

# EQUALITY AND ABORTION: LEGITIMATING WOMEN'S EXPERIENCES

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Since *Roe v. Wade*<sup>1</sup> the abortion debate has been confined within an individual rights framework, formulated as a "right of privacy." The proponents of such an individual rights-based approach argue that a woman should have the absolute right to control her own body and make her own reproductive choices uninhibited by the law. This argument rests on a belief in the inviolability of individual rights. The most legalistic and extreme version of this approach can be found in J.J. Thomson's provocative piece in which she compares the situation of a pregnant woman to that of a good samaritan: just as the law does not require people to be good samaritans, neither should a pregnant woman be forced to give up her body to sustain the life of her fetus, regardless of the issue of fetal personhood.<sup>2</sup>

Thomson's argument by no means fully characterizes the complexity of the pro-choice position,<sup>3</sup> but it is based on the same fundamental concept: the absolute right to control one's body. Both approaches locate a woman's right to an abortion in the abstract realm of individual rights, in a concept which provides women with the freedom to decide but which fails to provide a basis for understanding, supporting, and implementing that decision.<sup>4</sup>

Securing access to abortions through the concept of a right of privacy, the legal embodiment of this individual rights approach, has, at the very least, supported the growth and influence of a competing rights paradigm which at present defines the abortion debate. This paradigm for under-

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> Judith Jarvis Thomson, A Defence of Abortion, in *The Philosophy of Law* 112 (Ronald Dworkin ed., 1971).

<sup>3</sup> Under the label "pro-choice" I am not including all individuals who consider themselves to be in favor of a woman's right to obtain an abortion, but rather the public advocates of this position, those who create the rhetoric and have determined how we think about access to abortion.

<sup>4</sup> Before proceeding any further, I should state that I do not wish to deny or underestimate the historical importance of the concept of individual rights to the emancipation of women. It has been under the banner of individual rights and parallel concepts such as privacy and autonomy that women have made substantial social gains and acquired a greater amount of political freedom and dignity. I do, however, argue that individual rights doctrine cannot support the complexities of the abortion issue and is neither a healthy nor a constructive paradigm for thinking about reproductive concerns.

standing abortion has led us into an intractable debate. More significantly, however, this approach has obscured essential issues such as why a woman chooses abortion, who has access to abortions, and why and how women deal with abortion experiences.

Although the concept of a right of privacy is the focus of criticism in this paper, my concern is not so much with this precise formulation of an individual right to an abortion, but more generally with the competing rights paradigm which it has reinforced.<sup>5</sup> Abortion is now commonly viewed as a battle between the individual rights of a mother and the rights of a fetus.<sup>6</sup> It has been my observation that the public discussion of abortion in the media has generally ignored the relationship that exists between a mother and her fetus.<sup>7</sup> The concept of a right of privacy inherently tends to discourage rather than encourage an understanding of this relationship.

The approach I advocate focuses on women's experiences and knowledge. My concern is to locate abortion within the context of women's collective reproductive and maternal experiences—to identify an approach that accounts for the reasons women have abortions, the circumstances of their lives before and after pregnancy, and the problems associated with gender oppression. To do so requires expanding the scope of analysis beyond individual rights to the social dimension of reproduction which is inhabited by women's common experiences. Focusing on this dimension should encourage an understanding of women's experiences with abortion and consequently legitimate those experiences. If our ultimate desire is to reduce our reliance on abortion and the number of unwanted pregnancies, we must base a right to abortion on a knowledge and understanding of this broader context.

In the first section of this paper, I will discuss three problems of the individual rights-based approach to securing a right to abortion. Although these problems are essentially intuitive, they are important because they provide both the impetus and the framework for a new approach. I have chosen these three problems precisely because they serve this dual purpose: they reveal the conceptual weaknesses of an individual rights paradigm and provide us with a set of issues that help to construct the foundation of a new approach.

Following this, I will reassess how we think about abortion and

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<sup>5</sup> This paper is part of a larger paper which critiques a competing rights approach to abortion, drawing primarily on Canadian and English law. A right to privacy *per se* was never, and still is not, the primary target of my criticism.

<sup>6</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>7</sup> But see, e.g., Frances Kissling, *Pro-Choice Must Widen Its Agenda*, *L.A. Times*, June 30, 1992, at B7.

maternal-fetal relationships through an examination of women's perspectives. This discussion is not intended to define the abortion experience in decisive or universal terms, but merely to consider the existence of a realm of issues associated with women's maternal experiences. Finally, I will attempt to translate this reassessment into terms that will make us more effective advocates for women's reproductive freedom. I argue that by speaking of abortion in terms of equality we may better serve the needs of both women and society in general.

There is a clear tension between what may be the best arguments for women and what are potentially the most successful *legal* arguments. Given the present composition of the Supreme Court, equality arguments would be more easily dismissed than arguments based on a right of privacy. For this reason perhaps, relying on *Roe*'s right of privacy as a matter of *stare decisis*, not as a matter of doctrinal correctness, is the only sensible legal approach.<sup>8</sup> The arguments and conclusions of this paper, however, are not intended to be an exposition of current American constitutional doctrine. The position of the Supreme Court should not prevent us from developing and urging the recognition of a different paradigm for thinking about abortion outside of the courts.

It is important to explore this alternate line of approach for two reasons. First, a shift in the way the public speaks about and understands abortion may be necessary before we can think about convincing the Court to adopt a new paradigm. Equality arguments may be more persuasive in a different time with a different Supreme Court. In the meantime, it is crucial for us to build the foundations for a constructive dialogue on abortion.

Second, the forum of the abortion debate may be shifting. The strategy of Planned Parenthood in *Casey* seemed to be premised on an assumption that the fight in the Court had been lost, and that the struggle for abortion rights must now focus on the *political* arena. If legislators rather than judges are to play an increasing role in determining the scope of protection for reproductive rights, there is no need to assume that the scope of their protection will be limited to that provided by the reasoning

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<sup>8</sup> It is likely that the only reason *Roe* remained at least theoretically intact in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), was not because of a belief in a right of privacy, but because the Court had stated such a belief in *Roe* and was bound by *stare decisis* to the right of privacy argument.

A right of privacy was not the only argument made in support of a woman's right to choose an abortion before the Supreme Court in *Roe v. Wade*. See Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1289 n.34 (1991) (discussing the equal protection arguments made in *Roe*); Nancy Stearns, *Roe v. Wade: Our Struggle Continues*, 4 Berkeley Women's L.J. 1, 5 (1988-89) (noting that courts have found abortion rights to be part of personal liberty).

underlying the constitutional right of privacy.

## I. THE PROBLEM WITH RIGHTS

For the most part, the public advocates of a woman's right to abortion speak in terms of an absolute and unconditional right to autonomy and reproductive control. In locating a woman's interest in the heart of traditional liberal individual rights doctrine, abortion rights activists have effectively alienated the fetus from their argument, and, by doing so, have left themselves vulnerable to a fetal rights counterargument.

It may be possible to reconstruct a rights analysis by adopting a different perspective on rights.<sup>9</sup> For example, a noncompetitive approach to individual rights may very well accommodate many of the concerns that are discussed below. Furthermore, by choosing to critique a particular theory of individual rights, I may be giving short shrift to the possibility of developing and applying alternative rights-based arguments to the abortion issue.<sup>10</sup> However, the rights approach which is the focus of my criticism dominates the concept of a right of privacy in the abortion debate; it is difficult in speaking of rights to escape the entrenched rhetoric associated with that debate.

It is important to note, however, that rejecting the language of rights does not necessarily entail rejecting the notion of autonomy. Autonomy need not concern individual rights exclusively. Autonomy may be more effectively protected through an equality approach which is structured around the individual and collective experiences of women.<sup>11</sup>

To clarify the problems of the rights-based approach, I will examine three separate issues. First, I will look at the form of the debate as we now know it: a woman's right to reproductive freedom versus a fetus' right to

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<sup>9</sup> For an example of such an attempt, see Larry R. Churchill & José Jorge Simán, *Abortion and the Rhetoric of Individual Rights—Why the Abortion Debate Is Sterile*, *Hastings Center Rep.*, Feb. 1992, at 9, 11–12.

<sup>10</sup> I am also aware that "equality" does not magically steer the debate away from the notion of competing rights. Equality, like individual rights, can mean many things, and a shift from the latter to the former in the abortion debate might have no immediate substantive effect, although it may serve a rhetorical purpose. The real goal here is to identify a concept that can alter the competitive framework of the debate.

Perhaps the problem is not the choice between privacy and equality, but that both are "defined by those who do not share our interests or experiences." Sarah Burns, *Notes from the Field: A Reply to Professor Ruth Colker*, 13 *Harv. Women's L.J.* 189, 199 (1990). There is undoubtedly much truth to this statement, but it does not dictate against developing a feminist concept of equality, or privacy for that matter, applicable to reproductive issues, in the hope that it will be adopted and implemented in the spirit in which it is proposed.

<sup>11</sup> See discussion *infra* part III.

life. It is very difficult to reconcile these two rights when the issue is boiled down to such bare terms, unless one totally rejects the possibility that a fetus has some moral status. Therefore, I argue that focusing on women's rights leads to the development of a separate body of fetal rights.

Second, I will examine how by treating abortion as exclusively a woman's concern, a right of privacy relegates not just abortion, but reproductive concerns in general, to the private realm. Consequently, government has no apparent duty to intervene to protect women's interests, although it freely intervenes to protect the interests of others, including the fetus. Thus, abortion is not only a woman's right under a right of privacy, it is also exclusively her problem. This consequence runs contrary to the goal of feminists during the past century to free women from an exclusive association with their reproductive capacities, while accomodating their unique condition as child bearers.

Finally, I will argue that the rights-based approach obscures women's experiences; it provides a right without encouraging an understanding of the basis for that right or whether the right itself is sufficient.

