RECONSIDERING ABORTION LAW: LIBERTY, EQUALITY, AND THE NEW RHETORIC OF *PLANNED PARENTHOOD v. CASEY*

ERIN DALY*

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INTRODUCTION

> *I think it's a step that had to be taken as we go down the road toward the full emancipation of women.*

Justice Harry A. Blackmun, April 1994, speaking of the reaffirmation of *Roe v. Wade*.[1]

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* Assistant Professor, *Widener University School of Law*. J.D. 1990, *University of Michigan*; B.A. 1983, *Wesleyan University*. I would like to thank Phyllis T. Bookspan, Robert L. Hayman, Jr., and Robert Justin Lipkin for their extremely challenging and thoughtful comments on earlier drafts and Christine Mpaka and Tamas Perfit for their invaluable research assistance.

1. Associate Justice Harry A. Blackmun, Remarks at White House News Conference Announcing His Retirement from the Supreme Court (April 9, 1994) [hereinafter Blackmun

Since 1973, the Supreme Court has based the right to abortion on a right to privacy implicit in the Due Process Clauses of the Fifth and Fourteenth Amendments.[2] Despite forceful and increasingly frequent arguments that the harm caused by restrictive abortion laws deny equal protection, at least as much as they impinge on personal privacy,[3] the Court has steadfastly refused to consider abortion in this light.[4]

The Court's failure to recognize the applicability of equal protection law stems from its historic refusal to view women and men as similarly situated with respect to reproductive rights. This is true not just in the narrow sense that women can become pregnant and men cannot. Rather, the Court has, in a more fundamental sense, failed to accord women the respect necessary to make equal protection claims appropriate. Throughout its abortion jurisprudence, the Court has treated women as less than full adults and, on that basis, has denied that women are situated similarly—even if not identically—to men. The Court's opinions have traditionally reflected the view that women cannot make decisions about their pregnancy on their own.[5]

Remarks] *quoted in* Linda Greenhouse, *How a Ruling on Abortion Took on a Life of Its Own*, N.Y. TIMES, Apr. 10, 1994, at E3. Justice Blackmun was speaking about the reaffirmation of Roe v. Wade, 410 U.S. 113 (1973) in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

2. *See Roe*, 410 U.S. at 153 (holding that Texas' criminal abortion statutes violated Fourteenth Amendment's "concept of personal liberty" because "the right of privacy . . . is broad enough to encompass a woman's decision" to terminate her pregnancy).

3. Among the prominent advocates of this view are KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 92-125 (1984); LAURENCE H. TRIBE, THE CLASH OF ABSOLUTES 105-08 (1990) [hereinafter TRIBE, CLASH OF ABSOLUTES]; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 378-86 (1985); Kenneth L. Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1621-46 (1977). The arguments in favor of equal protection law have been considered so extensively in these and other works that they will not be explored in detail here.

As a matter of litigation strategy, the American Civil Liberties Union routinely raises the equality issue in its complaints in abortion cases, but does not develop it during the case because it is more likely to obtain relief under the privacy doctrine. *See* RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW 6 (1994) (describing uses of equality argument primarily in *amicus* briefs in abortion cases); *cf.* Doe v. Bolton, 410 U.S. 179, 200-01 (1973) (addressing claims of wealth-based equal protection violations); Brief for Appellants at 9, 73, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) (noting Roe's indigence and economic hardship resulting from continuing unwanted pregnancy).

4. In Justices Blackmun and Stevens' separate opinions in *Casey*, the Court's most recent major abortion decision, the Justices explicitly recognized that abortion restrictions implicate equal protection, as well as due process interests. *See Casey*, 112 S. Ct. at 2846 (Blackmun, J., concurring in part and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."); *id.* at 2838 (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty, and the basic equality of men and women.").

5. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 413 (1981) (upholding statute requiring physicians to notify minor's parents before performing abortion for consenting minor); Belotti v. Baird, 443 U.S. 622, 649 (1979) (upholding parental consent requirement); Planned Parent-

Beginning with *Roe v. Wade*,[6] the Court has viewed pregnant women exclusively as patients and has considered the decision to have an abortion as purely a medical one—the doctor's medical judgment was paramount and the woman's concerns were irrelevant unless they related to her physical health, as defined by the doctor and the Court.[7] Later on, the Court viewed the issue from the perspective not just of the doctor, but of the State, the husband, the parents, the fetus—everyone but the woman.[8] The Court failed to consider the woman's point of view and she effectively vanished from its opinions. Until recently, the Court did not recognize the ramifications of pregnancy and childbirth on women's lives; mothering seemed to fit so neatly into women's roles that no incompatibility between motherhood and other aspects of women's lives was imaginable.[9]

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hood v. Danforth, 428 U.S. 52, 65-67 (1978) (upholding requirement that doctors provide women seeking abortions with formulaic information); Doe v. Bolton, 410 U.S. 179, 191 (1973) (requiring women to obtain physician's consent to perform abortion); *Roe*, 410 U.S. at 164 (holding that abortion decision must be left to medical judgment of physician).

When it comes to life decisions, and particularly decisions relating to reproduction, the Court has never treated women as complete adults. Laws that constrain women's decisionmaking processes have been upheld even though the paternalism required to justify them could never be applied to men. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 142 (1872) (rejecting challenge, on privileges and immunities grounds, to Illinois' veto of woman's determination to practice law and failing to respect woman's own decision). *Compare* Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding maximum hours legislation for women in certain professions) *with* Lochner v. New York, 198 U.S. 45, 64-65 (1905) (striking down, on substantive economic due process grounds, maximum hours legislation as applied to employees, all of whom were men).

6. 410 U.S. 113 (1973).

7. Roe v. Wade, 410 U.S. 113, 163 (1973) (holding that in first trimester, physician, rather than pregnant woman, is free to make determination that patient's pregnancy should be terminated); *see also infra* notes 23-93 and accompanying text (discussing Supreme Court's view of woman as patient).

The Court's view of the ability to control reproduction as unrelated to other aspects of people's lives, while not unique in the world, seems to be losing ground. Attendees at the United Nations Conference on Population and Development in Cairo in September 1994 noted that industrial countries, including the United States, had finally "responded to their warnings that runaway population growth in the poorest countries will not be slowed until it is considered as part of a larger problem: poor health care, lack of choice in family planning, abuses and general powerlessness suffered by millions of women [in the developing world]." Barbara Crossette, *Women's Advocates Flocking to Cairo, Eager for Gains*, N.Y. TIMES, Sept. 2, 1994, at A3. The situation of women in the developing world can obviously be distinguished from the situation of American women. Nonetheless, the worldwide recognition of family planning, including abortion, as part of larger social issues is critical to resolving problems faced by women everywhere. This was reaffirmed in the Beijing Declaration, adopted in September 1995 at the United Nations Fourth World Conference on Women, which explicitly recognized and reaffirmed that "the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment." United Nations Fourth World Conference on Women, *Beijing Declaration*, September 18, 1995, *available in* LEXIS, Nexis Library, Current News File.

8. *See infra* notes 94-192 and accompanying text (discussing Supreme Court's failure to consider women's point of view in favor of the perspectives of others).

9. *See* Geduldig v. Aiello, 417 U.S. 484, 492-97 (1974) (holding that employer's decision to exclude pregnant employees from coverage under employer's disability program did not violate equal protection); Hoyt v. Florida, 368 U.S. 57, 62 (1961) (discussing women's central

The Court's most recent effort to clarify the abortion issue was in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[10] where it upheld some of the nation's most restrictive abortion provisions.[11] *Casey* is a remarkably splintered and confusing opinion, despite its lofty overture that "[l]iberty finds no refuge in a jurisprudence of doubt."[12] The lead opinion is so fractured that, as the maze of concurrences and dissents illustrate,[13] there is something in it for everyone to hate. Indeed, *Casey* has received almost nothing but criticism: pro-lifers have derided its continued protection of abortion, while pro-choicers have lamented its support of significant abortion restrictions.[14] Furthermore, both advocates and detractors of judicial restraint have reproached the Court for simultaneously reaffirming and gutting *Roe*.[15]

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role in home and family life as justification for exclusion from compulsory jury service). *But see* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (stating that women should be able to have families without fear of losing their jobs under California's pregnancy disability statute); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 650 (1974) (holding that rules requiring mandatory maternity leave violate Fourteenth Amendment's Due Process Clause). In his separate opinion in *Casey*, Justice Blackmun criticized Chief Justice Rehnquist's "view of the State's compelling interest in maternal health [as having] less to do with health than it does with compelling women to be maternal." 112 S. Ct. at 2853 (Blackmun, J., concurring in part, dissenting in part, and concurring in judgment in part).

10. 112 S. Ct. 2791 (1992).

11. The Court in *Casey* upheld 18 PA. CONS. STAT. § 3203 (defining medical emergency); § 3205 (imposing informed consent requirement); § 3206 (requiring parental consent); and § 3214 (requiring recordkeeping and reporting). 112 S. Ct. at 2822-26, 2832-33. The Court also struck down 18 PA. CONS. STAT. § 3209 (requiring husband notification). *Id.* at 2830-31.

12. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2803 (1992).

13. *Id.* at 2802.

14. A brief survey of newspaper articles about *Casey* demonstrates the confusion it created and general disapproval it garnered. *See, e.g.*, Dan Allison, *How Anti-Abortionists Lost the War*, ST. PETERSBURG TIMES, Aug. 16, 1992, at 7D; *Another Blow Against Roe*, ST. LOUIS POST-DISPATCH, June 30, 1992, at 2B (editorial); *Both Sides See Defeat in Decision*, ST. LOUIS POST-DISPATCH, July 5, 1992, at 1A; Kim Cobb, *Both Sides in Abortion Case Claim Defeat*, HOUSTON CHRON., June 30, 1992, at A1; B.D. Cohen, *Abortion Rights Prevail*, NEWSDAY, July 14, 1992, at 59; B.J. Isaacson-Jones, *Sorting out the Abortion Decision: Women's Rights Remain Threatened*, ST. LOUIS POST-DISPATCH, July 5, 1992, at 3B; Frances Kissling, *Pro-Choice Must Widen Its Agenda; Reproductive Rights Are in Peril, Not Just Abortion Rights*, L.A. TIMES, June 30, 1992, at B7; Nancy Myers, *What Happens Next in Abortion Rights Battle? For Opponents of Abortion, Fight to Change the Law Begins Anew*, USA TODAY, June 30, 1992, at 11A; William Neikirk & Glen Elasasser, *Ruling Weakens Abortion Right*, CHIC. TRIB., June 30, 1992, at C1; *Reproductive Rights Under Attack*, ST. LOUIS POST-DISPATCH, July 2, 1992, at 2C (editorial); Alexander C. Sanger, *What Victory for Abortion?*, NEWSDAY, Sept. 5, 1992, at 41 (letter to editor); David Savage, *How* Roe v. Wade *Survived: Dramatic Shift on Court Ended Years of War over Abortion*, DALLAS MORNING NEWS, Dec. 17, 1992, at 41A; Ellery Schempp, *Court Again Upholds Rights of the Individual*, N.Y. TIMES, July 17, 1992, at A26 (letter to editor); Kathleen M. Sullivan, *A Victory for Roe*, N.Y. TIMES, June 30, 1992, at A23; David Tuller, *The 2 Sides Agree—Ruling Settles Nothing*, S.F. CHRON., June 30, 1992, at A5.

15. *See, e.g.*, *Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (observing that "*Roe* continues to exist but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality"); *id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting portions of *Roe* that did not survive *Casey* despite its purported reaffirmation); Alan I. Bigel, Planned Parenthood of Southeastern Pennsylvania v. Casey: *Constitutional Principles and Political Turbulence*, 18 U. DAYTON

Nonetheless, *Casey* contains the seeds of many positive developments and could signal the approach of a new phase in the Court's abortion jurisprudence. Its most significant contribution may be to broaden the scope of what is considered relevant to the abortion issue. In several important ways, the lead opinion in *Casey*[16] seems to recognize that abortion is much more than a medical decision affecting people who can only be characterized as patients and implicating a narrow and precarious privacy interest.[17] *Casey* considers the effects of abortion restrictions not just on those in immediate need of abortion-related services but on all women who assume control over reproduction in planning their lives.[18] It also recognizes that reproductive rights implicate all aspects of women's social and economic lives and that a state's effort to pigeonhole women impinges on their right to liberty—not just to privacy.[19] Furthermore, *Casey* suggests that if such burden is not equally borne by men, it violates women's rights to equal protection because it

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L. REV. 733, 756-62 (1993) (criticizing *Casey* decision as providing ambiguous standard which undermined adherence to central holding of *Roe*); Paul Benjamin Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 18-34, 68-72 (1993) (providing view of attorney for Americans United for Life that Supreme Court's near total abandonment of *Roe* undermines Court's rationale that *stare decisis* requires *Roe* to be affirmed); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 19-30 (1992) (criticizing Supreme Court's decision in *Casey* to partially adhere to *Roe*); Julie Schrager, *The Impact of* Casey, 1992 WIS. L. REV. 1331, 1332-33 (providing views of abortion rights attorney on *Casey*'s undue burden test); Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of* Casey, 45 HASTINGS L.J. 961, 966-67 (1994) (discussing *Casey*'s failure to protect women); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2031-89 (1994) (discussing Supreme Court's failure to provide useful guidelines for undue burden test and suggesting new undue burden methodology); Note, *Workability of the Undue Burden Test*, 66 TEMPLE L. REV. 1003, 1027-37 (1993) (arguing that *Casey's* undue burden test violates women's constitutional rights and proposing return to strict scrutiny analysis for abortion rights as applied in *Roe*).

16. Justices O'Connor, Kennedy, and Souter announced the Opinion of the Court and delivered the Opinion with respect to Parts I, II, III, V-A, V-C, and VI. This Article refers only to the parts of the Opinion to which at least five justices have signed on, except where otherwise noted, and refers to these as the Opinion of the Court for the sake of convenience. *Casey* is a rare example of more than one justice signing the Opinion of the Court. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Court signed by Justices Stevens, Powell, and Stewart); Cooper v. Aaron, 358 U.S. 1 (1958) (opinion of Court signed by all nine Justices).

17. *See infra* Part III (discussing specific ways in which *Casey* has broadened traditional Supreme Court analysis on abortion issue). This Article uses the term "people" rather than the more specific term "women" in an effort to deter readers from artificially separating women from people, as if women were somehow different from, rather than half of, the generic universe of people. This term was embodied in the Beijing Declaration's recognition that "Women's rights are human rights." United Nations Fourth World Conference on Women, *Beijing Declaration* ¶ 14, September 18, 1995.

18. *See infra* notes 247-55 and accompanying text (arguing that *Casey* recognizes women's ability to make personal decisions independent of doctors' judgment, thus viewing abortion as more than medical decision).

19. *See infra* notes 209-46 and accompanying text (discussing Supreme Court's recognition of liberty as distinct interest from privacy).

impedes "the full emancipation of women."[20] Thus, the treatment of the abortion issue in *Casey* represents an understanding of the complexity of the issue that was lacking in prior decisions and it is the first case to evince enough respect for women to warrant application of equal protection principles. The language in *Casey* creates the hope and the promise of a legal doctrine that reflects this more comprehensive and realistic vision. It is critical to emphasize at the outset, however, that this promise is not fulfilled in four of the five holdings of *Casey* that uphold the restrictions.[21]

The Court has not granted *certiorari* in any challenge to abortion restrictions since it decided *Casey* more than three years ago and it appears unlikely that the present Court will revisit the issue in the immediate future.[22] The Court, however, is not likely to stay away

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20. Blackmun Remarks, *supra* note 1.

21. *See Casey*, 112 S. Ct. at 2822-26, 2832-33 (upholding 24-hour waiting period and one-parent consent requirements); *id.* at 2867-69, 2872-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2875 (Scalia, J., concurring in the judgment in part and dissenting in part). The dual nature of *Casey*—the rhetorical promise for individual rights and the stunted nature of the holdings—has been recognized since the opinion's publication. *See* David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 5 (arguing that theoretical approach implicit in *Casey*, rather than specific holding, will be center of debate over abortion issue).

22. For cases applying the undue burden test, see Planned Parenthood v. Miller, 63 F.3d 1452, 1458, 1468 (8th Cir. 1995) (invalidating South Dakota's requirement that physicians notify minors' parents 48 hours before abortion without judicial bypass but upholding informed consent and 24-hour waiting period); Jane L. v. Bangerter, 61 F.3d 1493, 1505 (10th Cir. 1995) (invalidating Utah's requirement that doctors performing post-viability abortions maximize fetus' chance of survival and prohibition on abortions after 20 weeks); Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994) (upholding North Dakota's informed consent and 24-hour waiting period which was nearly identical to Pennsylvania's); Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1494 (D. Utah 1994) (upholding Utah's 24-hour waiting period and informed consent, which was similar to Pennsylvania's); Planned Parenthood v. Neely, 804 F. Supp. 1210, 1218 (D. Ariz. 1992) (invalidating medical emergency exception at too narrow and parental consent requirement on vagueness grounds). In Mahaffey v. Attorney Gen., No. 94-406793 AZ, 1994 WL 394970 (Mich. Cir. Ct. July 15, 1994), the court invalidated Michigan's proposed 24-hour waiting period using strict scrutiny as required by state precedent concerning alleged infringements on fundamental rights.

The Supreme Court has already denied *certiorari* in several cases applying the undue burden standard. *See, e.g.*, Barnes v. Mississippi, 992 F.2d 1335, 1337-39 (5th Cir.) (upholding two-parent parental consent with judicial bypass), *cert. denied*, 114 S. Ct. 468 (1993); Sojourner T. v. Edwards, 974 F.2d 27, 29-30 (5th Cir. 1992) (invalidating Louisiana law criminalizing abortions except in very limited circumstance, such as reported incident of rape or incest if within 13 weeks), *cert. denied*, 113 S. Ct. 1414 (1993); Barnes v. Moore, 970 F.2d 12, 14-15 (5th Cir.) (upholding Mississippi informed consent and 24-hour waiting period identical to Pennsylvania's, without evidentiary hearings), *cert. denied*, 113 S. Ct. 656 (1992); *see also* Kathleen M. Sullivan, *The Supreme Court 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 33, 110 (1992) (noting that "[b]oth sides in the abortion debate decried the joint opinion and claimed defeat in *Casey*" and that "[a]ntiabortion activists . . . competed at press [conferences] with pro-choice activists . . . to see whose sound bite could more bitterly excoriate the Court").

For cases decided since *Casey*, see *Barnes*, 992 F.2d at 1337 (upholding Mississippi's parental consent law); *Sojourner T.*, 974 F.2d at 30 (holding unconstitutional Louisiana's prohibition on pre-viability abortions); *Barnes*, 970 F.2d at 14-16 (upholding informed consent requirement and 24-hour waiting period "substantially identical" to Pennsylvania's provisions); Preterm Cleveland

from the abortion cases for long. When it finally does turn its attention again to abortion, it should rely on the language in *Casey* to integrate equal protection analysis into its approach to create a more sensible abortion jurisprudence for the 1990s and beyond than it was able to create in the 1970s and 1980s.

Part I of this Article describes the perspective from which the opinion in *Roe v. Wade* was written, focusing on the centrality of the doctor's role in the decision whether or not to end a pregnancy. It also describes how cases subsequent to *Roe* amplified the themes introduced in the landmark decision. Part II describes how, in later decisions, the Court ignored the woman's interests to such an extent that she all but disappeared from its vision. In these cases, the Court evaluated the constitutionality of husband and parental consent or notification provisions, as well as restrictions on public funding for abortions. The Court was demonstrably more concerned with institutions that arguably form the backdrop to American public life, such as marriage and family, than with the needs of the individual. Part III describes *Casey*'s dramatic departure from the earlier cases and shows how the Court's new understanding of people needing abortions can lay the groundwork for equal protection arguments in future cases. Part IV analyzes the mechanics of integrating equal protection claims into the existing due process framework and shows how both lines of analysis are necessary and appropriate to a complete understanding of abortion.

I. THE PATIENT PATIENT

When the Justices first looked at the abortion controversy in 1973, the person they saw at the center of it was, above all else, a patient. She was not a complex, multi-faceted human being in a difficult and unfortunate situation. She was just a patient, incapable of acting on her own behalf and dependent on the responsible judgment of another.[23]

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v. Voinovich, 627 N.E.2d 570, 581 (Ohio Ct. App. 1993) (upholding informed consent requirement and 24-hour waiting period similar to Pennsylvania's provisions under Federal and Ohio Constitutions); *In re* Initiative Petition No. 349, 838 P.2d 1, 2-3 (Okla. 1992) (striking down initiative provision prohibiting pre-viability abortions except in narrow circumstances), *cert. denied*, 113 S. Ct. 1028 (1993). Even if the Court is not tempted to review the constitutionality of state abortion laws, it may be more interested in reviewing federal prohibitions on abortion. *See, e.g.*, H.R. 1833, 104th Cong., 1st Sess. (1995) (banning method of late-term abortion without exception for life or health of pregnant person). The House of Representatives passed H.R. 1833 on November 1, 1995. 141 CONG. REC. 11,618 (1995).

23. *See Roe*, 410 U.S. at 163 (holding that, in first trimester, physician, rather than pregnant person, determines whether pregnancy should be terminated).

The construction of woman-as-patient is etymologically apt, given the predominant image of women as passive in our culture.[24] A patient is someone who is "[b]earing or enduring (pain, affliction, trouble, or evil of any kind) with composure, without discontent or complaint . . . quietly awaiting the course or issue of events."[25] It derives from the Latin "pati," meaning to suffer.[26] As a philosophical matter, patience has "two component parts[:] the submission which accepts the will of God and the waiting which rests upon both faith and hope."[27]

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24. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE 142-50 (1982) (describing women's culturally adopted views of themselves as passive); KATE MILLETT, SEXUAL POLITICS 31 (1970) (describing passivity as main female "virtue" in our culture); DEBORAH L. RHODE, JUSTICE AND GENDER 20-24 (1989) (documenting women's exclusion from professions as justified by their "delicate organization, emotional instability, and domestic obligations" which required "a bovine placidity during critical reproductive years" in order to avoid "brain-womb conflict"); WOMEN'S STUDIES ENCYCLOPEDIA 136-39 (Helen Tierney ed., 1991) (explaining that "masculinity-femininity tests" of 20th century viewed femininity as being tied to passiveness, emotions, lack of independence, and personal relationships, whereas masculinity was tied to assertiveness, independence, rationality, and interest in objects); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 626 (1991) (describing "western liberal version" of "normal" behavior for women as reactive and passive).

Several writers have looked at the association between femaleness and passivity in particular contexts. *See, e.g.*, Michele Bograd, *What are Feminist Perspectives on Wife Abuse, in* WOMEN'S STUDIES: ESSENTIAL READINGS 197 (Stevi Jackson ed., 1993) (discussing wife battering and its effect on female passivity); ROBIN TOLMACH LAKOFF, LANGUAGE AND WOMEN'S PLACE 14-19 (1975) (discussing women's propensity to phrase affirmative statements as questions to avoid being considered assertive and therefore unfeminine); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 74 (1987) (discussing conflict between being successful lawyer and successful "lady" who is more deferential). *See generally* NAOMI WOLF, FIRE WITH FIRE (1993) (discussing women's ambivalence toward gaining and using power).

