

From Choice to Reproductive Justice:  
De-Constitutionalizing Abortion Rights  
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*Introduction*

The preferred moral foundations of the abortion right created in *Roe v Wade*<sup>1</sup> and its progeny continue to shift, from marital and medical privacy,<sup>2</sup> to women's equality,<sup>3</sup> to individual liberty or dignity<sup>4</sup> and back, in the minds of both the Supreme Court Justices and the pro-choice advocates and legal scholars that have argued or celebrated these famous cases. What has not shifted is the commitment of the pro-choice community to the right itself, and to the propriety of its judicial origin. Legal abortion, according to this near universal pro-choice consensus, is and should be an individual, constitutional right protected against political winds, rather than simply good policy reflected in a state's law, and it is therefore entirely fitting that we look to the Courts, and to the Supreme Court in particular, for its articulation and enforcement. It is the work of the courts and their actors – judges, lawyers, litigants, amici, judicial clerks and academic commentators – to orate the basis of this important individual right, develop its contours, and to expand or contract it when appropriate – to subject it in effect to the ordinary and extraordinary processes of constitutional adjudication.

This essay tabulates some of the costs to feminist ideals that are the product of our reliance on the creation of an individual right as the conceptual vehicle for legal abortion, and our reliance on adjudication as the strategic vehicle for the right's

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<sup>1</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 153.

<sup>3</sup> See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v Wade*, 63 N.C. L. REV. 375 (1985) (arguing that *Roe* should have been decided on the grounds that the specific statute before it violated the equal protection clause); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 350-77 (1992)(same); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984)(same).

<sup>4</sup> See Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694 (2008)(arguing that dignity is a universal value that can structure disagreements between subcommunities on abortion).

development and justification. I will argue that while the court-focused methods and the various “choice-based” arguments put forward by the pro-choice advocacy community have jointly secured for individuals a fairly robust constitutional right to legal abortion, those same arguments have ill-served not only progressive politics broadly conceived, but have also ill served women, both narrowly, in terms of our reproductive lives and needs, and more generally. I will ultimately urge a broader political argument for reproductive justice in women’s lives that embraces but does not center rights-based claims, and a re-orientation of legal resources to secure those gains away from the judicial realm and to state and federal legislative arena.

The paper is organized as follows. The first part of the paper asks a (somewhat) rhetorical question: why hasn’t there been more feminist and pro-choice criticism of both *Roe v Wade* specifically, and our reproductive rights jurisprudence more generally? Just to be clear: there is of course plenty of criticism of *Roe* from those who abhor legal abortion on moral grounds,<sup>5</sup> as well as from legal scholars and Court watchers who object to the Court’s perceived free-wheeling activism in this field.<sup>6</sup> There is also a fair amount of critique of *Roe* from progressive scholars worried about *Roe*’s demonstrated propensity to create backlash against the democratic party and progressivism more generally.<sup>7</sup> What is missing from the massive amounts of critical commentary on *Roe*, is an examination by pro-choice scholars of both the right itself and the Court’s central role in its creation for the possible harms they might have done to the broader cause of reproductive justice. There is, bluntly, almost none of this.<sup>8</sup> In the first part below, I will

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<sup>5</sup> See, e.g., Michael Paulsen, “What *Roe v. Wade* Should Have Said (Opinion of “Justice Paulsen”)” in WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS RELATE AMERICA’S MOST CONTROVERSIAL DECISION (Jack Balkin, ed., 2005)(arguing equivalence of support for legal abortion with support for state sponsored genocide).

<sup>6</sup> See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on *Roe v. Wade**, 82 YALE L.J. 920, 923-927 (1973)(arguing that *Roe v. Wade* is so bad as to not be a constitutional law decision at all); ROBERT BORK, *THE TEMPTING OF AMERICA* (1996) (arguing that *Roe v. Wade* is an illegal exercise of judicial power).

<sup>7</sup> See e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008)(arguing generally that Courts are ineffectual in bringing about progressive social change, using *Roe* as an example).

<sup>8</sup> Exceptions include Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade**, *supra* note 3 at 385-86 (1985)(expressing the concern that *Roe* had undercut a grass roots legalization movement, inviting backlash); Catharine MacKinnon, *Roe v Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES*, 45 (J. Gardfeld, ed, 1985)(arguing that privacy rationale of *Roe* legitimated the sexual aggression that often leads to unwanted pregnancy) and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364-1370 (1984)(using the abortion right created in *Roe* as exemplary of systematic regressive and unstable features of constitutional rights).

argue that while there are quite understandable reasons for the reluctance of this community to offer friendly critique, those reasons are not in the end good ones. Ultimately the costs of critical reticence are not worth the gains.

The second part argues that there are un-reckoned moral and political costs of judicially created, individualist and negative abortion rights – costs that ought to be troubling for all, but particularly for feminist legal scholars. Briefly, I look at three such costs of the abortion right, which I refer to as (1) legitimation costs (2) democratic costs and (3) aspirational costs. All three of these general types of costs of rights have been well developed in the various “rights critiques” produced by critical legal scholars during the 1970s and 80s.<sup>9</sup> None of them, however, to my knowledge, has been applied to the particular case of abortion rights. Individual, negative, constitutional rights, according to their critics, keep the state off our backs and out of our lives, but they also run the risk of legitimating the injustices we sustain in the privacy so protected, they denigrate the democratic processes that might generate positive law that could better respond to our vulnerabilities and meet our needs, and they truncate our collective visions of law’s moral possibilities. All three costs, I will argue, attend to the abortion right created by *Roe v Wade*. The second and major part of the essay specifies how.

The third part of the paper looks at opportunities for promoting reproductive justice that the pro-choice community might have lost – including legal, moral, political, and rhetorical – because of their focus on rights and Supreme Court authority in the abortion debates. Finally, the concluding part briefly envisions a reproductive justice agenda that incorporates without centralizing what I take to be a strong political case for access to legal abortion as central to women’s equal citizenship, without compromising or undercutting other progressive and feminist aims.

### *1. A Missing Critical Jurisprudence*

Why isn’t there more pro-choice criticism of *Roe*, and of its varying and various rationales? The lack of such commentary is odder than it might first seem. The liberal adjudicated victories of the Warren and Burger Courts, with the one exception of *Roe*, generated massive amounts of critical commentary from theorists purporting to speak for the interests of the victorious parties in those cases, and the communities they roughly represented. *Brown v Board of Education*,<sup>10</sup> to take the most iconic example, has generated a burgeoning cottage industry of critique, eventually coalescing in the creation of an entire scholarly movement -- critical race theory – that was rigorously critical, on left-wing and race-justice grounds, of that decision’s liberal, rights-expansive, and

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<sup>9</sup> See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Mark Tushnet, *Essay on Rights*, *supra* note 7; Duncan Kennedy, “The Critique of Rights in Critical Legal Studies” in LEFT LEGALISM/LEFT CRITIQUE pin (Wendy Brown & Janet Halley eds., 2002).

<sup>10</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

integrationist ideals. Thus, according to its progressive critics, *Brown* hid the massive problems of underfunded public education under the false covering of a legally reformed and racially fair integrationist ideal,<sup>11</sup> articulated an account of *de jure* segregation as the evil to be addressed by civil rights law that left an insidious pattern of *de facto* segregation both intact and legitimated,<sup>12</sup> birthed an entire ideology of “color blindness” that did little but undercut serious attempts at redistributive racial justice, including affirmative action programs in employment and education both,<sup>13</sup> lent a veneer of fairness to purportedly “meritocratic” hierarchic orderings that result from individual and state decision-making and that continue to subordinate poor people,<sup>14</sup> and relied on a cramped and ungenerous vision of “rights” and “integration” both that truncated rather than generated political progress on these and other progressive causes.<sup>15</sup> All of this, again, comes from the champions of race justice, not antagonists. Other less revered but nevertheless substantial Warren, Burger, and Rehnquist Court progressive victories have also prompted scathing critiques by progressive legal scholars. *Miranda*<sup>16</sup> prompted worry as well as celebration among advocates for the interests of criminal defendants: the right the Court created might constitute a triumph for nothing but a formalistic and legitimating conception of interrogatory justice, setting back, rather than advancing, the cause of respectful and non-coercive treatment of criminal defendants.<sup>17</sup> Likewise, the more recent *Lawrence*<sup>18</sup> decision prompted plenty of accolades, but also its share of criticism from equality minded legal scholars: Elevating sex into the realm of those aspects of life and identity so highly regarded as to be worthy of constitutional protection, some argued, might further burden the work of protecting vulnerable people against sexual harassment and assault.<sup>19</sup>

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<sup>11</sup> Derrick Bell, (opinion of Justice Bell) in Jack Balkin, ed., *WHAT BROWN V BOARD OF EDUCATION SHOULD HAVE SAID* (200\_).

<sup>12</sup> Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A critical Review of the Doctrine*, 62 *MINN LAW REVIEW* 1049 (1978)(arguing that race discrimination law since *Brown* has served to legitimate racial subordination).

<sup>13</sup> *See generally* Crenshaw, Gotanda, et al., eds., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT SHAPED THE MOVEMENT* (1996); Bell, *supra* note \_\_\_ at 151-61.

<sup>14</sup> Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 *WASH. & LEE L. REV.* 995, (1996).

<sup>15</sup> Morton J. Horowitz, *Rights*, *supra* note 8 at \_\_\_ (1988).

<sup>16</sup> 384 U.S.436 (1966).

<sup>17</sup> Louis M. Seidman, *Brown and Miranda*, 80 *CAL. L. REV.* 673 (1992).

<sup>18</sup> 539 U.S. 558 (2003).

<sup>19</sup> Marc Spindelman, *Surviving Lawrence v. Texas*, 102 *MICH. L. REV.* 1615, 1656-67 (2004)(arguing that *Lawrence* might prove over-protective of coercive sexuality).

Whatever the merits of the criticisms of these famously progressive cases, my point here is comparative: unlike *Brown*, *Miranda*, or *Lawrence*, *Roe v Wade* remains largely insulated from friendly critique. Why is that? I think there are three reasons for the critical reticence, none of them, however, particularly compelling justifications.

Part of the story – maybe the major part -- is a widespread belief among the pro-choice community in the opinion’s relative vulnerability. This alone deters criticism of the decision by those who politically support legal abortion. *Roe*, by contrast to *Brown*, *Miranda*, and even *Lawrence*, seems to be in perpetual and great danger of being overturned.<sup>20</sup> *Roe* is a perennial – permanent? – presidential campaign issue, and has been since it was decided. Its “hanging by a thread” status, furthermore, is perhaps the one sure thing that *won’t be* changed by Barack Obama’s world altering victory in 2008. President Obama may replace the retiring liberal justices with younger liberal justices, but that will still leave the opinion with only 5-4 support. A Republican Party victory in 2012, on the heels of a less than fully successful Obama administration, might result in a fifth vote on the Court for overturning *Roe*. Even assuming democratic administrations far into the future, however, it doesn’t follow that a newly constituted Court dominated by Democratic Party nominees will be committed to *Roe*. The pro-life wing of the Democratic Party will likely grow, not shrink, with Democratic dominance, as does the risk that a Democratically appointed Justice will see his or her way to reverse *Roe*. There is, in short, no end in sight to the compulsive vote-counting with respect to *Roe v Wade*. We are seemingly today, just as we were on November 3<sup>rd</sup>, 2008, one disastrous judicial appointment away from the decision’s reversal.

