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The Breadth of Context and the Depth of Myth: Completing the Feminist Paradigm

*by Emily Calhoun**

[W]hen women start acting like human beings, they are accused of trying to be men.

— J. Caucus
(Doonesbury)

Men — aware of their activity and the world in which they are situated, acting in function of the objectives which they propose, having the seat of their decisions located in themselves and in their relations with the world and with others, infusing the world with their creative presence by means of the transformation they effect upon it — unlike animals, not only live but exist.

— Paulo Frieri¹

In its quest for recognition that women are human beings, entitled to the freedom to think and act as human beings, feminist legal analysis has largely neglected its mythic dimension. Characteristics conventionally assigned to human beings — a unique capacity for reflective and rational thought that enables us to interpret and to imagine alternative realities,² an ability to construct the world through choice,³ and a need to reconcile

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1. PAULO FRIERI, *PEDAGOGY OF THE OPPRESSED* 88 (1986).

2. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1989).

3. *See, e.g.*, MAXINE GREENE, *THE DIALECTIC OF FREEDOM* (1988).

individual and social existence⁴ — place all human beings, including women, in the dimension of myth. However, feminist theory has not fully explored the possibilities of using myth in order to argue on behalf of women. As a result, feminists have disadvantaged themselves both theoretically and practically. This essay reconceptualizes the current abortion controversy within a mythic dimension. In part, my aim is to (re)define the terms of the abortion debate in order to emphasize that women must be treated as responsible and autonomous decision-makers. Ultimately, I argue that feminists should consider the larger question of constitutional theory in light of what myth teaches us about our capacity to deal with difficult moral questions.

In order to understand how feminists might develop a more complete legal paradigm, I suggest supplementing the narrative technique of story-telling used by feminists to contextualize law.⁵ Story-telling, as it appears in feminist legal theory, is highly personal. Its impact depends on the presentation of reality through detail. In feminist story-telling, context mediates the meaning and significance of both ethics and actions. I propose exploring the possibilities of using the very different narrative technique of myth in order to deepen and enrich feminist theory.⁶

A. THE STORY-TELLING NARRATIVE OF CONTEXT

Before I embark on my main argument, a brief review of how feminists have used personal, contextual narrative to expand legal norms is in order. This review provides an essential predicate to understanding how a narrative of myth can enrich feminist theory.

Feminist legal scholars have made special efforts to secure recognition of the legitimacy of women's collective point of view and the embodiment, in law, of contextual norms suited to the reality of women's lives. There are various devices for establishing and exploiting context to enrich legal analysis,⁷ many of which draw heavily on personal narrative.

4. *Id.* at 56 (arguing that freedom for human beings consists of "act[ing] to make a space for themselves in the presence of others").

5. See generally *infra* sources cited note 7.

6. Others have also suggested this approach. See, e.g., Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory, and the Feminine*, 75 CORNELL L. REV. 644 (1990). See also Marianne Wesson, *Mysteries of Violence and Self-Defense: Myths for Men, Cautionary Tales for Women*, 1 TEX. J. WOMEN & L. 1 (1992).

7. The devices include narrative advocacy (see, e.g., Kim Lane Scheppele, *Legal Storytelling: Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) and sources cited therein and Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988)); empathy (see, e.g., Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) and Martha Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987)); and mediating dialogue (see, e.g., Sally Engle Merry, *The Discourses of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN. 1 (1990)

Personal narrative, which relies on the details of everyday life and experience to generate a picture of reality, is well-suited to the task of contextualizing law. By illuminating the social, economic, and political contexts of women's lives and by juxtaposing those contexts against prevailing legal norms, personal narrative helps feminists argue that norms should be expanded or changed. Personal narrative legitimates the reality of women's lives, behavior, and point of view, thus bringing women's experiences within the law's purview. The details of personal narrative make it possible for feminists to engage in a meaningful exegesis of women's constitutional rights.⁸ This is especially critical given the balancing tests currently used to determine constitutionality.⁹ Finally, as many feminists have argued, moral decision-making is enhanced by expanding the context in which the decisions are made.¹⁰

Feminists who use only personal, contextual narratives occasionally appear to view gender-inclusive, contextualized norms as sufficient, in and of themselves, for a legal paradigm. Feminists have debated both about what norms actually exist for women¹¹ and what norms ideally should exist.¹² However, most feminists have not yet begun to consider how a legal paradigm should treat women who act at variance with (even) gender-inclusive norms. Feminists have asserted the legitimacy of women's collective point of view by arguing that each individual woman has a right to be heard and to be taken seriously as an individual human being.¹³ Unfortunately, feminist analysis has not fully developed the implications of this assumption.

The prevailing legal paradigm that feminists seek to change assumes

and Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989)).

8. See, e.g., Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 670-97 (1988) (discussing the importance of legislative facts in determining the validity of parental notification statutes affecting minors' abortion rights).

9. *Id.* at 664-65.

10. See, e.g., MAPPING THE MORAL DOMAIN (Carol Gilligan, Janie Ward & Jill Taylor eds., 1988); WOMEN AND MORAL THEORY (Eva Feder Kittay & Diane T. Meyers eds., 1987); MARY F. BELENKY, BLYTHE CLINCHY, NANCY R. GOLDBERGER & JILL M. TARULE, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986).

11. See, e.g., Cornell, *supra* note 6, at 668 (doubting that there is a sufficient consensus about women's context to make it a completely satisfying concept).

12. See generally Colker, *supra* note 7 (arguing that feminist paradigms need to permit aspirational thinking, which norms do not always do) and Cornell, *supra* note 6, at 656-58 (expressing concerns that the feminist paradigm of context will lead to a limiting essentialism).

13. Arguments that assert the legitimacy of women's point of view are joined with recognition that social, legal, and political reality has been constructed by point of view. As Maxine Greene notes, "the consciousness of authorship has much to do with the consciousness of [individual] freedom." GREENE, *supra* note 3, at 22.

that an individual whose thoughts and acts are not necessarily consistent with community norms has a valuable place.¹⁴ This paradigm recognizes that, on occasion, norms must be defied if individuals are to act morally and appropriately.¹⁵ In other words, this paradigm recognizes that conformity to community norms is not always the appropriate measure of an individual's responsibility to self and others. The prevailing paradigm responds to the difference between individual responsibility that is measured by adherence to community norms and individual responsibility measured by personal commitments to others.¹⁶ It assumes that individuals are able to make legitimate choices respecting others even if their choices threaten or defy existing norms. Because the prevailing legal paradigm embodies this assumption, it is willing to carve out certain areas for individual choice in which responsibility will not be evaluated solely by conformity to prevailing norms.

