THE POVERTY OF PRIVACY?

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I. OVERVIEW

This Article has two aims. First, it defends a continuing role for the right of privacy in arguments for women's reproductive freedom against charges that privacy is an impoverished concept. Second, it raises cautions about certain feminist critiques of privacy that would ground this freedom in notions of reproductive responsibilities. As this Article was first presented at a conference, "Reproductive Issues in a Post-*Roe*[1] World," held in the wake of *Webster v. Reproductive Health Services*,[2] the first question is: Are we now, given the Supreme Court's recent decision in *Planned Parenthood v. Casey*,[3] in a "post-*Roe* world"? Furthermore, what remains of the right of privacy?

The initial reactions to *Casey* among persons who support women's reproductive choice have run the gamut from interpreting the decision as signaling that *Roe v. Wade* is "dead"[4] to receiving it with a combination

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An earlier version of this Article was presented at the Feminism and Legal Theory Workshop on "Reproductive Issues in a Post-*Roe* World," held at Columbia University School of Law, November 15-16, 1991. It benefitted from helpful comments by the participants in the Workshop and from correspondence with Ruth Colker. Special thanks go to James Fleming for his patient and constructive reading of numerous drafts. I would also like to thank Robin Charlow, Jane Maslow Cohen, Eric Freedman, Sally Goldfarb, Sylvia Law, Dorothy Roberts, and Cynthia Williams for their comments and criticisms. Thanks as well go to my research assistants Jean Kephart Cipriani and John Hamberger, and former research assistants Amy Serper and Robert Stone. I appreciate the support for this project provided by a Hofstra Law School summer research grant. I also gratefully acknowledge the comments and suggestions of my editors at the *Columbia Journal of Gender and Law*.

[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] 492 U.S. 490 (1989). The *Webster* plurality's intimations that it would overrule *Roe* and its invitation to state legislatures to regulate abortion prior to viability subject only to a rational relationship standard of constitutional review gave reason to fear for the future of *Roe*, and therefore for women's reproductive freedom. Id. at 537-38 (Blackmun, J., dissenting).

[3] 112 S. Ct. 2791 (1992). *Casey* contains five opinions: a joint opinion by Justices O'Connor, Kennedy, and Souter, and four separate opinions concurring in part and dissenting in part by Justice Stevens, Justice Blackmun, Chief Justice Rehnquist (joined by Justices White, Scalia, and Thomas), and Justice Scalia (joined by Chief Justice Rehnquist and Justices White and Thomas).

[4] Patricia Ireland, President of NOW, reportedly stated: "*Roe* is dead, despite the flimsy stay of execution issued today by the Court." Abortion Angst, Newsweek, July

of relief and dread. Relief,[5] because *Casey* on its face claims that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[6] Arguably, *Casey* offers a fuller explication of the constitutional bases for women's reproductive liberty than did prior decisions, including *Roe*, although the word "privacy" all but disappears from the joint opinion's account. Dread, because, after all, the Court upheld all but one of the restrictive provisions of Pennsylvania's Abortion Control Act at issue.[7] There is reason to believe that some of these restrictions will in practice pose substantial obstacles for many women seeking abortions, particularly poor women, many of them women of color, and rural women.[8] Further, as Justice Blackmun's concurring opinion cautions, only one vote separates *Casey*'s official upholding of *Roe* from an outright overruling of *Roe*,[9] highlighting the critical importance of the Supreme Court nomination process, the outcome of federal elections, and the proposed Freedom of Choice Act.[10]

13, 1992, at 16. Two days after the *Casey* decision, Planned Parenthood of New York City ran a full page newspaper advertisement stating: "Don't be fooled. *Roe v. Wade* is dead." N.Y. Times, July 1, 1992, at A17.

[5] For reactions of relief, see, e.g., Kathleen Sullivan, A Victory for *Roe*, N.Y. Times, June 30, 1992, at A23; Laurence Tribe, News Conference with The National Commission on America Without *Roe* (July 1, 1992), available in WESTLAW, Fed. News Serv. For suggestions that *Casey* strengthened *Roe*'s justification of reproductive autonomy, see Ronald Dworkin, The Center Holds!, N.Y. Rev. Books, Aug. 13, 1992, at 30; Tony Mauro, Future of *Roe* Hangs by One Vote, U.S.A. Today, June 30, 1992, at A1 (quoting Laurence Tribe).

[6] Casey, 112 S. Ct. at 2804. That portion of the joint opinion, parts I to III, was joined by Justices Stevens and Blackmun, making the decision a five-four reaffirmation of *Roe*.

[7] See Casey, 112 S. Ct. at 2803, 2833. The Court affirmed the Third Circuit's upholding of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3205 (informed consent and waiting period); 3206 (informed consent of parent of minor, with judicial bypass); 3203 (medical emergency exemption); and 3207(b), 3214(a), and 3214(f) (reporting requirements). The Court, like the Third Circuit, held § 3209 (husband notification requirement) unconstitutional.

[8] See The Women with Undue Burdens, N.Y. Times, July 2, 1991, at A18; Dorothy E. Roberts, *Casey* and *Rust*: America's Two Abortion Laws, N.J. L.J., July 27, 1992, at 18.

[9] The four member dissent in *Casey* would have overruled *Roe* and henceforth applied *Webster*'s mere rational relationship analysis. See Casey, 112 S. Ct. at 2854–55 (Blackmun, J., concurring in part, dissenting in part).

[10] See Anna Quindlen, One Vote, N.Y. Times, July 1, 1992, at A23. The Freedom of Choice Act, S. 25, 102d Cong., 2d Sess. (1992) (July 17, 1992 version), is intended to secure, by federal statute, the limits on state power to restrict women's freedom to terminate a pregnancy that were recognized in *Roe v. Wade* but that have been eroded by subsequent decisions and statutes. That Act provides in relevant part:

Section 2. Right to Choose.

In part II, this Article will consider the usefulness of privacy in protecting women's reproductive freedom, not in a "post-*Roe* world," but in a world of a "revised *Roe*"—in which the Court's reading of the "essential holding of *Roe*" combines stirring and, I hope, sincere rhetoric about women's liberty with obvious sympathy and wide latitude for state restrictions motivated by the state's interest in protecting potential life. Anyone defending the right of privacy after *Webster* and *Casey* must take up the challenge of claiming that the full promise of privacy has been unrealized, not because of the poverty of the concept, but because of a failure to take privacy seriously. Properly understood and fully utilized, the right of privacy can aid in protecting women's autonomy and liberty of conscience with respect to reproduction and sexuality.[11]

The lack of full constitutional protection for women's reproductive freedom has led many feminists to fault the right of privacy and to proffer alternative bases, particularly sex equality arguments. There are many persuasive arguments for a sex equality analysis—indeed, portions of the *Casey* opinions indicate recognition of that dimension of the abortion issue.[12] This Article, while defending privacy, does not take up the "privacy versus equality" challenge,[13] since any principled argument that

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(a) IN GENERAL.—Except as provided in subsection (b), a State may not restrict the right of a woman to choose to terminate a pregnancy—

(1) before fetal viability; or

(2) at any time, if such termination is necessary to protect the life or health of the woman.

(b) MEDICALLY NECESSARY REQUIREMENTS.—A State may impose requirements medically necessary to protect the life or health of women referred to in subsection (a).

The November 1992 federal elections took place after this Article was substantially completed and shortly before it went to press. The landscape will undoubtedly change as a result of the election of Bill Clinton and a number of "pro-choice" congressional candidates. During his campaign and since his election, President-elect Clinton has publicly expressed a "pro-choice" stance and has indicated that he supports the proposed Freedom of Choice Act, intends to change by executive order a number of federal policies restricting access to abortion and abortion counseling, would not veto congressional action overturning restrictions on public funding of abortion (regarding such restrictions, see infra text accompanying notes 86–96), and is committed to working toward eliminating the need for abortion. See Philip J. Hilts, Clinton and Abortion: Limited Expectations, N.Y. Times, Dec. 13, 1992, at A44.

[11] This Article does not address the way in which privacy jurisprudence has distinguished between adult women and female minors with respect to reproductive decisions. Serious issues arise from tensions between constitutional protection of individual privacy and family privacy that are outside the scope of this Article. See infra note 52.

[12] See, e.g., Casey, 112 S. Ct. at 2807–12, 2829–31 (joint opinion); 2838 (Stevens, J., concurring in part, dissenting in part); 2846–47 (Blackmun, J., concurring in part, dissenting in part).

[13] For the source of the formulation quoted in the text and for a critique of the

may help safeguard women's freedom should be advanced, nor does this Article address every criticism levelled at privacy.

Instead, in part III, this Article will consider certain feminist criticisms that attribute the failure of privacy to secure reproductive freedom to privacy's rights-based approach. The authors of these critiques argue that privacy is an impoverished notion because it derives from or supports an atomistic view of human beings incompatible with feminist goals (and many women's actual experience) of connection and interdependency.[14] Such feminists argue that a more apt description of women's reproductive lives, and a more persuasive argument, would speak not of rights and privacy, but of responsibilities and connection.[15] This Article takes the position that such critiques offer an impoverished picture of privacy and argues that two proffered alternatives, Ruth Colker's notion of good faith feminist argument that is pro-woman rather than pro-choice and that acknowledges women as having interconnected responsibilities,[16] and Robin West's responsibility-based justification involving public-regarding arguments,[17] would inadequately protect women's reproductive freedom.

Particularly in a world of a revised *Roe*, responsibility-based justifications of women's reproductive freedom that would seek to prove that

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privacy rationale for failing to recognize the conditions of gender inequality in which pregnancy takes place, see Catharine A. MacKinnon, Privacy v. Equality: Beyond *Roe v. Wade*, in Feminism Unmodified 93-102 (1987).

[14] To put the point dramatically, by "atomistic man" and "atomism," I mean to connote a picture of a disembodied individual, an unencumbered self, protected legally by rights shielding him from community scrutiny and permitting him to pursue his self-interest with no thought of responsibility to others. See Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171, 1177-80 (1992).

[15] I have elsewhere written about the abortion issue in the context of assessing the atomism critique of liberal jurisprudence and certain feminist alternative visions of connection and care as a basis for legal analysis and standards. See id. at 1242-62. Two of the papers presented at the Workshop at which this paper was originally presented contain elements of the atomism critique and advance alternatives similar to those I critique herein. See Sarah Harding, Equality and Abortion: Legitimating Women's Experiences, 3 Colum. J. Gender & L. 7 (1992); Julie Mertus, Beyond the Solitary Self: Voice, Community, and Reproductive Freedom, 3 Colum. J. Gender & L. 251 (1992).

[16] See Ruth Colker, Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in *William L. Webster v. Reproductive Health Services*, 13 Harv. Women's L.J. 137, 161-68 (1990) [hereinafter Colker, Feminist Litigation]. For further elaboration, see Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 Cal. L. Rev. 1011 (1989) [hereinafter Colker, Feminism, Theology, and Abortion]. Colker also advances an equal protection argument, which I do not assess. See infra note 169 and accompanying text.

[17] See Robin West, Foreword: Taking Freedom Seriously, 104 Harv. L. Rev. 43, 79-85 (1990).

women deserve such freedom, either because they value life (Colker) or because they make decisions responsibly (West), raise a number of dangers. The problems are particularly acute as women turn to federal and state legislatures in addition to, if not instead of, the federal courts, to protect such freedom. As a theoretical matter, the descriptions given of women's moral experience risk essentializing all women and reinforcing stereotypes of the feminine.[18] As a practical and strategic matter, advocacy of a societal focus on the moral quality of women's decision making, even if intended to promote empathy or understanding of women's conflicting responsibilities, seems to invite societal second-guessing of women's decisions—an invitation even easier to accept given the apparent disappearance of privacy in *Casey*.

Moreover, advocates of "responsibility talk" instead of "rights talk"[19] about abortion need to consider how such talk may fare in a context in which themes of responsibility and irresponsibility play a prominent role in rhetoric opposing reproductive choice and in which there is growing interest in political and other circles in addressing societal ills through encouraging personal and social responsibility.[20] Any proposals under which women secure reproductive freedom because society believes it is "deserved" must take seriously the often contradictory messages about responsible and irresponsible reproduction. Because the work of Colker and West has some similarities to that of feminists of many different theoretical viewpoints who are working to develop descriptively accurate and persuasive arguments, part IV of this Article extends a more general caution about such rhetoric and a plea for the persuasive appeal of privacy.

When the feminist critics of privacy discussed herein talk about responsibility, one of their primary aims is, in fact, to secure autonomy and liberty of conscience. A better approach is to protect women's decision making about reproduction as falling within the autonomy and liberty of conscience shielded from majoritarian control through the right of privacy.[21] Providing such a shield is a central purpose of the pending

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[18] By "essentializing," I mean representing a particular account of women's experience as adequate for women generally. See Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought ix-x (1988); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585-86 (1990).

[19] Cf. Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991) (arguing that responsibility is missing from American discourse about rights).

[20] Such terms as responsibility and irresponsibility have contradictory and indeterminate content. A full treatment of this theme awaits elaboration elsewhere. See Linda C. McClain, Rights and Irresponsibility (December 1992) (unpublished manuscript, on file with author).

[21] I acknowledge that there are women actively opposing legal abortion who would

congressional initiative to "codify *Roe*" through the Freedom of Choice Act and of similar state initiatives.[22] While feminists often argue that the personal is political, and question the public/private dichotomy, women's decision making about reproduction should not be subject to public approval or second-guessing.[23] Therein lies the danger stemming from the apparent disappearance of privacy from the joint opinion in *Casey*, even if *Casey*'s rationale for the ultimate decision being the woman's rather than the state's is more thoroughly articulated than *Roe*'s.

II. IN DEFENSE OF THE RIGHT OF PRIVACY

A. Decisional Privacy and Liberty of Conscience: From *Roe* to *Casey*

1. The Privacy Justification

The privacy justification of women's reproductive freedom is grounded in the constitutional right to privacy with respect to the prerequisites of an individual's personhood, encompassing such notions as autonomy, liberty of conscience, self-determination, and individual identity.[24] Such a reading of privacy is well established, although not uncontroversial. Privacy so understood has been embraced by some feminists as having considerable potential for women;[25] undeniably, it has played a key role

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disagree that such autonomy is desirable or in the best interests of women. See Faye D. Ginsburg, Contested Lives: The Abortion Debate in an American Community 172–97 (1989) (viewing "current abortion controversy as the most recent expression of a two-hundred-year tradition of female reform movements engaged in defending what activists consider to be the best interests of women").

[22] See supra note 10; infra note 260 and accompanying text.

[23] See Sarah E. Burns, Notes from the Field: A Reply to Professor Colker, 13 Harv. Women's L.J. 189, 193 (1990).

[24] See infra text accompanying notes 38–56 for discussion of specific cases. On the line of cases associated with the right of privacy and the debate over substantive due process, see generally Laurence H. Tribe, American Constitutional Law §§ 15-1 to -21 (2d ed. 1988). Legal commentators have described the personhood interpretation as the most prevalent interpretation of privacy. See id. §§ 15-1 to -3. But see Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989) (critiquing personhood thesis as inadequate); Stephen J. Schnably, Beyond *Griswold*: Foucauldian and Republican Approaches to Privacy, 23 Conn. L. Rev. 861 (1991) (same).

[25] See Anita L. Allen, Uneasy Access: Privacy for Women in a Free Society 180 (1988) ("The central normative message of this book has been that women in the United States must have significant opportunities for individual forms of personal privacy and private choice. These opportunities enhance traits associated with moral personhood.").

from the outset in the struggle for reproductive freedom.

The right of privacy has significance not simply for a person's interest in avoiding disclosure of information about oneself or one's personal matters, but also for the types of self-constituting decisions and activities that make a person who she or he is.[26] Both informational and decisional privacy coneerns are present in the context of the abortion decision. To be sure, one might say that women do not realize their identity by choosing abortion in and of itself in the way that they do, for instance, by choosing certain religious or intimate associations. Rather, state abortion regulations denying women autonomy with respect to their reproductive lives either induce women to seek illegal abortions or compel childbearing and, as a practical matter, childrearing.[27] Anita Allen argues that while decisional privacy tends to be the exclusive focus of privacy analysis of contraception and abortion, also at stake in reproductive matters are what she calls such "paradigmatic" forms of privacy as "privacy at home" or a woman's need for solitude and seclusion; indeed, motherhood and family life often involve a sacrifice of such forms of privacy.[28]

Protecting decisional privacy as a constitutional matter by recourse to notions of personhood and self-determination does not mean that as a descriptive matter the reproductive choices of particular women are autonomous in the sense of being unburdened by circumstance and constraint. (Indeed, the story of "Jane Roe" was such a story, however little of that story survives in the *Roe* opinion.[29]) Yet, while recognizing

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[26] See Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (upholding reporting requirement for prescription of certain drugs while explaining that right to privacy embraces both (1) an "individual interest in avoiding disclosure in personal matters," and (2) an "interest in independence in making certain kinds of important decisions"); Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976) (upholding constitutionality of hospital rule forbidding husband's presence in delivery room while explicating same conception of privacy). Justice Stevens, whose privacy jurisprudence I explore infra at text accompanying notes 49-50, authored the majority opinions in both *Whalen* and, prior to his elevation to the Supreme Court, *Fitzgerald*. His opinion in *Casey* combines privacy concerns with sex equality concerns.