In addition, the image of female passivity pervades virtually every aspect of our legal system, which simultaneously and contradictorily assumes women's inability to protect themselves and their contentment with their situations. The old laws of coverture, work regulations, see Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding Oregon statute limiting number of hours women could work), and statutory rape laws that punish only the male, see Michael M. v. Superior Court, 450 U.S. 464, 475 (1981) (deferring to state's interest in preventing illegitimate teenage pregnancy), are examples of the law's paternalism, while the failure to punish marital rape and domestic violence exemplify law's assumption that women choose their situations. The Court's decision in *Rostker v. Goldberg* straddles both categories. 453 U.S. 57, 83 (1984) (upholding women's exclusion from military registration).

Another indication of the pervasiveness of the image of women as passive is the backlash against that stereotype by feminists. *See generally* BELL HOOKS, AIN'T I A WOMAN? (1981) (discussing history of black women and feminism and reactions to black feminism).

25. XI THE OXFORD ENGLISH DICTIONARY 342-43 (2d ed. 1989).

26. *Id.* at 342; *see also* Reprimand by Chief Judge Miles Lord to Executives of A.H. Robins in the Dalkon Shield litigation, *filed in* Judicial Council Proceedings 203, *In re* Complaint of A.H. Robins, No. JCP 84-001 (8th Cir. Jud. Council 1984) (suggesting that different consequences would have flowed had A.H. Robins' "victims" of Dalkon Shield "been men rather than women, women who seem through some strange quirk of our society's mores to be expected to suffer pain, shame and humiliation"), *cited in* KAREN M. HICKS, SURVIVING THE DALKON SHIELD: WOMEN V. THE PHARMACEUTICAL INDUSTRY 19-20 (1994).

27. 9 ENCYCLOPEDIA OF RELIGION AND ETHICS 674-75 (James Hastings ed., 1955) (using female pronoun to describe patience as Christian virtue).

If people seeking abortions are just patients, their rights are appropriately circumscribed by the role of the attending physician.[28] The medical judgment of the physician limits the right to abortion itself, as defined by *Roe*. Given that abortion is a medical procedure, the physician's role in the effectuation of the procedure is clearly not objectionable. What is striking, however, is the degree to which *Roe* constitutionalized the physician's role in the decisionmaking process—a process that will usually entail more non-medical than medical components.[29]

Even at the earliest stage, when the woman's interest is compelling and the State's is not, the Court says that "the abortion decision and its effectuation" are left to the doctor's medical judgment.[30] Thus, with non-therapeutic abortions (the kind at issue in *Roe*), the physician decides in the first instance whether or not the election should be made. Under *Roe*, the physician is not only invited to

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28. The widely held view that Justice Blackmun wrote his opinion in *Roe* from the point of view of physicians has been attributed to his decade as general counsel for the Mayo Clinic which ostensibly gave him "a unique [among his brethren] appreciation of the problems and strengths of the medical profession" and prompted him to "sympathize[] with the doctor who was interrupted in his medical practice by the state, and told how he could or could not treat his patients." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 167, 174 (1979). *But see* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626-29 (1987) (expressing skepticism about Justice Blackmun's Mayo Clinic experience as underlying physician perspective in *Roe*). The difference between Henderson's view and the hypothesis of the male authors of *The Brethren* could be attributed to the latters' failure to recognize the male viewpoint *as* distinctive viewpoint.

More generally, *Roe* illustrates the difficulty people have in thinking from a perspective other than their own. Or, as Professor Martha Minow has said, "Wherever you stand, there you see." Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 723 (1991). Thus, it should not surprise us that the nine men on the Supreme Court saw abortion from the point of view of men, not women. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 934 n.85 ("Of course most judges, like most legislators, are white males, and there is no particular reason to suppose they are immune to the conscious or unconscious temptations that inhere in we-they generalizations."); *cf.* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (urging scholars, and presumably courts, to adopt perspective of "those who have felt the falsity of the liberal promise"); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2137-51 (1989) (providing analogous critique of City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), as having been written from white perspective). The "we-they" dichotomy is particularly jarring with respect to pregnancy, which is distinctly difficult to imagine without experiencing it because it has no analogue in the experience of men. *See* COLKER, *supra* note 3, at 4-5 (commenting on how being pregnant affected her theoretical views of abortion issue). Unlike males, most females either have already experienced pregnancy or assume that at some point they may become pregnant.

29. *See Roe*, 410 U.S. at 163 (holding that in first trimester, physician, rather than pregnant person, makes determination that pregnancy should be aborted).

30. *Id.* at 164; *see also* Andrea Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion*, 6 HARV. WOMEN'S L.J. 51, 51-88 (1983) (arguing that Supreme Court possesses inordinate respect for physician in abortion cases).

participate at this stage, he[31] is constitutionally required to lead the decisionmaking process.[32] This contrasts with other kinds of elective surgery where, by definition, the patient herself elects the procedure or not. Substitute vasectomy (or any other elective procedure) for abortion and the absurdity of the doctor's veto power becomes clear.[33] In fact, no Court opinion on abortion has considered the situation from the patient's point of view; by contrast, the Court has examined the physician's situation exhaustively.[34]

Placing the physician in the decisionmaking process has several jurisprudential ramifications. First, it reduces the woman to nothing more than a patient, merely the object of the physician's medical judgment. Second, it reduces the decision to nothing more than a medical one, rendering all other characteristics irrelevant. Stripping the woman and the decision of all their attributes but the medical one, denies the woman her humanity and the decision its complexity. As a pragmatic matter, without her humanity, she cannot claim equal protection of the laws because she is not fully a person; she is but the object of someone else's professional judgment.

Presumably, the Supreme Court in *Roe* thought that requiring physicians to play a prominent role from the time the abortion

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31. The cases habitually refer to the doctor as a man. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 515 (1989) (requiring physician to apply *his* reasonable skill and judgment); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 767 (1986) (requiring physician to report basis for *his* determination that fetus is not viable); Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976) (referring to physician and *his* patient); *Roe*, 410 U.S. at 138 (permitting physician to terminate pregnancy "[w]here *he* is of the good faith opinion" that abortion is necessary) (emphasis added). *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2824 (1992) (referring to physician as him or her); *id.* at 2843 (Stevens, J., concurring in part and dissenting in part) (referring to physician as female).

In 1973, fewer than 10% of doctors were women. *See* Henderson, *supra* note 28, at 1628 (citing STATISTICAL ABSTRACT OF THE UNITED STATES 1975, at 75 (noting that because medical profession was predominantly male in 1973, doctors "were full-fledged human beings whose 'rights' merited protection from prosecution")). The American College of Obstetricians and Gynecologists (ACOG), whose membership comprises mostly board-certified practicing obstetricians, reports that in 1995, roughly one-third of its members are female. Telephone Interview with Sophia Ware, Membership Coordinator, ACOG Resource Center (Sept. 29, 1995) (reporting total membership of 35,710 obstetricians of whom 9822 are female).

32. *See Roe*, 410 U.S. at 163 (holding that doctor has discretion to determine whether pregnancy should be terminated).

33. A man's right to have a vasectomy is limited by his ability to find a doctor to perform it, but he is not required to consult with the doctor as to whether or not it is a good idea. Although there are plain differences between a vasectomy and an abortion, those differences are not obviously relevant to the doctor's role, but to other factors. In other words, there is no inherent or constitutional reason why the existence of a fetus or the emotional trauma that may attend abortion requires the commanding presence of a doctor at the decisionmaking stage.

34. The issue is not whether the right to abortion is absolute or balanced against some asserted state interests. Rather, the issue is the Court's attitude while it balances. The Court's condescension toward and marginalization of women prevents it from acknowledging the scope and extent of women's interests.

decision is first considered would make abortions somewhat more difficult to obtain. Physicians historically have been among the most active proponents of abortion restrictions.[35] If the concern were solely to ensure a thoughtful decision that would be in the woman's best interest, the Court could have selected other alternatives, such as trusting the woman to know what is best for herself or perhaps requiring her to discuss her situation with her best friend. Entrusting the physician with primary decisionmaking authority, although likely to reduce the incidence of abortion, is not necessarily likely to further the woman's best interests.

In *Roe*, the Court did recognize that unwanted pregnancy may result in a Jobian litany of ills unrelated to a person's medical condition.[36] For instance, the Court said:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In

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35. *See* Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 9, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) and Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40) (describing viability of human offspring in early stages of gestation); *see also* Brief of 281 American Historians as Amici Curiae Supporting Appellees at 13, Webster v. Reproductive Health Servs., 492 U.S. 290 (1989) (No. 85-605) [hereinafter Brief of 281 Historians] (documenting medical profession's opposition to readily available abortion, though not primarily on moral grounds). "Without exception, physicians were the principal nineteenth-century proponents of laws to restrict abortions. . . . [S]ome doctors had moral objections to abortion, as well as moral and social views about women and race. But the most significant explanation for the drive by medical doctors for statutes regulating abortion is the fact that these doctors were undergoing the historical process of professionalization." *Id.*; *see also* SARAH RAGLE WEDDINGTON, A QUESTION OF CHOICE 40 (1992) (noting that medical profession "wanted to put out of business the midwives and homeopathic physicians who often did abortions"). Professor Sylvia Law has explained: "The 1830s saw a blossoming of a popular health movement, dominated by women practitioners, particularly directed to women's health problems, and emphasizing education, nutrition, and self-reliance. . . . [T]he regular allopathic medical profession sought these restrictive laws to promote the authority of regular doctors and to restrict their irregular competitors." Law, *supra* note 3, at 1014 n.218 (citations omitted). As a result of the political and medical genesis of American abortion laws, physicians have, since the professionalization of medicine, played prominent roles in the determination of whether or not a woman is entitled to an abortion. For instance, the life or health of the mother—a medical factor—is often the only exception to abortion prohibitions. Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1784 (1991) ("The typical early abortion statute punished the provision of abortifacients . . . unless necessary to preserve the woman's life . . . ."). Even then, however, it is the doctor's obligation in the first place to determine what constituted a danger to life or health—terms fraught with ambiguity and vagueness, but well within the physician's discretion. Ironically, physicians have also paid for their control over the abortion decision by carrying primary or exclusive civil or criminal liability under most nineteenth century abortion statutes. *See infra* notes 51, 60 and accompanying text (discussing historical liability of physicians under abortion statutes).

36. *See Roe*, 410 U.S. at 153.

> other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.[37]

Although the Court should be credited for recognizing these non-medical issues, it undercut the potential benefit of this recognition by concluding that all these issues must be left to the attending physician to decide.[38] Because of this reliance on the physician, the myriad and varied factors implicated in a woman's decision to abort fuse into a singular medical factor, like a machine churning out widgets regardless of what is put into it. In *Doe v. Bolton*,[39] the companion case to *Roe*, the Court held that "the medical judgment may be exercised in the light of *all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.* All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment."[40] This conclusion credits the physician, whose only required training is medical, with understanding the social, psychological, economic, and reputational ramifications of abortion better than the person suffering through an unwanted pregnancy. Despite the personal nature of the decision, the Court designates the physician—not the pregnant woman—as the indispensible and responsible party, without whom the decision cannot be made, let alone effectuated.[41] *Roe* conjures up the image of the pregnant woman, patiently lying on an examining table, feet in stirrups, waiting for the man in the white coat to exercise his medical judgment.[42]

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37. *Id.*

38. *Id.* at 164. The harm, of course, is not the extent to which doctors do, in fact, veto women's requests for abortion but the fact that they have the opportunity to do so and that the woman is not constitutionally permitted to decide on her own whether or not it is in her best interest to have an abortion.

39. 410 U.S. 179 (1973).

40. Doe v. Bolton, 410 U.S. 179, 192 (1973) (emphasis added). Although the Court cited this passage with approval in H.L. v. Matheson, 450 U.S. 398, 404-05 (1981), it ended that opinion with the observation that the State may constitutionally burden the decision to abort more than the decision not to because "[i]f the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." *Id.* at 412-13 (emphasis in original). When applied to abortions, the term "medical" is expansively defined to justify the participation of the physician in all aspects of the decision, but these factors are apparently not implicated in childbirth, a result that might surprise most people who have given birth. This is not to suggest that the physician's participation ought to be required in the aftermath of childbirth, but merely that the Court's definition of medical, for the purposes of physician authority, is malleable.

41. The implication of the Court's formulation could be that the woman is not responsible because if she were, she would not have gotten herself into this mess.

42. At oral argument in *Roe*, Sarah Weddington, Roe's counsel, tried unsuccessfully to focus the Court's attention, especially during rebuttal, on the people who were most dependent on the Court's finding of a constitutional right for abortion. Henderson, *supra* note 28, at 1625 (citing 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES:

Thus, in the first trimester of pregnancy—when "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"[43]—the physician and his patient, in that order, are the key players. In the second trimester, however, the State emerges as an additional player, with its own agenda.[44] Now, the State may regulate the abortions "in ways that are reasonably related to maternal health."[45] Because the State's only cognizable interest at this point is in the health of the woman, the image of the woman-as-patient intensifies; she is now not only in her physician's care but in the State's care as well. The State's conception of the woman's welfare supercedes both the physician's and her own. The woman may need the abortion and her doctor may concur, but, in the second trimester, the State can veto it in the name of maternal health. In this unusual area, the State may override a doctor-patient consensus purportedly to further the health of the patient.[46] In almost every other context, it would be presumed that the adult patient could be entrusted with the non-medical issues and the physician with the medical ones, leaving no role for the State to play.

At the final stage of pregnancy, the State may narrow the scope of medical discretion and require the doctor to think only of preserving the life or health of the woman. "[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[47] The State may now close the door on any interest the woman or her physician might have previously had in the non-medical aspects of pregnancy. In this stage, the State's interest in the potentiality of human life completely eclipses the person who faces a distressed future, who suffers imminent psychological harm, whose mental and physical health are taxed by child care, and who is

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CONSTITUTIONAL LAW 832-33 (Philip Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT]). It is also true that Weddington began her arguments by focusing on the physicians' difficult situations under the law. *See* 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra*, at 783.

43. *Roe*, 410 U.S. at 164.

44. *Id.*

45. *Id.*

46. *See id.* (discussing how State may intrude into doctor-patient relationship by regulating abortion procedure after first trimester). Other contexts in which this could occur include doctor-assisted suicide and therapies involving experimental drugs, but in neither of these is there an underlying constitutional right to choose the procedure.

47. *Id.* at 164-65.

stigmatized by being an unwed mother. All that remains is the patient patient.

In *Doe v. Bolton*, the Court further obscured the non-medical aspects of pregnancy when it rejected the plaintiffs' argument that requiring someone to get the approval of a hospital committee for an abortion gave the committee excessive discretion which it might not exercise in the patient's best interest.[48] The Court said that the plaintiffs' suggestion

> is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error" and needs. The good physician . . . will have sympathy and understanding for the pregnant patient . . . .[49]

The Georgia statute at issue in *Doe* required the concurrence of six physicians before a woman could have an abortion.[50] The Court held that only one was necessary to approve an abortion, striking down the two-physician concurrence requirement and the three-physician committee approval requirement.[51] The Court did this, however, not because of any individual right to privacy, but because of a "physician's right to practice."[52] The majority did not even mention the privacy right. Only Justice Douglas, who had developed the privacy right eight years earlier in *Griswold v. Connecticut*,[53] raised it in his concurrence.[54] Thus, it has been clear since these first cases were decided that the Court has been more sympathetic to claims that a statutory provision impinges on a physician's discretion than that it violates a woman's privacy.

Subsequent cases perpetuate the image of woman-as-patient and reinforce the physician's central role "in consulting with the woman about whether or not to have an abortion, and in determining how

48. *Doe*, 410 U.S. at 197. The Court ultimately struck down the committee requirement because it was superfluous to the physician's approval that was already required. *See id.* at 197-98.

49. *Id.* at 197.

50. *Id.* at 199.

51. *Id.* (noting that no other voluntary medical procedure requires second opinion).

52. *Id.*

53. 381 U.S. 479 (1965). *Griswold* is generally credited with establishing the constitutional right to personal privacy, at least in the area of procreation. *Id.* at 484-86.

54. *Doe*, 410 U.S. at 209-21 (Douglas, J., concurring).

any abortion [is] to be carried out."[55] Throughout these cases, the woman and her physician are considered to be unequal partners in decisions relating to abortion. For instance, in *Thornburgh v. American College of Obstetricians and Gynecologists*,[56] the Court asserted that "[a] woman and her physician will necessarily be more reluctant to choose an abortion" if the State permits the decision to become public.[57] Lower courts and other higher court cases tip the balance in the physician's favor, requiring the woman to make this decision "'in consultation with her physician and *in reliance* on his judgment,'"[58] even if the abortion has already been deemed medically necessary.

In some instances, the statutes themselves all but guarantee that the woman's own interests will be marginalized and viewed only in medical terms.[59] They reinforce the paradigm established in *Roe* that values the physician's judgment over that of the pregnant person. Specifically, most laws describe abortion as a procedure performed on a woman, rather than as an exercise of a constitutional right, making the woman the passive recipient of the procedure and the object of the physician's activity, rather than the agent making it happen.[60]

The legislative designation of viability, accepted by the Court for the first time in *Casey*, is another way states have kept women from controlling their own pregnancies by ensuring women's dependence on medical professionals to *plan* abortions. Common law and early statutory law did not regulate abortions until quickening, when "the

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55. Colautti v. Franklin, 439 U.S. 379, 387 (1979) (striking down as overly vague statute forbidding abortion when fetus "may be viable"); *see also* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 427, 447 (1983) (Akron I) (limiting restrictions which can be placed on second trimester abortions); Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976) (finding requirement of woman's written consent not overbroad and not unconstitutional).

56. 476 U.S. 747 (1986).

57. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986).

58. Harris v. McRae, 448 U.S. 297, 305-06 (1980) (emphasis added) (quoting McRae v. Califano, 491 F. Supp. 630, 737 (E.D.N.Y. 1980)).

59. *See infra* note 60 (discussing various statutory schemes criminalizing abortion).

60. *See, e.g.*, GA. CODE ANN. § 16-12-140 (1992) ("A person commits the offense of criminal abortion when he administers any medicine, drugs, or other substance whatever to any woman."); KAN. STAT. ANN. § 65-6703 (1992) ("No person shall perform or induce an abortion when the fetus is viable."); MASS. GEN. L. ch. 112, § 12L (1995) ("If a pregnancy has existed for less than twenty-four weeks no abortion may be performed except by a physician and only if, in the best medical judgment of a physician, the abortion is necessary under all attendant circumstances."); NEB. REV. STAT. § 71-6901 (Supp. 1994) (defining abortion as "an act, procedure, device, or prescription administered to a woman . . . and administered with the intent and result of producing the premature expulsion, removal, or termination of the human life within the womb of the pregnant woman"); OKLA. STAT. tit. 63, § 1-730 (1995) (defining abortion as "the purposeful termination of a human pregnancy by any person," including pregnant woman herself); WYO. STAT. § 35-6-101 (1994) (defining abortion as "an act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including pregnant woman herself").

woman perceived signs of independent life."[61] *Roe* adopted the trimester framework which was more objective than quickening, yet still capable of being assessed by the woman herself (given that trimesters are counted in twelve-week increments beginning from conception or from the date of the woman's last menstrual period).[62] Under either of these standards, no additional medical information was needed to plan the termination of a pregnancy and the pregnant person could control the decision herself.

With legislative and judicial acceptance of the viability standard, the critical information rests with medical professionals and not with the pregnant people.[63] As the Court explained in *Planned Parenthood v. Danforth*,[64] "[W]e recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term" for the medical profession.[65] Even the plaintiffs in *Danforth* agreed that the determination of viability rests with the physician in the exercise of his professional judgment.[66] In

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61. Brief of 281 Historians, *supra* note 35, at 5 (emphasis in original); *see also* CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 219 (1985) (quoting Blackstone as saying that life "'begins in contemplation of law as soon as an infant is able to stir in the mother's womb,'" and noting that until the 1860s, "'abortion during the first four months of pregnancy (before quickening . . .) that did not involve the mother's death was not an indictable offense in the United States'") (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *125-26).

62. *See Roe*, 410 U.S. at 164 (discussing trimester framework).

63. Viability is defined as "that stage of human development when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems." S.C. CODE ANN. § 44-41-10 (Law. Co-op 1985); *see also Roe*, 410 U.S. at 160-63 (indicating that viability is when fetus can live outside womb with life support). In *Roe*, the Court found viability significant because it signaled the point at which the State's interest in protecting fetal life may become compelling. *See id.* at 163; *accord* Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989) (arguing against arbitrary line of viability as being point where State's interest may begin).

The viability of any particular fetus is difficult to determine and can only be ascertained by estimating the fetus's gestational age, weight, and lung capacity. *Webster*, 492 U.S. at 515. The Court in *Webster* upheld a provision that essentially presumed the viability of a 20-week fetus, *id.* at 516, although the Court in *Roe* stated that viability "is usually placed" at about seven months or 28 weeks, but may occur earlier. *Roe*, 410 U.S. at 160. Several states have adopted viability as the determinant for permissible abortions. *See, e.g.*, ALASKA STAT. § 18.16.010(d) (1994) ("'[A]bortion' means an operation or procedure to terminate the pregnancy of a nonviable fetus."); IND. CODE § 16-34-2-4(b) (1993) ("An abortion may be performed after a fetus is viable only if there is in attendance a physician, other than the physician performing the abortion."); KAN. STAT. ANN. § 65-6703 (Supp. 1994) ("No . . . abortion when the fetus is viable unless . . . referral from another physician."); UTAH CODE ANN. § 76-7-302(3) (1974) (placing restrictions on abortions after "20 weeks gestational age").

64. 428 U.S. 52 (1976).

65. Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976); *see also* Colautti v. Franklin, 439 U.S. 379, 388 (explaining that "[v]iability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support"); 18 PA. CONS. STAT. ANN. § 3203 (1983) (adopting *Colautti*'s language in definition of viability).

66. *Danforth*, 428 U.S. at 65 n.4 (citing Appellees' Brief).

his dissent in *Thornburgh*, Justice White objected to the viability standard as being "contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant."[67]

Nonetheless, the Court in *Casey* asserted that its rejection of *Roe*'s trimester framework and adoption of the viability test was insignificant because it went "only to the scheme of time limits."[68] But the shift actually undermines control over one's pregnancy and reinforces the physician's role in the abortion decision. Without knowing the state of technology at her hospital and medical information about the fetus' development, a woman cannot plan to terminate her own pregnancy.[69] This standard reinforces the woman's dependence on her physicians and her own status as a passive patient rather than a self-reliant adult in control of her own situation.

The informed written consent requirement is another legislative tool that has the effect of neglecting women's interests. Upholding such a provision, the Court in *Danforth* irrebuttably presumed that a woman cannot make a personal and important decision absent a physician's impersonal and formulaic recital.[70] The Court failed to realize that subjecting a woman to an informed consent requirement insults her intelligence because it presumes that she will not identify

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67. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting). Justice White's objections to the viability standard are legitimate and independent of the objections raised here:

> The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

Id. at 795 (White, J., dissenting).

68. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2811 (1992).

69. As Justice Scalia noted in his opinion in *Casey*, the fact that a machine could keep a baby alive at a given gestational age does not mean that such a machine is available to all infants. *See Casey*, 112 S. Ct. at 2897 n.5 (Scalia, J., dissenting in part). Chief Justice Rehnquist, in his opinion in *Casey*, however, suggested that the viability determination was taken over by the Court, rather than by doctors or states. *See id.* at 2858 (Rehnquist, C.J., concurring in part and dissenting in part). Under either of these formulations, people not carrying a child decide for people who are carrying a child whether they should continue to do so. As a practical matter, the viability framework may benefit women because viability should occur no sooner than 23 or 24 weeks, whereas quickening can occur at 16 or 18 weeks. *Accord* Webster v. Reproductive Health Servs., 492 U.S. 490, 519 (1989) (arguing against arbitrary use of viability as being point where State's interest may begin). *See generally* SMITH-ROSENBERG, *supra* note 61 (defining quickening).

