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

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# **BODY AND SOUL: EQUALITY, PREGNANCY, AND THE UNITARY RIGHT TO ABORTION**

*Jennifer S. Hendricks*<sup>1</sup>

## 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 show why equality arguments are needed—because our legal tradition's conception of liberty is based on male experience, and we have no theory of basic human rights grounded in women's reproductive experiences. Next, however, the Article shows that equality arguments, although necessary, can undermine women's reproductive freedom because they require that pregnancy and abortion be analogized to male experiences. The result is that equality arguments focus on *either* the bodily *or* the social aspect of pregnancy, to the detriment of the other. Most recently, for example, Jack Balkin has argued that there are “two rights” to abortion, one based in the right to bodily integrity and one based in the right to avoid motherhood. This is the wrong way to theorize pregnancy. The 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. The burden-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. Women's rights would stand more firmly on their own footing. The Article proposes a different framework for theorizing pregnancy. While this understanding of pregnancy could form the basis for yet more comparative equality arguments, abortion is better understood through a liberty framework developed directly from women's experiences.

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*If men could get pregnant,  
abortion would be a sacrament.*

—Florynce Kennedy<sup>2</sup>

But they cannot,<sup>3</sup> so legal and political arguments about abortion rights seek out ways 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. A recurring debate since *Roe v. Wade* concerns the relative merits of privacy and equality as theoretical explanation and doctrinal justification for reproductive rights.<sup>4</sup> This Article demonstrates a paradox of the equality approach: Equality arguments are necessary in order to establish women's liberty rights in a legal tradition based on male experience. However, because of the need for comparisons, equality arguments also 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.

Equality arguments for the right to abortion are typically either body-focused or motherhood-focused. Some commentators have

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<sup>2</sup> Gloria Steinem, *The Verbal Karate of Florynce Kennedy, Esq.*, MS. MAGAZINE (Mar. 1973) (quoting Kennedy's verbal statement).

<sup>3</sup> Recent press reports of a pregnant man notwithstanding, 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. "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 *accidental* pregnancy is important.

<sup>4</sup> See, e.g., 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); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1326-28 (1991) (advocating an equality approach); Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 TEX. J. WOMEN & L. 99 (1994) (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) (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. PENN. L. REV. 955 (1984) (proposing an equal protection standard); Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419 (1995) (defending the privacy approach); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137 (advocating a dual approach).

even suggested that there may be two distinct rights to abortion: one based on the right to bodily integrity, and one based on privacy for intimate family choices.<sup>5</sup> My thesis is that such bifurcation is exactly the wrong approach. The division is not based on women’s experience of pregnancy but on the need to make that experience fit into existing categories. True equality—which includes a non-derivative theory of women’s liberty—requires that reproductive rights be theorized without reducing pregnancy to component parts and shoe-horning it into doctrines developed without women in mind. Pregnancy is a complex and multifaceted process, but it is 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 reviews the strengths and weaknesses of the two main types of equality arguments for abortion rights. This critique leads to the conclusion that the bifurcation between body-focused arguments and burdens-of-motherhood arguments is itself a fatal flaw. Part III argues that pregnancy should be recognized as an archetypal parental relationship that incorporates a bodily relationship and a social one. This recognition would build on Supreme Court precedent that uses pregnancy as the baseline for a constitutional definition of parenthood. Analogies that take the female experience as the baseline can use equal protection analysis to construct a vision of fundamental rights that puts women at the center. Part IV sketches two possible equal protection arguments from this perspective but shows that the persistent need to compare women’s experiences to men’s ultimately undermines a more comprehensive approach to reproductive freedom. The Article concludes that equality arguments are a necessary tool for “getting there” from here but that they must be used with caution and awareness that they are stepping stones, not destinations, in the struggle for women’s human rights. A new effort to theorize fundamental human rights, which feminists are just beginning,<sup>6</sup> is needed.

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<sup>5</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 340-52 (2007) (describing the “two rights to abortion”); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 222 (discussing “Splitting the Woman’s Right in Two”) (1992).

<sup>6</sup> See, e.g., Martha Albertson Fineman, *Equality: Still Illusive After All These Years*, in *SOCIAL CITIZENSHIP AND GENDER* \_ (Joanna Grossman & Linda McClain, eds., forthcoming 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. Hanigsberg, *Homologizing*

## 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.*

—*Planned Parenthood advertisement*

As a matter of doctrine, abortion rights are part of the right to privacy, an unenumerated right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>7</sup> In *Roe v. Wade*,<sup>8</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, suggesting that whether to abort is the doctor's call even when the reasons are non-medical. 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>9</sup>

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*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> See *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Gonzales v. Carhart*, 550 U.S. 124, 1626-27 (2007) (applying Fourteenth Amendment precedent to a federal restriction on abortion, thereby implicitly invoking Fifth Amendment).

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</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 decision should be made by “the attending physician, in consultation with his patient”). In fairness to the *Roe* Court, some of these statements seem to be directed at state claims to be restricting abortion for the sake of women's medical safety. The Court may have emphasized the doctor's clinical judgment in part to rebut such claims. While the paternalism is rank, *Roe* need not necessarily be read to designate the doctor as the primary constitutional decision-maker. But see 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.”).

In this respect, *Roe* might truly have been the progeny of *Lochner v. New York*,<sup>10</sup> protecting doctors' right to contract to perform medical services rather than women's right to control their pregnancies.

Over the years, however, the Supreme Court came to see the choice as belonging to the pregnant woman. Justice Blackmun, the author of *Roe*, tentatively claimed the ground of women's equality rights in a 1986 decision, then staked it firmly in 1989, in a passionate dissent from the first major decision undercutting *Roe*.<sup>11</sup> In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>12</sup> the Court's partial affirmation of *Roe* grounded the abortion right squarely in women's liberty. Ironically, this shift from doctors' rights to women's rights accompanied a substantial curtailment of the scope of the right.<sup>13</sup> *Casey* also acknowledged the increasingly prevalent view that abortion rights were linked to sex equality.<sup>14</sup>

The intuition that abortion rights are part of sex equality has been elaborated in both political and legal forms. Second-wave feminists<sup>15</sup> assumed, and sometimes articulated, a strong connection between abortion rights and sex equality.<sup>16</sup> Although feminists

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<sup>10</sup> 198 U.S. 45 (1905) (striking down protective labor laws because they interfered with freedom of contract).

<sup>11</sup> See *Thornburgh v. Amer. Col. 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."); *Webster v. Reproductive 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>12</sup> 505 U.S. 833 (1992).

<sup>13</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").

<sup>14</sup> See *Casey*, 505 U.S. at 850, 856, 860, discussed *infra*, notes \_\_\_ and accompanying text.

<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." SARA DELAMONT, *FEMINIST SOCIOLOGY* 2 (2003).

<sup>16</sup> See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, (hereinafter Siegel, *Symposium*), 56 EMORY L.J. 815, 826-28 (2007) (stating that Second Wave feminists connected abortion to equality); Law, *Rethinking*, at 972 (noting that abortion was a central focus of the second wave).

strategically severed the abortion debate from the debate over the Equal Rights Amendment,<sup>17</sup> abortion has remained the defining, litmus-test issue for many advocates of women’s equality.<sup>18</sup>

Abortion, however, has not always been embraced as a feminist issue. In the eighteenth century, doctors promoting the criminalization of abortion were the first to link abortion (and contraception) to equality.<sup>19</sup> First-wave feminists<sup>20</sup> in the United States expressed sympathy for women who sought abortions, but publicly opposed both abortion and contraception.<sup>21</sup> The feminist goal of “voluntary motherhood” meant the right of married women to refuse sexual intercourse.<sup>22</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>23</sup> Indeed, at times, leaders of the second wave have been criticized for focusing

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<sup>17</sup> See Siegel, *Symposium*, at 826-28 (stating that feminists followed *Roe* in separating abortion rights from sex equality for strategic reasons).

<sup>18</sup> See, e.g., Katha Pollit, *Feminists for (Fetal) Life*, THE NATION (Aug. 11, 2005) (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 [www.emilyslist.org/about/mission](http://www.emilyslist.org/about/mission) (visited 8/14/09).

