

# Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion

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## ABSTRACT

*This Article explores equality-based arguments for abortion rights, revealing both their necessity and their pitfalls. It first uses the narrowness of the “health exception” to abortion regulations to demonstrate why equality arguments are needed—namely because our legal tradition’s conception of liberty is based on male experience, no theory of basic human rights grounded in women’s reproductive experiences has developed. Next, however, the Article shows that equality arguments, although necessary, can undermine women’s reproductive freedom by requiring that pregnancy and abortion be analogized to male experiences. As a result, equality arguments focus on either the bodily or the social aspect of pregnancy, to the detriment of the other. Some scholars have suggested that the right to abortion be split in two, with one right to bodily integrity and a separate right to avoid motherhood. This is the wrong way to theorize pregnancy: body-focused arguments fail to resonate with the reasons most women seek abortions and the role that pregnancy and abortion play in women’s lives. Burdens-of-motherhood arguments imply a sunset clause on abortion rights and lend credibility to arguments for a right to “male abortion.” This division between the body and the social suggests that women’s liberty can be protected only by breaking it into pieces that have analogs in men’s experiences. When men are the norm, women’s rights become derivative.*

*The Article proposes a relationship model for theorizing pregnancy as a starting point for developing a liberty framework directly from women’s experiences. This model of pregnancy builds on Supreme Court precedent that uses pregnancy as a baseline for a constitutional definition of parenthood. It thus provides a basis for treating abortion as one of a range of reproductive rights rather than in isolation. It also offers the promise of a woman-centered vision that would put those rights on firmer footing.*

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#### INTRODUCTION

*If men could get pregnant,  
abortion would be a sacrament.<sup>1</sup>*

But they cannot,<sup>2</sup> so legal and political arguments for abortion rights seek to compare a pregnant woman to a man and thereby make her situation comprehensible to liberal legal doctrine. Such comparisons become especially important when abortion is claimed not just as a privacy right, but as a matter of equality. This Article demonstrates a paradox of the equality approach: though perhaps necessary to establish women's liberty rights in a legal tradition based on male experience, because of the need for comparisons, equality arguments undermine the long-term goal of developing a theory of liberty based on female experience rather than defining women's liberty as derivative of men's.

A recurring debate since *Roe v. Wade* concerns the relative merits of privacy and equality as the theoretical explanation and doctrinal justification for reproductive rights.<sup>3</sup> In recent years, some scholars have settled on a

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<sup>1</sup> Gloria Steinem, *The Verbal Karate of Florynce Kennedy, Esq.*, MS. MAGAZINE, Mar. 1973, at 89 (quoting Florynce Kennedy's oral statement).

<sup>2</sup> Notwithstanding recent press reports of a pregnant man, this Article treats pregnancy as a female experience because pregnancy and the capacity for pregnancy are central to the cultural and legal construction of gender. This Article argues that men are free to develop the technology to become mothers. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 257 (1989). In addition, because this Article focuses on abortion rights, vulnerability to unwanted pregnancy is important.

<sup>3</sup> See, e.g., Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 456 (1995) (arguing that although liberty and equality are intertwined, "equality analysis is the most principled basis upon which to analyze reproductive rights" because the traditions that guide fundamental rights analysis are biased against women); Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitu-*

hybrid “equal right to liberty.”<sup>4</sup> This formula nicely captures the sense that abortion rights sound primarily in liberty, but their restriction is usually an instantiation of sex inequality. Men’s liberty with respect to having abortions is technically just as restricted as women’s, so the formula leaves us back where we started: in need of either a theory of liberty that embraces women’s right to abortion, or a comparison to some other male experience that seems similar to abortion but is not similarly restricted.

These comparisons are typically either body-focused or motherhood-focused. Some scholars have even suggested that there may be two distinct rights to abortion: one based on the right to bodily integrity and the other on privacy for intimate family choices.<sup>5</sup> My thesis is that such bifurcation is exactly the wrong approach. Rather than being rooted in women’s experience of pregnancy, the division is based on the need to make the experience fit into existing legal categories. True equality—that includes a non-derivative theory of women’s liberty—requires that reproductive rights be theorized without reducing pregnancy to component parts and shoehorning it into doctrines developed without women in mind. Pregnancy is a complex and multifaceted process, but nonetheless a unitary experience. A woman’s right to liberty during pregnancy is similarly unitary.

Part I of this Article summarizes the political basis for the connection between sex equality and abortion rights. Part II first shows how women’s liberty rights to abortion gave way under the weight of ideology that trivializes women’s needs, experiences, and judgment. This collapse prompted the turn to equality arguments. Beginning with Part II.A.2, this Article then reviews the strengths and weaknesses of the two main types of equality arguments for abortion rights. This critique leads to the conclusion that the

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tion, 18 HARV. J.L. & PUB. POL’Y 419 (1995) (defending the privacy approach); Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 TEX. J. WOMEN & L. 99 (1994) [hereinafter Colker, *Equality Theory*] (same); 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, 356, 361 (1991) [hereinafter Colker, *Reproductive Health Policy*] (defending the equality approach and providing an illustration of a non-essentialist equal protection argument for abortion rights); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1009-13 (1984) (proposing an equal protection standard); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1326-28 (1991) (advocating an equality approach); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women’s Rights*, 2002 U. CHI. LEGAL F. 137 (advocating a dual approach); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (setting out a foundational equality argument for abortion rights).

<sup>4</sup> Priscilla Smith, *Responsibility for Life: How Abortion Serves Women’s Interest in Motherhood*, 18 J.L. & POL’Y 97, 156, 159 (2009); see also Schneider, *supra* note 3 (advocating a combined liberty and equality approach).

<sup>5</sup> See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 222 (1992); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 340-52 (2007) (describing the “two rights to abortion”); cf. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 80 STAN. L. REV. 1135 (2008). Cohen separates the right not to procreate into genetic, legal, and gestational components. My concern here with the Balkin and Tribe proposals for conceptualizing the abortion right as two distinct rights is that it goes further, separating the right not to be a gestational parent into its physical and relational aspects.

bifurcation of body-focused and burdens-of-motherhood arguments is itself a fatal flaw. Part II concludes that equality arguments are a necessary tool for “getting there” from here, but they must be used with caution and awareness, as they are merely stepping stones, not destinations, in the struggle for women’s human rights. A new effort to theorize fundamental human rights is needed.<sup>6</sup> As part of that effort, Part III argues for a relationship model of pregnancy. The relationship model recognizes pregnancy as the prototypical parental relationship, incorporating both bodily and social relationships. The model builds on Supreme Court precedent using pregnancy as the baseline for a constitutional definition of parenthood. However, rather than analogizing to men’s experience, these cases use women’s experience as the baseline for a vision of fundamental rights, including the full range of reproductive freedom.

### I. THE INTUITION ABOUT EQUALITY AND ABORTION

*Seventy-seven percent of anti-abortion leaders are men.  
One hundred percent of them will never be pregnant.*<sup>7</sup>

The intuition of a connection between abortion rights and sex equality dates back at least to the eighteenth century, but has not always been embraced by feminists. The doctors who promoted the original criminalization of abortion were the first to link abortion (and contraception) to equality.<sup>8</sup> First-wave feminists<sup>9</sup> in the United States expressed sympathy for women who sought abortions, but they publicly opposed both abortion and contraception.<sup>10</sup> The feminist goal of “voluntary motherhood” meant the right of

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<sup>6</sup> Feminists are just beginning this effort. See, e.g., Martha Albertson Fineman, *Equality: Still Illusive After All These Years*, in *Gender Equality: Dimensions of Women’s Equal Citizenship* 251, 251 (Linda C. McClain & Joanna Grossman eds., 2009) (proposing “that one way to render equality less illusive is to move beyond gender and build a more comprehensive framework on the concept of universal human vulnerability”); Julia E. Hanigberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 380, 381-90 (1995) (sketching “a theory of the abortion decision and its relationship to selfhood”).

<sup>7</sup> Jennifer Baumgardner, *The Pro-Choice PR Problem*, THE NATION, Mar. 5, 2001, at 19-20 (quoting a Planned Parenthood advertisement).

<sup>8</sup> See Siegel, *supra* note 3, at 280-323 (describing the nineteenth-century doctors’ campaign to criminalize abortion); see also ROTHMAN, *supra* note 2, at 188 (“I do not believe that the shifting image, from mother as protector to mother as potential enemy of her children, represents a change in maternal behavior or protectiveness. I believe it represents, among other things, a response to the feminist movement. If women can look out for our own interests, then, some fear, perhaps we cannot be trusted to look out for the interests of our children.”).

<sup>9</sup> See, e.g., SARA DELAMONT, FEMINIST SOCIOLOGY 2 (2003) (“First Wave feminism, from about 1848 to 1918, focused on getting women rights in public spheres, especially the vote, education and entry to middle-class jobs such as medicine. The views of these feminists, at least as they expressed them in public, were puritan about sex, alcohol, dress, and behaviour.”).

<sup>10</sup> See Siegel, *supra* note 3, at 304-06 (stating that nineteenth-century feminists blamed abortion on “the social conditions in which women conceived and raised children”).

married women to refuse sexual intercourse.<sup>11</sup> More recently, most feminists have concluded that sexuality is too integral to human flourishing for the right to say “no”—even if always and everywhere respected—to be the *sine qua non* of women’s control over reproduction.<sup>12</sup> Although feminists strategically severed the abortion debate from the debate over the Equal Rights Amendment,<sup>13</sup> abortion has remained the defining, litmus-test issue for many advocates of women’s equality.<sup>14</sup> Indeed, at times, leaders of the second wave<sup>15</sup> have been criticized for focusing too narrowly on abortion rights at the expense of other goals.<sup>16</sup>

As a matter of constitutional doctrine, abortion rights are part of the right to privacy, an unenumerated liberty right protected by the Due Process

<sup>11</sup> See Linda Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States*, FEMINIST STUD., Winter-Spring 1973, at 5 (discussing voluntary motherhood as “an initial response of feminists to their understanding that involuntary motherhood and child-raising were important parts of women’s oppression”).

<sup>12</sup> See Law, *supra* note 3, at 972 (noting that abortion was a central focus of the second wave); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007) (observing that proponents of a sex equality basis for abortion rights generally view “sexual intimacy as a human need worthy of fulfillment”); *id.* at 826-28 (stating that second-wave feminists connected abortion to equality).

<sup>13</sup> See Siegel, *supra* note 12, at 826-28 (stating that feminists followed *Roe v. Wade*, 410 U.S. 113 (1973), in separating abortion rights from sex equality for strategic reasons).

<sup>14</sup> See, e.g., Katha Pollitt, *Feminists for (Fetal) Life*, THE NATION, Aug. 11, 2005, at 13 (answering no to the question, “Can you be a feminist and be against abortion?”). EMILY’s List, a leading feminist political fundraising organization, has three requirements for the candidates it will support at all levels of government: they must be women, Democrats, and pro-choice. See EMILY’s List, Our Mission, <http://www.emilyslist.org/about/mission> (last visited Mar. 13, 2010).

<sup>15</sup> Occurring between 1918 and 1968, second-wave feminism “was concerned with social reform (such as free school meals for poor children and health care for poor women) and ‘revolution’ in the private sphere: the right to contraception, the end of the sexual double standard, and so on.” DELAMONT, *supra* note 9, at 2.

<sup>16</sup> See, e.g., Colker, *Equality Theory*, *supra* note 3, at 104 (criticizing Laurence Tribe’s work on abortion as “narrowly pro-choice”); MacKinnon, *supra* note 3, at 1318 (“The right to reproductive control I have in mind would include the abortion right but would not center on it.”); cf. ROTHMAN, *supra* note 2, at 153-54 (“Women who do not want a maternity experience essentially comparable to what men’s experience with fatherhood has been may find that the dominant thinking in the feminist movement does not represent their concerns.”); Allen, *supra* note 3, at 453 (stating that her support for public funding of abortion is circumspect because “the history of slavery and medical abuse of women and people of color” raises concerns about “the appearance or reality of compulsory abortion.”); Colker, *Reproductive Health Policy*, *supra* note 3, at 327 (“[T]he popularity of the abortion debate is a reflection of the problem of essentialism because this debate chooses one issue for debate—abortion—and generally ignores the larger and more complex problems relating to reproductive health issues, of which pregnancy is only one part.”); MacKinnon, *supra* note 3, at 1295 (“[Feminist activists] have moved from a request to be permitted to play by the rules of the game to an understanding that having no say in the rules means not being permitted to play the game.”). Among those other goals is allowing women to have children secure in the knowledge that they will not have to look on as poverty and discrimination crush those children’s bodies and spirits.

Clauses of the Fifth and Fourteenth Amendments.<sup>17</sup> In *Roe v. Wade*,<sup>18</sup> it was not entirely clear to whom the privacy belonged. The leading feminist criticism of *Roe* has long been that it reads like a manifesto for doctors' rights rather than women's rights, suggesting that whether to abort is the doctor's decision, even when the reasons are non-medical.<sup>19</sup> For example, *Roe* concludes:

Th[is] decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.<sup>20</sup>

In this respect, *Roe* might truly have been the progeny of *Lochner v. New York*,<sup>21</sup> protecting doctors' rights to contract to perform medical services rather than women's right to control their pregnancies.

In a sense, however, equality concerns lurked just below the surface of privacy doctrine. For example, the first time the Supreme Court protected reproductive rights, in *Skinner v. Oklahoma*,<sup>22</sup> it did so as a matter of equal protection. Similarly, the right to use contraception was extended to unmarried people on equality grounds in *Eisenstadt v. Baird*.<sup>23</sup> Although equality between men and women was not at stake in either case, *Eisenstadt* expressed concern about using pregnancy as a punishment for sex, a concern bearing on women's equality.<sup>24</sup>

<sup>17</sup> See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 145-46 (2007) (applying Fourteenth Amendment precedent to a federal restriction on abortion, thereby implicitly invoking the Fifth Amendment); *Roe*, 410 U.S. at 153.

<sup>18</sup> 410 U.S. 113 (1973).

<sup>19</sup> See, e.g., Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 85-86 (1995) ("Under *Roe*, the physician . . . is constitutionally required to lead the decisionmaking process."); Scott Moss, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175, 178 (2008) (describing *Roe*'s "doctor-focused"—rather than woman-focused—justification); Abrams, *supra* note 3, at 487 (arguing that *Roe*'s focus on the physician's judgment continues a historical tradition regarding women's lack of "judgmental capacity").

<sup>20</sup> *Roe*, 410 U.S. at 165-66; see also *id.* at 153 (stating that medical, psychological, and social concerns are all "factors the woman and her responsible physician necessarily will consider in consultation"); *id.* at 163 (stating that before viability, abortion decisions should be made by "the attending physician, in consultation with his patient"). In fairness to the *Roe* Court, some of these statements emphasizing the doctor's clinical judgment seem to be aimed at rebutting state arguments for restricting abortion for the sake of women's medical safety. While the paternalism is rank, *Roe* need not be read to designate the doctor as the primary constitutional decision-maker. But see Daly, *supra* note 19, at 85-86.

<sup>21</sup> 198 U.S. 45 (1905) (striking down protective labor laws because they interfered with freedom of contract).

<sup>22</sup> 316 U.S. 535 (1942).

<sup>23</sup> 405 U.S. 438 (1972).