### **A. Fetal Rights Versus Women's Rights**

The argument developed by pro-choice activists and the rhetoric associated with it characterize a woman's right to control her reproductive capacities as an absolute right superior to any other claims, including those of a fetus. Discussing the fetus is discouraged within the pro-choice ranks; bringing the fetus into the debate is viewed as an unnecessary and dangerous concession that threatens to justify undue restrictions on a woman's reproductive freedom.<sup>12</sup>

The natural consequence of positing such an absolute right has been the development of a body of separate and conflicting fetal claims.<sup>13</sup> Thinking

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<sup>12</sup> Prior to the Post-*Roe* workshop I would not have stated this so emphatically, but it became clear to me that any discussion of the fetus was not welcome. This fear of talk about the fetus is supposedly rooted in a belief that any recognition of the fetus will be used against women. I do not believe this is necessarily the case. Whether or not discussion of the fetus can be used against women in their battle for access to abortion depends upon how the fetus is conceptualized, its place in the discussion, and our approach to discerning and respecting whatever interests it may have.

<sup>13</sup> The law has only recently afforded the fetus rights or recognition qua fetus in the abortion debate. Neither in the common law nor in the early legislative attempts to control abortion was the identity of the fetus considered to be distinct enough from its mother to accord it a separate legal existence. Only after birth did the fetus acquire a set of independent rights giving it sufficient authority to claim injury. Until that point, the interests of the mother and fetus were protected together. See Dawn E. Johnsen, *The Creation of Fetal Rights: Conflict with Women's Constitutional Rights*

strictly in terms of rights is divisive: "It teaches us to think of 'I' and 'I versus you' instead of we."<sup>14</sup> In the context of the abortion debate, the rhetoric of rights has taught us to think of the mother as an adversary of the fetus. When the rights of mother and fetus are juxtaposed in this way, one cannot help but wonder why it is that a mother deserves to have her rights respected but a fetus does not.

The proponents of an absolute right to reproductive freedom answer this query by presuming that a fetus simply does not fall within the category of persons. Consequently, a fetus cannot maintain the same set of individual rights that a woman does.<sup>15</sup> The majority of those who advocate a right to abortion rarely address the issue of the moral status of the fetus.<sup>16</sup> Certainly, if one accepts the view that the fetus has no ontological or moral status, the concept of women's absolute reproductive freedom is quite compelling. However, this position loses much of its weight if one is uncertain about the moral status of a fetus. Such a position also allows the "pro-life" movement to assume the "higher moral ground," as it is concerned not solely with the "self."<sup>17</sup>

It is worthwhile to consider briefly the range of views that exist on fetal life to illustrate the uncertainty in identifying the moral status of the fetus as a separate entity. The ontological identity of a fetus has been and continues to be the focus of much philosophical and theological debate. Modern science has shaped and redirected some of the issues by increasing our knowledge of biological development,<sup>18</sup> but the status of the fetus

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to Liberty, Privacy and Equal Protection, 95 Yale L.J. 599, 600-02 (1986). See generally Lawrence Glantz, *Is the Foetus a Person? A Lawyer's View*, in *Abortion and the Status of the Fetus* 107 (William B. Bondeson et al. eds., 1984) (discussing legal recognition of the fetus).

<sup>14</sup> John Hardwig, *Should Women Think in Terms of Rights?*, 94 Ethics 441, 448 (1984).

<sup>15</sup> See Richard Dworkin, *The Great Abortion Case*, N.Y. Rev. Books, June 29, 1989, at 49, 50 (stating with respect to constitutional protection that acceptance of the premise that a fetus is not a constitutional person makes *Roe's* decision to protect the rights of women, who are full constitutional persons, "largely persuasive").

<sup>16</sup> See Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Brief Filed in William L. Webster v. Reproductive Health Services*, 13 Harv. Women's L.J. 137, 157 (1990) (discussing the lack of empathy in feminist arguments and their failure to respond to "the emotional images of fetal life"). The silence per se of many "pro-choice" spokespeople on the status of the fetus has given critics of the movement even more reason to argue and complain. See, e.g., Iain T. Benson, *An Examination of Certain "Pro-Choice" Abortion Arguments: Permanent Concerns About a "Temporary" Problem*, 7 Can. J. Fam. L. 146, 150-55 (1988).

<sup>17</sup> Colker, *supra* note 16, at 157.

<sup>18</sup> Scientific, empirical facts, such as the permanence of a complete genetic make-up from conception and the existence of a relatively complete essential structure at

remains essentially a moral dilemma; "the concept 'human' is essentially philosophical, requiring both a philosophical and an ethical judgment."<sup>19</sup>

What are the distinguishing characteristics of a human being which provide it with an identity worth protecting? Biological existence, the capacity to feel pain and experience pleasures, may be a necessary but is not a sufficient criterion of personhood, as animals are capable of experiencing such biological responses. Prior to the nineteenth century, the predominant understanding of the concept of personhood in Western thought, dictated for the most part by Judeo-Christian religious doctrine, centered on the acquisition of a rational soul.<sup>20</sup> The fetus' acquisition of a soul was thought to occur from forty to eighty days after conception.<sup>21</sup> This view, however, has little resemblance to the present position of the Catholic Church which is widely considered to have the most traditional doctrine on abortion and fetal personhood. The Catholic Church asserts that ensoulment occurs at conception, providing the embryo and its successive forms with a full range of human rights;<sup>22</sup> there are no relevant distinctions in the different stages of fetal development. It should be noted, however, that the official Catholic position is not followed by many practicing Catholics and theologians.<sup>23</sup>

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approximately 10 weeks, have provided the foundation for many arguments in support of fetal right to life. See, e.g., Benson, *supra* note 16, at 150-55; George Grant, Abortion and Rights, in *Technology and Justice* 117, 120-23 (1986); Albert S. Moraczewski, Human Personhood: A Study in Personal-ized Biology, in *Abortion and the Status of the Fetus*, *supra* note 13, at 301.

<sup>19</sup> Kathleen McDonnell, Not an Easy Choice: A Feminist Re-examines Abortion 54 (1984) (quoting Daniel Callaghan, Abortion: Some Ethical Issues, in *Bioethics* 17-18 (Thomas A. Shannon ed., 1981)).

<sup>20</sup> This is an Aristotelian concept which was adopted by St. Thomas Aquinas. See Etienne Gilson, *The Philosophy of St. Thomas Aquinas* 211-16 (1929); see also Laurence H. Tribe, Abortion: The Clash of Absolutes 31 (1990) (discussing the history of the Catholic position).

<sup>21</sup> Tribe, *supra* note 20, at 31.

<sup>22</sup> John T. Noonan, Jr., An Almost Absolute Value in History, in *The Morality of Abortion: Legal and Historical Perspectives* 51 (John T. Noonan, Jr. ed., 1970). A version of the modern-day Catholic position, although not explicitly stated as such, can also be found in John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 *Phil. & Pub. Aff.* 37, 117 (1973).

<sup>23</sup> An example of the diversity of views held by Catholics can be found in the Brief for Catholics for a Free Choice, National Coalition of American Nuns, Women in the Spirit of Colorado Task Force, et al. as *Amicus Curiae* in Support of Appellees, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), reprinted in 11 *Women's Rts. L. Rep.* 365 (1989).

Excellent examples of the divergent views within Catholic theology can be found in two articles written by Roman Catholic priests. See James J. McCartney, *Some Concepts of Persons and Their Implications for the Ontological Status of the Unborn*, in *Abortion and the Status of the Fetus*, *supra* note 13, at 313, 322 (maintaining that

At the other end of the spectrum are those who claim that the true criterion for personhood is the existence of self-consciousness. Michael Tooley, for example, an ethicist who has written on abortion, claims that to be a person and have a right to life "presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states. This in turn presupposes both that one has the concept of such a continuing entity and that one believes that one is oneself such an entity."<sup>24</sup> Although this view may be rather extreme in its application, there are many others who propose similar definitions of personhood which make abortion perfectly acceptable.<sup>25</sup>

For those who accept the view that a fetus is a person from the moment of conception, and for those who are uncertain about its ontological identity, it is difficult to defend a woman's absolute right to abortion. If a fetus deserves any recognition as an independent entity, morally separated from its mother, surely it must at the very least have a right to life. George Grant, a Canadian philosopher, argues that those who support abortion in the name of individual rights are at the same time "unwittingly undermining the very basis of rights. Their complete disregard for the rights of the unborn weakens the very idea of rights itself."<sup>26</sup>

John Finnis, a strong supporter of the position of the Catholic Church, also focuses on the logical inconsistency of relying on a right to bodily security to support a right to abortion. He argues that all human life is a human good which is deserving of respect. Therefore, we must never perform an act against this basic good or set it against another basic good. We cannot look to good consequences to save an otherwise morally condemned act as it is impossible to estimate all of the possible consequences of the act but the act will certainly be contrary to a basic value or good.

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ensoulment and the acquisition of personhood occurs sometime after conception); Moraczewski, *supra* note 18, at 308 (asserting that personhood exists from the moment of conception).

<sup>24</sup> Michael Tooley, *Abortion and Infanticide*, 2 *Phil. & Pub. Aff.* 37, 49 (1972).

<sup>25</sup> See, e.g., Roland Puccetti, *The Life of a Person, in Abortion and the Status of the Fetus*, *supra* note 13, at 169. He claims that a person "is a conscious entity that builds a personal life from agency and experience." *Id.* at 175. Similar to Tooley, Puccetti believes that a person requires a capacity for conscious experience without which he claims "nobody is home upstairs." *Id.*

H. Tristram Engelhardt, Jr., also maintains that personhood requires a self-conscious, self-determining life, and, as fetuses do not have such a capacity, they "need not be extended the special protection we give to persons." H. Tristram Engelhardt, Jr., *Viability and the Use of the Fetus, in Abortion and the Status of the Fetus*, *supra* note 13, at 183, 184.

<sup>26</sup> Grant, *supra* note 18, at 119.

Finnis states,

[O]ne's responsibility for the realization of human good, one's fostering of or respect for human flourishing in future states of affairs at some greater or lesser remove from one's present action, does not override one's responsibility to respect each basic form of human good which comes directly in question in one's present action itself.<sup>27</sup>

He concludes that

the traditional condemnation of therapeutic abortion flows not from a prejudice against women or in favor of children but from a straightforward application of the solution in the one case to the other case, on the basis that the mother and child are *equally* persons in whom the value of human life is to be realized.<sup>28</sup>

According to Finnis, abortion is wrong from the moment of conception, even to save the life of a mother, because it is a choice directly against a human good: the value of life.

