](http://unstats.un.org/unsd/demographic/products/worldswomen/WW_full%20report_color.pdf) [<http://perma.cc/G2JL-A3JM>] [hereinafter Trends and Statistics].

<sup>191</sup> U.S. DEP’T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii–iv (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<http://perma.cc/7ATZ-NQCJ>] [hereinafter Violence Against Women Report].

<sup>192</sup> Keerty Nakray, *Introduction* to GENDER-BASED VIOLENCE AND PUBLIC HEALTH: INTERNATIONAL PERSPECTIVES ON BUDGETS AND POLICIES 1, 4 (Keerty Nakray ed., 2013) (noting that one of the “main hindrances to an effective response to gender-based violence is the misconception that the parity or symmetry of violence that is perpetrated by males against females is the same as violence perpetrated by women against men”).

<sup>193</sup> Violence Against Women Report, *supra* note 191, at 26 (noting that one out of five U.S. women has been physically assaulted by an intimate partner, while only one out of fourteen U.S. men report physical assault of this type).

partner—up to 14 times more likely.<sup>194</sup> This type of violence carries particularly long-lasting consequences, as violence at the hands of an intimate partner is more likely to be ongoing, harder to escape, and accompanied by other forms of violence, such as psychological or sexual violence.<sup>195</sup> In addition, this type of violence exposes women to distinctive types of harm because it has ramifications not only for a woman's physical well-being, but also her sense of security in her body and her home.<sup>196</sup>

Compounding this problem is the fact that traditional criminal justice remedies for the victims of violence are often developed with the male victim in mind, and do not account for the particular needs of women who may experience violence in distinct and unique ways.<sup>197</sup> While progress has been made to address these deficiencies, state laws that address gender-based or domestic violence are still often absent, or ineffective at meaningfully addressing the problem they seek to resolve.<sup>198</sup> Thus, women are less likely to enjoy protections or redress for the types of violence they experience.

Further, women are much more likely to experience violence because of their gender—often in response to the assailant's perception that the victim failed to adhere to gender expectations (including a woman's expression of personal autonomy). Gender-based violence “occurs as a cause and consequence of gender inequalities.”<sup>199</sup> Such violence includes a range of harmful behaviors, the most egregious of which is femicide.<sup>200</sup> Violence against women is often explained as a natural reaction to a woman who asserts her own bodily autonomy, whether through her choice of dress or daring not to be physically cowed by a man.<sup>201</sup> Indeed, in

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<sup>194</sup> *Id.* at 27 (noting that women were only two to three times more likely to report incidents of intimate partner violence that included pushing, grabbing or shoving than men, but seven to fourteen times more likely to report incidents of intimate partner violence that included beating, choking, attempted drowning or threats with a firearm).

<sup>195</sup> Trends and Statistics, note 190, at 131 (2010) (“Violence that women suffer from their intimate partners carries particularly serious and potentially long-lasting consequences, as it tends to be repetitive and accompanied by psychological and sexual violence as well.”).

<sup>196</sup> See WEST, *supra* note 154, at 102 (“When a woman suffers violence or threats of violence from an intimate she loses not only her sense of security against physical assault, but also her privacy—both the privacy of her body and the privacy of the dwelling in which the abuse occurs.”).

<sup>197</sup> See Ronagh McQuigg, *Gender-based violence as a public health issue and the legal perspective: A critical overview*, in GENDER-BASED VIOLENCE AND PUBLIC HEALTH: INTERNATIONAL PERSPECTIVES ON BUDGETS AND POLICIES 41–42 (Keerty Nakray, ed. 2013).

<sup>198</sup> See, e.g., Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits, at \*15–20, *U.S. v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1032809 (detailing failed state policies to address domestic violence and other types of violence against women).

<sup>199</sup> ALYS M. WILLMAN & CRYSTAL CORMAN, *SEXUAL AND GENDER-BASED VIOLENCE: WHAT IS THE WORLD BANK DOING, AND WHAT HAVE WE LEARNED?* 6 (2013).