So, there is considerable fear of the dangers posed by the wolf at this particular door. There is virtually no worry, by contrast, that *Brown*, *Miranda*, or *Lawrence* will be overturned. Those doors seem solidly well-constructed. Perhaps it is not so surprising that the small risk that they might be has been no deterrent to the criticism of the architecture of the house they protect.

The second reason has to do with a belief in *Roe*’s efficacy. The gains secured by *Roe* seem more tangible than the gains secured by *Brown* and *Lawrence* – so the potential cost of reckless critique seems higher. *Brown* ended *de jure* segregation of the schools – but not *de facto* segregation, and much less real racial subordination: the schools and much else remain segregated and unequal in much of the country. *Lawrence* struck from the books criminal statutes that had not been directly enforced anyway, and left untouched the unequal treatment of gay and lesbian citizens on any number of fronts, from marriage to military service, employment and tenancy rights. There is much to criticize, if one keeps the focus on the paltry consequences of these decisions, compared with what they promised. *Roe*, by contrast, was by no means an empty victory, much less a Trojan horse. Rather, *Roe* sent a clear material and rhetorical signal to women, girls,

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<sup>20</sup> See e.g., Dawn Johnsen, *Why the 2008 Election Matters for Reproductive Rights*, BALKANIZATION, Sept. 24, 2008.

and the larger society: women's reproductive lives should be and henceforth would be governed by a regime of choice – whose choice is not so clear -- and not by fate, nature, accident, biology or men. The gain of this one decision, in terms of the autonomy and broadened options for women and girls, were felt to be enormous. With the advent of birth control and safe and legal abortion, women can avoid life and health threatening pregnancies, can limit the number of children they will mother, and can plan the major sequence of their lives – pregnancies, education, marriage, job and career – so as to increase hugely their chances of succeeding at all. Without that control, women's and girls' control of these life-changing events is severely compromised: dangerous, injurious, or simply too many pregnancies in one's teens, twenties, thirties and forties make completion of high school, college, professional school, graduate school, or vocational training for skilled crafts much harder to even imagine, much less accomplish. The burdens of unwanted, dangerous, or just too many pregnancies are harder to measure, but are just as real in private and intimate life. Dangerous pregnancies shorten lives. Too many pregnancies make for difficult and unrewarding mothering. All of it leaves the woman feeling, justifiably, hostage to fate. If she cannot control her reproductivity, she cannot control her life. Without self-sovereignty over her body, all that remains of her life -- her work, her sociability, her education, her mothering, and her impact on the world -- is miniaturized. She lives a smaller life.

And lastly, there may be no pro-choice criticism of *Roe* because *Roe* got so much exactly right, and it is both understood and appreciated by the pro-choice community for doing so. Criticism, then, might just feel too churlish. Thus – it may simply be true that women must have a right to legal abortion, if women are to be equal citizens, and equal citizenship is what the Constitution requires. As the political philosopher Eileen McDonough has argued at length,<sup>21</sup> where abortion is criminal, women, but not men, are required to donate body parts, for a substantial part of their adult lives and at substantial risk to their own health and life, to the cause of nurturing and preserving the life of another, and they are required to do this regardless of whether or not they consent to this appropriation. Women's ownership of the use of their own bodies is therefore contingent, or conditional, in a way which men's is not: another human life (the fetus) has a primary right to their bodies, and they have no right to ward off what, were it a *borne* child making these demands, would be a criminal assault. This contingent self-sovereignty is not conducive to equal citizenship. If equal citizenship is the goal of the Constitution's declarations of equality and liberty, then it seems that women must have a right to legal abortion in order to achieve it. And equal citizenship does seem to be what our Constitution contemplates, at least as we now understand it. Whatever the problems with *Roe*'s rhetoric or rationale, that conclusion seems both important and right.

None of this, however – *Roe*'s perceived vulnerability, its consequences, or the truth it partially expresses -- justifies the relative dearth of critical inquiry by pro-choice scholars into the costs of either *Roe*'s genesis in the Court or it's various stated rationales. First, with respect to both the decision's vulnerability and its efficacy, the goal of the pro-

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<sup>21</sup> See EILEEN MCDONAGH, FROM CHOICE TO CONSENT: BREAKING THE ABORTION DEADLOCK (1996).

choice movement should be women's access to legal and safe abortion, not preservation of a right that may be increasingly hollow. Of course, there is a danger that *Roe* could be overturned (although perhaps considerably smaller than the pro-Choice community claims),<sup>22</sup> but there is an arguably greater danger with the road we're on: we preserve the right, while growing numbers of actual women across large swaths of the country lose access to the service. With *Roe* on the books, we are nevertheless witnessing a gradual diminution in the availability of abortion for poor, teenaged, and rural women, as state legislatures pass and the Court upholds first funding restrictions,<sup>23</sup> then parental notification requirements,<sup>24</sup> and then waiting periods.<sup>25</sup> The threat to legal, safe, affordable abortion, is not so much that the Court may overturn *Roe*, but that abortion will become less and less available, because of the impact of legislative and political decisions made far from the Supreme Court's doors. Either way, the challenge to legal and safe abortion comes primarily from state politics and only secondarily from Court action. Fixation on the Court and the narrowing constitutional right it has created as a way to secure legal abortion, is just counter-productive.

More important, even if it is true that legal abortion is necessary to women's equal citizenship, privacy or liberty, it by no means follows that a judicially created individualized constitutional right, rather than political persuasion, is the best way to achieve it, and for two reasons. First, it bears emphasizing that what the Court created in *Roe v Wade*, is *not* a right to legal abortion, it is a negative right against the criminalization of abortion in some circumstances. That no more creates a genuine right to a legal abortion than *Brown* created a right to an integrated school. To be a meaningful support for women's equality or liberty, a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one. And, for a right to legal abortion to guarantee that a woman who needs an abortion will have access to one whether or not she can pay for it, the state must be required to provide considerable support. But the Court has consistently read the Constitution as not including positive rights to much of anything from the state,<sup>26</sup> and certainly not to abortion procedures.<sup>27</sup> It is so unlikely as to be a certainty that neither this Court, nor likely any Court, will commence a jurisprudence of positive constitutional rights, by beginning in the contested terrain of mandating public

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<sup>22</sup> See Neal Devins, *Why Pennsylvania v Casey settled the Abortion Debate*, this volume.

<sup>23</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>24</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 886 (1992).

<sup>25</sup> *Id.* at 897.

<sup>26</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-37 (1973)(holding no right to a public education); *DeShaney v. Winnebago Cty. Dep. Social Serv.*, 489 U.S. 189, 194-97 (1989)(stating in dicta, no right to a police force).

<sup>27</sup> *Harris v. McRae*, *supra* note 25 at 316-18.

funds for abortions. By comparison, the state legislative arena is not so constrained: it is very much the business of state legislatures to create legislative programs to meet the positive needs of citizens. Whatever obstacles there might be to a legislative initiative to publicly fund abortions, a refusal to see “positive rights” in the Constitution is not among them.

But second, and aside from the growing body of doctrine that cuts against funding, even a purely negative right, assuming it exists, might be better secured through what is now sometimes called political,<sup>28</sup> popular,<sup>29</sup> or legislative constitutionalism,<sup>30</sup> rather than through the adjudicated constitution as interpreted by courts. A right to abortion might be better understood to be a part of our constitutional self understanding that is achieved through political and legislative victories, rather than adjudicative pronouncement. It would not be the first time a right would be better secured politically rather than judicially – think of the right to social security, or the right to be free of a military draft, or for that matter women’s right to equality itself. No Court ever secured any of these in constitutional doctrine, yet they seem at least as secure against political change as the various unenumerated rights the Court has discovered or created. A woman’s “right” to legal abortion likewise might better be inferred from contemporary understandings of equality and citizenship, than from any constitutional language or configuration of past cases that a Court is likely to recognize as authoritative. This is, at least, a possibility we ought to consider. The academic-feminist attachment not only to *Roe*, but to its origination in Courts, and our resistance to even the suggestion that we’ve become over-reliant upon it, precludes it.

So, neither the vulnerability nor efficacy of *Roe*, nor the partial truth it expresses, is a good reason to *not* engage in critique. Are there any positive reasons to do so? I think there are, and in the bulk of what follows I hope to demonstrate why: the lack of such a critique, I will argue, has dulled us to the degree to which the rhetoric of adjudicated abortion rights might have weakened reproductive justice more broadly conceived. But it is also worth noting, I think, that even if feminism’s or progressivism’s

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<sup>28</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)(arguing broadly against judicial exclusivity and supremacy in constitutional interpretation).

<sup>29</sup> LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)(arguing for popular engagement in the search for constitutional meaning); Reva Siegel and Robert Post, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004)(highlighting roles of executive and legislative decisionmaking in constitutional interpretation); NEAL DEVINS AND LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004)(arguing for the Court to play a dialogic, rather than exclusive or final role in the interpretation of the Constitution)

<sup>30</sup> See generally Robin L. West, *The Legislated Constitution*, in J. Balkin, ed., *THE CONSTITUTION IN 2020* (Yale Univ. Press 2008)(arguing for larger legislative role in determining Constitutional meaning).

or the Democratic Party's *sole goal* were to strengthen this embattled right, there is a strong pragmatic case for pro-choice feminist critique of the way that right is now constructed: by its steadfast loyalty to *Roe* the pro-choice community is in danger of losing this war by fighting – even if winning – yesterday's battle. Pro-life movement activists increasingly look to reduce abortions not by reversing *Roe* and criminalizing abortion, but rather with a three-pronged strategy, no part of which is dependent upon *Roe*'s reversal: first, by passing restrictions the Court will uphold even with *Roe* on the books,<sup>31</sup> second, by reducing both supply and demand by intimidating clinics and clinicians and shaming the women who use them,<sup>32</sup> and third, by reducing the long range cost of pregnancy by urging more political and communitarian support for motherhood, particularly for poor women.<sup>33</sup> For pro-life constituencies, the grounds of contestation of legal abortion have shifted to the local, political and moral, and away from the constitutional-adjudicative. The pro-choice community's fixation on the apparently never-ending project of finding adequate grounds for adjudicated abortion rights blinds it to that.

The pro-choice community might, then, for purely pragmatic reasons, be well advised to take up a challenge made a few years ago by Janet Halley and Wendy Brown in a different context,<sup>34</sup> to wit, that we subject liberal constitutional victories to criticism in an unfettered way, as though we were not in fear of the wolf at the door. I think it is past time to apply this simple enough prescription to abortion rights. Not only is critique of value for its own sake, but here, we might thereby push the wolf further back. The *Roe* to *Casey* line of decisions stands in need of progressive, feminist and pro-choice critique and transformation. The first without the second may well be irresponsibly reckless, but the second without the first is impossible. And – both are necessary.