Feminists who employ personal narrative as their only tool for reconceptualizing legal paradigms have given short shrift to these different ways of looking at responsibility to others. For all intents and purposes, they have forgotten that women seeking recognition as human beings are unlikely to be fully satisfied with or well-served by a legal paradigm that consists solely of norms.

B. THE STORY-TELLING NARRATIVE OF MYTH

Personal, contextual narratives, while effective in expanding legal norms, are ill-suited to exploring questions about the legitimacy of choices that threaten even gender-inclusive norms. Narratives of myth, on the other hand, can help feminists grapple with the difficult questions of individual choice and morality. Simply speaking, a narrative of myth is a story about a human being engaged in a heroic struggle. The story is centered around a human being who is torn by conflicting responsibilities, has the capacity to reconcile her responsibilities and the strength to bear the costs of this reconciliation.

The narrative of myth that I encourage feminists to exploit derives its

14. For some telling illustrations of this feature of the prevailing paradigm, see Wesson, *supra* note 6. Professor Wesson contrasts the way in which juries in criminal cases treat violent acts of men and women. The acts of men, like those of the notorious (or celebrated) Bernard Goetz, apparently are evaluated both with reference to prevailing norms and also as potentially legitimate even though they are at odds with norms. The acts of women, like those of women prosecuted for killing their batterers, seem not to be assessed with reference to the second test of legitimacy.

15. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED* 1-7 (1975) (discussing the literary portrayals of Creon and Captain Vere); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384, 401-26 (1985).

16. See *infra* notes 68-77 and accompanying text.

force, according to Professor Lee R. Edwards, from encounters "between spiritual imperatives and institutional prerogatives."¹⁷ The narrative is about the inevitable human struggle that arises when individual morality is at odds with social norms.¹⁸ The mythic hero(ine) confronts the conflict by making choices that put the stability of prescribed societal norms at risk. The hero(ine)'s choices isolate the hero(ine) from his or her community, but they also are the means by which the hero(ine) transfers conventional ideas of community and responsibility to others.

Contextual detail does not predominate in or constitute the driving force of the narrative of myth. Context is nonetheless important, since it fleshes out the hero(ine)'s story. It also makes the struggles of mythical hero(ine)s, and the hero(ine)s themselves, richly evocative for the reader. Because of context, the narrative of myth avoids the flatness of some of the figures of western allegory or of Greek or Roman mythology.¹⁹ Hero(ine)s share a common struggle and are assumed to possess the heroic awareness and abilities needed to engage in the struggle. They are not mere symbolic representations of abstract, moral ideas.

In the narrative of myth, the heroic struggle is one that most people can fit within their particular frame of reference. The heroic struggle has, in other words, "a surplus of meaning."²⁰ Hero(ine)s evoke empathies that transcend differences in the lives of people of different genders, races, or classes.²¹ Very different people can respond similarly to the same myth because, in important ways, myth has to do with large struggles rather than with specific outcomes, with ways of choosing rather than with choices themselves. The heroic struggle is universal, even if the choice and the context for the choice are not. For example, Professor

17. For my description of the heroic struggle and the qualities of the heroes who take on the struggle, I rely heavily on LEE R. EDWARDS, *PSYCHE AS HERO: FEMALE HEROISM AND FICTIONAL FORM* 5 (1984). See especially the introduction to the hero included in the description of the myth of Psyche, *id.* at 3-16.

18. *Id.* at 6 (heroes always feel outrage at the threat of convention and its limitations).

19. A failure to differentiate between allegory and myth tends to compromise an otherwise excellent discussion of feminism and myth in DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991).

20. Cornell, *supra* note 6, at 670.

21. *Id.* at 697 (myths may be applied to variable, particular circumstances while providing a basis for shared experience). Thus, for example, women and men (apparently) respond similarly to the conflicts between society and autonomy embodied in classic Western myth. See, e.g., Nina Baym, *Melodramas of Beset Manhood: How Theories of American Fiction Exclude Women Authors*, in *THE NEW FEMINIST CRITICISM* 72 (Elaine Showalter ed., 1985) [hereinafter *NEW FEMINIST CRITICISM*] (women students as well as men relate to the myth). The feminist versions of classical myths discussed in Alicia Ostriker, *The Thieves of Language: Women Poets and Revisionist Mythmaking*, in *NEW FEMINIST CRITICISM* 314, 317 (Elaine Showalter ed., 1985) tend to present similar anti-authoritarian conflicts.

Edwards uses the myth of Psyche to show how the hero(ine) of myth fits the conventional female, as well as the male, frame of reference.

Psyche's heroism, like all heroism, involves both doing and knowing. The pattern of the tale parallels the growth of consciousness. Each material advance marks an increase in psychic range, an apprehension of what was formerly forbidden and inaccessible [I]f heroism is defined in terms of external action [or choice] alone and heroic actions are confined to displays of unusual physical strength, military prowess, or social or political power, then physiology or culture that limits women's capacities in these areas thereby excludes women from heroic roles. But . . . action is important primarily for what it tells us about knowledge . . . [and therefore] any action — fighting dragons, seeking grails, stealing fleece, reforming love — is potentially heroic. Heroism thus read and understood is a human necessity, capable of being represented equally by either sex.²²

In other words, the narrative of myth uses contextual detail to illuminate fundamental human struggles.

The heroic struggle that arises from our human need to reconcile individual responsibility to others with the demands made by social norms is the stuff of myth. Consider two stories that illustrate this struggle. The protagonists, a man and a woman, are both in conflict with norms that they have not entirely rejected.²³ The first story is the western *Shane*,²⁴ recognizably North American and male. The second is Hawthorne's *The Scarlet Letter*.²⁵ In each story, the protagonist is both isolated and strengthened by acts that contravene norms. In each, the central character, by virtue of some special ability typically possessed by heroes, is effectively unconstrained by norms.

The heroic stories of both characters turn on how they choose to conduct themselves outside norms without denying their connection to others who live within those norms. The paradoxes and dilemmas of defiance of norms and connection to others are at the heart of these stories. In particular, connection to others is important. As Professor Edwards argues, heroic power is inseparable from love that is expressed as a social impulse. Heroic love, which manifests itself through choices that connect the hero(ine) to other human beings, differs from the connection that is demanded by conventional notions of community and conformity

22. EDWARDS, *supra* note 17, at 11.

23. See Baym, *supra* note 21, at 63. Myths, of course, may have other themes.

24. JACK SCHAEFER, *SHANE* (1949) [hereinafter *SHANE*].

25. THE PORTABLE HAWTHORNE 337 (Malcolm Cowley ed., 1968) [hereinafter *The Scarlet Letter*].

to norms.²⁶ The dilemmas created by choices that both isolate the hero(ine) from the community — as a result of a departure from norms — and also establish unconventional connections between the hero and the community are the focal point of both *Shane* and *The Scarlet Letter*.