The purpose of this brief discussion of the ontology of fetal life is not to persuade. The only definite conclusion that I believe can be drawn from this discussion is that fetal personhood is problematic. There is no consensus on the moral status of a fetus as an abstract entity.<sup>29</sup> The difficulty in drawing the line between person and non-person does not, however, lead to the conclusion that we should simply ignore the fetus as most pro-choice advocates would have us do. To ignore the fetus is to confirm indirectly its non-existence and thus alienate those who simply cannot reconcile this view with their personal experiences. For those who do recognize some moral significance in fetal life, without necessarily recognizing a fetus' personhood—and I include myself in this category—both the “pro-life” position and the notion of an absolute right to bodily integrity are problematic and unpersuasive.

If the failure of pro-choice advocates to include the fetus in their argument forces us to conceptualize the fetus as a *separate* entity, and if our experiences tell us that there is some moral significance to this entity

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<sup>27</sup> Finnis, *supra* note 22, at 129. Finnis' analysis, however, depends on how one interprets the “good” of life. I would argue that he does not take sufficient consideration of values other than an actual right to existence in considering what the “good” of life is and thus disregards issues pertaining to human responsibility, obligation, and relationships.

<sup>28</sup> *Id.* at 132.

<sup>29</sup> Frances Olsen observes that “[a]bsent an appeal to an external authority, any determination of the beginning of human life can be criticized as arbitrary.” Frances Olsen, *Unraveling Compromise*, 103 Harv. L. Rev. 105, 127 (1989).

deserving of at least some recognition, the pro-choice position is undermined; it bears the seeds of its own destruction.<sup>30</sup> Given the variety of opinions regarding a fetus' right to life, it is useful to move away from examining the fetus as a *separate* moral entity or, worse, as a non-entity.

It is conceptually difficult to produce a satisfactory defense for women's absolute right to bodily integrity in the context of abortion without showing that the life of a fetus has no moral status. This position is difficult to maintain and uncompromising. I do not wish to contend that we must seek or settle on a definition of personhood or that the abortion issue must begin and end with the question of what is a fetus. Such an analysis is far too one-dimensional. I do wish to argue, however, that as long as women speak in terms of an absolute right to bodily security as the basis for a right to safe abortions, they will continue to be vulnerable to a strong opposition advocating fetal rights.<sup>31</sup> Furthermore, by relying on the absolute, superior individual right of a woman to procure an abortion, the pro-choice movement has helped create the uncomfortable notion of an adversarial maternal-fetal relationship that now dominates in public discourse on abortion.<sup>32</sup>

## B. Women's Problem?

The assertion that access to abortion stems from a woman's right to control her own body, from a "right of privacy," has provided the state with a doctrine which permits it to disentangle itself from the abortion issue rather than pursue a responsible role in seeking ways to make a woman's choice effective. A right of privacy demands that states recognize a woman's theoretical right to choose an abortion, not insure she can get one. Most legislatures seem to be more concerned with designing and implement-

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<sup>30</sup> The same arguments can be made with respect to an absolute position in favor of a fetal right to life although very few pro-lifers adopt such an absolute position. This itself may create some problems for the pro-life movement. See Martha Fields, *Through a Different Lens: Responses to Webster*, 16 Harv. Women's L.J. (forthcoming 1993).

<sup>31</sup> See M.L. McConnell, "Even By Commonsense Morality": *Morgentaler, Borowski* and the Constitution of Canada, 68 Can. B. Rev. 765, 793 (1989) (stating in a discussion of the present situation of Canadian law that the "ultimate acceptance of a foetal *versus* woman's rights paradigm undermines [the] initial position regarding the importance of control over one's body").

<sup>32</sup> But see Johnsen, *supra* note 13, at 599-600, 611-13 (claiming that the opponents of abortion rights have created the adversarial relationship between the fetus and its mother); Dawn Johnsen, *A New Threat to Pregnant Women's Autonomy*, *Hastings Center Rep.*, Aug.-Sept. 1987, at 33, 35-36. Although I certainly agree with this claim, Johnsen, and many others, underestimate the role of the rhetoric of women's rights in contributing to this situation.

ing programs which restrict access to abortion and circumscribe a woman's decision, while claiming to recognize a woman's right to choose in increasingly limited circumstances.<sup>33</sup> Government has assumed the role of fetal protector,<sup>34</sup> constantly broadening fetal rights through abortion restrictions while women are left to deal with their problems in private.

In *Roe v. Wade*, the Supreme Court decided that a woman has a right to an abortion in the first trimester based on a constitutional "right of personal privacy" rooted in the Fourteenth Amendment.<sup>35</sup> Justice Blackmun held that a woman's right to decide is a fundamental aspect of a "right of privacy."<sup>36</sup> This right is not, however, absolute, but is subject to state regulation when the state's interest in the fetus is compelling. During the second trimester the state has a limited interest in protecting fetal life but its interest in the fetus does not become compelling until viability. The state has no interest in a woman's decision or any abortion related matters in the first trimester.

The Supreme Court has further limited the content of a woman's right of privacy and expanded the state's interest in protecting the fetus through a steady stream of cases concerning Medicaid funding, parental consent, public abortion facilities, abortion-related speech, and mandatory waiting periods.<sup>37</sup> One conclusion that we can draw from these decisions is that a right of privacy, or at least its present interpretation, does not require the state to support a woman's decision in any way; a right of privacy is, as interpreted by the Court, nothing more than a thin protective shell, insuring

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<sup>33</sup> These circumstances are rapidly shrinking through both direct and indirect restrictions on abortion. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (upholding a 24-hour mandatory waiting period before an abortion); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding federal restrictions on abortion-related counseling by federally funded doctors); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding parental notification requirements); *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972 (1990) (upholding parental notification requirements); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding viability testing requirements and a prohibition on abortions in public facilities); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding a federal ban on Medicaid funded abortions).

<sup>34</sup> In the United States, protection of the fetus has been designated a "substantial" and "compelling" state interest. See, e.g., *Casey*, 112 S. Ct. at 2820; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting).

<sup>35</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>36</sup> The doctrine of a "right of privacy" was first used in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating legislation permitting the sterilization of persons convicted of "felonies involving moral turpitude"). In 1965 it was further extended in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (granting married couples the right to make personal contraceptive decisions). *Roe* was considered a natural extension of the *Griswold* decision. See Tribe, *supra* note 20, at 77-112.

<sup>37</sup> See *supra* note 33.

that there are no direct incursions on a woman's right to decide, but requiring no obligation to make that decision meaningful or effective. Thus what was conceived as a universal right to obtain an abortion may ensure access for only a limited group of women.<sup>38</sup>

Catharine MacKinnon has been one of the most vocal opponents of the application of a "right of privacy" doctrine to the abortion issue. She states that a right of privacy "proposes to guarantee individual bodily integrity"<sup>39</sup> but, in practice, "the law of privacy works to translate traditional values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives."<sup>40</sup> Furthermore, MacKinnon argues, confining the abortion issue to the private sphere both arises out of and perpetuates the misconception that women actually control their sexual activity. "Sexual intercourse," as she states, "cannot simply be presumed coequally determined."<sup>41</sup> Sexual relations continue to exist under conditions of gender inequality and in a legal climate where meaningful consent is not possible.<sup>42</sup> Based on this acknowledgment of women's continued sexual subordination, MacKinnon adamantly rejects the privacy doctrine. She states that it "presumes [that] non-intervention into the private sphere will promote women's freedom of choice," when in reality it is within the private sphere that a woman's free choice is "precluded by conditions of sex, race and class."<sup>43</sup> MacKinnon argues that providing access to abortion without first recognizing the social and political reality of the inequality of the sexes in the private sphere "facilitates women's heterosexual availability."<sup>44</sup>

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<sup>38</sup> Even in jurisdictions such as Canada where there is a state health-care system, access to and funding for abortions are major problems. See Canada, Report of the Committee on the Operation of the Abortion Law 22, 33, 36 (1977). Since the prohibition on abortion in Canada was struck down in *R. v. Morgentaler*, 44 D.L.R.4th 385 (1988) (Can.), there has been a rash of attempts by provincial legislatures to restrict the availability of abortions to a limited number of hospitals and to deny funding except for those abortions performed in approved hospitals. See Research Branch, Library of Parliament, Abortion: Constitutional and Legal Developments, Current Issue Rev., Nov. 29, 1989, at 17-19; Various Provincial Regulations Set Up To Replace Three-Member Committees, *Globe & Mail*, June 28, 1989, at A3.

<sup>39</sup> Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *Feminism Unmodified* 93, 96-97 (1987). MacKinnon's critique of applying the right to privacy to reproductive and sex inequality issues are more fully discussed in her recent article. See MacKinnon, *supra* note 8.

<sup>40</sup> MacKinnon, *Privacy v. Equality*, *supra* note 39, at 97. MacKinnon defines "social imperatives" as "the imperatives of male supremacy." *Id.*

<sup>41</sup> *Id.* at 94-95.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 100-01.

<sup>44</sup> *Id.* at 99. MacKinnon also refers to Andrea Dworkin's articulation of the same

An isolated claim for a privacy-based "right to choose" may create a theoretical right to seek an abortion, but it does not secure for women adequate services nor does it "address the social relations and sexual divisions around which responsibility for pregnancy and children is assigned."<sup>45</sup> Until these issues are addressed, abortion will be only a "grim option."<sup>46</sup> It will not be freely chosen by women in the true sense of these words; choice "means little when women are powerless."<sup>47</sup>

Underlying this argument is an assumption that the goal of an abortion rights campaign should not be merely to secure for women the freedom to choose an abortion, a procedure which no woman wants to experience, but additionally to eliminate the number of unwanted pregnancies. Therefore, the advocates of a right to abortion should focus on eliminating the circumstances which effectively make choice an unrealistic concept, in addition to securing access to and safe facilities for abortions.<sup>48</sup>

Ultimately, claiming an absolute right to control one's body, a right to privacy and an inviolable right to decide, does not secure autonomy for women. Neither does it urge the state to acknowledge the pertinent socioeconomic concerns essential to an understanding of abortion. To claim

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point: "[G]etting laid was at stake." *Id.* See Andrea Dworkin, *Right Wing Women* 95 (1983).

Zillah Eisenstein makes a similar observation. She states in a discussion on the limitations of the "privacy" doctrine that it leaves intact the "patriarchal/phallocratic dimensions of privacy" and "obscures the political nature of the private realm." Zillah R. Eisenstein, *The Female Body and the Law* 187 (1988); see also Olsen, *supra* note 29, at 112-13.