<sup>200</sup> *Id.* at 8.

<sup>201</sup> See BORDO, *supra* note 124, at 7 (“In numerous ‘slasher’ movies, female sexual independence is represented as an enticement to brutal murder, and chronic wife batterers often claim that their wives ‘made them’ beat them up, by looking at them the wrong way, by projecting too much cheek, or by some other (often very minor) bodily gesture of autonomy.”).

many places throughout the world, women themselves accept that asserting their physical independence or autonomy is a sufficient basis for physical violence against them.<sup>202</sup> Repeated acts of such gender-specific violence impairs a woman's ability to express her own autonomy, as she learns to subjugate her own desires and self-expression in order to avoid further violence against her.<sup>203</sup> Noting the specific harms associated with gender-based violence is critical to combating such violence,<sup>204</sup> especially considering the historical context, which suggests that the law is less responsive to the types of harm that are unique to women.<sup>205</sup>

While the right to be free from physical violence is important to all people, the ability to be free from violence is particularly important to women who are more likely to be the victims of such violence in their intimate and familial lives, more likely to experience such violence as a result of their gender or their assertion of bodily autonomy, and less likely to enjoy effective state intervention into the types of violence that are specific to their experience. Thus, in this context as well, women are more invested in robust protections to bodily autonomy, which may serve to counteract these inequities in their experience of physical violence.

### iii. Women's Bodily Autonomy and Gender Equality

The particularly gendered issues surrounding threats to bodily autonomy detailed in the previous two sections share a common theme—their connection to women's equality. Each threat to women's bodily autonomy undermines women's ability to participate as equal members of society, both through and as a result of attacks on their bodily autonomy. Thus, the importance of physical autonomy to women is rooted not

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<sup>202</sup> See Trends and Statistics, *supra* note 190, at xi (noting that in many countries women believe that transgressions such as “venturing outside without telling their husband” are “sufficient grounds for being physically hit”).

<sup>203</sup> See WEST, *supra* note 154, at 104 (noting that repeated intimate partner violence has the potential to cause the “death of a liberal and individualistic sense of . . . self-possession” as “the self has been invaded by the desires, pleasure, will, and actions of another, and stronger, life-threatening human being”).

<sup>204</sup> See Nakray, *supra* note 192, at 4 (noting that one of the “main hindrances to an effective response to gender-based violence is the misconception that the parity or symmetry of violence that is perpetrated by males against females is the same as violence perpetrated by females against males”).

<sup>205</sup> See generally WEST, *supra* note 154, at 94–178 (discussing how women are protecting by the law only to the extent that their harms mirror the type of harm experienced by men, and that harms unique to women are often not legally redressable).

only in the importance of their physical control of their own person, but how such control enables them to enjoy equality in all spheres of life.<sup>206</sup>

This connection between bodily autonomy and equality is not novel. Many theorists have noted that women's ability to control their physical bodies, and more specifically their reproductive autonomy, is critical to ensuring that women have the ability to be equal with men in all spheres of society.<sup>207</sup> Absent the ability to control their own physical childbearing capacity, women cannot participate as equals in professional or political life to the same extent as men because of the physical requirements of pregnancy and childbirth.<sup>208</sup> Similarly, many scholars have noted how violence against women is often employed in the service of the maintenance of an unequal gender system.<sup>209</sup>

Thus, while all people are invested in a robustly protected right to bodily autonomy, women's position in society suggests that the protection of such autonomy is even more critical to them. This importance stems both from the increased likelihood that their physical autonomy is challenged by individual men, religious traditions, or society at large, and because absent such bodily autonomy they cannot meaningfully participate as equal members of society.