<sup>19</sup> See Siegel, *Reasoning*, at 280-323 (describing the nineteenth-century doctors’ campaign to criminalize abortion); see also ROTHMAN, 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>20</sup> “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.” DELAMONT, *supra* note \_\_, at 2.

<sup>21</sup> See Siegel, *Reasoning*, at 304-06 (stating that nineteenth century feminists blamed abortion on “the social conditions in which women conceived and raised children”).

<sup>22</sup> See Linda Gordon, *Voluntary Motherhood; The Beginnings of Feminist Birth Control Ideas in the United States*, FEMINIST STUD., Winter-Spring 1973, at 5, 5 (discussing voluntary motherhood as “an initial response of feminists to their understanding that involuntary motherhood and child-raising were important parts of woman’s oppression”).

<sup>23</sup> See Siegel, *Symposium*, at 817 (observing that proponents of a sex equality basis for abortion rights generally view “sexual intimacy as a human need worthy of fulfillment”).



too narrowly on abortion rights at the expense of other goals.<sup>24</sup> Among those is the goal of 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.<sup>25</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. The social practice of restricting abortion is closely associated with traditional attitudes about women's roles and with efforts to control women's sexuality.<sup>26</sup> Although concern for fetal life is the primary articulated argument against abortion, that concern typically either masks or works in tandem with prescriptions for women's roles.<sup>27</sup>

Feminists have long pointed out that public judgments about on abortion often turn on a moral judgments about the woman's sexual

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<sup>24</sup> See, e.g., Colker, *Equality Theory* (criticizing Laurence Tribe's work on abortion as "narrowly pro-choice"); MacKinnon, *Reflections*, at 1318 ("The right to reproductive control I have in mind would include the abortion right but would not center on it."); cf. Allen, *The Fix*, at 454 (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").

<sup>25</sup> Cf. MacKinnon, *Reflections*, 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."); ROTHMAN, at 154 ("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."); Colker, *An EP Analysis*, 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.").

<sup>26</sup> See Siegel, *Reasoning*, at 327-28 (summarizing findings from KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)).

<sup>27</sup> See Siegel, *Reasoning*, 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 (1992) ("[T]he problem lies in turning women's sexuality and reproductive capacity into objects for the control and use of others.").

conduct rather than on the moral status of the fetus.<sup>28</sup> For example, many abortion bans may provide exceptions for cases of rape. The fetus that results from a rape is no less alive than any other, suggesting that the real concern is the woman's culpability for voluntary sex. Even this characterization may be too generous: Since the law defines rape from the perpetrator's perspective,<sup>29</sup> it is more accurate to say that the right to abortion depends on the culpability of the man, not the woman. The rape exception thus represents a judgment about which men are entitled to have women forced to bear their children.

Other justifications for abortion restrictions are similarly suspect. For example, in the early twenty-first century, abortion opponents have drawn more from some of the rhetoric of the First Wave, arguing that women need to be protected from abortion.<sup>30</sup> These arguments are based on traditional, paternalistic views that women should be protected from poor decisions, or from coercion, by eliminating their choices rather than informing and empowering their decisions.<sup>31</sup> The fetus has moral status, the man has moral agency, and the woman remains a passive vessel.

This resonance with traditional sex stereotypes is a hallmark of unconstitutionality under the Equal Protection Clause.<sup>32</sup> Yet equal

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<sup>28</sup> *Roe* mentioned this point. *Roe v. Wade*, 410 U.S. 113, 57 n. 54 (1973). *See also* Siegel, *Reasoning*, at 364; Balkin, *Judgment of the Court*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 49* (Jack M. Balkin ed. 2005) (hereinafter *WHAT ROE V. WADE SHOULD HAVE SAID*); *but see* Akhil Reed Amar, *Opinion Concurring in Roe, Dissenting in Doe*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, at 159 (rebutting this argument by invoking the legislature's prerogative to balance competing interests).

<sup>29</sup> *See* MacKinnon, *Reflection*, 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.").

<sup>30</sup> *See* *Gonzales v. Carhart*, 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).

<sup>31</sup> *See* *Gonzales v. Carhart*, 550 U.S. at 183-85 (Ginsburg, J., dissenting) (criticizing the majority's paternalistic attitude toward women).

<sup>32</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).

protection arguments for reproductive rights have only barely gained traction in court. One reason for this failure is that courts do not analyze potential stereotypes behind a law until they first determine 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>33</sup> Under the notorious holding of *Geduldig v. Aiello*,<sup>34</sup> regulation of pregnancy is deemed not to be sex-specific: no sex classification, hence no equal protection analysis.<sup>35</sup> Because there are no pregnant men who are accorded greater rights than pregnant women, the doctrine largely fails to see an equality problem.

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 the Pregnancy Discrimination Act (“PDA”).<sup>36</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>37</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>38</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 that men can also have. While the comparisons often appear strained, some such comparisons appear to be necessary in order for abortion to be legally recognizable as an equality problem.

It is revealing that an issue felt to be so central to women’s equality is so difficult to express in the language of constitutional doctrine that purports to guarantee the equal protection of the laws.

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<sup>33</sup> MacKinnon, *Reflections*, at 1286.

<sup>34</sup> 417 U.S. 484 (1974).

<sup>35</sup> *Id.* at 496 n. 20.

<sup>36</sup> 42 U.S.C. § 2500e(k).

<sup>37</sup> *Id.*

<sup>38</sup> On the non-linearity of the paths among levels of generality, see LAURENCE TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION* 76 (1991).

As Catharine MacKinnon has explained, the law cannot see the 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>39</sup> To make an equality argument, one has to move to a higher level of abstraction, arguing, for example, that women and men must be accorded equal dignity as citizens.<sup>40</sup> That then requires a further argument about why women's dignity demands control over pregnancy.<sup>41</sup> When the comparisons run this far afield, the subject under discussion is no longer equality but women's autonomy and dignity. Those should not have to be derivative of men's experiences. Our constitutional discourse, however, has no tradition defining human dignity from a female perspective.<sup>42</sup> Ultimately, we need a concept of human rights not that "includes" women but that comes from, is based on, and meets the needs of women. In the meantime, we may need the ratchet of equality analysis to translate women's fundamental dignity into something that resembles men's.<sup>43</sup> When men are the baseline, equality analysis helps grope toward a different discourse.

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<sup>39</sup> See, e.g., MacKinnon, *Reflections*, 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>40</sup> See, e.g., Balkin, *Original Meaning*, at 322-23.

<sup>41</sup> See *id.*

<sup>42</sup> See ROTHMAN, 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."); Hanigsberg, *Homologizing* 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, *Are Mothers Persons? Reproductive Rights and the Politics of Subjectivity*, in *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 79 (1993)); MacKinnon, *Reflections*, 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.")).

Much of the legal academic literature about abortion is by men because *Roe v. Wade*—like *Brown v. Board of Education*—is an important test case and proving ground for interpretive theories. See, e.g., Balkin, *Original Meaning*; Sunstein, *Neutrality*. Thus, even the most empathetic and well-intentioned treatments of abortion in the legal literature can sound like any other group of men defining their culture by how they treat their women.

<sup>43</sup> Cf. Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 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

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

*Roe stands at an intersection of two lines of decisions.*

—*Planned Parenthood v. Casey*<sup>44</sup>

As the 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>45</sup> Instead of making the right to abortion doubly strong, however, that intersectionality illustrates the degree to which reproductive freedom must be justified in terms of traditional categories that emerged from men’s concerns.<sup>46</sup>

Despite the protection afforded by *Roe/Casey*, the doctrinal limits of the abortion right illustrate that women’s liberty is shaky ground for a fundamental right. Women’s need to control their bodies and lives has to be buttressed by specific comparisons to men’s experiences. Otherwise, the harms of forced maternity are invisible.

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 detriment of the other. While each kind of comparison illuminates part of 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 in terms of men’s experiences.

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U.S. 535 (1942) (striking down sterilization on equal protection grounds); *but see* MacKinnon, *Reflections*, at 1313 (“It has been held illegal to sterilize a male prisoner but legal to sterilize a mentally disabled woman.”).

<sup>44</sup> *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

<sup>45</sup> *Id.*

<sup>46</sup> *Cf.* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. L.F. 139 (demonstrating that people who are discriminated against because of a combination of marked characteristics receive less protection under civil rights laws).