70. *See Danforth*, 428 U.S. at 67 (requiring written statement by woman demonstrating that she understood her physician's input).

or consider all the important issues on her own. It subverts her independence because it is not tailored to her particular situation. And it undermines her self-confidence by forcing her to second-guess herself when she may already be in a vulnerable position.[71]

The Court in *Danforth* did note that the only other patients whose informed consent is required are patients "committed to the Missouri State chest hospital . . . or to mental or correctional institutions."[72] The informed consent requirement might be justified by the legal fiction that pregnant women, like people committed to mental or correctional institutions, need some kind of formalized protection to fend off over-reaching doctors who might otherwise take advantage of them.[73] Although it is certainly possible that some people benefit from the State's vigilance, it is not at all clear that this problem is pervasive enough to justify an irrebuttable presumption. Alternatively, it might not be justified at all, but simply "rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women . . . [as being] less capable of deciding matters of gravity."[74] Given the primacy of autonomy and respect for the individual that defines our legal culture, it is ironic that, in this one area that affects primarily women, laws irrebuttably presume an inability to act autonomously.[75]

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71. *See id.* at 65-67.

72. *Id.* at 66 n.6 (citations omitted). Because of the breadth of information that must be conveyed, the informed consent at issue in the abortion context is entirely different from the routine consent form one signs prior to any non-emergency surgery which merely states what procedure is to be performed and some of the most common risks associated with the surgery. *See* Berkey v. Anderson, 1 Cal. App. 3d 790, 803-04 (1969) (describing physician's duty to explain medical procedure in order to obtain patient's informed consent). It is worth noting that consent is a curious term to use in the context of making the decision to end a pregnancy and securing someone to do it. Absent unusual circumstances, one no more "consents" to an abortion than one consents to having one's hair cut. Rather, one decides that abortion is necessary and seeks a professional to effectuate that decision.

73. *See* W.L. Atlee & D.A. O'Donnell, *Report of the Committee on Criminal Abortion*, 22 TRANSACTIONS OF AM. MED. ASS'N 239, 241 (1871) (presenting American Medical Association's description of women who seek abortions as being weak and vulnerable).

74. *Casey*, 112 S. Ct. at 2842 (Stevens, J., concurring in part and dissenting in part) (discussing mandatory delay aspect of informed consent requirement).

75. Autonomy has been a central concern of both modern and contemporary philosophers. *See generally* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., Augustus M. Kelley Publishers 1974); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT IN TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1950); JOHN STUART MILL, *On Liberty*, *in* 25 THE HARVARD CLASSICS 193 (Charles W. Eliot ed., 1909) (1859); JOHN RAWLS, A THEORY OF JUSTICE (1971). The Critical Legal Studies movement has also addressed this tradition. *See* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1569-70 (1984) (criticizing reification of individual rights as alienating). For a feminist critique of autonomy as a dominant value of legal liberalism including critical theory, see generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (explaining how liberal legal theory's focus on individualism and autonomy reflects an

The limits that do exist on informed consent are defined not by the woman's constitutional right nor by her personal needs, but again by the physician's broad discretion. The State can only require that the doctor tell the woman "just what would be done and . . . its consequences."[76] Any more specific information would be problematic, not because of its coercive effects on women, but because it "might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession."[77]

The Court in *Danforth*, acknowledged:

> The decision to abort, indeed, is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.[78]

By defining just what kind of informed consent is required, the State, with the Court's approval, defines how stressful or important the decision may be; paradoxically, the more stressful for the woman, the more the State's interference is justified.

The Court's opinion in *Akron v. Akron Center for Reproductive Health (Akron I)*,[79] adopted the same vision of the doctor/patient relationship, although it struck down Akron's informed consent provision for two reasons.[80] First, the fact that the regulation was designed to "persuade [the woman] to withhold" her consent, rather than merely to inform it, rendered the provision unconstitutional; a state may significantly intrude on a woman's discretion but it may not coerce her to forego exercising her rights.[81] Second, the regulation intruded on the physician's discretion by requiring the physician to "recite [a formula] to each woman regardless of whether in his judgment the information is relevant to her personal decision."[82]

The combination of these two premises means that, despite the fact that abortion laws ostensibly implicate a woman's privacy right, the woman's discretion is restricted by the doctor's medical judgment while the doctor's discretion is protected against interference by the

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essentially male perspective). I am particularly indebted to Robert Justin Lipkin for drawing my attention to the irony of abortion restrictions' disregard for women, given the predominance of autonomy in our legal culture.

76. Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976).
77. *Id.* at 67 n.8.
78. *Id.* at 53.
79. 462 U.S. 416 (1983).
80. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444-45 (1983) (Akron I).
81. *Id.* at 444.
82. *Id.* at 445.

State.[83] But absent coercion of the pregnant person or intrusion into the discretion of the physician, "a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion."[84] The physician thus becomes the judge of what physical *and emotional* considerations are relevant to the woman's personal decision and the decision can only be implemented once *he* avers that *she* has considered what *he* has deemed the appropriate factors. Thus, his discretion goes not only to whether she continues the pregnancy or not but even to whether she has adequately considered the question. He may require her decision to meet whatever procedural obstacles he thinks appropriate in order to satisfy himself that she has maturely considered her options.[85] Clearly, the scheme described here clashes with the American constitutional ideal that values autonomy and individualism above all else.[86]

Moreover, the State's interest in abortion is not limited to the medical aspects of the procedure. Indeed, it is not at all clear why the physician is the appropriate spokesperson to communicate this information, especially because so much of the information may be non-medical in nature. Nonetheless, it is always "the physician and his patient mak[ing] that decision,"[87] with the State looking on—but not so closely as to make the doctor uncomfortable.

Even more troublesome than the informed consent provisions are the requirements that women notify or seek the consent of their husbands. In *Danforth,* the Court struck down such a restriction, but only because it violated the State's limited authority to delegate veto power,[88] not because it was wholly inconsistent with a view of women as competent, autonomous, responsible adults. The Court held that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the

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83. "[W]omen's right to decide [to have an abortion] has become merged with an overwhelmingly male professional's right not to have his judgment second-guessed by the government . . . ." Kristen Booth Glen, *Abortion in the Courts: A Lay Woman's Historical Guide to the New Disaster Area,* 4 FEMINIST STUDIES 1, 7 (1978), *cited in* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 189 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY].

84. *Akron I,* 462 U.S. at 445.

85. *See id.*

86. *See supra* note 75 (indicating that autonomy has been central concern of both modern and contemporary philosophers).

87. Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976).

88. *See id.* at 70.

spouse, to prevent abortion during that same period."[89] The decision is made jointly by the physician and his patient. The only question is the degree to which the husband controls the exercise of medical discretion, just as the question with informed consent provisions is the degree to which the State controls it. Again the answer is that the woman's right is protected not by constitutional privacy but by the broad shield of physician discretion which protects doctors and, through them, their patients from excessive oversight by other parties.

In striking down the informed consent provision, the Court recognized that a veto must rest with either the wife or the husband if they disagree, and that because "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[90] Thus, the woman's greater interest does not, in and of itself, preclude another's veto of her decision, but merely militates for her where the power to delegate is brought into question. It seems apparent that, in a world where women's experience was understood and valued, her greater interest in her pregnancy would not need to be litigated in the highest court; it would be so obvious as to be subject to judicial notice.[91] Delegation of the veto power to the physician, however, was not as problematic for the Court. In a footnote, the Court alluded to the woman's interest in self-determination, but it persisted in its view that even the most personal of interests should be shared with a stranger.[92] "The State, accordingly, has granted [the husband] the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's *and her physician's* decision to terminate her pregnancy."[93] The decision is so important to the woman that she cannot be compelled to share it with her husband, although she can be compelled to share it with a physician. Despite the woman's incommensurably greater burden in deciding

89. *Id.* at 69.

90. *Id.* at 71.

91. A fact may be judicially noticed if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). In her oral argument during *Roe*, Sarah Weddington spoke as if the significance of pregnancy is properly subject to judicial notice, although the Court was not particularly receptive. She said: "I think it's without question that pregnancy to a woman can completely disrupt her life." Transcript of Oral Argument, *in* 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT, *supra* note 42, at 787-88, *cited in* Henderson, *supra* note 28, at 1623.

92. *Danforth*, 428 U.S. at 70 n.11.

93. *Id.* (emphasis added).

whether to abort or carry a pregnancy to term, the cases perpetuate the view that the decision, and not just its implementation, is only a medical one, appropriately shared with a physician exercising medical judgment.

II. THE PHANTOM

In several abortion decisions, the Court has omitted almost all mention of the pregnant person; she does not even appear in the one-dimensional role of the patient. The Court addresses the concerns of many interested parties, including the physician, the State, the fetus, the husband, and the parents, but effectively ignores the living people who are most affected by its authority. In these decisions, the woman is a phantom without substance, lurking voicelessly in the shadows, unable to assert her own interests.

Given the importance of legal abortions to women,[94] it is striking that what has been called the "woman question"[95] has been persistently overlooked in cases not about property or trusts but about women. Asking the woman question would require the Court to consider how its decisions affect women. The woman question "demands . . . special attention to . . . interests and concerns that otherwise may be, and historically have been, overlooked."[96] The Court's failure to address women's experience in its abortion opinions reveals the extent to which it has studiously ignored the implications of its decisions on women.[97]

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94. *See* Law, *supra* note 3, at 980 (noting that "[n]othing the Supreme Court has ever done has been more concretely important for women" than finding constitutional protection for abortion).

95. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) (discussing need to ask "the woman question"). Bartlett traces the roots of the woman question to Simone de Beauvoir, although the term reaches back at least to the 19th century debate about the changing status of women in American society. *See id.* at 837 n.3103 (citing SIMONE DE BEAUVOIR, THE SECOND SEX at xxvi (1957)); *see also* Grant Allen, *Plain Words on the Woman Question*, POPULAR SCI. MONTHLY (Dec. 1889), *reprinted in* MEN'S IDEAS/WOMEN'S REALITIES POPULAR SCIENCE, 1870-1915, at 125-31 (Louise Michele Newman ed., 1985) (referring to "Woman-Question agitators" and arguing that women's "emancipation must not be of a sort that interferes in any way with the prime natural necessity" of bearing four or five children).

96. Bartlett, *supra* note 95, at 846.

97. A possible exception to this is Doe v. Bolton, 410 U.S. 179 (1973). In *Bolton*, the Court allotted a paragraph to a description of Mary Doe's complex and difficult life. *Id.* at 185. At age 22, Doe had two children in foster homes because she was indigent and unable to care for them, and her third child had been placed up for adoption. *Id.* When her husband abandoned her, Doe lived with her indigent parents and their eight children. *Id.* In addition, she had a history of mental illness, would not be able to care for the child she was carrying at the time of the suit, and was told that abortion would be less dangerous to her health than childbirth. *Id.* The scant attention paid to Mary Doe shows how even the most troubled lives barely move the Court to consider the costs of abortion restrictions on women. Justice Douglas in concurrence, however, recognized in more detail than any other Justice in any other abortion case, including *Casey*, the variety of burdens borne by someone who is compelled to carry a pregnancy to term.

Perhaps one reason for this judicial inattention is that the sanctions in abortion statutes have historically been directed at people other than the pregnant person.[98] The earliest American abortion regulations were enacted when abortions were more dangerous than childbirth and any surgery was potentially lethal.[99] Because these restrictions were passed to protect women's health, they did not punish the women seeking the abortion.[100] For instance, the 1857 Texas statute at issue in *Roe* prohibited a doctor from performing an abortion despite the pregnant woman's consent, doubled the penalty if the doctor did not have the woman's consent, and in its definition of abortion, included not only the destruction of the fetus in the womb, but the causing of premature birth.[101] The harm, therefore, was in putting the woman at greater risk than she would otherwise face. Furthermore, civil prohibitions against abortions generally provided that the physician violating the law be responsible for damages to the injured party whether it was the woman, her husband, or her parents.[102] Women have been generally exempted from both criminal and civil liability.[103]

Id. at 214-16 (Douglas, J., concurring).

98. *See* Buell, *supra* note 35, at 1785. The early American abortion statutes in most states "did not address the issue [of the woman's culpability] explicitly, choosing instead to leave her out of the crime, at least as a matter of statutory law. . . . Ultimately, the legislatures of fifteen states declared that a woman who solicited or submitted to an abortion had committed a criminal act" but subjected her to a lesser penalty than that applicable to the person performing the abortion. *Id.* "However, no reported cases reflect the actual enforcement of these provisions against women." *Id.* The bill recently passed by the House of Representatives to ban certain late-term abortions continues this trend. *See* H.R. 1833, 104th Cong., 1st Sess. (1995). The bill permits that "[t]he father, and if the mother has not attained 18 years at the time of the abortion, the maternal grandparents of the fetus" may obtain appropriate relief from the doctor. *Id.* § 1531(c)(1). The woman "upon whom a partial birth abortion is performed" is immune from prosecution as a principal or for a conspiracy. *Id.* § 1531(d).

99. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 429 n.11 (1983) (Akron I) (explaining that *Roe* "identified the end of the first trimester as the compelling point because until that time—according to the medical literature available in 1973—'mortality in abortion may be less than mortality in normal childbirth'" (quoting *Roe*, 410 U.S. at 163)); *see also* Brief of 281 Historians, *supra* note 35, at 12 ("[U]ntil the twentieth century, abortion, particularly when done through surgical intervention, remained significantly more dangerous to the woman than childbirth.").

100. *See* Brief of 281 Historians, *supra* note 35, at 12 (discussing sanctions against doctors who perform abortions); *see also* H.R. 1833, 104th Cong., 1st Sess., *reprinted in* 141 CONG. REC. 11,618 (1995) (banning partial-birth abortions).

101. *See* TEX. PENAL CODE ANN. §§ 1191-1194, 1196 (West 1911), *cited in* Roe v. Wade, 410 U.S. 113, 118 (1973).

102. *See* 18 PA. CONS. STAT. ANN. § 3209(e) (Supp. 1995) (granting civil cause of action against physician who performs abortion without private consultation and informed consent); *see also* H.R. 1833, 104th Cong., 1st Sess., § 1531(c)(1), *reprinted in* 141 CONG. REC. 11,618 (1995) (enabling father and, if mother has not attained age of 18 years, maternal grandparents, of fetus, to obtain appropriate relief against doctor performing abortion).

103. *See* H.R. 1833, 104th Cong., 1st Sess., § 1531(d), *reprinted in* 141 CONG. REC. 11,618 (1995) (providing that woman on whom partial-birth abortion is performed may not be prosecuted).

The post-*Roe* spate of abortion restrictions have again diverted attention from the woman and continue to reinforce judicial disregard for women's interests, although for different reasons. Given that early abortion is now safer than childbirth, most modern laws are enacted for purposes other than maternal health and tend to protect the interests of the fetus but not those of the pregnant individual.[104] For example, Missouri's abortion law begins with a series of legislative findings establishing, among other things, that "(1) [t]he life of each human being begins at conception; (2) [u]nborn children have protectable interests in life, health, and well-being; (3) [t]he natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn children."[105] This amounts to three different ways of saying that a law regulating a woman's reproduction is about the significance of the offspring's interests and the insignificance of woman's interests, despite constitutional protection for the latter. Although abortion is as much about women making life decisions as anything else, many participants in the abortion debate seem oblivious to the woman's perspective.

The failure to comprehend the woman's perspective has similarly marred the enforcement of abortion laws. Laws imposing civil or criminal penalties on parties involved in abortions have consistently treated the women seeking them as victims, not as perpetrators. And yet, "a primary impediment to the enforcement of abortion statutes was probably the fact that the woman, as the potential complainant,

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104. *See, e.g.*, KY. REV. STAT. ANN. § 311.710 (Michie 1994) ("The general assembly of the Commonwealth of Kentucky hereby finds and declares. . . . [t]hat it is in the best interest of the people of the Commonwealth of Kentucky that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion."); R.I. GEN. LAWS § 23-4.8.1 (1982) ("The purpose of this chapter [relating to spousal notice for abortion] is to promote the state's interest in furthering the integrity of the institutions of marriage and the family."); UTAH CODE ANN. § 76-7-301.1 (1994) ("It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life . . ." but that "a woman's liberty interest . . . may outweigh the unborn child's right to protection . . . when the abortion is necessary to save the pregnant woman's life . . . ."). The Illinois statute states:

> [T]he longstanding policy of this state to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this state to prohibit abortions unless necessary for the preservation of the mother's life shall be restated.

ILL. ANN. STAT. ch. 720, para. 510/1 (Smith-Hurd 1993).

105. MO. ANN. STAT. § 1.205 (Vernon Supp. 1995), *cited in* Webster v. Reproductive Health Servs., 492 U.S. 490, 504 n.4 (1989).

did not consider herself a victim of a crime."[106] Women who obtained abortions were rarely prosecuted and had little motivation to obtain the conviction of their doctors.[107]

For the past twenty years, litigation strategists challenging abortion restrictions have followed the leads of legislators, judges, and prosecutors by focusing on the role of doctors rather than that of women. Before 1973, women figured prominently in abortion litigation. Often, the cases were brought on behalf of hundreds or even thousands of women as individual plaintiffs, and on occasion, women were permitted to testify about the significance of abortion to them.[108] In other cases, however, claims by women were dismissed for lack of standing whereas claims by doctors were adjudicated, and often sustained on privacy and other grounds.[109] *Doe* resolved this split, but did so against women's interests. The Court in *Doe* conclusively held that physicians have standing to challenge abortion statutes, even if they have not been prosecuted or even threatened with prosecution: "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions."[110] Since *Doe*, doctors and other health care providers, rather than pregnant women, have been the principal litigants.

For example, the plaintiffs in *Webster v. Reproductive Health Services*[111] were "five health professionals employed by the State and two nonprofit corporations"[112] who sued for themselves, as well as other health professionals and physicians.[113] The plaintiffs also said they represented the class of pregnant women seeking abortion assistance in Missouri.[114] In this case, no pregnant woman sued individually;

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106. Buell, *supra* note 35, at 1789-90 (citing Michael S. Sands, *The Therapeutic Abortion Act*, 13 UCLA L. REV. 285, 291 (1966)).

107. *See* Buell, *supra* note 35, at 1790 (noting that "[w]omen who procured abortions virtually were immune from prosecution, and no reported case deals with a woman convicted of procuring abortion" (citing OTTO POLLAK, THE CRIMINALITY OF WOMEN 45 (1950))); TRIBE, CLASH OF ABSOLUTES, *supra* note 3, at 122; Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of (Cessation) of Constitutionality*, 14 N.Y.L.F. 411, 492 (1968); Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L. & CRIMINOLOGY 3, 17 (1969); Note, *A Functional Study of Existing Abortion Laws*, 35 COLUM. L. REV. 87, 90-91 (1935)).

108. *See* Law, *supra* note 3, at 972 (citing Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971)).

109. *Compare* Abramowitz v. Kugler, 342 F. Supp. 1048, 1056-58 (D.N.J. 1972) (dismissing case filed on behalf of 1200 women for lack of standing) *with* Young Women's Christian Ass'n v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972) (holding that organizations and physicians could "litigate the alleged deprivations of the constitutional rights of their women patients").

110. Doe v. Bolton, 410 U.S. 179, 188 (1973).

111. 429 U.S. 490 (1989).

112. Webster v. Reproductive Health Servs., 492 U.S. 490, 501 (1989).

113. *Id.* at 502.

114. *Id.*

the individual plaintiffs were a nurse, a social worker, and three physicians.[115] In *Danforth*, the plaintiffs were medical care providers who brought suit on behalf of themselves and other physicians who perform abortions within Missouri.[116] They also purported to represent "the entire class consisting of . . . patients desiring" to end their pregnancy; the patients were not before the Court on their own behalf.[117] Similarly, in *Akron I*, the plaintiffs were "three corporations that operate abortion clinics in Akron and a physician who has performed abortions."[118] In these cases, women do not appear before the Court as individuals with personal, cognizable injuries; they appear only to the extent that doctors choose to represent them. This implies that abortion restrictions harm doctors primarily and women only incidentally, if at all.

This can lead to the curious result that a physician plaintiff, who is subject to criminal sanctions, can raise claims on behalf of patients that an individual could not raise on her own behalf. For instance, in *H.L. v. Matheson*,[119] a minor could not argue that the statute was unconstitutional as applied to mature minors "since she had not alleged that she or any member of her class was mature or emancipated."[120] By contrast, the physician plaintiff in *Akron I* could raise claims on behalf of both his mature and immature minor patients.[121]

Given these sets of plaintiffs, it is not surprising that the Court has difficulty understanding the concerns of the pregnant women. Nonetheless, the relationship between the medical professionals who act as plaintiffs before the Court and the Court that fixates on the interests of medical professionals is mutually reinforcing. Because the women most affected by these laws are not present in the courtroom, there is no opportunity for their stories to be heard, for arguments about their particular situations to be made, or for the facts of their lives to be admitted as evidence.[122]

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115. *Id.*
116. Planned Parenthood v. Danforth, 428 U.S. 52, 56-57 (1976).
117. *Id.* at 57.
118. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 425 (1983) (Akron I).
119. 450 U.S. 398 (1981).
120. *Akron I*, 462 U.S. at 440-41 n.30 (referring to H.L. v. Matheson, 450 U.S. 398, 406 (1981)).
121. *Id.*
122. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 752 (1985) (suggesting that because plaintiffs included clergymen as well as health care providers, religious community has as much interest in woman's pregnancy as woman herself). The presence of a pregnant plaintiff before the Court, however, does not appear to change the results or the Court's analysis. *See* Harris v. McRae, 448 U.S. 297, 303 (1980) (describing named plaintiff in abortion funding case as "New York Medicaid recipient" wishing to terminate

The Court's intentional or unintentional ignorance of the woman question has resulted in the elimination of women's presence in its opinions. But this attitude has done something else as well. In many of its opinions, the Court has subordinated women to abstract ideas and institutions whose values apparently take precedence over women's own values. These institutions—of which marriage and family are the primary examples—engulfs the pregnant woman's real experience because the Court consistently views them in idealized abstraction.

A. The Institution of Marriage

When the law requires a woman to obtain her husband's consent before she has an abortion, it suggests that she is taking something of his away from him.[123] The fetus is his property (though in her custody) and she needs his concurrence before she disposes of it.[124] In considering these laws, the Court has supplanted the woman with an outmoded vision of the institution of marriage.[125]

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pregnancy); Maher v. Roe, 432 U.S. 464, 467 (1977) (characterizing plaintiffs in abortion funding case as "two indigent women . . . unable to obtain physician's certificate of medical necessity"). Efforts to bring women's stories to the Court are laudable, though the Court's opinions have not, for the most part, reflected these efforts. *See* Brief for the Amici Curiae Women Who Had Abortions and Friends of Amici Curiae In Support of Appellees, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605) (containing stories of 2887 women and 627 "friends" of Court). The *Thornburgh* opinion may come closest to recognizing these stories. *See Thornburgh*, 476 U.S. at 763 (stating that state statutes may require health care providers to share information that is "out of step with the needs of the particular woman"). *See generally* COLKER, *supra* note 3, at 6-7 (discussing bringing reality of abortion restrictions to attention of courts).

123. This type of requirement is known as "spousal consent." Despite its common gender-neutral name, however, there is nothing gender-neutral about it in the abortion context because its only possible effect is to require a woman to get the consent of a man. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2826-32 (1992) (discussing ramifications of husband notification requirements as compared to parental consent provisions). As *Casey* makes clear, these types of requirements are harmful whether they require consent or notification. This discussion applies equally to both.