## 2. Critique

There are at least three major costs of the right created in *Roe* that seem to be under-appreciated by the pro-choice community. All three are suggested by the various critiques of negative rights, of the left's reliance on Courts to create and protect them, and of the liberal-legal political commitments that underlie them, that were pioneered by the critical legal scholarship of the 1970s and 1980s. They are as follows. (1) Choice based arguments for abortion rights legitimate considerable injustice, both in women's reproductive lives and elsewhere. (2) The Court's active role in creating this

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<sup>31</sup> See Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

<sup>32</sup> Dawn Johnson, note 20 *supra*.

<sup>33</sup> See Jacqueline Salmon, *Some Abortion Foes Shifting Focus From Ban To Reduction*, WASHINGTON POST 11/18/2008

<sup>34</sup> Wendy Brown and Janet Halley, eds., *LEFT LEGALISM/LEFT CRITIQUE* (2002).

jurisprudence exacerbates anti-democratic features of U.S. constitutionalism, to women's detriment. (3) The arguments do not do justice to the aspirational goals of the women's movement's early arguments for reproductive rights. I'll take them up in that order.

*a. Legitimation*

“Legitimation” has come to mean many things in critical legal scholarship, but two particular meanings are of relevance to the right to abortion; the first has to do with the legitimating consequences of legal change, and the second with the legitimating consequences of individual choice. In the case of the right to abortion, of course, these are deeply intertwined: the legal change effected by this right is an expansion of individual choice. It is nevertheless helpful to treat them separately.

By the first, is simply meant that apparent gains in justice wrought through legal change are sometimes offset by what might be called the “legitimation costs” of the same legal breakthrough. The idea here is that a concededly just legal change will sometimes legitimate a deeper or broader injustice with the legal institution so improved, thus further insulating the underlying or broader legal institution from critique. This ought to be understood, then, as a “cost” of the reform – one which, in some circumstances, might be quite high. So, for example, although *Brown* ended *de jure* racial segregation of the public schools, it might have thereby “legitimated” an entire host of evils, including *de facto* segregation, unequally funded urban schools, private sphere rather than state sponsored subordination of African Americans, and the purportedly meritocratic classifications and hierarchies of market economies themselves. All of these are left not just untouched by *Brown*, but legitimated by it. The decision's equation of injustice with state sponsored racism carries the implicit suggestion that so long as those segregated or under-funded schools, or market generated hierarchies of class and race privilege, are not polluted by the pernicious impact of state sponsored racial classifications, then they are not only constitutional, but also morally and politically un-troubling.<sup>35</sup> The “legitimation cost” then of *Brown* is the possibly increased insularity against criticism and political reform of these greater injustices. The critic's claim is not that the goal of the legal breakthrough --- ending *de jure* segregation – is undesirable. Rather, the worry is that the goal comes at the cost of legitimating deeper racial injustices. At some point, the critic worries, these “legitimation costs” might outweigh the benefit of the breakthrough itself.

The second meaning of “legitimation” developed in critical scholarship of the late twentieth century concerns the nature and role of consent, and the specific impact of an

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<sup>35</sup> See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINNESOTA LAW REVIEW 1049-1119. (1978) (arguing that *Brown* legitimated *de facto* segregation); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) Derrick Bell, *What Brown v Board should have said*, *supra* note \_\_\_\_, Robin West, *Meritocratic Success Stories*, *supra* note \_\_\_\_. See generally CRENSHAW, et al, *CRITICAL RACE SCHOLARSHIP*, *supra* note \_\_\_\_.

individual's consent to the perceived justice of either particular transactions or entire institutions to which consent is given.<sup>36</sup> In liberal market economies and the legal orders that govern them, the act of consent generally insulates that to which consent was given even from criticism, much less legal challenge. Consent to the terms of a contract, for example, typically – almost always -- insulates the fairness of the terms of that contract from both public scrutiny and legal attack, regardless of how harmful or injurious that contract turns out to be, to one or both of the parties that consented to it. If the contract was consensual, it can't possibly be unfair to impose it on a later-regretful party, no matter how harmful its terms might appear to be. Widely shared norms against paternalistic legislation,<sup>37</sup> an ideological and seemingly bottomless belief in the ability of individuals to understand and act on their own welfare,<sup>38</sup> skepticism regarding the motivation of regulatory bodies or meddling individuals who would seek to upset consensual individual transactions, and at least for some, a definitional commitment to consent as that which maximizes value,<sup>39</sup> all burden attempts to intervene into or even question contract terms, whether that intrusion be implicit, such as through “unconscionability” or “duress” limits in the common law of contract, or through more explicitly regulatory means, such as consumer protection legislation or workers' rights laws. I have argued elsewhere that the same dynamic (increasingly) limits critique of intimate sexual relations: Consensual sex is not only not rape, but it is also viewed as not appropriately subjected to moral or political critique. To so subject it is puritanical, moralistic, or worse.<sup>40</sup> Lastly, in the public sphere, “consent” operates similarly: the consent of the governed legitimates whatever governance follows. We can generalize from these three examples of the impact of consent in the private, intimate, and public spheres: consent cleans or purifies that to which the consent is given, and thereby insulates it from political critique as well as legal challenge. Questioning the value of that to which consent has been given is politically suspect – because unjustifiably paternalist

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<sup>37</sup> The surrogacy debates of the late eighties and early nineties present the starkest instance of the application of this principle in policy debates, *See, e.g.*, Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989); Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995).

<sup>38</sup> *See* Epstein, *supra* note 42, at 2313 (arguing for a presumption favoring the validity of market exchanges because individuals know their self-interest best).

<sup>39</sup> Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 at 491-94 (1980) (arguing that consensual trades increase value by definition).

<sup>40</sup> Robin West, *The Harms of Consensual Sex*, in Alan Soble and Nicholas Power, eds., *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS*, (5th ed. 2007). (arguing that consensual sex can harms that are obfuscated by definitional conflation of consensual transactions with value).

or logically incoherent, or both.

Perhaps the hallmark of late twentieth century CLS writing, was that for the critic, this widely made inference from consent to value is simply unwarranted.<sup>41</sup> People's abilities to ascertain and act on their own self interest is limited, the critic argued, the capacity of countries, institutions, multi-national corporations, social forces or simply stronger parties to create in individual subjects a willingness to consent to transactions or changes that do not in fact increase their wellbeing is well documented, as is the capacity of the would be governmental regulator, on occasion, to ascertain the wellbeing of others. "Consent" of the weaker can be manufactured to serve the interests of dominant parties, and when it is, it is not a good measure of the value to the weak of that to which consent was given. Neither skepticism regarding the good motives or the knowledge base of the "paternalist," nor faith in the self-regarding preferences of the individual, justify the unexamined inference that a consensual change so extracted is a good one for all affected parties. The degree to which it is perceived as such, is the degree to which the consensual change has been unduly legitimated by the consent that preceded it. The "legitimation cost" of consensual transactions, then, is the sometimes unwarranted belief in the increased value of the change to which consent was proffered.

Are these worries about the legitimating effects of either legal change on the one hand, or individual consent on the other, of relevance to *Roe v Wade*? Does the decision in *Roe*, even assuming the value of the right it created, carry "legitimation costs"? Let me put the question in an historical context. Its worth recalling that Catherine MacKinnon's early critiques of *Roe v Wade* pointed to two important legitimating effects of that decision, one quite specific and the other more general. First, she argued, constitutionalizing a right to terminate a pregnancy broadly legitimates the sex that produced the pregnancy – sex that might well have been less than fully consensual by both parties. It shifts the focus away from addressing the social and sexual imbalances that lead to unwanted pregnancies, to the unwanted pregnancy itself, and strongly suggests that the appropriate social and individual response to unwanted sex is to protect the decision to end the pregnancy to which that sex might lead. This has the effect of minimizing the social costs of sexual inequality for the strong and the weak both, rather than ending the sexual inequality itself. *Roe*, then, legitimates both unwanted sex and the hierarchies of power that generate it.<sup>42</sup> Second, she argued, the privacy rationale of

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<sup>41</sup> See e.g., Mark G. Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979) (exploring examples of choices that do not increase utility); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (defending paternalism in contract law, on grounds that consensual transactions do not necessarily increase utility); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (critiqueing conflation of utility and consensuality).

<sup>42</sup> CATHERINE A. MACKINNON, "Privacy v. Equality: Beyond *Roe v. Wade*," in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1988).

*Roe v Wade* might have the pernicious effect of further insulating the already overly privatized world of intimate relations from either moral critique or political struggle. Men subordinate women, to a large degree, in private: in homes, in bedrooms, in hotel rooms, through pornography, prostitution, marriage, and sex. Extolling the privacy of these relations, and casting a constitutional wall of protection around them for the express purpose of warding off legal intervention or regulation, thus both insulates and valorizes – and hence legitimates -- the subordination that occurs within them.<sup>43</sup>

These arguments, I think, were never satisfactorily answered by feminist supporters of *Roe v Wade*. Completely unaddressed, however, was whether McKinnon's critique went far enough. The question should have been not only whether McKinnon was right to complain that *Roe v Wade* might have the undesirable effect of legitimating, by privatizing, sexual violence. The larger question her critique should have opened, but didn't, is whether there are other legitimating costs as well of this decision, in addition to, and not reducible to, the problem of male sexual coercion.

I think there are. The danger I want to highlight is that the individual right to terminate a pregnancy created by *Roe v. Wade* might have the effect not only of legitimating the coercive sex that might have led to it, but also legitimating the profoundly inadequate social welfare net, and hence the excessive economic burdens placed on poor women and men who decide to parent. As *Roe* and the choice it heralds to opt out of parenting become part of the architecture of our moral and legal lives, we increasingly come to think of the decision to parent, no less than the decision not to parent, as a chosen consumer good or life style – albeit a very expensive one. As this shift in consciousness occurs, it may come to seem, at least for many, that the only role for a caring or just society, here as elsewhere, is to ensure that that consumer choice to parent or not parent is well informed. Making sure that choices are well informed, after all, exhausts the role of the state in regulating consensual affairs, particularly market based ones, in a culture that valorizes consensual market transactions. So -- consumers of the choice to parent or not parent, from this “informed consent” model of the role of the just state, should know a few things. They should know that high quality child-care can only be obtained at a very high cost. They should know that caring for a newborn, nurturing a toddler, and then raising a child, will interfere and mightily with the parent's wage earning potential in a work-world that still valorizes the unattached laborer with no commitments to any earthly soul other than his employer.<sup>44</sup> They should know that the quality of public education is spotty -- in communities where housing is affordable, the public education is abysmal, and vice versa – and that a purchased private education at elite private schools costs far more than most Americans' paychecks. They should know that publicly funded preventative (as opposed to emergency) health care for one's

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<sup>43</sup> *Id.* at \_\_\_.