**A. BODY-FOCUSED ARGUMENTS: ARGUING EQUALITY WHEN WOMEN’S LIBERTY IS NOT ENOUGH**

Bodily integrity is a fundamental privacy right and an important aspect of the right to abortion.<sup>47</sup> Privacy-based abortion doctrine most expressly acknowledges the right to bodily integrity through the “health exception.” The health exception is a limited right to medical self-defense and a narrow caveat to the state’s power to regulate all abortions and to ban post-viability abortions.<sup>48</sup> A diminished right to bodily integrity is thus incorporated into the health exception from the outset: it is a right of survival, not autonomy.<sup>49</sup> The doctrinal evolution of the health exception thus illustrates how a liberty right can be weakened when applied to women as a special case. This weakening creates the 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 heightened medical risk. To go beyond the health exception, these arguments appeal to the general principle that the government cannot force one person to assist another physically: abortion bans wrongly and uniquely force pregnant women to be Good Samaritans. These equality arguments are necessary because women’s bodily integrity is not enough, standing alone, to justify protection under the prevailing legal regime.

**1. The Health Exception: Women’s Liberty Is Not Enough**

The health exception, taken seriously, could do as much as *Casey* does to protect the right to choose an abortion. The fact that it does not reveals the limits of a pure autonomy or pure privacy approach to abortion rights in a legal system not premised on women’s full humanity.

*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>50</sup> Even after the point of viability, a woman is entitled to seek an abortion if continuation of the pregnancy threatens

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<sup>47</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992) (aligning the abortion right with precedent protecting the right to bodily integrity).

<sup>48</sup> See *id.* at 846 (summarizing the core aspects of the abortion right).

<sup>49</sup> See Siegel, *Reasoning*, at 365 (arguing that health exceptions define a woman’s liberty interest as an interest in “brute survival”).

<sup>50</sup> *Casey*, 505 U.S. at 846 (reaffirming *Roe*’s holding that a woman has the right to choose an abortion before viability).

her life or health.<sup>51</sup> An immediate threat to life or health will also entitle a woman to an exemption from most restrictions on pre-viability abortion, such as a waiting period or parental consent requirement.<sup>52</sup>

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 invisible the inherent risks and physical burdens of all pregnancies.

*Casey*'s protection of women's health is limited by this implicit distinction. At issue in *Casey* was Pennsylvania's definition of a medical emergency sufficient to waive restrictions such as parental consent, waiting periods, and post-viability prohibition of 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>53</sup>

The only challenge to this provision even considered in *Casey* was that it failed to cover three specific conditions. Those three conditions develop gradually; the statute thus appeared to require postponing the abortion until the inevitable moment of crisis. The Supreme Court upheld the statute by reading out the immediacy requirement and thus declaring those three conditions to be covered. It retained the requirement of "substantial and irreversible" consequences.<sup>54</sup> *Casey*'s health exception thus protects not a woman's health but her interest in "brute survival."<sup>55</sup>

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<sup>51</sup> *Id.* (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health").

<sup>52</sup> *Id.* at 880 (stating that an "essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). The text says "most" rather than "all" because of *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding a ban on a particular abortion procedure, without a health exception).

<sup>53</sup> 18 PA. CONS. STAT. § 3203 (1990), *quoted in* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992) (emphasis added).

<sup>54</sup> *Casey*, 505 U.S. at 880.

<sup>55</sup> Siegel, *Reasoning*, at 365 (discussing health exception in Utah abortion law). In 2007, the legal academy was largely appalled to learn that "permanent impairment of a significant body function" had been adopted as part of the official U.S. definition of torture. U.S. Dep't of Justice, Office of Legal Counsel, *Memo. for William J. Haynes II, General Counsel of the Dep't of Defense Re: Military*

The high threshold for the *Casey* health exception plays to a supposed distinction between good reasons for having an abortion and frivolous ones. 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>56</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>57</sup>

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 the woman’s chances

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*Interrogation of Alien Unlawful Combatants Held Outside the U.S.*, at 37-38. (Mar. 14, 2003). Although the OLC Memo was retracted, *Casey* is good law. The *Casey* health exception thus protects pregnant women from being forced by the state to endure physical consequences that the George W. Bush Administration would define as torture. Unlike members of al Qaeda, pregnant women are not necessarily protected from psychological harm. See *Voinovich v. Women’s Med. Prof. Corp.*, 523 U.S. 1036 (1998) (Thomas, J., dissenting) (dissenting from denial of *certiorari* on the question whether mental health must be part of any health exception).

<sup>56</sup> *Roe v. Wade*, 410 U.S. 219, 221 (1973) (White, J., dissenting) (emphasis added).

<sup>57</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, *Original Meaning*, 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 (2008). 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 (2008). 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.



of death or long-term detriment health.<sup>58</sup> Once pregnancy has begun, abortion is statistically safer than carrying to term until well into the second trimester.<sup>59</sup> On top of the risk of complications is the physical burden of normal pregnancy itself. Many other symptoms—nausea, vomiting, back pain, sleeplessness—would not ordinarily be considered “healthy” but are within the range of “normal” for a pregnant woman.<sup>60</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 a lot 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. 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>61</sup>

Before *Casey*, the Supreme Court had at least suggested that a woman’s right to defend her health was more complete. Even before *Roe*, in *United States v. Vuitch*,<sup>62</sup> the Court had construed a statutory health exception to include a broad concept of mental health.<sup>63</sup> After *Roe*, in *Colautti v. Franklin*,<sup>64</sup> the Court strongly suggested that the state could not require “trade-offs” between fetal and maternal health.<sup>65</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

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<sup>58</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 21); 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 JAMA 3231, 3232 (1992).

<sup>59</sup> See Rhoden, *Trimesters*, at 640 n. 9.

<sup>60</sup> See Shari Motro, *The Price of Pleasure*, \_\_ (forthcoming) (describing symptoms and risks of pregnancy).

<sup>61</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852 (1992).

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

<sup>63</sup> *Id.* at 72. The challenge in *Vuitch* was that the law’s reference to “health” was vague.

<sup>64</sup> 439 U.S. 379 (1979).

<sup>65</sup> *Id.* at 400.

“merely desirable” in order to be used.<sup>66</sup> The courts, along with the medical profession, was moving toward the view that the pregnant woman rather than the fetus was the patient.<sup>67</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>68</sup>

*Casey*’s ratification of the “substantial and irreversible impairment” standard was thus a significant retreat. The immediately apparent impact of that retreat, however, was cushioned by the nature of the challenge in that case. In *Casey*, the health exception was relevant only to post-viability abortions and to cases in which parental consent or a twenty-four hour waiting period would otherwise be required. A higher threshold of medical risk makes somewhat more sense in this context.<sup>69</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. Because of this assurance, and because the health exception did not pertain to *whether* an adult woman could obtain a pre-

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<sup>66</sup> *Id.*; see also *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79 (1976).

<sup>67</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, 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 c-sections as well as abortion, see Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 COLO. L. REV. \_\_, \_\_ (forthcoming).

<sup>68</sup> *Colautti*, 439 U.S. at 400.

<sup>69</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).

viability abortion, a woman still had the final say on any necessary trade-offs between herself and the fetus.

Since *Casey*, the Court has not had to face hard questions about the scope of the health exception precisely because of the relatively unfettered right to choose abortion before viability. Viability occurs at roughly twenty-three to twenty-four weeks after the woman's last menstrual period.<sup>70</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 occurs, the more likely it was a wanted or welcomed pregnancy. In those cases, the woman herself is likely to seek an abortion only after the onset of serious complications. Similarly, doctors are increasingly reluctant to perform abortions as pregnancy progresses, and in most cases delivery eventually becomes medically safer than abortion.<sup>71</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 that justify therapeutic abortion.<sup>72</sup>

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 what kind and magnitude of risk is necessary to invoke the constitutionally required health exception.<sup>73</sup> Abortion opponents fear that "health" would be broadly defined to include, perhaps, not only

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<sup>70</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 860 (1992).

<sup>71</sup> See Rhoden, *Trimesters*, at 640 n. 9.

<sup>72</sup> See, e.g., *U.S. v. Vuitch* 402 U.S. 62 (1971) (analyzing health exception for vagueness).