<sup>45</sup> Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* 7 (1984).

<sup>46</sup> Caroline Whitbeck, *The Moral Implications of Regarding Women as People: New Perspectives on Pregnancy and Personhood*, in *Abortion and the Status of the Fetus*, *supra* note 13, at 247, 251.

<sup>47</sup> Petchesky, *supra* note 45, at 11. Petchesky states in another publication that the right to choose also falsely conveys the idea that given a "choice," "women's sexual and reproductive lives magically become a realm of self-determination." Rosalind Petchesky, *Abortion as "Violence to Women": A Feminist Critique*, 18 *Radical Am.*, no. 2-3, at 64, 67 (1984); see also Olsen, *supra* note 29, at 124.

<sup>48</sup> Beverly W. Harrison states:

If we are ever to become genuinely serious about reducing the need for abortions in the United States, we must cut through the miasma of fear and suspicion about women's sexuality and confront, by concrete analysis of women's lives, the conditions that lead women to resort to frequent abortion. . . . [I]f those intent on reducing the number of abortions are serious, they will have to take with full and non-judgmental seriousness the conditions of women's lives and women's social reality.

Beverly Wildung Harrison, *Our Right To Choose: Toward a New Ethic of Abortion* 245-46 (1983).

an absolute right is to "remove the rationale for the formation of strategies directed to the improvement of existing social conditions," because an absolute right is "possessed independently not just of prevailing social conditions but of any social conditions whatsoever," creating a gap between the right and social reality.<sup>49</sup> It is necessary to focus on more constructive and realistic objectives if we are going to narrow the gap and secure an effective right to safe abortions.

### **C. Women's Experiences**

In the preceding discussion, I contended that a rights-based paradigm does not provide a rationale either for reducing the need for abortion or for the ultimate emancipation of women from association with their reproductive capacities. Such a paradigm permits and, in fact, encourages government to ignore the condition of women's lives and the circumstances surrounding abortion decisions. In this section I am concerned with how the rights-based argument has more generally obscured these circumstances and conditions.

Attempts by men to exercise authority over women's reproductive freedom have been a major source of women's oppression. As Rosalind Petchesky states, "Fertility rates are the negotiated outcomes of struggles, whether overtly political or waged surreptitiously and 'underground,'" between the interests of women and "the demands of 'the race,' as represented by male rulers, churchmen and moralists, chiefs of clans or households, and medical and population authorities."<sup>50</sup> Women's sexual vulnerability and their reproductive capacities have thus been both the focal point and a cause of their oppression.

Recognizing the nature of women's oppression, its rootedness in sexuality and reproduction, has led a handful of feminists to reject the concept of motherhood. Shulamith Firestone, for example, perceives a woman's maternal function as being at the heart of her oppression. She envisions the development of an artificial reproduction system as the ultimate source of freedom for women.<sup>51</sup> Adrienne Rich criticizes this approach, stating that:

Firestone sees childbearing . . . as purely and simply the victimizing experience it has often been under patriarchy. . . . She

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<sup>49</sup> Elizabeth Kingdom, *Legal Recognition of a Woman's Right To Choose*, in *Women in Law* 143, 156-57 (Julia Brophy & Carol Smart eds., 1985).

<sup>50</sup> Petchesky, *supra* note 45, at 26.

<sup>51</sup> See Shulamith Firestone, *Dialectic of Sex: The Case for Feminist Revolution* 233-34 (1970).

discards biological motherhood from this shallow and unexamined point of view, without taking full account of what the experience of biological pregnancy and birth might be in a wholly different political and emotional context.<sup>52</sup>

By rejecting any further association with reproduction, Firestone's approach forecloses the prospect of making known and drawing on women's past experiences. It relegates motherhood to ancient history rather than capitalizing on this experience to effect positive change. In doing so, it makes it difficult for someone to understand properly the claim for a right to abortion since there is no corresponding attempt to clarify what experiences give women this prerogative. There is of course the obvious fact that a woman experiences a significant amount of physical stress during pregnancy, but this has always been apparent and has never been regarded as sufficient to publicly privilege a woman's opinion in an abortion decision.

Furthermore, if the issue is portrayed as solely a matter of personal freedom and of escaping the tyranny of biological destiny, it takes on the cast of a selfish pursuit. It is thus not surprising that the campaign for a right to an abortion and reproductive freedom is often characterized as a "self-interest lobby which seeks rights without responsibility."<sup>53</sup> Nor is it surprising that a woman seeking an abortion is considered to be immoral and self-interested—pursuing sexual freedom and liberation over and above all other interests.<sup>54</sup> This distorted view of a woman's conscience appears in abortion cases<sup>55</sup> and in legal literature.<sup>56</sup>

The disrespect apparent in this characterization of a woman's choice is arguably in part a result of the rhetoric of rights. A rights approach, particularly if it is associated with a complete rejection of women's reproductive capacities or responsibilities, does not encourage an understanding of the decision-making process. In other words, "the insularity of the abortion decision accorded by the right [of privacy] . . . has a cost: it obfuscates the moral quality of most abortion decisions."<sup>57</sup>

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<sup>52</sup> Adrienne Rich, *Of Woman Born: Motherhood as Institution and Experience* 174 (1986).

<sup>53</sup> Carol Smart, *Feminism and the Power of Law* 146 (Series in Sociology of Law and Crime, Maureen Cain & Carol Smart eds., 1989).

<sup>54</sup> *Id.* at 148.

<sup>55</sup> See, e.g., *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (stating that a woman's choice to have an abortion is based on "convenience, whim and caprice").

<sup>56</sup> See, e.g., Law Reform Commission of Canada, Working Paper 58, *Crimes Against the Foetus* 41 (1989) (expressing concern about abortion decisions made on "whim" or caprice).

<sup>57</sup> Robin West, *The Supreme Court—Foreword: Taking Freedom Seriously*, 104

Relying solely on a narrow and abstract concept of rights and duties<sup>58</sup> comes close to constituting a "reductio ad absurdum."<sup>59</sup> A rights analysis neither lends itself to an understanding of the particular social conditions of women nor of the circumstances of motherhood, both of which are integral to an abortion decision. It leads to a characterization of the choices made by women as selfish, immoral, and careless and to an insensitivity to women's sexual vulnerability. This characterization is, as Rosalind Petchesky argues, "not only false but malicious."<sup>60</sup>

A full discussion of the moral dilemmas which face a pregnant woman and influence her decision whether or not to carry a fetus to term is beyond the scope of this paper.<sup>61</sup> However I do want to examine one problem which relates to this characterization of a woman's decision as selfish and immoral:<sup>62</sup> the fact that the woman usually takes the blame for her unwanted pregnancy. Setting aside those instances that fall within the legal definition of rape, a woman is often characterized as irresponsible and "cheap" if she engages in heterosexual intercourse resulting in an unwanted pregnancy.<sup>63</sup> Yet, from a young age a woman is made to believe that she must please a man, which entails succumbing to his sexual desires.<sup>64</sup> Sexual activity and its possible consequences are presumed to be within a woman's control. Therefore, when something goes wrong it is the woman who is supposedly reckless, sexually deviant, and fully responsible for the predicament. Those who view women's sexuality in this light are usually also of the opinion that a pregnant woman should bear the fetus to term. To do otherwise, they argue, would simply be a convenient way out of a

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Harv. L. Rev. 43, 81 (1990).

<sup>58</sup> See, e.g., Thomson, *supra* note 2; see also Sanda Rodgers, *Fetal Rights and Maternal Rights: Is There a Conflict?*, 1 *Can. J. Women & L.* 456 (1985-86).

<sup>59</sup> Whitbeck, *supra* note 46, at 254; see also Donna Greschner, *Abortion and Democracy for Women: A Critique of Tremblay v. Daigle*, 35 *McGill L.J.* 633, 652-54 (1990).

<sup>60</sup> Petchesky, *supra* note 45, at 370.

<sup>61</sup> For a more complete discussion, see Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class*, 1991 *Duke L.J.* 324, 331-53 (discussing the moral dilemmas facing a woman in her decision to carry a fetus to term).

<sup>62</sup> This issue, as with many other problems or moral dilemmas relating to abortion that are mentioned in this section and throughout the paper, may be specific to white, North American women. This does not lessen the significance of the problems identified but is an indication that the issues associated with abortion are numerous, complex, and in need of recognition.

<sup>63</sup> Whitbeck, *supra* note 46, at 265-66.

<sup>64</sup> *Id.*

self-imposed predicament.<sup>65</sup>

The fact that birth control is widely available is used to support this view of sexuality and pregnancy. Birth control, when available, provides women with the means of controlling their reproductive capacities. Thus, according to this view, there is no acceptable excuse for unwanted pregnancies. Gender relations, however, also determine the nature and use of birth control, as they do the availability and use of abortion. Men traditionally abdicate all responsibility for birth control,<sup>66</sup> so women are forced to sacrifice their health and physical well-being for the sake of an effective contraceptive,<sup>67</sup> which is often discovered to be less than perfectly effective.<sup>68</sup> Furthermore, the institutional contexts through which these methods are administered, primarily the medical profession and pharmaceutical industry, have created a pattern of misinformation and "inadequate or inaccurate advice" leaving women with a number of significant health problems.<sup>69</sup>

In addition to obscuring the real issues with which a woman must grapple, the rights-based approach generates a distorted image of a selfish, heartless woman. It fails to capture the extent to which a woman considers not only the impact of her decision on the fetus, but on all those with whom she has relationships. Instead of focusing on abstract solutions, we need to develop a "more respectful approach to unwanted pregnancies," one which stops "blaming the victim."<sup>70</sup>

If our ultimate purpose is to reduce the number of unwanted pregnancies and abortions, it is necessary to have some understanding of women's experiences and their own knowledge and awareness of the fetus. The rights-based approach has done very little to help us in this endeavor. It has theoretically alienated the fetus and separated its interests from its mother's and yet simultaneously reaffirmed a woman's confinement by and in her biological nature. Although an individual rights approach was arguably progressive in the initial drive for reproductive freedom, it no

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<sup>65</sup> Id.

<sup>66</sup> Petchesky, *supra* note 45, at 171-73.

<sup>67</sup> See *id.* at 182-88 (discussing the health risks of sterilization, the Pill, and the IUD).

