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Female Autonomy: An Analysis of Privacy and Equality Doctrine for Reproductive Rights

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Political Science Honors Thesis
Advised by Patrick Schmidt
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I. Introduction

Over my years at Macalester, my study of legal scholarship presented me with a dilemma that I had not found solution for: the law is limited by its foundation of categories. In my first Constitutional Law class, we studied cases organized thematically by what right it was argued under. The first amendment had its case law, then the second amendment, and so on and so on until we had covered the entire Bill of Rights. In all of these discussions and doctrine, it was clear that the tests and rationale the Justices created were open to interpretation and debate. This is what makes the study of Constitutional Law so interesting to me. Every doctrine has a utility depending on who it is protecting, and it can be manipulated to serve an ends if interpreted favorably. Yet, what dumbfounded me the most was the utility of the privacy doctrine in the abortion case law. After taking women's biology, it seemed clear that the right to control ones reproductive life is an essential equality issue, not one of privacy. But where was this legal interpretation?

When *Obergefell v. Hodges* (2015) brought marriage equality under equal protection, I found myself questioning the utility of the privacy doctrine again as reproductive rights was under constant attack and gay rights succeeded in its legal battle. My intrigue was deepened after Harvard history professor, Jill Lepore, wrote a op-ed on the comparison between reproductive rights and marriage equality. She presented her readers with a tentative conclusion: "Over time, arguments based on a right to privacy have tended to weaken and crack; arguments based on equality have grown only

stronger."[1] In my mind, this critique was compounded with Ruth Bader Ginsburg's recent dissent record and her open critique towards *Roe*'s utility of the privacy doctrine as well. Lepore's comparison seemed astute to me as her use of a case study was a way to overcome the narrow scope legal analysis is usually limited to. The static nature of law seemed to fall short of representing women's issues adequately. Thus, using the success of marriage equality as a background to the contrasting story of privacy and reproductive rights was a useful analysis to gain insight into the legal doctrine developed thus far in the Court. To begin, I wanted to understand the influence of these two movements and their legal interpretations. Specifically, I wanted to gain insight into what legal interpretation and rhetoric would best serve the reproductive rights movement going forward.

The significance of this project comes through on both a material and theoretical level. In practice, a deeper understanding of the rhetoric used within the Court can inform how advocates outside the Court can curtail language to their advantage to progressively get across their argument. For example, the current "Host" bill introduced in Oklahoma would require a women to obtain consent from her sexual partner to get an abortion.[2] While this is a clear violation of the constitutional right to abortion established in *Roe* and solidified in *Casey*, the conversation within the state legislature centers around the woman's body as a "host" of the fetus and the argument for male control over her reproductive capabilities. In response to the bill's introduction, reproductive rights

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[1] Lepore, Jill. "To Have and to Hold". *The New Yorker*, 25 May. 2015, pp. 117.

[2] Oklahoma House Bill 1549

advocate Amanda Allen responded to the bills unconstitutionality by claiming that this is "a fruitless effort to shame and stigmatize women who are seeking abortion care and it is completely and unequivocally unconstitutional."[3] While Allen directs her response towards the obvious break in precedent in the Host bill, she does not respond to the deeper issue at play within this rhetoric—the autonomy of women over their bodies. In order to take reproductive rights off the defensive strategy and more towards making proactive change for women, it's important to understand the legal doctrine and inherent rhetoric available to litigants.

The recent reproductive rights cases of *Hobby Lobby* (2014) and *Whole Women's Health* (2016) provide more material that had not been analyzed with the same lens as Lepore introduced in her analysis. Additionally, the 2016 election made defunding Planned Parenthood a wedge issue, heightening the risk of dismantling the right to an abortion in America. On a theoretical level, the increased concentration on identity politics within feminist theory has pushed the discipline as a whole to utilize more intersectional analysis, and subsequently there had been a drop-off in legal interpretation. This is because many feminists believe that law is not the best platform to discuss intersectional identities and can actually be a hindrance for robust advocacy.[4] Thus, my perspective of feminist legal theory is less explored and lends opportunity for insight into the advocacy of the reproductive rights movement.

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[3] Smith, Jordan. "Oklahoma Lawmakers Want Men to Approve All Abortions." The Intercept. N.p., 13 Feb. 2017. Web. 25 Mar. 2017.

[4] Dean Spade, "Intersectional Resistance and Law Reform," *Signs: Journal of Women in Culture and Society* 38, no. 4 (Summer 2013): 1031-1055.

In this thesis, I investigate, what is the constitutional basis for women's equality? To do this, I begin with Jill Lepore's contribution and argument for the switch to equality doctrine from a privacy legal basis for abortion cases. A major part of my project is exploring the feminist criticisms behind both a privacy and equality argument to come to my own conclusion into what I believe the best way forward is. My initial intentions was to gather more in depth support for the switch to an equality argument for reproductive rights. However, my investigation into the specific ways equality doctrine has been applied to cases dealing with female autonomy showed me a much narrower concept of equality the Court draws on. If not careful, equality doctrine can be used as a way to perpetuate very traditional and limiting logic for female bodies and their autonomy. I will leave this research with a much more tenuous and nuanced suggestion towards utilizing arguments based in equality for reproductive rights. I contribute to this work by focusing on how privacy and equality legal doctrine has specifically informed women's autonomy through the arguments litigants use, and the interpretations Justices make based on these rights. I provide a analysis that highlights the draw backs and benefits of both privacy and equality for a reproductive rights movement that is focused on advancing female autonomy. Using a combination of liberal and legal feminist theory, I wish to find hope in the synergy between equality and privacy frameworks that if used together, can give way to a robust concept of female autonomy that will advance the feminist goal of articulating what gender equality requires in a patriarchy.