<sup>24</sup> *Id.* at 448-49 ("It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . .");

The Supreme Court has come to view the abortion choice as belonging to the pregnant woman and to explicitly link the abortion right to her equal status in society. Justice Blackmun, the author of *Roe*, described the choice as that of the woman as early as 1976, in the course of denying her husband a veto.<sup>25</sup> A decade later, Justice Blackmun tentatively claimed the ground of women's equality rights in a 1986 decision,<sup>26</sup> and then staked it firmly in 1989, in a passionate dissent from the first major decision undercutting *Roe*.<sup>27</sup> In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>28</sup> the Court's partial affirmation of *Roe* grounded the abortion right squarely in women's liberty. *Casey* also acknowledged the increasingly prevalent view that abortion rights were linked to sex equality.<sup>29</sup> Ironically, this shift from doctors' rights to women's rights accompanied a substantial curtailment of the scope of the right.<sup>30</sup> Moreover, despite a growing political and judicial intuition that abortion rights relate to sex equality, thus far, that intuition has failed to flourish in legal doctrine. If anything, the Court's most recent treatment of abortion took a step backward, adopting a paternalistic, controlling attitude toward women's reproductive decisions.<sup>31</sup>

Some of the best evidence of the relationship between abortion rights and sex equality is negative evidence—not an affirmative account of women's liberty, but an observation that opponents of sex equality generally oppose abortion as well.<sup>32</sup> The social practice of restricting abortion is closely associated with traditional attitudes about women's roles and efforts to control women's sexuality.<sup>33</sup> Although concern for fetal life is the primary

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Law, *supra* note 3, at 978 & n.79 (connecting *Eisenstadt* to the “theme that imposing unwanted pregnancy as punishment for sex is a violation of due process fairness”).

<sup>25</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976). Nonetheless, as in *Roe*, Justice Blackmun's opinion for the Court assured the reader that women would still be supervised, by describing the relevant situation as “when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy.” *Id.*

<sup>26</sup> *See Thornburgh v. Amer. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (“Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”).

<sup>27</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 537-38 (1989) (Blackmun, J., concurring in part and dissenting in part) (“I fear for the liberty and equality of the millions of women who have lived and come of age in the sixteen years since *Roe* was decided.”).

<sup>28</sup> 505 U.S. 833 (1992).

<sup>29</sup> *Id.* at 850, 856, 860, discussed *infra*, note 120 and accompanying text.

<sup>30</sup> *Casey* replaced strict scrutiny of abortion restrictions with the “undue burden” analysis. *See Casey*, 505 U.S. at 877-78; *see also* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 209 (1998) (stating that one objective of the *Casey* plurality was to “reduce the level of constitutional protection for pregnant women seeking autonomy in the management of their pregnancies.”). The correlation between the shift from doctors' rights to women's rights and the increased tolerance of restrictions is not a mere coincidence. *See infra* Part II.A.1.

<sup>31</sup> *See Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 159 (2007) (upholding the Partial-Birth Abortion Ban Act in part on the grounds that women need to be protected from later regret about having had an abortion).

<sup>32</sup> *See generally* Siegel, *supra* note 3 (tracing historical connections between abortion restrictions and opposition to sex equality).

<sup>33</sup> *See id.* at 327-28 (summarizing findings from KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)).

argument articulated against abortion, that concern typically works in tandem with prescriptions for women's roles.<sup>34</sup>

Feminists have long pointed out that public judgments about abortion often turn on moral judgments about a woman's sexual conduct rather than on the moral status of the fetus.<sup>35</sup> For example, many abortion bans provide exceptions for cases of rape. The fetus produced by a rape is no less alive than any other, suggesting that the real concern may be the woman's culpability for voluntary sex.<sup>36</sup> Even this characterization may be too generous: since the law defines rape from the perpetrator's perspective,<sup>37</sup> it is more accurate to say that the right to abortion depends on the culpability of the man, rather than the woman. The rape exception thus operates as a judgment about which men are entitled to have women forced to bear their children.<sup>38</sup>

Other aspects of abortion restrictions are similarly suspect. For example, in recent years, abortion opponents have drawn from the rhetoric of the first wave, arguing that women need to be protected from abortion.<sup>39</sup> These arguments are based on traditional, paternalistic views that women should be

<sup>34</sup> See *id.* at 359-62 (arguing that banning abortion in order to protect fetal life "entails a purely functional use of the pregnant woman," requiring one to ask, "What view of women prompted the state's decision to use them as a means to an end?"); see also *id.* at 335 ("The risk of harm to unborn life, and of bias against women in actions undertaken to prevent it, may each be real. To see how unexamined assumptions about women's obligations as mothers can shape fetal-protective regulation, it is necessary to consider the methods and resources this society employs to prevent harm to the unborn."); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 49 (1992) (arguing that "the basic problem is that the practice at issue turns women's sexuality and reproductive functions into objects for the control and use of others.").

<sup>35</sup> *Roe* mentioned this point. *Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973). See also Jack M. Balkin, *Judgment of the Court*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 31, 49 (Jack M. Balkin ed., 2005); Siegel, *supra* note 3, at 364.

<sup>36</sup> But see Akhil Reed Amar, *Concurring in Judgment in Part and Dissenting in Part in Roe v. Wade, No. 70-18, and Dissenting in Doe v. Bolton, No. 70-40*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 35, at 152, 159 (rebutting this argument by invoking the legislature's prerogative to balance competing interests).

<sup>37</sup> See MacKinnon, *supra* note 3, at 1303-04 ("Crystallizing in doctrine a norm that animates the rape law more generally, the defense of 'mistaken belief of consent' defined whether a rape occurred from the perspective of the accused rapist, not from the perspective of the victim or even based on a social standard of unacceptable force or of mutuality."). The phrase "perpetrator's perspective" is from Alan David Freeman, *Legitimizing Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978).

<sup>38</sup> Rape exceptions thus reflect the same ideology as that embodied in the requirement of a husband's consent to abortion that was struck down in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 71 (1976).

<sup>39</sup> See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 159 (2007) (arguing that Congress should be able to restrict abortion because women's consent may not be adequately informed and because they may later regret their decisions). See generally Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (documenting and analyzing the political use of such arguments).



protected from poor decisions, or from coercion, by eliminating their choices, rather than by informing and empowering their decisions.<sup>40</sup>

This resonance with traditional sex stereotypes is a hallmark of unconstitutionality under the Equal Protection Clause.<sup>41</sup> Yet equal protection arguments for reproductive rights have only barely gained traction in court. One reason for this failure is that courts do not inquire into potential stereotypes behind a law without first concluding that the law classifies individuals on the basis of sex. “The point [is] to apply existing law to women as if women were citizens—as if the doctrine was not gendered to women’s disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies.”<sup>42</sup> Under *Geduldig v. Aiello*,<sup>43</sup> regulation of pregnancy is deemed not to be sex-specific: no sex classification, hence no equal protection analysis.<sup>44</sup> Because there are no pregnant men who are accorded greater rights than pregnant women, the doctrine largely fails to detect an equality problem.

If *Geduldig* were overruled, as many feminists have long desired, abortion regulations would be presumptively sex-based. Courts could then proceed in the equal protection analysis to consider evidence of sex stereotyping or invidious motives. Alternatively, a general resurgence of the anti-subordination theory of the Equal Protection Clause<sup>45</sup> would lead courts to focus on the subordinating effects of abortion restrictions, rather than on specific comparisons to laws affecting “non-pregnant persons.” For example, Reva Siegel’s foundational article on abortion rights lays out a comprehensive case that abortion bans are subordinating and based on archaic norms.<sup>46</sup> In making this equality argument, Siegel elides the question of classification, noting flaws in the *Geduldig* doctrine and assuming its eventual demise.<sup>47</sup> Reports of *Geduldig*’s death, however, have been greatly exaggerated.<sup>48</sup> For now, at least, abortion restrictions are not deemed sex-based.

In response to this doctrinal dead end, many proponents of reproductive rights have tried to show that pregnant women are, in fact, treated differently from similarly situated men. To do so, they have followed the example of

<sup>40</sup> See *Carhart II*, 550 U.S. at 183-85 (Ginsburg, J., dissenting) (criticizing the majority’s paternalistic attitude toward women).

<sup>41</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 550 (1986) (stating that “generalizations” about sex differences cannot justify excluding all women from military academy).

<sup>42</sup> MacKinnon, *supra* note 3, at 1286.

<sup>43</sup> 417 U.S. 484 (1974).

<sup>44</sup> *Id.* at 496 n.20.

<sup>45</sup> See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (setting out the now-classic distinction between the anti-classification and anti-subordination interpretations of the Equal Protection Clause).

<sup>46</sup> See generally Siegel, *supra* note 3.

<sup>47</sup> See *id.* at 354.

<sup>48</sup> But see Reva B. Siegel, *You’ve Come A Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891-92 (2006) (arguing that the Supreme Court’s decision upholding the Family and Medical Leave Act modified the conventional understanding of *Geduldig* and implied that pregnancy classifications are impermissible sex classifications when they reflect and reinforce stereotypes).

the Pregnancy Discrimination Act (“PDA”).<sup>49</sup> The PDA overruled *Geduldig* in the employment context, declaring that pregnant women on the job must be treated the same as men who are similarly situated with respect to the physical demands of the work.<sup>50</sup> Pregnant women are thus classified with other workers experiencing temporary disability. Equality arguments for abortion similarly seek comparisons with male experience by describing pregnancy at a higher level of generality.<sup>51</sup>

Through these comparisons, feminists are reaching for a more affirmative account of abortion and equality. Rather than focusing on the impermissible motives that lie behind the restrictions, they show the importance of abortion rights by comparing women’s experience of forced pregnancy and childbirth to experiences shared by men. While the comparisons are often strained, some appear to be necessary in order for abortion to be legally recognizable as an equality problem.

It is revealing that an issue so central to women’s equality remains so difficult to express in the language of a constitutional doctrine purporting to guarantee the equal protection of the laws. As Catharine MacKinnon has explained, the law cannot detect sex discrimination in practices that are done only to women, because equality is violated only when there is a similarly situated man who is treated differently.<sup>52</sup> To make a compelling equality argument, one has to move to a higher level of abstraction, arguing, for example, that women and men must be accorded equal liberty or status as citizens,<sup>53</sup> which requires a further argument explaining why liberty demands control over pregnancy.<sup>54</sup> When the comparisons run this far afield, liberty becomes the subject of discussion, not equality. Women’s liberty should not have to be derivative of men’s experiences. Our constitutional discourse, however, has no tradition defining liberty from a perspective that includes the experience of pregnancy.<sup>55</sup> Therefore, we may need the ratchet of equality analysis to translate this aspect of women’s fundamental rights into some-

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<sup>49</sup> 42 U.S.C. § 2000e(k) (2006).

<sup>50</sup> *Id.*

<sup>51</sup> On the non-linearity of the paths among levels of generality, see LAURENCE TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION* 76 (1991).

<sup>52</sup> See, e.g., MacKinnon, *supra* note 3, at 1288-89 (observing that under formal equality principles, where women are perceived as unlike men, “discrimination as a legal theory does not even come up”).

<sup>53</sup> See, e.g., Balkin, *supra* note 5, at 322-23.

<sup>54</sup> See *id.*

<sup>55</sup> See ROTHMAN, *supra* note 2, at 59 (“Motherhood is the embodied challenge to liberal philosophy, and that, I fear, is why a society founded on and committed to liberal philosophical principles cannot deal well with motherhood.”); Hanigberg, *supra* note 6, at 386 (“As philosopher Susan Bordo observes, ‘[O]ntologically speaking, the pregnant woman has been seen by our legal system as the mirror-image of the abstract subject whose bodily integrity the law is so determined to protect . . . .’”) (quoting SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 79 (1993)); MacKinnon, *supra* note 3, at 1315 (“Women have not been considered ‘persons’ by law very long; the law of persons arguably does not recognize the requisites of female personhood yet.”).

thing that resembles men's experiences.<sup>56</sup> Where men are the baseline, equality analysis helps grope toward a different discourse. Ultimately, however, we need a concept of fundamental liberty that not only "includes" women, but that comes from, is based on, and meets the needs of women.

## II. BODIES AND BURDENS: TWO TAKES ON ABORTION AS AN EQUALITY RIGHT

*Roe stands at an intersection of two lines of decisions.*<sup>57</sup>

As the Supreme Court explained in *Casey*, the right to abortion fits squarely within two intersecting categories of protected rights: the right to bodily integrity and the right to privacy in making intimate family choices.<sup>58</sup> Instead of making the right to abortion doubly strong, however, this intersectionality illustrates the degree to which reproductive freedom must be justified in terms of traditional categories that emerged from men's concerns.<sup>59</sup>

This Part discusses a series of leading arguments for abortion rights. In the category of body-focused arguments, it first considers the "health exception" as an example of a liberty-based doctrine for protecting the right to abortion. Because the health exception has developed within an ideological context lacking a basis in women's liberty, the doctrine replicates sex inequality by downplaying the physical risks and burdens of pregnancy. This problem is not inherent in the idea of liberty itself, but arises in the course of implementation by a Supreme Court that still views motherhood as women's natural role.

In response to the health exception's cramped view of women's liberty, feminists turn to equality arguments. As Anita Allen has pointed out, equality arguments are attractive in part because they have not yet been through the grinder of the Supreme Court.<sup>60</sup> As the Court has already adopted a narrow view of women's reproductive liberty, equality is, at least, a fresh start. Moreover, if liberty arguments have failed to convince the Court on their own terms, equality arguments might be able to serve as a "ratchet."<sup>61</sup>

<sup>56</sup> Cf. Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1323 (2004) ("The Court [in *Eisenstadt v. Baird*, 405 U.S. 438 (1972),] uses the Equal Protection Clause as a kind of rights ratchet to expand the universe of people entitled to exercise the liberty interest established by *Griswold v. Connecticut*, 381 U.S. 479 (1965)]."). Compare *Buck v. Bell*, 274 U.S. 200 (1927) (rejecting woman's privacy challenge to forced sterilization), with *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down sterilization on equal protection grounds). But see MacKinnon, *supra* note 3, at 1313 ("It has been held illegal to sterilize a male prisoner but legal to sterilize a mentally disabled woman.").

<sup>57</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992).

<sup>58</sup> *Id.*

<sup>59</sup> Cf. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139 (demonstrating that people who are discriminated against because of a combination of marked characteristics receive less protection under civil rights laws).

<sup>60</sup> See Allen, *supra* note 3, at 445-55.

<sup>61</sup> See McGowan, *supra* note 56, at 1323.

Equality arguments compare restrictions on pregnant women's liberty to similar situations in which non-pregnant persons are not restricted. Feminists hope that such comparisons will make visible the harms of forced maternity, which seem to fade from view when abortion is treated in isolation. As a practical and doctrinal matter, women must buttress their claims to control their bodies and lives with specific comparisons to men's experiences.

Such comparisons tend to emphasize either the bodily imposition of forced pregnancy or the disproportionate social burdens of motherhood. Each approach has its own pitfalls, mainly stemming from the fact that each emphasizes one aspect of pregnancy to the neglect of the other. While each kind of comparison partially illuminates why reproductive rights are central to women's equality, both suffer from the fact that they are driven by the need to justify women's liberty and equality in terms of men's experiences. Thus, although comparison-based equality arguments are important rhetorical tools for demonstrating what is overlooked by current conceptions of a pregnant woman's rights, the goal should be a better theory of liberty that is based on women's experiences.