124. Such consent requirements treat the wife's pregnancy like an asset of community property, for which the managing spouse is responsible for giving "prior written notice to the other" of any disposition of the property and requiring each spouse to "act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships." CAL. FAM. CODE § 1100(e) (West 1994).

125. The practice of subordinating women to the institution of marriage has a long history. Under the common law, women lost their legal identity when they married. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982), *excerpted in* KATHARINE BARTLETT, GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY 4-5 (1993) (explaining that wives assumed their husbands' name and social status and came under husbands' protective cover in condition called coverture). A woman under coverture lost not just her legal identity but authority over every aspect of her life, including sex and reproduction. Though coverture seems archaic, it remained in effect in many jurisdictions well into this century. *See* United States v. Yazell, 382 U.S. 341, 342 (1966) (describing coverture as quaint and wife as "beneficiary" of it). *See generally* Perez v. Campbell, 402 U.S. 637 (1971)

Although the Court in *Danforth* ultimately struck down the requirement that the husband consent, it did so because the State lacked the power to delegate the veto over first-trimester abortions.[126] The Court warmly endorsed the State's concern about the impact of the abortion decision on the institution of marriage, regardless of its actual impact on the woman within that institution.[127] The Court reassured its readers that it had not "failed to appreciate the *importance of the marital relationship* in our society. Moreover, [it] recognize[d] that the decision whether to undergo or to forego an abortion may have profound effects on *the future of any marriage*, effects that are both physical and mental, and possibly deleterious."[128] The Court attends to the ramifications of unwanted pregnancy on the abstract institution, but does not comment on the effects on the *woman*, effects that are indeed likely to be physical, mental, and deleterious.[129] The Court seems unconcerned with these effects, though they will inevitably affect the marriage relationship. Although, in *Roe*, the Court at least identified the deleterious effects of abortion (chosen or foregone) on the woman,[130] three years later in *Danforth*, the Court only recognized the potential deleterious effects on the marriage.[131] The *Danforth* opinion, like others, is written entirely from the perspective of the man—in this case, the husband, whose concern is with his marriage and his family—and not from the perspective of the woman, whose concern is with her body and her life, as well as with her marriage and her family.

The Court elaborated on this theme, noting that it was "not unaware of the deep and proper concern and interest that a devoted and protective husband has in *his wife's pregnancy* and in the growth

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(depriving wife of driver's license because coverture makes car community property and personal property may be disposed of only by husband). Thus, it is not surprising that a legal regime that disables a wife from acting on her own behalf and permits a husband to rape her also seeks to grant him the right to control any consequences of sex he has with her. *See* State v. Smith, 426 A.2d 38, 45-47 (N.J. 1981) (discussing marital exemption to criminal law of rape); People v. Liberta, 474 N.E.2d 567, 573, 577-78 (N.Y. 1984) (invalidating state's marital rape exception on equal protection grounds), *cert. denied*, 471 U.S. 1020 (1985).

126. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1975). Catharine MacKinnon described this situation as a "remarkable if subliminal admission that male power by men in the family is coextensive with state power." MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 193.

127. *Danforth*, 428 U.S. at 69-70.

128. *Id.* at 70 (emphasis added) (citations omitted); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2871 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (adopting "importance of the marital relationship" language).

129. *Danforth*, 428 U.S. at 69-70.

130. *See* Roe v. Wade, 410 U.S. 113, 159-64 (1973) (discussing effects of abortion on women).

131. *Danforth*, 428 U.S. at 69-71.

and development of the fetus she is carrying."[132] Furthermore, "[r]eference is made to an abortion's possible effect on the *woman's childbearing potential*."[133] The husband's concern—codified by the State and endorsed by the Court's language (though not its holding)—is not with the person he married, but with her pregnancy, her fetus, her future childbearing potential. This certainly accords with the law's historic stance that women's primary importance lay with their reproductive capacity and that any individual woman's interests may justifiably be subordinated for the government's view of the common good.[134]

The implication of husband notification and consent laws, however, is not just that the woman's primary role is to reproduce, but that she cannot be trusted to fulfill this role on her own. Rather, the husband's oversight is necessary to safeguard her childbearing function. She would selfishly choose the abortion, ignoring implications for marriage and childbearing potential, whereas he would prevent the abortion to save the family and the marriage. The State is betting that the husband is less likely than the wife to agree to an abortion (otherwise a husband's concurrence would not constitute much of a safeguard). Her interests are not cognizable to the Court while his are paramount. If he consents, then it must truly be necessary and in everyone's best interest. The woman has disappeared, lost in a web of marriage and childbearing potential.

B. The Integrity of the Family

Husband consent and notification requirements generally have been struck down, nominally because of the state's lack of power to delegate, but more realistically because of the recognition that they impermissibly treat women like children and not like men.[135]

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132. *Id.* at 69 (emphasis added); *see Casey*, 112 S. Ct. at 2831 (commenting, albeit somewhat sarcastically, on "husband's interest in his wife's reproductive organs").

133. *Danforth*, 428 U.S. at 68 (emphasis added).

134. *See, e.g.*, Moorehead v. New York, 298 U.S. 587, 629 (1936) (Hughes, C.J., dissenting) ("The distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class."); Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding maximum hours legislation for women because "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race"); *see also* Hoyt v. Florida, 368 U.S. 57, 62 (1961) ("[W]om[e]n [are] still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."), *overruled in part by* Taylor v. Louisiana, 419 U.S. 522 (1975).

135. In *Casey*, however, the Court suggested, but did not hold, that husband notification and consent laws violate the constitutional right to equal protection based on gender. *See Casey*, 112 S. Ct. at 2804-05; *see infra* text accompanying notes 285-94.

Parental consent laws, by contrast, are constitutional because they permissibly treat minors or children (albeit pregnant children) like children.[136] In these cases, the analysis is similar to that in the husband consent cases,[137] but here the institution of family and parental authority rather than the institution of marriage supplant the unmarried minor.

In parental consent cases, the Court has focused primarily on the rights of the adult-parents—the putative grandparents—to raise a child, marginalizing the right of the pregnant girl not to raise a child.[138] In *Bellotti v. Baird*,[139] the Court considered at length the traditional reasons for treating children differently from adults under the Constitution, which is silent on the subject.[140] Ironically, it concluded that the adult-parents deserve almost the full bundle of privacy rights available, leaving virtually nothing to the minor.[141] The Court found that "the tradition of parental authority is [one of

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136. *See* Bellotti v. Baird, 433 U.S. 622, 642-43, 653-56 (1979) (discussing distinct constitutional status of minors and adults); *Danforth*, 428 U.S. at 74 (invalidating, on delegation grounds, statutes that permit parental veto of minor's decision to abort, absent some judicial bypass). Thirty-two states currently require unemancipated minors to notify or obtain the consent of a parent or someone who stands *in loco parentis*. *See* ALA. CODE § 26-21-3 (1994); ARIZ. REV. STAT. ANN. § 36-2152 (1995); CAL. HEALTH & SAFETY CODE § 25958 (West 1995); COLO. REV. STAT. ANN. § 18-6-101 (West 1995); DEL. CODE ANN. tit. 24, § 1790 (1994); FLA. STAT. ANN. § 390.001 (West 1995); GA. CODE ANN. § 15-11-112 (Michie 1995); IDAHO CODE § 39-4301 (1994); ILL. REV. STAT. ch. 420, para. 515/4 (1995); IND. CODE § 16-18-2-267 (1995); KY. REV. STAT. ANN. § 311.732 (Baldwin 1995); LA. REV. STAT. ANN. § 1299.35.5 (West 1995); ME. REV. STAT. ANN. tit. 22, § 1597-A (West 1994); MD. HEALTH-GEN. CODE ANN. § 20-103 (1995); MASS. GEN. L. ch. 112, § 12s (1995); MICH. COMP. LAWS § 722.903 (1995); MISS. CODE ANN. § 41-41-51 (1994); MO. REV. STAT. § 188.028 (1994); NEB. REV. STAT. § 71-6903 (1994); N.M. STAT. ANN. § 30-5-3 (Michie 1995); N.D. CENT. CODE § 14-02.1-03 (1995); OHIO REV. CODE. ANN. § 2919.12 (Anderson 1994); 18 PA. CONS. STAT. § 3206 (1995); R.I. GEN. LAWS § 23-4.7-6 (1994); S.C. CODE ANN. § 44-41-31 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1995); TENN. CODE ANN. § 37-10-303 (1995); TEX. FAM. CODE ANN. § 35.03 (West 1995); UTAH CODE ANN. § 76-7-304 (1995); VA. CODE ANN. § 18.2-76 (Michie 1995); WIS. STAT. § 48.375 (1994); WYO. STAT. § 35-6-118 (1995). In most states, the age of majority for such purposes is 18, although some states lower it. *See* CONN. GEN. STAT. § 19a-600(2) (1992) (defining majority at age 16); S.C. CODE ANN. § 44-41-10(m) (Law. Co-op. 1990) (defining minor as female under age of 17 for purposes of abortion). States define emancipation variously. *See, e.g.*, KY. REV. STAT. ANN. § 311.732 (1)(b) (Baldwin 1995) (exempting minors who are or have been married or who are deemed emancipated by court order); WIS. STAT. § 48.375(z)(e) (1994) (exempting minors who are not in their parents' care, who are or have been married or who have previously given birth); WYO. STAT. § 35-6-101(a)(x) (1995) (exempting minors who are legally married, in active military service, or have lived away from their parents and been financially independent for at least six months).

137. *See supra* notes 123-34 and accompanying text (discussing marriage analysis of husband consent provisions).

138. *See Bellotti*, 443 U.S. at 648 (articulating parents' interests in normal family relationship); *Danforth*, 428 U.S. at 75 (weighing independent interests of parents against interests of minor daughter).

139. 443 U.S. 622 (1979).

140. Bellotti v. Baird, 443 U.S. 622, 633-39 (1979).

141. *See id.* at 637-39 (stating that guiding role of parents justifies limitations on freedoms of minors).

the basic presuppositions of] our tradition of individual liberty," that is, the liberty of the individual parent, not the minor.[142] Parental authority apparently does not begin with the decision whether or not to become a parent.

The Court has repeatedly recognized that "the relationship between parent and child is constitutionally protected."[143] In the context of parental consent laws, however, the constitutional protection operates only in one direction: to protect the parent's discretion, but not that of the minor.[144] In *H.L. v. Matheson*, the Court held that a parental consent provision "plainly serves the important considerations of family integrity and protecting adolescents."[145] Indeed, the Court has noted that legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for full growth and maturity, thereby using the guarantee of individual liberty to justify restrictions on such liberty, particularly restrictions delegating the minor's discretion to the parents.[146]

The Court's treatment of these regulations reveals its propensity to consider cases independently of the real-life situations out of which they arise and to subordinate reality to formalistic analysis. In *H.L. v. Matheson*, for instance, the Court failed to imagine what might happen in real life when a girl tells her parents, under compulsion of law, that she is pregnant and needs an abortion.[147] The Court's hypothesized world is without emotion and without pain or violence. It has repeatedly failed to acknowledge the trauma that compulsory disclosure to parents is likely to cause and, instead, focuses on the utilitarian function of disclosure for what it deems to be significant state interests. Disclosure to parents, the Court has found, is useful because it permits parents to "provide medical and psychological data, refer the physician to other sources of medical history, such as family

142. *Id.* at 638.

143. H.L. v. Matheson, 450 U.S. 398, 410 (1981) (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (upholding Georgia statute permitting adoption without unwed father's consent)).

144. Nonetheless, in some of the cases the Court cited for this proposition, the State's authority to control the exercise of the child's discretion is so broad that it may override even the parent's discretion if inconsistent with state policy. *See* Prince v. Massachusetts, 321 U.S. 158, 170-71 (1944) (upholding parent's conviction for permitting child to work selling religious literature on street in violation of state labor laws, despite daughter's own desire to do so), *cited in*, Bellotti v. Baird, 443 U.S. 622, 636 n.14 (1979). The Court in *Bellotti* explained that society's interests in protecting the welfare of children and giving them a chance for personal growth justified State enforcement of the *Prince* statute. *See Bellotti*, 443 U.S. at 636 n.14 (citing *Prince*, 321 U.S. at 165).

145. *Matheson*, 450 U.S. at 411.

146. *See Bellotti*, 443 U.S. at 638 (stating that tradition of parental authority is not inconsistent with our tradition of individual liberty).

147. *See Matheson*, 450 U.S. at 413 (finding that inhibiting some minors from seeking abortions does not justify voiding statute).

physicians, and authorize family physicians to give relevant data."[148] Except in the most cursory fashion, the Court refuses to put itself in the place of a pregnant high school student or drop-out;[149] rather, it speaks from the point of view of a parent, focusing on the importance of the family institution in America and the constitutional rights of parents over minors.

As with the husband consent law considered in *Casey*,[150] a parental consent law primarily affects only those families in which relations are so strained and sometimes violent that the pregnant minor would not on her own seek the advice and support of her parents. By definition, the law is only relevant where a girl has made the determination that she is better off not telling her parents. The law then seeks to override that judgment.

The Court has upheld regulations requiring a minor to obtain the consent of a parent where judicial bypass or some other "alternative procedure" is available.[151] This safeguard supplements the basic *Roe*

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148. *Id.* at 411. Although most states have waiver provisions, such waivers tend to operate in a narrow range of cases. All states permit waiver when the abortion is required as a medical emergency to save the life of the minor and when the person to be notified is deemed unavailable. Some states that require consent from both parents permit the minor to obtain consent of only the mother if the pregnancy resulted from sex with the father. *See* ALA. CODE § 26-21-3(b) (1987); ILL. REV. STAT. ch. 720, para. 520/7(b) (1995); MISS. CODE ANN. § 41-41-53(2)(c) (1994); 18 PA. CONS. STAT. § 3206(a) (1995); WIS. STAT. § 48.375(4)(b)(2) (1994). Some states waive the requirement altogether where the minor is a victim of certifiable child abuse or neglect. *See* ARK. CODE ANN. § 20-16-805(3) (Michie 1989); S.D. CODIFIED LAWS ANN. § 34-23A-7(3) (1995). Wisconsin also waives the requirement when a psychiatrist certifies that the minor's well-being requires waiver or that the minor is likely to commit suicide rather than seek parental consent. *See* WIS. STAT. § 48.375(4)(b)(1m) (1994).

149. In *Bellotti*, the Court briefly listed some of the burdens borne by pregnant minors, but refused to conclude that the strong presumption that these girls were in dire circumstances required particular compassion for their situation. 433 U.S. at 642 (acknowledging potentially severe problems facing pregnant minors). Instead the Court nonchalantly suggested that abortion alternatives such as marriage to the child's father, placing the child up for adoption, or becoming a mother with her family's support, may be reasonable and in the minor's best interests. *See id.* at 642-43. This assumes that the girl would not consider these alternatives on her own and that the alternatives would palliate the difficulties of pregnancy. It further ignores the inconsistency created by a legal scheme that encourages childbirth that results from what many states call statutory rape. Ruth Colker has suggested that heightened scrutiny is appropriate for pregnancy-related legislation that concerns adolescents because this group bears all the indicia of a suspect classification. *See* Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 359-63 [hereinafter Colker, *An Equal Protection Analysis*].

150. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2827-29 (1992) (describing troubling picture of physical violence relating to abortion).

151. *See Bellotti*, 433 U.S. at 643 (concluding that State lacks constitutional power to grant third party total veto over minor's abortion); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (holding that State does not have constitutional authority to give third party absolute and potentially arbitrary veto). Judicial bypass to a consent provision would appear to mock the premise that abortion is protected as a *privacy* interest. If the decision is so private that parents may not interfere with it, it defies understanding why a state court judge should be able to, or how a judge could determine what is in the girl's best interest. *See infra* notes 156, 159, 160, 161, 162 (citing reported judicial bypass cases). To determine how mature a minor is, courts have

requirement that the pregnant woman consult with her physician by additionally requiring her to consult with her parents or a court.[152] It completes the plan envisioned by many state legislatures of imposing on every person who seeks an abortion the additional burden of obtaining consent from another person (usually male): an unmarried girl needs permission from her doctor and her parents or a judge, a married girl or woman needs permission from her doctor and her husband, and an unmarried woman needs permission from her doctor.[153] Everyone has to get the approval of at least one stranger for this most intimate of private decisions.

For the judge, the question in these cases is whether the minor is mature enough to have an abortion.[154] Virtually no attention, however, is paid to the maturity required to cope with unwanted pregnancy regardless of outcome or to decide not to have an abortion—that is, the maturity required for one young person to raise another or to give up an infant for adoption.[155] Only through legalistic abstractions severed from real world context could a court find that a pregnant girl is sufficiently mature to raise a child or give it up but not sufficiently mature to have an abortion.[156]

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felt free to ask extremely personal questions concerning the girl's sexual experience. *See* H.B. v. Wilkinson, 639 F. Supp. 952, 955 (D. Utah 1986) (questioning why minor did not use birth-control); *Ex parte* Anonymous, 618 So. 2d 722, 723 (Ala. 1993) (inquiring into frequency of sexual activity); *In re* Anonymous, 655 So. 2d 1052, 1053 (Ala. Civ. App. 1995) (considering evidence of minor's relationship with her boyfriend and whether she was currently sexually active); *In re* T.P., 475 N.E.2d 312, 313-14 (Ind. 1985) (inquiring about minor's prior abortion). In *Bellotti*, Justice Stevens noted that "[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." 443 U.S. at 655 (Stevens, J., concurring). Privacy does not mean very much if it does not even protect a girl from the scrutiny of a judge of her sexual experiences. *See also* Doe v. Bolton, 410 U.S. 179, 219 (1973) (Douglas, J., concurring) (arguing that privacy right becomes illusory when State mandates physician approval system for abortions).

152. *See Casey*, 112 S. Ct. at 2832 (reaffirming courts' discretion to authorize or deny abortion for minors).

153. *See supra* notes 123-34, 139-48 and accompanying text.

154. *See Casey*, 112 S. Ct. at 2832 (providing that court must make necessary determinations of whether young woman is mature and capable of giving informed consent, and whether abortion is in her best interest).

155. The Court has said that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for a mature judgment concerning the wisdom of an abortion." H.L. v. Matheson, 450 U.S. 398, 408 (1981).

156. In some instances, this may oversimplify the issue. Courts that deny a minor's petition for waiver of the parental notification or consent requirement may believe not that the minor should not obtain the abortion but that, in the long run, parental involvement in the decision is truly in her best interest. *See, e.g., In re* Anonymous, 597 So. 2d 709, 710-11 (Ala. Civ. App. 1992) (affirming trial court's finding that abortion without parental consultation was not in best interest of 14-year old girl who sought waiver but had not spoken to any adult other than her lawyer about her abortion). What happens to these girls after the courts deny their petitions is certainly an important line of inquiry, but is beyond the scope of this Article.

Bellotti requires judicial bypass of the parental consent requirement if the girl is able to show either:

> (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.[157]

The juvenile court or other governmental agency empowered to authorize minors' abortions *must* do so if the minor satisfies her burden.[158] This accommodation may sound acceptable, but it is difficult to envision its implementation. It is not clear, for instance, what criteria should apply to measure someone's maturity or to determine what is in another person's best interest. Courts tend to ask questions in three general areas. First, courts ask what the girl's life is like at present: how are her grades in school? what extracurricular activities is she involved in? does she work outside school? Second, courts inquire about the scope of her knowledge about the procedure itself: does she know what the risks are? does she have contingency plans in case of complications? And, third, courts inquire about her plans for the future: Does she plan to go to college? to get married?[159] The degree to which the trial court should ask about the girl's family life is unclear.[160]

The problem is exacerbated by many people's strong views about abortion. A judge who believes abortion is morally indefensible is

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157. Bellotti v. Baird, 443 U.S. 622, 643-44 (1979).

158. *Id.* at 647-48.

159. Many of the reported cases on parental consent are from Alabama. *See, e.g., In re* Anonymous, 650 So. 2d 919, 921 (Ala. Civ. App. 1994) (affirming denial of waiver, where trial court considered the minor's deportment, her failure to contact medical professionals or any adult, inadequate post-operative plans considering that minor did not obtain any information); *In re* Anonymous, 650 So. 2d 923, 924 (Ala. Civ. App. 1994) (reversing denial of waiver for lack of maturity where minor held after-school job, had serious future plans of going to college and getting married, seemed to understand what was involved in abortion, and had considered alternatives).

160. *See Ex parte* Anonymous, 618 So. 2d 722, 724-25 (Ala. 1993) (reversing denial of waiver, noting that the anticipated reaction of the parents is of little consequence in assessing minor's maturity). *But see In re* Anonymous, 655 So. 2d 1052, 1053-54 (Ala. Civ. App. 1995) (reversing trial court's denial of waiver where minor had "unpredictable" relationship with her mother and virtually no relationship with her father but had spoken with and had support of stepfather); *In re* T.P., 475 N.E.2d 312, 314-15 (Ind. 1985) (affirming denial of waiver where 16-year old had had prior abortion and testified that her parents would probably divorce if they discovered this pregnancy); *In re* Petition of Jane Doe, 866 P.2d 1069, 1076 (Kan. App. 1994) (reversing trial court's decision to deny waiver because 15-year old was still living with her family and had not alleged abuse); *In re* Complaint of Jane Doe, 645 N.E.2d 134, 135 (Ohio App. 1994) (reversing denial of waiver for woman who had described "horrible home life which more than justified her desire to conceal her pregnancy from her parents" over dissent arguing that complainant had failed to properly include allegations of abuse).

likely to believe that a minor who elects it is not mature enough to recognize her mistake.[161]

The Court has ignored the lives of people subject to the parental consent law much as it has ignored the lives of those subject to the ill-conceived (and now obsolete) husband notification laws. The girls are displaced by parents waving the banners of their own constitutional rights to parental authority and by judges gauging whether they are mature enough to exercise their constitutional rights to privacy.[162]

C. The Formality of Law

The phenomenon of the phantom woman is most remarkable in the abortion funding cases.[163] Here, the woman is not just subsumed by anachronistic or idealized institutions; she is entirely

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161. *See* Tamar Lewin, *Parental Consent to Abortion: How Enforcement Can Vary*, N.Y. TIMES, May 28, 1992, at A1 (noting that one Ohio judge denied a 17½-year old high school student waiver because she had "'not had enough hard knocks in her life'"). On the other hand, the Supreme Court of Alabama has held that "a minor's voluntary decision to use the judicial process and request advice of legal counsel may, in itself, indicate maturity." *Ex parte* Anonymous, 595 So. 2d 497, 499 (Ala. 1992). That court had also reminded trial judges within its jurisdiction that "it is not the [trial] court's responsibility to superimpose its judgment or its moral convictions on the minor in regard to what course of action she should take with reference to her own body." *Ex parte* Anonymous, 618 So. 2d 722, 725 (Ala. 1993); *see also In re* Mary Moe 423 N.E.2d 1038, 1043 (Mass. App. 1981) (reversing denial of waiver where trial court had used minor's immaturity and general desirability of parental involvement as evidence that abortion was not in her best interest).