I will begin by recounting the rise of the equal protection clause for women through gender discrimination case law. To begin the first chapter, I will provide a

theoretical background of equality to illustrate the feminist interpretation that I focus on for this thesis. The history of gender discrimination jurisprudence will bring us to the exclusion of reproductive rights within a equality argument category and the subsequent use of a privacy argument instead. Chapter two will focus on the right to privacy and reproductive rights case law. I will lay out how equal protection was not explicitly utilized in reproductive rights case law, but came up in litigants arguments in several cases. I will discuss the re-emergence of equality arguments within this privacy framework showcase the merits of an equality argument for the social movement in order to convey why critiques of the privacy argument have driven scholars such as Lepore to advocate for equality instead. In the third chapter, I will turn to the challenges and limitations of both the privacy and equality argument by describing the lessons we can take away from marriage equality. Finally, I will end with my suggestions for the road ahead.

Chapter 1

A. Theoretical Background: Privacy and Equality

If you had to choose between your privacy or your equality, which would you pick? It's an impossible question to answer, but to understand why it must be posed in the debate surrounding reproductive rights in America, it is important to critique the feminist utility of the concept of privacy and equality in law. This is what I strive to do through a case history of reproductive rights, gender discrimination, and marriage equality. Inherent in all of these social movements is a debate on morality, oppressive patriarchal structures, assimilation, and the consequences of an American liberal tradition embedded in the concepts of both equality and privacy. To begin, I will recount the origins of equality in general and how it is understood in our legal structure. I will then describe feminist positions and where I stand in the feminist interpretation of the equality and privacy doctrine.

Equality has a strained history in American Law. This is not surprising, as one prominent equality theorist, Ronald Dworkin, has described equality as a highly contested, theoretical, and unavoidable concept: "People who praise it or disparage it disagree about what they are praising or disparaging."[5] People who value equality, egalitarians, might share their esteem for the concept for a variety of reasons. Some theories assume the innate good in equality, some see it as a means for other forms of

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[5] Dworkin, Ronald, 2000, Sovereign Virtue. The Theory and Practice of Equality, Cambridge: Harvard University Press.

justice, and others conversely do not treat equality in society as a unconditional good. Non-egalitarians are skeptical of a system that may justify lowering the overall worth of society to make everyone the same. While all of these branches of philosophy are highly theoretical, their discourse illustrates that when someone conceptualizes "equality", many value assumptions must go into whatever form of equality they are advocating for. Historians have conceded that there is no singular ideal for equality that is accepted.[6] However, the blueprint for equality in an American context traces to philosophers like Aristotle, Hobbes, and Locke.[7] Equality theory has a prominent place in the American political and legal system.

For founding fathers Hobbes and Locke, any political system needs equality to ensure fair competition among political actors. They believed that men were the political actors, and their masculinity was inherently violent and in search of glory. If this "state of nature" was left unchecked, political society would end in destruction. The solution was a social contract that would bind men together with reciprocity. The social contract needed a leader to maintain the legitimacy and enforcement of the social contract. After a leader was established, the social contract required men to respect the boundaries of their property and put limitations on masculine violence. Included in the right to property was the right to control women and divide them among the households. This paternal social order made every male citizen like a king in his own household, responsible for its well being and secured that others would not try to destroy it. The social contract was based on

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[6] Rae, Douglas, et al., 1981, Equalities, Cambridge: Harvard University Press.

[7] Gosepath, Stefan, "Equality", The Stanford Encyclopedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2011/entries/equality/>.

a mutual equality that made the agreement reciprocal, it was paternal (the power stemmed from the male), and it was based on property rights and voting rights that were determined by race, gender, and class.[8] The social contract thus placed a certain value on equality in-so-far that the contract could remain reciprocal only with equal players in the political system. The equality stemmed from equal opportunity to own property and participate in the civil sphere.

If the political system rests on a promise of equality, then the law must protect it. At its minimum, equal respect recognizes the equal worth or dignity of all humans and "any political theory abandoning this notion of equality will not be found plausible today."[9] The field of philosophy has come to understand legal equality as a "strict equality" in that

> "from the principle of formal equality, all citizens of a society must have equal general rights and duties. These rights and duties have to be grounded in general laws applying to everyone…. every person should have the same freedom to structure his or her life, in the most far-reaching manner possible and in a peaceful and appropriate social order."[10]

This concept of equality can be traced to Aristotle and has been adopted in the American political system. Here, equality calls for two premises. One, people must have autonomy or "freedom to structure his or her life." Relevant to my research, it is important to note

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[8] Hobbes, Thomas, 1651, Leviathan, With Selected Variants from the Latin Edition of 1668, ed. by Edwin Curley, Indianapolis: Hackett 1994.; Pateman, Carole (1988). The Sexual Contract. Cambridge: Polity Press.

[9] Gosepath, Stefan, "Equality", The Stanford Encyclopedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2011/entries/equality/>.; Vlastos, Gregory, 1962, "Justice and Equality", in: R. Brandt (ed.), Social Justice, Englewood Cliffs: Prentice-Hall; reprinted in: J. Waldron (ed), Theories of Rights, Oxford: Oxford University Press 1984, pp. 41-76; reprinted in L. Pojman & R. Westmoreland (eds.), Equality. Selected Readings, Oxford: Oxford University Press 1997, pp. 120-133.

[10] Gosepath, Stefan (2011)

how the concepts of equality, privacy and autonomy have been connected and interdependent on each other, even from the start of their philosophical roots. Second, the law must treat people the same, or deliver formal equality. To have formal equality is to have leveled subjectivity. For this ideal, you must treat similar cases alike and different cases differently in proportion to their differences.[11] This concept makes sense in terms of the American legal system. Equal protection law accounts for the normative and societal discrimination protected classes face that effects their equal treatment. If a law treats someone differently because of their protected class, there must be a compelling state interest.