<sup>68</sup> "Because contraceptives and their uses are not perfect, the 38 million sexually active women and their partners using contraceptives account for 1.5 million unintended pregnancies, 43% of all unintended pregnancies in the United States." Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* 12 (1990), quoted in Colker, *supra* note 61, at 328.

<sup>69</sup> Petchesky, *supra* note 45, at 193-94 (quoting Joel Robins, *Failures of Contraceptive Practice*, 76 N.Y. J. Med. 361-65 (1976)).

<sup>70</sup> Colker, *supra* note 16, at 163.

longer holds such potential. We have exhausted the usefulness of this concept in dealing with abortion and it is time to look for a new approach which embraces women's perspectives.<sup>71</sup>

In arguing that examining women's experiences is crucial to developing a useful approach to abortion rights, I do not assume that the experiences of all women seeking abortions reflect the same moral and practical dilemmas. There are undoubtedly many other valid and relevant concerns, as well as some less germane considerations, which make the decision to have an abortion much more complex than a simple matter of convenience. But it is apparent that characterizing the abortion issue as a right to control one's body does not, at the very least, begin to deal with the complexity of the problem.<sup>72</sup>

## II. WOMEN'S PERSPECTIVES

[M]en describe abortion from their point of view—and consider that subjective, partial description to be the objective truth.<sup>73</sup>

The inadequacies of the competing rights paradigm increase our awareness of the need to shift the focus of debate. We must look for a more complete approach which encompasses both an understanding of the relationship between a fetus and its mother and a concern for women's social conditions. Because Rosalind Petchesky addresses these two concerns in her book, *Abortion and Woman's Choice*, her work will be essential to the following discussion.

I want to clarify at the outset that in discussing the status of a fetus and its relationship with its mother, my aim is not to let the fetus into the debate as a separate moral entity, but rather to put the fetus back where it belongs: in its mother's womb.<sup>74</sup> Anti-abortionists have put much time and energy

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<sup>71</sup> Carol Smart states in a discussion of the application of the concept of rights to feminist issues in general, "I am suggesting the rhetoric of rights has become exhausted, and may even be detrimental." Smart, *supra* note 53, at 139. With respect to the abortion issue I would accept Smart's conclusion with one slight amendment: the rhetoric of rights *is* detrimental.

<sup>72</sup> There are and likely will always be some women who do seek abortions for insignificant reasons. However, gender inequality is so entrenched in our society that such occurrences are arguably rare. Even those reasons that we may at first glance consider to be insignificant are also often inextricably tied to gender inequalities.

<sup>73</sup> Olsen, *supra* note 29, at 121-22.

<sup>74</sup> Ruth Colker talks about letting the fetus into the debate. Quoting a Canadian feminist, Kathleen McDonnell, she states that "we need to learn how to discuss the abortion issue in a way that 'lets in' the fetus." Colker, *supra* note 16, at 165. Colker goes on to state that to do so necessitates a communitarian rather than a traditional

into portraying the fetus as an innocent, abstract, and independent being which is forced to suffer the selfish whims of women. This image is not going to go away simply by ignoring it. I want to provide an alternative image of the fetus as part of a woman, physically, emotionally, and morally.<sup>75</sup>

Petchesky claims that being human and acquiring moral status necessarily involves interacting in a human community.<sup>76</sup> She states that "[w]hat it means to be human involves an irreducible social or relational basis without which the very concept of humanity, or persons as actual or developing moral beings, makes no sense."<sup>77</sup> What is important in this approach is not so much the mere existence of our being, but rather our interdependence. It is this interdependence, Petchesky argues, which humanizes us.

Petchesky seeks support for her views in the work of a Catholic theologian, Jacques Maritain, who also draws attention to the importance of looking beyond individual spirituality when identifying the concept of a person. He states, "The person is a whole, but it is not a closed whole, it is an *open* whole. . . . It tends by its very nature to social life and to communion. . . . [and] demands an entrance into relationship with other persons. To state it rigorously, the person cannot be alone."<sup>78</sup>

This view by no means dictates the exclusion of the fetus from the human community, but rather stresses the most essential aspect of its being prior to birth: its relationship with its mother. Without the use of an artificial substitute, a fetus cannot exist without its mother until late in its development. Even after that point in time, it is totally dependent on either its mother or another "human caretaker."<sup>79</sup> The fetus can exist only in

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liberal approach to abortion. Although there are many aspects of Colker's argument that I find compelling and which have influenced my thinking about abortion, I do not agree with her indictment of traditional liberalism. Liberalism may very well be able to address my concerns about the abortion debate. Although this issue is well beyond the scope of this article, in part III I do allude to the potential of liberal theory to address these concerns.

<sup>75</sup> Despite initial appearances, I am not abandoning the feminist imperative that any feminist argument must start with women's well-being. Burns, *supra* note 10, at 193-95. By letting the fetus into the debate I am simply trying to make sense of it in terms of women's lives and experiences, to re-conceptualize the fetus in a way that sheds light on women's decisions.

<sup>76</sup> See Petchesky, *supra* note 45, at 343-46; see also Robert C. Solomon, *Reflections on the Meaning of (Fetal) Life*, in *Abortion and the Status of the Fetus*, *supra* note 13, at 209, 220-23; Whitbeck, *supra* note 46.

<sup>77</sup> Petchesky, *supra* note 45, at 342.

<sup>78</sup> *Id.* at 343 (quoting Jacques Maritain, *The Rights of Man and Natural Law* 7 (1958)).

<sup>79</sup> *Id.* at 346.

and through a relationship with those who value its existence. Its humanization, its development and acceptance as a human being, occurs through our ability and willingness to include it in human society and to consider it a person.

Given the fact that we cannot identify the individuality of a fetus beyond its biological existence and needs, viewing it in terms of its connection to identifiable human beings brings us closer to an understanding of its value. Its identity and individual worth exist only through our recognition of its being. A fetus has neither the capacity to communicate its personality nor to express an understanding of its own being. These capabilities are decisive indications of moral status as a person, but their absence need not indicate non-personhood.

I am not proposing the adoption of a criterion of self-consciousness for personhood.<sup>80</sup> As fully functioning persons, our self-consciousness is inseparable from our environment and the relationships through which we develop. Our individuality exists not only in recognizing our own existence but, additionally and essentially, in its recognition by others. Fetal identity, however, exists only to the extent it is recognized by others.<sup>81</sup> A fetus can make itself known physically, but even this aspect of identity can only be communicated through its mother.

If we adopt this analysis, the consciousness of a mother, the person most immediately responsible for the fetus, is pivotal to its being. Petchesky states:

What is irreducible and indispensable in this humanization process (the formation of the "person") is *the subjectivity of the pregnant woman*, her consciousness of existing in a relationship with the fetus. . . . For it is *her* consciousness that is the condition of its humanization, of its consciousness evolving from the potential to the actual.<sup>82</sup>

Concurrently, a woman's consciousness is very much formed by and in turn influences her social context. Her personal circumstances and environment shape her perception of her own life and of the life growing within her. It is only the pregnant woman who can know and thus properly assess all of the social and environmental circumstances which will affect the existence of her fetus and, subsequently, her child. She is the person

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<sup>80</sup> For an example of such a theory of personhood, see Tooley, *supra* note 24, at 57.

<sup>81</sup> Frances Olsen makes a similar point when she states, "the value of fetal life is a social attribute that arises from the totality of social relations regarding reproduction." Olsen, *supra* note 29, at 128; see also Solomon, *supra* note 76, at 223.

<sup>82</sup> Petchesky, *supra* note 45, at 347.

most capable of assessing whether or not her own social context will enable her to nurture and humanize the life developing within her.<sup>83</sup>

The preeminent position of the mother does not rule out the relevance of other relationships with a fetus, particularly the attachment of the father or other persons who are closely connected with the pregnant woman. The care and love of a father may be an important part of the network of love, care, and support necessary to the humanization process and thus influential in the development of the fetus. Nevertheless, the crucial function of this network, including a father's love, is to strengthen a mother's ability and resolve to support her fetus. A pregnant woman's resolve and her ability to nurture the life within her is "indispensable" and cannot be substituted, but it can be supported, encouraged, and strengthened by the interests of well-intentioned individuals.<sup>84</sup>

Society's interest and involvement in this decision, if as a whole it is actively committed to reproduction and the well-being of children, should be to create conditions which make possible a woman's decision in favor of continuing the life of her fetus. In other words, society must ensure that a woman's "social context" will enable rather than disable her in nurturing the life within her. A father may play a similar role in such decisions, although his involvement is potentially much more immediate and effective.

This approach necessarily privileges a woman's view in the decision-making process. This privilege stems partially from a woman's biological association with the fetus but also from historical reality. Traditionally, at least in Western civilization, the care of children has been solely a woman's responsibility and hence has been crucial in defining a woman's role in society.<sup>85</sup> Petchesky states:

In a different world, in a different set of social arrangements where men's care and responsibility for children are a matter of customary practice and public policy and women have a full measure of power in the political economy, then a social dialogue about men's relation to the abortion . . . process will have a

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<sup>83</sup> As Robin West states, "The abortion decision typically rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that new life will be born only if it will be nurtured and loved." West, *supra* note 57, at 83.

<sup>84</sup> *Id.* at 80 (discussing the decision in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), concerning parental consent).

<sup>85</sup> Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 *Can. J. Women L.* 69 (1989); see also Whitbeck, *supra* note 46, at 256-58 (arguing that we must pay more attention to the experience and knowledge women have accumulated from their traditionally extensive role in the nursery and claiming that it is only through an understanding of the "ontological and moral status of a newborn," about which a woman knows more simply through her experiences, that we can begin to understand the nature of a fetus).

different and fuller meaning.<sup>86</sup>

The problem facing a woman with an unwanted pregnancy is certainly a moral dilemma. As Petchesky states, "[P]regnancies always exist in a context of social relations and moral commitments, not in isolation."<sup>87</sup> A woman with an unwanted pregnancy must assess the extent of her other responsibilities and her capacity to provide the proper care and guidance for a child in making a decision. "Maternal practices" are in this respect essential, as they form the core of experience and knowledge which a woman can draw on in arriving at a decision.<sup>88</sup> This decision is, as Petchesky remarks, "inevitably hard," but as a moral decision, it is best made by the person who sustains the fetus and for the most part will bear the continuing responsibility for its care.