Despite the clear link between granting women full, legally-protected bodily autonomy and gender equality, this is still not the framework in which courts discuss issues of bodily autonomy. The U.S. Supreme Court has been unable to meaningfully incorporate the link between bodily autonomy and equality of treatment, choosing instead to view them as separate concepts.<sup>210</sup>

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<sup>206</sup> See Littleton, *supra* note 45, at 1316 (attributing "[t]he inequality of women in their lived-out experience" to the infringement of "having everything that is associated with women defined as less valuable, less necessary to consider, less important").

<sup>207</sup> See Ginsburg, *supra* note 176, at 375 ("Inevitably, the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life.").

<sup>208</sup> See FIRESTONE, *supra* note 109, at 11 (arguing that a sex class revolution would only be possible were women to be able to own their own bodies, including their fertility).

<sup>209</sup> See Trends and Statistics, *supra* note 190, at 137 (2010) ("Wife-beating is a clear expression of male dominance; it is both a cause and consequence of women's serious disadvantage and unequal position compared to men."). Indeed, reproductive justice movements and movements targeted at preventing or addressing violence against women are both deeply rooted in a basic concept of women's right to bodily autonomy and the connection between that autonomy and access to equality. See Eesha Pandit, *On the Same Bodies: Exploring the Shared Historical Legacy of Violence Against Women and Reproductive Injustice*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 549, 550 (2015) ("The way we conceive, define and fight for reproductive freedom as well as freedom from violence is rooted in the belief that our bodies are our own. Both of these struggles stand in opposition to historical and contemporary efforts to ensure that the bodies of women, cis-and transgender women alike, are not fully ours. The ability to control our body is deeply connected to the amount of economic, social, cultural and political power we have.").

<sup>210</sup> See Ginsburg, *supra* note 176, at 375–76 (noting that the Supreme Court has treated reproductive autonomy under a substantive due process rubric not expressly linked to issues of gender discrimination).

As the preceding sections make clear, a hierarchy that subordinates rights to physical autonomy has real consequences for women, which extends beyond the theoretical harm that results from disfavoring the category of rights traditionally associated with women. It also continues to undervalue a type of right that is uniquely important to women's lived experience, including their ability to participate equally in all facets of society.

#### IV. THE HIERARCHY IN PRACTICE – *HOBBY LOBBY*

In the year prior to deciding the *Abercrombie* and *Young* cases, the Court handed down another important opinion that reveals its reliance on a hierarchy between rights of physical autonomy and spiritual autonomy. In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>211</sup> a for-profit corporation sought a ruling that the Affordable Care Act's (ACA) mandate that employers provide health insurance coverage—which included contraception and related education and counseling—violated the company's constitutional and statutorily-granted rights to religious freedom.<sup>212</sup> The Court found that the regulations violated the Religious Freedom Restoration Act (RFRA), which “prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”<sup>213</sup> The holding and reasoning in *Hobby Lobby* is problematic for a number of reasons, argued persuasively by other scholars.<sup>214</sup> What is interesting about *Hobby Lobby* for purposes of the present discussion is that it neatly previews the contrasting approaches to physical autonomy and spiritual autonomy that the Court goes on to adopt in the *Abercrombie* and *Young* decisions the following year.

In *Hobby Lobby*, the Court explicitly invokes the concept of spiritual autonomy. As Justice Kennedy's concurring opinion states:

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator

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<sup>211</sup> 134 S. Ct. 2751 (2014).

<sup>212</sup> *Id.* at 2765.

<sup>213</sup> *Id.* at 2759.