Criticism of the liberal interpretation and usefulness of equality has been present in discourses along race, class, and able lines. The Civil Rights movement, Affirmative Action, and disability law all asked if equal opportunity is enough. More has been demanded of the law to try and undue the coded hierarchies many identities live in everyday. Simple opportunity only hides the institutional barriers that work against any protected class in American society. The law has been persuaded to give up the liberal ideal and give way to a positive rights approach. The New Deal era and the start of an American Welfare State changed the way the state is expected to take care of their citizens. Sometimes the state must give resources to citizens to make up for the disadvantage they face due to their identity. Inherent to this is, of course, more criticism

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[11] Gosepath, Stefan, "Equality", The Stanford Encyclopedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2011/entries/equality/>.; Aristotle, Nicomachean Ethics, in The complete works of Aristotle, ed. Jonathan Barnes, Princeton: Princeton University Press.' Baehr, Amy R., "Liberal Feminism", The Stanford Encyclopedia of Philosophy (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.

of the ways the state can curtail its programs to perpetuate the status quo while managing to still seem paternalistic.

B. Feminist Liberal and Legal Theory

Liberal feminists value procedural equality and seek to treat similar cases alike and different cases differently in proportion to their differences, but there is still disagreement about what this means.[12] Feminist scholars may disagree about how to best achieve gender equality, but much of the discourse focuses on how to account for differences in the most genuine way, without backlash, isolation, or compromising the goal of equality.[13] Here, we see how many feminists agree that they want gender equality, but often refer to many different concepts or methods of achieving this. Thus, there are many branches of feminism, some in stark disagreement. Often a real world example to illustrate the theoretical variety of feminism is the discourse surrounding prostitution. While some feminists view prostitution as rape due to the economic disempowerment of women that limits their ability to make free choice and thus advocate for the complete elimination of sex work, while other branches view sex work as a breakaway from the sexual subordination of women and wish to make sex work safer for females who utilize

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[12] Baehr, Amy R., "Liberal Feminism", The Stanford Encyclopedia of Philosophy (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.

[13] Baehr, Amy R. (2013), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.; Rhode, Deborah (1997). Speaking of Sex: The Denial of Gender Inequality. Cambridge: Harvard University Press.; Minow, Martha (1990). Making All the Difference: Inclusion, Exclusion, and American Law. Cambridge: Harvard University Press.

agency to choose this employment.[14] These groups of two feminists may completely disagree on every step in their analysis of position law, but all would say that gender equality is the goal behind their method.[15]

One strain of feminist theory dealing directly with equality and privacy revolves around how the dichotomy of public/private and equality/difference exists in a patriarchal social order and works to limit female autonomy. Political theorists such as Carole Pateman have criticized the American Liberal tradition for relying on the subordination of women through what Pateman calls the "sexual contract." In order for the liberal ideal to permeate though the consciousness of society, there must be a threat of disorder. Political subjects agree to give up power to a leader with the promise that their property and liberty within their private life will be protected. In this context, liberty is the restraint of the state to interfere in private ownership and thus control over the property political across have. Pateman claims that women are included within the property men have and their presence is only valuable in so far as it serves the man. Thus, there is a necessary dichotomy between the public and private. Pateman claims that the maintenance of a public/private boundary sphere ideology needs the feminine to be subordinate to the masculine and tied to the private sphere. Female autonomy is very limited as a result of this construction. The social contract in a patriarchy requires the limited mobility of femininity (women) between the two spheres and the maintenance of masculinity (men)

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[14] Shrage, Laurie, "Feminist Perspectives on Sex Markets," The Stanford Encyclopedia of Philosophy (Fall 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2016/entries/feminist-sex-markets/>.; MacKinnon, C. and A. Dworkin (eds.), 1997, In Harm's Way: The Pornography Civil Rights Hearings, Cambridge, MA: Harvard University Press.

[15] https://aljahom.files.wordpress.com/2010/08/image48.png

in both. Without this tension, there would be no masculine anxiety to protect ownership over property and thus the need for a leader.

Scholarship spearheaded by Wendy Brown has taken this argument a step further to show that this dichotomy is maintained not only through marriage or explicit contracts that subordinate the feminine, but through rights discourse itself.[16] Brown argues that "the legacy of gender subordination Pateman identified as historically installed in the sexual-contract is to be found not in contemporary contract relations but in the terms of liberal discourse that configure and organize liberal jurisprudence, public policy, and popular consciousness".[17] Thus, Brown expands the maintenance of the patriarchy to reside not only in contractual relations, but in liberal discourse itself, particularly, in the discourse surrounding both privacy and equality. While Brown has illustrated that the law is one place that maintains a discourse of exclusion of women through liberal values such as privacy and equality, a solution using a feminist method has still not been identified.

I wish to focus on one "ongoing area of theoretical exploration among feminists," namely "the weight and scope to be given to any distinction between the public and the private in reproduction, family structures, work arrangements, and sexual relationships…"[18] that has been debated and analyzed through multiple feminist perspectives. Here, I have identified a collision between liberal feminism and feminist

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[16] Brown, Wendy. "Liberalism's Family Values." States of Injury: Power and Freedom in Late Modernity (1995): 135-165.