<sup>44</sup> See e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (exploring conflicts between work and family); Joan Williams, *Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RTS. L. REP. 3, 3-4 (2006)(exploring cost of mothering).

dependents is almost non-existent. They should know that once the decision is made to become a parent, there is “no exit,” or turning back.<sup>45</sup> Parenting is not the sort of at will employment from which an employee can simply walk away if the terms are no good; there are moral, emotional and legal restraints on one’s ability to do so. They should know all of this. All of this increases hugely the price of parenting.

If parenting is a *choice*, however – a status entered freely, as might be a very long and very binding long-term contract –its expense is not a source of injustice or even a cause for worry, so long as the choice is made knowingly. Parenting is indeed expensive. But so are private jets and graduate degrees. If the potential parent – like the potential buyer contemplating whether or not to buy an airplane paid for in installments and that will require a lot of upkeep -- is armed with enough information about her choices, then there is no further need for intervention into the various private markets for the support services –education, health care, child care – from which she might choose, when it comes time to employ those services. We now have a “choice” to end a pregnancy – so, when we parent, no less than when we don’t, we’ve made our choice. And, since *Roe*, many of us *do* now view parenting in this way, and we so view it not just incidentally, but as a part of our fundamental, American, constitutional identity. As Americans, when we choose to parent, we should be well informed; we should make the choice knowing the price. At least here in America, that’s no reason to publicly *subsidize* the choice. There’s no further reason to help a poor mother pay it than there is to help a would-be recreational sailor buy a boat that will allow him to sail around the world, or to help the wannabe scholar with the expense of yet another graduate degree. Its one life-style choice among several that happens to come with a hefty price tag.

Thus, constitutionalizing this particular right to choose legitimates, simultaneously, and in both of the senses noted above, the lack of public support given parents in fulfilling their caregiving obligations. By giving pregnant women the choice to opt *out* of parenting by purchasing an abortion, we render parenting a market commodity, and thereby legitimate, systemically, the various baselines to which she agrees when she opts *in*: an almost entirely privatized system of child care, a mixed private and public but prohibitively expensive health care system, and a publicly provided education system that delivers a product, the quality of which is spotty at best and disastrously inadequate at worst. Narrowly, by giving her the choice, her consent legitimates the parental burden to which *she* has consented. A woman who is poor and chooses to parent will exacerbate her poverty by so choosing, particularly if she “chooses” to parent without a partner. If she “chooses” to parent a special needs child, she will have little assistance for the extraordinary educational, health, and care needs of her child. If she chooses to parent without a partner while she herself lives in poverty, she likewise has so chosen. The choice-based arguments for abortion rights strengthen

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<sup>45</sup> See ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004). (arguing that parents have no exit from parental work and obligations, and for greater public support of parenting)

the impulse to simply leave her with the consequences of her bargain. She has chosen this route, so it is hers to travel alone. To presume otherwise would be paternalistic. The woman's "choice" mutes any attempt to make her claims for assistance cognizable.

More generally, the choice rhetoric of *Roe* undercuts the arguments for the development of what I have elsewhere called "care-giver rights" –the rights of caregivers, women and men both, to a level of public assistance for their care-giving work.<sup>46</sup> This has consequences for everyone who spends substantial parts of their adult lives caring for the needs of dependents, whether small children or the elderly, and who incurs substantial costs by virtue of so doing. Pregnant women, parents of small children, and the grown children of elderly parents, by virtue of their caregiving obligations, are not capable of the sort of independence that is so highly valued in a culture that prizes rugged individualism above all else. Caregivers are less independent, and therefore less autonomous, than those with no such obligations. Someone tied to the needs of others is that much less free to live the wealth maximizing, self regarding, autonomous life presupposed by, and valorized by, a free market economy in the first place. The right to an abortion gives women a right not to be a caregiver, but at the cost of rhetorically making the difficulties of care-giving all the harder to publicly share, should she opt for it. For privileged women, this is not such a terrible trade off: an economically secure woman gets a right to terminate a pregnancy, and can more or less put up with the bolstered legitimacy of an overly privatized system of health and child care. She can exit the paid labor market for a few years to raise her child, or she can split those obligations with a supportive spouse or partner and continue to work part time, or she can delegate to others the caregiving work for substantially less than she herself earns so that she need not interrupt her own wage labor. She can, through one of these routes, simply absorb the expense of these choices. The woman only marginally capable of supporting even herself, however, faces a choice between parenting and severe impoverishment, on the one hand, or foregoing children on the other. Are we really comfortable, morally, with a world that we've created, in which only rich people can satisfactorily parent? Is it a just world, in which poor people are told that perhaps they really shouldn't have children, particularly if they can't find someone to marry first? The sheer cruelty of this is what the legitimating rhetoric of choice, and of individual rights to privacy, liberty, and dignity, all mask.

*b. Democracy*

In the last thirty years, a growing body of scholarship from critical legal scholars and progressive legal or political theorists has decried the political left's heavy reliance on Courts, litigation, rights, and constitutional law as vehicles for progressive victories, that might better have been secured through ordinary politics.<sup>47</sup> Several themes have

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<sup>46</sup> Robin L. West, "Do We Have a Right to Care?," in *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* 88 (Ellen K. Feder & Eva Feder Kittay eds., 2003).

<sup>47</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPUPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW*, New York (2004); Larry Kramer, *Foreword – We the Court*, 115

emerged from this literature, some of it going back to early critiques of rights penned by the critical legal studies movement,<sup>48</sup> some of it more contemporary and based in understandings of the workings of institutions.<sup>49</sup> Three themes in particular recur in this literature, that, I believe, are of relevance to *Roe*. I will quickly review these concerns, spell out the ways in which *Roe* is exemplary of them, and then suggest in a bit more detail a fourth.

The first concerns the logic of counter-majoritarian rights. Echoing Marxist critiques, critical scholars have argued for well over a quarter century that while rights have indeed served the interests of minorities, as their celebrants claim, it has primarily been the interests and privileges and entitlements of not particularly embattled minoritarian aristocrats, property owners, and the wealthy, and what they have protected, all that privilege against, primarily, is the majoritarian, democratically expressed wishes of the less well off – peons, workers, renters, mobs, the poor or the masses -- for a bit of state sponsored, democratically inspired, re-distribution of wealth. With the advent of progressive rights based movements in the nineteenth and twentieth century, this historical alignment of rights and privilege becomes mixed. Thus, and whatever their propertied pedigree, rights have furthered the causes of abolition, suffrage, labor, and eventually racial justice and reproductive freedom. Nevertheless, purely as a matter of rhetoric and logic, rights are property’s coin of the realm, so to speak, and will likely always remain so. Regardless of content, then rights and rights rhetoric (or “rights-talk” as it used to be called) protect pre-existing property entitlements, even if just indirectly, by discrediting precisely the democratic, popular, majoritarian and political deliberation and reform it would take to upend them. Any progressive gains achieved by rights must therefore be understood as risking some degree of entrenchment of current distributions of property that favor a wealthy minority against majoritarian redistribution, simply because of the use of rights discourse.

Second, critical scholars argued forcefully that court-generated rights discourse in this country has tended to reinforce pernicious distinctions between the private and the public realms of social life, largely because of its cribbed insistence that injustice almost by definition emanates only from states and from state action rather than from private actors of any sort. What judicially discovered rights mostly give us is a way to ward off overly intrusive or irrational state involvement in our private lives.<sup>50</sup> There are two

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HARV. L. REV. 4 (2001) MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999), Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L. J. 1346 (2006); Robin L. West, *Ennobling Politics*, in EMPIRE OF FORCE (H. Jefferson Powell & James Boyd White eds., forthcoming).

<sup>48</sup> Mark Tushnet, *An Essay on Rights*, *supra* note \_\_\_\_.

<sup>49</sup> LARRY KRAMER, THE PEOPLE THEMSELVES, *supra* note \_\_\_\_, and Jeremy Waldron, *The Core of the Case Against Judicial Review*, *supra* note \_\_\_\_ at 1386-1390.

<sup>50</sup> Tushnet, *An Essay on Rights*, *supra* note \_\_ at 1382; Kennedy, *The Critique of Rights*, *supra* note \_\_ at 181-182.

problems with this. The first has been much belabored: court-generated rights perversely protect rather than stand as a challenge to forms of oppression that are distinctively private, such as unfair employment or contract regimes, patriarchal privilege, or private sphere racism, all of which are accomplished by private actors in some “private” realm. But second, and less noted, the valorization of the “private” realm comes at the expense of degradation of the “public”. Consequently, the “public-private” distinction at the heart of rights discourse feeds a distrust of the machinations of public deliberation – including processes of government, of democracy and collective action – the use of which is essential to any sort of genuinely progressive political movement against private injustice. For this reason as well, then, particularly in the economic sphere, the result is an undue, and perhaps unwitting, regressive conservatism.

The third cost of court-created rights identified by rights critics stems from concerns about the methods of reasoning courts employ. Progressive victories secured through adjudication rather than politics must be or at least aim to be consistent with past practice—they must mesh more or less seamlessly with pre-existing precedent, policies, decisions, institutional arrangements and forms.<sup>51</sup> This makes the progressive victory achieved through the courts – including rights-based victories -- relatively conservative, compared to what might be achieved politically: the restraint of integrity with the past makes it not even theoretically possible that the victory will be a truly radical one. At the same time, the apparent gain in permanence, depth, certainty, or profundity that seemingly comes from the adjudicative victory being secured through law – the perception that the “right” so discovered is something that has always been deeply embedded in a system of law that has its own roots in antiquity, and is therefore truly there and secured against precipitous change – is an illusion. Rights found by Courts can also be abandoned by Courts. The right is hostage to the whims of the people on the Court rather than a working majority of a Senate. It is nevertheless just as much hostage to whimsy. It is a product of power, no less than any traffic ordinance spelt out by a City Council, and just as subject to recall.<sup>52</sup>

These progressive critiques of judicially created rights, pressed in different ways by critical scholars over the past thirty years, all suggest limits to the progressive potential of *Roe v Wade*. *Roe*'s holding, whether couched in terms of liberty or privacy, did indeed quickly devolve into a bare negative contract right to buy a particular medical service – an abortion – free of moralistic intrusion by state legislators who would paternalistically intervene into that – or any other -- consensual purchase. The right became a stick in a bundle of negative rights we wield in order to keep the state out of our sex lives: we have a right to birth control, a right to same-sex sex, limited rights to produce and consume pornography, and a right to engage in the commercial and medical consultation necessary to secure an abortion to end the pregnancies in which all that

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<sup>51</sup> See e.g., Mark Kelman, , in *THE CONSTITUTION IN 2020* (Jack Balkin & Reva Siegel eds., 2008).

<sup>52</sup> MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988). Tushnet, *Critique of Rights*, *Texas Law Review*

protected sex sometimes result.<sup>53</sup> It has furthered the cause of unfettered sexuality in open markets, for purchase and otherwise. It has done nothing, however, to further the satisfaction of the positive needs – whether understood as rights or not – of either pregnant women or parents. By relentlessly celebrating negative rights as the route to women’s liberty and equality, and as relentlessly castigating politically secured legislation as the evil against which negative rights – and hence, liberty and equality both -- are constructed, it has undermined the case for the very sorts of positive legislative schemes that might do so.