I discuss *Shane* first because there is general agreement regarding its mythic aspects and because most women, as well as men, respond to it as myth.²⁷ In contrast, *The Scarlet Letter* is a more ambiguous myth.²⁸

In *Shane*, two characters are given significant powers: Shane himself and the gunman hired by the rancher Fletcher to drive local farmers from their lands. Both of these characters are, because of their nature and abilities,²⁹ beyond the practical constraints of society and its normal rules.³⁰ They are dangerous.³¹ They both kill, and when they do, the reader is left in no doubt that killing is unacceptable given society's norms.³²

26.

[A]ll heroism . . . appeals to love, makes love its end [This love is a] social rather than a private impulse . . . [and it replaces the] old ideal of community . . . [represented by conformity to norms, with] a new ideal, . . . "communitas." . . . Heroic power is inseparable from the love the hero expresses and inspires [although] the connection between love and power . . . [is] often glossed over in narratives and interpretations of male heroism.

EDWARDS, *supra* note 17, at 13.

27. See *supra* notes 20-22 and accompanying text.

28. For some, the mythical struggle is isolated in the character of the Reverend Dimmesdale. See, e.g., Baym, *supra* note 21, at 74-75. Others, who perceive the mythic dimension to Hester's choices and life, may describe the nature of the struggle in different ways. Compare, for example, the treatment of *The Scarlet Letter* in EDWARDS, *supra* note 17, at 49-61, with the treatment in this essay.

29. Shane, for example, is described as intimately linked to "[b]elt and holster and gun These were not things he was wearing or carrying. They were part of him, part of the man, of the full sum of the integral force that was Shane." SHANE, *supra* note 24, at 101.

30. As Shane says himself, "no man need be ashamed of being beat by Shane." *Id.* at 103. And, as Bobby understands, "there was not the least hint of a boast [in the statement]. He was stating a fact, simple and elemental as the power that dwelled in him." *Id.*

31. Bobby says:

[Shane, riding to confront the gunfighter,] was tall and terrible there in the road, looming up gigantic in the mystic half-light. He was the man I saw that first day, a stranger, dark and forbidding, forging his lone way out of an unknown past in the utter loneliness of his own immovable and instinctive defiance. He was the symbol of all the dim, formless imaginings of danger and terror in the untested realm of human potentialities beyond my understanding. The impact of the menace that marked him was like a physical blow.

Id. at 105.

32. Throughout the novel, Shane is portrayed as deeply saddened by the act of killing. See, e.g., *id.* at 110. Leaving town and his connection to the Starrett family (and, symbolically, leaving society as well) after he has killed both Fletcher and the

The difference between Shane and the gunman lies in the legitimacy accorded Shane's acts of killing.³³ That legitimacy stems from a number of factors. Shane clearly acknowledges his extraordinary power and the personal responsibility he must necessarily assume in limiting its use.³⁴ His breach of societal norms is not random. It represents a conscious acknowledgment of the failure of norms in unusual circumstances and a conscious decision to act in defiance of norms. Yet even as Shane's acts place him forever outside the community, they are an affirmation of his connection to others. The gunman's acts of killing are, in contrast, portrayed as random, for personal gain, and accomplished without recognition of their gravity.

The Scarlet Letter and its heroine Hester Prynne present a similar myth. Hester is an adulteress who has given birth to an illegitimate child. She is portrayed as a woman outside society,³⁵ living in a realm that is alien to other women³⁶ and making decisions pursuant to a set of moral standards that are her own.³⁷ Although Hawthorne tells the reader that Hester's defiance of norms is serious,³⁸ he also lets the reader know, in no uncertain terms, that her defiance is empowering.³⁹ As a result of her conduct — and because of her willingness to accept responsibility for it⁴⁰ — Hester obtains a power of mortal significance: the power to save

gunman, Shane reminds Bobby that "[t]here's no going back from a killing, Bob. Right or wrong, the brand sticks and there's no going back." *Id.* at 113.

33. Shane is described as "a special brand we sometimes get out here in the grass country A bad one's poison. A good one's straight grain clear through." *Id.* at 8.

34. Accountability and responsibility are primary themes in *Shane*. As Shane says, "[a] man has to pay his debts." *Id.* at 17.

35. Hester is "out of the ordinary relations with humanity," *The Scarlet Letter*, *supra* note 25 at 344, "as much alone as if she inhabited another sphere," *id.* at 373, in a "circle of seclusion from human society." *Id.* at 382.

36. Hester has put herself in a position unsuited for women; her "features should have been seen only in the quiet gleam of the fireside, in the happy shadow of a home, or beneath a matronly veil, at church." *Id.* at 353. The scarlet letter has been "a passport into regions where other women dared not tread." *Id.* at 485.

37. Hester does not "measure her ideas of right and wrong by any standard external to herself." *Id.* at 445. "[T]he world's law was no law for her mind." *Id.* at 450.

38. The scarlet letter is a mark "more intolerable . . . than that which branded the brow of Cain." *Id.* at 372.

39. For example, the portrayal of Hester's strength stands in sharp contrast to the depiction of Dimmesdale, the character who represents conformity to society's norms and who is seen as weak, a coward, and reliant on Hester to make decisions and to save his life.

40. Hester's consistent refusal to deny the truth of her actions — or to hide the scarlet letter — exemplifies her acceptance of personal responsibility. Hester not only refuses to hide the evidence of her defiant acts, she asserts an affirmative right to the pain as well as the joy associated with free will and choice. *Id.* at 400-01 (describing Hester's assertion of her right to retain custody of her child Pearl, the symbol of her defiant acts).

the soul of the father of her child, the Reverend Dimmesdale.⁴¹

The Scarlet Letter is the story of Hester's struggle, as a person with power over the soul of another, to act appropriately. As in *Shane*, appropriate conduct for Hester requires action rather than passivity⁴² and is associated with responsibility and connection to others.⁴³ As the heroic nature of Shane's acts contrast with the acts of the gunman, so Hester's choices and acts contrast with those of Roger Chillingworth, who chooses to use his power to attempt to destroy Dimmesdale's soul.