[17] Brown, Wendy (1995)

[18] Baehr, Amy R., "Liberal Feminism", The Stanford Encyclopedia of Philosophy (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.

legal theory, both of which provide an extremely useful perspective on the American legal system. As stated above, liberal feminism values procedural equality, yet has no consensus on how to best achieve this ideal. Feminist legal theory critiques the law's ability to legitimize the status quo and represent interpretations as objective. A major point of debate within the discipline is the interpretation and value judgment given to "sexual difference." Feminists agree that the gender difference is a women's ability to give birth, yet there is disagreement over how this should be accounted for in our laws. Should the law treat men and women the same, or account for the differences between them? Sexual difference is a convoluted concept within legal analysis since feminist legal scholars agree that "law makes systemic bias invisible, normal, entrenched and thus difficult to identify and oppose." The subordination of women is maintained by an unquestioning of what the private sphere is, and the states refrain from interfering.[19] Legal feminist analysis demands the scrutiny of laws that identifies bias towards this oppressive way of thinking whenever is occurs in the legal system.[20] Feminist legal theory is thus the practice of articulating what equality requires in a patriarchy. Liberal feminist theory holds that autonomy is a pre-condition for equality, where autonomy for women means the ability to move between the private and public just as freely as men. This would mean no barriers or assumed positionally of women or men in either domain. This is part of the feminist agenda, and will start with the dismantling of the assumption

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[19] Pateman, Carole. "Sexual Contract." John Wiley & Sons, Ltd, 2014.

[20] MacKinnon, Catharine A. "Toward a Feminist Theory of the State." Harvard University Press, 1989.

that the feminine belongs in a subordinate and privatized position to the masculine in a public/private dichotomy in the American liberal tradition.

Feminist liberal critiques generally argue that autonomy for women is limited by the inherited gendered institutions and traditions we live in that make it much more challenging for women to authentically author her own life.[21] It follows that in a liberal political system, it is the state's duty to provide a foundation of autonomy that goes beyond the protection of the male subject in a gendered system and to protect the female's autonomy as well. Feminist legal theory uncovers the assumption that the neutral subject in law is male, consequently the reproductive abilities of women is what constitutes gender "difference."[22] Given these many layers of assumed bias against women, there is yet no distinct concept of privacy for women that informs their autonomy. I believe this female autonomy that should be protected differently than male autonomy due to women's ability to become pregnant and have children. The state should have a different interpretation of privacy to ensure protection of autonomy. So far, case law has recognized that a women's autonomy and equality is connected to her ability to control her reproductive life.[23] Much like feminist theory does not have a clear answer on how to guarantee female autonomy, legal doctrine lacks a robust answer to this question

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[21] Stein, Laura. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality." Minnesota Law Review 77.1153 (1993): n. pag. LexisNexis. Web. 1 Mar. 2017.

[22] MacKinnon, Catharine A. "Toward a Feminist Theory of the State." Harvard University Press, 1989.

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

as well. Some scholars argue that the courts cannot account for intersectional issues and thus is not the proper place to theorize female autonomy.[24]

The push for identity politics has taken over much of feminist theory, yet I wish to refocus on the role of the Courts and jurisprudence's ability to inform and perpetuate the discourse of social movements.[25] The abortion debate has traditionally focused on the ability of women to access abortion, it is extremely important to recognize that this rhetoric is not representative of all women's denial of reproductive justice. A more inclusive representation of women's experiences in the abortion debate should entail intersectional issues to constitute a more nuanced understanding of women's limited autonomy over their reproductive lives. For some, this may mean limited abortion access while for other it may mean forced sterilization.[26] The important take away is that the reproductive justice movement is a social movement that has informed the legal rhetoric surrounding women's equality, and thus influences how we construct and treat women's position in society. Understanding the limitations of any one thread of change, I wish to investigate the feminist utility of the privacy and equality doctrine through a case study of mainly reproductive rights.

The reproductive rights of women is encompassed in a protection of privacy the state must ensure. While the Court may have interpreted this to mean that laws cannot

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[24] Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." Stanford law review (1991): 1241-1299.

[25] Brown, Wendy. "Liberalism's Family Values." States of Injury: Power and Freedom in Late Modernity (1995): 135-165.

[26] Dean Spade, "Intersectional Resistance and Law Reform," *Signs: Journal of Women in Culture and Society* 38, no. 4 (Summer 2013): 1031-1055.

restrict abortion if there is a undue burden on the women's right to an abortion, this variety of feminist analysis goes deeper. Women should be "free of the limits set by patriarchal paternalistic and moralistic laws: Patriarchal paternalistic laws restrict women's options on the grounds that such limits are in women's interest."[27] In the abortion debate, female autonomy is tied to an ideal of the feminine being privatized and to the continuation of motherhood for women who can assimilate to the private/public dichotomy. This concept of autonomy can be contrasted with the feminist interpretation of female autonomy that "can never be separated from an affirmative relationship to our 'flesh.'"[28] Feminists painfully recognize that the ability to give birth constitutes the "gender difference" that the law has traditionally used as *the* basis for female subordination.[29] Some feminists have wanted to deal with this difference by showing that women are just like men and should be treated just like them. Yet, others note that women are just as good as men men, and women can give birth.[30]

MacKinnon began the quest for a Feminist State by uncovering the harmful effects of law's neutrality. She strove to uncover the harmful discourse law perpetrates surrounding the private/public dichotomy that informs women's limited autonomy. Scholars such as Drucilla Cornell have expanded on this work to show the usefulness of a

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[27]Baehr, Amy R., "Liberal Feminism", The Stanford Encyclopedia of Philosophy (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2013/entries/feminism-liberal/>.

[28] Cornell, Drucilla, and Catharine A. MacKinnon. "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State." (1991): 2251.

[29] Cornell and McKinnon (1991)

[30] MacKinnon, Catharine A. "Toward a Feminist Theory of the State." Harvard University Press, 1989.

"equivalent rights" framework. Cornell articulates that equivalent rights "do not repeat the 'separate but equal' argument" and are "valuable to feminists precisely because it allows for a 'positive' program to guarantee women's equality of well-being and capability."[31] The concepts of negative and positive rights have been utilized by feminist legal analysis and provide a useful framework for the feminist agenda.