This understanding of an abortion decision is contrary to the abstract analyses of both "pro-life" and "pro-choice" advocates who define the issue in terms of the right of a single entity. This analysis emphasizes the need to view pregnancy and abortion within the context of society's responsibility for reproduction while privileging and legitimating a woman's opinion. Allowing a pregnant woman to be the primary adjudicator of her decision reflects the reality that she is the person most capable of assessing her existing responsibilities and how they will affect the development of a fetus. This privilege is not simply an extension of her right to bodily integrity.

Trusting the moral judgment of a woman is indispensable to this approach. The decision to have an abortion is not amoral, but rather is rooted in a "morality of praxis"—a decision based on the social conditions and relations which define a woman's life.<sup>89</sup> The interest of society in protecting fetuses and children is, therefore, best preserved through insuring that women do have real options available to them and that they can effectively control the circumstances of sex, pregnancy, and their lives as mothers.

It is important to realize that for the most part women do act with a particular sense of morality and are neither irrational nor selfish in the choices they make. This issue has been explored by Carol Gilligan in her well-known book, *In a Different Voice*.<sup>90</sup> She establishes, based on

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<sup>86</sup> Petchesky, *supra* note 45, at 356; see also Greschner, *supra* note 59, at 668.

<sup>87</sup> Petchesky, *supra* note 45, at 349.

<sup>88</sup> *Id.* at 376. Petchesky uses the phrase "maternal practices" because it emphasizes the social and practical rather than biological dimensions of maternal activity. She states: "Motherhood, or nurturance, is here seen in its *human* form, not as an 'instinct' but as a craft, a set of traditions and skills that are both learned and transferable." *Id.* (citation omitted).

<sup>89</sup> *Id.* at 367.

<sup>90</sup> Carol Gilligan, *In a Different Voice* (1982). The project which became the

evidence gathered from numerous interviews with women debating whether or not to have an abortion, that women frequently employ a distinct moral language which "defines the moral problem as one of obligation to exercise care and avoid hurt."<sup>91</sup> They perceive the issue as one which requires contemplating how a decision would affect both the self and others, thus necessitating an assessment of responsibilities.<sup>92</sup> Gilligan states, "The abortion study demonstrates the centrality of the concepts of responsibility and care in women's constructions of the moral domain, the close tie in women's thinking between conceptions of the self and of morality . . . ."<sup>93</sup>

Gilligan has been criticized for her failure to recognize the social construction of this morality or "ethic of care."<sup>94</sup> MacKinnon, for example, states:

I do not think that the way women reason morally is morality "in a different voice." I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men.<sup>95</sup>

I agree with MacKinnon's assertion that "female" behavior is socially constructed. However, accepting this argument does not logically lead to the conclusion that we should ignore those characteristics which have developed from a history of male domination.<sup>96</sup> Whether socially con-

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focus for this work was not initiated as a gender issue, but rather as a study of the relationship between judgment and action. In the interviews, Gilligan began to pick up a moral language which eventually became the "different voice." See Ellen C. Dubois et al., *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 Buff. L. Rev. 11, 37-42 (1985).

<sup>91</sup> Gilligan, *supra* note 90, at 73.

<sup>92</sup> For a discussion of Gilligan's conclusions and Lawrence Kohlberg's response, see Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 Ethics 622 (1987). Flanagan and Jackson point out that, although individuals do clearly favor one form of moral reasoning over another—either the justice model or the care model—they are likely to use both forms some of the time. See *id.* at 624. Gilligan herself has emphasized this in her subsequent work. See, e.g., Carol Gilligan, Reply to "On *In a Different Voice*: An Interdisciplinary Forum," 11 Signs 324, 327 (1986).

<sup>93</sup> Gilligan, *supra* note 90, at 105.

<sup>94</sup> See, e.g., Margaret Thornton, *Feminist Jurisprudence: Illusion or Reality?*, 3 Austl. J.L. & Soc'y 5, 13-15 (1986). Thornton criticizes Gilligan's approach not only because it "fails to take sufficient cognisance of the socio-political reality" which has brought about an "ethic of care," but also because it associates women with everything that has traditionally been considered *not* public.

<sup>95</sup> Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified*, *supra* note 39, at 32, 38-39.

<sup>96</sup> See Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. Pitt. L. Rev.

structed or not, the distinctive aspects of the "morality" which Gilligan identifies arise out of experiences which may be impossible to separate out from the essence of womanhood. Furthermore, the qualities which are associated with this morality may be worthwhile in and of themselves.<sup>97</sup>

Another shortcoming of Gilligan's analysis is that it presumes the category "women" is homogenous. Certainly not all women either experience the same problems or react to them in similar ways. Religious and racial distinctions, to give two prominent examples, may very well shape how women react to pregnancy and abortion, but there may also exist a sense of shared experience in connection with the chronicle of female subordination. There is value in identifying and describing this realm of common experience for women, as long as one is aware of the limits of such an endeavor in defining *women's* morality. On this "essentialism" issue, Ruth Colker writes:

I do not believe that the essentialism critique forces us to dispense with all group-based legal arguments. The fact that the impact of our reproductive health policies differs on the basis of race and class does not take away from the fact that every individual who is directly impacted by these policies is also female. The essentialism critique does not make feminism meaningless by eliminating our ability to talk about gender. It simply makes feminism more *complicated* by insisting that we understand the diversity of experiences within the category of female.<sup>98</sup>

Identifying and understanding women's experiences concerning reproduction and their impact on abortion may not provide us with a complete picture of the problem or explain the experiences of all women. This endeavor may, however, illuminate abortion from a different perspective and provide us with a conceptual framework for a new approach—an approach in which women are trusted rather than maligned. The decision to have an abortion is, for the most part, as I have explained, a moral decision and ultimately an individual choice. We must not, however, let this reality eclipse the political, social, and collective dimensions of abortion. As Petchesky states, "[I]t is women collectively whose competence to make moral judgments is maligned and whose sexual and maternal practices are circumscribed by and through the state."<sup>99</sup> By

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1043, 1056 (1987).

<sup>97</sup> See Flanagan & Jackson, *supra* note 92, at 630 (arguing that there is something problematic about proposing justice as the ultimate virtue in society).

<sup>98</sup> Colker, *supra* note 61, at 363.

<sup>99</sup> Petchesky, *supra* note 45, at 379.

focusing on the social dimension of reproductive decisions and their moral foundations, "rather than insulating them from understanding, liberals could redirect societal attention towards [the] web of shared responsibilities and societal failures."<sup>100</sup> Thus, abortion is obviously more than a private, individual issue and it requires a broader analysis based on an understanding of women's experiences within the context of "societal failures" and the impact of gender inequality.

### III. EQUALITY

Seeking refuge under the protection of privacy rights has neither encouraged the recognition of a woman's perspective nor challenged the male construction of the problem.<sup>101</sup> If we attempt to view abortion as an equality issue, we may be able to resolve these problems and establish a more constructive framework for dealing with abortion, one which accommodates not just the experiences and perspectives of privileged women, but additionally "the most vulnerable women—the poor and the young"<sup>102</sup> and the racially oppressed.

This section brings the discussion back to legal concepts and methods. I contend that it may be more constructive for us to re-conceptualize abortion as an equality issue. I then briefly examine two equality theories, equality of opportunity and "equality as acceptance," pointing out the drawbacks of the former and the advantages of the latter in dealing with gender issues. I argue that "equality as acceptance" is suitable, or at least more suitable, than a right of privacy, for understanding abortion.

#### A. Two Theories of Equality

##### 1. *Equality of Opportunity*

The concept of equality which has held sway in recent legal developments is the equality of individuals under the law, frequently referred to as equality of opportunity,<sup>103</sup> or in MacKinnon's analysis, the "differences

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<sup>100</sup> West, *supra* note 57, at 85.

<sup>101</sup> In the tradition of Gilligan, John Hardwig argues that women should not permit thinking in terms of rights, which he considers a male way of thinking, to penetrate the realm of personal relationships. He states, "[T]hinking in terms of rights encourages a kind of minimalistic ethical thinking that is inappropriate in cases of emotional involvement." Hardwig, *supra* note 14, at 444.

<sup>102</sup> Burns, *supra* note 10, at 200-01.

<sup>103</sup> See Katherine O'Donovan & Erika Szyszczak, *Equality and Sex Discrimination*

approach."<sup>104</sup> This approach is concerned with the prohibition of structural inequalities. It aims to provide procedural rather than substantive equality to individuals by ensuring that the same rules apply to everyone "similarly situated."<sup>105</sup>

This notion of equality, which has shaped and at present dominates the issue of rights, is predicated on an ethic of individual autonomy. Its function is to protect an "'untrammelled exercise of capacities'"<sup>106</sup> by ensuring the neutrality of law. It is this presumption of neutrality which has been the focus of numerous feminist critiques of traditional liberal individualism and its notion of equality in their attempts to make the "promise of equality a reality."<sup>107</sup>

The basic criticism of this procedural or structural notion of equality is that the idea of neutrality "both masks and legitimates" the particular male point of view from which the legal system and method emanate.<sup>108</sup> It operates as an ideological construct to conceal the inequities in established social relations and, by doing so, perpetuates the status quo.<sup>109</sup> The law generally has a "content and a structure that favors men's lives, attitudes and conditions,"<sup>110</sup> and attempts to apply the law neutrally often ignore this underlying effect.

The failure of this concept of equality to comprehend the prejudicial "content" and "structure" of the law is illustrated in the treatment of pregnancy in the workplace. Until recently, disadvantageous treatment based on pregnancy did not fall within the parameters of sex

3-6 (1988), for a discussion of equal opportunity.

<sup>104</sup> Catharine MacKinnon, *Sexual Harassment of Working Women* 107-16 (1979); see also MacKinnon, *supra* note 8, at 1291-97.

<sup>105</sup> See MacKinnon, *Sexual Harassment of Working Women*, *supra* note 104, at 107-16 (discussing this test).

<sup>106</sup> Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1389 (1986) (quoting David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. Pa. L. Rev.* 45, 62 (1974)).

<sup>107</sup> Littleton, *supra* note 96, at 1044.

<sup>108</sup> Mary Jane Mossman, *Feminism and Legal Method: The Difference It Makes*, 3 *Austl. J.L. & Soc'y* 30, 39 (1986).