The narrative implicit in the conventional story-telling metaphor — a narrative of context pursued without reference to or incorporation of a supporting narrative of myth — tends to produce an analysis that ignores the fundamental struggles portrayed in *Shane* and *The Scarlet Letter*. Take, for example, Professor Robin West's analysis of Mark Twain's *Huckleberry Finn* and Toni Morrison's *Beloved*.⁴⁴ Professor West describes the story of Huck Finn's heroic struggle to resolve the conflict between the demands of his own morality and those imposed by society, a struggle necessitated by his relationship with the runaway slave Jim. But West, guided by an analytical metaphor that emphasizes context in storytelling, is not interested in this struggle. Rather, she is intent on showing how Twain's narrative ignores the experience of slaves. She is right, of course, about Twain's omissions. West does not seem not to appreciate, however, that if Huck's story were changed to take into account the experience of slaves, it would not be Huck's story anymore. His story is, by definition, the story of a conflict between his standards and those of a society he does not entirely reject. Were Twain to include the slaves' experiences, Huck's conflict and his story would vanish — or at least would be radically transformed.

We need stories like Huck's to help us understand the nature of struggle. The story of a white man's struggle with standards set by a white racist society, a story told from the white person's standpoint, is important even to non-racists, to non-whites, and to women.

A narrative of myth must be included in the feminist story-telling project. It ensures that women will not be consigned to a purely contextual existence. It also insures that an individual who tries to construct a

41. *Id.* at 366, 443, 453. Hester also is portrayed as someone who, through her actions, acquires a superhuman ability to recognize secrets of others. *Id.* at 375.

42. Hester's passivity — preserving Reverend Dimmesdale's secret — is what is unacceptable in *The Scarlet Letter*.

43. Although she makes decisions according to her own moral standards, Hester feels a strong responsibility to Dimmesdale. *The Scarlet Letter*, *supra* note 25, at 445, 456. She also is consistently portrayed as someone who helps the people who have condemned her. *Id.* at 372, 447.

44. West, *supra* note 7, at 141. West compares Twain's novel to *Beloved* by Toni Morrison.

meaningful reality through choices that may deviate from norms will have a significant place in our legal paradigm. Finally, it reminds us that responsibility to others must be measured not only by community demands but also by personal moral standards.

C. ABORTION, CONSTITUTIONAL ANALYSIS, AND THE NARRATIVE OF MYTH

The narrative of myth helps us see what is missing from a contextual paradigm. But the question remains: Can a narrative of myth provide a new and meaningful dimension to a feminist paradigm of law? Although I approach the effort to use myth on behalf of women with some trepidation,⁴⁵ I believe that these familiar stories can be of assistance in conceptualizing a complete feminist paradigm, one that includes not only the breadth of context but also the resonance of myth. Myths, properly interpreted,⁴⁶ remind us that for women, as well as for men, evil may arise from passivity rather than action⁴⁷ and that women, as well as men, have an ability and a responsibility to reconcile the conflicting demands of society and personal morality through individual action.⁴⁸

A feminist paradigm ought to be responsive to the possibility that

45. Some feminists would argue that the searches and struggles portrayed in stories of male heroes have no relevance to women. *See, e.g.*, ROBIN MORGAN, *THE DEMON LOVER: ON THE SEXUALITY OF TERRORISM* 59-60 (1989). I obviously do not agree. "[H]eroism . . . [.] antithetical to social stability, . . . [is] appropriately female in a world where authority rests with the male." EDWARDS, *supra* note 17, at 61.

I do recognize that conventional interpretations of myths present an "inhospitable terrain" for women. *See, e.g.*, Ostriker, *supra* note 21, at 316. Conventional myth is, in many ways, alien to women. For example, there are "gender overlays" in myth that are difficult to escape. *See, e.g.*, Baym, *supra* note 21. Women are frequently represented as inert, passive objects. *See, e.g.*, Susan Gubar, "The Blank Page" and *the Issues of Female Creativity*, in *THE NEW FEMINIST CRITICISM* 292-93 (Elaine Showalter ed., 1985). In the North American western, women are identified with "the encroaching, constricting, destroying society." Baym, *supra* note 21, at 72. Worse, classical myth frequently presents women as feared, the archetypal representation of evil, the sub-human rather than the super-human being. When a narrative of myth is invoked on behalf of women, it may not secure empathy but rather may frighten and estrange. Even when myths are constructed for women they may be misinterpreted to reinforce prevailing views. Cornell, *supra* note 6, at 696, cautions that myth can be used to transform history into unalterable nature for women, but then so can context. *See infra* notes 65-67 and accompanying text.

46. The phrase "properly interpreted" is critical. *See, e.g.*, Baym, *supra* note 21, at 74 (illustrating how powerful portrayals of women who elect celibacy rather than the constraints of conventional domesticity are interpreted as "stories of the frustration of female nature" rather than as a "woman's version of the [American] myth" of the struggle of the individual against society).

47. Ostriker, *supra* note 21, at 321. *Cf.* Gubar, *supra* note 45, at 37.

48. EDWARDS, *supra* note 17, argues that women, in their marginality, are especially appropriate archetypes of the struggle between society and the individual. *Id.* at 7-9.

acts defying norms — even gender-inclusive norms — may be legitimate. All individuals (including women) will occasionally take actions that are out of step when measured by prevailing norms.⁴⁹ All individuals, including women, need a legal paradigm that acknowledges the inevitable human need to reconcile prevailing norms with personal moral standards that embody a heroic conception of responsibilities to others. All individuals — especially women — need a legal paradigm that acknowledges both their awareness of the heroic struggle and their capacity to act responsibly in reconciling conflicting demands of self and community.

A feminist paradigm of law should encourage confrontation with the dilemmas of individual choice and responsibility encountered by the mythical hero(ine). It should assume — and insist that others recognize — that individual women have the awareness and capacity to confront these dilemmas. Narrative of myth can contribute to the development of this paradigm by helping us reconceptualize legal controversies affecting women.

1. SEEING THE ABORTION DECISION AS A NARRATIVE OF MYTH

Were one to reformulate the abortion decision within the mythic framework outlined above, one would stress rather than minimize the conflict confronted by an individual whose choice respecting abortion may contravene norms.⁵⁰ One would acknowledge that a woman confronted with an abortion decision possesses a power that is both significant and superhuman, i.e., a power over life that is effectively beyond the constraints that society might wish to impose.⁵¹ One would stress rather than minimize the fact that her power may be exercised for good or ill.⁵² One would acknowledge that, although a woman may take her own

49. Cornell, *supra* note 6, at 676.

50. It is generally agreed that some decisions to abort will contravene norms. For example, there seems to be a strong societal consensus disfavoring abortion either as a method of birth control or to select the gender of offspring. See, e.g., LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 204-05, 231-32 (1990). It is not as well recognized that a decision not to abort may also contravene norms. See *infra* note 52 and accompanying text.