162. *See, e.g.*, *In re* Anonymous, 1995 WL 320389, at *4 (Ala. Civ. App. May 30, 1995) (reversing trial court's denial of waiver where "the trial court misapplied the law to the undisputed facts"); *In re* Anonymous, 597 So. 2d 709, 711 (Ala. Civ. App. 1992) (affirming trial court's denial of waiver after remand where 14-year old girl was deemed insufficiently mature to make decision to have abortion without any adult involvement); *In re* Anonymous, 597 So. 2d 225, 226 (Ala. Civ. App. 1992) (reversing trial court's denial of waiver after remand for lack of evidence that abortion would not be in minor's best interest); *Ex parte* Anonymous, 595 So. 2d 499, 502 (Ala. 1992) (reversing trial court's denial of waiver after remand from state supreme court where trial court failed to make any findings as to minor's maturity); *In re* Anonymous, 549 So. 2d 1347, 1348 (Ala. Civ. App. 1989) (reversing trial court's denial of waiver for 15-year old girl); *Ex parte* Anonymous, 531 So. 2d 901, 907 (Ala. 1988) (granting waiver to 12-year old girl at beginning of her second trimester); *In re* Anonymous, 515 So. 2d 1254, 1255 (Ala. Civ. App. 1987) (reversing trial court's denial of waiver despite general rule of deference due to trial court, and noting that in some instances, "decision to seek the waiver . . . is itself an indicia of maturity"); *see also* H.B. v. Wilkinson, 639 F. Supp. 952, 958 (D. Utah 1986) (upholding Utah's parental notification statute and denying waiver to 17-year old); *In re* T.H., 484 N.E.2d 568, 571 (Ind. 1985) (affirming denial of waiver to 14-year old ward of state who did not know she was pregnant until second trimester and whose foster mother supported her decision but where state would not consent to abortion for unstated reasons).

163. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326-27 (1979) (holding that states participating in Medicaid are not obligated to continue to fund medically necessary abortions exempt from federal reimbursement); Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam) (finding no constitutional violation in electing to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions); Maher v. Roe, 432 U.S. 464, 469-70 (1977) (holding that Equal Protection Clause does not require Medicaid state to pay expenses incident to nontherapeutic abortions for indigent women even if state pays expenses); Beal v. Doe, 432 U.S. 438, 447-48 (1977) (finding Social Security Act does not require funding of nontherapeutic abortions as condition of participation in Medicaid program).

eclipsed by legal rationalizations that justify state and federal subsidies for childbirth but not for abortion. This is true even where the abortion is medically necessary and, again, despite purported constitutional protection for abortion.

In *Maher v. Roe*,[164] the Court upheld Connecticut's refusal to fund nontherapeutic abortions.[165] Although the Court denied that it was "unsympathetic to the plight of an indigent woman who desires an abortion,"[166] it completely ignored her situation. The Court fundamentally misconceived her predicament by finding that "an indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth," but not abortion, because "she continues as before to be dependent on private sources for the service she desires."[167] Only a Court blinded by legalisms to the actual life of a poor pregnant person could conclude that it makes no difference to her whether or not the State pays for her abortion.[168]

A full-scale jurisprudential battle developed in the trilogy of cases of which *Maher* is a part. The majority in each case—*Maher, Beal v. Doe*,[169] and *Poelker v. Doe*[170]—upheld state and local provisions permitting or requiring public facilities to deny access to nontherapeutic[171] abortions to poor people who rely on public assistance for their medical care.[172] While the majority waxed

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164. 432 U.S. 464 (1977).

165. Maher v. Roe, 432 U.S. 464, 480-81 (1977).

166. *Id.* at 479.

167. *Id.* at 474.

168. The Court's analysis was legalistic in structure as well. In *Maher*, the Court held first that Connecticut's regulation impinged on no fundamental right and then that it disadvantaged no suspect class; all that remained was to decide that Connecticut had a rational basis for favoring childbirth over abortion. *Id.* Some scholars have described this methodology as intrinsically male. *See* Judith Baer, *How Is Law Male? A Feminist Perspective on Constitutional Interpretation*, *in* FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE 151 (Leslie Friedman Goldstein ed., 1992). Writing about Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990), Baer noted that the Court "took pains to separate its decision from the concrete situation that produced the case [and rejected] the emotional, the experiential, and the individual in favor of the rational, the detached, and the generalizable." Baer, *supra*, at 151. The favored features are characteristic of both legal thinking and male thinking. This contrasts with the plurality's discussion in *Casey* of reliance which is experiential and almost emotional, even if quite general. *See infra* Part III (analyzing Court's discussion of reliance in *Casey*). It is interesting to note that the O'Connor-Kennedy-Souter approach is criticized by Chief Justice Rehnquist in his dissent on this ground. *See infra* note 273.

169. 432 U.S. 438 (1977).

170. 432 U.S. 519 (1977) (per curiam).

171. Categorizing some abortions as therapeutic (i.e., medically necessary) and others as nontherapeutic (i.e., chosen) ignores the range of reasons for which women seek abortions and fact that the decision to do so is rarely meaningfully voluntary.

172. *See* Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam) (holding that Constitution does not forbid state to prefer normal childbirth); *Maher*, 432 U.S. at 479-81 (holding that it is not unreasonable for State to insist on showing of medical necessity to ensure proper spending

formalistically, the dissenting Justices tried to articulate the adverse costs to women, to children, and to the public.[173] Justice Marshall, in particular, linked the denial of abortion services to stigmatization, racism, school segregation, and cycles of poverty, encouraged or fostered by legislative and judicial choices.[174] He described some of the difficulties incident to raising children, including the lack of child care, the consequent inability to work, the cost of feeding and clothing children, and the mother's own inability "to control the direction of her own life."[175] The majority responded to the dissent's concern with "the perceived impact of [the Court's] decisions on indigent pregnant women who prefer abortion to carrying the fetus to childbirth" by explaining that the dissent simply "misconceive[d] the issues before us, as well as the role of the judiciary."[176]

In *Harris v. McRae*,[177] decided two years after this trilogy of cases, the Court's analysis was even more legalistic and plaintiff Cora McRae's absence from the Court's opinion was even more striking. The Court held that McRae could not have a "medically necessary" abortion if she could not pay for it; this was true, despite both her constitutional right to choose and the medical *necessity* for the abortion.[178] It was true because the federal government's refusal to pay for abortions for Medicaid recipients "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."[179] The disjunction between the legalistic

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of funds); Beal v. Doe, 432 U.S. 438, 447 (1977) (holding that refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX).

173. *See, e.g.*, *Poelker*, 432 U.S. at 522-25 (Brennan, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting); *Beal*, 432 U.S. at 448-63 (Marshall, J., dissenting).

174. *See Beal*, 432 U.S. at 454-62 (Marshall, J., dissenting). Justice Brennan made similar points in *Maher* and *Poelker*. *See Poelker*, 432 U.S. at 522-25 (Brennan, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting).

175. *Beal*, 432 U.S. at 458-59 (Marshall, J., dissenting). Justice Blackmun also attempted to remind the majority that "[t]here is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize." *Id.* at 462-63 (Blackmun, J., dissenting). Justice Blackmun also joined Justice Brennan's dissents in *Poelker* and *Maher*. *See Poelker*, 432 U.S. at 522-25 (Brennan, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting).

176. *Beal*, 432 U.S. at 447-48 n.15. The dispute over the role of the judiciary pits the majority, which defers to the democratic process, against the dissenters who view the Court's role as protecting the poor and the powerless against the vagaries of political majorities.

177. 448 U.S. 297 (1979).

178. Harris v. McRae, 448 U.S. 297, 326-27 (1979) (holding that State is not obligated under Title XIX to fund medically necessary abortions and that funding restrictions do not violate Fifth Amendment or Establishment Clause of First Amendment).

179. *Id.* at 315.

rhetoric and the real circumstances of McRae and others like her is jarring. A woman whose life or health depends on an abortion that she cannot afford may wonder what "alternative activity" means and who deemed it to be in the public interest. She may also wonder who this "public" is that can compel her to carry a dangerous pregnancy to term and why they have any interest, let alone a prevailing one, in her decision. Further, she may wonder how this public expects her to care for her child and what it plans to do to help.

The trial in McRae's case took thirteen months, "produced a record containing more than 400 documentary and film exhibits and a transcript exceeding 5000 pages."[180] Yet, the only thing about Cora McRae the Supreme Court thought worth mentioning was that she was "a New York Medicaid recipient then in the first trimester of a pregnancy that she *wished* to terminate."[181] To a majority of the Court, these cases are not about people who are not medically able to carry their pregnancy to term but are too poor to pay for abortions and must find the means to raise their children if born alive, all despite the nominal constitutional protection for their right to abortion. Instead, they are about states' rights, tiers of review in equal protection and due process analysis, the state action doctrine, Congress' spending power, the public interest, and a host of other legal rules, categories, formalities, and legal fictions. The Court's opinions have nothing to do with the real people whose cases bear their names or the thousands of individuals like them.[182]

The effects of this penchant for devaluing women's lives is clear. A provision invalidated in 1983 is spared in 1992 when the formal categories change because of personal politics inside the Court or public politics outside. The categories change even though the actual hardships and real medical necessities remain the same and are equally real to people then as now. For instance, in *Akron v. Akron Center for Reproductive Health (Akron I)*, the Court struck down Ohio's

180. *Id.* at 305 n.6.

181. *Id.* at 303 (emphasis added).

182. The Court's preference for legalistic abstraction over factual context is not limited to abortion cases. *See* Coleman v. Thompson, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting). In *Coleman*, Justice Blackmun objected to the majority's penchant for abstraction:

> Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . [without] any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.

Id.

24-hour waiting period[183] because of the State's failure to link the requirement to maternal health.[184] The Court paid scant attention to the actual plight of women who have to go to a clinic two days in a row for a single procedure. Nine years later, the Court no longer requires the State to act only to promote maternal health. Now the requirement stands although the effect on women is the same.[185]

The Court in *Webster* followed the lead of *Maher v. Roe*, focusing on the State's right to allocate "public resources, such as hospitals and medical staff"[186] to areas other than abortion. Again, the Court did not pay much attention to the effects of such de-allocation on women.[187] "Nothing in the Constitution requires States to enter or remain in the business of performing abortions,"[188] the Court said. The Court recharacterized, then quickly dismissed, plaintiffs' argument that "private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions,"[189] again without recognizing why such a right might be important to a pregnant person. This was a legal and economic question, well within the legislature's discretion, not a personal question within the individual's discretion.[190] The Court in *Webster* viewed Missouri's prohibition on public facilities performing abortions not as a privacy issue, but as an equal protection issue that was without merit: the state could rationally favor childbirth over abortion, denying abortions to the class of women who "choose[] . . . to use a physician affiliated with a public hospital"[191] even though

183. Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450 (1983) (Akron I) (finding that Akron failed to demonstrate any legitimate state interest for arbitrary and inflexible waiting period).

184. *Id.* at 451.

185. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823 (1992) (overruling portions of *Akron I* and *Thornburgh* that invalidated informed consent laws in part because Court saw "no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health"). Nevertheless, when the Supreme Court decides to change legal standards, it can do so without regard to the dictum that underlay the prior rules. Justice Blackmun's opinion in *Thornburgh* is unusual in its sympathetic attention to the rape victim forced to hear the "gratuitous advice that an unidentified perpetrator is liable for support" and to the patient with a life-threatening pregnancy for whom the recital of the dangers of abortion would be "cruel as well as destructive of the physician-patient relationship." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 763 (1985).

186. Webster v. Reproductive Health Servs., 492 U.S. 490, 510 (1988) (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 521 (holding that "the goal of constitutional adjudication is surely not to remove inexorably 'political divisive' issues from the ambit of the legislative process"); *see also id.* at 510 (discussing role of government expenditures and recoupment of expenditures).

191. *Id.*

abortions would be available to women who chose private physicians. The Court's logic rests on the unrealistic assumption that the choice between public and private facilities is an entirely free one, as if poverty and medical needs were voluntary conditions. The narrowness of the Court's focus again limited its ability to recognize, or permitted it to avoid recognizing, the actual impact of its ruling on real people.[192]

III. *CASEY* MEETS THE WOMAN OF THE 90S

Until now, the Court has proceeded on two basic assumptions with respect to abortion. First, men, acting as legislators, doctors, judges, or husbands must have a role in women's private decisions.[193] Second, abortion is properly subject to restriction in order to encourage childbirth or to reinforce women's traditional role in society as nurturer and caregiver.[194] The language in the first part of *Casey*, however, suggests a new role for women not evident in the Court's prior abortion decisions.[195] Unlike the patient patients of *Roe* and the phantoms that haunt the later cases, *Casey* women participate in the nation's economy alongside men, have personal dignity, and should and do shape their own destinies, unimpeded by the cramped vision of women's lot that has predominated "in the course of our history and our culture."[196]

This shift in the depiction of the women who are at the center of the abortion debate may signal a shift in the Court's thinking about abortion itself. If the Court stops viewing women paternalistically and starts viewing them, like men, as autonomous and responsible individuals, it may recognize that restrictive abortion laws limit women's reproductive options and that, in turn, limits the opportuni-

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192. *Id.* The Court, in a single paragraph, dismissed the suffering of the pregnant indigent woman and those women who choose a physician affiliated with a public hospital. *Id.*

193. *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 192.

> Women were granted the abortion right as a private privilege, not as a public right. Women got control over reproduction which is controlled by a man or The Man, an individual man or the doctors or the government. Abortion was not so much decriminalized as it was legalized. In *Roe v. Wade*, the government set the stage for the conditions under which women got this right. Most of the control that women won out of legalization has gone directly into the hands of men—husbands, doctors, or fathers—and what remains in women's hands is now subject to attempted reclamation through regulation. This, surely, must be what is meant by reform.

Id. (internal quotations and citations omitted).

194. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 509 (1988) (citing Harris v. McRae, 448 U.S. 297, 315 (1980), for proposition that State can aid childbirth at expense of abortion availability).

195. *See Casey*, 112 S. Ct. at 2803-12.

196. *Id.* at 2807.

ties women have in other parts of their lives.[197] Put in terms that equal protection law can understand, women and men are similarly situated because everyone has the right to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[198] Restrictive abortion laws that unequally burden women's, but not men's, capacity to define their own lives should be invalidated as violating the equality principle. If the Court adheres to the conception of women suggested by the *Casey* dictum, it may find that the harm caused by restrictive abortion laws derives from this inequality, more than from some amorphous and not entirely propitious concept of invasion of privacy. At the very least, the Court should understand that it needs both strands of analysis to fully address the harm done by such laws.

In *Casey*, the three authors of the lead opinion, Justices O'Connor, Kennedy, and Souter, emphatically stated that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[199] The Court, however, upheld four of the most restrictive abortion provisions enacted since *Roe*, including an informed consent requirement admittedly intended to discourage people from aborting,[200] a 24-hour waiting period,[201] and a parental consent provision applicable to "unemancipated young wom[en] under 18."[202] The Court did strike down a provision requiring married women to certify that they had notified their husband of their intent to have an abortion.[203]

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197. This shift also suggests a departure from the traditional view that women who seek abortions (except in cases of rape or medical necessity), by definition, are not responsible individuals.

198. *Id.* at 2807.

199. *Id.* at 2804.

200. *Id.* at 2824 (holding informed consent requirement is not undue burden). "[W]e permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id.* (overruling *Thornburgh* and *Akron I*, to extent that they conflict).

201. *Id.* at 2824. Upholding this provision also required the Court to depart from *Akron I*, where the Court had held nine years earlier that "the State's legitimate concern that the woman's decision be informed is [not] reasonably served by requiring a 24-hour delay as a matter of course." Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 450 (1983) (Akron I). The Court in *Casey* found "that conclusion to be wrong." *Casey*, 112 S. Ct. at 2825.

202. *Casey*, 112 S. Ct. at 2832. The Court also upheld reporting and recordkeeping requirements and the definition of medical emergency (in which narrow circumstances the other provisions do not apply). *Id.* at 2832-33.

203. *Id.* at 2826. The requirement would not apply if the woman certified to her doctor that "her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her." *Id.* (citing PA. CONS. STAT. ANN. § 3209 (Supp. 1991)). Pennsylvania was ostensibly trying to get around the *Danforth* case by requiring merely notification to, and not consent of, the

The lead opinion actually reads like two parts not of the same whole. The first three main parts are discursive essays on the nature of substantive due process and the meaning of individual liberty (Part II),[204] the nature of the Court's power to overrule precedent and its relevance to *Roe* (Part III),[205] and the relation of *Casey*'s undue burden test to *Roe*'s trimester framework (Part IV).[206] Finally, in a relatively succinct fifth section, the Court analyzes the provisions before it.[207] Unlike the long, discursive preliminary sections, neither the language nor the result of part five is markedly different from the Court's prior opinions, with the possible exception of the discussion of husband notification—the only provision the Court invalidates.[208] The language of the other sections, however, diverges markedly from language in prior abortion cases and, for that matter, from most of part five.

A. Women and Their Liberty

The Supreme Court's revival of substantive due process in the guise of privacy, beginning with *Griswold v. Connecticut*,[209] has been criticized as being without textual or other support in the Constitution,[210] without precedential authority,[211] result-oriented,[212] and

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husband.

204. *Id.* at 2803-08.

205. *Id.* at 2808-16.

206. *Id.* at 2816-21.

207. *Id.* at 2816. An introduction (beginning with the word liberty), *id.* at 2803, and a conclusion (essentially ending with the word liberty), *id.* at 2833, sandwich these four sections. The six Justices who did not sign the lead opinion all concurred and dissented in part. Chief Justice Rehnquist and Justices Stevens, Blackmun, and Scalia filed separate opinions.

208. *Id.* at 2830 (holding that burden of husband notification is undue and, therefore, unconstitutional).

209. 381 U.S. 479 (1965).

210. Griswold v. Connecticut, 381 U.S. 479, 508-09 (1965) (Blackmun, J., dissenting).

> [T]he Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. . . . One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.

Id.; *see also* ROBERT BORK, THE TEMPTING OF AMERICA 110-26 (1990) (criticizing Supreme Court's privacy jurisprudence on this ground); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935-36 (1973) ("What is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure.").

211. *See Griswold*, 281 U.S. at 514-17 (Black, J., dissenting) (discussing inapplicability of cases advanced in majority opinion). Chief Justice Rehnquist's separate opinion in *Casey* also notes the absence of precedents. "A reading of [prior] . . . opinions makes clear that they do not endorse any all-encompassing 'right of privacy.'" *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). John Hart Ely has also noted that

manipulable.[213] The Court's privacy jurisprudence has additionally been criticized for not being responsive to women,[214] for obfuscating the real interests that actually animate the need for abortions,[215] and for being a tool for male domination of women.[216]

Casey, however, emphasized *liberty* as distinct from *privacy*.[217] The Court placed its marriage/procreation/contraception/family/child-rearing/education precedents[218] directly in the Fourteenth Amend-

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whatever right to privacy the pre-*Roe* cases did establish did not support the right to abortion. Ely, *supra* note 210, at 929-30.

212. *Griswold*, 381 U.S. at 511-12 (Black, J., dissenting) (noting that "[i]f these formulas based on 'natural justice' . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary"); *see also* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1426-27 (1974). Professor Henkin has noted:

> We are not told what is the touchstone for determining 'fundamentality.' We are not told why Privacy satisfies that test . . . . What, then, is it that makes my right to use contraceptives a right of Privacy, and fundamental, but my right to contract to work 16 hours a day . . . not a right of Privacy and not fundamental? Is it, as some suspect, that the game is being played backwards: that the private right which intuitively commends itself as valuable in our society in our time, or at least to a majority of our Justices at this time, is called fundamental, and if it cannot fit comfortably into specific constitutional provisions it is included in Privacy?

Id.

213. *See* Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 239, 249 (1987) (describing manipulability and contingency of public/private distinction given that "anything can be described as either public or private," and showing how "the language of privatism [in the context of abortion] is a double-edged sword").

214. One commentator suggests that the Court's repeated failure "to say much about women . . . may be the result of reliance on the conceptual and legal category of 'privacy' rather than 'equal protection.'" Henderson, *supra* note 28, at 1629. *See generally* Nadine Taub & Elizabeth Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151-57 (David Kairys ed., rev. ed. 1990) (describing harmful effects of relegating women to "private" sphere insulated from law).

215. *See* Law, *supra* note 3, at 1020 (stating that "[t]he rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied") (emphasis in original).

216. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 193, 194.

> It is probably no coincidence that the very things feminism regards as central to the subjection of women . . . form the core of privacy doctrine's coverage. . . . Through this perspective, the legal concept of privacy . . . has protected a primary activity through which male supremacy is expressed and enforced. . . . Privacy law keeps some men out of the bedrooms of other men.

Id.; *see also* Charlesworth et al., *supra* note 24, at 626 (noting that "a universal pattern of identifying women's activities as private, and thus of lesser value, can be detected") (citations omitted).

217. *See supra* note 207 and accompanying text (noting *Casey*'s introductory and conclusory use of the word "liberty").

218. The Court cited some cases that were, at least arguably, decided on privacy grounds. *Casey*, 112 S. Ct. at 2805-06 (citing Washington v. Harper, 494 U.S. 210 (1990) (finding that state's interest in prison security outweighed mentally ill prisoner's privacy interest in refusing psychiatric drugs)); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating New York's limitation on distribution of contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (extending *Griswold* to unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down prohibition on use of contraceptives by married people)). Other cases it cited could have been decided on privacy grounds but were not. *See* Loving v. Virginia, 388 U.S. 1,

ment's protection of liberty, literally without any reference to privacy.[219] "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 liberty protected by the Fourteenth Amendment."[220] Thus, under the *Casey* analysis, these matters are protected whether or not there is a constitutional right to privacy, and regardless of any specific constitutional authority for such right.[221] They are protected for the very broad reason that the Constitution respects individual dignity and autonomy.[222] This departs from the rationales of the earlier cases justifying the constitutional right to privacy on more narrow, case-specific grounds, such as societal abhorrence of the right of "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives"[223] or the societal desire to protect the privacy of the patient-physician relationship.[224] Under *Casey*, these matters are

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12 (1967) (striking down anti-miscegenation laws under Equal Protection Clause); Prince v. Massachusetts, 321 U.S. 158, 161 (1944) (upholding parent's conviction for permitting daughter to work in violation of state labor laws); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542 (1942) (striking down sterilization law for some inmates under Equal Protection Clause). Only four of the cited cases concerned bodily invasions. *Skinner*, 316 U.S. at 535 (prohibiting forced sterilization); *Washington*, 494 U.S. at 210 (authorizing use of drugs on mentally ill patient); Winston v. Lee, 470 U.S. 753, 766 (1985) (prohibiting surgical removal of bullet from suspect); Rochin v. California, 342 U.S. 165, 173-74 (1952) (prohibiting stomach-pumping of suspect). Two other cases concerned parental control over children's education. *See* Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925) (striking down prohibition on private schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down prohibition on teaching modern foreign language in school).

219. *See Casey*, 112 S. Ct. at 2804-07.

220. *Id.* at 2807. The Court further noted that the State is not entitled to proscribe abortion in all instances "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.* This is the first time in an abortion case that the Court has overcome what Professor Littleton would call the law's "phallocentric" bias: its tendency to use the male experience as the standard and consequently to denigrate that which is not part of the male experience. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1304 (1987). The Court in *Casey* recognized that reproductive ability is unique to women but did not devalue it on that ground and thus finally confronted its obligation to deal with reproduction as something other than a deviation from the male norm. *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 217 (describing men's sexuality as constituting standard to which women must show themselves to be similarly situated).

221. The lack of any mention of the right to privacy in the discussion of abortion as a Fourteenth Amendment liberty issue permits the inference that the Court would protect these matters whether or not the Court recognized a right to privacy.

222. *See Casey*, 112 S. Ct. at 2805 (stating that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter").

223. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

224. *See, e.g.*, Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 445 (1983) (Akron I). "By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed 'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *Id.* (Douglas, J., concurring) (quoting Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)). "The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship." *Whalen*, 429 U.S. at 604. *See generally* Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v.

protected because there is something far more fundamental at stake. These issues are private, not in the sense of private-versus-public, but in the sense of unique to each individual and going directly to what makes that individual unique; they are private in virtually a spiritual sense[225] that involves "personal decisions concerning . . . human responsibility and respect [for procreation]."[226]

Although it is impossible to know for sure why the Justices in *Casey* chose to focus on liberty rather than privacy, one reason that immediately suggests itself is the Court's desire to reaffirm *Roe* without being dependent on *Roe*'s vulnerable constitutional doctrine. Thus, *Casey* avoided the quicksand of privacy jurisprudence by relying directly on the firmly grounded and unobjectionable liberty interest explicitly guaranteed in the Bill of Rights.[227] Another reason might be to emphasize the breadth and complexity of the abortion issue by locating whatever rights are incident to it in the broader liberty interest, rather than in a narrower privacy right.

The shift noted here is in the level of generality at which the Court analyzes abortion: liberty as conceived in *Casey* is broader than privacy as conceived in *Roe*. But the shift has significant substantive ramifications as well. Conceived as purely a question of privacy, abortion analysis focuses on the government's obligation to let women alone when they make the decision whether or not to continue a

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Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973).

225. *Casey*, 112 S. Ct. at 2807 (holding that mother's liberty is at stake "in a sense unique . . . to the law" which must be safeguarded against state encroachment). "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.*

226. *Id.* Although the *Casey* opinion does not make the connection explicit, the right alluded to here recalls freedom of conscience recognized under the First Amendment. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (holding that union dues cannot be coerced because "in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (striking down compulsory pledge of allegiance because "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"); *see also* Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (stating that "individual freedom of mind" precludes requiring residents to adopt state motto on license plates which "invades the sphere of intellect and spirit") (citations omitted).

227. *See* U.S. CONST. amend. V, XIV. The plurality in *Casey* itself implied some discomfort with the notion of privacy as established by *Griswold*. "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity." *Casey*, 112 S. Ct. at 2810; *see also* Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 575 (1993) (noting that "it is not necessary to find a [state] constitutional right to privacy in order to reach the conclusion that the choice of a woman whether to bear a child is one of the liberties" guaranteed by Ohio Constitution). It is not clear whether Justice Blackmun adopted the view that the plurality shifted its focus from privacy to liberty. *See Casey*, 112 S. Ct. at 2844-45 (Blackmun, J., concurring in part and dissenting in part) (applauding plurality's "fervent view of individual liberty" but reviewing Court's historic protection of right to privacy).

pregnancy. Abortion as a privacy issue compels a narrow inquiry and does not even suggest the applicability of a broader understanding of women's rights. Abortion as privacy, for instance, means that women are protected against governmental intrusion but can make no claim to governmental assistance.[228] Abortion as a liberty issue, on the other hand, permits a broader understanding of abortion that more accurately reflects the multiple meanings of reproductive rights. That a liberty analysis does not guarantee more sensitive results is evident from the holdings of *Casey* which, while paying lip service to the broader social interests involved in the abortion decision, upheld exceedingly restrictive laws.[229] The argument here, however, is that viewing abortion in this broader liberty context is a necessary, though obviously not sufficient, predicate to recognizing how restrictive abortion laws in fact do affect women's lives. Privacy rhetoric has never described and cannot describe what abortion restrictions really mean.[230] While privacy is about being let alone to make personal decisions, liberty values who we are as individuals.

By identifying abortion as part of a more general liberty interest, the Court raised the stature of the abortion decision, at least by implication. Issues that go to one's own concept of existence are protected from state regulation because they "define the attributes of personhood" and therefore must not be "formed under compulsion of the State."[231] Thus, decisions about procreation, including abortion, are protected because they significantly contribute to how one defines oneself. When the State forces a woman to be pregnant, or to abort, she is not who she wants to be, not able to define her own life and destiny, based on her "own conception of her spiritual imperatives."[232] For the first time in the context of abortion, the Court in *Casey* announced that women have the right to do these

228. The limits of privacy jurisprudence have been well documented. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353 (2d ed. 1988) (commenting that "[h]aving won abortion rights in *Roe v. Wade* in the name of abstract personal privacy, women were poorly situated in *Harris v. McRae* to demand public funds for the exercise of such rights").

229. *See Casey*, 112 S. Ct. at 2822 (holding that abortion, unless threatening to life of mother, is not medical emergency despite significant health risks); *see also id.* at 2824 (holding that informed consent does not create undue burden).

230. The fact that liberty analysis does not inevitably yield results responsive to women's needs justifies combining it with equal protection analysis. Allen, *supra* note 95, at 422 (embracing application of equal protection doctrine as well as liberty, over privacy doctrine to abortion cases). It does not suggest any benefit from relying instead on privacy jurisprudence. *Id.* at 423 (stating that "privacy jurisprudence should yield to a conceptually, jurisprudentially and politically superior equal protection alternative").

231. *Casey*, 112 S. Ct. at 2807.

232. *Id.*

things, and that such a right has textual support in the Constitution.[233]

The Court's language is lofty and perhaps overly dramatic, unique in abortion decisions and rare in Supreme Court opinions generally. In fact, such language suggests a new attitude by the Supreme Court toward the women who must choose between giving birth and abortion. Instead of being condescending to women or ignoring them altogether, the Court now sees before it individuals who have the option, the responsibility, and indeed the constitutional right to define themselves and to live their lives according to their own imperatives. Abortion restrictions, like any law that compels one life decision over another, impinge on that autonomy or liberty. If they do so to women but not men, the burden is impermissibly unequal.

Moreover, *Casey* seems to recast even the concept of abortion as a choice. Adherents to the pro-life perspective may view women who seek abortions as having a meaningful choice between carrying a pregnancy to term and ending it.[234] Thus, except in cases where abortion demonstrably is not a choice such as where pregnancy endangers the woman's life or where conception resulted from certifiable rape, there is little sympathy for those who need abortion services. Any access to abortion other than in those instances is a matter of legislative grace and subject to majoritarian preferences.[235]

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233. Other abortion cases have included stray phrases to this effect, but in none has it been as prominent a theme as it is in *Casey*. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. . . . A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Id. at 772 (citations omitted). Apparently this language has already become a part of mainstream rhetoric. Former Chair of the Joint Chiefs of Staff General Colin Powell has said that "we should do everything possible to avoid [the choice of abortion] for a woman. But when she faces that choice, ultimately I think she has to have control over her own destiny, her own body." Martin Kasindorf & Patrick J. Sloyan, *Everyone's Waiting for Powell*, NEWSDAY, Oct. 29, 1995, at A7.

234. *See Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in part and dissenting in part) (comparing fundamental right of abortion to liberty interest in "firing a gun . . . into another person's body"). This mischaracterization may, of course, result from the name of the "pro-*choice*" movement. *See* Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 12 (1992) (describing choice as an "allegedly neutral premise" and pointing out that under Supreme Court precedents, states can deny funding "for a poor woman to *have* an abortion, so long as she can still *choose* to have an abortion") (emphasis in original).

235. In other contexts as well, the Court has viewed pregnancy as a completely voluntary choice. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 130 (1976) (holding that insurance need not cover pregnancy because it is voluntary condition and not medical condition such as disease). This is incompatible with the traditional view of childbearing as a matter of social responsibility. *See supra* note 134.

The Court in *Casey*, however, seemed to take a more expansive, liberated view of the decisionmaking process itself. The Court specifically included within its scope of constitutional protection women who become pregnant "despite [their] attempts to avoid it."[236] This ostensibly refers not just to women who try to avoid being raped, but to women who choose to have sex but try to avoid pregnancy.[237] This suggests the Court's attempt to stop blaming women who choose to have non-procreative sex and to recognize that they are as entitled as men, and as rape victims, to constitutional protection of their right to define their own destiny. It also suggests judicial recognition that abortion is not something women choose. Like choosing chemotherapy, it is only a choice in the narrow sense that the alternative seems worse.[238]

But *Casey* went even further. It brought within its scope of protection not just women who were raped and not just women who chose to have sex, but all women and, indeed, all *people*, women and men alike.[239]

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The 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.[240]

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236. *Casey*, 112 S. Ct. at 2808.

237. *Id.* "Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control." *Id.* at 2809. The breadth of the term "unplanned activity" seems to include rape and incest, as well as consensual but spontaneous sexual activity, the latter being traditionally the most morally objectionable and least worthy of judicial sympathy or constitutional protection. *Id.* In this opinion, however, the Court did not distinguish between victims of rape and women who deliberately have unprotected sex. It also included women who try in good faith to protect themselves. This is certainly more in keeping with the way other public health decisions are made. So far, AIDS treatment is not denied to people who voluntarily have unprotected sex or cancer treatment to people who voluntarily smoke or live with smokers.

238. *See* Scales, *supra* note 234, at 12 (describing this "choice" as being as meaningful as choice to be Princess of Wales or Aretha Franklin).

239. *See Casey*, 112 S. Ct. at 2831. "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . ." *Id.*

240. *Id.* at 2809. Many people have linked the right-to-life movement to efforts to retard this development. "Indeed, those who most violently oppose the pro-choice position make an explicit connection between such opposition and their desire that women be put back in their traditional roles," seeing "abortion rights as a force that would destroy the traditional family unit and motherhood." TRIBE, CLASH OF ABSOLUTES, *supra* note 3, at 237-38 (internal quotations omitted). By contrast, this language downplays the differences between men and women, rather than using those differences, and in particular the differences in reproductive capabilities, as a basis for disadvantaging women.

Laurence Tribe has said that the failure to recognize this would "operate . . . to the serious detriment of women as a class, given the myriad ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant is inevitably affected by her knowledge of the power relationships thereby created."[241] In fact, the plurality concluded, many people have "ordered their thinking and living around" *Roe*.[242]

Thus, to the Court in *Casey*, the participation of women, like men, in the economic and social life of the nation is constitutionally meaningful.[243] The recognition that abortion laws affect such participation, and must be especially carefully appraised because of such effect, is remarkable in the course of Supreme Court jurispru-

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241. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 228, at 1354.

242. *Casey*, 112 S. Ct. at 2809. This opinion would correspond to what Laurence Tribe has called a post-Newtonian understanding of the effects of constitutional law on people, which contrasts sharply with *Casey*'s predecessors. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 13 (1989) [hereinafter Tribe, *The Curvature of Constitutional Space*] (analogizing judiciary's effect on "the legal space through which we all move to changes in understanding of physics"). "The *Roe v. Wade* opinion ignored the way in which laws regulating pregnant women may shape the entire pattern of relationships among men, women, and children. . . . That vision described a part of the truth, but only what might be called the Newtonian part." *Id.* at 16. In essence, the decision in *Casey* to reaffirm *Roe* answered the question that Tribe suggested ought to be asked: "[W]hether the state's combination of acts and omissions, rules, funding decisions and the like, so shaped the legal landscape in which women decide matters bearing on their reproductive lives [that reversing *Roe*] would violate the Constitution's postulates of liberty and equality." *Id.* at 32. Chief Justice Rehnquist and Justice Scalia also criticized *Casey*'s acknowledgement of the relationship between law and life. Rehnquist dismissed it as "undeveloped and totally conclusory. In fact, one can not be sure to what economic and social developments the opinion is referring." *Casey*, 112 S. Ct. at 2862 (Rehnquist, C.J., concurring in part and dissenting in part). Professor Tribe's comment about the significance of *stare decisis* is also relevant here: "[W]hen courts make observations about the legal landscape, they may . . . deeply alter the terrain itself." Tribe, *The Curvature of Constitutional Space*, *supra*, at 32. Although nominally reaffirmed, *Roe* was so ravaged by *Casey* that two Justices suggested that it was all but overruled. *See Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in part and dissenting in part) (calling decision "a wholesale retreat from the substance" of *Roe*); *id.* at 2883 (Scalia, J., concurring in part and dissenting in part) (stating that "[t]he only principle the Court did 'adhere' to . . . is the principle that the Court must be seen as standing by *Roe*"). Of course, the argument that the Court ought to take responsibility for its role in society does not necessarily compel the conclusion that even a case on which millions have relied should not be overruled. *See generally* Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Lochner v. New York, 198 U.S. 45 (1905)).

243. Professor Strauss has suggested that "throughout our history—for example, in the opposition to slavery, the exaltation of freedom of contract at the turn of the century, and the centrality of employment discrimination to civil rights issues today—the right to alienate one's labor has been highly valued, and that is evidence that a person is not regarded as fully human in our society unless he or she is allowed to participate in the labor market." Strauss, *supra* note 21, at 19.

dence concerning the status of women.[244] In addition, by focusing on liberty, *Casey* took the abortion issue out of the adversarial context of woman against fetus[245] and put it in the potentially more constructive context of autonomy and the ability to define one's own concept of existence—all those things that men have always had and, in fact, that law was devised to protect for men.[246] To the extent that women are entitled to these things, and *Casey* announced for the first time that they were, women and men are similarly situated, and laws that burden women's exercise of those rights violate the guarantee of equal protection.

B. Women and Their Doctors

The language in *Casey* departed from prior decisions most dramatically when it spoke of the woman-as-patient. Directly repudiating its former characterization of the doctor-patient relationship, *Casey* said that that relationship "does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy."[247] The doctor-patient relationship, the Court said, is "*derivative* of the woman's position," and not, as the earlier cases had

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244. *See* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (failing to recognize relationship between work and pregnancy). *But see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974) (invalidating mandatory maternity leave under Due Process Clause).

245. At least one commentator has described the adversarial attitude as deriving from Thomas Hobbes' competitive view of human nature. "'[I]f any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, . . .) endeavour to destroy, or subdue one an other.'" Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 7-8 (1988) (quoting THOMAS HOBBES, LEVIATHAN 183-84 (C.B. Macpherson ed., 1968)). Professor West shows:

> The culture thinks about harm, and violence, and therefore self defense, in a particular way, namely a Hobbesian way, and a Hobbesian conception of physical harm cannot possibly capture the gender-specific subjective harm that constitutes the experience of unwanted pregnancy. From a subjective, female point of view, an abortion is an act of self-defense, (not the exercise of a "right to privacy") but from the point of view of masculine subjectivity, an abortion can't possibly be an act of self-defense: the fetus is not one of Hobbes' "relatively equal" natural men against whom we have a right to protect ourselves.

Id. at 69.

246. *See generally id.* (describing how "Rule of Law" recognizes traits associated with men (autonomy and freedom) and protects against what men fear (annihilation), but neither values traits associated with women (intimacy and connection) nor protects against what women fear (intrusion and separation)). Professor MacKinnon also has written extensively about this: "Human rights, including 'women's rights,' have implicitly been limited to those rights that men have to lose . . . . Abstract equality has never included those rights that women as women need most and never have had. All this appears rational and neutral in law because social reality is constructed from the same point of view." MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 229.

247. *Casey*, 112 S. Ct. at 2824.

made clear, definitive of it.[248] Indeed, the *Casey* woman makes personal decisions independently of her doctor's medical judgment. "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions," without a doctor's intrusion into the decisionmaking process.[249] Abortion laws, in this view, affect women as decisionmakers, as autonomous actors in society, rather than merely as patients dependent on others to direct their lives. In this view, abortion is finally recognized as more than a medical decision. It is a life decision.

Justice Blackmun, the architect of the woman-as-patient motif, has also recognized its limitations, now opting for the more expansive view of abortion taken by Justices O'Connor, Kennedy, and Souter. The rhetorical tone of his separate opinion in *Casey* was consistent with that of the lead opinion and, in several instances, he adopted the plurality's language.[250] Justice Blackmun's focus is now squarely on the "unique role of women in the decision-making process" rather than on the primacy of the physician's role.[251] Indeed, Justice Blackmun referred almost two dozen times to the woman's rights and to her exclusive interest in the decision, with hardly a single reference to the rights of the physician.[252] He even noted that "because

248. *Id.* (emphasis added). This is also perhaps the place where the inconsistency between the dictum and the holding is the sharpest. Here, the Court ignored its own dictum in upholding the informed consent provision, in which the doctor's admittedly biased information defines the scope of the woman's right. *Id.* at 2825.

249. *Id.* at 2812. It is ironic that the protective restrictions afforded to women in Justice Blackmun's woman-as-patient paradigm are broader than those afforded to the *Casey* woman-as-decisionmaker, but there is no reason why the relative degrees of protection inhere in the paradigms. In fact, the difference results from the use of strict scrutiny or undue burden within the paradigm. *See infra* note 331 and accompanying text (discussing *Casey*'s undue burden test). Indeed, the Court's particular selection of tests notwithstanding, it would make sense for the broader protection to apply to the autonomous, decisionmaking adult and the lesser protection to the patient whose interests are, by definition, circumscribed by her medical condition.

250. *Casey*, 112 U.S. at 2842-45 (Blackmun, J., concurring in part and dissenting in part).

251. *Id.* at 2845 (Blackmun, J., concurring in part and dissenting in part).

252. Justice Blackmun referred to the rights of the physician in the limited context of the informed consent provision and there he quoted from an earlier opinion. *Id.* at 2850 (Blackmun, J., concurring in part and dissenting in part).

> "[T]he listing of agencies in the printed Pennsylvania form . . . contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician."

Id. (Blackmun, J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 763 (1986)).

trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, the physician-only disclosure requirement" does not withstand constitutional scrutiny.[253]

Furthermore, as the quotation opening this Article indicates, Justice Blackmun seems to have recognized the importance of considering the "social context" of abortion.[254] He explicitly argued that abortion restrictions "conscript women's bodies into [the service of the State], forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care," and that the assumption that women owe this duty to the State appears "to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."[255]

Justice Blackmun disagreed with Justices O'Connor, Kennedy, and Souter on the appropriate standard of review and the actual scope of the *Roe* holding.[256] Justice Blackmun continued to argue for strict scrutiny[257] and to advocate the trimester framework, which would render unconstitutional several of the provisions upheld by the plurality.[258] Nonetheless, he and Justice Stevens, along with the three-member plurality, agreed that although the *Roe* attitude towards women may have been acceptable in 1973, it no longer fits women's role in society, and it fails to encompass the full significance of abortion to women.[259]

C. Women and Their Husbands

The only provision the Court in *Casey* invalidated provided that, with a few narrow exceptions, "no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion."[260] The woman could certify to her doctor that "her husband is not the man who impregnated her; that her husband

253. *Id.* (Blackmun, J., concurring in part and dissenting in part).

254. *Id.* at 2845 (Blackmun J., concurring in part and dissenting in part); *see also id.* at 2853 (Blackmun J., concurring in part and dissenting in part) (criticizing Chief Justice's "complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives" and his lack of "concern with women's health" and taking broader view of what reaffirmation of *Roe* would require).

255. *Id.* at 2846-47 (Blackmun, J., concurring in part and dissenting in part).

256. *Id.* at 2853-54 (Blackmun, J., concurring in part and dissenting in part) (arguing that plurality's "undue burden" standard is "arbitrary and capricious").

257. *Id.* at 2847-50 (Blackmun, J., concurring in part and dissenting in part).

258. *Id.* (Blackmun, J., concurring in part and dissenting in part).

259. *Id.* at 2849 (Blackmun, J., concurring in part and dissenting in part).

260. *Id.* at 2826 (citing PA. STAT. ANN. tit. 18 § 3209 (1989)).

could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her."[261] The discussion of this requirement differs in length and tone from the opinion's analyses of the other provisions. It is unusual for a Supreme Court opinion, and especially for recent non-dissenting opinions, for its effort to acknowledge the real lives of disempowered people.[262]

One fundamental difference between the lead opinion and that of the Chief Justice is how each responded to the fact that most women consult with their husbands even in the absence of legislation compelling them to do so. Chief Justice Rehnquist concluded that because of this, "the vast majority of wives . . . suffer no burden as a result of the provision."[263] The plurality, however, seemed to recognize that the injury to women is not in the act of notification, but in the *compulsion*.[264] In certain instances, the law may not compel obedience even though most people would voluntarily comply. For example, even if most people would willingly pledge their allegiance to the national flag, a law that forces one to do so is unconstitutional because it does not respect each person's right to decide for herself.[265] This is particularly true in the context of compelled communication,[266] although it was not an explicit basis

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261. *Id.* The district court noted some of the provision's loopholes, including its requirement that women notify their husbands—even if they were raped by their husbands but did not report the rape within 90 days, or if they feared that notifying their husbands would result in emotional or economic injury to themselves, or if they feared that injury to someone else, such as a child, could result. *Id.* (citing Planned Parenthood v. Casey, 744 F. Supp. 1323, 1360 (E.D. Pa. 1990)). The husband notification provision is clearly intended to protect and benefit husbands of women seeking abortions. *Id.* at 2826-31; *see also supra* text accompanying note 123. A violation of this provision would render the physician liable to the husband in damages. *Casey*, 744 F. Supp. at 1360.

262. Nonetheless, the plurality opinion has been criticized for focusing on the plight of white, middle class women. *See* COLKER, *supra* note 3, at 91 (noting that Court in *Casey* "understood the problem of violence in the private sphere for pregnant married women, who are disproportionately older, white, and middle class, but did not understand this problem for pregnant unmarried women, who are disproportionately younger, African-American, and poor").

263. *Casey*, 112 S. Ct. at 2870 n.2 (Rehnquist, C.J., White, Scalia, Thomas, J.J., concurring in part and dissenting in part) (citing *Casey*, 744 F. Supp. at 1360).

264. *Id.* at 2829.

265. *Id.* at 2807; *see* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (overturning state statute compelling school children to salute flag and pledge allegiance); *see also* United States v. Eichman, 496 U.S. 310, 318-19 (1990) (striking down federal prohibition of flag burning as protest); Texas v. Johnson, 491 U.S. 397, 420 (1989) (striking down Texas' prohibition of flag burning as protest).

266. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government[] contravenes this essential right" and is subject to "the most exacting scrutiny." Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2458-59 (1994). Compelling personal speech

for the plurality's decision to strike down the notification provision.

For Justices O'Connor, Kennedy, and Souter, the first defect of the law was its effect on the women who would not otherwise tell their husbands of their intent to undergo abortion surgery.[267] Quoting the findings of the district court, the Supreme Court emphasized that more than two million women are victims of domestic violence every year;[268] in finding after finding, the Court relentlessly undermined the illusion of idealized American marriages. Many married women, the Court said, would have "very good reasons for not wishing to inform their husbands."[269] The Court considered these people to be "reasonable"[270] and held that the law's failure to let people decide for themselves whether to tell their husbands rendered it unconstitutional.[271]

By contrast, Chief Justice Rehnquist focused on instances where the decision not to tell the husband is neither reasonable nor supported by objective evidence.[272] In some of the situations he found significant, the married woman was "'initially inclined to obtain an abortion without [her] husband['s] knowledge because of *perceived* problems—such as economic constraints, future plans, or the husband['s]

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about one's body in the intimate context of marriage is no less suspect. Furthermore, this explains in part the injury caused by the informed consent and 24-hour waiting period requirements. Most people want as much information as possible about any medical procedure they are considering and most women considering abortion undoubtedly think about abortion for more than 24 hours before committing to it. *Casey*, 112 S. Ct. at 2841-43 (Stevens, J., concurring in part and dissenting in part). Nonetheless, the State's control over the thought process, in time and content, impermissibly intrudes into liberty and conscience of person. *Id.* at 2853-54 (Blackmun, J., concurring in part and dissenting in part).

267. *Id.* at 2828-29.