[27] See Rubenfeld, supra note 24, at 788. Reva Siegel argues that as a matter of "actual social practice," even if not legally compelled to raise children they bear, women generally do so, and thus, as a practical matter, forced childrearing follows forced childbearing. See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 371-72 (1992).

[28] See Allen, supra note 25, at 83-97, 122; cf. Virginia Woolf, A Room of One's Own (1929). I have elsewhere explored what Carol Gilligan calls the equation of female-provided care (particularly by mothers) with self-sacrifice. See McClain, supra note 14, at 1196-1203.

[29] Compare Brief for Appellants at 9, 73, Roe v. Wade, 410 U.S. 113 (1973) (No.

the interplay of choice and constraint, it is important not to abandon the affirmative case for the link between reproductive control and personal destiny nor to underestimate the persuasive force of the appeal to rights of autonomy as linked to personhood. In fact, the joint opinion in *Casey* speaks of women's protected right to decide (largely) for themselves the meaning of reproduction in their lives and links reproductive choice to equality: "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[30] In explaining why it adheres to stare decisis, the joint opinion considers what *Roe* has meant for the "generation of women who have come of age" since it was decided, treats as a "fact" the notion that people have organized relationships and choices around the availability of abortion should contraception fail, and concludes that the cost for people who have ordered their thinking and living around the protection promised by *Roe* cannot be dismissed.[31]

The decision making protected by privacy, not merely the ultimate decision, is necessary to the development and expression of personhood and personality, including the freedom to exercise moral responsibility.[32] Ronald Dworkin therefore interprets the Supreme Court's privacy jurisprudence in terms of moral responsibility and moral independence:

> The Court's previous privacy decisions can be justified only on the assumption that decisions affecting marriage and childbirth are so important, so intimate and personal, so critical to the development of personality and sense of moral responsibility, and so closely tied to religious and ethical convictions protected by the First Amendment, that people must be allowed to make these decisions for themselves, consulting their own conscience, rather than allowing society to thrust its collective decision on them.[33]

Moreover, with respect to abortion, Dworkin concludes:

> The abortion decision is at least as much a private decision in that sense as any other the Court has protected. In many ways

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70-18) with Roe v. Wade, 410 U.S. 113, 120 (1973).

[30] Casey, 112 S. Ct. at 2809 (citing Rosalind Pollack Petchesky, Abortion and Women's Choice: The State, Sexuality, and Reproductive Freedom 109, 133 n.7 (rev. ed. 1990)); see also id. at 2807–08.

[31] See id. at 2809.

[32] Similarly, equality-based defenses of abortion have spoken of the responsibility of self-determination as a component of equal citizenship and of how restricting the right to abortion "denies women the capacity of responsible citizenship." See Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1017 (1984).

[33] Ronald Dworkin, The Great Abortion Case, N.Y. Rev. Books, June 29, 1989, at 49, 51.

> it is more private, because the decision involves a woman's control not just of her connections to others, but of the use of her own body, and the Constitution recognizes in a variety of ways the special intimacy of a person's connection to her own physical integrity.[34]

Privacy, thus interpreted, is bound up with notions of the intimacy of one's connection to one's self, to one's body, and to others, as well as of the protection of self-determination notwithstanding public disapproval.[35] With respect to the first notion, the strength of an appeal to bodily integrity is clear from its prominence in *Casey*, where the joint opinion found it to be one of the two doctrinal bases for women's constitutional liberty at stake, invoking cases recognizing "limits on governmental power to mandate medical treatment or to bar its rejection."[36] The second notion Dworkin elaborates is freedom to exercise moral responsibility, to make decisions for oneself despite state disapproval or alleged majoritarian preferences to the contrary. On this point the *Casey* joint opinion expresses only qualified adherence.[37]

2. *The Disappearance of Privacy?*

The view of privacy as protecting reproductive decisions critical to personhood finds articulation in *Eisenstadt v. Baird*, a contraception case invoked in *Roe* and *Casey*: "[I]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[38] *Roe* characterized *Eisen-*

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[34] Id. at 51. The strong endorsement of privacy in the statements quoted in the text may be in some tension with Dworkin's qualified support for the *Casey* joint opinion. See Dworkin, supra note 5; infra text accompanying notes 64, 85, 103, 107.

[35] In his concurrence in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), overruled in part by *Casey*, Justice Stevens contends that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" Id. at 777 & n.5 (citing Charles Fried, Correspondence, 6 Phil. & Pub. Aff. 288-89 (1977)). On Fried's attempt, as Solicitor General, to distinguish between *Griswold* and *Roe* in the *Webster* litigation, see Laurence H. Tribe, Abortion: The Clash of Absolutes 95, 101-02 (1990); see also Charles Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account 71-88 (1991).

[36] Casey, 112 S. Ct. at 2810. As discussed infra text accompanying notes 51-53, the other basis is the line of cases protecting liberty to make certain important decisions concerning family, contraception, marriage, and the like. Id.

[37] See infra text accompanying notes 57-71, 97-125.

[38] 405 U.S. 438, 453 (1972). In Griswold v. Connecticut, 381 U.S. 479 (1965),

stadt as establishing that the right of privacy has "some extension" to activities relating to procreation.[39] The *Casey* joint opinion quoted most of the foregoing passage from *Eisenstadt*, but omitted the characterization of the right as the right of privacy.[40]

While privacy jurisprudence concerning abortion generally falls under the rubric of "*Roe v. Wade*," Justice Blackmun's opinion in *Roe* emphasized the role of the physician.[41] Recognizing that the right of privacy, grounded in the Fourteenth Amendment's concept of personal liberty, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," the Court nonetheless placed the "basic responsibility" for the abortion decision with the physician and characterized the decision as "inherently, and primarily, a medical decision."[42]

The privacy rationale for constitutional protection of a woman's decision concerning abortion thus finds strongest expression in *Thornburgh v. American College of Obstetricians & Gynecologists*[43] (including Justice Stevens' concurrence) and in the opinions of Justices Stevens and Blackmun in *Casey*. In *Thornburgh*, the Court (in an opinion also written by Justice Blackmun) more explicitly focused on the woman as the proper locus of decision making, making the association of privacy with liberty and autonomy clear:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision. . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.[44]

In *Casey*, the joint opinion similarly focuses squarely on the woman and uses closely parallel imagery of the "promise" of a "realm of personal liberty" held forth by the Constitution, a realm of "personal" and

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the Court first elaborated the right to privacy in the context of married persons' use of contraceptives.

[39] See Roe v. Wade, 410 U.S. 113, 152 (1973).

[40] See Casey, 112 S. Ct. at 2807. The Court does, however, quote the entire passage in the context of the husband notification provision. Id. at 2830. See infra text accompanying note 126.

[41] See Jane Maslow Cohen, A Jurisprudence of Doubt: Deliberative Autonomy and Abortion, 3 Colum. J. Gender & L. 177 (1992).

[42] Roe, 410 U.S. at 153, 164-65, 166.

[43] 476 U.S. 747 (1986), overruled in part by *Casey*.

[44] Id. at 772.

"intimate" (although not "private") decision making.[45] As argued below, given that *Casey* overrules *Thornburgh* as to the constitutionality of state efforts to persuade women to choose childbirth instead of abortion, this disappearance of privacy talk may not be without consequence.

The constitutional protection of a sphere of individual liberty elaborated in *Thornburgh* and *Casey* reflects an allocation (or reservation) of decision-making power to the individual rather than the state. While "privacy," rather than liberty or autonomy, may well be a "misnomer" for the right that grounds the legal protection of abortion,[46] "privacy" nonetheless has stood not for isolation of the right holder for its own sake, but for the critical importance of a space for decision making and the constitutive nature of such decision making. Thus, while the specter of literal state intrusion into the marital bedroom led the Court in *Griswold v. Connecticut* to find a statute prohibiting the use of contraception particularly "repulsive,"[47] the Court in subsequent cases has interpreted *Griswold* as teaching that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.[48] Justice Stevens, whose privacy jurisprudence strongly reflects the theme of privacy as autonomy and liberty of conscience,[49] has suggested that while the Court has emphasized privacy, "its decisions have actually been animated by an even more fundamental concern . . . , the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he [or she] will live his [or her] own life intolerable."[50]

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[45] Casey, 112 S. Ct. at 2805 ("[I]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."). On the "intimate" and "personal" nature of the decision, see id. at 2807, 2808, 2810.

[46] See Tribe, supra note 24, § 15-10:

> [W]hat is truly implicated in the decision whether to abort or to give birth is not privacy, but autonomy. And the issue of individual autonomy—of control over one's body and reproductive destiny—is in turn a question of power, pure and simple. *Roe v. Wade* was less a judgment about the relative importance of maternal liberty and fetal life, than it was a decision about *who* should make judgments of that sort.

[47] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[48] See Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977). The *Casey* joint opinion repeatedly relies on *Carey*'s articulation of constitutional protection for decision making. See Casey, 112 S. Ct. at 2805-08, 2810-11.

[49] For another defense of the right to privacy stressing the jurisprudence of Justice Stevens, see Susan Estrich & Kathleen Sullivan, Abortion Politics: Writing for an Audience of One, 138 U. Pa. L. Rev. 119, 125-28 (1989).

[50] Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting); see also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 n.11 (1986) (Stevens, J., concurring) (citing Fitzgerald v. Porter Memorial Hosp.,

This delimitation of the respective roles of the citizen and the state is rooted in the eloquent defense of individuals against totalitarian state control and orthodoxy in such early cases as *Meyer v. Nebraska*[51] and *Pierce v. Society of Sisters*.[52] The demarcation is again invoked in *Griswold*'s explication of the right of privacy, and in the Court's recent school prayer decision, *Lee v. Weisman*.[53] In the context of procreative decisions, in his concurring opinion in *Thornburgh*, Justice Stevens interpreted the fundamental premises underlying *Roe* as placing "the primary responsibility for decisions in matters of childbearing in the private sector of our society."[54] Public recognition of, and support for, that allocation of responsibility may be seen in the successful use by pro-choice advocates of the slogan "Who decides?" and in poll data indicating strong support for the proposition that the government should not prohibit a woman from choosing to have an abortion—even if others may think it is the wrong thing to do in particular cases.[55] As Dworkin argues, noting that such decisions implicate one's deepest, and often one's religious, beliefs, "[t]olerance is a cost we must pay for our adventure in liberty."[56]

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523 F.2d 716, 719-20 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976)), overruled in part by *Casey*. Under Stevens' analysis, "the essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." Bowers, 478 U.S. at 218.

[51] 262 U.S. 390 (1923).

[52] 268 U.S. 510 (1925). These ancestors of privacy jurisprudence are, however, a double-edged sword as applied to pregnant female minors. On the one hand, arguments supporting the constitutionality of parental notification and consent requirements draw upon the recognition in those precedents of "the guiding role of parents in the upbringing of their children." H.L. v. Matheson, 450 U.S. 398, 410 (1981) (citing Meyer, 262 U.S. at 399-401); see also Bellotti v. Baird, 443 U.S. 622, 637 (1979) (citing Pierce, 268 U.S. at 535). On the other hand, some members of the Court have argued that such requirements are contrary to the protection of family privacy from unwarranted state intrusion that those precedents establish, see Matheson, 450 U.S. at 447-54 (Marshall, J., dissenting), or have invoked the anti-totalitarian principle of those precedents against parental notification requirements premised on an ideal of the family which often does not correspond to reality. See Hodgson v. Minnesota, 110 S. Ct. 2926, 2946 (1990) (Stevens, J.) (invoking Meyer, 262 U.S. at 399-400, to reject state interest in "making the 'private realm of family life' conform to some state-designed idea").

For a discussion of the "appealing" yet "problematic, potentially dangerous" concept of decisional family privacy, see Allen, supra note 25, at 110-18.

[53] 112 S. Ct. 2649 (1992).

[54] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 (1986) (Stevens, J., concurring), overruled in part by *Casey*.

[55] See E.J. Dionne, Poll Finds Ambivalence on Abortion Persists in U.S., N.Y. Times, Aug. 3, 1989, at A18.

[56] Ronald Dworkin, Unenumerated Rights: Whether and How *Roe* Should Be

Might not one cheer *Casey*'s focus on liberty, rather than privacy, as merely recognizing that privacy is a "misnomer" and situating the abortion decision more firmly within the constitutional framework? Moreover, might not "liberty" pure and simple better capture what is really at issue—self-determination?[57] How significant is the Court's omission of any explicit reliance upon the right of privacy in explicating its view of "the essential holding of Roe"? (Justice Blackmun, for example, reads the joint opinion as reaffirming the right of privacy and instead focuses on the disappearance of strict scrutiny.[58])

Consider the different characterizations of the abortion decision and of "informed consent" in *Thornburgh* and *Casey*. *Thornburgh* characterized "the decision to terminate a pregnancy" as "an intensely private one," one that "'may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.'"[59] In *Thornburgh*, the Court struck down a number of Pennsylvania's abortion regulations allegedly furthering "informed consent"[60] as in reality serving to intimidate women and to "wedge the Commonwealth's message

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Overruled, 59 U. Chi. L. Rev. 381, 427 (1992). The theme of moral independence and toleration is also sounded by David Richards, in his Rawlsian interpretation of the Constitution and justification of abortion. See David A.J. Richards, Toleration and the Constitution 261–69 (1986). In an analysis cited by pro-choice litigants, Richards interprets privacy in terms of autonomy, or liberty of conscience, and freedom of intimate association in pursuing a conception of the good. See Brief for *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* in Support of Appellees at 6 n.4, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605). In justifying women's right to decide to have an abortion, as an exercise of liberty of conscience and moral independence, Richards cites Carol Gilligan's discussion of "the moral conscientiousness of an abortion decision for women." Richards, supra, at 268 (citing Carol Gilligan, In a Different Voice 70–71 (1982)).

[57] See Motion for Permission to File Brief and Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 14–24, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-40), reprinted in Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, *Roe v. Wade* 563, 592–602 (Philip B. Kurland & Gerhard Casper eds., 1973) (1990); Rosalind Petchesky, Introduction to *Amicus* Brief: *Richard Thornburgh v. American College of Gynecologists*, 9 Women's Rts. L. Rep. 3 (1986) (arguing for feminist interpretation of liberty as self-determination); Elizabeth Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 995–98 (1991) (drawing upon Justice Douglas' concurrence in *Roe* in her assessment of affirmative potential of privacy as encompassing liberty, equality, freedom of bodily integrity, autonomy, and self-determination).

[58] See Casey, 112 S. Ct. at 2846–52.

[59] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986) (quoting Justice Stevens' concurrence in Bellotti v. Baird, 443 U.S. 622, 655 (1979)), overruled in part by *Casey*.

[60] Id. at 759–65.

discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician."[61]

The *Casey* joint opinion claims to reaffirm the "essential holding of *Roe*" while upholding nearly identical regulations as permissible state efforts to "persuade" women not to choose abortion, so long as women are the ultimate decision makers.[62] In one of only two explicit references to the right of privacy in the joint opinion, the Court rejects the argument that the informed consent provision interferes with "a constitutional right of privacy between a pregnant woman and her physician," since whatever constitutional status such a relationship has is derived from the woman's position and "does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy."[63] Here we have travelled from *Roe*'s placement of the responsible physician at center stage to *Thornburgh*'s situation of the woman as decision maker in a private dialogue with her physician to *Casey*'s removal of the physician from the stage, except as message bearer for the state.

In a crucial formulation intended to offer guidance, the Court restates the right recognized in *Roe*:

> Some guiding principles should emerge. *What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.* Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose . . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.[64]

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[61] Id. at 762.

[62] See Casey, 112 S. Ct. at 2850 (Blackmun, J., concurring in part, dissenting in part) (noting "virtual identity" to *Thornburgh* regulations). The main difference between the regulations in *Thornburgh* and *Casey* appears to be the inclusion in the earlier scheme of required disclosure of "the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable." Thornburgh, 476 U.S. at 760; see discussion infra part II.B.3. Although Justices Stevens and Blackmun joined in parts I-III of *Casey* upholding *Roe*, Chief Justice Rehnquist and Justices Scalia, White, and Thomas joined part V-B and -D upholding the informed consent procedures.

[63] Casey, 112 S. Ct. at 2824.