C. Positive and Negative Rights

The Bill of Rights is written as negative rights: the state will not infringe on the freedom of citizens. However, these same rights can be understood in a positive interpretation. For example, feminists have discussed the possible use of a positive interpretation of a right to privacy. For abortion, this would mean that the state has a obligation to fund abortions, not just agree to not infringe on a woman's access to services.[32] Negative rights is a refrain from government interference, while a positive right is an affirmative protection. Both the equality and privacy doctrine have these elements within their jurisprudence. For equality, treating men and women similarly would be a negative interpretation of a right to equality, since it demands less from the state. A positive approach would be to demand services such as maternity leave, childcare, abortion services, etc. to make up for the gender difference that inhibit women

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[31] Cornell, Drucilla, and Catharine A. MacKinnon. "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State." (1991): 2251.

[32] Stein, Laura. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality." Minnesota Law Review 77.1153 (1993): n. pag. LexisNexis. Web. 1 Mar. 2017.

to participate fully in the civic sphere. Privacy is inherently a negative right that embodies the private/public dichotomy that works to subordinate the feminine into the private sphere. Yet, feminists have argued that its positive interpretation "would authorize the government not simply to refrain from interfering with personhood, but also to act when action is required to ensure personhood."[33] I draw on this concept to showcase the strengths and limitations of both the equality and privacy doctrine though a positive and negative rights framework.

In conclusion, feminist critique of concepts such as privacy and equality add nuance to our understanding of how doctrines work to subordinate women in a variety of ways. The upholding of a private/public dichotomy is essential for a patriarchy in a liberal political tradition. It operates by limiting women to the private sphere to sustain a male norm in civic life. On a rights level, this limits the equality of women because it robs them of their autonomy. Philosophically, autonomy is tied to both notions of equality and privacy, yet there is no explicit "right to" autonomy in our constitution. However, we do know that as a consequence of the public/private tension, female autonomy is understood and treated very differently than male autonomy. Currently, male autonomy allows men to move more freely between civic and public life, while women are confined to sustaining ideals of home life and motherhood. I will now turn to history to showcase how early feminist theory handled severe limitations of women in the civic sphere.

[33]Stein, Laura (1993)

Chapter 2: Equality As Sameness: Gender Discrimination Case Law

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The American constitution guarantees equal protection under the law. In the modern understanding, this means that laws cannot treat an individual differently or deny them protection *because* of their race, gender, or sexuality, absent sufficient justification. But this was not always the case, and the ideal is not that simple to apply. Each of the categories of discrimination has a case history in which it had to be established that differential treatment of a group because of their race, gender, or sexual orientation must survive heightened scrutiny to further a state interest. In this analysis, these categories receive particular protection under the law.

An examination of sex discrimination case law shows the concept of equality the Court has been building off of since the feminist movement in the 1960s. The framework these feminists were working with was a concept of "equal treatment" that was informed by stereotypes of femininity that were articulated to protect women, but in actuality limited them. Holding a job and raising children at the same time was almost impossible, as women's ability to be anything but mothers was highly suspect by cultural norms. The Court was fully operating on cultural expectations of women at the time, rather than equal treatment.

While the NAACP was articulating to the Court how laws which treated African Americans differently were deserving of strict scrutiny, laws that treated women differently than men were not questioned yet. Litigators challenging sex discrimination had the task of convincing the Court that women were not inherently different than men,

just like African Americans were not inherently different than white people. Thus, any limitations put on women were arbitrary and deserved a higher level of review from the court and a compelling state interest.

The initial approach of the liberal feminist movement was to focus legal arguments on strict equality. To do this, litigants denied that there was any difference between the sexes, and thus they should be treated alike. As a leader of this strategy, Ruth Bader Ginsburg, through her founding of the ACLU's Women's Project, worked at convincing the Court that stereotypes of women were not a compelling state interest to limit women from experiencing full personhood under the law. This strategy was best at dismantling overt legal restrictions the law imposed on women and was called the assimilation approach.[34] She not only lived out this theory by being one of the first female lawyers at the time, but she spearheaded caselaw that slowly expanded and presented this idea of equality for women before the Court.

At the time of *Reed*, Justice Ginsburg's argument was radical. Explicitly informed by feminist theorist Simone de Beauvoir, Ginsburg began to bring feminist theory into the Supreme Court. Her first case was *Reed v. Reed* (1971), in which a Idaho state law defaulted to males over females when deciding who gets administrator privileges over an estate.[35] Sally Reed was separated from her husband and sued the state for sex

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[34] Taub, N. and W. Williams, 1993. "Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure" in P. Smith (ed.) 1993, pp. 48–56.; Smith, P., 2005. "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity & Denial," in M. Golding and W. Edmundson, Philosophy of Law & Legal Theory, Oxford: Blackwell Publishing, pp. 90–104.; Bartlett, K. and R. Kennedy (eds.), 1991. Feminist Legal Theory, Boulder: Westview Press.

[35] Reed v. Reed, 404 U.S. 71, (1971)

discrimination when they gave her husband administrator rights over their previously joint owned estate. Ginsburg used this case to articulate a provision of due process that had never before been used to accommodate the different lived experiences between men and women. Behind this law was the assumption that women are not as capable as men to manage property. The *Reed* case provided an explicit example of discrimination that limited women in the civic sphere.