51. Despite attempts to regulate it throughout history, abortion "is an absolutely universal phenomenon." TRIBE, *supra* note 50, at 52. Tribe's account of the history and future of reproductive technologies makes it clear that women will and can have abortions despite society's opposition and possible danger to the woman herself.

52. As Professor Cass R. Sunstein has observed, "the very existence of the abortion right can be seen as a response to a failure of social responsibility." Cass R. Sunstein, *Righttalk*, *THE NEW REPUBLIC*, Sept. 2, 1991, at 33, 36. See also, *Planned Parenthood v. Robert Casey*, 112 S. Ct. 2791, 2806 (1992). In other words, an abortion decision may be the only responsible individual choice in a socially irresponsible world. See also the *amicus curiae* brief of Agudath Israel of America in *William L. Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605) (making a First Amendment argument that the Jewish religion would require abortion as a

life in the process of securing an abortion, if determined to abort, she will abort. The decision is hers. One would emphasize that there are conflicting ways of looking at responsibility and connection to others.

With this reformulation of the abortion controversy, the woman does not attempt to persuade others that making an abortion decision is the same as making any other medical decision. She does not minimize the significance or consequences of her act.⁵³ She does not try to persuade others that her decision may be made in isolation. This woman does, however, demand a constitutional paradigm that recognizes the existence of her power and her ability to use it for good or ill. She demands a paradigm that permits her to raise questions about the legitimacy of acts that may defy societal norms as well as those acts that conform to norms. She insists on a paradigm that assumes her heroic awareness of the dilemmas of responsibility. She demands a paradigm that helps explain the nature of her personal struggle to make difficult decisions.

It makes sense to reformulate the abortion controversy as a narrative of myth.⁵⁴ However, with the notable exception of the joint opinion in *Planned Parenthood v. Casey*,⁵⁵ the Supreme Court's decisions regarding abortion have not yet begun to deal with the woman of myth. The Court's decisions on abortion have been decidedly non-mythic in their characterization of the woman whose choice is at stake. They have yet to

positive, moral good in some cases); Brief for Appellees at 68-81, *Patricia R. Harris v. Cora McCrae*, 448 U.S. 297 (1980) (No. 79-1268).

53. Although the Supreme Court's refusal to grant the fetus constitutional status may for some women ameliorate the significance of the choice entailed in an abortion decision, for most women the mere existence of potential life makes the decision significant. See, e.g., the stories told in *amicus curiae* brief filed by Women Who Have Had Abortions, William L. Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605); Colker, *supra* note 7, at 1046, 1063-66; Kimberly Sharron Dunn, *The Prize and the Price of Individual Agency: Another Perspective on Abortion and Liberal Government*, 1990 DUKE L. J. 81, 101-03, 108; Carol Gilligan, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11, 36-39 (1985). I doubt that the Court will declare the fetus to be a person, as the discussion of the status of the fetus is one of the most unequivocal parts of *Roe v. Wade*, 410 U.S. 113 (1973). Even the strongest critics of *Roe* apparently have not pushed for a contrary decision. See, e.g., the argument of Charles Fried in *Webster, Women's Liberty by a Thread*, N.Y. TIMES, Apr. 28, 1989, at A38. Recognition of the fetus as a constitutional person would have obvious and significant effects beyond the abortion context. See, e.g., William Saletan, *If Fetuses are People . . . reductio ad absurdum in Missouri; Abortion Legislation*, THE NEW REPUBLIC, Sept. 18, 1989, at 18. The Court's ultimate resolution of this issue does not affect the basic argument of this essay.

54. Many people emphasize features of the abortion decision that coincide with features of the heroic struggles described in this essay. See, e.g., TRIBE, *supra* note 50, at 137-38, 211; Colker, *supra* note 7, at 1046, 1063-66; and Dunn, *supra* note 53, at 101-103, 108.

55. 112 S. Ct. 2791, 2803-08 (1992).

place the conflicts and dilemmas inherent in this choice in a mythic dimension. In other words, they have neither acknowledged the heroic struggle implicit in an abortion decision nor assumed a woman's heroic awareness and capacity to make such a choice.

The deficiencies in the abortion decisions have resulted from the Supreme Court's (mis)use of context. The predominantly medical context of the Court's analysis detracts from an analysis that has a mythic dimension. According to *Roe v. Wade*,⁵⁶ the abortion decision is a medical decision that must be supported by sound medical judgment.⁵⁷ In *Roe*, rights and interests are discussed in a medical context.⁵⁸ Some portions of *Roe* seem to protect only the right of the physician to exercise independent medical judgment.⁵⁹ Others refer to the importance of protecting consultation of the woman with her physician.⁶⁰ In both positions, the locus of responsible decision-making is the physician rather than the woman. The opinion of the Court implicitly assumes that women will decide to have an abortion without regard to moral, medical, or social consequences. In contrast, the Court explicitly presumes that a licensed physician will act competently and in accordance with professional responsibilities in considering abortion as a medical option. The Court offers this presumption to reassure us that abortion will not be available to women on demand and that women will not be allowed otherwise to abuse the right to abortion.⁶¹ In *Roe*, the states are informed that they can guard against abuses of abortion rights by levying traditional professional sanctions against physicians who act inappropriately.⁶² The medical context firmly enshrined in *Roe* is a predominant feature of subsequent abortion decisions.⁶³ Although the importance of the medical context of abortion

56. 410 U.S. 113 (1973).

57. *Id.* at 166. As Justice Douglas stated in a brief explanatory statement accompanying a denial of certiorari in *Cheaney AKA Owens v. Indiana*, 410 U.S. 991 (1973), *Roe* is "confined to the condition . . . that the abortion, if performed, be based on an appropriately safeguarded medical judgment." *Id.* The denial of certiorari in *Cheaney* affirmed the conviction of a non-physician who had performed an abortion, but Douglas' reasoning seems to apply to all abortion controversies.

58. See *TRIBE*, *supra* note 50, at 30-51 (regarding the primary role assumed by the medical profession in the abortion debate).

59. 410 U.S. at 164.

60. *Id.* at 153.

61. *Id.* at 165-66; see also *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973).

62. 410 U.S. at 165-66.