A. *Body-focused Arguments: Arguing Equality When Women's Liberty Is Not Enough*

*Planned Parenthood v. Casey* held that a pregnant woman has the right to decide whether to have an abortion before the fetus is capable of living outside the womb.<sup>62</sup> After the point of viability, a woman is entitled to seek an abortion if continuation of the pregnancy threatens her life or health.<sup>63</sup> An immediate threat to life or health also triggers the woman's entitlement to an exemption from most restrictions on pre-viability abortion, such as a waiting period or parental consent requirement.<sup>64</sup> The health exception is privacy doctrine's most explicit acknowledgement of the right to bodily integrity as an aspect of the *Casey* right to abortion.

All pregnancies and abortions implicate women's health. This is especially so if "health" is understood broadly—as it was in *Roe*—to include both physical and mental well-being.<sup>65</sup> Since *Roe*, however, the health exception has increasingly resembled a more limited right to medical self-defense and a narrow caveat to the state's power to regulate all abortions and ban post-viability abortions. A diminished right to bodily integrity is thus

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<sup>62</sup> See *Casey*, 505 U.S. at 846.

<sup>63</sup> *Id.* at 846.

<sup>64</sup> *Id.* at 880. Following *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124 (2007), which upheld a ban on a particular abortion procedure without a health exception, the rule is now exemption from "most" restrictions on pre-viability abortion, rather than exemption from "all" such restrictions in the event of an immediate threat to life or health.

<sup>65</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973) (describing the "detriment" that an abortion ban imposes on a pregnant woman in terms of both diagnosable conditions and the effects of child care and other burdens on mental and physical health).

incorporated into the health exception: it is a right of survival, not autonomy.<sup>66</sup> The doctrinal evolution of the health exception illustrates how a liberty right can be weakened when applied to women as a special case.

This weakening of women's liberty creates a need for additional arguments, especially equality arguments. Under the rubric of equality, feminists have constructed broader arguments that focus on the body, but not necessarily on the greater-than-average medical risks that trigger the health exception. To go beyond the health exception, these arguments appeal to the general principle that the government cannot force one person to assist another physically. Under this view, abortion bans wrongly and uniquely force pregnant women to be Good Samaritans. These equality arguments are strategically necessary because women's bodily integrity is not enough, standing alone, to justify protection under the prevailing legal regime. While Good Samaritan arguments ought to be doctrinally sufficient to justify abortion rights, they do not provide a satisfactory account of the place of abortion in women's lives, or its relationship to broader rights of reproductive freedom.

### 1. *The Health Exception: Liberty Falls Short*

A robust health exception, taken seriously, could do as much as *Casey* does to protect the right to choose an abortion. The actual health exception, however, is not intended to acknowledge that normal pregnancy is itself a substantial drain on a woman's health. Indeed, that risk is obscured by the existence of a health exception distinct from the general *Roel/Casey* right to abortion. Moreover, *Casey* approved a stringent standard, so the health exception may be triggered only by health risks much greater than those of a typical pregnancy. The narrowness of the exception reveals the limits of a pure liberty or privacy approach to abortion rights in a legal system not premised on women's full humanity.

One issue in *Casey* was Pennsylvania's definition of a medical emergency sufficient to waive restrictions such as parental consent, waiting periods, and the post-viability prohibition on abortion:

That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of *substantial* and *irreversible* impairment of a *major* bodily function.<sup>67</sup>

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<sup>66</sup> See Siegel, *supra* note 3, at 365 (arguing that health exceptions define a woman's liberty interest as an interest in "brute physical survival").

<sup>67</sup> 18 PA. CONS. STAT. § 3203 (1990), *quoted in* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (emphasis added).

The only challenge to this provision even considered in *Casey* was that it failed to cover three specific conditions that develop gradually.<sup>68</sup> The statute thus appeared to require postponing an abortion until the inevitable moment of crisis. The Supreme Court upheld the statute by reading out the immediacy requirement, thus considering those three conditions covered. It retained the requirement of “substantial and irreversible” consequences to a major bodily function.<sup>69</sup> *Casey*’s health exception thus protects not a woman’s health but her interest in “brute physical survival.”<sup>70</sup>

The high threshold for the *Casey* health exception plays to a supposed distinction between good reasons for having an abortion and frivolous ones. Indeed, the idea of a health exception, however broad or narrow, incorporates an implicit distinction between normal pregnancy and the complications of pregnancy. That distinction renders the inherent risks and physical burdens of all pregnancies invisible. In *Roe v. Wade*, the dissent complained:

At the heart of the controversy . . . are those recurring pregnancies that pose *no danger whatsoever* to the life or health of the mother. . . . [The majority] values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus . . . .<sup>71</sup>

Even setting aside the very large gap between danger to health and convenience, whim, or caprice, there is no such thing as a pregnancy that poses “no danger whatsoever” to a woman’s health.<sup>72</sup> Yet *Casey*’s protection of

<sup>68</sup> The district court had found that the emergency exception would not apply to cases of preeclampsia, inevitable abortion, or premature ruptured membrane. *Casey*, 505 U.S. at 880.

<sup>69</sup> *Id.*

<sup>70</sup> Siegel, *supra* note 3, at 365 (discussing health exception in Utah abortion law).

<sup>71</sup> *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting) (emphasis added).

<sup>72</sup> Even supporters of abortion rights can overlook the risks of normal pregnancy. For example, in *Abortion and Original Meaning*, Jack Balkin recognized that abortion bans “require a woman’s body to undergo the strains of pregnancy and the difficulties of childbirth without her consent.” Balkin, *supra* note 5, at 323. Yet, when he articulated the right to abortion, he argued that there are two distinct rights to abortion. The first is a right to bodily integrity that works out to be equivalent to the health exception. The second is a right to avoid motherhood, which focuses on post-birth responsibilities that are disproportionately borne by women. *Id.* at 342-43. Lost in this division are the risks and burdens of normal pregnancy. Dawn Johnsen pointed out this omission in her comment on Balkin’s article. See Dawn Johnsen, *The Progressive Political Power of Balkin’s “Original Meaning,”* 24 CONST. COMMENT. 417, 423-24 (2007). In reply, Balkin amended his description of the second right to abortion to include the burdens of pregnancy. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 528 (2007). This amendment, however, undermines his equality justification for the second right, which blames societal discrimination for making women bear the disproportionate burden of child-rearing. See *id.* at 529 (“Nevertheless, the second right is premised on a background of social expectations and technological possibilities.”). Society cannot be blamed for men’s immunity from unintended pregnancy. This is not to say that Balkin is dismissive of that burden in the fashion of the *Roe* dissent, only that the burden is often and easily overlooked. See Balkin, *supra* note 35, 41 (noting the strains of pregnancy and childbirth).

women's health is limited by the implicit distinction between normal and complicated pregnancies.

Every pregnancy has the potential to become a complicated pregnancy over the course of nine months of dramatic physiological changes. The mere fact of pregnancy increases a woman's chances of death and long-term detriment to health.<sup>73</sup> Once pregnancy has begun, abortion is statistically safer than carrying to term until well into the second trimester.<sup>74</sup> On top of the risk of complications is the physical burden of normal pregnancy itself. A long list of symptoms—nausea, vomiting, back pain, sleeplessness—would not ordinarily be considered “healthy,” but are within the “normal” range for a pregnant woman.<sup>75</sup> At a minimum, carrying a pregnancy to term entails a 100% risk of either severe uterine contractions and painful dilation of the cervix, or major abdominal surgery. Childbirth is a journey to the boundary between life and death, a place where much can go wrong.

If “health” referred to the likely medical outcomes of early abortion as compared to continued pregnancy, the health exception would swallow *Casey*. But the perspective of the *Roe* dissent—that the normal risks of pregnancy are women's lot—remains enshrined in *Casey*'s health exception, which is understood as distinct from the right to choose an early abortion for any reason. Although *Casey* acknowledged that a pregnant woman “is subject to anxieties, to physical constraints, to pain” and that her sacrifice “ennobles her,” those sufferings were defined out of the health exception.<sup>76</sup> So, even this core, relatively undebated aspect of the liberty right is deeply embedded in a perspective that sees the risks of pregnancy as an inherent part of being female.

Before *Casey*, the Supreme Court had at least suggested that a woman's right to protect her health was more complete. Even before *Roe*, in *United States v. Vuitch*,<sup>77</sup> the Court had construed a statutory health exception to include a broad concept of mental health.<sup>78</sup> In *Roe*'s companion case, *Doe v. Bolton*,<sup>79</sup> the Court relied on *Vuitch*'s broad conception of “health” as overall well-being to uphold an abortion statute that allowed abortion only when

<sup>73</sup> See Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 *YALE L.J.* 639, 640 n.9 (1986) (collecting statistics and calculating that as of 1983, abortion was safer than childbirth until at least week twenty-one); see also Council on Scientific Affairs, American Medical Ass'n, *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women*, 268 *J. AM. MED. ASS'N* 3231, 3232 (1992).

<sup>74</sup> See Rhoden, *supra* note 73, at 640 n.9. Under current doctrine, a woman can take all of these risks into account in deciding whether to have a pre-viability abortion. *Casey*, however, downplayed these risks and created a false dichotomy between health considerations and other reasons for abortion.

<sup>75</sup> See Shari Motro, *The Price of Pleasure*, 104 *NW. U. L. REV.* (forthcoming 2010) (describing symptoms and risks of pregnancy); see also Priscilla Smith, *Responsibility for Life: How Abortion Serves Women's Interest in Motherhood*, 17 *BROOK. J.L. & POL'Y* 97 (2009).

<sup>76</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

<sup>77</sup> 402 U.S. 62 (1971).

<sup>78</sup> *Id.* at 72. The challenge in *Vuitch* was that the law's reference to “health” was vague.

<sup>79</sup> 410 U.S. 113 (1973).

“necessary” in the clinical judgment of the doctor.<sup>80</sup> And after *Roe*, in *Colautti v. Franklin*,<sup>81</sup> the Court strongly suggested that the state could not require “trade-offs” between fetal and maternal health.<sup>82</sup> Although it ultimately resolved *Colautti* on vagueness grounds, the Court was sharply critical of the possibility that a particular abortion technique had to be “indispensable” rather than “merely desirable” in order to be used.<sup>83</sup> The courts, along with the medical profession, were moving toward the view that the pregnant woman, rather than the fetus, was the patient.<sup>84</sup> For the state to balance the woman’s health against “additional percentage points of fetal survival” raised “[s]erious ethical and constitutional difficulties.”<sup>85</sup>

*Casey*’s ratification of the “substantial and irreversible impairment” standard was, therefore, a significant retreat on the meaning of “health.” Indeed, the best that can be said about *Roe*’s “doctors’ rights” approach to abortion is that *Roe* treats *all* abortions as health care. The state could not interfere with first trimester abortions, because abortion was medically safer than carrying the fetus to term. It was therefore appropriate to take a wide range of both medical and social factors into account in deciding whether to abort. By the time of *Casey*, however, the abortion decision had come to be understood as a woman’s choice rather than a doctor’s judgment—and a woman’s choice still registers as “convenience, whim, or caprice.”<sup>86</sup> With women no longer assumed to be under the supervision of their doctors, the right was narrowed. Health considerations, more narrowly defined, became a distinct doctrinal “exception.”

The immediate impact of the narrowed concept of “health” was cushioned by the nature of the challenge in that case. In *Casey*, the health excep-

<sup>80</sup> *Id.* at 191-92.

<sup>81</sup> 439 U.S. 379 (1979).

<sup>82</sup> *Id.* at 400.

<sup>83</sup> *Id.*; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79 (1976) (rejecting the legislative prohibition of saline use as an unreasonable regulation that, instead of protecting maternal health, would have the effect of inhibiting most abortions after twelve weeks).

<sup>84</sup> See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (holding that district court erred in granting hospital’s petition for court-ordered cesarean based on statistical trade-offs regarding maternal and fetal survival). On the importance of allowing the individual to make such decisions, see ROTHMAN, *supra* note 2, at 193 (“We cannot know who will be right, but we do know that, inevitably, anyone making these decisions will sometimes be wrong. To me, it comes down not to whose *judgment* we trust, but whose *mistakes*. . . . Why, then, do I trust the idiosyncratic mistakes of parents? Precisely because they are idiosyncratic. The mistakes of medicine and those of the state are systematic, and that alone is reason not to trust.”); cf. Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 462-65 (2007) (discussing de-centralization of parenting decisions as a key reason for Fourteenth Amendment protection of parental rights). On the deterioration of respect for women’s autonomy in areas such as court-ordered caesarean section as well as abortion, see Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97, 140-46 (2010); April L. Cherry, *Roe’s Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723 (2004).

<sup>85</sup> *Colautti*, 439 U.S. at 400.

<sup>86</sup> *Roe v. Wade*, 410 U.S. 113, 219, 221 (1973) (White, J., dissenting).



tion was relevant only to post-viability abortions and cases in which parental consent or a twenty-four hour waiting period would otherwise be required. A higher threshold of medical risk makes more sense in this context.<sup>87</sup> Planned Parenthood implicitly conceded that a narrow health exception was acceptable by arguing only that the phrasing of the statute failed to cover particular conditions that were also substantial and irreversible. By loosely construing the statute, the Court was able to dismiss this challenge with the blithe reassurance that “significant threat[s]” would be covered. Due to this assurance, and because the health exception did not pertain to *whether* an adult woman could obtain a pre-viability abortion, a woman still had the final say on any necessary tradeoffs between herself and the fetus. She could still make the broad assessment of health that was entrusted to the doctor in *Roe*, although this assessment was now understood as something more akin to a lifestyle choice, with medical factors considered separately under the “significant risk” standard.

Since *Casey*, a few scholars have complained that the state of the health exception is unclear.<sup>88</sup> Is it broad, as earlier cases like *Vuitch* and *Bolton* held? Or narrow, as *Casey* implied? The Supreme Court has been able to avoid this issue precisely because the right to choose abortion before viability remains relatively unfettered.<sup>89</sup> Viability occurs roughly twenty-three to twenty-four weeks after a pregnant woman’s last menstrual period.<sup>90</sup> After sixteen weeks, and certainly after twenty-two, hard questions about the health exception are increasingly less likely to arise. The later in pregnancy an abortion is performed, the more likely the pregnancy was wanted or welcomed. In those cases, the woman herself is likely to seek an abortion only after the onset of complications. Similarly, doctors are increasingly reluctant to perform abortions as pregnancy progresses, and in most cases delivery eventually becomes medically safer than abortion.<sup>91</sup> The fact that the woman has the right to choose abortion for any reason before viability avoids the question of how much risk is necessary to trigger the health exception. The right to elective abortion has thus suspended much of the pre-*Roe* debate over the medical conditions justifying therapeutic abortion.<sup>92</sup>

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<sup>87</sup> See Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle Over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397, 405 (1998) (arguing that the standard for abortion-related health concerns should vary over the course of pregnancy, as birth gradually becomes safer than abortion).

<sup>88</sup> See, e.g., Stephen G. Gilles, *Roe’s Life or Health Exception: Self-Defense or Relative Safety?*, 85 NOTRE DAME L. REV. 525 (2010); see also David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1 (2007).