When Justice Ginsburg spoke to the Burger Court, she had to conceptualize a theory of equality that accommodated the Court's narrow view of women. Women had been differentiated by the courts as a special kind of classification that needed special protections due to their weak nature. *Muller v. Oregon* (1908), and its accompanying Brandeis brief, legitimized a women's domestic role in society through maximum labor laws that only applied to women.[36] In the words of the unanimous court:

> "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[37]

Documented in 1908, the Court thought of women as different from men, as delicate, as mothers, and as situated in the domestic sphere of law. These assumptions were rationalized as "women's physical structure" and thus her propensity to have a passive nature that was deserving of protection and resulted in limitations on women in

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[36] Muller v. Oregon, 208 U.S. 412 (1908)

[37] Muller v. Oregon (1908)

the civic sphere. Feminists criticized these laws as in place to "protect" this image of women and ensure the perpetuation of the tradition or belief that this was indeed the way that gender works.[38] This notion of equality as paternalistic put women in an extremely limited position. In *Reed,* this view of women was relevant for the wife that wanted administrators rights over her estate, and was only denied them because of her gender. But for the Court at the time, women were mothers first, and everything else second. It was no wonder that Ginsburg and legal feminist scholars at the time conceptualized the fight for equality to directly combat these perverse stereotypes and limitations on women due to their "nature."[39] Ginsburg called for equal treatment as sameness, stating in her brief that:

> "Although the legislator may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis on an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race…and merits no greater judicial deference… Laws which disable women from full participation in the political, business and economic areas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[40]

Ginsburg made the case that gender functioned similarly to race in that no tangible difference related to biology existed between men and women. Ginsburg succeeded in her

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[38] Carmon, Irin, Shana Knizhnik, and Andi Arndt. "Notorious RBG: The Life and Times of Ruth Bader Ginsburg." Blackstone Audio, 2015.

[39] Carmon, Irin, Shana Knizhnik, and Andi Arndt. "Notorious RBG: The Life and Times of Ruth Bader Ginsburg." Blackstone Audio, 2015.

[40] Carmon and Arndt (2015) pg. 57

first step to achieve a higher level of judicial scrutiny for laws that treated the men and women differently with a rational basis review. It was a necessary first step to combat overt and explicit limitations on women. *Reed* was the first time the Court ruled that a law was unconstitutional for the sole reason of denying certain rights based on sex. Chief Justice Warren E. Burger delivered the opinion of the Court: "Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."[41]

Ginsburg took the cue from the Court that they were willing to take up challenges to laws that treated the sexes differently. Inherent in this was the chance to argue to the Court that women's roles were not limited to mothers, caretakers, or wives. Women were just as dynamic as men and deserved just as much protection and opportunity as men to live out their lives with autonomy and respect. This was the articulation of equality Justice Ginsburg aimed for when she argued *Reed*.[42] However, legal rhetoric that assumed a male as the subject of law veiled the less overt, but just as harmful, instances of gender discrimination.[43] *Reed* was successful because it started the conversation with the Court that some laws treated the sexes differently and this distinction was arbitrary. Yet the "equality" the Court developed was one of erasing difference between the genders rather than embracing them and dismantling their limitations. The language Justice

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[41] Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971)

[42] Carmon, Irin, Shana Knizhnik, and Andi Arndt. "Notorious RBG: The Life and Times of Ruth Bader Ginsburg." Blackstone Audio, 2015.

[43] MacKinnon, Catharine A. "Toward a Feminist Theory of the State." Harvard University Press, 1989.

Burger used in his main opinion stemmed from a vision of equality that treated all cases alike, while not robustly accounting for the differences between the subjects. The Idaho law violated the Equal Protection Clause, because according to the litigant's argument and the Court's interpretation, when dealing with estate rights, men and women are similarly positioned to take on administrator rights. There is, then, no difference between them and the law should treat them as similar subjects, rather than defaulting to men. This version of equality pushes the narrative that so long as men and women are alike, the laws should not treat them differently. Yet how would the court account for situations in which the "sexual difference" *was* relevant to the position of women?

The legal development of treating men and women as similar subjects was furthered in *Fronterio v. Richardson* (1973), two years after *Reed.*[44] Sharon Fronterio was not permitted to claim her husband as a dependent in order to receive social security benefits from the military benefit policy after serving in the army as a lieutenant. Again, we see how the stereotype of women being tied to the home and dependent on men was informing the law. The ACLU Women's Project succeeded in convincing four Justices that a higher level of scrutiny should be applied to gender cases due to the salient and entrenched history of sex discrimination in American law. Justice Brennan recognized that "…statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members" and thus, these laws needed a higher level of review than just the rational basis that was employed in *Reed*. The narrative that men and

[44] Frontiero v. Richardson, 411 U.S. 677 (1973)

women are the same and women should not be limited by the law persisted as litigants' strategy and this concept of equality as sameness was carried through in further sex discrimination cases.

The logic that laws informed by arbitrary stereotypes of the genders should be subjected to a higher level of judicial review was further solidified in *Craig v. Boren* (1976).[45] The facts of the case seem almost arbitrary for the Supreme Court, but perhaps the juvenile nature of the case showcased the unsophisticated reasoning behind laws that treat the genders differently. Craig, a male under twenty one years old, challenged an Oklahoma law that permitted eighteen year old women to buy beer but did not allow her male counterparts to do the same until he was twenty-one years-old. The Court agreed that under its Equal protection analysis of *Frontiero* that this law's chosen means to furthering a state interest was poorly adapted to that end. In their opinion, Justices Brennan, White, Marshall, Powell, Stevens, and Blackmun articulated a standard of intermediate scrutiny, now a higher level, that had to be applied to laws that treated the genders differently.