63. See, e.g., *Planned Parenthood of Central Missouri v. John C. Danforth*, 428 U.S. 52, 75-79 (1976) (prohibiting states from interfering with a doctor's assessment of the safety of a particular medical procedure for abortion); *Colautti v. Franklin*, 439 U.S. 379, 388-94 (1979) (recognizing a need to protect the independence of a physician's medical judgment regarding fetal viability); *Richard Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-65 (1986); and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443 (1983) (demonstrating a reluctance

is somewhat diminished in the Court's most recent abortion decisions, it is still an essential feature.⁶⁴

The Court has also denied the mythic stature of women in its abortion decisions by (mis)using the context of pregnancy. For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁶⁵ Justice White argues that a mother must not be considered in isolation from the fetus; therefore, a woman's constitutional right, whatever that right may be, is diminished with pregnancy. To Justice White, pregnancy (or the fetus) is not simply a factor to be balanced against a woman's right. Rather, pregnancy transforms a woman into a diminished constitutional individual, a "pregnantwoman" who serves as a vehicle for the state's interests. By virtue of pregnancy, otherwise basic rights are *per se* diminished. Justice White accomplishes this transformation by extracting language from *Roe's* discussion of the nature of the state's interest in potential life⁶⁶ and incorporating it into a discussion of the nature of a woman's right.⁶⁷

A narrative of myth would militate against an analysis of the medical context of abortion that substitutes the decisional rights of physicians for those of women. It would also tend to preclude an analysis that (mis)uses the context of pregnancy to construct an essentialist "pregnantwoman" with lesser constitutional rights.

2. THE NARRATIVE OF MYTH IN THE CONSTITUTION

It is quite possible for constitutional dialogue to take place in a dimension that conveys the mythic status of the individual woman as decision-maker. To engage in this dialogue, one need only recognize that the Constitution itself assumes that conflicts between community norms and individual notions of responsibility will exist and that conflicts should not be resolved by majority determination but instead should be left to the individual's conscience. Moreover, the Constitution implicitly assumes that individuals have the awareness and capacity to resolve these kinds of conflicts. The Constitution acknowledges the inevitability of the human

to impose a rigid structure on physician-patient dialogue).

64. See, e.g., *Planned Parenthood v. Robert Casey*, 112 S. Ct. 2791, 2823 (1992) (the joint opinion states that statutory informed consent requirements are related to the state objective of protecting maternal psychological health); *Irving Rust v. Louis W. Sullivan*, 111 S. Ct. 1759, 1777 (1991) (in discussing the Fifth Amendment rights of women, the majority observes that a physician's medical judgment as to what is required, as well as information sought by the patient, is important to the physician-patient dialogue). See also *infra* notes 78-80 and accompanying text.

65. 476 U.S. 747 (1986).

66. 410 U.S. at 159.

67. *Richard Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 792 (1986). See *TRIBE*, *supra* note 50, at 96-98.

struggle that is addressed in myth and posits the existence of a constitutionally archetypal individual who possesses the awareness and capacities of the mythic hero(ine). Thus, one must ensure that the discussion of women's decisional rights is informed both by an understanding of the heroic struggle and by the presumed individual capacities of the constitutional archetype.

The constitutional archetype, like the hero(ine) of myth, attempts to establish connection to others by reconciling norms with autonomous choices that deviate from accepted norms.⁶⁸ The surplus of meaning with which the constitutional archetype is imbued provides ample grist for the mill of constitutional debate. For example, there may be strong disagreement as to whether specific rights flow inexorably from the constitutional archetype.⁶⁹ But the archetype itself, the individual struggling to reconcile conflicting demands, is recognizable and acceptable to very different people.⁷⁰

The constitutional archetype is a creature of our general understanding of the Declaration of Independence, the Constitution, and the Bill of Rights. Together, these documents embody the very tensions at the heart of the myths presented in *Shane* and *The Scarlet Letter*.⁷¹ Consider Gary Wills' explication of the constitutional archetype in *Inventing America: Jefferson's Declaration of Independence*.⁷² Wills is primarily concerned with Jefferson's view as reflected in the Declaration of Independence. According to Wills, Jefferson was influenced by the widespread belief that the highest faculty possessed by the individual was the moral sense. The moral sense was communally oriented. It was the basis of individual accountability, as well as the bond between individuals, and was believed to guide individuals to act benevolently toward others. All people were thought to possess this faculty equally.

The existence of the moral sense was critical to the recognition of certain individual rights. For example, the right to pursue happiness was considered inalienable because it was believed to be necessary to the full expression of the moral sense. Thus, individual rights were conceived not

68. See *supra* notes 23-26 and accompanying text.

69. Compare the discussion and argument in Jeffrey Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990) (concluding that there is not a right to abortion that withstands contrary state interests) with Dunn, *supra* note 53 (concluding that a right to abortion should be recognized).

70. See *infra* notes 73-77 and accompanying text.

71. Suzanne Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) presents an excellent discussion of the ambivalent themes and philosophical views respecting individual and community that inform each of the political documents.

72. See generally GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 167-255 (1979).

only as protections against government intrusions but also as an affirmation of an important individual stature. These rights placed the individual in a mythic dimension of individual choice and action respecting matters of significance, including those matters related to communal obligations.

We need not accept the Jeffersonian ideas discussed by Wills as correct in their particulars in order to recognize the constitutional archetype. We see this archetype, the attempt to reconcile different notions of responsibility and connection to others, in other accounts of our constitutional history. At the level of archetype, Wills' pursuer of happiness is not unlike the individual who possesses a "rational liberty" interest.⁷³ Wills' archetype is not unlike the individual whose dedication to "civic virtue" comes close to Jefferson's classical republicanism.⁷⁴ Wills' archetype is not unlike the individuals whose presumed equal possession of "faculties suited to individual agency in ordering individual lives" makes governmental coercion of some acts inappropriate.⁷⁵ What unites these individuals as archetype is not their *a priori* devotion to a particular view of responsibility to others. There is no unity in this regard. Rather, they are united as archetype in their heroic struggle to reconcile those different views of responsibility. They are united as archetype in the assumption that they have the heroic awareness and capacity to engage in that struggle. Constitutional history and doctrine may be ambivalent as to the *a priori* question of responsibility,⁷⁶ but there is no uncertainty about the struggle. As in myth, the Constitution permits us continually to revisit the struggle.⁷⁷

Until the authors of the joint opinion spoke in *Planned Parenthood v. Casey*, one might have searched the abortion decisions in vain either for the constitutional archetype, for an affirmation of women as constitutionally heroic individuals, or for a discussion that places a woman and her choice in a mythic dimension. Although some Justices seemed both to recognize the significance of a woman's decisional right⁷⁸ and to acknowledge the non-medical character of the abortion decision,⁷⁹ they

73. Koehlinger, *supra* note 69.

74. Sherry, *supra* note 71.

75. Dunn, *supra* note 53, at 88-93.

76. Sherry, *supra* note 71, at 550-62.

77. *Id.* at 577.