Second, and as the rights critiques of the “public-private” distinction presaged, the libertarian rhetoric of the opinion has indeed focused attention on pernicious state intermeddling in women’s lives, rather than either the private-sphere appropriation of women’s sexuality caused by male sexual aggression, or the appropriation of women’s reproductive and parenting labor in that sphere, as the primary limit on women’s equality and liberty.<sup>54</sup> Catherine MacKinnon warned in her early critiques of *Roe* that the pro-choice community ran the risk that it would further obfuscate both the fact and nature of private sphere sexual subordination – by aggressively shrouding that sphere, and the subordination that occurs within it, in a constitutionally protected veil of laudatory privacy.<sup>55</sup> The right to abortion, she argued, might further privatize the private by constitutionalizing it, and by so doing thicken the veil of privilege around intimate life, and therefore around the sexual subordinations that occur within it. Events have not proven her wrong to have so worried. The same is true, although she did not so argue, with respect to women’s labor, no less than women’s sexuality, and with respect to the economic sphere, no less than the sexual. Parenting is economic activity, as well as the result of sexual acts that may or may not have been coerced. By insulating the private economic realm of parental choice against public critique and intervention, the economic deprivations occasioned by overly privatized parenting are further shielded against public intervention. The effect is not only the valorization of the “private” activities of sex and parenting; it is also the denigration of the public sphere of politics. The public assistance that would be required to alleviate costs borne in private is cast as unwarranted intrusion into an exalted sphere of private economic life, rather than warranted assistance with an almost impossibly privatized burden.

And third, and just as a critical sensibility should have predicted, the right has indeed proven to be both relatively regressive and seemingly unstable. This right’s genesis in “law” rather than “politics” -- has not yielded the permanence or security or respect that law promises. *Roe*, conceived as a “right” so as to withstand the whims of hostile political opinion that would upset it, still seemingly “hangs by a legal thread.”

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<sup>53</sup> As was predicted in Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS., Summer 1980, at 83.

<sup>54</sup> See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184-194 (1991) .

<sup>55</sup> *Id.* at \_\_.

The Court can broaden it, narrow it, uphold it or overrule it. Meanwhile, and ironically, the activity it primarily protects – legal and safe abortion in the first trimester of an unwanted pregnancy – enjoys strong majoritarian political support.

There is, though, an additional and less appreciated cost to democracy of conceptualizing legal abortion as a judicially created right that the rights critics never touched on, that I want to address more expansively. This cost too has particular poignancy in the domain of abortion rights. When the Court claims privileged and even monopolistic access to the language of moral principle, reasoned discourse, and civil dialogue, it suggests a lesser and distasteful view of the politics it thereby limits.<sup>56</sup> Representative politics is routinely construed by the devotees of court-generated rights as the realm of bald power: whimsical, arbitrary, emotive, unprincipled, rent-seeking, horse-trading, reflective of the “interests” of a basically infantile constituency that does nothing but form arbitrary preferences for unprincipled -- unthoughtful – reasons. The public whose interests and preferences are so reflected in politics and in Congress and in the legislative branches of state governments, is portrayed as prone to hysteria, as a body that acts on whims and winds of political sentiment, and as given to unpredictable moments of mob mentality. Politics, as construed by the Court and their liberal devotees, is anything but the highest art of which the species is capable, and anything but deliberative. The Court, by contrast, expresses *law* – and when it does so, it speaks in the language of principle, reason, rationality, integrity, consistency with the past and dispassionate concern for the future. It speaks with intelligence and wisdom both; it assimilates knowledge from history and judiciously weighs – rather than reacts to – the desires of the interested parties of the present. It takes the long view. It is attentive to enduring principles. It is Herculean. It deliberates; it does not react. It engages in civil discourse. The Court, not the Congress, is the institution that permits rational and respectful dissent. It is the Court that keeps the civil conversation going in this country. Therefore, *Law*, expressed through Courts, is our highest and best form of *politics*. Meanwhile, our *actual* politics – what happens in Washington or Annapolis or Sacramento or downtown Wasila – is everything this adjudicative conception of our highest politics is not. Its low life.

*Roe v Wade* and its progeny are not, of course, responsible for the degradation of politics that has become the natural counterpart of the institution of judicial review, its high-minded justifications, and the reverence we now accord it. It does though exemplify it. When the Court speaks of the hollowed right to privacy in which it locates abortion, it speaks of the sanctity of marriage and family,<sup>57</sup> of individual liberty,<sup>58</sup> of equality or

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<sup>56</sup> I’ve detailed this argument in Robin West, *Ennobling Politics*, *supra* note 86 at 31-33.

<sup>57</sup> *Roe v. Wade*, 410 U.S. 113, 152-153, 168 (1973) (right to privacy extends to activities “relating to marriage,” “procreation,” and “family relationships.”); *Griswold v Connecticut*, 381 U.S. 479, 495 (1965) (“The entire fabric of the Constitution ... demonstrate[s] that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected”).

dignity,<sup>59</sup> of respect and of the great and deepest mysteries of life,<sup>60</sup> of the constituents of individual identity, and of what is most important to a well-led life.<sup>61</sup> When the Court and pro-*Roe* celebrants speak of the Court's jurisprudence in the area, they reference these values and a host of others, more particular to law: the grand promises of the Fourteenth Amendment,<sup>62</sup> the importance of precedent to political and social order,<sup>63</sup> the protections of substantive due process,<sup>64</sup> the needs of all of us to be free of a "jurisprudence of doubt,"<sup>65</sup> the value of an evolving and living constitution, as well as the importance of consistency, integrity, and moral principle in decision-making and in our law. The contrast between what Courts and Court-commentators say, when speaking of this right, and what abortion rights advocates say in the public sphere when defending or addressing the need for legal abortion could not be more stark. When advocates speak of abortion in the public sphere and outside the Courts, they don't, for the most part, talk about a "jurisprudence of doubt" or the importance of precedent or of principled judicial decision-making. They only occasionally speak of liberty, dignity, or even equality. Rather, they most often speak of women's bodies. They speak of the dangers to women's health that are posed by many pregnancies. They speak of the lives that have been lost to illegal abortion. They talk a lot about hemorrhaging, and of women and girls bleeding to death in botched back alley abortions. They also speak of women's emotional lives. They speak of fear and terror. They speak of lives shortened, or narrowed, or rendered mean and dull and uncompromising, by dangerous pregnancies, or too many unplanned pregnancies, or too many children, or too much mothering. They speak of shattered dreams, or girls with low or no expectations for their own futures. They often speak of abusive step-family members, of domestic violence, and child rape. They speak of intentional, deeply wanted pregnancies gone wrong: they talk about diseased fetuses, miscarriages, and tragic choices. They talk about still-births and life threatening complications. They speak of the earthy, present, demanding, felt, fought-over need of

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<sup>58</sup> *Roe v. Wade*, 410 U.S. at 153 (right to privacy founded on personal liberty)..

<sup>59</sup> *Gonzales v. Carhart*, 550 U.S. 124, 1626-1627 (2007)(Justice Kennedy, discussing state interest in respecting dignity of human life, while upholding Partial Birth Abortion Ban Act).

<sup>60</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (Justice O'Connor, defining the heart of liberty protected by due process as the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.)

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 846-850.

<sup>63</sup> *Id.* at 854-69.

<sup>64</sup> *Roe v. Wade*, 410 U.S. 113, 167-168 (1973) (Stewart, J., concurring) (statutes prohibiting abortion and contraception must be understood as substantive violations of due process liberty right).

<sup>65</sup> *Planned Parenthood v. Casey*, 505 U.S. at 844.

women to control their bodies and fate.<sup>66</sup>

The contrast on the other side of this debate, between the rhetoric of the Court and commentators on the one hand and activists on the other, is if anything even more stark, although it is beginning to narrow somewhat, at least if *Carhart* is any guide.<sup>67</sup> In the public square, pro-life advocates speak, argue, petition, canvas and beseech us to attend to the biological lives of unborn babies. They wield pictures of fetal life and body parts. They deploy sonograms and give voice to silent screams. They push their listeners to identify with the unborn, to open their sympathies and their hearts to the least of these, to pull fetal life into the human community, to recognize us in them and them in us. Conservative legal critics of *Roe v Wade*, on the other hand, speak rarely if at all of any of this.<sup>68</sup> Rather, they speak of originalism,<sup>69</sup> of constitutional integrity,<sup>70</sup> of the close readings of texts, of plain meaning, and of the lack of the word “privacy” in the text of the constitution.<sup>71</sup> They worry over the integrity, identity, and future of the Constitution. There is little talk, either on the Court or in the pages of scholarly commentary that is hostile to *Roe*, about fetal life, silent screams, or unborn babies, and even less about the struggles facing women with unwanted, or dangerous pregnancies. The discussion is principled, constitutional, historical. It does not stem from a visceral identification with

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<sup>66</sup> In *Webster v. Reproductive Health Services*, the National Abortion Rights Action League made the strategic decision to file as Amici what came to be known as the “Voices Brief” in that and subsequent Supreme Court abortion cases. Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989). The point of the Voices Brief was to allow women to speak to the issue of legal abortion in their own voices, and on the basis of their real concerns, rather than through the distorting lens of legal doctrine. For a general discussion of the contrast between the felt and expressed concerns of women having legal or illegal abortions, and the unfolding of legal doctrine governing *Roe* and eventually *Casey*, see LAURA R. WOLIVER, *THE POLITICAL GEOGRAPHIES OF PREGNANCY*, 88-92 (2002) (discussing the Voices Brief and NARAL’s “Silent No More” campaign, both intended to present women’s stories of illegal abortions to the public).

<sup>67</sup> *Gonzales v. Carhart*, 550 U.S. \_\_\_\_ (2007) (partial life abortion described in graphic and morally charged detail).

<sup>68</sup> There are of course exceptions. See, e.g., Michael Paulsen, *supra* note \_\_\_\_ (legal abortion compared with the Holocaust).

<sup>69</sup> ROBERT BORK, *THE TEMPTING OF AMERICA*, at 95-101 (1990) (arguing for originalism).

<sup>70</sup> John Ely, *The Wages of Crying Wolf*, *supra* note \_\_\_\_, at 946-949. (arguing against the legality, as well as the correctness, of *Roe v Wade*.)

<sup>71</sup> *Id.* at 927-929 (criticizing inappropriate use of rights inferred from the constitution).

or sympathy for the plight of murdered babies.

This momentous gulf in the substance of pro choice and prolife arguments on the street, versus prochoice and prolife arguments on the Court, is understandable: the issue facing the Court, after all, is *not* the morality of abortion, but the power of the states to criminalize it. The contrasting substance of the arguments, however, is in turn reflected in contrasting styles and modes of discourse – and it is that contrast that I wish to problematize. The clerks and Justices of the Court craft arguments for and against legal abortion from the principles, precedent, and constitutional phrases found in the pages of past case law. They then make analogies from those principles and precedents. They reason closely or loosely from original texts – either of the Constitution or of the cases that interpret it. Public advocates of free and legal abortion as well as public advocates for criminalization of abortion speak in a different modulation entirely. They protest, march, yell, organize, canvas, petition, and carry posters depicting coat hangers and fetuses, dead women and body parts. They make demands rather than arguments: that states either protect the least of us, or stay off our backs. And on both sides the demands are visceral.