[64] Id. at 2821 (emphasis added). Dworkin apparently agrees with the Court's reading of *Roe*: "*Roe* itself did not grant a right, fundamental or otherwise, that states

Perhaps the seeds of this "non-right" to insulation were planted with *Roe*'s qualification that a pregnant woman "cannot be isolated in her privacy,"[65] although here that phrase takes on new, and probably unintended, meaning. One need only contrast the prominence of the language of privacy in the characterization of women's decision making in the partially dissenting opinions of Justices Blackmun[66] and Stevens[67] to show the distance from *Roe* to *Thornburgh* to *Casey*. The disappearance of privacy and of strict scrutiny, and the latitude given to state second-guessing, imperil women's reproductive liberty. As Justice Stevens argues in *Casey*, this new approach denies women equal respect and equal dignity.[68]

The simplest explanation for the divergent results in *Thornburgh* and *Casey* (aside from changed Court membership) is the dramatically greater weight given in *Casey* to the state's interest in potential life throughout pregnancy and the substitution of the undue burden test for strict scrutiny in the assessment of state regulations prior to viability. Indeed, the *Casey* joint opinion announces that it rejects *Roe*'s trimester framework as not "part of the essential holding of *Roe*" and as "in practice . . . undervalu-[ing] the State's interest in potential life, as recognized in *Roe*."[69] This "revised *Roe*" is the joint opinion's attempt to reconcile women's liberty and the state's interest in protecting potential life, an interest it claims has received "too little" attention in decisions subsequent to *Roe*.[70] Is such a "privacy, modified"[71] an inevitable consequence of applying a privacy analysis to pregnant women's constitutional liberty or is it a result of failure to take privacy seriously?

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not encourage responsibility in the decision a woman makes or that states not display a collective view of which decision is most appropriate." Dworkin, supra note 56, at 410.

[65] Roe v. Wade, 410 U.S. 113, 159 (1973).

[66] See Casey, 112 S. Ct. at 2847 (Blackmun, J., concurring in part, dissenting in part).

[67] See id. at 2840, 2842 (Stevens, J., concurring in part, dissenting in part).

[68] See id. at 2842.

[69] Id. at 2818.

[70] See id. at 2817.

[71] The allusion, admittedly a stretch, is to Catharine MacKinnon's *Feminism Unmodified*, see MacKinnon, supra note 13, and to the debate over whether the representation of women in such theories as hers excludes "women modified" by race, class, and other differences. See generally Harris, supra note 18. Here the point is the impact upon the right of privacy of pregnancy and the state's interest in potential life.

B. Privacy and the "Unique" Condition of Pregnancy: The Trajectory from *Roe* to *Casey*

From the outset, although the Court situated a woman's liberty with respect to choosing to continue or terminate her pregnancy within the cluster of such constitutionally protected important decisions as those concerning family, marriage, education, and contraception, it characterized abortion as "inherently different" from such situations because of the nature of pregnancy.[72] Thus, while the Court in *Thornburgh* stated that the right to a private sphere of individual liberty "extends to women as well as to men,"[73] the Court in *Roe* had previously characterized that right with respect to the abortion decision as limited and "not unqualified."[74] As the Court put it, "the pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . ."[75] But while the State of Texas argued for a constitutionally grounded "right to life" for the fetus, the Court held that the term "person" within the meaning of the Fourteenth Amendment "does not include the unborn."[76] The *Casey* joint opinion implicitly reaffirms that holding; moreover, as Justice Stevens notes, "no member of the Court has ever questioned this fundamental proposition."[77] The persistent formulation of the abortion issue as pitting fetuses' rights against women's liberty ignores the constitutional underpinning of *Roe* and fails to acknowledge the location of the interest in the state rather than in the fetus.

Without specifying the source of this interest, the issue both *Roe* and *Casey* address is "how best to accommodate the State's interest in potential life with the constitutional liberties of pregnant women."[78] Justice Stevens suggests that the state interest is one not grounded in the Constitution but supported by "humanitarian and pragmatic concerns."[79] *Roe* recognized and protected the state's compelling interest in protecting fetal life after viability, the time when the fetus "presumably has the capability of

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[72] Roe v. Wade, 410 U.S. 113, 159 (1973).

[73] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986), overruled in part by *Casey*.

[74] Roe, 410 U.S. at 154. In *Roe*, the Court also appeared to reject, outside of the context of pregnancy, any general claim of an unlimited right to do as one pleases with one's body. See id.

[75] Id. at 159.

[76] Id. at 156–58.

[77] Casey, 112 S. Ct. at 2839 (Stevens, J., concurring in part, dissenting in part); see also Dworkin, supra note 56, at 398–402.

[78] Casey, 112 S. Ct. at 2849 (Blackmun, J., concurring in part, dissenting in part).

[79] Id. at 2840 (Stevens, J., concurring in part, dissenting in part).

meaningful life outside the mother's womb," by allowing a state to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[80] Arguably, the viability line, which is grounded in the "biological facts and truths of fetal development,"[81] accommodates adequately not only the state's asserted interest in protecting potential life, but also the need to maintain a taboo against taking life or to foster regard for human life in general, since late-term abortion may be particularly offensive to some people.[82]

The real battles over *Roe* have not, however, been primarily about post-viability abortion (which, like late abortions, are few in number although central to anti-choice rhetoric[83]) but over state regulations to protect fetal life prior to viability, including outright prohibition of abortion. On the one hand, with respect to outright prohibition, *Casey* adheres to the viability line as to women's ultimate choice, stating: "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*."[84] On the other hand, as noted above, *Casey* rejects *Roe*'s trimester framework with respect to state regulation of women's decision making and upholds measures designed to protect potential life and persuade women against abortion at every stage of pregnancy, provided the measures are not unduly burdensome. In such a move, the joint opinion finds a perhaps surprising ally in Dworkin, who argues that the state interest identified in *Roe*—admittedly "mysterious" in *Roe* and subsequent cases—is "a legitimate interest in maintaining a moral environment in which decisions about life and death, including the abortion decision, are taken seriously, [and] treated as matters of moral gravity."[85]

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[80] Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[81] Webster v. Reproductive Health Servs., 492 U.S. 490, 553 (1989) (Blackmun, J., dissenting).

[82] See Casey, 112 S. Ct. at 2840 (Stevens, J., concurring in part, dissenting in part), 2849 (Blackmun, J., concurring in part, dissenting in part); Webster, 492 U.S. at 553–54 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring), overruled in part by *Casey*); Rosalind Pollack Petchesky, Abortion and Women's Choice: The State, Sexuality, and Reproductive Freedom 351–52 (rev. ed. 1990) (interpreting data showing that between 92% and 96% of abortions took place in first trimester as reflecting sense of importance of fetal development and "implicit moral code" at work in women's decisions); Frances Olsen, Unraveling Compromise, 103 Harv. L. Rev. 105, 131 (1989) (arguing that "[m]any people, including strongly pro-choice people, view a fetus as sharing our humanity in an important way, especially late in pregnancy," as indicated by widespread acceptance of limiting late abortions).

[83] See Celeste Michelle Condit, Decoding Abortion Rhetoric: Communicating Social Change 79–89 (1990) (on strategic use of imagery of late-term fetuses in "pro-life" literature); see also Petchesky, supra note 82, at 351–52.

[84] Casey, 112 S. Ct. at 2817.

[85] Dworkin, supra note 56, at 428; see also supra note 64. An assessment of the

Casey's revision of *Roe* must be understood within the context of the erosion of privacy jurisprudence well prior to *Casey*.

1. The Poverty of Privacy for Poor Women? From Roe *to* Rust

In a series of decisions subsequent to *Roe*, the Court permitted a wide range of state restrictions on access to abortion prior to viability. It argued that these restrictions did not impinge women's right of privacy on the ground that *Roe* did not prevent a state from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds."[86] For example, the Court held that a state need not show a compelling interest to provide Medicaid funds for childbirth but not abortion (even those that are medically necessary), or to provide publicly financed hospital services for childbirth but not "nontherapeutic" abortion, because such regulations do not place an obstacle in the path of a woman seeking an abortion but merely encourage childbirth, an "alternative activity deemed in the public interest."[87] Indeed, it is from such cases that the notion of undue burden, which triumphed in *Casey*, originated.

Webster and *Rust v. Sullivan*[88] carried that line further: *Webster* upheld a prohibition on the use of public facilities or medical personnel for abortion, even where a woman seeks to use her own private physician, and *Rust* upheld a ban on even mentioning abortion as an option in family planning clinics receiving any federal funding. The public funding decisions triggered bitter dissents from members of the Court who pointed out the encroachment of such holdings upon women's (particularly poor women's) privacy rights in the name of "state-mandated morality."[89] But

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implications of Dworkin's seeming move from "taking rights seriously" to "exercising rights responsibly" awaits elaboration. See McClain, supra note 20.

[86] Maher v. Roe, 432 U.S. 464, 474 (1977).

[87] See id. (holding states not constitutionally required to pay Medicaid benefits for "nontherapeutic" (i.e., not medically necessary) abortions); Harris v. McRae, 448 U.S. 297, 315 (1980) (holding states not required to pay for medically necessary abortions for which federal reimbursement is unavailable under Hyde Amendment to Title XIX and upholding Hyde Amendment funding restrictions on medically necessary abortions); Poelker v. Doe, 432 U.S. 519 (1977) (holding no constitutional violation if state provides publicly financed hospital services for childbirth but not for nontherapeutic abortions).

[88] 111 S. Ct. 1759 (1991).

[89] See, e.g., McRae, 448 U.S. at 332 (Brennan, J., dissenting) (such restrictions foist majoritarian viewpoint disapproving of abortion upon only "that segment of our society which, because of its position of political powerlessness, is least able to defend

critics of *Roe*'s privacy analysis have pointed to such decisions as showing the poverty of privacy and the effect of relegating reproductive rights to the private sphere.[90] Here the literal poverty of privacy is at issue, since it is poor women, among them many women of color, who lack the practical means to effectuate decisions to terminate a pregnancy and may not exercise their rights, or may only do so accompanied by financial and other hardships, including increased health risks.[91] By the Court's reasoning, it is women's indigency, not the state's preferential funding, that restricts women's "ability to enjoy the full range of constitutionally protected freedom of choice."[92] Thus, Dorothy Roberts argues that while privacy as "personhood" protects independent decision making, "abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice."[93]

The line of cases from *Maher* to *Rust* raises complex constitutional issues about state preferences, selective funding, interpretations of the Due Process clause, and the application of constitutional norms of equality which are outside the scope of this Article.[94] However, a few points are critical

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its privacy rights from the encroachments of state-mandated morality"). There can be no doubt that religious opposition to abortion played a key role in achieving such restrictions on funding, as the history of the Hyde Amendments makes clear. See Tribe, supra note 35, at 151–59.

[90] See MacKinnon, supra note 13, at 93, 100–01; Petchesky, supra note 82, at xxi–xxvi, 295–302.

[91] See Dorothy Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1477 (1991) (advancing privacy argument but arguing that from perspective of women of color, connection between privacy and abortion funding decisions is most compelling argument against privacy rhetoric). On the impact of funding decisions on low income women, see Petchesky, supra note 82, at 155–61; Charlotte Rutherford, Reproductive Freedoms and African American Women, 4 Yale J.L. & Feminism 255, 279–83 (1992).

[92] McRae, 448 U.S. at 316.

[93] Roberts, supra note 91, at 1478.

[94] The abortion funding problem poses a number of distinct and difficult issues of constitutional interpretation that a privacy argument must face. First, can a privacy argument effectively counter the interpretation of the Constitution underlying *Rust* and before it *Webster*, that "'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual'"? Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991) (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 491 (1989), quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989)). The interpretation of the Constitution as a charter of negative—rather than positive—liberties is hardly new, although the Court's invocation of it in the controversial decision in *DeShaney*, upon which the *Webster* plurality and the *Rust* majority relied, has received considerable critical attention. See, e.g., Glendon, supra note 19, at 91–98. Second, if the government, while not obligated to do so, chooses to subsidize one activity and not another,

here. First, while some critics of those decisions view them as following logically from *Roe*'s reliance upon privacy, other critics do not. Indeed, some urge affirmative obligations of government arising from commitment to privacy as personhood.[95] Those decisions are not a failure of privacy jurisprudence, but rather a failure to take privacy seriously.[96] At the same time, additional arguments rooted in constitutional bases other than privacy have been used and may be necessary to challenge such results. Finally, prior to *Casey*, the Court drew a distinction (persuasive or not) between a state permissibly attempting to persuade women against abortion through

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does a right of privacy provide a persuasive argument against such selective funding, either on its own or through the fundamental rights branch of Equal Protection analysis? See, e.g., Rachael N. Pine & Sylvia A. Law, Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real, 27 Harv. C.R.-C.L. L. Rev. 407, 419 (1992) (arguing that line of cases from *McRae* to *Rust* violates requirement that, under constitutional equality norms, "government must act with neutrality in the distribution of benefits or burdens that affect the exercise of important liberties such as free speech and reproductive choice").

[95] See Richards, supra note 56, at 262 (discussing *McRae* and arguing that the prohibition of abortion services infringes exercise of essential moral powers of private life). For arguments for affirmative government obligations, see, e.g., Roberts, supra note 91, at 1479 (in context of argument against punishing crack-addicted pregnant women, arguing for affirmative duty of government to "protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination"); Tribe, supra note 24, § 15-2 (arguing that privacy need not be read as purely negative right, but that both negative and positive obligations of government can flow out of "substantive vision of the needs of human personality"); cf. Glendon, supra note 19, at 61–66 (noting that certain Western European countries recognize affirmative obligations of government stemming from constitutionally recognized rights of personality and development of personality); Pine & Law, supra note 94, at 421–23 (arguing that securing affirmative reproductive liberties requires going beyond traditional constitutional guarantees); Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 707 (1990) (arguing that Due Process Clause can be source of affirmative obligations of government "to take action to facilitate, protect, and ensure those choices most essential to [human flourishing and] freedom").

It is important to note that the strongest defenders of privacy on the Court, Justices Brennan, Blackmun, Marshall, and Stevens, all dissented in *McRae* and, with the exception of Justice Stevens' partial concurrence, in *Webster*.

[96] In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court (per Justice White) upheld, on communitarian grounds, Georgia's sodomy statute as applied to homosexual sodomy. This decision has been widely cited as showing the limits of privacy jurisprudence, but the better argument is that it was wrongly decided. See id. at 199–214 (Blackmun, J., dissenting; joined by Brennan, J., Marshall, J., and Stevens, J.), 214–20 (Stevens, J., dissenting; joined by Brennan, J., and Marshall, J.); Anand Agneshwar, Ex-Justice Says He May Have Been Wrong: Powell on Sodomy, Nat'l L.J., Nov. 5, 1990, at 3 (reporting Justice Powell's public remarks that he may have made mistake by voting with majority in *Bowers*).

Recently, the Kentucky Supreme Court struck down its state's anti-sodomy law, ruling that the statute violated privacy rights under the state constitution. See Kentucky Justices Strike Down Anti-Sodomy Law, N.Y. Times, Sept. 25, 1992, at A13.

preferential funding and services, and the state impermissibly wedging its preference for childbirth, through informed consent requirements, into women's decision-making process itself.

2. Protecting Women's Liberty and Accommodating the State's Interest in Protecting Potential Life: Casey

The Court in *Casey* speaks of the woman's liberty at stake in the abortion decision as "unique to the human condition and so unique to the law."[97] More explicitly than *Roe*, and evocative of *Thornburgh*, *Casey* links reproductive choice to a woman's existential decisions, her spirituality, and her personhood:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[98]

Yet the joint opinion goes on to say that its analysis begins but cannot end there because abortion "is more than a philosophic exercise," it is also conduct, "an act fraught with consequences for others."[99] Here, tension between women's liberty and the state's interest in potential life emerges.

At the outset the Court explains that the state cannot proscribe abortion in all instances because of the "unique" liberty of the woman. Its characterization of pregnancy and of interpretations of women's reproductive role is striking and poignant (if idealizing), even while the frequent modifiers the Court uses may signal trouble ahead:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot *alone* be grounds for the State to insist she make the sacrifice. Her

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[97] Casey, 112 S. Ct. at 2807.

[98] Id.

[99] Id. Just who are those others? The Court explains that they are "the persons who perform and assist in the procedure; . . . the spouse, family, and society which must confront the knowledge that these procedures exist . . . ; and, depending on one's beliefs, . . . the life or potential life that is aborted." Id.

> suffering is too intimate and personal for the State to insist, *without more*, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped *to a large extent* on her own conception of her spiritual imperatives and her place in society.[100]

Here the medical picture of the abortion decision in *Roe* with the physician front and center gives way to a focus on the pregnant woman, her life, her pains, her suffering, and her right to form her own interpretation of what procreation means in her life. The above passage also brings to mind the imagery of "distress" used in *Roe* to describe the consequences of restricting abortion: "maternity, or additional offspring, may force upon the woman a distressful life and future."[101]

Yet while the *Roe* Court focused on the consequences for the pregnant woman, her family, and the future child of the forced continuation of an unwanted pregnancy, the *Casey* joint opinion focuses on the consequences of a woman's decision to terminate a pregnancy—consequences for "the woman who must live with the impact of the consequences of her decision" and for "others," among them society (including those who deem abortion "nothing short of an act of violence against innocent life") and, "depending on one's beliefs, . . . the life or potential life that is aborted."[102] As argued below, this dramatic characterization of "consequences" appears to drive the joint opinion's analysis of why state procedures designed to protect potential life and dissuade women from choosing abortion are constitutionally permissible, even if they lead to increased costs and delay.