<sup>73</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 (D.C. 1990) discussed *supra* note \_.

slightly above-average physical risks but even the risks inherent in pregnancy or the mental distress of an unwanted pregnancy.<sup>74</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>75</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. Indeed, in 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? What if the woman threatened suicide if the abortion was not performed? ... Is it sufficient if having the child will shorten the life of the woman by a number of years? ...

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? ...

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>76</sup>

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<sup>74</sup> See, e.g., *Stenberg v. Carhart*, 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>75</sup> *Vuitch*, 402 U.S. at 72.

<sup>76</sup> *Id.* at 75-76 (1971) (Douglas, J., dissenting in part).

Justice Douglas concluded that “health” was infinitely malleable to fit the moral views of jurors and was therefore an unconstitutional standard.<sup>77</sup> Should *Roe/Casey* be overruled, one of the next battles in the abortion wars will be a renewal of this debate over the scope of the health exception.<sup>78</sup>

The Supreme Court has already 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>79</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 10-15 percent percent of all abortions in the United States are performed.<sup>80</sup> The most common procedure is called dilation and extraction, or D&E.<sup>81</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>82</sup> Congress deemed in “partial birth” abortion, and it is banned by the Act. In *Carhart II*, the government justified the Act’s lack of health exception in part on the grounds that intact D&E is never safer than available alternatives; thus no health exception is needed. Never did the government explain why the statute nonetheless has 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

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<sup>77</sup> *Id.*

<sup>78</sup> *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850-51 (1992) (suggesting that if *Roe* were overruled, the right to abortion might still exist “in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest”).

<sup>79</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>80</sup> *See Carhart II*, 550 U.S. at 134.

<sup>81</sup> *Id.* at 135.

<sup>82</sup> *Id.* at 136, 161.

the health exception.<sup>83</sup> To prevent such abuse, the Act places women's lives but not their health above the government's distaste for a particular abortion procedure. 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>84</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>85</sup>

In sum, the health exception is not intended to acknowledge that normal pregnancy itself is a substantial drain on a woman's health. Indeed, that risk is obscured by the existence of a health exception distinct from the general *Roe/Casey* right to abortion. Bearing

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<sup>83</sup> Testimony before Congress suggested that the Act's proponents would have preferred to omit the life exception as well. See Oliveri, *Crossing the Line*, at 408-09 (collecting examples 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."); *The 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*, 120 S. Ct. 2597 (2000); cf. Reva Siegel, *Concurring Opinion*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, at 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>84</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 550 U.S. 833, 880 (1992).

<sup>85</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 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 Burkstrand-Reid, *Invisible Woman* at \_; cf. Sylvia Law, *Childbirth: An Opportunity for Choice That Should Be Supported*, 32 N.Y.U. REV. L. & SOCIAL CHANGE 345 (2008) (discussing medical and non-medical factors a woman might consider in choosing between vaginal birth and scheduled c-section).

children is such a normalized aspect of what women are for that state imposition of the typical risks of pregnancy is inadequate to invoke a woman's right to protect her bodily integrity. Something more is needed to demonstrate that this imposition is contrary to human rights. Enter equality.

## 2. The Good Samaritan Argument

Because the *Roe/Casey* health exception is not meant to reach early abortion of a normal pregnancy, several commentators 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. Their main feature is an 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 analogies illustrate some of the limits of the equality approach.

The most famous of the body-focused argument is Judith Jarvitz Thomson's *A Defense of Abortion*.<sup>86</sup> Thomson's essay 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 kidnapping victim remains hooked up for nine months. Thomson argues that she 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>87</sup> Going further than Thomson in some

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<sup>86</sup> Judith Jarvitz Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

<sup>87</sup> See EILEEN MCDONAGH, *BREAKING THE ABORTION DEADLOCK* (1996). See also, e.g., Donald Reagan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Siegel, *Reasoning*, 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") (discussing forced cesareans, other medical interventions, and regulation and prosecution of women for fetal neglect).

respects, she argues that an unwillingly pregnant woman is a “Captive Samaritan” to whom the state owes a duty of rescue.<sup>88</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>89</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>90</sup>

Another strength of the Good Samaritan argument is that it allows for the possibility that the fetus has substantial moral status, perhaps 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>91</sup>

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<sup>88</sup> See MCDONAGH, at 171-73.

<sup>89</sup> Cf. Jed Rubenfeld, *Opinion Concurring in the Judgment Except as to Doe*, in WHAT ROE V. WADE SHOULD HAVE SAID, at 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>90</sup> See MCDONAGH, at 145, 171-73

<sup>91</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’ right to life would then be guaranteed specifically by the Amendment.”); *Abele v. Markle*, 341 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.”); *but see id.* at 228 (“If [the fetus] is [a person], then a legislature may well have *some* discretion to protect that right even at the expense of someone else’s constitutional right.”) (emphasis added). See also Balkin, *Original Meaning*, at 339-40 and 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). Disagreement over whether fetal personhood completely defeats the right to abortion appears to reflect deep-seated assumptions about whether pregnancy is a



Despite these strengths, the Good Samaritan argument has not taken hold in either court decisions or popular discourse about abortion. This failure is 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. It is opponents, not advocates, of abortion who paint the right as 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>92</sup> In the absence of an impossibly precise analogy, background assumptions about the naturalness of female care work 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>93</sup> One feminist criticism of the Good Samaritan argument, then, 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 is rejected by an important branch of feminism.<sup>94</sup>

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passive or active state—i.e., whether making a baby rather than aborting is an act or an omission.

<sup>92</sup> 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. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). While *Geduldig*'s future is uncertain, 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, 1873 (2006) (arguing that *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003), "introduces an important new understanding of" *Geduldig*); MacKinnon, *Reflections*, 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>93</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>94</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, *Rethinking*, 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, *A Defense*, at 63-64.

Third, the violinist analogy lacks resonance with women's experiences of pregnancy, reproduction, and abortion. The physical burden of normal pregnancy is not what prompts most abortions.<sup>95</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. In extreme cases this risk-taking probably reflects undesirable social conditioning toward a maternal imperative. But in recognizing the problem of the extreme we should not condemn the more typical case, in which reasonably healthy women willingly assume the medical risks of pregnancy.<sup>96</sup> The Good Samaritan argument is thus unable to provide a convincing account of abortion rights as human rights for women, even if the argument ought to be doctrinally sufficient to call into question the constitutionality of abortion bans.

The body-focused arguments—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 carefully constructed as distinct from early elective abortion, maintaining the normalcy of pregnancy's inherent risks. Women's right to 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. What makes both the health exception and the Good Samaritan argument incomplete is that the right to have an abortion is not *just* about bodily integrity and medical self-defense. It is about the entire course of one's life. Because of this omission, and perhaps because of the persistence of an idealized image of pregnancy, arguments that focus on the whole life's course

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<sup>95</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 didn't "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).

<sup>96</sup> The alternatives are either a dramatic reduction in population or a much more widespread market in babies, in which poor women bear all the risks of pregnancy and the sale of children through surrogacy contracts is normalized as a convenient and more rational way for a wealthy woman to have a child, rather than a last resort in the face of infertility.

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 theory of second-wave legal feminism.<sup>97</sup> Formal equality theory sees a path to equality in being like a man, in particular being free of caretaking responsibility for children. It at times reflects 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. 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 suggest that the right is contingent on the persistence of those inequalities. This form of equality argument is thus important for illuminating the operation of sex inequality in society, but it is incomplete as an account of reproductive freedom as a human right.

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

In the years after *Roe*, as abortion gained increasing political salience, the felt connection between abortion rights and sex equality

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<sup>97</sup> See Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 57 (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.").

began to permeate legal discourse about abortion. In 1992, in *Casey*, the Supreme Court briefly recognized this connection in affirming what it called the “essential holding” of *Roe*.<sup>98</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. ...

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>99</sup>

*Casey* also suggested that state prohibition of abortion might have more to do with controlling women than with protecting fetuses.<sup>100</sup>

To the extent that these brief references can be read as an equality argument for abortion rights,<sup>101</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, but it ignored the complexity of the relationships among those aspects of women’s lives and the importance of social policy in constraining the choices that women and mothers have. By taking the social structure as given, *Casey*’s vision of equality accepted 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

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<sup>98</sup> *Casey*, 505 U.S. at 846.