<sup>89</sup> The Court denied certiorari in one case raising the question whether the health exception had to include mental health. Justice Thomas dissented from denial, joined by Chief Justice Rehnquist and Justice Scalia. See *Voinovich v. Women’s Med. Prof’l. Corp.*, 523 U.S. 1036 (1998).

<sup>90</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

<sup>91</sup> See Rhoden, *supra* note 73, at 640 n.9.

<sup>92</sup> See, e.g., *United States v. Vuitch*, 402 U.S. 62 (1971) (analyzing health exception for vagueness).

This hiatus would come to an end if the right to elective abortion were eliminated. Presumably, a woman would retain the right to an abortion when pregnancy endangered her life or health. The Supreme Court would then find itself thrust into a revival of the debate over the magnitude of the risk necessary to invoke the constitutionally required health exception.<sup>93</sup> Abortion opponents fear that “health” would be defined broadly, including not only slightly above-average physical risks, but also the risks inherent in pregnancy or the mental distress of an unwanted pregnancy.<sup>94</sup>

This fear is well-grounded in pre-*Roe* decisions about abortion. In *Vuitch*, the pre-*Roe* case challenging a health exception as vague, the Supreme Court read “health” to include mental health, “whether or not the patient had a previous history of mental defects.”<sup>95</sup> The clear implication of the government’s concern with lack of prior diagnosis was that mental health was too malleable to limit a woman’s choice to abort. In his dissent, Justice Douglas bore out the state’s concern by demonstrating that malleability:

How likely must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case?

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he act in a similar way under this abortion statute? . . .

Is any unwanted pregnancy a ‘health’ factor because it is a source of anxiety? . . .

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<sup>93</sup> This debate remains alive in other countries with stricter limits on abortion. Where abortion opponents have reacted to perceived “abuse” of both health and life exceptions by banning all abortions, the result is that doctors have, in some cases, refused to treat a woman in the midst of miscarriage until they could confirm fetal death. In at least one documented case, doctors prolonged the delay by giving a woman drugs to stop her contractions, and she died from lack of treatment. See MICHELLE GOLDBERG, *THE MEANS OF REPRODUCTION: SEX, POWER, AND THE FUTURE OF THE WORLD* 13 (2008). Even defenders of such laws, who say that refusal to treat a miscarriage is a mistake, suggest that, late in pregnancy, the doctor should save the baby at the woman’s expense if the baby has a better chance of survival. *Id.* at 30-31; cf. *In re A.C.*, 573 A.2d 1235, 1242 (D.C. 1990).

<sup>94</sup> See, e.g., *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (“[D]emanding a ‘health exception’—which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others . . . —is to give live-birth abortion free rein.”); Brian W. Clowes, *The Role Of Maternal Deaths In The Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327, 371 (1993) (“The potential for abuse of the term ‘mental health’ is even greater than misuse of the term ‘physical health’ where abortion is concerned. When a definite physical indication for abortion cannot be ascertained, it is a simple matter to use virtually any rationalization to justify an abortion for the mother’s mental health.”); cf. WORLD HEALTH ORGANIZATION, *CONSTITUTION OF THE WORLD HEALTH ORGANIZATION* 1 (2006), [http://www.who.int/entity/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/entity/governance/eb/who_constitution_en.pdf) (“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”).

<sup>95</sup> *Vuitch*, 402 U.S. at 72.

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?<sup>96</sup>

Justice Douglas concluded that “health” was infinitely malleable to fit the moral views of jurors and was therefore an unconstitutional standard.<sup>97</sup>

One could imagine a theory of abortion that adopted this broad understanding of “health” early in pregnancy, much like *Roe* did, but imposed a heightened, “significant risk” standard later in pregnancy. Such a theory would produce doctrine much like what we have today. The Supreme Court, however, having already created a doctrinal separation between “therapeutic” and “elective” abortion, has also begun laying the groundwork for a narrow health exception that forces women to bear the risks of normal pregnancy and at least some complications.

In *Gonzales v. Carhart (Carhart II)*,<sup>98</sup> the Court upheld the federal Partial-Birth Abortion Ban Act, which contains a life exception but not a health exception. The Act bans a particular method of surgical abortion. Surgical abortions are used in the second trimester, when about ten to fifteen percent of all abortions in the United States are performed.<sup>99</sup> The most common procedure is called dilation and extraction, or D&E.<sup>100</sup> In some cases, a doctor may keep the fetus intact (and living) until the end of the procedure in order to minimize the use of sharp instruments inside the uterus. This approach is called intact D&E.<sup>101</sup> Congress deemed intact D&E “partial birth” abortion and banned it. In *Carhart II*, the government justified the Act’s lack of a health exception in part on the grounds that intact D&E is never safer than available alternatives. The government failed to explain why the statute nonetheless contains a life exception—how could the procedure be necessary, in some cases, to save a woman’s life, but *never* necessary to prevent injury short of death?

The answer is that the Act’s proponents did not want minor health concerns—i.e., anything short of death—to be used to invoke the health exception.<sup>102</sup> To prevent such abuse, the Act places women’s lives, but not their

<sup>96</sup> *Id.* at 75-76 (Douglas, J., dissenting in part).

<sup>97</sup> *Id.*

<sup>98</sup> 550 U.S. 124 (2007). *Carhart I* was *Stenberg v. Carhart*, 530 U.S. 914 (2000). In *Carhart I*, the Court struck down Nebraska’s ban on partial-birth abortion because the description of the prohibited procedure was vague and because of the lack of health exception. *Carhart II* concluded that Congress had cured any vagueness problems and that congressional findings were adequate to demonstrate that a health exception was unnecessary, at least for purposes of a facial challenge. Both decisions were 5 to 4. Justice O’Connor had voted with the majority in *Carhart I*. She retired and was replaced by Justice Alito, who voted with the majority in *Carhart II*.

<sup>99</sup> See *Carhart II*, 550 U.S. at 134.

<sup>100</sup> *Id.* at 135.

<sup>101</sup> *Id.* at 136, 161.

<sup>102</sup> Testimony before Congress suggested that the Act’s proponents would have preferred to omit the life exception as well. See Oliveri, *supra* note 87, at 408-09 (collecting examples

health, above the government's distaste for a particular abortion procedure. Importantly, the ban applies equally to pre-viability abortions. Although the Court upheld the ban only against a facial challenge, it made clear that any as applied challenges would have to meet the "significant risk" standard. In other words, a woman having an early, pre-viability abortion can be forced to undergo a less safe procedure unless the safety difference is so great that it creates a "serious risk of substantial and irreversible impairment of a major bodily function."<sup>103</sup> This is so even though theories of self-defense against the fetus are irrelevant to her right to have an abortion at this stage of pregnancy.

Early abortion started, in *Roe*, as a decision about health care. A doctor supervised the decision, while taking a wide variety of social factors into account. As the right to consider social factors shifted to the woman, the decision came to be seen as a lifestyle choice rather than a matter of health. The "health" category was narrowed to refer only to significant medical risks. This heightened standard draws on ordinary concepts of self-defense and was, arguably, appropriate when applied to post-viability abortions. In *Carhart II*, however, the more stringent definition of health was pushed back to the beginning of pregnancy. This development completes the doctrinal divorce between "choice" by the pregnant woman and "health," which is still assessed by the doctor.

If *Roe/Casey* is overruled and abortion rights are limited to the health exception, *Carhart II* will be used to justify a high standard of medical risk that will substantially exceed the difference between the risks of normal pregnancy and the risks of early abortion. Only "significant threat[s]" to a woman's health will be adequate to overcome her duty to the fetus and the state.<sup>104</sup> *Carhart II* also establishes substantial deference to the legislature in assessing those risks contrary to medical opinions, let alone the pregnant woman's opinion based on her own consideration of medical data and other factors.<sup>105</sup>

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from congressional testimony indicating that a good mother would sacrifice herself for her fetus) ("The argument seems to be that, as long as a maternal health problem poses no risk to the health of the fetus, the woman is seeking an 'elective' abortion if it is to save her own health."); *Hope Clinic v. Ryan*, 195 F.3d 857, 880-81 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting) ("These statutes . . . are concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. The statement is that fetal life is more valuable than women's health."), *vacated*, *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000); *cf. Reva Siegel, Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID, supra* note 35, at 63, 78 (quoting Eugene Quay, *Justifiable Abortion*, 49 GEO. L.J. 173, 234 (1961) ("A mother who would sacrifice the life of her unborn child for her own health is lacking in something. If there could be any authority to destroy an innocent life for social considerations, it would still be in the interests of society to sacrifice such a mother rather than the child who might otherwise prove to be normal and decent and an asset.")).

<sup>103</sup> 18 PA. CONS. STAT. § 3203 (1990).

<sup>104</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 880 (1992).

<sup>105</sup> The same derogation of women's interest in, and control over, their own health is also evident in other, related areas of law. For example, under no circumstances will a court order that a parent be forced to submit to surgery—say to donate bone marrow—for the benefit of a

The health exception obscures the inherent risks of pregnancy and denies a woman the ability to protect herself from any but the most serious complications. Bearing children is such a normalized part of a woman's socially prescribed role that the state often imposes the risks associated with pregnancy by infringing her right to protect her bodily integrity. In the ideological context in which the Supreme Court operates, the broad conception of "health" as physical and mental well-being could not survive the transfer of authority from the doctor to the woman. Something more was needed to demonstrate that this imposition is contrary to fundamental rights. Enter equality.

## 2. *The Turn to Equality: Good Samaritan Arguments*

The narrowness of the *Casey* health exception and its disregard for the physical burden of normal pregnancy cry out for comparison to the myriad circumstances in which the legal system abhors putting similar burdens on men.<sup>106</sup> Because the *Roel/Casey* health exception is not meant to reach early abortion of a normal pregnancy, several scholars have developed more extensive moral arguments for a woman's right not to carry the physical burden of the state's claimed interest in potential life. These arguments apply to the physical burden of a typical pregnancy and proceed mainly by analogy between pregnancy and other situations in which the law declines to impose similar burdens. When presented in legal form, this analogy sounds in equal protection rather than privacy. This approach illustrates how equality principles can serve as a ratchet to broaden the law's conception of fundamental rights to include women's experiences. At the same time, the limits of the analogy illustrate the limits of the comparison-based equality approach.

The most famous of the body-focused arguments is Judith Jarvitz Thomson's *A Defense of Abortion*.<sup>107</sup> Thomson presents an ethical case against requiring pregnant women to be Good Samaritans, even assuming that a fetus has the same moral status as a born person. Among several other analogies, Thomson asks us to consider a person's rights and duties if she is kidnapped by the Society of Music Lovers and turned into a life support system for a famous violinist. The violinist can survive only if the kidnap-

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born child. Yet courts seriously consider and sometimes grant petitions to force pregnant women to submit to surgery for the purported benefit of their fetuses. See generally Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97 (2010). Similarly, women's assessments of the relative merits of vaginal birth and cesarean section are frequently treated with little respect, despite the well-documented harms caused by—and illegitimate reasons for—the medical industry's preference for c-sections. Cf. Sylvia A. Law, *Childbirth: An Opportunity for Choice That Should Be Supported*, 32 N.Y.U. REV. L. & SOC. CHANGE 345 (2008) (discussing medical and non-medical factors a woman might consider in choosing between vaginal birth and scheduled c-section).

<sup>106</sup> "Men," of course, means "people," which means people who are not pregnant or otherwise marked as female.

<sup>107</sup> Judith Jarvitz Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

ping victim remains hooked up for nine months. Thomson argues that the kidnapping victim has the right to unplug herself, even if doing so will cause the violinist's death. Eileen McDonagh has translated Thomson's ethical argument into legal terms.<sup>108</sup> Going further than Thomson in some respects, McDonagh argues that an unwillingly pregnant woman is a "Captive Samaritan" to whom the state owes a duty of rescue.<sup>109</sup>

The strength of Thomson's violinist analogy lies in its demand that we contemplate the physical risks and burdens of pregnancy in a new context, where unconscious assumptions about the normalcy of pregnancy do not apply. Stripped of these assumptions, the health risks of pregnancy clearly exceed any burdens the law ordinarily imposes on unwilling individuals, even to further the state interest in the life of another.<sup>110</sup> Translating this analogy into the language of equal protection, McDonagh makes a convincing case for an affirmative obligation on the part of the state to provide (and pay for) abortions, just as it pays for law enforcement to respond when one person attempts to capture and make use of the body of another. While a pregnant woman who seeks an abortion may be a legally justified "Bad Samaritan," a woman who cannot afford an abortion is a "Captive Samaritan" to whom the state owes the same duty of rescue as other captives.<sup>111</sup>

Another strength of the Good Samaritan argument is that it allows for the possibility that the fetus has significant moral status, perhaps even the same moral status as a born person, and shows why the right to abortion should nonetheless be protected. Most court decisions and commentary have incorrectly assumed that fetal or embryonic personhood would completely defeat the right to abortion.<sup>112</sup>

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<sup>108</sup> See EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK* (1996); see also Robin West, *Concurring in the Judgment*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 35, at 121, 131-35 (adopting a Good Samaritan argument for the limited purpose of requiring a rape exception in an abortion ban); Donald Reagan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Siegel, *supra* note 3, at 342 (observing that "selective regulation of women's conduct is justified on the grounds that pregnant women have a unique physical capacity to harm children, when the regulation may in fact reflect the view that pregnant women have a unique social obligation to protect children" and discussing forced cesareans, other medical interventions, and regulation and prosecution of women for fetal neglect).

<sup>109</sup> See McDONAGH, *supra* note 108, at 171-73.

<sup>110</sup> Cf. Jed Rubenfeld, *Concurring in Roe v. Wade and Concluding that the Writ of Certiorari Should be Dismissed as Improvidently Granted in Doe v. Bolten*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 35, at 109, 119 ("As there are privileges of citizenship, so too there are duties, such as jury or military service . . . But we do not deal here with such public duties of citizenship. Rather, we deal with a law that would force a particular private life on particular private individuals . . .").

<sup>111</sup> See McDONAGH, *supra* note 108, at 145, 171-73.

<sup>112</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 156-57 (1973) ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus's right to life would then be guaranteed specifically by the Amendment."); *Abele v. Markle*, 351 F. Supp. 224, 228-29 (D. Conn. 1972) ("[I]t is difficult to imagine how a statute permitting abortion could be constitutional if the fetus had fourteenth amendment rights."). See also Balkin, *supra* note 5, at 339-40 & n.127 (arguing that fetal personhood would imply that abortion could never be legal, except after a hearing, with appointed counsel for the fetus, to protect a pregnant woman from death or serious injury). But see *Abele*, 351 F. Supp. at 228 ("If [the fetus] is [a per-

Despite these strengths, the Good Samaritan argument has failed to take hold in either court decisions or popular discourse about abortion, due to three related layers of resistance to Thomson's analogy. First is the entrenched naturalness of pregnancy and other caretaking as women's social role. Abortion opponents characterize reproductive freedom as asserting a right to walk away from rendering life-saving aid to another. Legal doctrine reflects cultural assumptions when it refuses to see that abortion regulations are sex-specific.<sup>113</sup> In the absence of an impossibly precise analogy, background assumptions about the naturalness of female caretaking fill the gap of rationalizing a duty to carry a fetus to term.