<sup>109</sup> Many feminists have focused on the fact that this concept of neutrality not only masks the gendered source of law and, by doing so, entrenches a male-centered perspective, it concurrently legitimates the rule of law itself. The rule of law derives strength from (mis)representing itself as a "neutral arbiter and protector of the weak." Smart, *supra* note 53, at 140; see also Thornton, *supra* note 94, at 7 ("The objectification of law successfully disguises the fact that it is the product of fallible human beings while, at the same time, it promotes the unquestioning acceptance of the rule of law.").

<sup>110</sup> Tove Stang Dahl, *Women's Law* 41 (Ronald R. Craig trans., 1987).

discrimination.<sup>111</sup> While most jurisdictions now accept pregnancy discrimination as a form of sex discrimination,<sup>112</sup> they do so by treating pregnancy as a temporary illness. For example, if a man suffering a temporary ailment is treated better than a pregnant woman this constitutes sex discrimination.<sup>113</sup> Despite the positive results in such cases, this approach exposes the extent to which the legal system attempts to cover up differences and appear neutral by relying on the notion of sameness. As Carol Smart, a British feminist, states, "The tortuousness of this logic defies belief, but it reveals the extraordinary lengths to which a legal system, which has staked its policy on the equality approach, will go to prove that difference is sameness."<sup>114</sup> Another British feminist, Nicola Lacey, argues that by comparing pregnancy to sickness or an abnormal condition, the struggle to achieve equality "reinforces the sexist idea of women as the victims of their hormones."<sup>115</sup> Equality for pregnant women is thus established "in terms of a norm set by and for men."<sup>116</sup>

Equality in this sense is primarily concerned with glossing over differences, insuring that the law maintains its neutral pose. It operates on the presumption that society consists of autonomous individuals, each fully capable of complying with the established norm. All that this paradigm demands is that differences be disregarded in providing opportunities. There is no recognition of the inherent prejudice within the accepted norm or of the consequent need to accommodate difference. Moreover, there is no attempt to get at the root of the discrimination by exposing the source

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<sup>111</sup> See, e.g., *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>112</sup> See the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982); *Brooks v. Safeway Can., Ltd.*, 59 D.L.R.4th 321 (Can. 1989); *Hayes v. Malleable Working Men's Club & Inst.*, 1985 I.R.L.R. 367 (E.A.T.); *Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen Plus*, 1991 I.R.L.R. 27 (E.C.J.) [hereinafter *Dekker*]; *Handels-Og Kontorfunktionaerernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, 1991 I.R.L.R. 31 (E.C.J.) [hereinafter *Handels*].

<sup>113</sup> See, e.g., *Hayes v. Malleable*, 1985 I.R.L.R. 367 (E.A.T.) (a British case).

<sup>114</sup> Smart, *supra* note 53, at 83.

<sup>115</sup> Nicola Lacey, *Legislation Against Sex Discrimination: Questions from a Feminist Perspective*, 14 J.L. & Soc'y 411, 417 (1987).

<sup>116</sup> Id. An exception to this reasoning can be found in the European Court of Justice opinions in *Dekker* and *Handels*. In *Handels*, the Advocate General stated that pregnancy is an event that "can never . . . concern anyone but women; to take it into account in justifying a refusal of engagement is therefore by nature discrimination directly based on sex." *Handels*, 1991 I.R.L.R. at 35. He thus rejected any notion that pregnancy was somehow comparable to factors concerning both sexes. The *Dekker* court similarly concluded, "As employment can only be refused because of pregnancy to women, such refusal is direct discrimination on grounds of sex." *Dekker*, 1991 I.R.L.R. at 28.

or nature of the difference in question. An equality theory should not, if it is to be effective, be based on disregarding difference without taking account of the existence of "domination, disadvantage and disempowerment."<sup>117</sup>

Thus, one of the major problems in past cases involving discrimination against women and the application of an equal opportunity theory is that there is no consideration for the fundamentally different circumstances of women. Equality exists as the opportunity to be like a man rather than focusing on whether this is desirable, practical, or even possible given the particular historical and social condition of women, not to mention their preferences. As MacKinnon states, "[T]he neutrality of objectivity and of maleness are coextensive linguistically, whereas women occupy the marked, the gendered, the different, the forever-female position."<sup>118</sup> If the promise of equality is to become a reality, it is necessary to take account of a multitude of perspectives. Through the recognition and acceptance of alternative viewpoints, the myth of objectivity will be revealed for what it is worth.<sup>119</sup>

The problems of a traditional equality of opportunity theory are dramatically illustrated by its inability to deal with reproductive freedom issues, including abortion. Women's reproductive capacities have very much been a source of discrimination.<sup>120</sup> Yet the discriminatory practices which are inextricably tied to a woman's unique circumstances are impossible to address within an equality theory which uses maleness as the norm. It is impossible to expect a woman to be like a man in this regard. Consequently, there is no male standard or "comparator" to which the exigencies of a woman's reproductive capacities can be compared.<sup>121</sup> The fact that these exigencies are disregarded, to the detriment of women, is by itself an adequate justification for developing an approach to equality which at the very least takes into account these fundamental differences without making them a source of disadvantage.<sup>122</sup>

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<sup>117</sup> Scales, *supra* note 106, at 1394.

<sup>118</sup> Catharine A. MacKinnon, *Desire and Power*, in *Feminism Unmodified*, *supra* note 39, at 46, 55.

<sup>119</sup> This method of achieving equality is by no means restricted to the acceptance of women's perspectives but includes the recognition of "multiple viewpoints." See Katherine O'Donovan, *Engendering Justice: Women's Perspectives and the Rule of Law*, 39 U. Toronto L.J. 127, 134-36 (1989).

<sup>120</sup> See, e.g., *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>121</sup> See Eisenstein, *supra* note 44, at 189. Lacey succinctly phrases the issue when she writes that these problems "arise from the fact that the concept of discrimination imports a notion of comparison—of *less* favorable treatment as opposed to purely *unfavorable* treatment." Lacey, *supra* note 115, at 416.

<sup>122</sup> See Dekker, 1991 I.R.L.R. at 27, and Handels, 1991 I.R.L.R. at 31, for an

## 2. A Feminist Theory of Equality: "Equality as Acceptance"

An alternative theory of equality, expressed by Christine Littleton—"equality as acceptance"—assumes that the problem is not the existence of differences but rather the perception and treatment, whether direct or indirect, of those differences. She states that "there is no logical, inherent link between *difference* and *inequality*."<sup>123</sup> The "equality as acceptance" model requires that "social institutions react to gender differences, whether arising from biological or cultural sources, in such a way as to create equality between complementary male and female persons, skills, attributes and life patterns."<sup>124</sup> It encourages the law to reflect the perspectives of those to whom it applies rather than to assimilate them into the dominant male norm.

MacKinnon articulates a similar theory of equality, also based on the distinction between "difference" and "inequality." In her pivotal work on sexual harassment, MacKinnon argues that there is nothing inherently wrong with difference.

The disadvantage which constitutes the injury of discrimination is not the failure to be treated "without regard to" one's sex; that is the injury of arbitrary differentiation. The unfairness lies in being deprived *because* of being a woman or a man, a deprivation given meaning in the social context of the dominance or preference of one sex over another.<sup>125</sup>

Thus, under MacKinnon's approach, "[a] rule or practice is discriminatory . . . if it participates in the systemic social deprivation of one sex because of sex."<sup>126</sup>

Angela Miles, a Canadian feminist, adopts a similar approach in a discussion of policies affecting reproduction.

In order to alleviate women's subordination, legal reform which recognizes women's special role in reproduction must also recognize the enormous economic contribution of this work and

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approach which correctly takes account of these differences.

<sup>123</sup> Littleton, *supra* note 96, at 1050.

<sup>124</sup> *Id.* at 1052.

<sup>125</sup> MacKinnon, *supra* note 104, at 117.

<sup>126</sup> *Id.* Although both MacKinnon's "inequality" approach and Littleton's "equality as acceptance" approach correct some of the problems of the traditional equality of opportunity doctrine, I have adopted Littleton's phrase because it is a more precise articulation of my concern that women's perspectives are not *accepted* in our public and institutional treatment of abortion.

the social imperative of restructuring society and redistributing social resources to meet human needs more successfully than has been the case.<sup>127</sup>

In practice, this approach requires diversifying structures and norms rather than trying to fit women's circumstances into the existing structures; women's equality must be grounded in a recognition of "women's specificity."<sup>128</sup> In the context of discrimination on the basis of pregnancy, for example, such an approach would ensure that women receive adequate paid maternity leaves or pregnancy benefits, not because pregnancy is seen as a legitimate illness or a disability, but because to deny women adequate time and resources for a pregnancy ignores the systemic disadvantages experienced by pregnant women. To ignore these disadvantages places an undue burden on women, the only group biologically capable of pregnancy, for an activity which benefits all of society.<sup>129</sup>

One must be wary in adopting this approach of essentializing female experience. Denying or ignoring the existence of a variety of perspectives among women is potentially as damaging as imposing a male norm.<sup>130</sup> Challenging the existing assumptions about equality in this way does, however, expose the failure to account for alternative perspectives. It does not deny the existence of differences, but rather challenges the social perception of those differences. "Equality as acceptance" is not, as Littleton states, a "leveling proposal" but rather "calls only for application of equalizing analysis across those differences which culture has already encoded as gendered complements" in order to overcome the assignment of "importance" to "male" traits and "triviality" to "female" traits.<sup>131</sup>

A legitimate concern about adopting an approach which focuses on the

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<sup>127</sup> Angela Miles, *Feminism, Equality and Liberation*, 1 Can. J. Women & L. 42, 66 (1985).

<sup>128</sup> Id. at 60.

<sup>129</sup> See, e.g., *Brooks v. Safeway Can., Ltd.*, 59 D.L.R.4th 321, 335 (Can. 1989) (Dickson, C.J.). In holding that the exclusion of pregnant women from an employee compensation package for health-related absences is discriminatory, Chief Justice Dickson stated:

[T]o not view pregnancy [as any other health-related reason for absence from the workplace] goes against one of the purposes of anti-discrimination legislation. This purpose . . . is the removal of unfair disadvantages which have been imposed on individuals or groups in society. *Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons.*

Id. (emphasis added).

<sup>130</sup> See Colker, *supra* note 61, at 326-28 (responding to the anti-essentialism arguments leveled against her, among others).