<sup>99</sup> *Id.* at 856, 860.

<sup>100</sup> *Id.* at 852 (“Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of women’s role, however dominant that vision has been in the course of our history and culture.”).

<sup>101</sup> See Daly, *Reconsidering* (arguing that *Casey* represented a shift from privacy toward equality).

atypical woman who seeks to pursue a male path, rather than a challenge to the gendered hierarchy itself.<sup>102</sup>

*Casey*'s version of the equality argument is also class-specific, and even for well-off women it 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 to care for the children they already had. They needed abortions because they had other opportunities to pursue.<sup>103</sup> Moreover, the men to whom they were implicitly compared are not 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>104</sup> Women, but not men, must forgo or delay parenthood in order to succeed in the public sphere. *Casey*'s vision of abortion as a tool for equality questions 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.

Of course, the public sphere nonetheless persists in its current form, only somewhat less hostile to dependency than it was in 1973

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<sup>102</sup> In that respect, *Casey* is consistent with the Court's sex discrimination jurisprudence generally. See Law, *Rethinking*, at 981-82 (arguing that 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 the woman and her doctor: a 'woman's problem,' in which the social organization of motherhood plays little part." Siegel, *Reasoning*, 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>103</sup> See *Casey*, 505 U.S. at 856 (citing data pertaining to fertility and college education).

<sup>104</sup> Teresa Stanton Collett, *Dissenting Opinion*, in WHAT ROE V. WADE SHOULD HAVE SAID, at 194.

or 1992, and the private sphere remains neglected by men.<sup>105</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, there is a difference between *unplanned* and *unwanted*; there ought to be room for unplanned pregnancies to become wanted pregnancies without derailing the rest of 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 in a Sexist World

The more nuanced version of this argument is exemplified by Jack Balkin's recent *Abortion and Original Meaning*.<sup>106</sup> Balkin attributes the incompatibility between motherhood and public participation to social pressure to conform to a particular vision of motherhood.<sup>107</sup> He compares the burdens of motherhood to the burdens of fatherhood and finds socially imposed disparities.<sup>108</sup> This comparison highlights the fact that the problem lies in society rather than biology. The comparison, however, suffers 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.

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<sup>105</sup> See Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equity*, 38 UCLA L. REV. 1415, 1415-16, 1435 (1991) (collecting statistics on men's continuing non-participation in domestic work).

<sup>106</sup> Balkin, *Original Meaning*. See also Siegel, *Reasoning*; MacKinnon, *Reflections*, 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."); Colker, *Equality Theory* (critiquing several versions of the equality argument for abortion rights from an anti-essentialist perspective); Colker, *An Equal Protection Analysis* (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*).

<sup>107</sup> See Balkin, *Original Meaning*, at 324.

<sup>108</sup> See *id.* at 323-24.

First, attributing the burdens of motherhood to societal discrimination ignores many women's experience of caretaking as an authentic choice. *Casey* appeared merely to assume that whenever a child was born that 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>109</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 explains more of 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>110</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>111</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>112</sup> Accusing one's opponent of hypocrisy,

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<sup>109</sup> See Hendricks, *Essentially a Mother*, at 473-82 (discussing surrogacy and reproductive technology). My claim is not that the bond between a biological mother and child is unequalled 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>110</sup> MacKinnon, *Reflections*, at 1317.

<sup>111</sup> Cf. West, *Opinion Concurrin gin the Judgment*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, 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>112</sup> See, e.g., Colker, *Equality Theory*, 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* ("So far as I can tell, [Feminists for

however, is not a response to the merits of her argument.<sup>113</sup> The fact that abortion opponents have not offered better solutions to women's poverty does not alter the grossness of the disparity between the problem and abortion as a remedy. Focusing on the inequalities that constrain women's lives can explain why the right to abortion is sometimes an important means of asserting some control over a woman's own life. But using abortion as a backstop to avoid the worst impositions of inequality does not provide a full justification of 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

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Life] is 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>113</sup> Consider this comparison. In *Carhart II*, the Supreme Court accepted a paternalistic, woman-protective rationale for banning what Congress deemed "partial-birth" abortions. *See Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007). One of the Court's reasons for protecting women from a particular abortion procedure was the supposition that women were not aware of how the procedure was performed. Banning the procedure protected a woman from trauma later on, when she learned "that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child." *Id.* at 160. While much of this reasoning was directed at the abortion decision itself, the opinion suggests that doctors were likely performing abortions without fully apprising women of what the procedure entails and offering a choice of method. Perhaps ordinary standards of informed consent were inadequate where the choice of procedure is reasonably understood to have moral as well as medical implications.

The government's and the Court's response to this problem understandably infuriated feminists. In dissent, Justice Ginsburgh fulminated at the paternalism of responding to the absence of adequately informed consent by removing choice rather than providing information. *See id.* at 183-85 (Ginsburg, J., dissenting). Suppose, however, that rather than banning a particular procedure, Congress had imposed a heightened informed consent requirement. To ensure full consent to the abortion method, women were subjected to descriptions of abortion procedures like those found in the *Carhart* opinions. Feminists would surely object. They might propose a different solution, or argue that no change is needed. The feminist objection, however, would not mean that feminist outrage at the paternalism in the Court's reasoning is any less justified. The Court's argument is demeaning to women regardless of whether feminists have an alternative solution that the sponsors of the Partial-Birth Abortion Ban Act would also find acceptable.

The same is true for the question of abortion as a response to poverty or other systematic inequality suffered by women who might seek abortions. The availability of abortion is a "pathetically inadequate remedy" for a pregnant woman who lacks the material resources to rear a child. Robin West, *Opinion Concurring in the Judgment*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, at 141.



concludes that sex equality is at hand. Many women in the U.S. already 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>114</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 by 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 suggest that greater infringement on women’s liberty would be justified. 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>115</sup>

An increasing number of liberal voices are also rising in support of the one kind of restriction on abortion that the Supreme Court has consistently struck down: spousal notification and consent requirements. Commentators who implicitly assume at least rough social equality between men and women are now beginning 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

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<sup>114</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).

<sup>115</sup> See, e.g., Siegel, *Reasoning*, 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, *Reflections*, 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 UNIV. OF ST. THOMAS J.L. & PUB. POL’Y 51 (proposing a constitutional amendment banning abortion to take effect in forty years, although not conditioning this effect on any improvements in women’s status).

the pregnancy and an opportunity to be heard, to relieving men from child support obligations if they would have preferred an abortion.<sup>116</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>117</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>118</sup>

Moreover, the combination of (1) poverty and inequality as a justification for abortion and (2) willingness to allow greater regulation when and 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, while less privileged women are breeding too much.<sup>119</sup> A

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<sup>116</sup> See Shari Motro, *The Price of Pleasure* (draft on file) (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 (Apr. 4, 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. Czapansky, *Volunteers and Draftees*, at 1478-79 (arguing that mother should be required to notify father of birth, with judicial bypass available).

<sup>117</sup> See Allen, *The Fix*, 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.”); Hanigsberg, *Homologizing*, 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.”); Colker, *Equality Theory*, at 109 (“And if legislatures regulated men’s lives more, would that make restrictions on women constitutional or not sex-based?”); see also Rubinfeld, *Concurring*, 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>118</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 (published by Catholics for Choice), at 13 (Summer 2009).

<sup>119</sup> See GOLDBERG, MEANS OF REPRODUCTION, at 198-222 (discussing the “threat of first-world population decline that has, in recent years, come to obsess

theory that emphasizes social disadvantage as the primary justification for abortion, and allows for greater regulation when greater sex equality is present, is an invitation to regulate access to abortion in an essentially 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 women with ample means to support a child. In other words, a sunset clause for reproductive rights is a bad idea in any event; even worse if 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,” a right about which feminists should be cautious.<sup>120</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>121</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>122</sup> When the right to abortion is premised largely on the post-birth consequences of motherhood, it is not entirely unreasonable to argue that it is unfair for women to have a clean-up period to avoid motherhood after pregnancy has begun, while sexual intercourse for men is a strict liability affair.<sup>123</sup> Resting the right to abortion entirely on the social context of parenthood is an invitation 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 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 it is

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conservatives worldwide”); see also *The Economist*, Special Issue on Aging (2009).