These contrasting modes of discourse around abortion – reasoned, from the bench, and impassioned, on the street -- have fueled the perception that the Court, rather than the public square, is the necessary and proper place to decide the legality or criminalization of abortion. The Court epitomizes reason, dispassion, and principled discussion. The debate in the public square epitomizes the hysteria against which the Courts, law, and rights themselves do combat, with the sword of sweet reason. The Court and its product – opinions – jointly constitute and embody the nobility of law. The political branch that represents us, particularly at the local level, is ignoble.

Now, there is much to be said against this picture – most of it already said by the critical legal studies scholars in the seventies and eighties. In a nutshell, they argued, the Court's reasoning is neither as rational nor as principled as might first appear.<sup>72</sup> True enough, but it missed and itself obfuscated what might be a more consequential point. The now conventional division of labor spelt out above – that the Court exercises reason in the pursuit of principle, while the legislative branch is an escape valve for the emotive excesses of various publics and an arena for horse trading among their infantile interests and desires – is untrue, not only because it so discounts emotionality, infantilism, and horse trading on the Court, but also because it understates the seriousness, public mindedness, and capacity for reasoned discourse of legislators. Courts are less than fully reasonable, yes. And, congress is more than emotive.

But even that friendly amendment understates the damage done by this liberal conception of judicial wisdom and legislative infantilism. The deeper harm is that it misstates the role of passion in politics. Politics at its best, not just its worst, is an admixture of passion and principle. Signs, pictures, and images that evoke empathy may

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<sup>72</sup> See MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

be ingredients of mob un-think, but they are also necessary components of any movement that aims to broaden our moral compass – if we don't think of either women or fetal life as a part of us, we're not going to legislate, as a people, so as to protect them. Any politics, but certainly progressive politics, must seek to expand affective sympathies. The derogation of passionate politics so deeply embedded in the jurisprudence of an activist, anti-majoritarian, and rights-oriented Court, systematically belittles precisely the sort of politics that is obviously not sufficient, but is likely necessary to any sort of expanded progressive political vision.

Finally, the traditional identification, and the elevation, of reasoned discourse with the Court and at the heart of rights-oriented constitutionalism, not only pits the principled decision-making of which the Court is so proud against passion, but it also pits itself against compromise. Principle cannot abide compromise, but politics can't proceed without it. The public discussion of abortion has become as raw as it has, in part, because of that fact. When we battle this out in Court as a clash of principles, we develop those martial arts of the mind that are necessary to that battle. We lose, though, the arts of political compromise. We lose the ability and willingness to craft deals we can live with, the nimbleness of giving a little and getting a little, the commitment to the project of living with and under the roofs that compromise creates. There is much to worry over, of course, in compromise, but there is also much to applaud: it is neighborly, civil and inclusive.

Adjudicating abortion rights over the last quarter century and more may have dulled our capacities and appreciation for impassioned, engaged politics and civil compromise both. It is not at all clear that the result has been a stronger rather than weaker set of reproductive rights and liberties.

### *c. Aspiration*

Roberto Unger famously complained of the “truncated” thinking that constitutes the core of canonical common and constitutional law texts.<sup>73</sup> The “weighing of policies” that informs common law cases in the absence of clear legal rules, for example, flattens even ordinary normative argument: policies are listed on each side, one side declared more compelling, and the case decided. This is a cartoon version of decent policy analysis. Principled decision-making fares no better. The same is true of what I call aspirational vision – arguments about what we should do now, based on a view of what we should ideally be, or aspire to become. Aspirational visions of what justice requires get truncated as they get litigated: they are cut to size so as to fit the demands of doctrine, of standing requirements, of what the Fifth Justice might believe, and of the principles laid down by the past. Thus, *Brown* truncated the claims of racial justice that motivated those who brought the case: it was reduced to a bare right not to be irrationally discriminated against by the state on the basis of skin color. *Miranda* likewise: what was trimmed was an aspiration of a decent criminal justice system, not riddled by racism and

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<sup>73</sup> Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 576-577 (1983).

contempt of criminal defendants. What remained after the trimming was a crude right not to be “mirandaized.”

Nowhere, though, has this “truncating” dynamic been more on display than in the context of abortion rights, and the aspirational vision of which it was originally a part. The constitutional right to abort a fetus, and the right to be left alone on which it is built, is as hollow as it is, in part because it represents just such a truncation of the aspirational feminist vision of reproductive justice from which it was forged. For most of the first two thirds of the century just passed, legal abortion was understood by feminists who sought it as a component of a conception of women’s equality that also included a demand for a robust public role in child care, heightened protections against rape and domestic violence, equal employment opportunities, equal pay for comparable worth, and inclusion of women in the public spheres of politics and governance.<sup>74</sup> Abortion rights was a branch on a tree, the trunk of which was the aspiration of equal citizenship and whatever social reimagining of basic structures of work and governance would be necessary to achieve it.

At least according to contemporary social and legal historians of the time period, advocacy for legal abortion was in effect severed from its trunk largely because of the politics surrounding the ERA movement,<sup>75</sup> and then transplanted in the quite different terrain of individual liberty. It then became its own “tree,” rooted, though, not so much in women’s equality, but in marital, medical, and sexual privacy. Without second guessing the then-compelling reasons for doing so, its clear in retrospect that this re-rooting strategy carried costs beyond even the legitimation and democratic costs outlined above – it also carried costs for our understanding of what an abortion right is, and why we should have one. Understood as one of a series of Supreme Court cases, *Roe v Wade* and the right it articulates become a chapter in a narrative authored, developed, and controlled by the Court, rather than a part of a narrative of women’s rights authored, developed and controlled by feminists, progressives, or women’s rights devotees. Abortion rights are a part of a story consisting of Supreme Court cases -- *rather than* a part of a story consisting of political victories for women’s equality, health care, or poor families.

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<sup>74</sup> See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CA. L. REV. 1323, 1396-97 (2006) (arguing that abortion advocacy shifted to liberty and privacy rationale, when abortion rights became disaggregated from the equality thrust of the ERA movement). See also LAURA R. WOLIVER, *THE POLITICAL GEOGRAPHIES OF PREGNANCY*, *supra* note \_\_\_ at 83 (arguing that abortion advocacy came to be understood as an individual isolated right in the 1970s, while until that point, had been construed as a part of a broader reproductive rights agenda).

<sup>75</sup> Reva Siegel, *Constitutional Culture*, *supra* note \_\_\_. See generally DAVID GARROW, *LIBERTY AND SEXUALITY AND LIBERTY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V WADE* (1998) at 335-389 (chapter 6, “From Reform to Repeal: The Right to Abortion”).

And what is that story? Of course there are several narratives that can be told, based on these cases, just as there are any number of patterned ways to assemble beads on a string. One might, for example, think of *Roe* as the first in a possible trajectory of future cases revitalizing *Lochner*.<sup>76</sup> *Lochner* famously found a right to contract for labor in the Constitution that in turn trumped democratic control of labor markets, and *Roe* likewise found a right to contract for an abortion that trumped democratic control of markets for reproductive services. *Roe*, then, might be sensibly viewed as a stepping-stone toward a revitalized libertarian understanding of the relation between citizen, state and contract. On this reading, the extreme administrative and legal intervention into markets that characterized so much of the twentieth century, whether prompted by moralistic impulses, or by redistributive impulses, is the anomaly. The norm is an ecumenical understanding of the individual liberty protected by the substantive prong of the due process clause – a liberty that protects the sale and purchase of labor, contraception, abortions, sub-prime mortgages, high interest loans, prostitution services, surrogacy services, babies, gambling contracts, guns, or kidneys, and protects all of these contractual transactions against either moralistic or paternalistic intervention. That’s one way to string the beads.

Another way to string the beads aligns *Roe* with other cases that establish what I call “lethal rights,” or defensive rights to kill. On this understanding, *Roe* is part of a narrative that also prominently includes *Heller*.<sup>77</sup> Thus, the Court in *Heller* created, or discovered, a right to own a handgun, desired not only by gun enthusiasts and hunters, but also by citizens who worry that the state will not defend them against aggressors in their home or elsewhere. The right to own a gun, read in this way, is the complement to the Court’s refusal to grant a positive right to a state’s protection against private violence<sup>78</sup>: if you *don’t* have a right to the state’s protection against violence, but you do have a right to kill in self defense, then it becomes quite natural that you must have a prior right to the arms necessary to exercise it. Viewed as a bead on *that* string, we might understand *Roe* as granting a right to kill fetal life, made all the more desirable by virtue of the state’s refusal to create meaningful systems of health and child care, and the Court’s refusal to even consider the possibility of creating a right to such assistance. A right to an abortion looks all the more desirable if one has no right to help deal with the economic stresses of parenting. It becomes another “defensive” lethal right, necessitated, in part, by an excessively minimalist state. The rights created by the Court in *Heller* and *Roe v Wade* have more than a slight family resemblance.

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<sup>76</sup> *Lochner v. New York*, 198 U.S. 45 (1905). Randy Barnett has recently argued that *Lawrence v Texas* points the way toward a revitalization of individual liberty against moralistic intrusion (whatever its doctrinal under\_\_ning). Barnett, (cite)

<sup>77</sup> *District of Columbia v. Heller*, 554 U.S. \_\_\_\_, 128 S. Ct. 2783, 2793(2008) (Right to bear arms historically a right to self-defense).

<sup>78</sup> *DeShaney v. Winnegabo County*, 489 U.S. 189, 195-96 (1989) (due process does not impose any duty on a state to provide members of the general public with adequate protective services).

Of course, neither of these radically libertarian understandings of *Roe* are the narratives preferred by *Roe*'s pro-Choice celebrants, or by the Court itself. Rather, the dominant narrative puts *Roe* in line with cases protecting sexual liberty, not economic liberty and not self defense. On the dominant understanding, *Roe* is on a string of beads with *Griswold*,<sup>79</sup> *Eisenstadt*<sup>80</sup> and *Lawrence*,<sup>81</sup> not with *Lochner*, and certainly not with *Heller*. What *Roe* does, along with *Griswold*, *Eisenstadt*, and *Lawrence*, is protect an individual's right to have non-reproductive sex. Read in this way *Roe* points the way not backward to *Lochner*, and not forward to *Heller* but rather, primarily, to *Lawrence*. What is stressed, on this story, is the consequence for sexual freedom to be garnered from the right to be free of the risk of pregnancy.

There are undoubtedly other ways to read *Roe* as well. There are lots of ways to string a finite number of beads on a string. Nevertheless, the class is not infinite. It is not possible, for example, to read *Roe* as protective of marital, as opposed to individual privacy.<sup>82</sup> That's foreclosed by *Eisenstadt*. Nor is it possible, I believe, to read *Roe* as a part of an adjudicative, narrative movement toward a robust conception of reproductive justice. That is ruled out by the right's negativity. Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, health care, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early child care for infants and toddlers, income supports for parents who stay home to care for young babies, and high quality public education for school age children. The Court is not equipped to mandate any of that, and has stated repeatedly that it is not inclined to even suggest that a citizen might have a right to a state that does so. The negative right that it *has* recognized suggests something very different: it suggests at best a right to non-reproductive sex, and at worst, a right to end a pregnancy by killing the fetus so as to free oneself of the burden of impossible parental obligations in an unjust world. Either way, it is not all that clear that women, parents or children are the beneficiaries.