Although the Court's treatment of "consequences" brings to mind Dworkin's evocation of the state's interest in the "moral environment" and how decisions concerning the "sanctity of life" are made, the Court (like the Commonwealth of Pennsylvania) nowhere explains exactly what the basis for the state's interest in potential life is or why its preference for childbirth over abortion—irrespective of the circumstances and beliefs of particular women—should receive such judicial solicitude. The treatment suggests protection of the pure value of "life" as such without any concern for the quality of life of the woman, her family, or her future child.[103]

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[100] Id. (emphasis added); cf. Genesis 3:16 ("To the woman, he said, 'I will greatly multiply your pain in childbearing; in pain you shall bring forth children, yet your desire shall be for your husband, and he shall rule over you.'").

[101] Roe v. Wade, 410 U.S. 113, 153 (1973).

[102] Casey, 112 S. Ct. at 2807.

[103] See Dworkin, supra note 56, at 405–09.

3. Informed Consent and "Wise Exercise" of Women's Reproductive Liberty

What does the *Casey* joint opinion's qualified defense of women's liberty mean for the privacy justification of women's reproductive autonomy? As argued above, on the Court's reading of *Roe*, women have no right to be insulated from state persuasion against abortion or the state's expression of its "profound respect for the life of the unborn"; on that reading, such persuasion in and of itself is not "undue" interference so long as it is not a substantial obstacle to women seeking abortion.[104] Thus, *Casey* affirms the informed consent requirement before it as facilitating the "wise exercise" of a woman's right to decide to terminate a pregnancy "free of undue interference by the State."[105] But can one doubt what "wise exercise" of women's right to choose means? The statute and the joint opinion, in upholding the requirement, conflate furthering women's informed choice with state persuasion against abortion. Such conflation substantially retreats from the decisional privacy this Article defends, as the dissents of Justices Blackmun and Stevens make clear. Moreover, aside from the intrusion into women's decisional privacy, one cannot ignore the practical effect of the informed consent provisions on women's ability to exercise their rights—an impact the Court found "troubling" as to some women but not, on the record before it, an undue burden.[106]

Illustrative of the conflation of informed choice and persuasion, the joint opinion defines a state's interest in regulating abortion as permitting the state to set up what the Court calls a "reasonable framework for a woman to make a decision that has such profound and lasting meaning," by which a woman is encouraged "to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy."[107] Since the Court explicitly links the informed choice provisions to permissible state efforts to persuade women against abortion, it is hardly necessary to substantiate the claim that the state's goal is to persuade women against abortion and not to enhance truly autonomous,

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[104] But see Casey, 112 S. Ct. at 2847 n.5 (Blackmun, J., concurring in part, dissenting in part) ("under *Roe*, any more than *de minimis* interference is undue").

[105] Id. at 2826.

[106] See id. at 2825.

[107] Id. at 2818. Dworkin praises the Court for such a characterization of the state interest. Dworkin, supra note 5, at 30. Nevertheless, as Justice Stevens indicates, it is not at all clear how the procedures described below inform the woman of philosophic arguments. See Casey, 112 S. Ct. at 2843 (Stevens, J., concurring in part, dissenting in part).

deliberative choice.[108] In contrast, both Justices Stevens and Blackmun distinguish permissible procedures designed to enhance and inform choice from state persuasion. Enhancing deliberative autonomy would appear to be the joint opinion's goal only to the extent that those justices accept that women are choosing abortion out of ignorance or without due attention to arguments against abortion. Thus, promoting "maternal health," an additional basis proffered for the informed consent provisions, appears to be limited to protecting women from the psychological consequences of choosing abortion.[109]

The informed consent provision upheld by the *Casey* joint opinion requires a twenty-four-hour waiting period after a woman requests an abortion and is offered, among other things, printed materials "which describe the unborn child and list agencies which offer alternatives to abortion."[110] The joint opinion concludes that the state, by such a provision, attempts to "ensure that a woman apprehends the full consequences of her decision" and so to reduce the "risk" that a woman may elect an abortion, "only to discover later, with devastating psychological consequences, that her decision was not fully informed."[111] A foreshadowing of this fear of a precipitous abortion decision is clearly seen in Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health* (prominent in the *Casey* briefs), in which she concluded that a twenty-four-

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[108] See, e.g., Casey, 112 S. Ct. at 2818, 2821, 2823–25. The Court explicitly grounds one justification for the informed consent provisions in the state's interest in protecting potential life, even absent a relationship to maternal health, id. at 2823, 2825, and makes no effort to link the 24-hour waiting period to maternal health rather than to the state's interest in protecting the life of the unborn. Id. at 2825. Significantly, the Act which the Court upholds is entitled the "Abortion Control Act."

[109] The Court's lack of concern for maternal health, apart from the Court's notion of psychological devastation from abortion, also comes through in restrictions in funding medically necessary abortion. See supra text accompanying notes 86–93.

In assessing whether the *Casey* joint opinion is really concerned with "informing women's decisions about their reproductive health," Dorothy Roberts suggests that we contrast *Casey*, which upholds regulations requiring doctors to provide women with information designed to persuade them against abortion even if the women do not want it, with *Rust*, which allows the government to deliberately withhold information about abortion from millions of poor women, even when the woman specifically requests it. Both holdings, she argues, deny women's self-determination and ability to make their own decisions about pregnancy. See Roberts, supra note 8, at 18, 38.

[110] Casey, 112 S. Ct. at 2834. The materials are to describe "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments," to include pictures at two-week increments, and to provide relevant information on the possibility of "the unborn child's survival," while making sure such materials are appropriate to the woman's stage of pregnancy. The materials are also to contain "objective information describing the methods of abortion procedures commonly employed." Id. at 2828–36.

[111] Casey, 112 S. Ct. at 2823.

hour waiting period, if it imposes costs, is "surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain irreparable consequences on fetal life, and the possible effects on her own."[112]

In particular, the piece of information the Court fears the woman may lack is "the impact on the fetus," something the Court claims that "most women considering an abortion would deem . . . relevant, if not dispositive to the decision."[113] This remarkable, if enigmatic, sentence stands without any cited support. Moreover, the Court makes no mention of evidence before it suggesting that for the great majority of women, the primary reaction to abortion is relief,[114] that (granting the difficult nature of the decision and notwithstanding anecdotal examples) there is no significant evidence of adverse psychological consequences resulting from abortion,[115] and that a decision to continue a pregnancy may have potential negative impacts upon the life of a woman, including adverse psychological consequences upon the woman and, eventually, upon the future child.[116] Indeed, echoing *Roe*, one might as aptly say that "for most women consider-

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[112] Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 474 (1983) (O'Connor, J., dissenting), overruled in part by *Casey*.

[113] Casey, 112 S. Ct. at 2823. Admittedly, the quoted statement is ambiguous: it could be interpreted to say "even if not dispositive" or "indeed, dispositive."

[114] See Brief for *Amicus Curiae* American Psychological Association in Support of Petitioners at 21, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902) [hereinafter APA Brief] (citing studies such as Adler, David, Major, Roth, Russo & Wyatt, Psychological Responses After Abortion, 248 Science 41 (1990), and other sources).

[115] See id. at 21–23 (citing sources which include testimony of former Surgeon General C. Everett Koop before Congress concerning federal study's conclusion that the development of significant psychological problems related to abortion is "minuscule from a public health perspective"); Kathleen McDonnell, Not an Easy Choice: A Feminist Re-Examines Abortion 35 (1984) ("[W]hile many women may deeply regret having become unwillingly pregnant and having had to make the abortion decision, relatively few would reverse their decision or say they regret having had an abortion."). In contrast, in its *amicus* brief, Feminists for Life of America stated as its interest "having seen the adverse physical and psychological effects of abortion on women." See Brief of Feminists for Life of America, Professional Women's Network, Birthright, Inc., Legal Action for Women, as *Amici Curiae* in Support of Respondents and Cross-Petitioners at 1a, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902) (citing David C. Reardon, Aborted Women: Silent No More (1987) (relating stories of women who had abortions and later regretted their decisions)).

[116] In contrast, in *Roe*, the Court spoke of the "distressful life and future" resulting from forced maternity and the consequences upon the child. See Roe v. Wade, 410 U.S. 113, 153 (1973). On the negative impact on the psychological health of women, see APA Brief, supra note 114, at 20. A recent study suggests that women who are denied abortions only rarely give up their unwanted babies for adoption, and many harbor resentment and anger toward their children for years. See Natalie Angier, Study Says Anger Troubles Women Denied Abortions, N.Y. Times, May 29, 1991, at C10.

ing abortion," the impact of continuing pregnancy (on the woman, her family, and, perhaps, the future child) is highly relevant, if not dispositive.

The Court's analysis of informed consent and women's health is patronizing, selective, and in part contrary to fact. As the dissenters point out, there was no evidence that the delay provision was of benefit to women or furthered their informed consent, but rather considerable evidence (as the District Court found) that the provisions would impose severe burdens on many women.[117] Assuming that the provision was not designed merely to wear women down and thus reduce the number of abortions (an assumption some would reasonably challenge),[118] Justice Stevens concludes it "appears to rest on outmoded and unacceptable assumptions about the decision making capacity of women or an illegitimate belief that an abortion decision is presumptively wrong."[119] Indeed, it would appear that the Court assumes that women who seek abortions do not understand what abortion means with respect to a pregnancy.[120]

Further, the analysis suggests not only a belief in the overriding value of prenatal life but in some maternal (or merely humane) instinct that might well prevent any woman who came to understand what abortion really is and does to the "unborn child" from going through with it—certainly a belief or hope of some proponents of the Pennsylvania provisions.[121] In

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[117] See Casey, 112 S. Ct at 2842–43. Upholding informed consent as "in theory" permissible, the joint opinion found the question whether in practice the 24-hour waiting period would pose a "substantial obstacle" upon many women, particularly poor and rural women, a "closer question." The Court was not persuaded, however, that it was an undue burden. See id. at 2825.

[118] Pennsylvania's Abortion Control Act and similar acts have been regarded, certainly by pro-choice advocates but by other observers as well, as attempts by opponents of legal abortion to erode abortion rights incrementally, an alternative and complementary strategy to recriminalizing abortion through more restrictive statutes. See Cynthia Gorney, Endgame, Wash. Post Mag., Feb. 23, 1992, at 6 (quoting Denise Neary, Pennsylvania Pro-Life Federation Director); Adam Pertman, Abortion Debate Heats Up: Foes, Backers Craft Strategy Across N.E., Boston Globe, Feb. 3, 1991, at 29 (New England states).

[119] Casey, 112 S. Ct. at 2841–42.

[120] Compare the nineteenth-century medical profession's view that women getting abortions did so because of "widespread popular ignorance of the true character of the crime" and because of "a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening." Roe v. Wade, 410 U.S. 113, 141–42 (1973). See also Siegel, supra note 27, at 280–300.

[121] Denise Neary, Pennsylvania Pro-Life Federation Director, who worked on the statute, has commented with respect to teenage women:

> It's not just a little bit of mush, like the woman is led to believe . . . . If these girls knew the contents of their uterus had little tiny hands and legs, they would not be as quick to say, "Yeah, go ahead and suck me out." When they do find out, because they pick up Life magazine, or they're in a health class and

requiring a physician to tell a woman who requests an abortion of the availability of materials "describing the unborn child *and* agencies providing alternatives," is not the state conveying the message that once any woman really understood the physical characteristics of "the unborn child" (not the more medically correct term "embryo" or "fetus"), she would surely be moved to choose against abortion, and, indeed "agencies" also holding that view stand ready to help?

Consistent with *Thornburgh* and the view of privacy this Article defends, Justice Stevens, dissenting, concludes: "Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best."[122] Acknowledging that a woman considering abortion faces "a difficult choice having serious and personal consequences,"[123] he nonetheless concludes that "[t]he authority to make such traumatic and yet empowering decisions is an element of basic human dignity . . . . [and] a matter of conscience."[124] He argues that women seeking abortion are entitled to dignity and respect equal to that of women choosing otherwise: "No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference."[125]

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somebody does something on fetal development, they're destroyed, because they're looking at a 9- or 10- or 11-week fetus.

Gorney, supra note 118, at 6, 10. AAPLOG's *amicus* brief reports two instances of women who were contemplating having abortions who decided against doing so after an ultrasound procedure, since "seeing what was inside of them changed their mind." Brief of the American Association of Prolife Obstetricians and Gynecologists (AAPLOG) and the Amercian Association of Prolife Pediatricians (AAPLP) as *Amici Curiae* in Support of Respondents at 11, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902) [hereinafter AAPLOG Brief].

[122] Casey, 112 S. Ct. at 2840. Justice Stevens grants that the state has an interest in an informed and thoughtful "choice," may provide a reasonable framework for the decision, and may prefer childbirth to abortion. See id.; see also Casey, 112 S. Ct. at 2849 (Blackmun, J., concurring in part, dissenting in part).

[123] Although the joint opinion makes no mention of it, the clinics challenging the Act routinely offered women "options counseling," information about prenatal development, and, if a woman showed uncertainty, encouraged her to delay the abortion. See Brief for Respondents at 17, 68, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902).

[124] Casey, 112 S. Ct. at 2840; see also McDonnell, supra note 115, at 36–38 (describing experience of making abortion decision as painful yet "empowering" and potentially "a profoundly maturing experience"). Consider the formulation by politicians and activists who support codifying *Roe*: "I am not pro-abortion. I am pro-choice." See In Their Own Words: Transcript of Speech by Clinton Accepting Democratic Nomination, N.Y. Times, July 17, 1992, at A14; Kate Michelman, President of NARAL (National Abortion Rights Action League), The MacNeil/Lehrer Newshour, Transcript #4366 (PBS, June 29, 1992), available in LEXIS, Nexis Library, Script File.

[125] Casey, 112 S. Ct. at 2842. In his concurrence in *Thornburgh*, Justice Stevens

4. Casey's Reaffirmation of Privacy Between Wife and Husband

Casey strongly endorses women's decisional privacy within the marital relationship by striking down the husband notification provision. Here, in fact, is the only use the joint opinion explicitly and approvingly makes of the right of privacy. In rejecting the common law notion of marriage as inconsistent with present views of marriage and the nature of the Constitution, the Court quotes the operative language from *Eisenstadt*: "If the right of privacy means anything . . . ."[126] Therefore, although a woman's right of privacy does not protect her from the state's efforts to persuade her to continue her pregnancy, it does safeguard her from compelled disclosure of personal decisions to her husband. Indeed, the very women the Court repeatedly refers to as "victims,"[127] the women who may have "very good reasons" not to tell their husbands of their intention to have an abortion, still must go through the informed consent and waiting period requirements by which the state, in furthering *its* interest in potential life, may seek to persuade them to choose childbirth.

Nonetheless, in its invalidation of the husband notification provision, *Casey* provides reason to cheer pro-choice litigants' successful presentation of the circumstances of women's lives and the practical impact of abortion restrictions upon them. Making recourse to the record before it and reiterating many of the findings of the lower court, the Court observes that "there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands"—women who, if pregnant, "may have very good reasons" for not informing their

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stated that "no individual should be compelled to surrender the freedom to make [the abortion] decision for herself simply because her 'value preferences' are not shared by the majority." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 776–77 (1986), overruled in part by *Casey*. Such moral independence is protected notwithstanding the risk of "incorrect" decisions:

> In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny . . . . [T]he lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.

Id. at 781–82 (citing West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[126] Casey, 112 S. Ct. at 2830.

[127] How significant is the Court's repeated characterization of women subject to domestic violence as "victims"? Is it their vulnerability to victimization at the hands of their husbands that brings into the picture their right of privacy, or does the Court affirm more generally a right of privacy?

husbands of a decision to have an abortion.[128] The Court lifts the veil of family privacy that some feminists have argued shields violence against women in the home[129] and further distinguishes family privacy from a married pregnant woman's individual right of privacy rooted in her bodily integrity.[130]

Just as *Casey* rejects proffered state rationales for husband notification that are consistent with common law notions of marriage when marriage meant the suspension of a woman's civil existence, but that are offensive to present understandings, the Court similarly rejects any analogy with respect to consent drawn between a parent-pregnant child relationship and a husband-pregnant wife relationship.[131] Pondering just how much authority recognizing a husband's interest in a fetus might give him over a wide range of his wife's reproductive choices and behavior, the joint opinion (perhaps here reflecting in particular Justice O'Connor's voice) concludes that "[a] husband has no enforceable right to require his wife to advise him before she exercises her personal choices."[132] Thus, although *Casey* did not fully reaffirm privacy between women and the state, it reaffirmed privacy between wife and husband.