<sup>120</sup> See generally 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).

<sup>121</sup> See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>122</sup> See *Leib, A Man’s Right to Choose*; district court decision in South Dakota.

<sup>123</sup> That is, not unreasonable as long as one ignores the existence of the child.

insufficient for a construction of women's reproductive human rights that looks forward to the elimination of that inequality.

### 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.*

—Frederica Mathewes-Green<sup>124</sup>

Body-focused and burden-focused arguments for abortion rights both seek comparisons by emphasizing one aspect of pregnancy. The limits of both kinds of comparisons stem from the separation of the biological and social 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 that social context and the life-changing burdens that motherhood entails. Yet, in order to make those burdens support an equality argument, they attribute women's parenting decisions to negative forces in society. Moreover, severing the "right to avoid parenthood" from women's bodies has undesirable implications. A better basis for equality arguments would respect pregnancy as a unitary process even while trying to draw analogies to other experiences.

Such an approach is well grounded in existing precedent dealing with pregnancy 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. Its approach has been criticized for essentializing women as mothers, and thus perhaps undermining the right to abortion. It holds the potential, however, for a more robust theory of reproductive rights that connects abortion to other concerns rather than isolating it.

A pregnant woman has a right to abortion for the same reason she is the presumptive constitutional parent of any baby she carries to term: because pregnancy is physical caretaking and the archetype for creating a parental relationship. This unified understanding of pregnancy is a better basis for articulating women's rights because it treats the female rather than the male experience as the norm.

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<sup>124</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.

## A. PREGNANCY AND PARENTHOOD

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 in 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>125</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 dealing with the parental rights of unwed fathers, the Supreme Court used pregnancy as the model for defining constitutional status as a parent. The Court recognized that pregnancy combines biology and caretaking, and it based its equal protection analysis on a female baseline. The unwed father decisions thus provide a starting point for constitutional analysis of reproduction that defines rights with women’s unique experiences as the norm rather than the exception.<sup>126</sup>

The unwed father cases involved a series of challenges to state laws that treated the mother but not the father as the legal parent of a child born outside of marriage.<sup>127</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>128</sup> Men were thus at a biological disadvantage when it came to parental rights.<sup>129</sup> By analogy to cases such as *Geduldig*, where women were

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<sup>125</sup> Law, *Rethinking*, at 1018.

<sup>126</sup> For a more detailed elaboration of this point, see Hendricks, *Essentially a Mother*, at 433-444.

<sup>127</sup> The main cases are *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Ill.*, 405 U.S. 645 (1972).

<sup>128</sup> See Hendricks, *Essentially a Mother*, at 435-36.

<sup>129</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*

biologically disadvantaged in the workplace, the conclusion should have been that the state could choose whether to accommodate men's disadvantage by giving them parental rights.

The Court, however, did not end its analysis with the observation that women and men are not similarly situated and therefore need not be treated the same. 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. As the Court later explained, it makes sense to allow a man to acquire parental rights comparable to a mother's by creating a test "in terms the male can fulfill."<sup>130</sup> Men's biological disadvantage thus served not as a justification for different legal treatment but as the 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>131</sup>

This vision of pregnancy as combining a biological relationship with a caretaking relationship fits comfortably at the intersection of the body-focused and burdens-of-motherhood arguments for abortion rights. Pregnancy itself, when unwanted, is both a bodily invasion and a 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 comparison would retain both elements, since it is the combination of biology and social relationship that

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*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>130</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—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility*, 104 HARV. L. REV. 800, 807 (1991)).

<sup>131</sup> Hendricks, *Essentially a Mother*, at 444.

makes pregnancy uniquely challenging to analyze using legal principles based on the experiences of “non-pregnant persons.”<sup>132</sup>

## B. PREGNANCY AS PARENTING: A DANGEROUS PATH?

The biology-plus-relationship understanding of pregnancy unites the bodily and social aspects of motherhood in a woman-centered definition of parenthood. That model of parenthood is well-suited to describe the harm of forced pregnancy. Nonetheless, there is cause to be concerned about the implications for abortion rights of describing pregnancy as a form of parental relationship. Opponents of reproductive rights use a similar conception of pregnancy to suggest that the natural order of biology implies a woman’s duty to bear children.<sup>133</sup> That implication, however, depends on transforming an ability into a duty. Properly understood, the biological caretaking model of pregnancy supports the right to abortion as part of a comprehensive theory of reproductive freedom.

### 1. Abortion and Mothering

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 going to the opposite extreme, denying that pregnancy has relational significance.<sup>134</sup> Commentators have warned of the dangers of relational feminist theories that emphasize women’s connectedness to others.<sup>135</sup> Feminist theory that portrays women as inherently more

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<sup>132</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974). 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 employer violated Title VII when it barred all fertile women from a job that involved exposure to lead).

<sup>133</sup> See Siegel, *Reasoning*, at 265-80 (discussing the “physiological” reasoning behind the criminalization of abortion).

<sup>134</sup> See Hendricks, *Essentially a Mother*, at 468-71 (criticizing the Supreme Court’s recent insistence on the maternal-paternal equivalence at the moment of birth); ROTHMAN, 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.”).

<sup>135</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.

nurturing than men can easily be used against feminist political goals.

The model of pregnancy I have described 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 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>136</sup>

The unwed father cases recognized that a history of nurturing gives rise to an emotional bond that is both worthy of respect and indicative of future willingness to provide care. This result is at least as plausible as a consequence of pregnancy. Specifically, it is plausible that pregnancy and childbirth will induce a woman to respond to the child in ways that make her likely to be a better caretaker and decision-maker than a person who lacks such a bond with the child.

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>137</sup> Much of our legal and social structure is devoted to suppressing what appear to be natural impulses. The thrust of equal protection jurisprudence has been to reject legal rules premised on claims about natural sex differences.<sup>138</sup> The point of the comparison to the unwed father

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858 (1993); see also Hanigsberg, *Homologizing*, 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>136</sup> Cf. Hanigsberg, *Homologizing*, at 385 (“The argument that pregnancy is unique, however, should neither devalue nor sentimentalize it.”).

<sup>137</sup> Rose Sayer (Katherine Hepburn) to Charlie Allnut (Humphrey Bogart) in *The African Queen* (United Artists 1951). See generally Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (So Far) Irrelevant to Legal Regulation*, \_ L. & PHIL. \_ (forthcoming).

<sup>138</sup> See, e.g., *U.S. v. Virginia*, 518 U.S. 515, 546-556 (1986) (rejecting a plan to admit only men to a traditional military academy and only women to a “leadership



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 a bond based on 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>139</sup> Rather, pregnancy is a form of caretaking that is at least comparable to the relationships recognized in the unwed father cases, relationships that routinely form between children and their caretakers beyond their birth mothers.<sup>140</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>141</sup>

## 2. Abortion Decisions as Parental Decisions

The relationship model of pregnancy needs to be incorporated into the feminist discourse on abortion. Most arguments for abortion rights emphasize the weight of the woman's interest. Only the Good Samaritan arguments directly address the implications of fetal life. This Article assumes that a vigorous defense of abortion rights can still value fetal life, as many pregnant women do. There is much to be gained from recognizing the moral status of pregnancy as a parental relationship. Abortion is always a decision about parenthood, but sometimes it is also a parenting decision. The comparative rights discourse about abortion too often leaves feminists without a framework for talking about abortion as part of parenting. Abortion rights are better understood by connecting them to parenting.<sup>142</sup>

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academy” designed for what the state claimed were women's typical educational needs).

<sup>139</sup> See ROTHMAN, 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.”).

<sup>140</sup> See Hendricks, *Essentially a Mother*, at 473-75; see also Law, *Rethinking*, 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>141</sup> Cf. MacKinnon, *Reflections*, at 1305 (“The dissent [in *Michael M v. Superior Ct.*, 450 U.S. 464 (1981), the 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.”); Hendricks, *Essentially a Mother*, at 470-71 (criticizing opinions in *Nguyen v. INS*, 533 U.S. 53 (2001), for denying reality for the sake of superficial formal equality).