Second, an important strand of feminist thought resists the law's embrace of Bad Samaritanism generally. Most feminists would object to a legal system that forces women, but not men, to provide care. Relational feminists, however, disagree with the Bad Samaritan principle that it is generally inappropriate for the law to demand caretaking.<sup>114</sup> As a result, one feminist criticism of the Good Samaritan argument is that it depends on embrace of the Bad Samaritan principle. It seems odd to ground a fundamental basis for women's equality in a principle that an important branch of feminism rejects.<sup>115</sup>

Third, the violinist analogy lacks resonance with women's experiences of pregnancy, reproduction, and abortion. The analogy suggests that the harm of forced pregnancy lies primarily in the nine-month biological imposition. But the physical burden of normal pregnancy, while substantial, is

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son], then a legislature may well have *some* discretion to protect that right even at the expense of someone else's constitutional right." (emphasis added). Disagreement over whether fetal personhood completely defeats the right to abortion appears to reflect deep-seated, baseline assumptions about whether pregnancy is a passive or an active state—i.e., whether making a baby rather than aborting is an act or an omission. Cf. Rubinfeld, *supra* note 110, at 110 ("Laws that prohibit abortion . . . do not merely prohibit a particular act. They oblige an unwilling individual to carry out a specific, sustained, long-term, life-altering, and life-occupying course of conduct.").

<sup>113</sup> See *Geduldig v. Aiello*, 417 U.S. 484 (1974). Under the logic of *Geduldig*, abortion laws are sex-neutral because they apply to anyone, regardless of sex, who is pregnant and seeks an abortion. *Id.* However, *Geduldig's* future is uncertain. See Siegel, *supra* note 48, at 1873 (arguing that *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), "introduces an important new understanding of" *Geduldig*); see also MacKinnon, *supra* note 3, at 1322 ("In the pregnancy area, the notion that one must first be the same as a comparator before being entitled to equal treatment has been deeply undermined, although it remains constitutional precedent."). The problem remains that there is no precise, realistic analog to pregnancy in male experience.

<sup>114</sup> See, e.g., Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 580-81 (1993) (using relational feminist concepts to argue against the Bad Samaritan principle that a person has no duty to rescue a stranger in distress).

<sup>115</sup> In a similar vein, Sylvia Law has objected that the Good Samaritan argument suggests that abortion is morally wrong even if legally defensible. See Law, *supra* note 3, at 1022. Thomson suggests the possibility that the law must refrain from requiring individuals to be Good Samaritans but might still require them to be Minimally Decent Samaritans. See Thomson, *supra* note 107, at 63-64.

not what prompts most abortions.<sup>116</sup> Most women who want to have a child are willing to undergo pregnancy if they can; many women take great medical risks to bear children. Women's reasons for having abortions have much more to do with the life-altering arrival of a(nother) baby than with morning sickness or the risk of eclampsia. The Good Samaritan argument is thus unable to provide a convincing moral account of abortion as a reproductive right, even if the argument ought to be doctrinally sufficient to call into question the constitutionality of abortion bans.

Body-focused arguments about abortion—from the health exception to the Bad Samaritan principle—illustrate both the need for and the limits of equality arguments. The health exception has been constructed as distinct from early elective abortion, maintaining the normalcy of pregnancy's inherent risks. Women's bodily integrity is thus defined narrowly even as the doctrine purports to protect it. The Good Samaritan argument steps in to reveal the extent of the burden thereby placed on women. In doing so, however, the Good Samaritan argument characterizes pregnancy and abortion in ways designed to maximize their similarity to men's lives, rather than their place in women's lives. As a result, both the health exception and the Good Samaritan argument are incomplete, as the right to have an abortion is not *just* about bodily integrity and medical self-defense, but implicates the entire course of one's life. Due to this omission, and perhaps also because an idealized image of pregnancy persists, arguments focusing on the whole life's course rather than the nine months of pregnancy have become more prevalent in feminist thought, public discourse, and the Supreme Court's own explanations for the abortion right.

*B. The Burdens of Motherhood: An Incomplete Account of Reproductive Rights*

Rather than comparing pregnancy to other physical invasions, burdens-of-motherhood arguments compare the social burdens of motherhood to the social burdens of fatherhood. This emphasis responds to the reality that the importance of abortion rights is not limited to the period of pregnancy. At the same time, however, the comparison distances abortion rights from the physical fact of pregnancy.

Burdens-of-motherhood arguments have evolved over the years. They began in a relatively simple form that had its roots in the formal equality

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<sup>116</sup> In a study published in 2005 examining the reasons that contributed to a woman's choice to obtain an abortion, 74% of the respondents stated that "having a baby would dramatically change my life," 73% of the respondents said that they couldn't afford a baby, and 48% of the respondents did not "want to be a single mother or [were] having relationship problems." Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh, & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112 (2005).



theory of second-wave legal feminism.<sup>117</sup> Formal equality theory sees a path to equality in being like a man, in particular, being free of caretaking responsibility for children. At times, formal equality arguments reflect an implicit assumption that having children is incompatible with a woman's professional advancement. Thus, equality in the public sphere depends on a right to abortion in private.

More nuanced incarnations of this approach reject the assumption that children are inherently a hindrance to women's equality in the public sphere.<sup>118</sup> They blame socially enforced gender roles for pressuring women to sacrifice participation in the public sphere for the sake of caretaking. These arguments also contextualize the abortion right in women's lived experiences of intersecting inequalities. In doing so, however, they detach the abortion right from women's bodies and instead suggest that the right is contingent on the persistence of social inequalities. While illuminating the operation of sex inequality in society, these equality arguments provide incomplete accounts of reproductive freedom as a human right.

### 1. *Version One: Women Fitting into a Man's World*

In the years after *Roe*, as abortion gained increasing political salience, the felt connection between abortion rights and sex equality began to permeate legal discourse about abortion. In 1992, in *Casey*, the Supreme Court briefly recognized this connection in affirming what it considered the "essential holding" of *Roe*.<sup>119</sup>

The Court's acknowledgement of equality concerns overlapped with its discussion of stare decisis. *Casey* argued that women had come to rely on the availability of abortion in planning their lives, particularly with respect to pursuing educational and other opportunities leading to greater participation in the public sphere:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . .

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<sup>117</sup> See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 58 (2002) ("By the time the second wave of the feminist movement reached the legal system, it was dominated by formal equality, a commitment to the equal treatment of individual men and women regardless of sex.").

<sup>118</sup> See, e.g., Balkin, *supra* note 5; Colker, *Equality Theory*, *supra* note 3; Siegel, *supra* note 3.

<sup>119</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . .<sup>120</sup>

*Casey* also suggested that state prohibition of abortion might have more to do with controlling women than with protecting fetuses.<sup>121</sup>

To the extent that these brief references can be read as an equality argument for abortion rights,<sup>122</sup> the argument assumes incompatibility between motherhood and full participation in the public sphere. The Court cited correlations among women's increased education, increased workforce participation, and reduced fertility, yet ignored the complexity of the relationships among those aspects of women's lives and the importance of social policy in limiting women's choices. By accepting the social structure as given, *Casey*'s vision of equality embraced the division of the world into separate spheres and merely gave women the option of being like men. It was an argument on behalf of the atypical woman seeking to pursue a male path, rather than a challenge to the gendered hierarchy itself.<sup>123</sup>

*Casey*'s version of the equality argument is also class-specific, and, even for financially secure women, offers a false promise of equality. The women *Casey* envisioned were facing unwanted pregnancies as obstacles to college and more, not struggling to make ends meet on minimum wage or care for the children they already had. They needed abortions because they had other opportunities to pursue.<sup>124</sup> Moreover, the men to whom they were implicitly compared are not, in fact, without children, nor are their children all planned; women and men experience unplanned parenthood at the same rate. The difference is that, for the most part, the men have wives or other women who care for those children. There is thus some merit to the pro-life rejoinder that *Casey*'s version of equality promises women that they can be equal to men so long as they are willing to "slay their children in order to obtain equal access to the marketplace and the public square."<sup>125</sup> Women,

<sup>120</sup> *Id.* at 860.

<sup>121</sup> *Id.* at 852 ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the women's role, however dominant that vision has been in the course of our history and our culture.").

<sup>122</sup> See Daly, *supra* note 19 (arguing that *Casey* represented a shift from privacy toward equality).

<sup>123</sup> In this respect, *Casey* is consistent with the Court's sex discrimination jurisprudence generally. See Law, *supra* note 3, at 981-82 (arguing that the ACLU litigation strategy in sex cases perpetuated the disregard of difference).

The seeds of *Casey*'s equality approach can be found in *Roe* itself, which similarly presented "decisions about motherhood as a private dilemma to be resolved by a woman and her doctor: a 'woman's problem,' in which the social organization of motherhood plays little part." Siegel, *supra* note 3, at 273. This account "invites criticism of the abortion right as an instrument of feminine expedience . . . because it presents the burdens of motherhood as women's destiny and dilemma—a condition for which no other social actor bears responsibility." *Id.* at 274.

<sup>124</sup> See *Casey*, 505 U.S. at 856 (citing data pertaining to fertility and college education).

<sup>125</sup> Teresa Stanton Collett, *Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 35, at 187, 194. See also Smith, *supra* note 4, at 157 ("[T]he way that sex equality notions have been ushered into abortion jurisprudence with an emphasis on equality in the

but not men, must forgo or delay parenthood in order to succeed in the public sphere. Absent from *Casey* is any aspiration toward equality in the private sphere.<sup>126</sup> *Casey*'s vision of equality challenges neither the division of labor that makes motherhood, but not fatherhood, inconsistent with career success nor the structure of a public sphere that is hostile to caretaking demands. Outside the courts, most feminists have long rejected any such acceptance of separate spheres or of a public sphere designed to be hostile to dependency.<sup>127</sup>

Of course, the public sphere persists in its current form, only somewhat less hostile to dependency than it was in 1973 or 1992, while many men continue to neglect the private sphere.<sup>128</sup> *Casey* was thus factually correct that the availability of abortion is an important factor in women's ability to pursue public careers. A broader vision of reproductive freedom, however, demands an abortion right that does not depend on structural sex inequality. Even in a perfect society, not every pregnancy will be planned. Moreover, in light of the difference between *unplanned* and *unwanted* pregnancies, there ought to be room for unplanned pregnancies to become wanted pregnancies without derailing the rest of a woman's life. *Casey*'s vision of women assimilating into a man's world free of caretaking burdens does not allow for that space.

## 2. *Version Two: Women Oppressed by a Sexist World*

Jack Balkin provides a more nuanced version of this argument in *Abortion and Original Meaning*.<sup>129</sup> Balkin attributes the incompatibility between motherhood and public participation to social pressure to conform to a particular vision of motherhood.<sup>130</sup> He compares the burdens of motherhood to

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labor force has focused the Court on a decision it is uncomfortable with—a decision to have an abortion so one can be equal in the workplace.”).

<sup>126</sup> Cf. Smith, *supra* note 4, at 137 (“Gone was any link of the right to abortion to responsible parenting or to equality in family life, and gone was a sense of the importance of equality in parenting at home to women’s equality, liberty, humanity, or dignity.”).

<sup>127</sup> For a more nuanced analysis of some of the connections between abortion and work/family conflict, see Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

<sup>128</sup> See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16, 1435 (1990-1991) (collecting statistics on men’s continuing non-participation in domestic work).

<sup>129</sup> Balkin, *supra* note 5; see also Colker, *Equality Theory*, *supra* note 3 (critiquing several versions of the equality argument for abortion rights from an anti-essentialist perspective); Colker, *Reproductive Health Policy*, *supra* note 3 (arguing that society, rather than biology, puts the burdens of parenthood on women and that abortion restrictions should be attacked for their disparate impact on women, under a more stringent disparate impact standard than the one set out in *Feeney*); MacKinnon, *supra* note 3, at 1312-13 (“Social custom, pressure, exclusion from well-paying jobs, the structure of the marketplace, and lack of adequate daycare have exploited women’s commitment to and caring for children and relegated women to this pursuit which is not even considered an occupation but an expression of the X chromosome.”); Siegel, *supra* note 3.

<sup>130</sup> See Balkin, *supra* note 5, at 324.

the burdens of fatherhood and finds socially imposed disparities.<sup>131</sup> This comparison highlights the fact that the problem lies in society rather than biology. The comparison suffers, however, from its rejection of biology as one source of the problem. Defending abortion as a remedy for social inequality overlooks the fundamental nature of women's need to control their reproductive lives, implies inherent limits on the right, and abstracts women's bodies out of the discussion. It is an apology, rather than a moral justification, for abortion.

First, attributing the burdens of motherhood to societal discrimination ignores many women's experience of caretaking as an authentic choice. *Casey* merely assumed that whenever a child was born, the caretaking burden would fall on the mother. The more sophisticated versions of the argument agree, but explain that phenomenon in terms of social pressure to conform to gender roles. This explanation requires too much false consciousness about the reasons mothers devote huge amounts of time, money, and energy to caring for their children. Without denying the social pressure on mothers, it is, first, a good thing that someone feels that level of responsibility towards children. Second, it is not unreasonable to think that even in our non-sexist future, women will feel disproportionately attached (relative to men) to their biological children, at least at the time of birth.<sup>132</sup> The ability to act on that attachment without sacrificing material security or public life is as much a part of reproductive freedom as the right to abortion.

Setting aside questions of causation—whether state action, societal discrimination, or authentic choice best explains the disproportionate burdens of motherhood—why is abortion an appropriate remedy for women's poverty and other inequality? Catharine MacKinnon argues, "Short of . . . equality . . . abortion has offered the only way out."<sup>133</sup> But it is a very narrow way. Everyone agrees, in theory, that if a woman wants to have a child, but fears she cannot afford to care for it, alleviating her poverty would be preferable to merely pointing her to an abortion clinic.<sup>134</sup> Pro-choice advocates are quick to point out that they, rather than their pro-life opponents, are more likely to support sex education, freely available contraception, health care, social welfare programs, and a family-friendly public sphere.<sup>135</sup>

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<sup>131</sup> See *id.* at 323-24.

<sup>132</sup> See Hendricks, *supra* note 84, at 473-82 (discussing surrogacy and reproductive technology). My claim is not that the bond between a biological mother and child is unequaled by other love between parents and children (or that the bond is always one of love) but that pregnancy is sufficient to create a cognizable parent-child relationship that will typically include emotional bonds.

<sup>133</sup> MacKinnon, *supra* note 3, at 1317.

<sup>134</sup> Cf. West, *supra* note 108, at 141 ("If there is a conflict between caring for one's children and being a citizen in this Republic of Choice, it is a conflict that will also burden mothers who enjoyed fully consensual, welcome pregnancies conceived in happy, consensual, joyful sex.").

<sup>135</sup> See, e.g., Colker, *Equality Theory*, *supra* note 3, at 107 ("Why are the states that refuse to increase funding for women and children under Medicaid also the states that restrict abortion substantially?"); Pollitt, *supra* note 14, at 13 ("So far as I can tell, [Feminists for Life] is

However, the fact that abortion opponents have not offered better solutions to women's poverty does not lessen the gross disparity between the problem and abortion as a remedy. An examination of the inequalities that constrain women's lives may reveal why the right to abortion is sometimes an important means of asserting some control over a woman's own life. However, the need for abortion as a backstop to avoid the worst impositions of inequality does not justify abortion as a human right, regardless of the woman's social condition.