A. Feminist Criticisms of Assimilation/Denial of Difference Between the Sexes

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While it was a success to convince the Court that differential treatment based on gender should be constitutionally suspect by eliminating gender difference from an analysis of equality, it still did not change the reality that women can have children while

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[45] Craig v. Boren (1976), 429 U.S. 190 (1976)

men cannot. The approach of formal equality was initially to deny any difference between the sexes. Consequently, there was no mention of reproduction in the arguments to the Court in *Reed*, *Richardson*, and *Boren*. This "difference as sameness" approach would later be criticized by feminist legal scholars such as Catharine Mackinnon who claim that difference as sameness perpetuates the innate masculinity in legal doctrine and does little to change the oppression of femininity.[46]

Feminist criticisms of this approach have warned that a robust and genuine representation of equal protection needs to account for women's reproductive role as natural and not situated in the private sphere of liberal protection. A thread of feminist critique developed its search for equality to account for the ways women are biologically different, but do not default as subordinate to men. The goal was to show how the feminization of the home in a liberal system puts women down, constructed to the normative understanding that women are just the weaker sex. As Laura Stein and many liberal feminists developed,

> "'To have substantive equality between the sexes… the law must accommodate women's particular reproductive role' and without it, equality doctrine 'may help perpetuate the separate spheres ideology, both because it can be interpreted as accepting that women, as childbearers, are and will always be the primary childrearers….Rather than achieving power for women generally, the minority of

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[46] MacKinnon, Catharine A. "Toward a Feminist Theory of the State." Harvard University Press, 1989.

Cornell, Drucilla, and Catharine A. MacKinnon. "Sexual Difference, The Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State." (1991): 2274.

> women who do operate in the public sphere will, in order to succeed, necessarily be co-opted into the preexisting male-defined value system.'"[47]

The equality doctrine, at this point in case law, has fallen short of a robust concept required to directly challenge women's oppression. The facts of *Reed*, *Richardson*, and *Boren* made these cases about women in civic life: managing estates, purchasing beer, and employment benefits. Yet, these cases allowed women into the public sphere as long as they were like men and lead to a one dimensional concept of equality that only worked for some women and "co-opted" them into a "preexisting male-defined system." Materially, women have been let into the public sphere without the proper accommodations to make sure they have equal footing with their male counterparts. "Difference as sameness" only holds in situations in which women's reproductive life is not glaringly at issue, or if women bend over backwards to hide it.

This thread of critique can also be understood as a positive and negative rights issue. The negative interpretation of the equal protection clause was utilized in gender discrimination case law. *Reed*, *Richardson*, and *Boren* resulted in a higher level of scrutiny for laws that discriminate the sexes without demanding any sort of affirmative protection to women in the civic sphere. According to MacKinnon, this is what resulted in women being allowed in the civic sphere as long as they suppressed their femininity and assimilated to the male run and defined public sphere. Theoretically, the feminine needed to remain tied to the private sphere to perpetuate the public/private dichotomy

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[47] Stein, Laura. "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality." Minnesota Law Review 77.1153 (1993): n. pag. LexisNexis. Web. 1 Mar. 2017.

that was essential for political liberalism. Gender discrimination case law did little to challenge this dichotomy and instead worked towards dismantling glaring limitations on women in civic life. The consequences of this case law materialized in the treatment of pregnant women in the law.

B. Pregnancy Discrimination

The treatment of pregnancy as a disability shows the problematic conceptualization of the Equal Protection Clause the Court continued to develop. Feminist legal theory accounted for the "dilemmas of difference", which happens when a decision encompasses assumptions about the genders and solidifies them as inevitable or unchangeable, when really it is just one point of view.[48] By not protecting women's biological differences in "equal treatment", it became the unstated norm that people working should not become pregnant. Male norms informed laws, and thus "employment policies concerning pregnancy are notorious examples warranting separate mention" for the limited construct of equality the Court developed.[49] The treatment of pregnant women shows the consequences of the difference as sameness approach. While the sameness argument made theoretical sense, it made little material sense for the lives of actual women and men trying to practice autonomy in their lives. A encyclopedia of feminist

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[48] Minow, M., 1991. "Making All the Difference: Inclusion, Exclusion & American Law." Cambridge: Harvard University Press.

[49] Francis, Leslie and Smith, Patricia, "Feminist Philosophy of Law", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/feminism-law/>.

legal scholarship synthesizes that many feminists studying law were outraged by the treatment of pregnant women. It became a great example of the unwavering patriarchal institutions that still exist, despite gender discrimination case law, that controls the bodies of women:

> "Men and women were being treated the same: neither received pregnancy benefits. So men did not receive any benefits that women did not receive. And women did not receive any benefits that men did not receive. The logical implication was that requiring a benefits program to include pregnancy benefits for women would entitle them not to equal rights, but to special rights; not to equal treatment but to special treatment… Feminists were stunned by this argument—after all, only women can become pregnant."[50]

Attitudes towards pregnant bodies, that they don't belong in the civil sphere, denied women accommodations for their difference and instead pushed them to hide pregnancy or deal with the experience themselves. This was seen as the consequence of women trying to be like men and thus, deserving of equal treatment. "Special rights" or accommodations for sexual difference became shameful. Yet, this stood in stark contrast to the liberation of women. It was a the "maternal function" of women that "formed the basis of a dual system of law" and perpetuated the feminization of the privacy doctrine.[51] Equality for women was not robust without the accommodation of women's biological ability to have children. Given the assumption that women's primary role in society was to be mothers, pregnant women in the workplace had no protection over their bodies and jobs once they became pregnant while employed. In *General Electric v. Gilbert* (1976),

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[50] Francis, Leslie and Smith, Patricia, "Feminist Philosophy of Law", The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/feminism-law/>.