<sup>214</sup> See, e.g., Travis Gasper, *A Religious Right to Discriminate: Hobby Lobby and “Religious Freedom” As a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 416 (2015) (arguing that the “exemption based upon any ‘sincerely held’ religious belief . . . could lead to increased discrimination against employees,” especially LGBT employees); Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 76 (2015) (arguing the holding of *Hobby Lobby* is problematic because it “elevates the power of corporate managers over that of secular society”).

and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.<sup>215</sup>

The Court's concern with preserving this autonomy of religious beliefs is paramount to their decision, which focuses almost exclusively on the spiritual rights of the plaintiff.<sup>216</sup>

Almost as an aside, the Court "assumes that the [Department of Health and Human Services] regulation here at issue furthers a legitimate and compelling interest in the health of female employees."<sup>217</sup> Thus, the employees' right to physical autonomy in the form of access to a range of healthcare products and services, although recognized by the Court as a freestanding interest, is seen as less important than the spiritual autonomy of the employer. The dissent persuasively points to this disparity in treatment, stating that:

In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.<sup>218</sup>

Clearly linking women's ability to access these services to a concept of physical autonomy, Justice Ginsburg states that "[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan" will be "the woman's autonomous choice."<sup>219</sup> Further, the dissent explicitly connects the ability of women to enjoy bodily autonomy to gender equality, stating "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>220</sup>

Thus, *Hobby Lobby* served as a warning shot for what would happen when a right to spiritual autonomy clashed with a contrary right to physical autonomy. The Court used the *Young* and *Abercrombie* deci-

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<sup>215</sup> *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

<sup>216</sup> *Id.* at 2782–83.

<sup>217</sup> *Id.* at 2786 (Kennedy, J., concurring).

<sup>218</sup> *Id.* at 2787 (Ginsburg, J., dissenting).

<sup>219</sup> *Id.* at 2799 (Ginsburg, J., dissenting).

<sup>220</sup> *Id.* at 2787 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 856 and drawing attention to the fact that the birth control coverage was expressly included to be "responsive to women's needs" and that the Court ought to be more cognizant of the "genesis of [the] coverage" as a source to "enlighten the Court's resolution" of the case).

sions decided the next year, however, to expand on the themes from *Hobby Lobby*, clearly establishing the importance of a right to spiritual autonomy over and above the right to physical autonomy. And the Court did so even in the context of a case where the physical autonomy claim was front and center.

## V. CORRECTING THE SPIRIT/BODY HIERARCHY

By implicitly favoring the right to spiritual autonomy over the right to bodily autonomy in its recent decisions, the Court has (perhaps unwittingly) enforced a hierarchy that undermines women's legal status and equality. But as *Hobby Lobby* makes clear, there may be situations in which such rights come into direct conflict with one another—in such a scenario, how is the Court to determine which rights are paramount? The following sections explore options to address this potential conflict.

### A. Flipping the Script to Favor Bodily Autonomy

One potential response to the Court's use of a mind/body autonomy hierarchy would be to invert the hierarchy, and recognize that bodily autonomy may be more important than spiritual autonomy. There is certainly an argument that bodily autonomy can be seen as a right of paramount importance because it is often through the body that we explore and express various social, political, and cultural identities.<sup>221</sup> Absent a robust and comprehensive right to bodily autonomy, individuals may be prevented from meaningfully expressing any other type of autonomy, including spiritual autonomy, because lacking control over their physical person prevents them from worshiping in the manner that they find spiritually necessary.<sup>222</sup> As such, the right to bodily autonomy becomes almost a prerequisite for all other human rights, and on that basis one could argue that bodily autonomy should be favored over other types.

Further, inverting the hierarchy in order to preference the right to bodily autonomy may have a positive, and salutary, effect on women by injecting a greater level of scrutiny to scenarios in which bodily autonomy is challenged—including those scenarios discussed above which uniquely or overwhelmingly affect women. Perhaps through “flipping

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<sup>221</sup> See Ramachandran, *supra* note 75, at 4, 29–44 (2009) (arguing that the body is a “primary site for exploring different values, subcultures, and identities”).

<sup>222</sup> Cf. Feldblum, *supra* note 76, at 123–156 (describing interaction between conduct and belief).



the script” on the autonomy hierarchy, women will have the chance to participate equally because they will receive special and additional protections in areas where historically they have endured the opposite.