268. *Id.* at 2826 (adopting district court's finding that "[s]tudies reveal that family violence occurs in two million families in the United States"). Noting that "researchers estimate that one of every two women will be battered at some time in their life," the district court found that this was a conservative figure that substantially understated the actual number of families affected by domestic violence because battering is usually not reported until it reaches life-threatening proportions. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1361 (E.D. Pa. 1990).

269. *Casey*, 112 S. Ct. at 2828.

270. *Id.* at 2829-30.

271. *Id.* at 2830 ("[M]any may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement." (citing *Casey*, 744 F. Supp. at 1360)).

> The "bodily injury" exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children . . . The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

Id. at 2831.

272. *Id.* at 2870-71.

previously expressed opposition—that may be obviated by discussion prior to the abortion.'"[273] Thus, married women are so likely to make the wrong decision that the law may compel them to consult with their clear-headed husbands.

Throughout this discussion, the dissent subordinated the actual harms done to women to the legal fictions that justify state regulation.[274] "The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but 'the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect.'"[275] But this misperceives the position of the lead opinion. In the view of Justices O'Connor, Kennedy, and Souter, the risk of husband notification is not counterproductivity (i.e., will the statute actually discourage discussion that might otherwise have taken place?), but rather, violence.[276]

The attitude articulated in the *Casey* dissent has precedent as far back as Justices White and Rehnquist's dissents in *Roe v. Wade* and *Doe v. Bolton.*

> At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request . . . . [Under the majority's holding,] the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus . . . .[277]

This view assumes that the most serious reason a married woman could have for needing an abortion is economic and not personal or, in the words of the *Casey* plurality, "spiritual."[278] In *Roe* and *Doe*, as

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273. *Id.* at 2871 (emphasis added) (quoting Planned Parenthood v. Casey, 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part)). This view perpetuates the unfounded stereotype that women do not understand money. *See generally* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293 (1991) (discussing legal inequities that result from harm of gender stereotyping).

274. *Casey*, 112 S. Ct. at 2869-72 (Rehnquist, C.J., concurring in part and dissenting in part).

275. *Id.* at 2871-72 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 800 (1986) (White, J., dissenting)).

276. *Id.* at 2827-29.

277. Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, Rehnquist, J.J., dissenting).

278. *Casey*, 112 S. Ct. at 2807.

in *Casey*, the Justices' views of the regulations seem colored by their perception of women's reasonableness. Simply put, the plurality and the dissent disagreed as to whether a state legislature may act on the irrebuttable presumption that women are unreasonable. Furthermore, Chief Justice Rehnquist's view legitimates the legislative presumption that women are so likely to misperceive their family's financial or other situation that State-compelled disclosure to a husband about a wife's exercise of her constitutional right is justified. This, of course, turns the privacy inquiry inside out by requiring the person who has the constitutional right to privacy to justify to the State why she wishes to exercise it. This is akin to insisting that a criminal defendant explain why she is electing not to testify. This argument demonstrates privacy doctrine's malleability and may suggest another reason why, at least in the context of abortion, it has not proven effective at invalidating restrictive laws.

The plurality's analysis, however, was not limited to the two million women who would reasonably decline to tell their husbands about an abortion. The Court also addressed the broader question of whether it is ever permissible for a state to compel communication from a wife to her husband.[279] In this part of the analysis, the Court came closest to fulfilling the promise of its earlier rhetoric and of directly implicating equal protection analysis. The Court said that, regardless of whether most women would discuss abortions with their husbands, the husband notification requirement is unconstitutional because it treats women as subordinate to men by *requiring* them to have this discussion.[280] Further, the Court took pains to note that, while this may have been acceptable at common law, it does not accord with our current understanding of the Constitution.[281] In this section, the Court fused together questions of equal protection and liberty, of women's traditional role in society and abortion.[282]

The Court compared the relative interests of the man and the woman and found that "as a general matter . . . the father's interest in the welfare of [a living child] and the mother's interest are equal." While the wife is still pregnant, however, her interest in the pregnancy is greater.[283] With respect to the specific condition of pregnancy, then, husbands and pregnant wives are not similarly situated, and the

279. *Id.* at 2829-30.
280. *Id.* at 2831.
281. *See id.*
282. *See id.* at 2827-31.
283. *Id.* at 2830. Here, the woman's predominant role in the pregnancy moves from the supporting position of such cases as *Danforth* to center stage. *See supra* notes 70-93 and accompanying text (discussing Planned Parenthood v. Danforth, 428 U.S. 52 (1976)).

notification provision is therefore unconstitutional because it treats dissimilarly situated people similarly, requiring both to participate virtually equally in the decisionmaking process.[284]

The Court then used such un-equal protection cases as *Bradwell v. Illinois*,[285] and *Hoyt v. Florida*,[286] to show that the outdated views of women's role in society as subordinate to their husbands and limited to nurturing families are not constitutionally tenable anymore.[287] Such cases, the Court said, "are no longer consistent with our understanding of the family, the individual, or the Constitution."[288] According to the Court, the State's interest in restricting abortion impermissibly corresponds to "its own vision of the woman's role" which, although "dominant . . . in the course of our history and our culture," is no longer a constitutionally valid basis for legislation.[289]

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284. *Casey*, 112 S. Ct. at 2830-31. In fact, the Pennsylvania provision did not mandate absolute equal participation by husband and wife, since the husband's consent was not required. PA. STAT. ANN. tit 18, § 3209 (1989). The wife, therefore, could override his disapproval. *Id.* Nonetheless, the Court intimated that even notification violates the equality principle. *See infra* notes 295-98 and accompanying text (discussing how equal protection analysis applies, despite this partial dissimilarity).

285. 83 U.S. (16 Wall.) 130 (1872). This case is now best known for Justice Bradley's concurring opinion which embodies the "separate spheres" ideology.

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for man of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and function of womanhood.

Id. at 141.

286. 368 U.S. 57, 62 (1961) (upholding Florida statute excluding women from compulsory jury service because women are "still regarded as the center of home and family life").

287. *Casey*, 112 S. Ct. at 2830-31.

288. *Id.* at 2791, 2831. These cases have previously been disclaimed by the Court, but never in an abortion decision. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (invalidating state school's denial of admission to male nursing candidate); Frontiero v. Richardson, 411 U.S. 677, 685 (1971) (invalidating benefits differential for families of servicewomen).

289. *Casey*, 112 S. Ct. at 2807. The image of women's role in society is well illustrated by an 1871 report of the American Medical Association's Committee on Criminal Abortion describing the woman needing an abortion.

> She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity; and, destitute of all delicacy and refinements, resigns herself, body and soul, into the hands of unscrupulous and wicked men. Let not the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.

Atlee & O'Donnell, *supra* note 73, at 239, 241. This description obviously isolates the woman, without sympathy or compassion, in her predicament and "link[s] doctor and husband as the equally wronged and innocent parties. The aborting wife, in contrast, [is] unnaturally selfish and ruthless." Brief of 281 Historians, *supra* note 35, at 17-18 n.55 (quoting CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT 236-37 (1985)); *see also* TRIBE, CLASH OF ABSOLUTES, *supra* note 3, at 33 (noting that this same description "pit[s] husbands, who must often have

Casey marks the first time in an abortion case that the Court has explicitly abandoned the separate spheres ideology that justified its earlier cases regarding women's rights.

Casey, of course, recognized women's role in the perpetuation of the species but, unlike the earlier abortion decisions, it did not permit the State to justify restrictions on women on the basis of biological differences between women and men.[290] "That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice."[291] Finally, the Court recognized that the ability to give birth is a biological privilege, not an opportunity for the State to constrict women's lives.[292]

According to the Court, our current understanding of the Constitution is that it "protects individuals, men and women alike, from unjustified state interference."[293] Although the rhetoric sounds like equality language, the Court did not take the final step of explicitly finding the Equal Protection Clause to be applicable to abortion legislation. Instead, it persisted in relying on women's liberty interests, finding that "Section 3209 embodies a view of marriage consonant with the common-law status of married women, but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry."[294]

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participated in decisions to terminate pregnancy" or caused need for abortions in first place, against their wives). As noted in the Brief of 281 Historians, *supra* note 35, at 18, the Supreme Court echoed this language the next year in its description of women's place in society in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); *see also supra* note 285 (discussing "separate spheres" ideology).

290. *Casey*, 112 S. Ct. at 2807.

291. *Id.*

292. *Id.*

293. *Id.* at 2830.

294. *Id.* at 2831. The Chief Justice would have upheld this provision for two reasons. First, by requiring only notification and not consent, the state was not delegating any veto power that it did not have. *Id.* at 2869-70 (Rehnquist, C.J., concurring in part and dissenting in part). Second, since plaintiffs had challenged the law on its face, they had to "show that no set of circumstances exists under which the provision would be valid." *Id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part).

IV. RECONSTRUCTING *CASEY*: TREATING SIMILARLY SITUATED PEOPLE EQUIVALENTLY

A. What Does Equality Mean?

Many scholars have legitimately criticized the equality principle which provides that similarly situated people ought to be treated similarly and that non-similarly situated people ought not to be treated similarly.[295] The Court has persistently fueled these criticisms by using the equality principle as a sword to deny women rights to reproductive freedom, rather than as a shield to help women escape the discriminatory practices of the past.[296]

Nonetheless, the equality principle may have some value, even in the area of reproductive rights. First, it has a certain logical appeal in that it makes little sense to treat unequal things equally.[297] Second, if applied broadly enough, it can be a valuable tool for establishing and preserving reproductive and other rights.[298] It is necessary, however, to find an appropriate standard by which to

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295. "If women ask to be treated the same as men on the grounds that we *are* the same, then we concede that we have no claim to equality in contexts where we are *not* the same." Scales, *supra* note 234, at 11. Professor MacKinnon has also emphasized that focusing on gender—i.e. that which makes women different from men—to gain equal treatment is inherently futile. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 217-18. She also has commented that "[s]ex equality becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 33 n.19 (1979). This is what Professor Martha Minow calls "the difference dilemma." MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 74 (1990). Professor Minow states that "if equality depends on 'sameness,' then the recurrence of difference undermines the chances for equality . . . [and t]he fear of emphasizing difference, whether by acknowledgment or non-acknowledgment, arises as long as difference carries stigma and precludes equality." *Id.* This has been a particularly difficult problem in the context of reproductive rights because of the biological nature of reproductive differences.

296. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 762 (1993) (holding that women seeking abortions do not constitute discrete group for purposes of 42 U.S.C. § 1983); General Elec. Co. v. Gilbert, 429 U.S. 125, 134 (1976) (holding that exclusion of pregnancy from disability-benefits plan providing general coverage is not gender-based discrimination under either Equal Protection Clause or Title VII because pregnancy is unique); Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (stating that question of pregnancy discrimination "is thus a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such"). Professor Littleton has recognized that underlying both *Geduldig* and *Gilbert* "was the unarticulated assumption that pregnancy was a real difference, and that equality was therefore simply inapplicable." Littleton, *supra* note 220, at 1306.

297. Dean Kay has noted that what has come to be known as the equality principle in American jurisprudence derives from Aristotle's NICOMACHEAN ETHICS. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 26 & n.138 (1985) (quoting NICHMACHEAN ETHICS v.3. 1113a-13b (W. Ross trans., 1925) (stating "'[e]quality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness'")).

298. Kay, *supra* note 297, at 23 n.125.

measure the equality claim for the purpose of establishing reproductive rights. The critical questions are: What elements are relevant to determining whether two entities are in fact similar?; and What constitutes equal treatment, once entitlement to equality has been recognized? Again, *Casey* has laid some of the groundwork for answering these questions in the context of abortion.

In the context of reproductive rights, the use of pregnancy as a specific point of comparison dooms any equal protection claim to failure, because men and women are inherently dissimilarly situated with respect to the biological capacity to procreate. This biological measure for sameness is too narrow, excluding the significance of intended or unintended pregnancy in a person's life and the real life contexts in which the abortion decision arises.[299] Because pregnancy is more than a biological issue, and abortion is more than a medical one,[300] the first step in thinking of abortion as an equal protection issue is to reject the notion that the biological facts of pregnancy are conclusive of legal results. This means rejecting the view of the pre-*Casey* abortion cases in which women were considered, if at all, as no more than patients.[301]

It is necessary to recognize that reproductive rights have broader significance—at least now and at least in this society—because of what they can do for women and what their absence does to women. Because of the profound effects of pregnancy on a woman's body and the responsibilities entailed in raising children, reproductive rights, perhaps more than anything else, define the degree to which women can control the course of their lives.[302] It is in this sense that

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299. This highlights one of the flaws of characterizing pregnancy as unique. *See* General Elec. v. Gilbert, 429 U.S. 125, 132 n.11 (1976) (discussing lower court's statement that pregnancy is unique disability which affects only members of female sex); Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (explaining uniqueness of disability). Referring to pregnancy as "unique" focuses on the biological difference between men and women, using men as the benchmark and identifying women's experience as a deviation from the norm. *Gilbert*, 429 U.S. at 159-60. Focusing on the particular—pregnancy—ignores the broader and more important fact that both men and women *have children*. Even keeping to the particulars of pregnancy, this focus completely ignores the fact that billions of people throughout history have experienced it and continue to do so every year, and that many do it repeatedly throughout their lifetimes. It is curious, therefore, to call this most common and necessary of conditions unique. It is only unique because it does not describe the common experience of males.

300. *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 189 (explaining impact of pregnancy on women's lives).

301. *See supra* notes 248-49 and accompanying text.

302. Kay, *supra* note 297, at 23 n.125. The draft action plan of the 1994 United Nations Conference on Population and Development illustrates this on a global scale, linking "women's freedom of choice in reproduction, protection from abuse and empowerment through education and other means." Crossette, *supra* note 7, at A3. This theme was reiterated at the United Nations Fourth World Conference on Women in Beijing at which Hilary Rodham Clinton said that "It is a violation of human rights when women are denied the right to plan

reproductive rights must be addressed for the purposes of an equal protection claim and that *Casey* can be considered an important precedent for future equal protection arguments.[303]

In three dimensions at once, the Court in *Casey* advanced this goal. First, it recognized that what is at stake is a potentially broad and embracing liberty right, and not an isolating privacy right.[304] As applied to the equal protection analysis, this recognition suggests a baseline for comparison that is more encompassing than biological pregnancy but that extends to those "attributes of personhood" that *Casey* found essential.[305] The relevant elements in determining whether women and men are similarly situated should be whether members of both sexes are equally able "to organize[] intimate relationships and ma[k]e choices that define their views of themselves and their places in society . . . [and] to participate equally in the economic and social life of the Nation."[306] If these rights are so important as to implicate the constitutional right to liberty, they must be available to women and men on an equal basis.

Second, the Court addressed a broader spectrum of people. In prior cases, the women implicated in the abortion issue were inevitably people with whom the Court could not or did not want to relate: patients (as opposed to physicians), wives who perhaps unreasonably would end their pregnancies (as opposed to husbands who would further family values), young girls who were too immature to know what was in their best interest (as opposed to responsible parents or judges), or poor women dependent on public largess

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their own families." Uli Schmetzer, *First Lady Scolds China on Rights*, CHI. TRIB., Sept. 6, 1995, at 1. The conference formally adopted a plan of action that "strongly affirmed women's sexual rights." Rone Tempest & Maggie Farley, L.A. TIMES, Sept. 16, 1995, at A1. Although economic opportunities and protection from violence are distinct issues and critical in their own right, they are clearly connected to issues of reproductive health and freedom. Protection of one right is less meaningful without the companionship of other rights. As Professor Catharine MacKinnon points out, connecting the right to abortion with control over the body:

> has been appealing for the same reasons it is inadequate: socially, women's bodies have not been theirs; women have not controlled their meanings and their destinies. Feminists have tried to assert that control without risking pursuit of the idea that something more than women's bodies might be at stake, something closer to a net of relations in which women are gendered and unequal.

MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 189; *see also* Law, *supra* note 3, at 1016-19 (describing some ways in which unwanted pregnancies burden women's lives). Law concludes that "[c]ontrol over reproduction is the *sine qua non* of women's capacity to live as equal people." *Id.* at 1028.

303. *See* Strauss, *supra* note 21, at 3 (suggesting that *Casey* began to recognize both centrality of social status of women and issue of moral status of fetuses).

304. *See supra* notes 209-33 and accompanying text (discussing Supreme Court's emphasis on liberty as distinct from privacy).

305. *Casey*, 112 S. Ct. at 2807.

306. *Id.* at 2809.

(rather than deference-owed legislatures). In *Casey*, the Court shifted its focus away from these women and gave its attention instead to adults whom the Court could understand and respect: people who seek to participate in the public life of the nation, people who become pregnant despite responsible efforts to avoid it—in short, all people who wish and deserve to be treated as equals in society.[307] Only when the Court focuses on people it identifies with and respects, can the equality principle apply because only then is everyone situated similarly. Furthermore, the recognition that abortion restrictions affect all women militates against the legalistic dichotomies that have, in the past, precluded equal protection analysis on the ground that heightened scrutiny does not apply to subgroups of women such as "women seeking abortions" or "pregnant women."[308]

Third, the Court recognized that abortion relates to profound and far-reaching aspects of peoples' lives that affect both men and women. Although both men and women do not get pregnant, both may want to have children at a particular time in their lives and may want to control their destinies, participate in public life, and live by their own spiritual imperatives.[309] This broader perspective is less artificial and less restrictive than the narrow and simplistic standard which focused only on the biological capacity to bear children thereby rendering any equal protection analysis irrelevant.[310]

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307. *Id.*

308. This polarization was evidenced in such cases as Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 761 n.4 (1993) (finding that relevant category is not women generally but "women seeking abortions"); Harris v. McRae, 448 U.S. 297, 322-24 (1980) (adopting language of *Maher*); Maher v. Roe, 432 U.S. 464, 470-71 (1977) (identifying relevant class as indigent women desiring abortions); General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (adopting language of *Geduldig*); Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (permitting insurance program to classify people as pregnant women or nonpregnant persons).

309. *See Casey*, 112 S. Ct. at 2830-31 (discussing how women are affected by pregnancy). As an empirical matter, it could turn out that, statistically, not all women want control over their lives in the same way or to the same degree as men do. The Equal Protection Clause and the equality principle it stands for, however, require the judicial presumption that both men and women have these goals to the same extent. Any other presumption would throw the Court back to a time when it constitutionalized cultural biases to justify state action that perpetuated separate roles for men and women. *Compare* Hoyt v. Florida, 368 U.S. 57, 62 (1961) (finding that voluntary jury service for women was "based on some reasonable classification" because "wom[e]n [are] still regarded as the center of home and family life") *and* Muller v. Oregon, 208 U.S. 412, 416-17, 423 (1908) (upholding maximum hours legislation for women in certain professions on the ground that women need legislative protections) *with* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1422 (1994) (proscribing gender-based peremptory challenges because "the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women") *and* International Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, 499 U.S. 187, 197 (1991) (holding that fertile women, like fertile men, must be "given a choice as to whether they wish to risk their reproductive health for a particular job").

310. *See* Kay, *supra* note 297, at 22-23 (stating that "[a] woman may be distinguished from a man by her capacity for pregnancy, childbirth, and lactation; but she may choose never to

Casey's placement of reproductive rights in a broader context seems squarely to reject earlier holdings that pregnancy-related burdens did not constitute gender discrimination. These holdings were exemplified by the glib assertion in *Geduldig v. Aiello*[311] that a health insurance plan that excludes pregnancy does not discriminate against women because "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[312] By contrast, the approach in *Casey* might reveal that the risk of not being able to participate simultaneously in the social and economic life of the nation and have a biological family is a cognizable risk from which the *Geduldig* and *General Electric Co. v. Gilbert*[313] plans improperly protected men but not women.[314]

By considering factors that are constitutionally significant to women's lives, *Casey* indicated the "appropriate perspective from which to decide whether groups or individuals are similarly situated."[315] The notion of equality envisioned in *Casey* does not "assume that it is possible [or even desirable] to ignore an individual's sex" or her childbearing capacity.[316] Rather, *Casey* equality acknowledges gender differences and, through them, constructs a broader understanding of how the system harms women. *Casey* equality, therefore, avoids the unnecessary schism between formal equality and special treatment by recognizing that men and women have different reproductive capacities but similar life goals. It makes terms such as formal equality and special treatment irrelevant by focusing on whether women's opportunities for self-expression or self-fulfillment,

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utilize that capacity. Is she any less female? . . . In our society salient distinctions are based on sexuality rather than reproductive behavior").

311. 417 U.S. 484 (1974).

312. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974). The Court said, "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496 n.20; *see also Gilbert*, 429 U.S. at 138 (quoting *Geduldig* language in text). Unfortunately, this thinking was also revived in the post-*Casey* decision of *Bray*, 113 S. Ct. at 760-61, which again rejected the argument that restrictions on "voluntary abortions" are gender-based. In that case, the issue was whether obstruction of access to health clinics constituted gender-based discrimination for the purposes of maintaining an action under 42 U.S.C. § 1985(3). *Id.* at 758; *see also* Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 581 (Ohio Ct. App. 1993) (adopting *Geduldig* language cited above).

313. 429 U.S. 125 (1976).

314. *See Gilbert*, 429 U.S. at 139 n.17 (maintaining that providing fringe benefits for women who get pregnant would be unfair to men).

315. Mary E. Becker, *Prince Charming: Abstract Formal Equality*, 1987 SUP. CT. REV. 201, 207 (arguing that formal equality did not provide such standards and was, therefore, apt to hurt women more than it helped them).

316. *Id.* at 209. "We cannot so easily imagine a world in which women and men are equal or in which sex would matter no more than eye color. Most of us would not want to live in a world in which sex was no more important or relevant than eye color." *Id.* at 234.

whether chosen through childbearing, professional exertion or something else, are equivalent to men's. Because the ultimate goal is equality, formal and otherwise, *Casey* equality implicitly incorporates special treatment to the extent necessary to attain equivalent opportunities.[317] Moreover, *Casey* equality eliminates the false choice between accommodating and ignoring gender differences.[318] It recognizes gender differences without using those differences to disadvantage women. Finally, *Casey* equality assumes that the genders must be equivalent to each other, rather than assuming that one gender, presumably the male, sets the standard to which the other is to be compared.[319]

The vision of equality suggested by *Casey* focuses on equivalency but does not require that the two categories being compared be identical.[320] Because both men and women have an equal right to define their lives but may choose to do so differently, the equal protection mandate requires that similarly situated people—meaning all people who want to control their reproduction—be treated the same—that is, be afforded the same opportunity to do so. A regulation that impinges on one gender's ability to control their lives burdens people unequally on the basis of gender. In this sense, equal means equivalent, not identical, making women's and men's situations commensurable and therefore subject to meaningful equal protection scrutiny.

The idea of equivalency, rather than sameness, is parallel to the increasingly common acceptance in tort law of perspectives other than those of the reasonable man.[321] Some courts, including the United States Supreme Court, have recognized that in certain contexts, where men and women are likely to respond differently to a situation, it is necessary to acknowledge that the male perspective is not universal

317. *See Casey*, 112 S. Ct. at 2707-08 (focusing on impact of pregnancy on women's lives and giving women's life choices same respect as men's).

318. *See* Littleton, *supra* note 220, at 1313-14 (discussing how using accommodation to take account of differences "accepts the prevailing norm as generally legitimate").

319. *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 83, at 225 (criticizing Aristotelian notion of treating likes same because it requires women to show that they are like men in order to be entitled to equal treatment).