<sup>131</sup> Littleton, *supra* note 96, at 1056.

systemic problems related to unwanted pregnancies and abortion restrictions is whether it will adequately protect women's autonomy. Autonomy may, however, be more effectively protected under an approach which is based on listening to and accommodating the needs of women as a whole while allowing for individual choice. All of our decisions, including abortion decisions, take place in a specific context which either enables or disables us in making decisions according to our desires. Our contexts, whether they are determined by gender, culture, race, or other group identities, provide us with a range of choices and expectations. Unless this context is protected, then autonomy, choice, and freedom are ineffectual.

If, for example, we know that a significant proportion of women have neither the monetary nor the emotional resources to raise a child, this factor should be acknowledged as a reason why women choose abortion. How can we understand an abortion decision without an awareness of the conditions of women's lives? How can we give women an effective choice without bettering their general condition in society? Autonomy, in the sense of having a range of choices and the ability to decide and act on one's decisions, is only possible if we focus on the context of women's lives.<sup>132</sup>

Thus, the paradigm of "equality as acceptance" enables us to take seriously the conditions of groups in society. It allows us to recognize that *women* are disadvantaged because the conditions of their lives preclude them from taking advantage of open opportunities. It is open to the collective experiences of women and enables us to identify systemic problems in certain institutions and policies. "Equality as acceptance" is a theory which broadens our scope of analysis beyond the individual to the problems experienced by women, problems which are inextricably tied to unwanted pregnancy and abortion. An understanding of the contexts in which women make decisions to have abortions provides us with a much stronger foundation for seeking solutions to unwanted pregnancies. "Equality as acceptance" serves as a model for understanding that context.

## B. Abortion as an Equality Issue

Two fundamental factors are inextricably tied to a woman's abortion decision. First, a woman is influenced, at least indirectly, by the past and, to a lesser extent, continuing oppression of women. Second, she necessarily takes account of the social context in which she is personally situated. A woman's choice is strongly influenced by both of these factors, but they

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<sup>132</sup> The idea of a "context of choice" comes from Will Kymlicka, *Liberalism, Community, and Culture* (1989). Kymlicka argues that minority and group rights are consistent with liberalism's emphasis on the individual. *Id.* at 4.

are not necessarily distinct. More often than not, a woman's particular social context will reflect the general inequality of women. The fact that neither the historical oppression of women nor, in many instances, the social framework have been chosen does not, as Petchesky states, nullify the choice, but "suggests that we have to focus less on 'choice' and more on how to transform the social conditions of choosing, working, and reproducing."<sup>133</sup>

At present, abortion law focuses almost exclusively on curtailing women's behavior.<sup>134</sup> Sanctions are imposed on women without taking account of the social frameworks which circumscribe their behavior with respect to abortion. This approach is ultimately ineffective, as it leaves untouched all the circumstances which lead to an abortion. But more importantly, it portrays women, rather than the constraints placed on them through gender inequality, as the source of the problem. This approach is fundamentally discriminatory and reinforces deeply misogynistic attitudes.

In this way, abortion can be viewed as an equality issue. Abortions occur within a social context deeply affected by sex/gender divisions. As with discrimination based on pregnancy, women encounter problems as a result of these gender divisions which hinder their ability to control the incidence or circumstances of sex and to care adequately for both themselves and their children during and after a pregnancy. Taking these factors into account, it is apparent that women seek abortions because of the problems of being women: sexual and physical vulnerability, inadequate contraception, fewer employment opportunities, pay inequity, child care, the "feminization of poverty," and a myriad of other inequalities.<sup>135</sup> To proscribe women's behavior when it is clearly associated with the inescapable realities of their subordination is discriminatory. Legislative enactments which restrict or prohibit abortion with the threat of criminal sanctions unfairly stigmatize a woman for the choice she makes, regardless of whether she is subject to the stipulated sanctions. The existence of the sanction itself sheds an unfavorable light on a woman's situation and her

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<sup>133</sup> Petchesky, *supra* note 45, at 11.

<sup>134</sup> Women who choose to have an abortion are, of course, not the only persons who fall within legislative restrictions on abortion. Medical practitioners who perform abortions also risk the possibility of criminal sanctions and are increasingly restricted in what they can do and say. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). It is, however, more practical to focus on the treatment of women, as the act of aborting a fetus will almost always be performed at the request of a pregnant woman and as it is generally women's judgments that are maligned in the abortion debate. In fact, most abortion cases deal almost exclusively with the rights and interests of women, despite the fact that many legal challenges are initiated by clinics and medical practitioners.

<sup>135</sup> See Littleton, *supra* note 96, at 1043-44.

decision. Criminalizing abortion is punishment on top of punishment.<sup>136</sup>

Furthermore, the criminalization of women's behavior does not comport with the generally accepted aim of eliminating unwanted pregnancies. Criminalizing abortion under the pretext of protecting the fetus focuses on fetal life and the pregnancy itself removed from the circumstances which make it "unwanted." An equality approach which makes clear that abortion involves the condition and status of women as a group in society, accepting that the experiences within that group may differ, further assists us in designing positive changes to ameliorate women's circumstances. It leads to the recognition that there are societal problems which create the "unwanted" aspect of some pregnancies. In so doing, it permits the introduction of a host of other issues—such as the availability of adequate and safe contraception, provisions for child care, and the treatment of pregnancy in the work place—into an analysis of abortion. By contrast, an approach which focuses on the individual to the exclusion of the group, whether it be equality of opportunity or a rights-based analysis embodied in the notion of a right of privacy, ignores the systemic problems which have influenced and considerably restricted a woman's ability to decide in favor of continuing a pregnancy.

I am not arguing that abortion should be legal and available to women so that they have the freedom to pursue those opportunities available to men. Such a view of equality is no different from the rights-based approach followed at present, since it ignores the realities of inequality in the private sphere.<sup>137</sup> With respect to abortion, it concentrates on permitting women to reject an association with their reproductive capacities, supposedly leaving them free to emulate men, and to assume men's "forced non-involvement in child care—the very forced non-involvement that has made child care 'woman's work.'"<sup>138</sup> The purpose of establishing a different paradigm under the concept of equality is not to free women from their biological functions in order to allow them to pursue traditional male goals, but rather to ensure that those functions cease to curtail women's full participation in society.<sup>139</sup> Achieving this goal requires an equality theory which looks beyond the public sphere and takes account of gender in every

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<sup>136</sup> In a similar vein, Andrea Dworkin refers to imposing sanctions on women for obtaining abortions as "punishment for sex." Dworkin, *supra* note 44, at 104.

<sup>137</sup> See Lacey, *supra* note 115, at 415.

<sup>138</sup> Littleton, *supra* note 96, at 1053–54.

<sup>139</sup> See Patricia Hughes, *Feminist Equality and the Charter: Conflict with Reality?*, 5 Windsor Y.B. Access Just. 39, 55–64 (1985). Hughes writes extensively about the need to socialize reproduction and the care of children by elevating these activities to higher levels of importance. She expresses this need for reprioritization in terms of a "life principle," which she states must constitute the organizing principle of society.

aspect of society.<sup>140</sup>

The fact that abortion is rarely examined as an equality issue reflects the inadequacies of contemporary legal equality theory. Equality law in the United States has been particularly unsuccessful in promoting women's equality, which has lead many to believe that equality arguments are futile.<sup>141</sup> Many abortion rights advocates are therefore of the opinion that we should focus our energies on a right of privacy rather than begin fighting the battle on another less familiar and generally more hostile front.<sup>142</sup> But certainly the way we talk about abortion should not be limited to what arguments are successful in the Supreme Court. Plus, it is evident that we must start looking for other fora in which to promote access to abortion.<sup>143</sup> If a right of privacy can no longer effectively protect women,<sup>144</sup> and if the courts are unwilling to entertain other arguments, it is time to adopt a different paradigm for thinking about abortion and to seek a different forum in which to argue it.

## V. CONCLUSION

Public reaction to the *Casey* decision is perhaps one of the most telling signs of how unsatisfactory a right of privacy is in the context of abortion. Both of the main parties to the debate, the pro-life supporters and the pro-choice supporters, announced defeat.<sup>145</sup> The Supreme Court formally

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<sup>140</sup> See Lacey, *supra* note 115, at 414-15.

<sup>141</sup> The Canadian Constitution, in contrast, has a much broader equality provision, which has been more effective in correcting gender inequalities. This provision states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). For an interpretation of this provision, see *Andrews v. Law Society*, 1989 S.C.R. 143 (Can.). The equality provision was not, however, argued in the leading Canadian abortion case, *R. v. Morgentaler*, 44 D.L.R.4th 385 (1988) (Can.). See Lynn Smith, *An Equality Approach to Reproductive Choice: R. v. Sullivan*, 4 Yale J.L. & Feminism 93 (1991), for an example of the equality arguments made in other cases before the Supreme Court of Canada concerning reproductive choice.

<sup>142</sup> Many of the participants in the Post-*Roe* workshop dismissed an equality argument for, among other reasons, the limited scope and application of the Equal Protection Clause.

<sup>143</sup> See discussion *supra* part I.

<sup>144</sup> See Tamar Lewin, *The Supreme Court: Long Battles Over Abortion Are Seen*, N.Y. Times, June 30, 1992, at A18 (the pro-choice responses to *Casey* the day after the decision).

<sup>145</sup> See *id.* (quoting Burke Balch of the National Right to Life Committee as saying, "[F]or now, we've lost," and quoting Kate Michelman of the National Abortion Rights Action League as saying, "The Pennsylvania decision is a disaster, and to say *Roe* is

recognized the continuing existence of a right of privacy, thus disappointing pro-life advocates, and yet gutted even further a woman's right of access to abortion, thus disappointing pro-choice advocates. Formal legal solutions are rarely satisfactory and this decision is no exception.

If we are to learn anything from *Casey*, it should be that we have adopted the wrong paradigm. If no one wins and we all lose, then we should accept that we are fighting on the wrong battle ground and move on. The competing rights paradigm has proven itself to be, at the very least, ineffective, if not destructive. "Equality as acceptance" may not be the answer, or the only answer, but it provides some hope in that it works to expose the problems endemic to abortion and, in doing so, urges the adoption of more progressive remedies.

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overturned a little bit is like saying a woman is a little bit pregnant.").