<sup>142</sup> See Hanigberg, *Homologizing*, at 390.

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>143</sup> In addition to vagueness problems, the statute was unconstitutional because it had no health exception, even though "a substantial body of medical opinion" held that intact D&E was sometimes safer.<sup>144</sup> Seven years later, however, the Court handed down *Gonzales v. Carhart (Carhart II)*,<sup>145</sup> discussed earlier in this Article. Justice O'Connor having been replaced with Justice Alito, the Court in *Carhart II* upheld the federal ban with no health exception.

An unacknowledged tragedy of *Carhart II* was that many of the abortions to which the law applies are abortions of 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 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 abortion is triggered by fetal deformities or by a threat to the pregnant woman's life or health.<sup>146</sup> The patient receiving a "partial birth" abortion may be a woman who has already picked out names, arranged for maternity leave, or had a baby shower. She 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 its short life.

A woman planning an abortion in such circumstances faces additional decisions regarding the method of abortion. In some cases, the doctor can induce contractions, performing an abortion by triggering a miscarriage. Of the surgical options, the traditional D&E is legal, while the intact D&E is now illegal. There is no clear medical distinction between the two procedures, 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

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<sup>143</sup> 530 U.S. 914 (2000).

<sup>144</sup> *Id.* at 937-38.

<sup>145</sup> 550 U.S. 124 (2007).

<sup>146</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).

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. The intact D&E avoids the physical and emotional toll of prolonged labor while also preserving the fetus intact.<sup>147</sup> Women may also come to different conclusions than Congress about the relative morality of regular and intact D&E.<sup>148</sup>

The sympathy evoked by this example need not be reserved for women reluctantly aborting welcomed pregnancies because of 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 also be the ones that make the abortion necessary. Her decision is no less parental, and her moral reasoning no less able to account for fetal life, because she had not meant to become a parent.<sup>149</sup>

In *Carhart II*, the Court accepted Congress's characterization of the intact D&E on the grounds that it "perverts" the natural birth process.<sup>150</sup> Yet the Act's proponents pointed to induction of labor as the morally superior method for necessary late abortions.<sup>151</sup> Apparently, the "natural birth process" is not when a woman labors to push out a baby but when a doctor uses instruments to extract a fetus from a uterus.<sup>152</sup>

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<sup>147</sup> See PAUL, CLINICIAN'S GUIDE, at 125 ("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>148</sup> Cf. Law, *Childbirth* (arguing for women's right to make choices about how to proceed with childbirth).

<sup>149</sup> See MacKinnon, *Reflections*, 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>150</sup> *Gonzales v. Carhart*, 550 U.S. 123, 1635 (2007) (quoting congressional findings); see also *Stenberg v. Carhart*, 530 U.S. 914, 962-63 (2000) (Kennedy, J., dissenting) (citing AMA statements on intact D&E).

<sup>151</sup> See *Gonzales v. Carhart*, 550 U.S. at 140.

<sup>152</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: JOURNAL OF LAW-MEDICINE 325, 345 n. 128 (collecting information about risks of unnecessary use of forceps); Law, *Childbirth*, 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

This perspective on the natural birth process is, at best, a medical one. 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 complained that the majority reasoned entirely from the perspective of the doctor, rather than the perspective of a "shocked" society.<sup>153</sup> He was right. To the question "who decides" on the method of abortion, half the Court sided with the doctor, half with society, and no one with the pregnant woman. Not until Justice Ginsburg's dissent in *Carhart II* was there any suggestion that she might be an appropriate decision-maker.

The choice of abortion method is not only medical but also moral and emotional. It is the sort of choice that adults make for themselves and that parents make for their children. The moral and emotional status of the woman/mother, however, were submerged by both sides in *Carhart 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. Glucksburg*,<sup>154</sup> that the state may inflict intimate suffering to further its moral interest in preserving life.<sup>155</sup> But a model of pregnancy as parenting would help redress the prevailing assumption of frivolity that attaches to women's abortion decisions.<sup>156</sup>

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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.").

<sup>153</sup> *Stenberg v. Carhart*, 530 U.S. 914, 957 (2007) (Kennedy, J., dissenting).

<sup>154</sup> 521 U.S. 702 (2007).

<sup>155</sup> Justice Kennedy referred to *Glucksburg* 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. In *Glucksburg*, the individual privacy right was balanced against state interests in tangible consequences, such as possible coercion or euthanasia. In the *Carhart* cases, however, 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>156</sup> Cf. Hanigsberg, *Homologizing*, at 416, 399-403.

#### IV. THE DIALECTIC OF EQUALITY

*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.*

—Catharine MacKinnon<sup>157</sup>

The comparison-based equality arguments discussed in Part II are incomplete because they are single dimensional. Each gives only a partial view of how forced pregnancy diminishes human dignity. This partiality is a function of the search for a basis for comparison to male experience on which to ground an equal protection analysis. Pregnancy instead should be analyzed on its own terms, as a biological and social process. As discussed in Part III, the Supreme Court has already moved in that direction in the context of parental rights. This Part explores some possibilities for analogizing to a unified experience of pregnancy. It then suggests how such arguments could support claims for an affirmative right to reproductive freedom. Finally, it reflects on the limits of comparison-based equality arguments when what is really at stake is women's liberty.

##### A. UNITARY COMPARISONS

The burdens of motherhood argument criticizes society for forcing women to “become mothers” by imposing disproportionate responsibility for taking care of children after they are born. A more unified perspective on pregnancy and birth is that pregnant women have already become mothers—in the social as well as biological sense—by the time they give birth. Regardless of pressures from society as a whole, the law does not force men to become fathers in the same sense. Forced pregnancy can thus usefully be compared to the types of parenting duties that family courts will and will not require the parents of born children to perform. A second comparison, which more thoroughly integrates the physical and the social, is to a different kind of intimate relationship: one that may arise when a person is held physically hostage to the needs of another.

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<sup>157</sup> MacKinnon, *Reflections*, at 1313-14.

## 1. Mandatory Visitation

While legal parenthood of a born child triggers a duty of financial support, courts are loathe to impose a physical caretaking burden on parents other than pregnant women. Through child support requirements, the state forces only liability, not parenthood, onto noncustodial parents. Visitation, and the caretaking relationship it implies, is considered a right, not a duty.<sup>158</sup> Faced with custodial parents' requests that another parent be required to take advantage of visitation rights, courts have recoiled: "A court simply cannot order a parent to love his or her children, or to maintain a meaningful relationship with them."<sup>159</sup> While the law imposes child support obligations based on a tort-like notion of causation, it does not force noncustodial parents to engage in the caretaking work that is likely to produce an emotional bond.

The mandatory visitation analogy improves on the burdens-of-motherhood arguments because it draws a comparison between forcing pregnancy and forcing a post-birth relationship with a child. It also reveals a core shortcoming of the "male abortion" argument focused on child support,<sup>160</sup> which misses the difference between a forced relationship and financial liability. This analogy suffers, however, from some of the same flaws previously discussed. It requires one to embrace the questionable premise that a person has no legal duty to provide direct care for his or her child. In addition, although the prospect of forced visitation raises a specter of physical coercion, it is not comparable to the invasion of bodily integrity involved in forced pregnancy.

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<sup>158</sup> See Daniel Pollack & Susan Mason, *Mandatory Visitation*, 42 FAM. CT. REV. 74, 74 (2004); Czapansky, *Volunteers*, at 1436-39 (describing courts' entrenched resistance to mandatory visitation). Cf. Siegel, *Reasoning*, at 377 ("Nor has the legislature required that men fathering the children that women are forced to bear assume primary responsibility for the work of nurturance and maintenance women typically provide."); Rubinfeld, *Concurring*, at 110 ("[H]aving forced an unwilling woman to carry and bear, Texas 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>159</sup> See Pollack & Mason, at 78 (quoting *Mitchell v. Mitchell*, No. 2-00-005 (Ill. App. Ct. 2001)); see also Anita L. Allen, *Opinion Concurring in the Judgment*, in WHAT ROE V. WADE SHOULD HAVE SAID, at 105 (noting that the state cannot force a person to adopt a child, even to protect the sanctity of human life).