### *III. The Opportunity Costs of Constitutionalized Abortion Rights*

Reproductive justice is a political, legal and moral project. The Court-created abortion right is a judicial and constitutional one. How might the world be different, if the pro-Choice community focused on the former rather than the latter? What opportunities have been foregone, by virtue of the constancy of the gaze on Courts? What

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<sup>79</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>80</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>81</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>82</sup> This is precluded by *Eisenstadt*, 405 U.S. at 453, in which the Court made clear that privacy protects individual rather than marital privacy.

are *Roe*'s "opportunity costs"? Let me outline four.

*a. Legal Costs.*

First, some purely legal issues at the heart of a reproductive justice agenda are blurred by the myopic focus on abortion rights. They might come into sharper focus if we redirect our gaze away from the Constitution and the Supreme Court, and back to ordinary courts and ordinary law, and the role it plays in women's lives. As noted above, a focus on the right to abortion has forefronted the rights and needs of women who wish to end their pregnancies, and has marginalized, or pushed to the background, the rights and needs of women or girls who wish to, intend to, must, or willy-nilly simply do, continue them. If the injustices in the world concerning reproduction were limited to the refusal of the state to grant women the power to end pregnancies, that foregrounding and backgrounding would not be particularly problematic. But that is not the nature or extent of reproductive injustice. Rather, the roots of that injustice lie not only in the lack of choice given a pregnant woman who wishes out, but also in the lack of full recognition of the humanity of all pregnant women, inattentiveness to their needs that originate in their reproductive role, and to the needs of the parents they become. The problem, in other words, to which a right to abortion eventually emerged as a partial solution, is a lack of reproductive justice – not just a lack of choice regarding abortion. One consequence of the funneling of reproductive justice concerns into the language of choice is that the needs of marginalized pregnant women who complete their pregnancies are neglected, and the injustice of that neglect is then ignored or overshadowed.<sup>83</sup>

Who are these marginalized pregnant women? Begin with teenagers. A pregnant teenager who chooses not to abort the pregnancy will need health care for herself and child care after she gives birth, as will all mothers. But unlike older mothers, she will also have educational needs: she needs to complete her secondary education. For the most part, she has a right to that education and a right not to be discriminated against because of her pregnancy in the furtherance of her secondary educational goals.<sup>84</sup> There is mounting evidence, however, that the education of teen mothers is radically unequal to that of non-parenting teens.<sup>85</sup> If so, then her existing right to an equal education regardless of pregnancy is a right that is badly under-enforced. That under-enforcement – no less than the criminalization of abortion -- is an instance of reproductive injustice.

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<sup>83</sup> Lynn Paltrow, *Abortion Issue Divides, Distracts Us From Common Threats and Threads*, 13 PERSPECTIVES (Winter 2005) (arguing that we need to pay more attention than we do to the legal problems of pregnant women who continue their pregnancies).

<sup>84</sup>

<sup>85</sup> See WENDY LUTTRELL, "Separate and Unequal" in PREGNANT BODIES, FERTILE MINDS: GENDER, RACE, AND THE SCHOOLING OF PREGNANT TEENS, (2003) (arguing that Title IX ended de jure, but not de facto discrimination against pregnant teenagers in high schools).

That it is not widely proclaimed as such by the pro-choice community may be one reason – of course there are others – for the under-enforcement itself.

Drug addicted pregnant women, likewise, have serious and still largely unattended needs – not only needs not to be incarcerated, but also health needs to minimize the impact of their addiction on their stressed bodies, needs to end their addictions, needs for education, and needs for help in caring for their infants and babies.<sup>86</sup> Incarcerated pregnant women have needs – a need, for example, not to be shackled while giving birth.<sup>87</sup> Rural and poor mothers need income supports to tide them over during the time that they are out of the wage market, so that they can reestablish themselves as autonomous earners when their parenting obligations are not so intense.<sup>88</sup> Breastfeeding mothers need a hospitable public square that does not censure or discriminate against their need to nurse their babies.<sup>89</sup> Women bearing and raising children conceived in rape need help warding off their rapists.<sup>90</sup> And of course all of these mothers as well as their parenting partners, need health care for themselves and both health and child care for their families. These in turn imply legal needs, and when they are systematically unmet, the result is a failure of reproductive justice. None of these ordinary legal needs, however, are even clearly seen, much less met, by an abortion rights movement focused on a constitutional right to terminate a pregnancy. A reproductive justice agenda, by contrast, would center them.

*b. Political Costs.*

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<sup>86</sup> See Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1477-78 (1991) (arguing that the negative right of privacy created in *Roe* is not helpful to drug addicted mothers); April Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST.L. 723, 733-736 (2004) (arguing the structure of *Roe* has led to restrictions on pregnant women's medical choices in the latter stages of pregnancy, by creating a constitutionally protected state interest in the fetus).

<sup>87</sup> See Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 372-73 (2008)(arguing the unconstitutionality of shackling inmates during childbirth).

<sup>88</sup> See Joan Williams and Shauna Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 820, 830-40 (2003) (arguing that the high price of mothering should be understood as an argument for legal abortion).

<sup>89</sup> For a summary of federal and state laws regarding discrimination against breastfeeding mothers, see JAN RIORDAN, BREASTFEEDING AND HUMAN LACTATION, 3<sup>rd</sup> Ed. 501-04 (2005).

<sup>90</sup> For an excellent discussion see Shauna Prewitt, *Rapists Exercising Parental Rights over Their Rape Conceived Children: Why the Law Has Failed To Address this Problem*, \_\_\_ GEORGETOWN LAW JOURNAL \_\_\_ (2009)(forthcoming on file with author).

Second, movement toward a broadened reproductive justice movement could prompt a fresh look at the pro-life movement, which is different than it was thirty years ago, when it coalesced around the overriding goal of reversing *Roe*.<sup>91</sup> Feminist and progressive theorists and advocates routinely characterize the pro-life movement as aimed at reversing *Roe*, and as committed to the project of requiring women to carry pregnancies to term, primarily so as to enforce restrictive and Victorian roles of motherhood, femininity and sexuality. This depiction, however, is dated. At least parts of that movement, as expressed both by its leadership and by its members, are not single-mindedly focused on over-turning *Roe*, or on criminalizing abortion and not particularly interested in using either pregnancy or motherhood as a way to punish pre-marital or extra-marital sexual activity. Thus, a fair amount of pro-life feminist scholarship is now focused as much on increasing public support for parenting – both for its own sake, and as a means of minimizing the number of abortions – as with minimizing abortions by criminalizing them and incarcerating the doctors that perform them.<sup>92</sup> The change is just as clear outside of the law review pages. Internet Web sites such as *MomsRising*<sup>93</sup> seek to organize mothers –both pro-life and pro-choice mothers, but the focus seems to be on the former – around what have to date been almost exclusively progressive-feminist goals: paid maternity leave, publicly funded child care, more public assistance for single mothers, more support across the board for working families. These internet-based movements express more interest in helping women and teens through their pregnancies and with their families, and less or no interest in punishing teenagers for pre-marital sex.

By putting legal abortion in its place – meaning, putting it in the context of a reproductive justice agenda pursued in the legislative arena -- pro-choice advocates might find common cause with pro-life movements that responsibly seek greater justice for working families and struggling mothers. I do not mean to say that progressive-feminist advocates and scholars have not been actively seeking these goals. Of course they have, and for a good long while. But at the level of theory, the pro-choice movement exists in considerable tension with those goals. And at the level of politics, the antipathy of pro-choice and pro-life advocates has veiled the possibility of coalitions on these issues, where interests are in fact aligned. Pro life and pro choice movements

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<sup>91</sup> See Jacqueline L. Salmon, *Some Abortion Foes Shifting Focus From Ban to Reduction*, WASHINGTON POST, Nov. 18, 2008, at A01 (reporting on shift of several prominent pro-life leaders and groups against strategies focusing on criminalization of abortion, to reducing incidence, through pregnancy prevention as well as lowering the cost of mothering).

<sup>92</sup> See e.g., Elizabeth Schiltz, *Should Bearing the Child Mean Bearing All the Costs: A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 CATHOLIC THOUGHT AND CULTURE 15 (2007) (arguing for a blend of catholic and feminist social thought on issues pertaining to support for childraising).

<sup>93</sup> MomsRising,Org, <http://www.momsrising.org> (last visited Dec. 24, 2008).

have a common interest in reducing the incidence of abortion by minimizing the number of unintended pregnancies and lowering the cost of mothering both. It might be time to give ordinary politics a chance to achieve common goals.

*c. Rhetorical Costs.*

Third, turning our attention away from the Courts might prompt a profitable return to pragmatism and away from principle, in the formulation of arguments for legal abortion. It may be true as a matter of principle – I have argued above that it is true – that a woman who does not consent to a pregnancy must not be forced to endure it; to do so devolves her to a status lesser than that of full citizen. Again, no man or non-pregnant woman is required to sacrifice his or her biological body or body parts for the sake of a born child, regardless of whether the child was lovingly, willfully, consensually, negligently, or recklessly conceived. It may also be true, however, as a matter of principle, that no one, including the pregnant woman, should have the power to kill a fetus that was recklessly or negligently conceived, when the conception could have been prevented in the first place. The formal inequality between the pregnant woman and others might be better resolved by elevating the legal obligations of the parent of the born child, rather than granting abortion rights to the bearer of the unborn. It is just not clear how these two principles – that no one is required to give body parts over to another human being against one’s will, even if the other human being is one’s own child, on the one hand, and that one has a right against one’s own destruction, where one was negligently conceived in the first place -- both drawn from fundamentally liberal and legal premises -- can be reconciled. Principled argument can take us only so far.

It doesn’t follow, though, that the alternative to “one principle trumping another” is unthinking chaos. There are pragmatic reasons that the power to make this decision should rest with the pregnant woman or girl: she would be the one physically burdened for a substantial period of time by the pregnancy, she would be the one faced with the decision to raise or relinquish a baby, she would be the one to bear the burden of motherhood with little or no support from the public sphere should she carry the pregnancy to term, and so on. Giving this power over to husbands, fathers, or medical boards when the pregnant woman is the person who will bear the brunt of the decision, and when that “brunt” is as life-altering and as life-shrinking, as it currently is, is likely to result in injuries, stunted lives, and some deaths. We should be developing these pragmatic reasons for women to have control over their own reproductive lives, as things are here and now, rather than focus as exclusively as we have on principled constitutional claims that women must have such control, across all cultures and times. The need to shoehorn arguments for choice into constitutional form has not only forced the “right to an abortion” into its current truncated and negative form, with the costs noted above, it has also muted arguments for reproductive choice that are pragmatic and time-bound. De-constitutionalizing the case for legal abortion, and relocating the argument so as to appeal to legislative and popular audiences rather than judicial ones, might re-center those claims.