This inversion would be reflective of a particular strand of feminist thought that accepts the natural division of feminine and masculine traits into a dichotomy but believes that feminine traits are as good, or in some instances better, than those associated with masculinity. As a result, this type of feminist thought would likely support an argument that bodily autonomy is more important than spiritual autonomy not in spite of its connection with the feminine half of the dichotomy, but indeed because of it.<sup>223</sup>

## B. Affording All Autonomy Rights Favored Status

Another approach is to resist the tendency to place these two rights to spiritual and bodily autonomy into a hierarchy at all. Such an approach would recognize that rights to both physical and spiritual autonomy are important and necessary to a concept of individual liberty. If Ms. Young’s and Ms. Elauf’s claims were to be evaluated under such a standard, each could have been “favored” because the rights implicated would be recognized as crucial. Using such an approach, however, would necessitate the creation of a method for determining which rights take precedence when the two collide, such as in *Hobby Lobby*, without relying on the spirit/body hierarchy. While suggesting such a system is outside the scope of the current project, a number of options are immediately available, including analyzing the nature or extent of the burden on individual rights, the closely-held nature of the rights involved, or the likelihood that choosing one set of rights over another would negatively impact that group or individual’s ability to participate equally in society.<sup>224</sup> Whatever method is employed to determine which rights take precedence, however, would not rely on the assumed superiority of a right to spiritual autonomy.

A further reason to afford physical and spiritual autonomy equal footing is that describing physical and spiritual autonomy as separate, and even conflicting, is normatively incorrect.<sup>225</sup> Despite the human ten-

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<sup>223</sup> See Olsen, *supra* note 110, at 455 (describing feminist strategies when confronted with gendered dichotomies, including one that “accepts the identification of women with irrational, passive, and so forth, but proclaims the value of these traits; they are as good or better than rational, active, and so forth”).

<sup>224</sup> See Feldblum, *supra* note 76, at 123–150 (describing how such conflicting rights might be analyzed is under a Due Process analysis).

<sup>225</sup> See Fox & Stein, *supra* note 111, at 1009 (arguing that the “widely held assumption [that mind and body are distinct, separate entities] reflects a deep delusion—conceptually flawed and empirically false—that distorts our laws in pernicious ways”).

dency to separate things into dichotomies, such a separation is not always reflective of reality.<sup>226</sup> The separation of spiritual and bodily autonomy is one such false dichotomy. In fields outside the law, such a separation has been rejected<sup>227</sup>—in some cases supported by scientific evidence that a sharp distinction between physical and non-physical sensation is not reflective of the human brain.<sup>228</sup>

The separation breaks down flowing in both directions. The spirit, as far as we know, cannot be physically separated from the body.<sup>229</sup> It is dependent on the body for its existence and experiences the world through the physical senses of the body.<sup>230</sup> The body, however, derives its meaning and understands its purpose through the soul within it. We use our bodies to move through the world and to express our spirit—in small ways such as our choice of dress and adornment and in large ways such as our devotion to performing religious or spiritual rituals using our physical bodies.<sup>231</sup> The falseness of the autonomy dichotomy becomes particularly apparent in a number of circumstances, including circumstances that solely affect women. For instance, the recent rise of state laws which require women seeking an abortion to undergo a forced sonogram implicates not only the physical autonomy of the woman undergoing the sonogram, but also her right to be free of the moral judgments of the state in her choice.<sup>232</sup> Thus, a system of legal thought that sepa-

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<sup>226</sup> See Olsen, *supra* note 110, at 458–59 (noting that feminists “have begun to question the basic dichotomies themselves” and to “challenge[ ] the border between the two terms in each of the dualisms, problematize[ ] the straightforward opposition between them, and deny their separateness.”).

<sup>227</sup> See Fox & Stein, *supra* note 111, at 978 (“It should come as little surprise that mind-body dualism has most much of its influence in philosophy and has been widely rejected within psychiatry, psychology, and neuroscience.”).