78. See, e.g., *William L. Webster v. Reproductive Health Services*, 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting); *Irving Rust v. Louis L. Sullivan*, 111 S. Ct. 1759, 1784-86 (1991) (Blackmun, J., dissenting).

79. There is, however, considerable ambiguity in this regard. For example, the dissenters in *Rust* declare that "*Roe* . . . and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination." *Id.* at 1784. They also refer to the importance of a woman's right to "bodily self-determination." *Id.* at 1785. Yet they couch their analysis as a discussion of "medical option[s]," "medical situation[s]," and "health-related decisions," and they

were in a decided minority. Moreover, their language was not linked to a strong philosophical position regarding the status of woman as archetype. There was no apparent recognition that a mythic conception of individual awareness and capacity is necessary to an adequate discussion of individual rights. In general, participants in the abortion debate either gave short shrift⁸⁰ or were resistant to⁸¹ a mythic conception of the individual woman.

It is profoundly troubling that the abortion decisions and debate have not generally been imbued with a mythic dimension that is relevant to acts of moral significance taken by individuals. We use this dimension in analyzing other, similarly complex, moral decisions. For example, there is

continue to speak of the special role of the physician. *Id.* at 1785-86.

80. Advocates' briefs typically discuss only the right, not the archetypal individual of choice, and characterize the right in ways that minimize the archetypal dimension. For example, pro-choice advocates continue to stress the right to medical self-determination. *See, e.g.*, the petitioners' brief and the *amicus curiae* brief of the American College of Obstetricians and Gynecologists in *Irving Rust v. Louis W. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1391). The latter brief stressed that women should not be given misleading information, a potentially archetypal issue, but restricted argument to the assertion that misleading information increases the medical risks inherent in pregnancy. *Id.* at 28. Of the many briefs filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605), the brief that most directly argues that women are involved in making a moral decision was filed on behalf of *Women Who Have Had an Abortion*.

Even persons generally supportive of a woman's right to make an abortion decision occasionally make statements that undercut recognition of an archetypal stature for women. *See, e.g.*, Ronald Dworkin, *The Future of Abortion*, THE N.Y. REV. OF BOOKS, Sept. 28, 1989, at 47, 49 (the state's interest in ensuring that women understand the "moral gravity" of their decision may justify state regulation).

The majority in *Rust* certainly gives short shrift to a mythic conception of decision-making for women. For example, it refuses to take into account the way in which Title X regulations use information to manipulate the choices of indigent women. It also gives little if any weight to the reality of the lives of indigent women who, without some affirmative steps on the part of government, may not be in a position in which it is even meaningful to speak of constitutional rights in an archetypal dimension.

81. *See, e.g.*, the brief of *amici curiae* Covenant House and Good Counsel, Inc., in *William L. Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605). *Amici* represent that they are worried that a right to abortion will encourage "provisional parenthood" by both men and women; however, their descriptions of men and women differ radically. Women are portrayed as uninitiated in "the delicate medical/legal debate over the nuances of 'trimesters'" and likely to regard as "[fanciful] . . . any responsibility for personal sacrifice or even prudent medical attention" in making an abortion decision. *Id.* at 24. "For fathers, by contrast, abortion on demand presents an often excruciating dilemma. Some are eager to become parents and suffer a deep sense of loss after an abortion." *Id.* In this brief, only men are characterized as reflective and responsible decision-makers, personally confronting a dilemma of significance that involves connection to others. *Cf.* Justice Scalia's well-known characterization of Justice O'Connor's views on abortion as irrational. *Webster*, 492 U.S. at 536, n.* (Scalia, J., concurring).

a long and strong tradition that restricts governments from requiring one person to save another's life by sacrificing his or her own.⁸² In this tradition, the state's deference to individual choice affirms the individual's heroic stature. It gives individuals the freedom to reconcile conflicting obligations to others. There is every reason to believe that women as a group (although not every woman) can and will resolve morally complex dilemmas at least as well as men as a group (although not necessarily as well as every man), and that women can and will give at least as much weight to their responsibilities to others in making decisions.⁸³ There is no reason to believe that women are more likely than men to abuse their powers to decide matters of significance.

Perhaps the joint opinion of Justices O'Connor, Souter, and Kennedy in *Planned Parenthood v. Casey*⁸⁴ portends a change in the way women's constitutional rights are conceived because, in some respects, it moves constitutional debate into the dimension of myth. For example, in explaining why the abortion decision warrants protection as a liberty interest, the joint opinion speaks of the importance of "intimate and personal . . . choices central to personal dignity and autonomy."⁸⁵ The opinion puts the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" at "the heart of liberty."⁸⁶ This is because "[b]eliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."⁸⁷ Choices respecting pregnancy and abortion concern

not only the meaning of procreation but also human responsibility and respect for it [R]easonable people will have differences of opinion about . . . [it]. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that

82. For example, a state does not force individuals to donate portions of their body (before or after death) to save other persons, even relatives. See LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1354-62 (1988). According to Tribe, the tradition would presumably not permit a state to interfere with a father's refusal to donate life-saving blood to save the life of a voluntarily conceived fetus. See also TRIBE, *supra* note 50, at 130-35; Dunn, *supra* note 53, at 109-14. Cf. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 85-86 n.12-13 and 95-96 n.43 (1991) (arguing that the discrepancy in how we treat abortion and other similar decisions makes anti-abortion laws suspect).

83. See, e.g., MAPPING THE MORAL DOMAIN, *supra* note 10; GREENE, *supra* note 3; WOMEN AND MORAL THEORY, *supra* note 10.

84. 112 S. Ct. 2791, 2803-33 (1992).

85. *Id.* at 2807.

86. *Id.*

87. *Id.*

the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations.⁸⁸

The joint opinion places the abortion decision "within the zone of conscience and belief."⁸⁹ It links beliefs about abortion and the abortion decision itself to "personhood"⁹⁰ and "human responsibility"⁹¹ rather than to medical treatment.⁹² Although it recognizes that the abortion decision is not made in isolation, it does not consider the woman facing the decision to be a lesser constitutional individual, a "pregnantwoman" whose rights are per se diminished by virtue of pregnancy.⁹³ It understands that the struggle to make significant decisions is a defining experience of human beings and that to be deprived of that right through state compulsion is, on occasion, to be denied humanity.

For the first time in a written opinion discussing the rights of women, some members of the Supreme Court have recognized that the discussion calls for a mythic perspective. In these respects, the opinion is promising. But the opinion is also flawed. While the abortion decision is clearly placed in a mythic dimension, the decision-maker herself is not.