*d. Moral Costs.*

Finally, the focus on Courts, rights and law has diverted resources not only from

political and legal possibilities for promoting reproductive justice, but from other forms of social persuasion as well, including moral argument, that might directly impact upon the number of unwanted pregnancies women experience, whether they result in live births or not. Obviously, the juridical articulation of rights does not logically preclude the development of moral forms of discourse surrounding the same set of issues. The possession of a right to an abortion does not preclude the assertion of moral obligations to engage in sexual behavior responsibly. It does, however, distract from it, particularly when the right is contested.

Advocates for abortion rights, however, clearly view moral persuasion as worse than simply distracting. In part this is because the liberal and rights focused world view of which the right is now such a central part is more or less across the board committed to a robust individualist and anti-communitarian ethos that is suspicious of moral constraints generally.<sup>94</sup> But second, the Pro-Choice sub-community within liberalism's big tent has its own reasons to be suspicious of moralism. Pro-choice feminists, as well as pro-sex feminists, have condemned moralistic and puritanical codes of sexual behavior that have undergirded attacks on both non-conventional forms of sexual expression and also on women's autonomous control of their own bodies. They have been right to do so. There may be no sensible moral arguments that can be brought against mutually desired consensual sexuality of any form: same sex, opposite sex, any sex, vaginal, anal, coital, sado-masochistic, vanilla, paired, unpaired, or multi-partnered and so on. That we seem to be moving toward consensus on this is an important evolution in human thinking, on all matters sexual.

As important as it is, however, it doesn't follow that there are no justifiable moral constraints on sexual expression whatsoever. The unjustifiability of punitive moralistic stances toward sexual variation, does not imply the irrelevance of moral constraints on personal conduct, any more than it suggests the irrelevance of moral imperatives for social intervention toward the end of promoting healthy families. Moral persuasion is a necessary mode of social and personal argumentative interaction. We can "cast off our tired old ethics," and urge that others cast off theirs, but it doesn't follow that when we do so we will have no need to articulate a younger and more energized set. The mistaken belief that it does has consequences. One consequence is that teenagers and young men and women need, but do not have, a Moral Code of personal, social, and state responsibilities that are grounded in and reflect the demands and rights of reproductive justice. They don't have it, in part, because the pro-Choice community has not produced one, and it has not produced one, in part, because of a deep suspicion of the project itself – a suspicion about moralism per se, rather than of moralism wrongly directed.

The suspicion is unwarranted. Abortion rights need not come at the cost of a

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<sup>94</sup> Liberalism is widely criticized for its refusal to incorporate visions of the good life. See e.g., Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 140-142 (2005) (criticizing liberalism for excluding moral arguments for same-sex marriage in favor of arguments grounded in moral neutrality and rights).

frank acknowledgement of the fact that there are strong moral reasons to act in ways that minimize the demand for abortion, and legal abortion likewise does not preclude the existence of moral constraints on behavior that would help to do just that. There are two moral constraints in particular that seem particularly compelling, the case for which has been neglected, in part, because of an obsessive fixation on rights.

First, it would behoove the pro-choice community to acknowledge – and then insist -- that opposite sex partners who do not intend to conceive have a compelling moral duty to use birth control. The pro-choice community has focused hard on a *right* to use birth control and much less on the duty to do so, with the lukewarm exception of their endorsement of some liberal high school sex education classes. But it is not only teenagers that need to hear this message. Look for purposes of contrast at another historical moment. At the height of the AIDS epidemic, the gay male community embraced a “condom code,” the purpose of which was to influence, through moral persuasion, the use of condoms, so as to reduce the incidence of recklessly transmitted HIV.<sup>95</sup> In the straight community, there has been nothing even remotely comparable to the Condom Code, with respect to undesired pregnancies. There ought to be. We need a moral code that makes clear that heterosexuals who do not wish to conceive have a duty to use birth control. We don’t have one.

Second: a powerful array of societal forces still pushes heterosexual women and girls to have sex that they patently do not desire. Some of that unwanted sex in turn leads to unwanted pregnancies. As I have argued elsewhere, unwanted sex, so long as it is consensual, is not rape.<sup>96</sup> But it is injurious, and it does occur – perhaps a lot. Women and girls engage in unwanted but consensual sex to please their partners, because they think their role as a wife or their religion demands it of them, because they are afraid of the future violence from their partner that might ensue should they refuse, because they need the economic support of the man to whom they give consent, because they need to get home and their boyfriend has the car keys, because they don’t want to deal with a foul temper that might be displayed should they not, because their peers expect it of them, and so on and on and on. Women who have sex they don’t want regard such sex as a duty, a hassle, a trauma, or a bore, as painful, as not so painful, as a mystery, as a pain in the neck, or, perhaps, as something closer to rape – as the cost of staying free of violence. But whether traumatic or just boring, unwanted sex that is not enjoyed is sure to be alienating to the woman who experiences it: her body is penetrated in an undesired way without her pleasure, and while she may consent, *her* physical desires, rather than his, are not what is motivating her to do so. She gives her body over – willfully, but still she gives it over – for use by a man, as a part of a bargain she has struck that gives her no pleasure. All of this, I have argued at length elsewhere, is a serious but largely

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<sup>95</sup> See Marc Spindelman, (forthcoming).

<sup>96</sup> Robin West, “Sex, Consent and Law,” in Alan Wertheimer, ed., *THE ETHICS OF CONSENT* (2009).

unrecognized and deeply alienating harm.<sup>97</sup>

Should she then become pregnant, however, and consent to an unwanted pregnancy, the alienating harm is compounded: she now will have a comparable relation with an unwanted fetus that she initially had with the unwanted sex. Again, her body is being used for the service of another. The result of this consensual but undesired alienation of one's body or body parts is dehumanizing: her body is a thing for others, rather than a part of an integrated self. This can be not just unpleasant but injurious down the road. When a woman who has endured an unwanted pregnancy must later reclaim use of her body, whether for remunerative market based labor, or for sport, or even for relaxation, she might find it difficult to do. She might find that having given one's body away against the sovereignty of one's own desire, it is not an easy path back. "Gifts" of one's body to sex and pregnancy are not joyous when they are deeply unwanted. *Waitress* – in which unwanted sex leads to an unwanted pregnancy that then morphs into a wanted pregnancy, which eventually produces a loved child – was fiction.<sup>98</sup>

From this, I would conclude that a girl or young woman owes a duty not just to herself but also to her future self not to engage in sex she does not want, and a boy or man has a duty not to engage in sex undesired by his partner. Our current sex education curricula – whether abstinence only or abstinence plus birth control – says nothing of this. Nor do the pro-marriage urban billboards that are one of the legacies of the Clinton and Bush administrations' war on welfare mothers: the "Marriage Works" and "Sex Can Wait, your Future Can't" and "I Don't Give it Up and I'm not Giving In" messages that now plaster city landscapes, as a quid pro quo for block grants to aid poor families.<sup>99</sup> These abstinence-only curricula and personal responsibility enhancing billboards all seemingly pre-suppose that teenagers universally desire full throttled, vaginally penetrating sex, *but that* this sex they all want so intensely is bad, and for various (unstated) reasons they should not have it. Nowhere do we see billboards instructing the same population that there is no reason at all not to have sex if they want it – that fully desired sex is good – but that they should indeed abstain from sex they don't desire – that they have a duty to each other and to themselves to do so. Nowhere do we see billboards conveying the message that while sex is good, un-contracepted or unwanted sex is a moral wrong. Why not? A straightforward public relations campaign, aimed at teenagers, and young adults, that sought to convey both norms – that while wanted sex is a human good, one has a duty to use contraception to avoid unwanted pregnancy, and a duty to say no to unwanted sex -- couldn't hurt and it might do a lot of good. It might also bring down the total number of unwanted pregnancies in the world.

#### IV. *From Choice to Reproductive Justice*

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

<sup>98</sup> *WAITRESS*, (Fox Searchlight, 2007).

<sup>99</sup> For a fuller discussion of the *Marriage Works* campaigns, see ROBIN WEST, *MARRIAGE, SEXUALITY AND GENDER*, at \_ (2006).

Pro-choice policies, I believe, from the outset, should have been generated by ordinary politics, respectful and reflective of a humanistic and sex-friendly popular morality, and expressed ultimately in ordinary law. The community of advocates and scholars that held those commitments should have looked to the public, legislators, educators and social structures, rather than to hoary constitutional principles expressed by not particularly trustworthy seers and oracles, for their meaningful articulation, elaboration, and enforcement. The moment for developing such a politics, however, without interference from the Court, has long passed. But that doesn't mean that both sides – pro-life as well as pro-choice -- can't reclaim at least a degree of such a focus, each from where we now stand.

There are particularly good reasons for the pro-choice community to do so. Political, legal, constitutional and moral arguments for reproductive justice, made in political fora and divorced from the adjudicative context, might not carry the specific costs of rights discourse theorized by critical writers and highlighted above. First, while they might incorporate and reference, they need not rest on a commitment to negative rights and libertarian premises. Those arguments tend, when made in courts, to be more absolutist than need be and to undercut badly the case for positive rights -- particularly the positive rights of poor families to assistance with the costs of parenting. A court created negative right, after all, is a right to be free of the very state whose assistance is sought by a positive right. But this formulation of legal abortion as a negative right to unfettered choice belies the social reality. Women need legal abortion not to ward off undue state interference, but in order to live better and more integrated lives in their families and workplaces both. And to live those better and more integrated lives, they need better support for their caregiving obligations, as do the men with whom they might partner. Viewed as pragmatic needs for well led lives, rather than principled demands for rights, better supports for child care and legal abortion are both components of an as yet unrealized reproductive justice. It is only when elevated to the level of constitutional and timeless principle that the argument for one seems to undercut the case for the other.

Nor need these arguments be put forward in the context of appeals to individual anti-majoritarian rights that have the effect, whether or not intended, of undercutting the institutional structures of majoritarian democracy. Arguments for legal abortion have strong majoritarian appeal, and are at least as amenable to public deliberation, persuasion and compromise as the ordinary fodder of political debate: tax policy, foreign affairs and the like. Lastly, made in legislative and public arenas, arguments for legal abortion need not be made in ways that limit the movement for reproductive rights to this most individualistic and self-abdicating "right to an abortion." They need not be "truncated." Re-politicizing reproductive justice arguments, in other words, might not carry the costs of rights-focused constitutional rhetoric.

Finally, a shift in focus away from Courts and to more democratic fora, might open the door to legal, moral and political opportunities to which we have been blinded by the light of the promises of a living constitution. We might recapture some of those heretofore slighted opportunities. Most modestly, it might at least break the log-jam that now makes difficult any sort of coalition between pro-choice and pro-life communities that undoubtedly share many common interests and goals. The reproductive justice so

achieved, through ordinary modes of political persuasion, might prove to be more enduring than what we have to date garnered from the Court. It might also prove to be more deserving.