The emphasis on existing social inequality also suggests a built-in sunset clause for abortion rights. If the right to abortion flows from society's disproportionate expectations of mothers, then abortion rights will no longer be needed once the Supreme Court concludes that sex equality is at hand. Many women in the U.S. currently experience greater levels of equality and privilege than any other women in recorded history. The Supreme Court has already forecasted the end of structural race inequality within a generation; the practical end of sex inequality cannot be far behind.<sup>136</sup>

Equality, of course, can be achieved by leveling up or by leveling down. A state could claim that women no longer "need" abortion, either by improving women's ability to control their sexuality and supporting pregnancy and child-rearing (leveling up) or by imposing substantial sex- and child-related burdens on men (leveling down). In either case, the burdens-of-motherhood arguments justify greater restrictions on abortion. Indeed, some of the strongest advocates of women's equality have suggested that greater restrictions on abortion would be warranted under conditions of sex equality.<sup>137</sup>

Liberal voices are also increasingly rising in support of the kinds of abortion restrictions that the Supreme Court has consistently struck down:

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the only 'prolife' organization that talks about women's rights to work and education and the need to make both more compatible with motherhood.").

<sup>136</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 342-43 (2003) (predicting that affirmative action in higher education will not be needed after about twenty-five years); see also *Freeman*, *supra* note 37, at 1102 ("The typical approach of the era of rationalization is to 'declare that the war is over,' to make the problem of racial discrimination go away by announcing that it has been solved."). The fact that the Supreme Court is likely to declare the problem solved prematurely is not a flaw in the argument itself, merely a likely distortion by the Court. The assumption of an eventual sunset, however, inheres in the argument.

<sup>137</sup> See, e.g., *Siegel*, *supra* note 3, at 366-67 (stating that a state could justify forced pregnancy "by showing that the state does all in its power to promote the welfare of unborn life by noncoercive means . . . ; by demonstrating that the sacrifices the state exacts of women on behalf of the unborn are in fact commensurate with those it exacts of men . . . ; and even, by showing that the state is ready to compensate women for the impositions and opportunity costs of bearing a child they do not wish to raise"); *MacKinnon*, *supra* note 3, at 1326-27 ("Under conditions of sex equality, I would personally be more interested in taking the man's view into account"). *But see id.* ("The issue of the pregnant woman's nine-month commitment and risk would remain, and might have to be dispositive. The privacy approach might make more sense."). Cf. *Michael Stokes Paulsen, Prospective Abolition of Abortion: Abortion and the Constitution in 2047*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 51 (2007) (proposing a constitutional amendment banning abortion to take effect in forty years, although not conditioning this effect on any improvements in women's status).

spousal notification and consent requirements. Commentators who implicitly assume at least rough social equality between men and women have begun to see a biological and legal inequality in women's favor. Men, in this view, are unfairly disadvantaged by their lack of control over pregnancy and the decision whether to abort. Proponents of this view have proposed remedies ranging from a due process-like right to notice of the pregnancy and an opportunity to be heard, to relieving men from child support obligations if they would have preferred an abortion.<sup>138</sup>

If pregnancy and women's liberty were adequately theorized, the prospect of *more* state control of abortion once equal liberty is declared would easily be recognized as a contradiction in terms.<sup>139</sup> The need for *abortions* would almost certainly decrease dramatically under conditions of sex equality, but the same cannot be said of the need for *abortion rights*.<sup>140</sup>

Moreover, the combination of poverty and inequality as a justification for abortion and a willingness to allow greater regulation where women enjoy greater equality is a potentially dangerous mix. Demographic panic in the United States and Europe today is reminiscent of the fears that motivated the criminalization of abortion in the first place. Conservatives have increasingly expressed concern that privileged women are failing to breed,

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<sup>138</sup> See Shari Motro, *supra* note 75 (seeking a kind of equality by proposing that men should have to compensate women for the pain and suffering of pregnancy but that in exchange women should be required to notify and consult with biological fathers with regard to decisions about the pregnancy); Ethan J. Leib, *A Man's Right to Choose: Men Deserve a Voice in the Abortion Decision*, 28 LEGAL TIMES 1, 61 (Apr. 2005) (arguing that a man who is not negligent with respect to conception should be able to avoid a child support obligation by requesting that the woman abort); cf. Czapanskiy, *Volunteers and Draftees*, *supra* note 128, at 1478-79 (arguing that mother should be required to notify father of birth, with judicial bypass available); see also I. Glenn Cohen, *The Right Not to Be a Genetic Parent*, 81 S. CAL. L. REV. 1115 (2008) (proposing a framework for distinguishing claims about the right not to be a gestational, genetic, or legal parent). *But see* TRIBE, *supra* note 5, at 198 (arguing, along the lines of *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), that the man's opposition should not be allowed to trump the woman's decision to have an abortion).

<sup>139</sup> See Allen, *supra* note 3, at 432 ("[I]f constitutional liberty does not include reproductive control, then a national citizenship . . . continues to mean something disturbingly different for male and female citizens."); Colker, *Equality Theory*, *supra* note 3, at 109 ("And if legislatures regulated men's lives more, would that make restrictions on women constitutional or not sex-based?"); Hanigsberg, *supra* note 6, at 413 ("Would any of these suggestions [for supporting women] obviate the need for abortions? The answer is no. In countries with a social welfare net beyond the wildest dreams of Americans, women still need abortion as a way to manage their procreative lives."); see also Rubinfeld, *supra* note 110, at 119 (distinguishing cases such as jury or military service because "we do not deal here with such public duties of citizenship. Rather, we deal with a law that would force a particular private life on particular private individuals.").

<sup>140</sup> President Obama's efforts to bridge the divide in the abortion debate show the importance of maintaining the distinction between reducing the need for abortions and reducing the number of abortions by any available means. See generally Jon O'Brien, *Reducing the Need for Abortion: Honest Effort or Ideological Dodge?*, CONSCIENCE: THE NEWSJOURNAL OF CATHOLIC OPINION 2009, Summer 2009, at 13.

while less privileged women are breeding too much.<sup>141</sup> A theory utilizing social disadvantage as the primary justification for abortion, and allowing for greater regulation when greater sex equality is present, acts as an invitation to regulate access to abortion in essentially a eugenic fashion. It is not hard to imagine, for example, that abortion decisions could be made by a governmental body under a generous “health” standard that permits or encourages abortion for poor women, but rejects abortion requests from healthy women with ample means to support a child.<sup>142</sup> In other words, a sunset clause for reproductive rights is a bad idea, which becomes even worse where the sunset looks different on the basis of race and class.

Finally, disconnecting abortion rights from the body has implications for other doctrinal developments in the realm of privacy and reproductive rights. The focus on the social aspect of motherhood, rather than the biological, lends support to a generalized “right to avoid parenthood,” about which feminists should be cautious.<sup>143</sup> To date, this right has been applied to enforce the wishes of a husband seeking to destroy frozen embryos over his wife’s protest.<sup>144</sup> It also lends credibility to claims for a so-called “male right to abortion,” the claimed right to avoid child support obligations to an unintended child.<sup>145</sup> When the right to abortion is premised largely on the post-birth consequences of motherhood, it may be reasonable for men to claim the right to avoid parenthood even after pregnancy has begun.<sup>146</sup> Resting the right to abortion on the social context of post-birth parenthood opens the door to claims of equal rights for men.

Burdens-of-motherhood arguments respond to the lived experiences of pregnancy and inequality that structure the circumstances under which many

<sup>141</sup> See GOLDBERG, *supra* note 93, at 198-222 (discussing the “threat of first-world population decline that has, in recent years, come to obsess conservatives worldwide”); see also Special Issue on Aging, *ECONOMIST*, 2009 (“Most of the rich world is short of babies.”).

<sup>142</sup> That scenario is of course not the only possibility. The children of white parents are in demand for adoption. See ROTHMAN, *supra* note 2 at 85; Baumgardner, *supra* note 7. I am also not as sanguine as many are about the ability of well-off women to obtain abortions in the face of re-criminalization. At least to the extent that surgical facilities are needed for an abortion, recent interest in the possibilities of prosecuting women who leave their home jurisdiction in order to procure an abortion suggest an interest on the part of anti-abortion forces in foreclosing that outcome. Prosecution would be more difficult for medical abortions. See Richard H. Fallon, *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 *ST. LOUIS U. L.J.* 611 (2007).

<sup>143</sup> See generally Cohen, *supra* note 138, at 1115 (proposing a framework for distinguishing claims about the right not to be a gestational, genetic, or legal parent).

<sup>144</sup> See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>145</sup> See Leib, *supra* note 138.

<sup>146</sup> Reasonable, that is, as long as one ignores the existence of the child. More rigorously, Glenn Cohen has proposed several reasons why any claimed right to avoid genetic parenthood is weaker than the right to avoid gestational parenthood by terminating a pregnancy. See Cohen, *supra* note 138. The same framework and arguments might usefully be applied to the claimed right to avoid legal parenthood by disclaiming responsibility for child support. See also Jill E. Evans, *In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility*, 36 *LOY. U. CHI. L.J.* 1045, 1109 (2005) (“[t]he conclusion that the right to procreate inures in the individual imposes not simply a right to choose when and how to procreate, but perhaps a nondelegable obligation to protect against unwanted procreation.”).

women seek abortions. By focusing on the social burden of motherhood as compared to fatherhood, however, they disconnect the abortion right from women's bodies, instead constructing it as a right to avoid parenthood under conditions of inequality. This account of abortion rights is revealing and powerful in many circumstances, but remains inadequate as a construction of women's reproductive human rights that will endure when sex inequality is eliminated or, more accurately, when the Supreme Court takes judicial notice of this perceived sociological reality.

### C. *The Limits of Comparison*

No equality argument for abortion rights can rest on a perfect analogy between pregnancy and some other life experience. Pregnancy is unique, yet equality analysis demands a comparison. The inequality, however, is deeper than a failure to apply liberty principles appropriately to pregnant women. The principles themselves were developed from the experiences of privileged men, conceptualized as isolated, autonomous actors. There is no particular reason to expect these principles to translate well to pregnant women.

Equality and equal protection mean, at a minimum, treating "like things alike." For a long time, the Supreme Court has added, "and different things however you want." Feminists have worked hard to argue that the rule should instead require treating "like things alike, and different things in appropriately different ways." However, equality is ultimately an empty concept.<sup>147</sup> To know what it means to treat women equally with men in the context of reproduction, one needs to have a substantive concept of human dignity for people who are sometimes pregnant.

The comparative equality arguments for abortion try to defend abortion rights by taking pieces of the problem and analogizing to general (male) experience. One might think that a series of partial views could eventually paint a picture of the whole, as with the blind men and the elephant. In this case, however, the whole is being constructed not merely from partial views but from partial views transformed by analogy into something else. When we break the elephant into pieces and subject them to this transformation, we could end up with a giraffe. The flaws in the various equality arguments are thus deeper than mere incompleteness. Each reveals an important aspect of the problem, but the forced comparison to male experience also channels how pregnancy and abortion themselves are understood.

Analogies that seek to convey the harm of unwanted pregnancy and motherhood understandably tend to portray pregnancy and motherhood in a negative light. That might not be so bad; the point, after all, is that forced pregnancy is wrong. All of these arguments, however, create a context in which only the right to obtain an abortion is protected, at the expense of a broader conception of reproductive freedom. For example, many of the

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<sup>147</sup> See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).



equality arguments were specifically designed to attack funding restrictions. These arguments do a good job of showing why it is sex-biased for a state health care program to pay for the expenses of childbirth, but not the expenses of abortion. They may even convince you that it is sex-biased for the state to rescue kidnapping victims, while refusing to rescue involuntarily pregnant women.<sup>148</sup> Unfortunately, equality arguments are poorly suited to demonstrating why the reverse—say, funding abortion, but not childbirth—would be equally horrid. Equality is not merely an empty concept, but also a risky method of theorizing women’s reproductive human rights.

### III. THE CONSTITUTIONAL STATUS OF PREGNANCY

*No one wants an abortion as she wants an ice-cream cone or a Porsche. She wants an abortion as an animal, caught in a trap, wants to gnaw off its own leg.*<sup>149</sup>

Body-focused and burden-focused arguments for abortion rights seek comparisons by emphasizing one aspect of pregnancy. The limits of both kinds of comparisons stem from the separation of the biological and relational aspects of pregnancy. Body-focused comparisons highlight bodily integrity at the expense of the social context that is crucial in the decision to seek an abortion. Burdens-of-motherhood comparisons emphasize the social context and life-changing burdens that motherhood entails, attributing women’s parenting decisions to negative forces in society. However, severing the “right to avoid parenthood” from women’s bodies has undesirable implications.

Part III.A proposes a relationship model of pregnancy that respects pregnancy as a unitary process, including both biological and social elements. Although analogies to other experiences are useful for illuminating disparities, the ultimate goal is to theorize reproductive freedom directly from women’s experiences, rather than to derive it from men’s experiences.

This approach is grounded in existing precedent dealing with parenthood outside the context of abortion. The Supreme Court has already treated pregnancy, in its biological and social aspects, as the foundation for constitutionally protected parental rights.<sup>150</sup> Its approach has been criticized for stereotyping women as mothers,<sup>151</sup> which perhaps undermines the right to abortion. It holds the potential, however, for a more robust theory of repro-

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<sup>148</sup> See McDONAGH, *supra* note 108, at 142.

<sup>149</sup> Frederica Mathewes-Green, *Seeking Abortion’s Middle Ground: Why My Pro-Life Allies Should Revise Their Self-Defeating Rhetoric*, WASH. POST, July 28, 1996, at C1. One can read too much into this analogy, which suggests that abortion permanently harms a woman by killing a part of her, even if it is necessary to escape a worse fate. That is true for some women, but other women are starfish, who will grow a new leg and go on as before.

<sup>150</sup> See *infra*, Part III.A.

<sup>151</sup> Laura Oren, *Honor Thy Mother?: The Supreme Court’s Jurisprudence of Motherhood*, 17 HASTINGS WOMEN’S L.J. 187, 187, 198 (2006).

ductive rights that would connect abortion to other concerns, rather than isolating it. A pregnant woman has a right to abortion for the same reason she is constitutionally presumed to be the parent of any baby she carries to term<sup>152</sup>: pregnancy is physical caretaking and the prototype for creating a parental relationship.

In treating the female experience as the norm, the relationship model of pregnancy provides a superior basis for articulating women's rights. Part III.B discusses how the model would support reproductive rights. First, despite drawing on the connection established during pregnancy, the relationship model avoids the essentialism problems of relational feminist theory. Second, the model is strategically useful for keeping the focus on women's rights, rather than doctor's rights, with respect to reproductive health care, especially abortion. Finally, the comparison to the treatment of unwed fathers provides a basis for arguing for affirmative reproductive rights, possibly including state funding for abortion.

#### A. *The Relationship Model of Pregnancy*

The harm of forced pregnancy should be understood *in toto*, as hijacking the body to force the creation of an intimate caretaking relationship. While the abortion right has been described this way, the impulse to break it down into separate pieces remains because of the need to find male analogs for equality arguments. That process of disaggregation, however, takes us further away from an understanding of human dignity that is at home in female bodies. "Bearing a child creates a profoundly intimate relationship between the woman and the child, even when that relationship ends shortly after birth."<sup>153</sup> Forced pregnancy forces women into that intimate relationship, regardless of whether society imposes too many expectations and disabilities on maternal status.