<sup>228</sup> As Adam Benforado explains in his article, *supra* note 118, at 1190:

“[R]ecent research in embodied cognition by cognitive psychologists, social psychologists, and neuroscientists, among others, casts strong doubt on the traditional understanding of the mind and body as placed “in opposition, as well as more recent scientific understanding of thought as abstract, disembodied information processing.” In particular, that research suggests “the body helps to constitute the mind” and that the Cartesian boundaries between the mind and the body must be dissolved. Our perceptions, attitudes, feelings, memories, and judgments are influenced—indeed, constructed—by bodily states and experiences. Abstract thought is actually grounded to a significant extent in our bodies’ interactions with the concrete, physical world.”

<sup>229</sup> See Fox & Stein, *supra* note 111, at 1009–10 (“Contemporary neuroscience, psychology, and psychiatry make plain that our mental and physical lives interact with each other (and our environment). A person cannot be reduced to his mind or separated from his body. He is, inescapably, both at once.”).

<sup>230</sup> See Jaggar & Bordo, *supra* note 147, at 4 (challenging the conventional hierarchy of mind over body and asserting that the body is central to epistemology). See generally Benforado, *supra* note 118, at 1191.

<sup>231</sup> James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and A Democratic State*, 1998 B.Y.U. L. REV. 479, 484 (1998) (“The ultimate basis of religious liberty, as with all civil liberty, is found in the dignity and sanctity of the human person and the inviolability of the human conscience.”).

<sup>232</sup> See Borgmann, *supra* note 75.

rates the two types of autonomy may not be representative of the reality of human experience.<sup>233</sup>

Indeed, the *Young* and *Abercrombie* cases are a prime example of how the dichotomy between spiritual and physical autonomy is not reflective of lived experience. While Ms. Elauf was claiming the protection of Title VII due to her religious beliefs, the act she was seeking to protect—wearing a head scarf—was undeniably a physical act. Physically adorning her body in a particular way was a reflection of her spiritual beliefs, and her ability to engage in that act of physical adornment was critical to the full expression of her beliefs. Ms. Elauf was therefore claiming a right to both physical and spiritual autonomy because the two were interrelated.

Likewise, Ms. Young's decision to bear a child encompasses the physical right to be pregnant and her decision to create new life—undoubtedly a decision that touches on deeply personal and spiritual beliefs. The Court, at times, has seemed to understand the intertwined nature of physical and spiritual autonomy—at least as it relates to the decision to have a child. For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>234</sup> the Court described the right to physical autonomy (in the context of a right to abortion) in language that undeniably expresses a spiritual element to such physical choices:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>235</sup>

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<sup>233</sup> Further, even if a rational distinction could be made between physical and spiritual autonomy which would support the current hierarchy which preferences the latter over the former, the continuation of such a hierarchy in the face of an understanding of its negative impact on women would be misguided. See Olsen, *supra* note 110, at 465 (“Law cannot be successfully separated from politics, morals, and the rest of human activities, but is an integral part of the web of social life.”).

<sup>234</sup> *Casey*, 505 U.S. 833.

<sup>235</sup> *Id.* at 851 (internal citations and quotation omitted).

As this quote illustrates, the decision concerning whether to have a child is related to an individual's "concept of existence" and relationship to the "mystery of human life." Such decisions are undeniably spiritual, and not purely physical, in nature. Thus, Ms. Young required a pregnancy accommodation to effectuate her physical choice to carry a child and to express her spiritual choice to bring a new life into the world.