<sup>160</sup> See *supra*, notes \_ and accompanying text (discussing Ethan Leib's argument for a "man's right to choose").

To bring the body back into play, one could turn to the oft-cited example of organ donation or other medical procedure. No court or legislature in the United States has ever ordered a parent to submit to a medical procedure for the benefit of a born child. Yet they have so ordered pregnant women for the benefit of fetuses, both through abortion bans that mandate childbirth and through court-ordered cesareans and other surgery.<sup>161</sup> These comparisons, however, lack the social element of pregnancy—even forced organ donation to a child would not impose the intimate caretaking relationship of pregnancy. The offense lies in the invasion of bodily integrity, again neglecting the social aspect that is an important part of the right to abortion.

## 2. Stockholm Syndrome

A better analogy may be to supplement Thomson's violinist analogy with more information about the likely non-physical effects on the person serving as the violinist's life-support system. In a psychological phenomenon known as Stockholm Syndrome, people who find themselves physically hostage to the interests of another have been known to identify and sympathize with those interests.<sup>162</sup> During the period of physical risk, this phenomenon is considered a natural, adaptive method for surviving and for coping psychologically with the captive state.<sup>163</sup> Forced pregnancy creates analogous conditions. The pregnant woman is physically hijacked to serve the interests of the state, which purports to be acting on behalf of the fetus. This circumstance forces her to develop a psychological posture toward the fetus and the eventual child.<sup>164</sup> Our violinist's life-support system is thus not merely physically kidnapped for nine months' service. She is put in a position in which it is likely that she will identify with, care for, and develop a long-term emotional bond with the violinist.<sup>165</sup> For the involuntarily pregnant woman, that

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<sup>161</sup> See Burkstrand-Reid, *Invisible Woman*, at \_.

<sup>162</sup> See THOMAS STRENTZ, *PSYCHOLOGICAL ASPECTS OF CRISIS NEGOTIATION* 243-245 (2006).

<sup>163</sup> See *id.*, at 245-46.

<sup>164</sup> See Siegel, *Reasoning*, at 371- 72 (stating that a woman forced to carry a pregnancy to term "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"). Siegel points out that "legislatures adopting restrictions on abortion both desire and expect" this result. *Id.*

<sup>165</sup> This is an alternative explanation for the claimed phenomenon that desire for an abortion is merely a symptom of the emotional swings of pregnancy, and that "birth of the child brings contentment." Collett, *Dissenting Opinion*, at 192.

adaptation to the captive state is reinforced by personal beliefs and social norms about motherhood. If she is prevented from having an abortion, it is preferable—not diagnosable as a “syndrome”—that she develop a positive identification with the child, whether to rear herself or to find a different home.

This analogy also provides a useful example of the need to distinguish what is natural from what is desirable. A hostage’s identification with her captors is natural in that it is recognized as a normal, adaptive psychological response to physical captivity. The response is adaptive in that it may actually increase the odds of survival. “Natural,” however, does not mean “inevitable”: many hostages do not experience Stockholm Syndrome. Moreover, once the period of captivity is over, the response is no longer considered desirable. To the contrary, it becomes a “syndrome” in need of treatment.

With pregnancy, the social response is reversed: even after the period of physical “captivity,” society usually favors and promotes the mother’s identification with the infant’s needs.<sup>166</sup> As I have said, I agree with that societal preference; it bears emphasizing that this analogy does not imply that a pregnant woman’s attachment to a fetus or infant is a pathology. A woman seeking an abortion, however, can be understood as analogous to a hostage seeking to avoid the development of an attachment analogous to Stockholm Syndrome. This analogy shows why the relationship theory of pregnancy is consistent with a right to abortion: “When a woman chooses abortion, she is choosing not to enter into a maternal relationship. Women want access to safe abortions as quickly as possible, before quickening, before a relationship can begin.”<sup>167</sup> The harm of forced pregnancy is not only the physical invasion evoked by Thomson’s violinist analogy but also the creation of a strong emotional relationship of identification.

Neither mandatory visitation nor the Stockholm Syndrome is, of course, a perfect or even a very good analogy to pregnancy. They have the advantage, however, of combining the physical and the social aspects of pregnancy. They are therefore somewhat truer to the experience of pregnancy than analogies that focus more exclusively on the body or exclusively on social relationships. These two analogies are also consistent with the Supreme Court’s use of

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<sup>166</sup> Unless perhaps she has previously signed a contract to turn the child over to others. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>167</sup> ROTHMAN, at 243.



pregnancy as archetypal parenthood in the unwed father cases. This resonance creates opportunities for developing a broader based constitutional vision of reproductive freedom.

## B. AFFIRMATIVE RIGHTS

The unattained holy grail of abortion rights lawyering after *Roe* was public funding of abortions for poor women. As the nation lurches slowly toward universal health care, and as higher income women gain 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. 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>168</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>169</sup>

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>170</sup> The state action problem, however, remains. One problem with the equality

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<sup>168</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*, U. ILL. L. REV. (forthcoming 2010).

<sup>169</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, *NEGLECTED STORIES*, 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.

<sup>170</sup> See, e.g., MCDONAGH, 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, *The Fix*, 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 tousled in the fray.").

arguments discussed in Part II—and with any equality argument for public funding of poor women’s abortions—was 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>171</sup> That discrimination, however, is not attributable to the government under the state action doctrine.<sup>172</sup> Existing inequality in biology and in social circumstances typically means that the government may choose whether to level the playing field by, say, giving women access to abortion.<sup>173</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 brings abortion rights within the ambit of those cases. The abortion right is closely related to the right at stake in the unwed father cases, since abortion involves the parent-child relationship as well as bodily integrity.<sup>174</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 similarly be required to accommodate *de facto* inequality in the context of reproductive rights.

### C. THE LIMITS OF EQUALITY

None of the equality arguments I have either criticized or proposed rests on a perfect analogy between pregnancy and some

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<sup>171</sup> See, e.g., Balkin, *Original Meaning*, at 323-24 (arguing that abortion bans force women to become mothers, which society links to disproportionate burdens with respect to child care).

<sup>172</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 Opinion*, in WHAT ROE V. WADE SHOULD HAVE SAID, at 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>173</sup> See Hendricks, *Contingent Equal Protection*, at \_\_.

<sup>174</sup> Cf. Hanigsberg, *Homologizing*, at 372 (1995) (“suggesting a connection between motherhood and abortion”).

other life experience. Pregnancy is unique, yet equality analysis demands a comparison. If women's unique fundamental rights have been unrecognized, then one way to bring them into view is to make them similar to experiences men could have. Finding a comparator is difficult with an event so unique and so socially fraught as pregnancy and birth.

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 be "like things alike, and different things in appropriately different ways." The difficulty is that equality is an empty concept.<sup>175</sup> To know what it means to treat women equally with men in the context of reproduction, one needs to have a substantive idea of what human dignity looks like for women.

The 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.

One feature of analogies that seek to convey the harm of unwanted pregnancy and motherhood is that they 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 bad. All of these arguments, however, create a context in which only abortion is a protected right, at the expense of a broader conception of reproductive freedom. For example, many of the 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 to rescue kidnapping victims but refuse to rescue involuntarily

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<sup>175</sup> See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

pregnant women.<sup>176</sup> Unfortunately, they are poorly suited to demonstrate why the reverse—say, funding abortion but not childbirth—would be equally horrid. Equality is not merely empty but in some ways a risky as a method for theorizing women’s basic human rights with respect to reproductive freedom.

### CONCLUSION

Equality analysis yields valuable insights into the state’s willingness to force women to bear children and the role that policy plays in maintaining inequalities. Equality analysis, however, requires comparison, which in turn requires 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 channels the discussion further and further from the reality of pregnancy, in which those components are inextricably intertwined, producing 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 teach two lessons for constructing a feminist theory of reproductive freedom. First, feminists should avoid bifurcating pregnancy into physical and social components. The right to abortion is unitary and rests not on two distinct freedoms but on their inseparability. Any comparative analysis should include both aspects, or, if focused on just one, acknowledge its incompleteness. Second, equality analysis 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. The risk of mistaking the strategy for the goal is that women’s rights will continue to be defined as derivative of what the law has already deemed fundamental for men.

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<sup>176</sup> See MCDONAGH, at 142.