Abortion rights are not the only context in which pregnancy is relevant to constitutional analysis. In an important line of cases addressing the parental rights of unwed fathers, the Supreme Court used pregnancy as the model for defining the constitutional status of parents. The Court recognized that pregnancy combines biology and caretaking and based its equal protection analysis on a female baseline. Thus, the unwed father decisions provide a starting point for a constitutional analysis of reproduction that defines rights with women's unique experiences as the norm, rather than the exception.<sup>154</sup>

The unwed father cases involved a series of challenges to state laws treating the mother, but not the father, as the legal parent of a child born

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<sup>152</sup> One consequence of the relationship model of pregnancy is to call into question legal fictions such as surrogacy contracts that are meant to define the pregnant woman as not-a-mother. See *infra* Part III.B.4.

<sup>153</sup> Law, *supra* note 3, at 1018.

<sup>154</sup> For a more detailed elaboration of this point, see Hendricks, *supra* note 84, at 433-44.

outside of marriage.<sup>155</sup> The Supreme Court started with the assumption that the biological mother's parental rights were established by the birth of the child. The Court also accepted the state's argument that biological fathers were not similarly situated to biological mothers: biological maternity implied a caretaking relationship to the child, which is not part of biological paternity.<sup>156</sup> Men are thus at a biological disadvantage when it comes to parental rights.<sup>157</sup>

Traditionally, men have overcome this disadvantage by acquiring parental rights through marriage to a child's mother. Through at least the 1970s, the Supreme Court continued to see men's relationships with children as primarily derivative of their relationships with women. For example, in *Planned Parenthood of Missouri v. Danforth*,<sup>158</sup> the Court struck down the requirement that a woman's husband consent to her abortion. In acknowledging the husband's interest in the matter, the Court spoke first of his concern for "his wife's pregnancy," and only secondarily of his interest in "the fetus she is carrying."<sup>159</sup> The emphasis was on the effect of the abortion decision on the marriage, not on a direct relationship between the husband and the fetus. In the unwed father cases, men asked the Court to recognize such a direct relationship as a matter of equality of parental rights between women and men.

Recall that in cases like *Geduldig*,<sup>160</sup> where women were biologically disadvantaged in the workplace, the Court held that the state could decide whether to accommodate their disadvantage in defining the terms and conditions of employment. Therefore, consistency with *Geduldig* would mean allowing the state to choose whether to accommodate men's disadvantage when defining the prerequisites for parental rights.

However, the Court did not apply *Geduldig*-like reasoning to the unwed fathers. Nor did the Court hold that an unwed father was equivalent to an unwed mother based merely on the fact of biological parenthood. Instead, having identified a relevant biological difference between the sexes, the Court took another step: it used motherhood as the model for crafting a "biology-plus-relationship" test to accommodate fathers' physical disadvantage.<sup>161</sup> As the Court later explained, it makes sense to allow a man to ac-

<sup>155</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>156</sup> See *Hendricks*, *supra* note 84, at 435-36.

<sup>157</sup> Men are disadvantaged in that they are unable to become pregnant and give birth to a child. Cf. Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (1990) (noting the "disadvantage [that] men experience in accessing child-nurturing opportunities").

<sup>158</sup> 428 U.S. 52 (1976).

<sup>159</sup> *Id.* at 69.

<sup>160</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>161</sup> The Court has summarized the biology-plus-relationship test as follows: "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it

quire parental rights comparable to a mother's by creating a test "in terms the male can fulfill."<sup>162</sup> Men's biological disadvantage thus served not as a justification for different legal treatment, but as an impetus for devising a legal standard that fairly accommodated their disadvantage. "[P]arental rights, the one area of law in which men's biology rather than women's is a disadvantage, is also the one area in which the Supreme Court has adopted a flexible, accommodating theory of sex equality" as a matter of constitutional command, not just governmental choice.<sup>163</sup>

This model of pregnancy as combining biological and caretaking relationships fits comfortably at the intersection of the body-focused and burdens-of-motherhood arguments for abortion rights. Pregnancy itself, when unwanted, involves both a bodily invasion and a forced social relationship of caretaking. It is precisely that combination that is at the heart of the harm of forced pregnancy, yet the combination is too often abandoned in the quest for a comparison to male experience. A better explanation for abortion rights would retain both elements, since it is the combination of biological and social relationships that makes pregnancy uniquely challenging to analyze using legal principles based on the experiences of "non-pregnant persons."<sup>164</sup>

Nonetheless, the description of pregnancy as a caretaking, parental relationship sounds alarm bells for many feminists. The capacity for pregnancy has long been the basis for extrapolating general duties of uncompensated care work by women, as well as condemnation of women who seek abortions. Both liberals and conservatives on the Supreme Court have at times reacted to that concern by moving to the opposite extreme, denying that pregnancy has relational significance.<sup>165</sup> Scholars such as Pam Karlan and

may be said that he 'act[s] as a father toward his children.' But the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 389 n.7, 392).

<sup>162</sup> *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (describing Congress's effort to give male citizens means to obtain citizenship for foreign-born children); see also Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 88-90 (1995) (stating that the model parent is a pregnant woman but that the "different biological roles of men and women in human reproduction make it imperative that law and public policy 'recognize that a father and a mother must be permitted to demonstrate commitment to their child in different ways'" (quoting *Recent Developments—Family Law*, 104 HARV. L. REV. 800, 807 (1991))).

<sup>163</sup> Hendricks, *supra* note 84, at 444.

<sup>164</sup> *Geduldig*, 417 U.S. at 496 n.20. More accurately, it is the experiences not only of the currently non-pregnant but of those who will never be pregnant and whose social identity is not defined largely by the possibility, regardless of the probability, of pregnancy. See generally *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that the employer violated Title VII when it barred all fertile women from a job that involved exposure to lead).

<sup>165</sup> See ROTHMAN, *supra* note 2, at 248-49 ("[B]oth patriarchal ideology and liberal feminist thinking have come to the same conclusion about what to do with the problem of the uniqueness of pregnancy: devalue it. . . . Instead of a flower pot, the woman is seen as an equal contributor of seed—and the baby might just as well have grown in the backyard."); Hendricks, *supra* note 84, at 468-71 (criticizing the Supreme Court's recent insistence on the maternal-paternal equivalence at the moment of birth).

Dan Ortiz have warned of the dangers of relational and other feminist theories that emphasize women's connectedness to others.<sup>166</sup> Feminist theory that portrays women as inherently more nurturing than men can easily be used against feminist political goals.

The relationship model of pregnancy is not based on the tenets of relational feminism. Relational feminists are correct, however, that pregnancy and birth are occasions of heightened connection to another life. While the capacity for pregnancy does not imply that women have a nurturing essence, pregnancy is an act of nurturance: the feeding and care of a developing life. That nurturing may be done willingly or unwillingly, with love, indifference, or hate, but it is done, and is thus analogous to the relationship prong of the biology-plus-relationship test for unwed fathers.<sup>167</sup>

Of course, just because such a bond might seem natural does not necessarily mean it should have legal significance. "Nature," after all, "is what we were put on this earth to *rise above*."<sup>168</sup> Much of our legal and social structure is devoted to suppressing what appear to be natural impulses. The thrust of equal protection jurisprudence is a rejection of legal rules premised on claims about natural sex differences.<sup>169</sup> The point of the comparison to the unwed father cases, however, is not that women are any more inherently nurturing than men are. The unwed father cases reflect a social judgment that it is normatively good to recognize and promote bonds based on a biological connection and a history of caretaking. Recognition of a similar bond created by pregnancy does not imply that pregnancy has unique status as the ultimate form of caregiving or that only pregnant and birthing women can achieve such a bond with a child.<sup>170</sup> Rather, pregnancy can be consid-

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<sup>166</sup> See Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 Nw. U. L. REV. 858 (1993); see also Hanigsberg, *supra* note 6, at 380, 410 (noting that concerns about the implications of acknowledging a maternal relationship with the fetus have constrained feminist discourse about abortion). In law, relational feminism is typically a critique of autonomy-oriented, rights-centered discourse that ignores or discounts relationships and dependency. That critique is described as feminist on the basis of a series of claims about sex differences. Women are said to feel more connected to other people and to be more sensitive to relationships, as compared to men.

<sup>167</sup> Cf. Hanigsberg, *supra* note 6, at 385 ("The argument that pregnancy is unique, however, should neither devalue nor sentimentalize it."). In some cases, this nurturing may be performed without any expectation of substantial post-birth parenting, as when a woman plans to place a child for adoption or has signed a surrogacy contract. Under the relationship model, it is nonetheless the relationship of pregnancy that makes the woman the appropriate decision-maker about the adoption by others. See *infra* Part III.B.1.

<sup>168</sup> THE AFRICAN QUEEN (United Artists 1951) (Rose Sayer played by Katherine Hepburn is quoted saying this to Charlie Allnut played by Humphrey Bogart). See generally Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (So Far) Irrelevant to Legal Regulation*, 29 L. & PHIL. (forthcoming 2010).

<sup>169</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 546-56 (1996) (rejecting a plan to admit only men to a traditional military academy and only women to a "leadership academy" designed for what the state claimed were women's typical educational needs).

<sup>170</sup> See ROTHMAN, *supra* note 2, at 242 ("[The relationship theory of pregnancy] does not mean that the maternal relationship cannot be ended. Nor does it mean that the relationship is the most overwhelming, all-powerful relationship on earth.").

ered a form of caretaking comparable to the relationships recognized in the unwed father cases, relationships that routinely form between children and their caretakers beyond their birth mothers.<sup>171</sup> Fear of traditional ideology—or the excesses of relational feminism—should not lead to discounting pregnancy, especially as compared to other forms of parental relationships.<sup>172</sup>

*B. Pregnancy as Parenting: How to Reason (Carefully) from the Body*

The heading for this section refers to Reva Siegel's classic article, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*.<sup>173</sup> In her article, Siegel describes how "physiological reasoning" promoted the criminalization of abortion in the nineteenth century. Doctors and legislators extrapolated fetal personhood and women's duty to carry to term from women's ability to become pregnant and new science about fetal development. The relationship model of pregnancy treads close to the dangers of this kind of reasoning, since it uses the physiological relationship of pregnancy as the model for parental rights. The challenge is to assign appropriate value to the relationship without becoming deterministic about women's roles. Treading close to the line, however, is necessary in order to support women, both when they seek motherhood and when they seek to avoid it. Properly understood and carefully applied, the relationship model of pregnancy supports the right to abortion as part of a comprehensive theory of reproductive freedom.

The sections that follow provide examples of how the relationship model applies to questions of reproductive rights. First, the caretaking relationship supports pregnant women's claims of parenthood in the face of purported waivers of parental rights in surrogacy contracts. Second, it reveals the difference between involuntary pregnancy and liability for child support. And third, it strengthens the moral and rhetorical weight of the pregnant woman's interest in the entire range of abortion cases. An important example of the need for that moral weight is the choice of abortion method in *Carhart II*, discussed in section 4. That case might have come out differently if the Court had perceived pregnant women as making parental choices. The final section argues that the construction of positive parental rights for men in the unwed father cases supports positive rights for women with respect to contraception and abortion.

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<sup>171</sup> See Hendricks, *supra* note 84, at 473-75; see also Law, *supra* note 3, at 1007 (arguing that refusal to acknowledge the special relationship of pregnancy means that women can only be equal to the extent they are the same as men).

<sup>172</sup> Cf. Hendricks, *supra* note 84, at 470-71 (criticizing opinions in *Nguyen v. INS*, 533 U.S. 53 (2001), for denying reality for the sake of superficial formal equality); MacKinnon, *supra* note 3, at 1305 ("The dissent [in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), a statutory rape case,] revealed more concern with avoiding the stereotyping attendant to the ideological message the law communicated than with changing the facts that make the stereotype largely true.").

<sup>173</sup> Siegel, *supra* note 3.

### 1. *Surrogacy Contracts and the Adoption Alternative to Abortion*

I have argued elsewhere that the relationship model of pregnancy casts doubt on whether states should enforce pre-conception “surrogate mother” contracts.<sup>174</sup> When such contracts are signed, the relationship is not yet formed. The child, the gestational mother, and the society all have an interest in ensuring that such a basic decision in the life of a child is made in the context of an existing relationship with a specific child, not in an abstract negotiation over a hypothetical infant.

For similar reasons, the relationship model provides one explanation of why the option of placing a child up for adoption is not a sufficient alternative to the right to abortion. First, of course, the prospect of adoption does not alleviate the physical risks and burdens of pregnancy. More important, however, an adoption plan does not prevent the caretaking of pregnancy from occurring. As Reva Siegel has argued:

Once compelled to bear a child against their wishes, most women will feel obligated to raise it. A woman is likely to form emotional bonds with a child during pregnancy; she is likely to believe that she has moral obligations toward a born child that are far greater than any she might have to an embryo/fetus; and she is likely to experience intense familial and social pressure to raise a child she has borne.<sup>175</sup>

For feminist arguments that shy away from connecting pregnancy and abortion to motherhood, these bonds are inconvenient. Under the relationship model, they are central to understanding the harm of forced pregnancy.

### 2. *“Male Abortion” and Better Analogies*

The relationship model also makes obvious the failure of the argument for a male “right to abortion” in the sense of avoiding liability for child support. An obligation to pay for the support of a child is entirely different in nature from either the physical imposition of compulsory pregnancy or the relational imposition of compulsory parenting.<sup>176</sup>

<sup>174</sup> See Hendricks, *supra* note 84.

<sup>175</sup> Siegel, *supra* note 3, at 371-72. Siegel notes that the pressure to raise the child will be especially strong if the child is not likely to be easily adoptable. See also Rubinfeld, *supra* note 110, at 110 (“[H]aving forced an unwilling woman to carry and bear, [the State] cannot disclaim responsibility if, as a natural and foreseeable consequence, the woman ends up feeling bound, by the deep sentiments of love or duty that characteristically arise, to keep and raise her child.”).

<sup>176</sup> I. Glenn Cohen’s approach to the right not to procreate may also be useful here. See Cohen, *supra* note 5. His argument demonstrates that any right not to be a genetic parent may be less robust and more amenable to waiver than the right not to be a gestational parent. The same may be true of any right not to be a legal parent and thus liable for child support.

This point also suggests a strategy for deploying comparison-based equality arguments when they are needed. Advocates for reproductive rights should seek analogies that combine the physical and the caretaking aspects of pregnancy, rather than isolate them. For example, rather than using Thomson's violinist analogy, advocates could point to courts' abhorrence, in family law cases, for imposing mandatory visitation on non-custodial parents.<sup>177</sup> Mandatory visitation would involve at least some physical compulsion and a duty of caretaking far less substantial than pregnancy. If pregnant women's rights must be justified by comparison to men's experiences, it is preferable to use comparisons that share both of the key aspects of pregnancy.

### 3. Valuing Women's Judgment

Through its connection to parenting, the relationship model invokes a body of law that disfavors state interference with an individual's considered judgment on family matters. Priscilla Smith has pointed out that women have abortions primarily for "mothering-related" reasons,<sup>178</sup> but that those reasons have disappeared from political and legal discourse about abortion. This disappearance has contributed to the Supreme Court's "increasing discomfort with and distrust of women's decision-making process."<sup>179</sup> Thus, the Court has upheld abortion restrictions such as waiting periods, "informed" consent, and the Partial-Birth Abortion Ban Act, all of which reflect an assumption that women take abortion decisions lightly.