Thus, in applying its undue burden test to statutory informed consent requirements, the joint opinion effectively permits states to assume that women need special help — a "reasonable framework for"⁹⁴ — deciding whether to carry a pregnancy to term. States "may enact rules and regulations designed to encourage . . . [women] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."⁹⁵ States may adopt "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus."⁹⁶

The joint opinion ignores the fact that states like Pennsylvania assume that special assistance in matters of adult, personal conscience is needed only for women. In justifying their conclusion that the informed consent requirement is constitutional, the Justices argue that a law mandating that recipients of kidney transplants be given information about risks to kid-

88. *Id.* at 2807-08.

89. *Id.* at 2807.

90. *Id.*

91. *Id.*

92. The opinion does not entirely avoid the medical context, however. *See id.* at 2823.

93. *See, e.g., id.* at 2817 (the critical issue in *Roe* was the "weight to be given the state interest, not the strength of the woman's interest").

94. *Id.* at 2818.

95. *Id.*

96. *Id.*

ney donors would be constitutional.⁹⁷ Of course, states have not adopted such laws. The crucial point for women seeking full constitutional equality is that society does not question whether men, generally, can make mature and informed decisions.⁹⁸ It only questions that capacity in women confronting an unwanted pregnancy.⁹⁹ Men are assumed to have the heroic qualities needed to function responsibly within constitutionally defined arenas of liberty. Women's heroic qualities have yet to be affirmed.

CONCLUSION

Feminist analysis needs to insist on a paradigm for constitutional analysis that includes the dimension of myth. Conflicts between different views of responsibility and connection to others — conflicts inherent in communal existence — are unlikely to vanish even if norms are expanded to include women's experiences. Hester Prynne's narrative of myth attests to this fact. Although Hester hoped for a social transformation¹⁰⁰ and a new truth¹⁰¹ that would make life easier for women, she also recognized that such a transformation would require change of a religious magnitude¹⁰² and a complete rejection of pre-existing norms.¹⁰³ Under those circumstances, Hester's life necessarily comprised a story of a continuing personal struggle to resolve conflicts respecting social norms that she did not entirely reject.¹⁰⁴ Because a narrative of myth helps generate a paradigm that addresses this conflict, it is essential to women.

Feminists use context to persuade lawmakers to listen and respond to the reality of women's lives. An analysis of context explicitly and openly relies on appeals to others — e.g., to men or to judges — to pay more attention to women's context. A narrative of myth is also used to persuade. But a narrative of myth secures an empathy for women that is stronger and more powerful than an empathy invoked merely by context.

97. *Id.* at 2823.

98. See Calabresi, *supra* note 83.

99. However, it is worth noting that, in concluding that women will not be unduly burdened by state imposition of a decision-making framework that explores only one side of the issue of conscience, the joint opinion arguably assigns superhuman decision-making capacities to women.

100. *The Scarlet Letter*, *supra* note 25, at 452.

101. *Id.* at 545.

102. *Id.* at 545-46.

103. *Id.* at 452.

104. At the conclusion of *The Scarlet Letter*, Hester returns to live her life at the outskirts of the town that has condemned her. Because of the conclusion, EDWARDS, *supra* note 17, views Hester as a failed heroine. *Id.* at 56. Edwards does not adequately reconcile her view with her recognition either that women require a context in order to be heroic, *id.* at 6, 7, or that all heroes "rest[] and rust[]" after their quest is over. *Id.* at 7.

Myth secures an empathy that flows from its presentation of a story of a struggle that almost all people can recognize. In contrast, context must rely on the willingness of others to pay attention to different, sometimes alien, stories.¹⁰⁵ At the level of myth, empathy arises as a natural and positive affirmation of connection, rather than as a gift given by insiders in response to pleas for understanding by outsiders.

Myth does not necessarily displace context. Instead, it makes context useful rather than potentially limiting. Once empathy is secured, the most forceful presentation of women's context may be offered without fear that contextual differences will pervert conventional analysis.¹⁰⁶ I find it difficult, for example, to imagine that a Justice who accepts the constitutional archetype for women would misuse women's context in the way it has been misused by Justice White in the abortion decisions.¹⁰⁷ A Justice who accepts the constitutional archetype for women will use context to assess the legitimacy of specific state acts that affect women and to determine their constitutionality in a specific contextual setting. A Justice who accepts the constitutional archetype for women will not use context to emphasize the "otherness" of women so as to exclude them from the realm of conventional legal discourse. In other words, myth helps ensure that context will be used to solve problems of constitutional dimension for women, rather than as an identifier of illusory differences that confound a meaningful discussion of constitutional rights.

Only by securely positioning themselves in a mythic constitutional dimension will women ensure that an analysis of context will not be misused. Although my proposed paradigm does not guarantee recognition of specific rights of individual choice and action respecting any or all moral issues,¹⁰⁸ recognition of mythic stature for women as decision-

105. See, e.g., Minow, *supra* note 7.

106. Cornell, *supra* note 19, at 194-95, illustrates this point in her discussion of Morrison's *Beloved* as a retelling of the Medea myth. The context of slavery is critical to the story, but Morrison's reliance on a myth familiar to all readers is essential to the force of the contextual story.

107. See *supra* notes 65-67 and accompanying text. I also doubt that such a Justice would rely on unproven assumptions as a substitute for proven context, as many Justices evidently did in the parental-notification abortion decisions. See Pine, *supra* note 8.

108. The narrative of myth may, however, have an impact on how we describe rights that are rooted in an archetypal dimension. For example, a right labeled a right of privacy does not, for me, adequately represent a right applicable to women facing an abortion decision. Rhetoric conventionally explicates the right of privacy as a right of autonomy, a right to self-definition, a right to psychological self-determination, a right to individuality, a right to be economically and politically self-sufficient, or a right to be free from the pain associated with childbirth. This rhetoric fails to convey the dimension of myth necessary either to affirm a woman's archetypal stature or to promote appropriate constitutional problem-solving. It emphasizes isolation (and, occasionally, alleged differences between women confronting an abortion decision and oth-

makers and actors is a prerequisite to an adequate discussion of constitutional (or any other) rights for women. A narrative of myth enhances contextual stories of women's lives but does not consign women to a limited existence as a purely contextual beings. A narrative of myth completes the feminist paradigm by affirming women's legitimate place within the rich, perilous, and aspirational realm of individual rights and responsibility without denying women the reality of their context.

er people) rather than tensions between autonomous choice and communal responsibility (which are implicit in many decisions, not simply an abortion decision).