5. *The Poverty of Privacy or the Promise of Liberty?*

What, after *Casey*, is the poverty of privacy? I have argued that the virtual disappearance of privacy from the *Casey* opinion (and with it, of strict scrutiny) is significant because of the Court's nod to a state's ability to design informed choice provisions intended to persuade women to choose childbirth, so long as they pass the "undue burden" test. Therefore, the Court could hardly have echoed *Thornburgh*'s language about the intensely private nature of the decision or affirmed any right to be free of public scrutiny. Such erosion of women's privacy rights warrants concern.

At the same time, when one contrasts the joint opinion's eloquent, at

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[128] Casey, 112 S. Ct. at 2826–28.

[129] See, e.g., Schneider, supra note 57, at 974.

[130] See Casey, 112 S. Ct. at 2830.

[131] See id. at 2830–31. The fact that I report this distinction does not mean that I endorse teen consent rules.

[132] Id. at 2831. At oral argument, Justice O'Connor conducted a line of inquiry along the lines indicated in text. See Linda Greenhouse, Abortion and the Law: Court Gets Stark Arguments on Abortion, N.Y. Times, Apr. 23, 1992, at A1; see also Sandra Day O'Connor, Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1549–57 (1991) (chronicling Court's early acceptance and subsequent questioning of separate spheres ideology). I use "voice" advisedly, since Justice O'Connor has cautioned both against reading her jurisprudence as reflecting a "different voice" and against unwittingly reviving the cult of domesticity. See id. at 1558.

times poignant, articulation of the constitutional roots of women's liberty with the limited scope of that liberty as characterized by those urging the Court to overrule *Roe*—and by dissenters Chief Justice Rehnquist and Justice Scalia—one may agree with Justice Blackmun in calling the joint opinion "an act of personal courage and constitutional principle."[133]

By repeatedly stating that it adheres to *Roe*'s "essential holding"—a woman's right to make the ultimate choice concerning her pregnancy prior to viability—the joint opinion makes clear, one may reasonably conclude, that legislative attempts to recriminalize abortion subject to certain narrow exceptions (laws that might have passed muster under a rational basis test) are unconstitutional: indeed, *Casey*'s impact may already be seen in the recent invalidation of Louisiana's abortion law by the Fifth Circuit and in the Supreme Court's refusal to review the Ninth Circuit's invalidation of Guam's similarly restrictive law.[134] At the same time, the *Casey* joint opinion may have the beneficial political impact of moving opponents of legal abortion to more moderate ground, although it may be difficult to discern politically expedient posturing from genuine shifts in strategy. For instance, in seeming contradiction to its commitment to constitutional protection for prenatal life from conception and the recriminalization of abortion (with narrow exceptions), the Bush Administration indicated qualified approval of the *Casey* decision and "reasonable restrictions on abortion."[135]

With respect to court challenges to laws like the Pennsylvania Abortion Control Act, much hinges on the further application of the undue burden test, but the first indicators suggest that the Supreme Court may take its time before considering further challenges to restrictions similar to Pennsylvania's.[136] As for protecting privacy in the political arena, much will

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[133] Casey, 112 S. Ct. at 2844 (Blackmun, J., concurring in part, dissenting in part).

[134] See Court Backs Overturning of Strict Abortion Law, N.Y. Times, Sept. 23, 1992, at A25 (reporting Fifth Circuit decision in Barnes v. Moore, 970 F.2d 12 (5th Cir.), cert. denied, 1992 WL 289333 (U.S. 1992) (No. 92-588) (holding Louisiana law banning all abortions except in cases of rape, incest, or threat to woman's life "clearly unconstitutional" in light of *Casey*)); Linda Greenhouse, High Court Spurns Guam Bid to Revive Curbs on Abortion, N.Y. Times, Dec. 1, 1992, at A1 (reporting Court's denial of certiorari in Ada v. Guam, 962 F.2d 1366 (9th Cir.), cert. denied, 113 S. Ct. 633 (1992)). But see infra note 136 and accompanying text.

[135] See Maralee Schwartz & Dan Balz, Issue Passes to Politicians: Decision Is Grist for Election-Year Mill, Wash. Post, June 30, 1992, at A1 (Bush indicating he was "pleased" by decision); see also Andrew Rosenthal, Bush Tries to Recoup from Harsh Tone on "Values," N.Y. Times, Sept. 21, 1992, at A1.

[136] Justice Blackmun and others read the joint opinion as leaving the door open to successful "as applied" challenges (however costly and protracted such litigation may be). See Casey, 112 S. Ct. at 2845, 2852 n.9 (Blackmun, J., concurring in part, dissenting in part). But see Linda Greenhouse, Justices Decline to Hear Abortion Case,

depend on the success of pro-choice advocates in undertaking public education about the impact of such provisions upon the lives and health of women, particularly in states with few or only one abortion provider,[137] and in persuading voters and legislatures—through legislation like the Freedom of Choice Act—to protect decisional privacy.[138]

For the *Casey* Court, the distinction between the state precluding pregnant women from making the ultimate choice and merely persuading them against abortion is critical. Dworkin seemingly approves such a distinction, arguing that a state may seek to encourage *responsibility* in decisions about the sanctity of life, and even indicate its own view of the right decision, yet may not enforce *conformity* with the state's own view of what sanctity means.[139] Whether the joint opinion's interpretation of *Roe* is a substantial revision of that precedent or is technically correct will no doubt provoke much debate. However, it is an interpretation considerably at odds with the elaboration of *Roe* in privacy jurisprudence between *Roe* and *Casey* which this Article defends—as the Court, by partially overruling such cases as *Akron* and *Thornburgh*, acknowledged.

To the extent *Casey* is a continuation of the trajectory begun in *Harris* and *Maher*, it brings into sharp focus the need to challenge the state's asserted interest in childbirth independent of the choices and circumstances of particular women, rather than in the reproductive health of citizens[140]

N.Y. Times, Dec. 8, 1992, at A22 (discussing Court's refusal to hear Barnes v. Moore, 970 F.2d 12 (5th Cir.), cert. denied, 1992 WL 289333 (U.S. 1992) (No. 92-588) (challenging Mississippi's law)).

[137] Public opinion apparently supports the type of regulations upheld in *Casey* and on the books or under consideration in a number of other states. See, e.g., U.S.A. Today, June 30, 1992, at A1; American Political Network Abortion Report, Pennsylvania: 77% Pro-Choice, but Majority Favor Law, July 6, 1992, available in LEXIS, Nexis Library, Wires File; Richard Davis, The Supreme Court Heeds the Voice of the People, Christian Sci. Monitor, July 17, 1992, at 19 (citing May 1992 Times Mirror survey). Thirteen states have waiting periods of at least 24 hours; 26 states have mandatory counseling regarding alternatives and fetal development. See Abortion Angst, supra note 4 (citing NARAL, Who Decides? A State-by-State Review of Abortion Rights (3d ed. 1992)). NARAL's publication also indicates proposed legislation in many other states.

[138] Michelman, supra note 124.

[139] Dworkin, supra note 5, at 30 (quoting Casey, 112 S. Ct. at 2818); Dworkin, supra note 56, at 409–10. Like the *Casey* Court, Dworkin leaves open whether a waiting period could so raise costs and difficulty in securing abortion as to become an undue burden. Id. at 410.

[140] *Amici curiae* in *Casey* attempted to situate the informed consent provisions within the framework of a crisis in women's reproductive health care. See Brief of the American College of Obstetricians and Gynecologists, the American Medical Women's Association, the American Psychiatric Association, the American Public Health Association, the Association of Reproductive Health Professionals, the National League for Nursing, and the National Medical Association as *Amici Curiae* in Support of the

and the health of prenatal life pregnant women choose to carry to term. As Reva Siegel argues, "[s]tate action on behalf of the fetus in utero must find its constitutional bearings, and constraints, in the community's relation to the citizen in whom unborn life resides."[141] In contrast to the feminist proposals considered below, this Article urges that privacy should feature prominently in explicating that relation.

III. FEMINIST CRITIQUES OF THE RIGHT OF PRIVACY

The origins of privacy jurisprudence, in such notions as the "right to be let alone" and the image of man in his castle,[142] suggest certain avenues for feminist critique. Such imagery evokes for some the history of public toleration of domestic violence and sexual assault in the home,[143] leading such feminists as Catharine MacKinnon to call the right to privacy the right of men to abuse women in private.[144] Women, she argues, are deprived of precisely what privacy secures for men: an inviolate personality.[145] From this standpoint, one might well regard such privacy as an illusion for women.[146]

Yet the response to that problem need not be an abandonment of privacy's goals of personhood and autonomy; to the contrary, women need privacy all the more.[147] Consider, for example, the role that recognition of the danger which domestic violence poses to millions of married women played in the *Casey* joint opinion's affirmance of women's decisional privacy with respect to their husbands. Indeed, precisely in the context of domestic violence, Elizabeth Schneider argues for the positive potential of privacy understood as personhood, liberty, freedom, and autonomy.[148] As Dorothy Roberts has written in defense of privacy rights for women of color, "affirming Black women's constitutional claim to personhood is particularly important because these women historically have been denied

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Petitioners at 10–13, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902). On women's reproductive health needs, see Rutherford, supra note 91, at 283–84 (describing proposed Women's Health Equity Act).

[141] Siegel, supra note 27, at 380.

[142] See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195, 205, 220 (1890); see also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[143] See Schneider, supra note 57, at 974.

[144] MacKinnon, supra note 13, at 101–02.

[145] Id.

[146] See supra text accompanying notes 86–93 for a discussion of funding cases.

[147] See Allen, supra note 25, at 180.

[148] See Schneider, supra note 57, at 975, 994–98.

the dignity of their full humanity and identity."[149] Moreover, both Roberts and Schneider argue for affirmative governmental obligations or actions to help women secure what privacy protects.[150]

As noted above, many legal commentators, including feminists, have criticized the Supreme Court's grounding of the right to choose abortion in privacy instead of equality.[151] This Article does not argue against an equality analysis, but instead considers a different strand of feminist critique which echoes some of the above themes but which emphasizes the atomistic nature of privacy. This critique faults privacy for failing to recognize the connectedness of women's lives by casting abortion as an adversarial dilemma of competing rights rather than conflicting responsibilities.[152] For example, Ruth Colker charges that feminist organizations which make autonomy arguments in abortion litigation are really making atomistic privacy arguments.[153] Robin West argues that pro-choice litigants' embrace of the logic of rights reinforces the association of abortion with

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[149] Roberts, supra note 91, at 1468. Citing Roberts' work, the NAACP Brief urged the Court that: "[f]or poor women, and particularly for poor African American women, the right to privacy in matters of body and reproduction—a right that was trammeled with state sanction during centuries of slavery—is fundamental to notions of freedom and liberty." Brief for the NAACP Legal Defense and Educational Fund, Inc., and Other Organizations as *Amici Curiae* in Support of Planned Parenthood of Southeastern Pennsylvania at 9, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902); see also Patricia J. Williams, Alchemical Notes: Reconstructed Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 414 (1987) (on role of rights assertion in finding the self).

[150] See Roberts, supra note 91, at 1476–81; Schneider, supra note 57, at 994–98; supra note 95 and accompanying text.

[151] See, e.g., Olsen, supra note 82, at 117–26 (characterizing sexual equality analysis as main alternative to privacy and describing shift by commentators and some members of Court to equality analysis). For an often-cited explication of the sex equality argument for abortion rights, see Law, supra note 32. For more recent statements, see Tribe, supra note 24, § 15-10, at 1353–54; Siegel, supra note 27; see also MacKinnon, supra note 13, and, for a fuller exposition, Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991). For the influence of the sex equality argument on the *Casey* joint opinion, where it is more apparent than in *Roe*, see supra note 12 and accompanying text.

[152] See Carol Gilligan, In a Different Voice 64–105 (1982). Gilligan reported that the women in her study of the abortion decision saw a "justice" or "rights" approach "as a distortion and a deformation of the situation" because it leaves out issues of connection and attachment. See Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buff. L. Rev. 11, 39 (1985). She found instead that women asked "in effect, whether it is responsible or irresponsible, moral or immoral, to sustain and deepen an attachment under circumstances in which [they] cannot be, for whatever reason, responsible, and in which [they] cannot exercise care." Id. at 38; see also Note, Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy, 103 Harv. L. Rev. 1325 (1990).

[153] For responses to Colker, see Burns, supra note 23; Naomi R. Cahn, Defining Feminist Litigation, 14 Harv. Women's L.J. 1 (1991).

irresponsibility.[154] She has called for "public-regarding" arguments explaining the responsibilities that the right to abortion entails.[155]

Both Colker and West are motivated by the desire to combat images of women who seek abortion as selfish and irresponsible and to persuade the public that women deserve reproductive freedom.[156] In assessing their proposals, I will argue that both undervalue privacy as autonomy and liberty of conscience and that privacy can capture the notion of women's responsible moral choice while protecting autonomy. Although both proposals were written in the wake of *Webster* but prior to *Casey*, it is useful to think about them in light of, if not as alternatives to, a "revised *Roe*."

A. Colker's Communitarian Critique

1. Colker's Conception of Feminist Litigation

Describing herself as a "religious feminist" interested in dialogue, Colker, in recent articles, asks whether feminists have been making truly feminist arguments in litigation concerning reproductive freedom.[157] She argues that the traditional pro-choice argument about individual autonomy and privacy is not the best *feminist* argument that feminists can make.[158] Such argument gives abortion opponents the higher moral ground, Colker claims, because they appear to be concerned about social welfare, not just liberal individualism. She urges feminists to make more communitarian

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[154] West, supra note 17, at 81–82; see infra text accompanying notes 212–18.

[155] West, supra note 17, at 84.

[156] See Colker, Reply to Sarah Burns, 13 Harv. Women's L.J. 207, 207 n.3; West, supra note 17, at 82.

[157] Colker, Feminist Litigation, supra note 16, at 137–42; see also Colker, Feminism, Theology, and Abortion, supra note 16, at 1046–47. Colker offers her ideas on abortion in *Feminism, Theology, and Abortion* as tentative and not fully worked out. See id. at 1074. I draw on that article mainly to fill in the content of similar ideas in *Feminist Litigation*.

[158] Colker, Feminist Litigation, supra note 16, at 165–68. While Colker does not think that a convincing non-atomistic privacy argument has yet been made, she does not rule it out as a possibility. See id. at 181–82 n.136. In fact, Colker has since indicated no objection to a privacy argument made in conjunction with an equal protection argument, since a "liberty/privacy argument would emphasize the right of each individual to make informed decisions about appropriate medical treatment," and seems particularly suited to such issues as access to RU 486. See Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 Duke L.J. 324, 324 n.1 [hereinafter Colker, Equal Protection]; cf. Ruth Colker, Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy, 1 Law & Ineq. J. 191 (1983) (describing failure of privacy doctrine to protect against abuses of women's sexuality).

arguments that are "pro-woman, viewing women as interconnected members of society, rather than pro-choice, viewing each woman as an atomized individual in society."[159]

Colker suggests that a good faith, "pro-woman" argument about abortion must include both respect for the well-being of women and respect for the value of prenatal life.[160] With respect to the first prong, based on her study of *Webster*, Colker sweepingly claims that, with the exception of *amicus* briefs filed by women of color and on behalf of juvenile women, a focus on women's well-being has been obscured by the pro-choice focus on privacy.[161] Indeed, she claims that "[t]he *Roe* privacy argument easily allowed the result in *Harris v. McRae* to occur because it was embedded in an individualistic rather than a communitarian framework."[162] To satisfy the second prong, Colker puzzlingly suggests that we "let in" the fetus to the argument by showing that women value prenatal life.[163] Thus, while acknowledging that a liberty of conscience defense of privacy is an attempt to "salvage it" from being atomistic, she concludes that in order to make such a defense credible, we need a "communitarian, woman-centered perspective that considers a woman's responsibility to her fetus in a nonatomistic way."[164] In attempting to move away from a competing rights analysis that pits the rights of a woman against the rights of a fetus, Colker also believes that her alternative approach will "persuade people that pregnant women are the people most likely to protect life in all of its forms" and hence that "[i]t is they . . . who deserve decision-making responsibility for reproductive choices."[165]

Colker seems to envision that feminists should be open to talking about

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[159] Colker, Feminist Litigation, supra note 16, at 167. Colker's vision of feminism as dialogic and of women as interconnected does not invoke Gilligan, although McDonnell, upon whom Colker relies, does. See McDonnell, supra note 115, at 37–38. Instead, Colker offers insights from religious sources. See Colker, Feminist Litigation, supra note 16, at 142–44; see also Colker, Feminism, Theology, and Abortion, supra note 16, at 1011–30.

[160] Colker, Feminist Litigation, supra note 16, at 161. While Colker advocates her two-pronged argument to defend a right to abortion, a number of opponents of the rhetoric of choice who favor dramatically restricting or eliminating abortion insist upon the harmony of protecting women and protecting potential life. Consider, for example, a recent newspaper advertisement, "A New American Compact: Caring About Women, Caring for the Unborn," signed by a group of academics, politicians, and Feminists for Life of America. See N.Y. Times, July 14, 1992, at A23.