### 4. Choosing the Method of Abortion

That the abortion decision can be a parenting decision is most readily apparent in the context of the ban on intact D&E abortions. The Supreme Court struck down Nebraska's ban in *Stenberg v. Carhart* (*Carhart I*).<sup>180</sup> In addition to vagueness problems, the statute was unconstitutional because it had no health exception, even though "a significant body of medical opinion" held that intact D&E was sometimes safer.<sup>181</sup> Seven years later, however, the Court decided *Gonzales v. Carhart* (*Carhart II*),<sup>182</sup> discussed earlier in this Article. With Justice Alito having replaced Justice O'Connor, the Court upheld the federal ban against a facial challenge even though the law contained no health exception.

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<sup>177</sup> See generally Daniel Pollack & Susan Mason, *Mandatory Visitation*, 42 FAM. CT. REV. 74 (2004).

<sup>178</sup> Smith, *supra* note 4, at 144. See also Williams, *supra* note 127, at 1589-90 ("The pro-choice movement needs to work harder to represent aborting women as moral actors making hard choices in no-win situations.").

<sup>179</sup> Smith, *supra* note 4, at 142.

<sup>180</sup> 530 U.S. 914 (2000).

<sup>181</sup> *Id.* at 937-38.

<sup>182</sup> 550 U.S. 124 (2007).



An unacknowledged tragedy of *Carhart II* was that many of the abortions to which the federal ban applies involve wanted pregnancies. The “partial birth” procedure was used only in relatively late abortions. In some cases, these would be pre-viability abortions sought primarily because a lack of health services delayed a woman’s knowledge of her pregnancy or access to abortion. In other pre-viability cases, and in all post-viability cases, the need for abortion is triggered by fetal deformities or by a threat to the pregnant woman’s life or health.<sup>183</sup> The patient receiving a “partial birth” abortion may be receiving a late, but pre-viability abortion of her choosing. She may have already picked out names, arranged for maternity leave, or had a baby shower. The latter woman has suddenly been faced with the prospect of her own possible death or disability, or of giving birth to a child who would know little but suffering in her short life. In either case, any as-applied exception to the ban on intact D&E is subject to the “significant risk” standard.

A woman planning an abortion in such circumstances faces additional decisions regarding the method of abortion. In some cases, a doctor can induce contractions, performing an abortion by triggering a miscarriage. There is no clear medical distinction between traditional and intact D&E, and the legal distinction is based primarily on Congress and the Supreme Court’s purported disgust for intact D&E.

While medical exigencies may favor one method of abortion over others, they are not the only relevant factors. Many women may prefer an abortion by induction, tracking to some degree the birth they had been anticipating, albeit with a tragic end. This procedure, when medically possible, may allow the woman to see and hold the intact fetus. Other women may want to avoid the resemblance to birth. As a guide for doctors explains, the intact D&E avoids the physical and emotional toll of prolonged labor, while also preserving the fetus intact:

Patients with anomalous fetuses may find that the prospect of a prolonged induction and delivery compounds the anguish of their decision and loss. . . . Grieving is important for the parents of an anomalous fetus, and seeing and holding the fetus are important components of healing. Their needs may be better met with an intact fetus (intact D&E procedure).<sup>184</sup>

Women may also come to different conclusions than Congress about the relative morality of regular and intact D&E.<sup>185</sup> The sympathy evoked by this example need not be reserved for women reluctantly aborting welcomed

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<sup>183</sup> See *id.* at 173 n.3 (Ginsburg, J., dissenting) (describing the reasons that women seek abortions in the second trimester); MAUREEN PAUL ET AL., A CLINICIAN’S GUIDE TO MEDICAL AND SURGICAL ABORTION 17-18 (1999).

<sup>184</sup> PAUL, *supra* note 183, at 125.

<sup>185</sup> Cf. Law, *supra* note 105 (arguing for women’s right to make choices about how to proceed with childbirth).

pregnancies due to complications. A woman who needs a second trimester abortion because poverty or youth delayed her action is entitled to the same presumption that she is capable of making her own moral choice. The very factors that delayed her decision may be the same factors rendering the abortion necessary. A woman's moral reasoning is no less able to account for pre-viable fetal life because she had not meant to become a parent.<sup>186</sup>

One of the problems with both *Carhart I* and *Carhart II* is that the party challenging the ban was not a woman claiming her status as a moral actor, but a doctor claiming his right to practice medicine as he saw fit. His advocates pinned their arguments on the doctor's expertise, rather than women's moral status. In *Carhart I*, Justice Kennedy rightly complained that the majority reasoned entirely from the perspective of the doctor, rather than the perspective of a "shocked" society.<sup>187</sup> In *Carhart I*, on the question of "who decides" on the method of abortion, the majority of the Court sided with the doctor, the dissent sided with society, and no one sided with the pregnant woman on whom the procedure is performed. Not until Justice Ginsburg's dissent in *Carhart II* was there any suggestion that the pregnant woman might be an appropriate decision-maker.

This narrow medical perspective is apparent in the Court's acceptance of Congress's claim that intact D&E "perverts" the natural birth process.<sup>188</sup> In apparent contradiction of this assertion, the Partial-Birth Abortion Act's proponents pointed to induction of labor as the morally superior method for necessary late abortions.<sup>189</sup> From this perspective, the "natural birth process" is not when a woman labors to push out a baby, but when a doctor uses drugs and instruments to extract a fetus from a uterus.<sup>190</sup> If women have so little to do with the natural birth process, it is no wonder that no one thought to seek their opinion on the choice of abortion method.

The choice of abortion method implicates not only medical, but also moral and emotional well-being. It is the sort of choice that adults make for themselves and parents make for their children. The moral and emotional status of the woman/mother, however, was submerged by both sides in *Car-*

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<sup>186</sup> See MacKinnon, *supra* note 3, at 1318 (stating that a woman's decision to have an abortion because "she cannot give this child a life" is "one of absolute realism and deep responsibility as a mother").

<sup>187</sup> *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting).

<sup>188</sup> *Gonzales v. Carhart (Carhart II)*, 550 U.S. 123, 129 (2007) (quoting congressional findings); see also *Carhart I*, 530 U.S. at 962-63 (Kennedy, J., dissenting) (citing American Medical Association statements on intact D&E).

<sup>189</sup> See *Carhart II*, 550 U.S. at 140.

<sup>190</sup> The routine use of forceps to extract a baby during childbirth has been thoroughly discredited. See Laura D. Hermer, *Midwifery: Strategies on the Road to Universal Legalization*, 13 HEALTH MATRIX: J. LAW-MEDICINE 325, 345 n.128 (2003) (collecting information about risks of unnecessary use of forceps); Law, *supra* note 105, at 363-64 ("[R]outine care for normal childbirth [in the mid-twentieth century] required that the woman be sedated throughout labor, the baby removed from the unconscious mother by forceps, an incision be made to facilitate use of the forceps, and the placenta removed by injecting a drug (ergot). Because the anesthetized woman might thrash about and injure herself, her arms and legs had to be restrained.").

*hart I* and *Carhart II*. Recognizing the moral, parental aspect of the *entire* abortion decision, including the method, would not necessarily change the outcome of *Carhart II*. The Supreme Court has already held, in *Washington v. Glucksberg*, that the state may inflict intimate suffering to further its moral interest in preserving life.<sup>191</sup> A model of pregnancy as parenting would help redress the prevailing assumption of frivolity that attaches to women's abortion decisions.<sup>192</sup>

### 5. *Affirmative Rights and Government Funding*

A final possible application of the relationship model is the unattained holy grail of abortion rights lawyering after *Roe*: public funding of abortions for poor women. As the nation has lurched slowly toward universal health care, and as higher-income women have gained better contraceptive care (and thus less need for abortion), it becomes increasingly important to define the full range of reproductive health services as basic health care for women.<sup>193</sup> Specifically, the exclusion of abortion and other reproductive health care from public health plans needs to be understood in a way that triggers heightened scrutiny, both as a sex classification and as implicating fundamental rights.

Even in the heyday of strict scrutiny for abortion restrictions, the Supreme Court rejected all efforts to secure such funding and upheld the specific exclusion of abortion services from Medicaid.<sup>194</sup> Under privacy doctrine, the government's duty was merely to refrain from interfering when a woman privately sought a doctor to perform an abortion. Just as the freedom of speech does not mean that the government must give a person a megaphone, the right to have an abortion did not include the right to government assistance in procuring one.<sup>195</sup>

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<sup>191</sup> 521 U.S. 702 (1997) (holding that a ban on physician-assisted suicide was constitutional, even as applied to mentally competent, terminally ill adults who sought control over the manner of their deaths). Justice Kennedy referred to *Glucksberg* in his opinions in both of the partial-birth abortion cases. *Carhart II*, 550 U.S. at 158; *Carhart I*, 530 U.S. at 962. Note, however, that in *Glucksberg*, the individual privacy right was balanced against state interests in tangible consequences, such as possible coercion or euthanasia. In the *Carhart* cases, the state's interest was its generalized moral objection to intact D&E, which was not clearly distinct from its moral objection to all abortions.

<sup>192</sup> Cf. Hanigsberg, *supra* note 6, at 399-403, 416.

<sup>193</sup> See generally B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501 (2008) (proposing recognition of a negative right to health care, based in part on abortion precedents).

<sup>194</sup> See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); see generally Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. (forthcoming 2010).

<sup>195</sup> See *McRae*, 448 U.S. at 317-18. Peggy Cooper Davis points out that *Maher* went further, arguing not only that the state lacked a duty to fund abortion, but also "that it has a clear right to discourage abortion." DAVIS, *supra* note 30, at 203. This move set the stage for *Casey* to extend the state's compelling interest in fetal life back to the point of conception.

The rejection of public funding was perceived to be a limit of privacy doctrine, and many feminist lawyers believed that the Equal Protection Clause would be a better path to funding.<sup>196</sup> However, the state action problem remains. One problem with the equality arguments discussed in Part II—and with any equality argument for public funding of poor women’s abortions—is that they assume a governmental duty to accommodate de facto inequality. Under the burdens-of-motherhood approach, for example, women have a right to abortion because women are disproportionately and discriminatorily saddled with responsibility for rearing children.<sup>197</sup> That discrimination, however, is not attributable to the government under the state action doctrine.<sup>198</sup> Existing inequality in biology and social circumstances typically means that the government may choose whether to level the playing field by, say, giving women access to abortion.<sup>199</sup>

The unwed father cases, however, provide an opening for a possible affirmative duty on the part of the government. A unified vision of pregnancy based on the relationship model brings abortion rights within the ambit of those cases. The abortion right relates to the right at stake in the unwed father cases, since abortion also involves the parent-child relationship.<sup>200</sup> In the fatherhood cases, the state was required to accommodate biological sex inequality when it acted to deny putative fathers of their liberty interest in the parent-child relationship. When the state restricts abortion, it also denies a liberty interest, and might therefore be required to accommodate de facto inequality in the context of reproductive rights.

As a matter of biology, men are disadvantaged with respect to creating parental relationships; women are disadvantaged with respect to avoiding them. In the unwed father cases, the Supreme Court required that states

<sup>196</sup> See, e.g., McDONAGH, *supra* note 108, at 148-54 (arguing that her adaptation of the Good Samaritan argument leads to the conclusion that government must fund abortion); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 384-85 (1985) (arguing that if *Roe* had been decided using equality principles, the outcomes of *McRae* and *Maher* might have been different). But see Allen, *supra* note 3, at 545-55 (rebutting this claim and pointing out, “One must consider the possibility that equal protection can look ‘better’ today only because it has not yet been touselled in the fray.”).

<sup>197</sup> See, e.g., Balkin, *supra* note 5, at 323-24 (arguing that abortion bans force women to become mothers, which society links to disproportionate burdens with respect to child care).

<sup>198</sup> See Jennifer S. Hendricks, *Contingent Equal Protection*, 16 MICH. J. GENDER & L. (forthcoming 2010) (discussing the parallel treatment of biological disadvantage and social inequality). The state action doctrine makes the government accountable only for harms linked through a tight chain of causation to specific, illegal acts of discrimination by the government. Everything else is societal discrimination or structural inequality. When the purportedly natural workings of society result in inequality, the government may choose whether to act as a counter-weight. The difficulty of establishing an affirmative right to government help is that government is not required to act without proof of fault and immediate causation. See Jeffrey Rosen, *Dissenting, in WHAT ROE v. WADE SHOULD HAVE SAID* *supra* note 35, at 170, 173 (“[T]here are no formal barriers that keep pregnant women from pursuing whatever occupations they choose. The pressures that they feel are social, rather than legal.”).

<sup>199</sup> See Hendricks, *supra* note 198, at 432-33 & n.175.

<sup>200</sup> Cf. Hanigsberg, *supra* note 6, at 372 (suggesting a connection between motherhood and abortion).

affirmatively assist men in overcoming their disadvantage. States had, in fact, already done so by establishing the institution of marriage, connecting men to women's children. The unwed father cases required that, in addition, states recognize and support relationships between men and their children that resemble the relationship between women and their newborns. Many states have gone further, interpreting the unwed father cases as requiring the establishment of institutional mechanisms such as putative father registries, which assist men in perfecting and enforcing parental rights outside marriage. The cost of funding abortion services does not seem like too much to ask for where other reproductive health care is already funded, and in light of accommodations that have already been made for men's disadvantage.

This last claim brings us full circle: premising a claim of positive rights for women on a comparison to a right already recognized for men. Perhaps there is no avoiding it. I take solace, at least, in the fact that the test for recognizing the unwed fathers' parental rights is itself premised on the key features of pregnancy.

#### CONCLUSION

*Had women participated equally in designing laws, we might now be trying to compare other relationships—employer and employee, partners in a business, oil in the ground, termites in a building, tumors in a body, ailing famous violinists and abducted hostages forced to sustain them—to the maternal/fetal relationship rather than the reverse.<sup>201</sup>*

Equality analysis yields valuable insights into the state's willingness to force women to bear children and the role that such policies play in maintaining inequalities. Equality analysis, however, requires comparisons, which, in turn, require reframing pregnancy, abortion, and motherhood in ways that are comparable to male experiences. Often, the analysis proceeds by splitting apart the biological and social components of pregnancy. This initial step pulls the discussion further and further from the reality of pregnancy, in which those components are inextricably intertwined. Equality analysis thereby produces a rights discourse that remains rooted in men's experiences, even as it speaks the language of sex equality.

The pitfalls of both the body-focused and the burdens-of-motherhood equality arguments provide two lessons for constructing a feminist theory of reproductive freedom. First, the right to abortion is unitary and rests not on two distinct freedoms but on their inseparability. Therefore, feminists should avoid bifurcating pregnancy into physical and social components. Any comparative analysis should include both aspects, or, if focused on only one aspect, should acknowledge its incompleteness. Second, equality analy-

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<sup>201</sup> MacKinnon, *supra* note 3, at 1313-14.

sis in this context should be undertaken as a method for revealing the legal system's omission of women's concerns, not as the final stage of defining the scope of reproductive human rights. If the strategy is mistaken for the goal, women's rights will continue to be defined as derivative of what the law has already deemed fundamental for men.