Stated simply, our ability to fully express our spiritual autonomy is dependent on our bodily autonomy, and conversely our bodily autonomy means little without spiritual autonomy.<sup>236</sup> Both forms of autonomy are critical, and any substantial impingement of either should prompt the Court to provide "favored" protection.<sup>237</sup>

Further, although it is clear that women are most often the disfavored group whenever rights are separated into dichotomous, gendered hierarchies, it is not altogether clear that men benefit from such a system of separation.<sup>238</sup> For instance, men who have "disfavored" bodies would stand to benefit from a system of rights that equally favored the protection and encouragement of physical autonomy. And there are a number of instances in which men would equally benefit from the robust protection of physical autonomy, including the protection of rights regarding physician-assisted suicide or the right to be free from certain invasive search procedures at the hands of law enforcement. Thus, the adoption of a framework that lessens a particular harm or risk to women could also result in positive outcomes for men.<sup>239</sup>

If such an equality of treatment for spiritual and physical autonomy had been employed in the context of *Young* and *Abercrombie*, the decisions would have reflected that both Ms. Young and Ms. Elauf were entitled to the same treatment—minor accommodations to their workplace which served to protect their rights to physical and spiritual auton-

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<sup>236</sup> Ironically, this tendency to see the connection between the two types of autonomies, instead of placing them in a hierarchy, could easily be labeled a "female" approach. See Littleton, *supra* note 45, at 1281 (describing Carol Gilligan's work "In a Different Voice" as noting that women "reason[] morally in terms of connection and relationship, rather than in terms of separation, hierarchy of values, and abstraction of principles"). Whether or not my proposal is inherently "female," it seems in this instance to better reflect the lived experience of people of both sexes.

<sup>237</sup> See Koppelman, *supra* note 101, at 581 ("We do not have nerve endings in every one of our preferences, either. Some are more pressing than others. Some aim at ends that are unusually valuable. If two human undertakings are equally urgent or valuable, then this is a reason to treat both with equal regard."); *Schempp*, 374 U.S. at 305 ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.").

<sup>238</sup> See Williams, *supra* note 43, at 329–30 ("[A] belief that a dual system of rights inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations—at enormous cost to women and not insubstantial cost to men.").

<sup>239</sup> *Id.* at 331 ("The goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world any more than it has been to build a separate but better place for women. Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.").

omy regardless of their sex or religion. Such an outcome would have avoided the awkward result that Ms. Young could have more easily achieved the accommodation she required by asserting a religious, rather than a physical, need to avoid lifting packages heavier than twenty pounds. It may also have affected the outcome in *Hobby Lobby* by forcing the Court to consider seriously the bodily autonomy claims that weighed in favor of mandating that employers provide health insurance coverage that included contraception to female employees. Even if the outcome in *Hobby Lobby* remained the same, however, a meaningful commitment to concepts of bodily autonomy would have necessitated an analysis like the one undertaken in the dissent, which at least would have taken such concerns seriously.

Even if such a result would be preferable, though, is it the Court's role to subvert the deeply entrenched physical/spiritual hierarchy, along with its gendered implications?<sup>240</sup> Displacing fundamental concepts such as this one could certainly have extensive repercussions, including the potential to alter legal doctrines unrelated to Title VII claims.<sup>241</sup> Even if these repercussions were unavoidable, it is undeniably the Court's role to disavow a worldview that is both inequitable and unreflective of reality.<sup>242</sup>

The truth, however, is that the Court would need to do no such thing in order to have reached an equal result in the *Young* and *Abercrombie* cases. Moreover, the language of "favoritism" need not have been employed for the Court to reach equivalent conclusions. The basis for finding that both plaintiffs were entitled to accommodation under Title VII is located, intuitively and easily, from the text of Title VII itself, which explicitly states that both "sex" and "religion" are protected categories.<sup>243</sup> And both the PDA and the 1972 religious amendments make clear that plaintiffs claiming sex or religious discrimination under Title VII are entitled to workplace accommodations. The underlying public policy of Title VII thus already "favors" the enumerated categories of protected plaintiffs by specifically listing them in the text of the statute itself.<sup>244</sup> The Court need not, and should not, further separate the individ-

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<sup>240</sup> *Id.* at 374–75 (noting the limitations of courts to fundamentally readjust the social order).

<sup>241</sup> See, e.g., Fox & Stein, *supra* note 111, at 1010 ("Displacing dualism with mind-body integration has far-reaching implications for the American legal system.").