[161] Colker, Feminist Litigation, supra note 16, at 174–78.

[162] Id. at 177.

[163] Id. at 180–82.

[164] Id. at 181. The context of this statement is Colker's criticism of the appellee's use of cases striking down regulation of pregnant women's conduct during pregnancy.

[165] Colker, supra note 156, at 213.

valuing prenatal life, but that the burden of valuing such life should rest with the state. Colker also insists that the state respect the well-being of women and finds public funding restrictions to be disrespectful of women.[166] Similarly, Colker would support a stronger government commitment to sex education, contraception availability, and emphasis upon men's responsibility to use contraception. In essence, Colker's proposed argument against abortion restrictions is that, while the state has good reason to value prenatal life, at this point in our history we cannot trust the state adequately to respect the well-being of women.[167] Her argument against state regulation, and indeed her defense of abortion, is contingent—she suggests that when the state demonstrates a consistent record of respect for women, we can delegate to it the power to protect prenatal life.[168] Colker's proposed argument would be a group-based equality argument that focuses on the negative impact of the restriction of abortion on the lives of women, particularly poor women, women of color, and teenaged women.[169]

In subsequent elaboration, Colker has proposed a "reproductive health perspective" that "considers the full consequences of a woman's reproductive capacity and sexual behavior" and "the larger socioeconomic circumstances surrounding pregnancy."[170] Granting the importance of focusing on "reproductive health" and on particularly vulnerable groups such as teenaged women, there are still some unresolved questions and troubling implications posed by Colker's "pro-woman," rather than "pro-choice," argument, with its twin notions of women's well-being and valuing fetal life. They are of particular concern in view of *Casey*'s declarations that a state may advance its interest in protecting potential life throughout pregnancy so long as it does not impose undue burdens.

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[166] See Colker, Feminist Litigation, supra note 16, at 146–48, 165.

[167] See id. at 165.

[168] Id. On contingency, compare Alison Jaggar, Abortion and a Woman's Right to Decide, 5 Phil. F. 347 (1974) with Petchesky, supra note 82, at 399–401.

[169] See Colker, Feminist Litigation, supra note 16, at 174–78. In deriving her group-based equality argument, Colker invokes Zillah Eisenstein's argument that feminist theory is implicitly group-based and thus cannot be embedded in liberal individualism because it necessarily recognizes that women are a sex-class. See id. at 157 (citing Zillah Eisenstein, The Radical Future of Liberal Feminism (1981)).

[170] Colker, Equal Protection, supra note 158, at 329. According to Colker, such a perspective would discuss

> the nature of sexual activity (e.g., whether it is consensual), the use and availability of contraceptives, the availability of pre- and post-natal care, the socioeconomic and physical consequences of motherhood, the socioeconomic status and physical health of the child that is born, the availability of adoption, as well as the availability and consequences of abortion.

Id.

2. Questions About Women's Well-Being and Responsibilities

First, Colker seeks to offer an "anti-essentialist" perspective,[171] but is her vision of women, of feminism and feminist argument, and of the value of dialogue, an attractive or appropriate vision for all women? Her own aspirational view of women, inspired by theology, is of women having "responsibilities in this world to nurture love and life," although such responsibilities must be allocated by society respectfully.[172] As "connected selves," she argues, "we have no claim to act in ways to protect our bodily integrity in isolation from society."[173] In turn, women's right to abortion is tied to their need to protect their own well-being. With respect to feminist argument about abortion, she faults a failure to acknowledge women's interconnected responsibilities, including a pregnant woman's responsibilities to her fetus, or, evocative of the *Casey* joint opinion, to acknowledge the consequences of a woman's decision upon others. By apparently rejecting an autonomy-based defense of abortion, Colker inadequately values the vision of feminism as entailing liberty of conscience, self-determination, and meaningful choice about reproduction. As Sarah Burns points out, "feminism is neither necessarily a celebration nor a rejection of women's cultures and norms. It is, however, always a rejection of women's subjugation."[174] Second, who defines such notions as responsibility and interconnected responsibilities and what is their content? Colker does not offer a general account of a woman's obligation to her fetus, but faults pro-choice feminists' reliance on arguments that our constitutional framework does not force on women physical subordination and exceptional samaritanism with respect to the fetus. She claims that such feminists fail to recognize "that a pregnant woman may have obligations to others, including [her] fetus" and, indeed, that "we may want to live in a world in which we have interconnected responsibilities to each other."[175]

But should such responsibilities be legally enforced? Although Colker

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[171] See id. at 325–28.

[172] Colker, Feminism, Theology, and Abortion, supra note 16, at 1050.

[173] Id.

[174] Burns, supra note 23, at 195.

[175] Colker, Feminist Litigation, supra note 16, at 180–81. Colker is criticizing the *amicus* brief of NOW as well as the *amicus* brief of Catholics for a Free Choice. In fact, it has been argued that placing abortion law in the context of the law of samaritanism is one of the most powerful arguments against state restriction of abortion. See Donald Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979) (acknowledging debt to Judith Jarvis Thomson, A Defense of Abortion, 1 Phil. & Pub. Aff. 47 (1971)).

would insist on fair allocation of the burden of valuing life, would recognition of interconnected responsibilities put women at risk of uneven application or enforcement of such responsibilities? While such responsibilities may remain merely hortatory for some people, women, even with access to abortifacient contraception, depend on medical assistance to terminate pregnancy. Thus, women might be compelled to be Good Samaritans to fetuses, while such self-sacrifice would not automatically be required of others.[176] *Casey* suggests the continuing power of arguments premised on bodily integrity and on women's liberty to choose precisely because of the physical impact of pregnancy upon women.[177] While Colker insists that women may not be disproportionately burdened, she does not accept as a general point a person's right to bodily integrity "in isolation from society."[178] As discussed below, Colker's communitarian notions of well-being and valuing life lead to a goal of preserving fetal life so long as women are free to terminate pregnancy.

Third, would Colker's view of women's well-being sufficiently protect decisional autonomy? She supports more regulation of abortion than the *Roe* Court permitted. Colker faults *Roe* and *Akron* for adopting an overly medical view of women's health and not permitting states to protect such aspects of women's well-being as "the conflicting emotional and moral issues that a woman must resolve in deciding whether to have an abortion."[179] Noting women's reports of adverse psychological consequences due to abortion—reports similar to those cited in some of the briefs before the *Casey* court[180]—and concluding that women need "to be confronted with conflicting opinions about the abortion decision and to have a safe place in which to consider them," Colker believes the Court should "encourage states to develop programs that could improve a woman's deliberative process about abortion."[181] But Colker's vision of desirable

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[176] See Suzanna Sherry, Women's Virtue, 63 Tul. L. Rev. 1591 (1989); Tribe, supra note 24, § 15-10, at 1354–55; Tribe, supra note 35, at 130–35. I have elsewhere posited that one might argue for a duty to rescue while also defending abortion rights. See McClain, supra note 14, at 1256–62.

[177] See supra text accompanying notes 44–50, 97–103.

[178] Colker, Feminism, Theology, and Abortion, supra note 16, at 1050.

[179] Id. at 1062.

[180] See supra note 115 and accompanying text. Colker is critical of the *Webster amicus* brief filed by Feminists for Life of America (akin to its brief filed in *Casey*) for its stereotypes of women and because "the brief seems to assume that all women would choose to bring their pregnancies to term if their consciousnesses were raised," but nonetheless takes seriously women's reports of feeling pressured in their decisions and lacking adequate information. Colker, Feminist Litigation, supra note 16, at 170–72; see also McDonnell, supra note 115, at 33–41.

[181] Colker, Feminism, Theology, and Abortion, supra note 16, at 1066–67; see id.

counseling is not the mandatory informed consent and waiting period provisions upheld in *Casey*. To the contrary, Colker opposes such provisions because they are coercive and intended to eliminate abortion rather than to further reflective choice.[182] Colker's picture of a desirable counseling scheme is closer to what Dworkin imagines the *Casey* court approves—a process by which women are encouraged to know philosophic arguments. Colker suggests requiring all health care providers to make available voluntary counseling sessions for pregnant women and their partners, whether the women plan to continue or to terminate their pregnancies, to be run by trained ethicists, in which the issues considered would include, inter alia, "the meaning or value of the fetus' life."[183] On her aspirational view of feminism and women's well-being, she notes the risks of a wrong decision, and suggests: "Rather than simply acquiescing to any abortion decision made by a woman, we might want to consider how we can improve her qualitative judgment."[184] Such a notion may indeed be appropriate among friends or among people who consider themselves linked in a community; guaranteeing decisional privacy with respect to the state does not preclude such evaluation and consultation. In the current climate, however, one must express serious reservations about the identity of the "we" and ask whether government involvement is necessary or could transcend the persuasion model upheld in *Casey*.

3. Questions About "Valuing Life"

What does valuing prenatal life mean and how might the state value it? Is it merely what Dworkin calls respect for the "intrinsic value of human life"?[185] How is it related to the well-being of women?[186] Colker contends that within a more communitarian framework, we would not have to balance women's right to choose with the state's interest in preserving fetal

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at 1063–66 (citing Reardon, supra note 115, at 1–26, 138–41).

[182] See personal correspondence with Ruth Colker (Aug. 17, 1992) (on file with author); see also Brief of *Amici Curiae* National Black Women's Health Project [et al.], Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992) (No. 91-1953) (Colker identified as attorney for *amici curiae*; on file with author).

[183] Colker, Feminism, Theology, and Abortion, supra note 16, at 1067.

[184] Id. at 1063. For the expression of similar concern with establishing a supportive community within which women can explore issues relating to the abortion decision, see McDonnell, supra note 115, at 38–41.

[185] Dworkin, supra note 56, at 396–97.

[186] With respect to adolescents, Colker properly condemns as irresponsible governmental policy "blindly encouraging childbirth among the group that can ill afford unintended and unwanted pregnancies." Colker, Equal Protection, supra note 158, at 364.

life. Instead, she suggests that "we might consider the ways in which the state could protect *both* the women's well-being and the state's interest in preserving prenatal life, rather than incorrectly assume that the woman's choice of abortion has no effect on society or others."[187] Here, again, one is reminded of the *Casey* joint opinion's attention to the effects of a woman's decision upon others, including the consequences for the fetus.[188] The critical point in Colker's argument is that abortion can be separated morally (if not practically) into a woman's right no longer to be pregnant, which Colker grants, and a woman's right to insist upon the termination of the potential life of a fetus, which Colker insists a woman has no moral right to do.[189] She suggests women seek abortion to terminate pregnancy and to value their own lives, not because they are "anti-fetal life," and that such a termination decision "cannot be grounded in disrespect or disregard for the life of the fetus."[190] Under current science, the implications of such splitting would be confined largely to the post-viability context, although she speculates as to how in the future such a split might result in preserving fetal life while permitting abortion at earlier stages in pregnancy.[191]

Although Colker splits the abortion right to support her claim that there may be ways to permit women to terminate pregnancy (thus promoting women's well-being) *and* to preserve prenatal life (valuing life), one must recognize that opponents of legal abortion use the technological possibility of separating "the unborn child" from "any particular woman" in order to advance the claim that neither the viability nor the birth line is of any significance for "personhood" and that the unborn child is as much a person in the womb as outside of it.[192] At its most extreme, such logic makes use of technology such as embryo transfer and surrogate motherhood to demonstrate "the fundamental biological independence of the newly conceived child from any particular woman" and treats intrauterine gestation

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[187] Colker, Feminist Litigation, supra note 16, at 166–67.

[188] See supra text accompanying note 102.

[189] See Colker, Feminist Litigation, supra note 16, at 166. Laurence Tribe has also explored the splitting of abortion into the right no longer to be pregnant and the right to terminate the life of the fetus. See Tribe, supra note 35, at 222–28. But see Estrich & Sullivan, supra note 49, at 146 ("By definition, [a pregnant woman's] right is to control her bodily autonomy *even at the expense of potential human life*.").

[190] Colker, Feminism, Theology, and Abortion, supra note 16, at 1055, 1059.

[191] See id. at 1055–60; Colker, Feminist Litigation, supra note 16, at 166–67; see also Tribe, supra note 35, at 221–23 (discussing impact of reproductive technology on ideas of fetal viability).

[192] See Brief of Catholics United for Life [et al.] as *Amici Curiae* in Support of Respondents and Cross-Petitioners at 18–19, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902).

as "merely an intermediate stage subject to technical manipulation regarding both its duration and the identity of the woman who bears the child."[193]

Would a vision of interconnected responsibilities support a view that prenatal life is a creature or ward of the state so that, from a communitarian perspective, the state's interest in preserving potential life justifies preserving and raising even pre-viable prenatal life?[194] Should or could artificial wombs be developed or volunteer women be recruited as incubators so that a pregnant woman who did not wish to carry a fetus to term would have to surrender even a pre-viable conceptus or fetus for incubation elsewhere?[195] At the risk of sounding irreverent, one might well ask, "whose prenatal life is it, anyway?"[196] Would the state's interest justify developing and insisting on pre-viability abortion methods designed to preserve the fetus, even if such methods created greater health risks and costs for a wom-

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[193] Id.; cf. Martha Albertson Fineman, Feminist Theory in Law: The Difference It Makes, 2 Colum. J. Gender & L. 1, 2 n.3 (1992) (describing, as example of technological elimination of biological differences between women and men, reports on technology that would alter biological capacities of men so they could carry fetus).

[194] In Planned Parenthood v. Danforth, 428 U.S. 52, 62 n.2 (1976), the Court declined (on standing grounds) to decide the constitutionality of a statutory provision declaring an infant who survives "an attempted abortion which was not performed to save the life or health of the mother" an abandoned ward of the state and that the mother (or father, if he consented) "shall have no parental rights or obligations whatsoever relating to such infant."

[195] In his discussion of splitting the abortion right, Tribe acknowledges that the prospect of artificial wombs "raises justified fears about a Brave New World of state-run baby farms, including the specter of state control over the disposition of fetuses that are not wanted by their biological parents but that develop under state command into viable infants, some of them perhaps badly handicapped." Tribe, supra note 35, at 227.

Anti-abortion groups have increasingly sought alliances with groups representing people with disabilities, playing on the ambivalence that some persons with disabilities feel toward selective abortion in the case of a fetus with disabilities. See Steven A. Holmes, Abortion Issue Divides Advocates for Disabled, N.Y. Times, July 4, 1991, at A11.

[196] Consider Davis v. Davis, No. 92-34, 1992 WL 115574 (Tenn. June 1, 1992), in which the Tennessee Supreme Court protected the genetic father from the genetic mother's attempt to donate frozen pre-embryos to childless couples. The Court concluded, in view of the "profound impact" such donation would have upon the gamete providers who would be, at least, genetic parents, that the progenitors should retain "sole decisional authority as to whether the process of attempting to gestate these preembryos should continue." Id. at 15. The Court held that, in case of conflict, "ordinarily, the party wishing to avoid procreation should prevail." Id. at 17. The Court distinguished Planned Parenthood v. Danforth, 428 U.S. 52 (1976), because it involved a pregnancy inside the woman's body. Id. at 14. Colker disagrees with the *Davis* decision, faulting the court's failure to consider the physical effort and pain the woman endured. See personal correspondence with Ruth Colker (Aug. 17, 1992) (on file with author). Obviously, arguing against the splitting that Colker proposes raises questions about why women, and not men, should have a right not to be the source of children if they (voluntarily) engage in sex, if the differential of pregnancy were eliminated.

an?[197] Under a communitarian perspective, who would be expected to care for the children developed from such fetuses? Colker does not appear to advocate government rearing of children nor does she view adoption as a "panacea for the need for abortion."[198] What, then, is the practical meaning and scope of valuing prenatal life? And may women do so without posing dangers to their self-determination?

The notion of decisional privacy in bearing or begetting a child does not seem to support the state acting as a repository for prenatal life and children that individuals have decided they cannot or do not wish to bear or parent. Ironically, a feminism rooted in a belief in relationship and interconnectedness seemingly would make the prenatal life the property of the entire community and not a part of the woman.

In *Griswold*, the Court invoked such cases as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, in which the Court held that parents have the right to direct their children's education and that the government has no power to attempt to standardize its children or to foster a homogeneous people.[199] Tribe suggests that those cases, also invoked in *Casey* as establishing "that the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood,"[200] are the immediate ancestors of the liberty invoked by women when they insist on a right not to be made mothers against their will.[201] Tribe suggests that such precedents mean that the state cannot shackle individuals with self-defining decisions and therefore women cannot be made "mere instrumentalities of the state."[202] If a woman is forced to surrender prenatal life, a part of herself, for societal adoption is she not made such an instrumentality?

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[197] Cf. Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding provisions requiring that second physician be present at abortion of viable fetus and take reasonable steps to provide care to "child born as a result of the abortion" and forbidding use of abortion procedure fatal to viable fetus unless alternative procedures posed greater risk to health of woman). In discussing such regulations with respect to pre-viable prenatal life, Estrich and Sullivan argue that they would only increase the cost of abortion without any countervailing benefits to the fetus other than discouraging abortion. See Estrich & Sullivan, supra note 49, at 147.