320. The focus on equivalency, rather than identicality, takes advantage of a concept that Dean Kay has termed "equality of opportunity." Kay, *supra* note 297, at 26. Equality of opportunity "offers a theoretical basis for making unequals [men and women] equal in the limited sense of removing barriers which prevent individuals from performing according to their abilities." *Id.*

321. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 32, at 173-75 (5th ed. 1984) (describing "reasonable person" as "the 'reasonable man of ordinary prudence'" and stating that "[s]ometimes he is described as a reasonable person"); *see infra* note 325.

and, insofar as the people principally affected are female, may not even be relevant for measuring harm.[322]

In the context of sexual harassment, for instance, the relevant perspective is increasingly that of the victim. The old assumption that the male perspective was applicable to women often precluded women from recovering when the alleged behavior was offensive to the reasonable female, but not to the reasonable male.[323] For instance, if the tort of sexual harassment is merely defined as the right to work without being propositioned and it is measured from the male perspective, women do not benefit because men are not generally injured by the kinds of propositioning that injure women.[324] In this regard, women and men are not similarly situated.

Recognizing this problem, some courts have measured unlawful harassment by reference to the perspective of the reasonable woman or the reasonable person in the victim's situation.[325] Courts that have accepted multiple perspectives have stepped just far enough back from the traditional and narrow reasonable man standard to increase their field of vision and permit the inclusion of women's viewpoints.[326] In stepping back, these courts have redefined the sexual harassment tort to redress harms to both women and men. In these courts, the protected right is not simply the right to work free of propositioning, but the broader right to work in an environment that

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322. Harris v. Forklift Sys., 114 S. Ct. 367, 370 (1993) (holding that plaintiff's subjective perceptions are relevant to determining whether allegedly offensive conduct violates Title VII).

323. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1206 (1989) (arguing that "courts must employ a standard that reflects women's perceptions of sexual harassment" because men and women experience sexual conduct in workplace differently); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1207-08 (1990) (explaining that men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object").

324. *See* Ellison v. Brady, 924 F.2d 872, 879 n.9 (9th Cir. 1991) (discussing how women and men react differently to sexual advances).

325. *See id.* at 878 (adopting reasonable victim standard). The Ninth Circuit adopted this standard because "[i]f we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy." *Id.* The Ninth Circuit cited the Equal Employment Opportunity Commission complaint manual in support of its findings. *Id.* at 878 (citing EEOC Compl. Man. (CCH) § 615, ¶ 3112C, at 3242 (1988) (stating that courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior")). Several other courts have also adopted this standard. *See, e.g.*, King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990) (looking to perspective of plaintiff when adjudicating harassment case); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (acknowledging that men may consider actions that injure women to be harmless and innocent); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (applying reasonable female standard in case where victim was female).

326. *See Brady*, 924 F.2d at 878 (taking into consideration different viewpoints in understanding victim's perspective).

is not hostile or abusive.[327] Here, women and men are similarly situated, and even if men and women differently define the content of the right, both have an *equivalent* right.[328] Thus, the equality principle can acknowledge gender differences without demanding that women be like men.

Like the equivalency measure in tort law, applying this standard to abortion law would require a court to incorporate women's lives as well as men's into its calculus. A court would also have to recognize that what is at stake is not the narrow right to abortion, but the broader right to liberty, autonomy, and control over one's life. By injecting into its abortion jurisprudence the importance of autonomy over the course of one's life, *Casey* paved the way for a constructive application of equal protection jurisprudence to abortion cases.[329] Unfortunately, the Court did not follow through to see where this new understanding would lead.

B. Integrating the Undue Burden Test

For more than twenty years, abortion has been considered part of the fundamental right of privacy and protected as a liberty interest under the Due Process Clauses of the Fifth and Fourteenth Amendments.[330] This means that the Court has purported to strictly scrutinize regulations interfering with the exercise of that privacy right which, in turn, strongly suggested a finding of unconstitutionality.[331] While strict scrutiny reigned at least nominally, urging the Court to apply equal protection law would be counterproductive for advocates of legalized abortion: under equal protection, the Court is most likely to apply the intermediate level of scrutiny it has used in gender discrimination cases, which imposes a lesser burden on the Govern-

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327. *See id.* at 879-80 (discussing right to work). The Court noted:

> [A] gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."

Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

328. *Id.*

329. Strauss, *supra* note 21, at 18-20. Professor Strauss has argued that some abortion regulations are inherently suspect because of society's tradition of undervaluing the interests of women and their bodily integrity, as well as of stereotyping women "as people whose principal responsibility is child bearing and child rearing." *Id.* at 19-20. This tradition, Strauss argues, warrants heightened judicial scrutiny because it effectively disqualifies the government from mandating women's reproductive rights. *Id.*

330. Roe v. Wade, 410 U.S. 113, 153 (1973); *see also supra* note 2.

331. *Casey*, 112 S. Ct. at 2817 (stating that cases subsequent to *Roe* "decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn on narrow terms to further a compelling state interest").

ment to justify the classification.[332] The Court is therefore more likely to uphold regulations reviewed under this more deferential standard.

Even before *Casey*, however, it was clear that the Court was applying, at best, a diluted brand of strict scrutiny to most abortion regulations. In *H.L. v. Matheson*, the Court did not require Utah to use the least restrictive alternative but, mixing doctrinal metaphors, held that the statute "was narrowly drawn" to achieve its "important considerations of family integrity and protection of adolescents."[333] In *Harris v. McRae*,[334] the Hyde Amendment was upheld under the most deferential standard because it was "rationally related to the legitimate governmental objective of protecting potential life," even though the effect was to preclude completely some women from obtaining the abortions they needed.[335] Most significantly, in the most prominent abortion case prior to *Casey*, *Webster v. Reproductive Health Services*,[336] a plurality of the Court applied a simple rational basis standard to abortion restrictions.[337]

One reason for the Court's reluctance to use strict scrutiny, despite its lip service to fundamental rights, may be the now-you-see-it-(*Roe*)-now-you-don't-(*Bowers*)[338] nature of the privacy right.[339] By locat-

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332. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring government to prove that distinction drawn between males and females was substantially related to important governmental purpose).

333. H.L. v. Matheson, 450 U.S. 398, 411 (1981) (footnotes omitted). The first part of the standard borrows language from the strict scrutiny test, while the second part requires the government to meet only the intermediate scrutiny standard.

334. Harris v. McRae, 448 U.S. 297 (1980).

335. *Id.* at 325. Ignoring the effect, the court treated the Amendment as a funding decision well within legislative discretion.

336. 492 U.S. 490 (1989).

337. Webster v. Reproductive Health Servs., 492 U.S. 490, 520 (1989). *See generally* Colker, *An Equal Protection Analysis*, *supra* note 149, at 356-57 (discussing the Court's application of legitimate interest standard to abortion restrictions).

338. 478 U.S. 186 (1986).

339. *Compare* Roe v. Wade, 410 U.S. 113 (1973) (finding that right to privacy is broad enough to encompass decision to terminate pregnancy) *with* Bowers v. Hardwick, 478 U.S. 186 (1986) (finding that no constitutional right to privacy precludes Georgia from criminalizing sex between consenting homosexual adults). It is difficult to reconcile *Bowers* with the Court's long tradition of cases protecting rights relating to sex, procreation, and intimate associations despite the Court's effort to do so. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing right to have abortions); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (holding that unmarried individuals have right to use contraception); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (recognizing right to interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that married individuals have right to use contraception); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942) (protecting right of convicted felons against forced sterilization); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding that parents may have children learn foreign language). The Court in *Bowers* characterized the case as concerning the "fundamental right to engage in homosexual sodomy," that could not be found in the Constitution, and distinguished earlier cases as protecting rights relating to "family, marriage, or procreation." *Bowers*, 478 U.S. at 191. The Court might have chosen a broader level of generality and found

ing the right to make an abortion decision directly in the liberty right of the Due Process Clauses, without detouring through privacy jurisprudence, *Casey* arguably reinforced the applicability of strict scrutiny to regulations impinging on the exercise of a textually explicit fundamental right.[340] Regardless of terminology, however, consistency between dictum and holding would require that the same Justices who extol reproductive rights in Parts II and III of *Casey*,[341] apply strict scrutiny to restrictions on such rights in Part V.[342]

In *Casey*, however, the Court officially adopted the undue burden test, which invalidates a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus."[343] This is not akin to the strict scrutiny test[344] or to the rational basis test.[345] What the undue

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Hardwick's claim to be consistent with the precedents noted above by characterizing them all as protecting against state interference with individuals' rights to organize their intimate relationships. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 228, at 1427-28.

340. *Casey*, 112 S. Ct. at 2804-07. This analysis, however, could alternatively lead to the opposite conclusion: strict scrutiny applies so long as something is considered part of a fundamental right to privacy (such as the use of contraceptives), but mere liberties (such as economic or non-procreative sexual liberties) may be analyzed under rational basis. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 228, at 1306-08 (describing standards for fundamental rights). Chief Justice Rehnquist's separate opinion in *Casey* offers some support for this view: "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." 112 S. Ct. at 2867. Alternatively, the analysis could be completely result-oriented. If the Court decides that a particular right (e.g., non-procreative sex) can be properly regulated, it will find that the right is not included in the constitutional right to privacy. *See Bowers*, 478 U.S. at 190 (characterizing right at issue on most specific level and therefore finding no constitutional support for protection against infringement in right to privacy). Characterizing the right as liberty, as opposed to privacy, therefore, is not conclusive, but it does permit the Court to focus on the more essential question of whether the right is so important as to be fundamental instead of determining, first, if the right is a concomitant of privacy and, second, the scope of the privacy interest.

341. *Casey*, 112 S. Ct. at 2804, 2808; *see also supra* note 207 (discussing structure of court's opinion).

342. *Casey*, 112 S. Ct. at 2821.

343. *Id.* at 2820.

344. Chief Justice Rehnquist complained that "*Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and could be justified only in the light of 'compelling state interests.' The joint opinion rejects that view." *Id.* at 2860 (Rehnquist, C.J., concurring in part and dissenting in part). *But see id.* at 2845-46 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun stated that "[t]oday, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest of judicial scrutiny . . . . Our precedents and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny." *Id.* It is not clear whether Justice Blackmun spoke descriptively or normatively.

345. *See Casey*, 112 S. Ct. at 2806-07 (distinguishing Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (stating that legislature has discretion to balance advantages and disadvantages of economic legislation) *and* Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (settling that Due Process Clause does not require Court to apply heightened scrutiny to economic regulations)). The undue burden test is distinguishable from strict scrutiny and rational basis, as well as from intermediate scrutiny in that it does not permit the government to justify the regulation: even the most compelling purpose will not save a law if it is found to impose an undue burden. *Id.*

burden test is akin to is unclear. The Court's application of the test to the Pennsylvania laws failed to indicate how it or lower courts will or should apply the test in the future, except to suggest that the test does not have much bite.[346] In addition, the Court did not explain how it could abandon strict scrutiny while emphatically reaffirming "a constitutional liberty of the woman to have some freedom to terminate her pregnancy."[347] Thus, the undue burden test represents an amorphous middle tier in the due process context; it seems to apply even when the right being impinged is admittedly fundamental, and despite *Casey*'s admonition that "[l]iberty must not be extinguished for want of a line that is clear."[348] It is therefore doubtful that, even if the Court were to apply equal protection analysis, it would adopt anything more rigorous or predictive than intermediate scrutiny, the amorphous middle tier of equal protection law. Thus, a shift to equal protection analysis would not necessarily increase the accessibility of safe abortion services for women in need any more than the present due process analysis.[349]

There is no need, however, to choose between due process and equal protection analyses because abortion restrictions implicate both. Any legislation that infringes on the liberty of a discrete segment of the population is susceptible to challenge on both grounds. For instance, where a law limits whom members of one group can marry, the limitation discriminates by not applying to all people equally and violates due process by impermissibly regulating a decision about

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at 2820.

346. *Id.* at 2819-22.

347. *Id.* at 2816.

348. *Id.* The Court was obviously aware of the amorphous nature of the undue burden test and presumably chose it for its flexibility despite the vehement criticism of four Justices. *Id.* at 2876-80. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas called it "an unjustified constitutional compromise," 112 S. Ct. at 2855-56, while Justice Scalia described the test as "inherently manipulable" and predicted it would "prove hopelessly unworkable in practice." *Id.* at 2877; *see also* Barnes v. Mississippi, 992 F.2d 1335, 1336 (5th Cir.) (stating that "[d]espite the recent efforts of a three-justice plurality of the Supreme Court, passing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution"), *cert. denied*, 114 S. Ct. 468 (1993). In *Casey*, Justice Scalia also noted that the test is intrinsically illogical since "[a]ny regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated [to] hinder' a decision to have an abortion," and thus violate the undue burden test. 112 S. Ct. at 2877. Despite this logical criticism, most of the statutes in *Casey* were found to pass the test.

349. *Casey*, 112 S. Ct. at 2804-08. To the extent that the rational basis standard garnered more votes in *Casey* than either strict scrutiny or the undue burden test and was one vote away from a majority and to the extent that the court's commitment to intermediate scrutiny for gender discrimination is on more solid ground, a switch toward an equal protection analysis would ensure a higher level of scrutiny than rational basis.

marriage.[350] In *Skinner v. Oklahoma*,[351] the Court invalidated, on equal protection grounds, the sterilization of thrice-convicted felons, although Chief Justice Stone would have invalidated the law as a deprivation of personal liberty.[352] In *Bowers v. Hardwick*, the Court found no due process violation in a Georgia statute regulating consensual but non-procreative sex,[353] but failed to consider whether the application of the statute only to homosexual men constituted an equal protection violation.[354]

In all of these examples, the state discriminated against a politically powerless group by invading the members' liberty interests. Abortion restrictions are similar. Indeed, *Casey* professed a dual commitment to reproductive rights as a concomitant of liberty and of women's roles and opportunities in society today. Because abortion implicates both these issues, laws restricting access to abortion must pass both due process and equal protection tests. Initially, the Court should ask whether a provision constitutes an undue burden. If it does, it should be struck down.[355] If it does not, the Court should then ask whether the burden, even if not undue, is borne more heavily by women than by men. If so, does the unequal burden substantially further an important state interest?[356]

For example, the Court in *Casey* upheld the informed consent provision because it did not constitute an undue burden.[357] Under

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350. *See* Loving v. Virginia, 388 U.S. 1, 7-12 (1967) (applying equal protection analysis to invalidate antimiscegination law).

351. 316 U.S. 535, 538 (1942).

352. Skinner v. Oklahoma, 316 U.S. 535, 544 (1942).

353. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

354. In many cases, it will not matter which constitutional provision the Court chooses, if either would result in invalidation. Because of the different levels of scrutiny, however, the selection could be determinative. For instance, a court could sustain a morality-based regulation for any rational reason, but if it found homosexuals to constitute a quasi-suspect class, the court could require the state to show it had an important reason for applying the regulation only to homosexuals. Even where the levels of scrutiny are the same, what the court requires the government to justify may differ, and that could change the result. Thus, even if no quasi-suspect classification exists, a court may find that it is rational for a state to regulate morality, but irrational for the state to apply its regulation only to homosexuals.

355. *See Casey*, 112 S. Ct. at 2821.

356. This is merely an application of the general principle that all governmental action must comport with all parts of the Constitution. The intermediate scrutiny test, as originally conceived, recognized that equal protection and due process tests are not redundant and that a provision that violates one is not made constitutional just because it does not violate the other. In Craig v. Boren, 429 U.S. 190, 197, 199-200 (1976), for instance, the Court held that Oklahoma's refusal to permit boys under 21 to buy low-alcohol beer did not violate due process, though it did violate equal protection because the disparate treatment of underage boys and girls furthered no important governmental interest. *Id.* at 197, 199-200. While it was clear that Oklahoma could forbid anyone under the age of 21 from purchasing low-alcohol beer, it could not forbid boys from purchasing beer while allowing girls to do so. *Id.* at 199.

357. *Casey*, 112 S. Ct. at 2822-24.

this proposal, the Court would further ask if the burden created by the informed consent provision—subjecting women, but not men, to information intended to discourage the exercise of protected reproductive rights—substantially furthered an important state interest.[358] A burden that is constitutional for due process purposes may nonetheless be invalid if it injures women more than men for no important reason.[359] Requiring the State to prove that abortion regulations are not undue burdens and that they do not, without important reasons, treat women differently than men would be treated under equivalent circumstances is an appropriate burden for the State to bear. Furthermore, as discussed above, the point of reference should not be as specific as the particular question of access to abortion because with respect to pregnancy women and men are not similarly situated. The question must be conceived broadly enough to reflect the true significance of the regulation on the women subject to it and to encompass events that women and men experience equivalently. Using *Casey* language, the question might be: as a result of this law, are women less able than men to "organize [] their intimate relationships and . . . define . . . their place in society?"[360] Does this regulation impede women's ability "to participate equally in the economic and social life of the Nation" or to "control their reproductive lives"[361] to the same degree as men can?

Had the Court in *Casey* adopted an equal protection analysis, it would have been able to deal more honestly with the husband notification provision that it struck down. The Court invalidated the notification requirement primarily on the ground that it unduly burdened those women who would not otherwise tell their husbands about the intended abortion.[362] Although it is true that the requirement would impose significant burdens on these women, the harm of

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358. An alternative formulation might be: "Does the state require informed consent designed to discourage election of medical procedures that pertain only to men or equally to men and women?" *See* Schrager, *supra* note 15, at 1332 (discussing *Casey*'s informed consent and waiting period and noting that no other medical procedure demands such delay).

359. *See* Colker, *An Equal Protection Analysis*, *supra* note 149, at 355-57 (embracing equal protection analysis as more stringent than due process analysis).

360. *Casey*, 112 S. Ct. at 2809.

361. *Id.*

362. *Id.* at 2829-31. Chief Justice Rehnquist criticized the plurality for focusing on these women because the appropriate question in a facial challenge is whether any "set of circumstances exists under which the [provision] would be valid." *Id.* at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted). Justice Blackmun in turn criticized the Chief Justice for failing to explain "how a battered woman is supposed to pursue an as-applied challenge." *Id.* at 2854. To avoid this morass, the plurality could have rested its holding on the fact that compelled communication is invalid under the First Amendment, see *supra* notes 263-66 and accompanying text, or, more broadly, that the provision violates the Equal Protection Clause, see *supra* notes 188-284 and accompanying text.

the requirement is in its subordination of all married women to their husbands in contravention, not of their liberty rights, but of their equality rights. As noted above, the Court recognized this without explicitly holding that the constitutional defect of the provision was the violation of the Equal Protection Clause.[363]

CONCLUSION: WHEN RHETORIC HAS A MEANING OF ITS OWN

When a case is as harmful to women in its multiple holdings as the *Casey* decision is, it can legitimately be asked what justifies an article such as this one which lauds the rhetoric of the case while downplaying the holdings. At the very least, *Casey* provides substantially less protection than was available under *Roe.* In addition, *Casey* explicitly overruled some prior cases that had provided people with a meaningful measure of protection against some of the more burdensome abortion restrictions.[364] Therefore, it is quite possible that *Casey*'s real legacy will be a collection of cases in lower and higher courts that uphold increasingly restrictive abortion laws as not imposing undue burdens. As noted above, this has already begun.[365] After all, dictum is just dictum, but holdings are what courts follow. Indeed, it could be argued that focusing on the lofty language while ignoring the actual effects of the case simply reproduces the very injustice that the Court itself is accused of committing.[366] The objection recalls the following comment of Catharine MacKinnon about the relationship between theory and practice:

> It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it? To be good in theory but not in practice posits a relation between theory and practice that places theory prior to practice, both methodologically and normatively, as if theory is a terrain unto itself.[367]

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363. *See supra* notes 260-94 and accompanying text (discussing Court's attention to equality issues).

364. *Casey*, 112 S. Ct. at 2823 (overruling Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (Akron I), and Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) to extent that cases invalidated "the giving of truthful, nonmisleading information about the nature of [abortion], the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus").

365. *See supra* note 22 (identifying lower court cases applying undue burden standard to abortion restrictions). As those cases demonstrate, several states have already amended their laws to conform to the provisions upheld in *Casey.*

366. *See supra* Part II (demonstrating how Court repeatedly ignores persons most affected by pregnancy); *see, e.g.*, Schrager, *supra* note 15, at 1332 (commenting on implication of *Casey* opinion); West, *supra* note 15, at 962 (criticizing *Casey* decision).

367. Catharine A. MacKinnon, *From Practice to Theory, Or What is a White Woman, Anyway?*, 4 YALE J.L. & FEMINISM 13, 13 (1991) (*quoted in* COLKER, *supra* note 3, at xi).

In other words, what good is good rhetoric if it couches harmful holdings?

Two answers to this question present themselves, one instrumental and the other intrinsic. The first speaks generally to the nature of reconstructive projects. Reconstructive efforts spring from events that compel them, not events that are already fully constructed. They are only relevant when the defects but not the benefits of the thing are evident.[368] Thus, a principal purpose of this effort is to show how, despite the evident harm caused by *Casey*, this case may contain the seeds for a jurisprudence more consistent with and more responsive to people's needs for secure reproductive rights. In this context, *Casey* is important because it represents a new willingness by the Supreme Court to acknowledge realistically the effects of unintended pregnancies on women's lives, and to recognize that abortion laws affect all women including those not currently pregnant and those whose pregnancies resulted despite diligent attempts to avoid pregnancy. Furthermore, the Court seems to recognize that because abortion laws affect women significantly more than men, such laws implicate the constitutional right to equal protection on the basis of gender. Given how rare victories are, litigants should seize whatever opportunities the Court presents. They should use to their advantage whatever progressive language the Court provides, even when such language is obscured by regressive holdings.

The intrinsic response focuses on the independent harm caused by the language of the earlier abortion cases from which *Casey*, to some meaningful extent, departs. Language, perhaps unlike theory, *is* a terrain unto itself, and the language the Court uses to talk about litigants is significant because it reveals something about how the government views its constituents.[369]

When the Court speaks only from the perspective of doctors, fathers, and husbands, it minimizes the importance of other points of view; its condescension towards those who voice other arguments pervades its opinions. The Court's lack of respect for women was not only insulting, but it prevented the Court from even considering the relevance of equal protection arguments to abortion. Thus, the Court's rhetoric produces benefits and harms independent of the actual holdings. Its dependence on the *Roe* rhetoric in subsequent

368. The historical period called Reconstruction, of course, occurred after the Civil War, not after a time of peace and prosperity. THE COLUMBIA ENCYCLOPEDIA 2288 (5th ed. 1993).

369. *See* Law, *supra* note 3, at 969-87. "[C]onstitutional concepts of equality are important both because of their concrete impact on legislative power and individual right and because constitutional ideas reflect and shape culture." *Id.* at 956-57.

cases, for example, perpetuated and reinforced the view that abortion is a medical decision that implicates doctors' rights first and women's rights a distant second. Although the holding in *Roe* pleased many feminists, the Court's stunted understanding of women's lives and the effects of abortion laws on women's lives limited the effective impact of the decision. *Roe*'s rhetorical framework could not reach the restrictions that subsequently came under the Court's scrutiny. Thus, a court wishing to shift from *Roe*'s doctor-oriented privacy rationale to an equal protection analysis would have to abandon the *Roe* perspective and adopt a view of women that fully recognizes their personhood. The 1970s view of women will no longer work.

Although *Casey* does not fulfill the promise of its rhetoric, it does at least create a promise, and one that has substantially more potential than what was possible with the outmoded view of women manifested in the earlier cases. When the Court does revisit the abortion issue, it should remember that abortion implicates both equal protection and liberty interests, and integrate both lines of analysis, taking into account its updated view of women that is new to abortion jurisprudence, and entirely welcome.