<sup>242</sup> See *id.* at 984 ("[T]he law might draw distinctions between mind and body as an imperfect proxy that makes it easier for judges to resolve complex disputes or for citizens to understand confusing rules. But even large gains in administrative efficiency cannot generally excuse the accumulation of substantive errors in the delivery of justice. A related justification is that expelling dualism from the doctrine would upset the settled expectations of those who count on the stability of law. Notwithstanding the importance of stare decisis, our legal system's reliance on dualism cannot be justified unless the costs of correction exceed the benefits of correcting it.").

<sup>243</sup> 42 U.S.C. §2000e-2(a)(1).

<sup>244</sup> Title VII thus already reflects the State's determination that discrimination on either religious or pregnancy-related basis is contrary to public policy, and the State is entitled to make such distinctions. See Koppelman, *supra* note 101, at 594 ("Given the diversity of human goods, there is some-

uals protected under Title VII into “favored” and “disfavored” plaintiffs. There is no basis for that distinction in the statutory language and describing protected groups in this way will inevitably lead to an unwarranted belief that individuals in such a group are receiving *more*, when in fact that are only being made *equal*.<sup>245</sup> One plaintiff under Title VII should be no more “favored” than the next; language that suggests, and outcomes that reflect otherwise, should be discarded.

## CONCLUSION

It is perhaps tempting to think of the gendered nature of the spirit/body dichotomy as nothing more than a philosophical issue, unlikely to affect real lives. This would be incorrect.<sup>246</sup> The Court’s decisions in *Young* and *Abercrombie* reveal that the operation of this dichotomy in the background of legal thought leads courts to not only disfavor plaintiffs who make bodily autonomy claims to the detriment of those plaintiffs, but to do so in a way in which the underlying assumptions are never addressed or acknowledged.<sup>247</sup>

As this paper has explored, such an unchallenged dichotomy results in the favoring of spiritual autonomy claims to the detriment of bodily autonomy claims. Such a process is not only inherently gendered in a way that makes it suspect in the abstract, but also works to materially disadvantage women and impede societal progress to true gender equality.<sup>248</sup> Further, the dichotomy is a false one—predicated on the incorrect assumption that the soul and body are distinct, divisible entities. As the Court continues to develop its approach to cases that implicate either type of autonomy, it should be more conscious of the disfavoring of bod-

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times good reason to entrench respect for some of them by institutional mechanisms to ensure that these goods retain their privileged status.”).

<sup>245</sup> See Williams, *supra* note 43, at 367 (discussing the Court’s tendency to see accommodations for “the atypical worker” as suspect).

<sup>246</sup> See Benforado, *supra* note 118, at 1192 (discussing mind/body dualism and concluding that, “[i]t is not only that these commonsense ideas about what moves us are deeply affirming and have been established over centuries, and that many of the processes at work are beyond our conscious awareness or control, but also that there are powerful entities that benefit greatly from maintaining the status quo.”); JOHNSON, *supra* note 149, at 3 (“[T]he conventional gendering of the soul-body relationship is at once debilitating and deeply problematic for women, and yet something that risks being overlooked as mere convention, as unimportant because it does not really reflect sincere belief.”).

<sup>247</sup> Indeed, it is arguably more pernicious if such a hierarchy is operating in the minds of the Justices without them being consciously aware of its presence. See Fox & Stein, *supra* note 111, at 983 (“The Justices . . . need not have been self-conscious dualists for [their] opinions to reflect the estrangement of mind from body.”).

<sup>248</sup> See Williams, *supra* note 43, at 331 (“The ability to challenge covert as well as overt gender sorting laws is essential both for challenging in court a male defined set of structures and institutions and for requiring the reconstruction to reflect the full range of our human concerns.”).

ily autonomy claims, and embrace a doctrine that seeks to avoid the curtailment of the fundamental autonomy of individuals—in whatever form such a constraint takes.