[198] Colker, Equal Protection, supra note 158, at 351. Contrast a statement by anti-abortion activist Betsy Hart on *Larry King Live* that there are two million childless couples waiting to adopt children, including "minority" babies and babies with Down's Syndrome. See Larry King Live, The Republican Party's Position on Abortion, Transcript #613 (CNN, July 24, 1992), available in LEXIS, Nexis Library, Script File.

[199] Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (citing Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

[200] Casey, 112 S. Ct. at 2806.

[201] See Tribe, supra note 35, at 92–93; see also Rubenfeld, supra note 24, at 741–44.

[202] Tribe, supra note 35, at 102–04 (citing Rubenfeld, supra note 24, at 788, 790).

Finally, how contingent is the abortion right?[203] Should the state's interest in valuing life take the form of independently "bearing" fetuses and rearing children or of removing socioeconomic and other constraints causing women to choose abortion rather than childbirth? As Colker elaborates it, a reproductive health perspective, focusing on why pregnancy is unwanted, would seek to meet women's needs connected with choosing to continue pregnancy and to raise children.[204] Considered in this light, the informed consent scheme upheld in *Casey* seeks to inform women of public and private agencies ready to help them continue their pregnancies and to raise their children, or to give them up for adoption.[205]

But would Colker's notion of balancing women's well-being and fetal life support restrictions on women's right to choose abortion, either if government makes a commitment to address the socioeconomic constraints making particular pregnancies and childrearing unwanted, or if government or citizens (or indeed a woman's intimate associates)[206] stood ready to assume the burdens of childrearing?[207]

Colker is correct, and not alone, in calling for a reproductive health perspective.[208] Her insistence on governmental respect for the well-being of women becomes especially important in light of *Casey*'s protection of state "persuasion" of women to continue pregnancies. Indeed, in a world of a revised *Roe*, one could well understand that some advocates of reproductive freedom might look longingly at certain European abortion laws which, although expressing the state's respect for life and informing pregnant women of alternatives to abortion (including greater state support for families than here in the United States), nonetheless fund abortions and do not exclude them from public facilities. Yet Colker's notions of well-being and valuing life, and of women's interconnected responsibilities,

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[203] See, e.g., supra note 168 and accompanying text. A full analysis of this question, and feminist debate on this issue, is outside the scope of this Article.

[204] See Colker, Equal Protection, supra note 158, at 328–31.

[205] See Casey, 112 S. Ct. at 2822, 2824; see also NARAL, Who Decides? A State-by-State Review of Abortion Rights (3d ed. 1992) (listing proposed informed consent legislation).

[206] Cf. Casey, 112 S. Ct. at 2870 (Rehnquist, C.J., dissenting in part) (in enacting husband notification requirement, state could rationally believe that resulting discussion could obviate perceived problems such as economic constraints or husband's previously expressed opposition to having children).

[207] Consider an unsuccessful legislative proposal in Wyoming to fund a pregnant woman's expenses provided she first indicate intent to turn her child over for adoption, and requiring that she reimburse the state if she later decides to keep the child. See NARAL, supra note 205, at 140.

[208] See, e.g., Rutherford, supra note 91 (focusing on concerns of African-American women).

coupled with her criticism of autonomy and of traditional pro-choice arguments about self-determination, may not offer adequate limiting principles to her perspective.

B. West's Notion of Abortion as a Facet of "Reproductive Responsibility": From "Taking Rights Seriously" to "Taking Responsibilities Seriously"

1. Responsibility Versus Rights

In *Foreword: Taking Freedom Seriously*, West casts abortion as a facet of "reproductive responsibility." She claims that reproductive freedom can best be justified and secured by a responsibility-based argument that more accurately reflects the experience of women than does a rights-based approach.[209] Written in the wake of *Webster* and *Hodgson v. Minnesota*[210] and inspired by poet and former Czechoslovakian President Vaclav Havel's writings about freedom, which West claims present a responsibility-based vision of liberalism, her proposed shift to responsibility is in part strategic and therefore assumes shrinking judicial protection of individual rights and a need to secure freedom through legislatures. If the *Casey* dissenters had secured the one more vote needed to leave reproductive freedom entirely to the realm of "citizens trying to persuade each other and then voting," as Scalia proposes it should be,[211] then West's proposal would have an even greater urgency. Nevertheless, in light of *Casey*'s recasting of the right of privacy as not insulating a woman from state persuasions, certain aspects of her proposal retain considerable interest, particularly her claims concerning declining public support for rights because of their insulation of the right-holder and her invitation to focus on societal failures as reasons why women need abortions.

A rights approach, West argues, insulates the abortion decision from public scrutiny. Doing so, she contends, has a cost: "it obfuscates the moral quality of most abortion decisions."[212] She claims:

The overriding "insulating" logic of rights, generally embraced

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[209] West, supra note 17, at 84. West states that such an argument "would justify rather than supplant the rights-based claim of *Roe*." Id. Elsewhere I have developed this critique of West's responsibility-based justification of reproductive freedom. See McClain, supra note 14, at 1244–56.

[210] 110 S. Ct. 2926 (1990).

[211] Casey, 112 S. Ct. at 2873 (Scalia, J., concurring in part, dissenting in part).

[212] West, supra note 17, at 81.

> by the pro-choice movement, that rights insulate conduct and the actor from scrutiny so that they can better protect the "worst of us" as well as the "worst in us" may reinforce the damaging misperception that the demand for abortion reflects the irresponsible worst of us and worst within us.[213]

In contrast, under a rights *and* responsibility analysis, support for reproductive freedom would "rest on the demonstrated capacity of pregnant women to decide whether to carry a fetus [to term] or to abort responsibly"; the "moral quality of the underlying decision" is what "insulates [it] from scrutiny."[214]

Under West's proposed alternative to traditional "atomistic" privacy talk, "women need the freedom to make reproductive decisions, not merely to vindicate a right to be left alone but often to strengthen ties to others [and] to plan responsibly," for example, to "have a family for which they can provide, to pursue professional or work commitments made to the outside world, or to continue supporting their families or communities."[215] West views those reasons, among others, as removing the decision from "an egoistic private vacuum."[216] She claims that "[w]hatever the reason, the decision to abort is almost invariably made within a web of interlocking, competing, and often irreconcilable responsibilities and commitments."[217] Furthermore, she distinguishes abortion from murder, not on the

> nominal and question-begging difference between a 'fetus' and a 'baby,' but rather in the moral quality of the underlying decision . . . . Unlike the homicidal decision to take another's life, the decision to abort is *more often than not* a morally responsible decision. The abortion decision *typically* rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that a new life will be borne only if it will be nurtured and loved.[218]

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[213] Id. at 82. Although she offers no examples, perhaps West has in mind Justice Stevens' point regarding protecting individual liberty despite the risk of "incorrect decisions." See supra note 125. I have argued elsewhere that West's critique of pro-choice litigants (she cites NARAL as an exception) is unfair and belied by the history of abortion litigation; I will not repeat that criticism here. See McClain, supra note 14, at 1246–51. However, the *Casey* litigation offers an illustration of painstaking effort to present empirical evidence of the practical impact of abortion regulations upon the lives of women. See supra text accompanying notes 97–103, 126–32.

[214] West, supra note 17, at 82–83.

[215] Id. at 84–85.

[216] Id. at 85.

[217] Id.

[218] Id. at 83 (emphasis added) (citing, inter alia, Aida Torres & Jacqueline D. Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169 (1988)). In

In West's analysis of reproductive freedom, the concept of responsibility appears to mean autonomy in the sense of self-determination and moral independence. Thus, West states that "support for expanded reproductive freedom should rest on the claim that only by accepting that responsibility to make those judgments do women manifest their freedom to pursue their authentically chosen and desired life goals."[219] As argued in part II, defenders of the right to privacy, far from justifying privacy because it isolates the individual for the sake of isolation, often speak the language of moral responsibility and self-determination. Notwithstanding West's charge, pro-choice litigants have focused on women's moral independence, not as a license to irresponsibility but as tied to their personhood and full participation in society, an association strongly reflected in the *Casey* joint opinion.[220] It is not clear that West's responsibility-based analysis accomplishes anything that notions of rights, autonomy, and privacy do not. To the extent it does, given the growing prominence of such notions of responsibility and irresponsibility in discussions about sex, the family, abortion, and social welfare, it may prove difficult to cabin and may endanger women's reproductive freedom.[221]

2. *Responsibility, "Insulation," and the "Vicissitudes" of Public Opinion*

Under West's responsibility and rights analysis, "[l]ike all freedoms, [reproductive freedom's] security would rest on citizens' understanding that it is deserved, rather than on the legalistic ground that it is a right simply possessed regardless of the contrary whims or convictions of the commu-

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support, West cites Gilligan's assertion that women contemplate abortion as posing its moral issues in terms of responsibility, not rights. Id. (citing Gilligan, supra note 152, at 64–105). But a number of the 29 women who formed the basis of Gilligan's study reported that they viewed abortion as murder, yet nonetheless felt compelled to have an abortion because of their own circumstances. See Gilligan, supra note 152, at 85, 125. For an interpretation of the phenomenon of women viewing abortion in general as murder, while justifying it in their own particular cases, see Petchesky, supra note 82, at 368–79; infra notes 241–46 and accompanying text.

[219] West, supra note 17, at 83.

[220] See Casey, 112 S. Ct. at 2807–09; supra notes 30, 200.

[221] I have argued elsewhere that West's suggestions that society be invited to focus on the moral quality of women's abortion decisions, as well as to accept a collective responsibility for unwanted pregnancy, raise a number of potential problems—both as to who is the proper locus of decision making and whether a woman will be required to satisfy some test to show that she truly faces irreconcilable responsibilities. See McClain, supra note 14, at 1251–54.

nity."[222] I have elsewhere argued that West does not clearly indicate how such a demonstration would be made: whether by reading into the legislative record empirical or moral literature about women's decision making or by evaluating women's decisions on a case-by-case basis.[223] In either case, West's argument that reproductive freedom would be better defended by inviting society to focus on the moral quality of a woman's abortion decision overlooks the highly controversial nature of the abortion issue and the role of people's convictions about family, religion, and the like in their opposition to abortion.[224] Furthermore, it does not grapple with the tenacity in the Court's abortion jurisprudence—only enhanced by *Casey*'s sanction of state persuasion—of the concept of the state's interest in protecting potential life and in "normal childbirth" nor with the unceasing efforts of state legislatures to further that interest.

Thus, West's argument that the true distinction between abortion and murder lies not in the "question-begging distinction between a 'fetus' and a 'baby,'" but in the moral quality of women's decisions, invites two immediate criticisms. First, West underestimates the role of a belief in "fetal personhood" held by a certain politically mobilized segment of the population (manifest in the Republican platform[225]) as well as the strength of a more general sympathy for the particular vulnerability of prenatal life found in many who oppose abortion.[226] In the face of a belief in fetal personhood, it seems doubtful that any argument about women's reasons for needing an abortion will persuade those who, for reasons often deeply rooted in religious faith, believe abortion is murder[227] and that a pregnant woman is a "mother" killing her "baby."[228] Further, even under a

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[222] West, supra note 17, at 83.

[223] See McClain, supra note 14, at 1252–53.

[224] See infra text accompanying notes 231–39.

[225] See David E. Rosenbaum, The Platform: Party Takes More Conservative Stance Than Bush, N.Y. Times, Aug. 14, 1992, at A16.

[226] See Petchesky, supra note 82, at 241–76, 335–45 (describing role of religious belief in "fetal personhood" in opposition to abortion); see also Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1585 (1991) (arguing public has bonded with fetus).

[227] Of course, a privacy argument faces a similar problem here.

[228] A survey of newspaper accounts of the protests staged by Operation Rescue not only at the abortion clinic in Wichita but in a number of cities across the country during August 1991 leaves no doubt as to the belief, as a matter of religious faith, in the personhood of the fetus in the adamant opposition to abortion. In press accounts, spokespersons for Operation Rescue consistently referred to prenatal life as "children" and "babies" and to pregnant women as "moms" and "mothers." In a memorable declaration, the Reverend Pat Robertson, television evangelist and former Republican presidential hopeful, reportedly told a rally of protesters in Wichita, "'We will not rest until every baby in the United States is safe in *his* mother's womb.'" On Land, In the

constitutional regime in which the fetus is not a constitutional person, *Casey* serves as a reminder of just how much concern for "potential life" drives the issue, despite women's rights to liberty and autonomy. Therefore, far from being persuaded as to the validity of women's reasons, the public, instead, through democratically-elected legislatures, may attempt to persuade women that they should continue their pregnancies and not choose abortion. Admittedly, those absolutely opposed to all abortion are a small percentage of the population, but larger segments of the population premise approval or disapproval of abortion upon the stage of pregnancy, as well as the reasons for which it is sought.[229]

Second, contrary to West's argument, reproductive freedom would be especially vulnerable if it depended upon women being able to convince the majority of the appropriateness or, better still, the "responsible" and moral quality of their decision. This difficulty can be demonstrated by mapping the various reasons West gives (and which studies indicate women give) as to why women have abortions and the reasons that polls indicate various majorities approve or disapprove as motivations for having an abortion.[230] Granting that any attempt to use or interpret public opinion polls is fraught with peril, it is by no means clear that the reasons West characterizes as moral and responsible would be accepted as such by various majorities.[231]

It would seem that, since *Roe*, a clear majority of the population has favored legal abortion yet expressed reservations about specific reasons for having an abortion.[232] In other words, on the *legal* or *political* question of whether government should restrict abortion or intervene in a woman's decision, "overwhelming majorities of every demographic group" agree that it should be a woman's private choice; on the *moral* question of when an

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Air, Abortion Debate Rages, Chi. Trib., Aug. 26, 1991, at 3 (emphasis added).

[229] See Condit, supra note 83, at 147–51.

[230] A frequently cited source on the reasons women give for why they have abortions is Aida Torres & Jacqueline D. Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persp. 169 (1988). See also Petchesky, supra note 82, at xxvii n.2, 352–53, 369–79. On public opinion, I draw on cited newspaper polls and on Condit, supra note 83, at 147–51; Petchesky, supra note 82; Tribe, supra note 35, at 231–32.

[231] For example, under West's analysis, two of the most common reasons given in Torres and Forrest's study, not being able to afford a baby and problems with relationships or wanting to avoid single parenthood, would make a woman's decision moral, or responsible. But would the reason even more commonly given, "woman is concerned about how having a baby could change her life," satisfy a responsibility standard or instead be subject to criticism as "egoistic"? See Torres & Forrest, supra note 230, at 170.

[232] See Petchesky, supra note 82, at x, xxvii n.2 (citing polls). But see Mary Ann Glendon, Abortion and Divorce in Western Law 41 (1987) (claiming that "[b]oth before and after *Roe*, majorities (consistently around 55 percent) have been opposed to its major innovation, elective abortion").

abortion is appropriate, opinion is more divided.[233] Public opinion polls suggest a disparity between the reasons most women get abortions (which may broadly be called socioeconomic or, one might add, relational) and the reasons people approve of women getting them (e.g., "dire indications" such as medical harm to the women or birth defects in the fetus).[234] Moreover, some polls indicate such moral disapproval spills over to the belief that abortion should not be legal in those disapproved circumstances.[235]

Distressingly, some of the disapproved reasons touch directly on the well-being of a pregnant woman, and even of a potential child. For instance, some polls suggest that small majorities think abortion should not be legal if sought for such reasons as the pregnancy is, and the child would be, unwanted; the woman is poor or low-income, or otherwise has financial concerns about having a child; or the woman is unmarried and/or does not want to marry the father.[236] Such reasoning suggests vestiges of the view of women as properly and solely in the role of maternal self-sacrifice, as well as the strength of the notion of fetal personhood in opposition to abortion.[237] In the face of such opposition, reasons such as a woman's conclusion that she is "unready for responsibility," is "not mature enough," is "too young to have a child," or that she "can't afford baby now" seem, sadly, unlikely to be persuasive.[238]

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[233] See Petchesky, supra note 82, at xxvii n.2, 352–53, 369–70; see also Tribe, supra note 35, at 172–91. On this point, consider polls indicating that a majority of persons surveyed accept the proposition that "[e]ven in cases where I might think abortion is the wrong thing to do, I don't think the government has any business preventing a woman from having an abortion." See Dionne, supra note 55, at A18 (reporting that two-thirds of those surveyed in New York Times/CBS poll agreed with statement quoted).

[234] See Petchesky, supra note 82, at 369, 375–76. Petchesky includes in the socioeconomic category such reasons as "being too young, too poor, without a job; needing to finish school; wanting 'to have a life for myself.'" Id. at 369. See also Tribe, supra note 35, at 231–32 (same).

[235] See Michael S. Boykin, GOP Should Rewrite Abortion Plank, Atlanta Const., July 11, 1992, at A20 (survey of Georgians); Charles Leroux, Facing Facts: Abortions Cross Racial, Economic, Religious Lines, Chi. Trib., July 5, 1992, at 1 (Illinois); American Political Network Abortion Report, supra note 137 (Pennsylvania).

[236] See Petchesky, supra note 82, at 369, 375–76; American Political Network Abortion Report, supra note 137; Boykin, supra note 235; Leroux, supra note 235. Glendon reports that most Americans disapprove if a woman seeks an abortion "simply" because she does not want the child. See Glendon, supra note 232, at 41. Such characterization tellingly underestimates the significance of such a reason. See Born Unwanted 122–25 (Henry P. David et al. eds., 1988).

[237] On this point, consider the battle in Congress in the debate over the Hyde Amendment as to just how severe and permanent a health problem pregnant women had to face as a result of pregnancy in order to fall within the "medical necessity" exception from the funding bar. See Tribe, supra note 35, at 156.

[238] See Torres & Forrest, supra note 230, at 170 (31% of women studied gave as

As argued below, when weighed against the value of fetal life or notions of women's proper responsibilities, women's reasons are too easily dismissed—by the public, by judges, and by legislatures—as reasons of "convenience,"[239] a point driven home by the representation of women's reasons given in *amicus curiae* briefs in *Casey* urging the Court to affirm the lower court and/or overrule *Roe*.[240] Society should not be invited to scrutinize women's abortion decisions to see if they are "responsible." As the *Casey* court recognizes, the pregnant woman's suffering is hers alone to bear; she should be the decision maker and should have the liberty to determine for herself what meanings procreation has for her. Indeed, as the *Casey* court reads *Roe*, the persuasion runs the other way: although a woman must be the ultimate decision maker, she does not have a right to be insulated from others, and the state may express profound respect for potential life and encourage childbirth.

An additional problem with an approach inviting public scrutiny is that views about the legality and morality of abortion may differ when it is a case of what Ronald Dworkin has called first-person as distinguished from third-person ethics.[241] This distinction explains the frequent disparity between abstract disapproval of abortion, often on religious grounds, and evaluation of a personal choice or that made by a friend or relative.[242]

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reason "woman is unready for responsibility"; 30%, "woman is not mature enough, or is too young to have a child").

[239] In his dissent to *Roe* and Doe v. Bolton, 410 U.S. 179 (1973), Justice White characterized the Court's ruling as providing that, prior to viability, "the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus." Id. at 221. As discussed above, the most common reasons given by women in the Torres & Forrest study would probably be dismissed by Justice White as reasons of "convenience," while among the least common (fetal or pregnant woman's health problem) would be the more compelling. See supra text accompanying notes 232–38.

[240] See Brief of *Amici Curiae* of Hon. Henry J. Hyde, Hon. Christopher H. Smith, Hon. Alan B. Mollohan, Hon. Harold L. Volkmer, Hon. Robert G. Smith and Other United States Senators and Members of Congress in Support of Respondents at 28–29, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902) [hereinafter Hyde Brief] (claiming abortion has become substitute for birth control and almost never relates to woman's health); AAPLOG Brief, supra note 121, at 20 (most abortions are "socioeconomic decisions"). These briefs cite several of the same sources West uses, most notably the Torres & Forrest study. See AAPLOG Brief, supra note 121, at 19; Hyde Brief, supra, at 12, 29.

[241] Ronald Dworkin, Foundations of Liberal Equality, in XI The Tanner Lectures on Human Values 1, 81–82 (Grethe B. Peterson ed., 1990).

[242] See Petchesky, supra note 82, at 369–70. Conversely, it is not uncommon to find among those seeking to restrict or outlaw abortion women who had abortions and now regret their decisions. Organizations such as Women Exploited by Abortion and Feminists for Life of America stress these themes. Such women sometimes blame others (or a lack of information) for steering them to choose abortion, and apparently

Similarly, scholars who have studied women's abortion decisions discern a situational morality, whereby a woman must reconcile views held in the abstract about the status of the fetus or a prohibition on taking potential life with the particularity of her own situation and what pregnancy, childbirth, and unplanned parenthood would mean for her life and that of the potential child.[243] An example of such situational morality burst into national political debate in July 1992 when Vice President Quayle, viewed as resolutely opposed to abortion and supportive of a Republican platform calling for constitutional protection of fetuses, was asked what he would do if his daughter, when grown up, chose an abortion, even if he counselled her against it. He replied: "I'd support my daughter."[244] The foregoing suggests the wisdom of leaving the choice to the particular woman who can best judge her own circumstances.

Feminist argument that would invoke "responsibility talk"[245] encounters difficulties when used in the context of pregnancy, abortion, and motherhood. Contemporary social and political rhetoric about responsibility and irresponsibility offers a range of contradictory messages about when pregnancy, abortion, and motherhood are desirable or responsible.[246] While such contradictory messages may offer feminists a fulcrum by which to demonstrate the poverty of such notions as "promoting childbirth" absent a broader governmental commitment to reproductive health and to families, these messages nonetheless counsel caution about responsibility talk.

Responsibility-based arguments are especially troubling in the context of state regulation of pregnant women and single mothers.[247] Unmarried mothers generally (even Murphy Brown!) and, more particularly, those receiving public assistance for their children are sometimes vilified for creating the socioeconomic problems that other citizens face and for

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seek to prevent other women from making the same mistake. See Colker, Feminist Litigation, supra note 16, at 170–72.

[243] See Petchesky, supra note 82, at 369–79; see also Gilligan, supra note 152, at 64–105, 125.

[244] N.Y. Times, July 23, 1992, at A12 (citing statements Quayle made on *Larry King Live*, July 22, 1992). Both Dan and Marilyn Quayle followed up by assuring the public that if their daughter, now 13, became pregnant while a minor, they would insist that she carry the pregnancy to term. See Kevin Sack, Quayle Insists Abortion Remarks Don't Signal Change in His View, N.Y. Times, July 24, 1992, at A1.

[245] Cf. Glendon, supra note 19.

[246] Again, this awaits elaboration elsewhere. See McClain, supra note 20.

[247] As Dorothy Roberts argues, in the case of criminal prosecution of drug-addicted mothers, it is particularly unlikely that painting such mothers as the locus of the best decision making will carry the day; instead, Roberts argues against such prosecution by invoking a strong right to privacy as autonomy, understood as the right to choose to procreate, along with arguments based on racial equality. Roberts, supra note 91, at 1471–72.

behaving irresponsibly, or even for having the children *in order to* collect the additional government benefits. Hence, social welfare reform is often targeted to eliminate such alleged incentives for unwed motherhood and to encourage responsibility.[248] Yet if women seek to terminate a pregnancy because they "can't afford baby now" (a reason given by some sixty-eight percent of women in a study of women's abortion decisions),[249] accounts of public opinion polls suggest that a majority disapproves of abortion for financial reasons. Apparently, it is in the public interest that poor, unmarried pregnant women bear and raise children, yet the public does not wish to support such women and children and seeks to discourage sexual activity, conception, and childbirth in such circumstances.[250]

Akin to Colker, West calls upon society to recognize "societal failures" that lead to many unwanted pregnancies and abortions and to accept a collective responsibility for them.[251] Such a call becomes particularly relevant in light of *Casey* and the wave of state legislation that would inform pregnant women about help available to them if they choose to continue their pregnancies. One might interpret such legislation as taking up the "collective responsibility" West charges society must accept, but query whether such state help really does enough for women or can possibly resolve the "irreconcilable responsibilities" that West claims pregnant women seeking abortion face or assist in the work of, or mitigate the costs of, motherhood.[252]

The questions raised above suggest that focusing solely on the moral

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[248] Such themes were prominent in the 1992 Presidential campaign and in state social welfare reform. On the treatment of single mothers as pathological and a cause of crime and poverty, see Martha L. Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J. 274 (1991); Roberts, supra note 91, at 1444.

[249] See Torres & Forrest, supra note 230, at 170.

[250] With respect to African-American women, Dorothy Roberts argues that due to the legacy of slavery, they have been devalued both as victims of forced motherhood as well as of forced sterilization. Roberts, supra note 91, at 1436–44.

[251] West, supra note 17, at 85; see also Williams, supra note 226, at 1595 (arguing work-family context more appropriate forum than abortion debate for attacking societal constraints on women's choices).

[252] In *Casey*, the petitioners made the argument that availability of government medical assistance and paternal child support in theory often does not translate into practice. See Brief for Petitioners and Cross-Respondents at 9, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902). As Reva Siegel suggests, "[I]nstead of devising new ways to control women as mothers, [society] needs to promote the welfare of future generations by means that respect and support women in their work as mothers." Siegel, supra note 27, at 381. Siegel stresses that abortion restrictions would compel pregnancy and motherhood while "failing to mitigate or offset the social consequences" through compensation, childcare, protection of employment, or educational opportunities, or by forcing men to assume responsibility for the nurturance and maintenance women typically provide. See id. at 377.

quality of reproductive decisions or on women's "interconnected responsibilities" would not better secure reproductive freedom than does a focus on the importance of self-determination. Although West urges that we take responsibilities seriously, taking rights seriously may require insulation of the right holder if the right is to survive. Engaging in public justification does not guarantee success in persuading others and thus ensure recognition or protection of rights deemed fundamental. West's claim that, under liberal legalism, the moral worth of the act protected by rights does not matter fails to specify the perspective from which moral worth is assessed. The locus of the decision should remain the woman: as the privacy jurisprudence discussed above recognizes, "people must be allowed to make these decisions for themselves, consulting their own conscience, rather than allowing society to thrust its collective decision on them."[253] On this point, *Casey* rings true: recognizing disagreement among "men and women of good conscience" about abortion, and even that certain members of the Court find abortion morally offensive, the Court concludes: "Our obligation is to define the liberty of all, not to mandate our own moral code."[254] Removal of rights from the political agenda and the "vicissitudes" of changing political majorities[255] helps to ensure autonomy in the sense of self-determination.

Obviously, the twenty years since *Roe* demonstrate that abortion has not been removed from the political arena; indeed, this Article began by suggesting that *Casey* highlights the importance of the outcome of elections. Yet the underlying appeal of some version of the allocation of decision-making authority to the individual rather than the state (and democratic majorities) continues to hold sway, as is perhaps evident from the citation of *Barnette* in the *Casey* joint opinion.[256] In this regard, it is telling that, when asked about their own granddaughters or daughters, neither President Bush nor Vice President Quayle responded as they should have, were they to adhere to their stated positions on abortion and their party platform, by saying something like: "If I am successful in implementing my agenda on this issue, she will not be able to make that choice because I will make

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[253] Dworkin, supra note 33, at 49, 50.

[254] Casey, 112 S. Ct. at 2803.

[255] See West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); Ronald Dworkin, Taking Rights Seriously 204–05 (1977). Of course, *Roe* acknowledged some realm of permissible state regulation. See Roe v. Wade, 410 U.S. 113, 162–65 (1973). *Webster* stressed drawing the line between what about abortion was properly removed from public debate and what was not, Webster v. Reproductive Health Servs., 492 U.S. 490, 520–21 (1989), in an opinion read by many as opening the door to increased state regulation. See id. at 537–38 (Blackmun, J., dissenting). *Casey* would appear to draw the line differently from both *Roe* and *Webster*.

[256] Casey, 112 S. Ct. at 2807.

abortion illegal except in limited circumstances." Instead, President Bush wondered aloud, "well, whose else's—who else's [decision] could it be?"[257] In the face of a party platform recognizing no exceptions to its opposition to legal abortion, First Lady Barbara Bush at last publicly expressed her view that abortion was a "personal thing" that has no place in political platforms.[258]

Furthermore, even if women must increasingly turn to legislatures to preserve reproductive freedom (as they have in fact done subsequent to *Webster* and *Casey*), arguments based on self-determination and on women as the proper locus of decision making are more likely to preserve women's reproductive freedom.[259] The Freedom of Choice Act, now before Congress, offers pre-viability protection of women's reproductive decisions, with no reference to the reasons women proffer for such decisions. Similarly, several proposed or already successful state initiatives to codify *Roe*, either through state legislation or constitutional amendment, declare women's decisional autonomy prior to viability pure and simple.[260]

IV. CONCLUSION

As Nancy Stearns and others active in early reproductive freedom efforts recount, pro-choice litigants sought "to influence the law by dramatizing women's experiences with abortion" and the stories and circumstances of women found their way into judicial opinions, including *Roe* itself, when the Court spoke of the distress created by unwanted pregnancy.[261] As the most recent example, the *Casey* opinion reflects such

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[257] Excerpts from an Interview with President Bush, N.Y. Times, Aug. 12, 1992, at A15.

[258] See Alessandra Stanley, First Lady on Abortion: Not a Platform Issue, N.Y. Times, Aug. 14, 1992, at A1.

[259] See Tribe, supra note 35, at 172–91 (describing NARAL's public education campaign in anticipation of *Webster*, organized around effective message, "Who decides?," and galvanizing impact of *Webster* decision on pro-choice movement's efforts in political arena, organized around successful theme that voting for any abortion restriction threatened women's right to choose whether to terminate pregnancy).

[260] See NARAL, supra note 205, at 16, 52, 130. In 1990, Connecticut enacted such a legislative declaration. Conn. Gen. Stat. Ann. § 19a-602 (West Supp. 1992). Washington's Reproductive Privacy Act, Initiative 120, §§ 1–2, Wash. Rev. Code Ann. tit. 9, ch. 9.02 (West Supp. 1992) (codified preceding § 9.02.005 pending assignment of section number), successfully passed by popular vote on November 5, 1991. Maryland's codification of *Roe*, Md. Health-Gen. Code Ann. § 20-209 (Supp. 1992), was approved by a two-to-one margin by the state's voters in a November 1992 referendum. See Robert Reinhold, The Ballot Issues: Five States Adopt Term Limits for Members of Congress, N.Y. Times, Nov. 4, 1992, at B8.

[261] Nancy Stearns, who authored the *amicus curiae* brief submitted on behalf of New

efforts with its references to the link between reproductive freedom and the full participation in social, political, and economic arenas of the women who have come of age since 1973.[262]

Arguments premised on self-determination and bodily integrity, associated with the right of privacy, should continue to play a central role in defending and protecting women's right to choose to continue or to terminate their pregnancies. While a bald appeal to bodily integrity alone—e.g., "keep your laws off my body"—may not go far enough to establish the case for such a right, going down the path of responsibility and "women who would be mothers but for circumstances and constraints" is not, by itself, a better alternative. Such rhetoric will trigger too much second-guessing of women's decisions, without triggering adequate societal or governmental commitment to reproductive health and to families. At the same time, it will also leave women vulnerable to charges of irresponsibility. Even the most compelling cases of constraint will still be found by some abortion opponents to be instances of mere "convenience."[263] As argued above, the unfolding political and social debates over responsibility and irresponsibility indicate that women face a number of double binds with respect to reproductive choices.

In contrast, I believe *Casey*'s articulation of liberty demonstrates the continuing appeal of arguments protecting self-determination by reference not only to the bodily integrity of women but also to the profound and personal nature of assessing the meaning of reproduction in the lives of particular women. Privacy rhetoric need not be silent about the circumstances of women's lives. From the beginning of reproductive freedom litigation, women's stories were a part of the education and litigation process.

Many feminists writing about and working to protect reproductive freedom stress the need to place abortion in the context of a broader reproductive health agenda. There is some exploration of common ground between women on both sides of the abortion issue, particularly common ground with respect to addressing circumstances and constraints making

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Women Lawyers in *Roe*, made this observation in her keynote address at the Workshop. See also Nancy Stearns, *Roe v. Wade*: Our Struggle Continues, 4 Berkeley Women's L.J. 1, 4–5 (1989); Schneider, supra note 57, at 995–97 (arguing that the concurrence of Justice Douglas in *Roe* "directly responded to the range of arguments presented in feminist briefs in *Roe*").

[262] See supra text accompanying notes 30–31.

[263] See supra notes 239–40 and accompanying text. In addition, in my own experience in discussing the right to abortion with colleagues, students, and friends, no matter how forcefully someone articulates responsibility arguments, persons morally opposed to abortion invariably reduce these arguments to matters of mere "convenience." Self-determination and toleration arguments usually fare better with such persons.

pregnancy unwanted. Yet there will undoubtedly be some stark differences as to solutions, disagreements on issues like the need for access to contraception and sex education, particularly for teens, like the desirability of the patriarchal family and its division of labor between mother and father, and like the appropriateness of sexual activity outside of marriage.

Nevertheless, feminists should seek to influence the debate over what it means to say that a state has an interest in protecting potential life and a preference for childbirth, regardless of the choices and circumstances of particular pregnant women. Arguments premised in decisional autonomy, in the connection between reproductive choice and self-determination and identity, should influence that debate. Perhaps we are entering a new political climate in which a focus on reproductive health and genuine support for persons who choose to become parents may be possible. One can aspire to eliminate the need for abortion and to eliminate constraint while nonetheless defending the constitutional liberty embodied in the right of privacy.