[51] Williams, Wendy W. "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate." NYU Rev. L. & Soc. Change 13 (1984): 325. pg. 333

the employers provided insurance to its workers that did not include disabilities from pregnancy. The Court had to decide if the exclusion of pregnancy violated Title VII. They reasoned that because the disability plan split the employers up into groups that included both sexes in it, there was no sex discrimination on the part of General Electric. With their ruling, the Court set the precedent that pregnancy was going to be treated like any other disability for insurance claims. Pregnant women in the workforce were not given any protection under the law despite the fact that it was only women who could become pregnant while working and thus it was not the same as a "disability" that could potentially affect the entire population with equal distribution. Classifying pregnancy as a general disability is clearly not representative of the realities in which women live their lives. While the opportunity to have a family and work at the same time may be possible in theory, the lack of protection of reproductive decisions excludes and limits women through their reproductive capabilities.

Here lies the fork in the road from equal protection to privacy for the reproductive rights movement. Decision barring gender discrimination was rooted in the Equal Protection clause with no mention of reproduction, while *Roe* was established under the right to privacy and with no mention of equality between the sexes. This fracture of the equality/privacy arguments lead the Court to make interpretations in what the equal treatment of women in society would entail. It was the efforts of scholars such as Ginsburg at the time to advance equality through litigation and the Equal Rights Amendment (ERA). The ERA was advocated for predominantly by the group National Organization for Women. The amendment was proposed as such in 1972 in Congress:

"Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[52]

The amendment was defeated in 1982, but its proposal fueled the dialogue around the treatment of women in the law. Before intermediate scrutiny was won in *Boren*, Ginsburg saw the ERA as another catalyst for the Court to take on sex discrimination cases "in earnest" and that it would help litigators flag which State laws treat the sexes differently and thus needed suspect review.[53] The belief behind the legal strategy Ginsburg and the ACLU utilized was that dismantling gender stereotypes would convince the Court to adopt a higher level of scrutiny for gendered laws. Theoretically, then, equality rested on the concept that there was no legitimate difference between the ability of the sexes to be dynamic individuals. Consequently then, Justice Ginsburg began to pick away at the assumptions the Court had that made women unequal to and more limited than men on a case by case basis. Labor laws, child custody laws, social security laws, and liquor laws were all used to show the arbitrary differential treatment women endured that were ultimately dangerous and thus deserving of a higher level of scrutiny. While Justice Ginsburg made major advancements for women and gender equality, abortion was not a part of the equality argument that was developed for the Court. Thus, to the Court, women's reproductive abilities was left out of the logic that women should not limited by their ability to have children.

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[52]Becker, Susan D. "The Origins of the Equal Rights Amendment American Feminism Between the Wars." (1981).

[53] Ginsburg, Ruth Bader. "The Need for the Equal Rights Amendment." American Bar Association Journal (1973): 1013-1019.

At the time of *Gilbert*, the general attitudes towards disabled people was one of paternalistic pity that assumed people with disabilities were "not expected to lead normal lives."[54] This same logic was present towards women when the Court made its decision in *Gilbert*. Instead of providing accommodations for pregnant women to allow them to work and raise a family at the same time, any barrier removal for women was treated as a privilege rather than a right. This was due in part to the negative right side of equality that became the doctrine for equal protection. Women's control over their reproductive lives is an unmet condition for equality as long as this logic persists. While the development for disability rights adopted the belief that "…people with disabilities are oppressed more by society than by their disabilities,"[55] and thus any law that restricts a disabled person was discrimination, women have not achieved this logic as a category. The consequence was "the way government chooses to aid people with disabilities… 'It looks as though the federal government prefers to keep disabled people down than help them up.'"[56] Feminists argue the same can be noted about the legal treatment of women and how every step forward only worked to uphold institutional limitations on the feminine. As Wendy Williams writes:

> "Due process and equal protection doctrines produce distinctly different constraints and consequences. Because the two doctrines focus on different aspects of the reproductive phenomenon—the one on protecting the liberty to make certain reproductive choices free of state intervention, the other on whether the state has treated the sexes evenhandedly…in all contacts in which

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[54] Burke, Thomas F. "Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society." No. 2. Univ of California Press, 2002. pg. 70.

[55] Burke, Thomas F. (2002) pg. 70

[56] Burke, Thomas F (2002) pg. 71

> pregnancy is regulated, a concern for the equality as well as the liberty implication of the regulation is warranted."[57]

Williams' analysis shows one of the many ways the application of equality was insufficient to capture the totality of what equal protection for women would really look like. The negative interpretations of privacy and equality boundaries in reproductive choice cases allowed for the Court's biases to determine how women's control over their bodily decisions were made.

C. Equality as a Negative Right

So far, I have shown how the utility of an equality argument for gender discrimination resulted in a narrow view of womanhood that works to default women into the private sphere as mothers. The negative rights use of equality created a uphill battle for women trying to engage in civic life. Women's admission into civic life is conditional: as long as they assimilate to the male defined norms, they can stay. But the moment women disrupt this order, they are mistreated and not protected fully by the law. Pregnancy discrimination proves the best example of this limitation on women. Due to male norms, maternal functions are not welcome in the work force and the law was not interpenetrated to adequately protect women's full personhood inside and outside the home. Thus, reproductive rights case law and its development is crucial for the concept of female autonomy and its fluidity between the spheres. An affirmative protection of

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[57] Williams, Wendy W. "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate." NYU Rev. L. & Soc. Change 13 (1984). pg. 343.

female reproductive abilities has the potential to deliver a concept of autonomy for women that is just as robust and respected as the males. Jill Lepore has suggested that an equality argument would work towards this ideal for abortion cases and could help litigants argue for more healthcare protection for women. Yet as I have showcased, the equality argument as applied to women so far, has not delivered its full potential. But to access the legitimacy of the argument for equality, we first need to understand how privacy has been developed and applied for reproductive rights cases.

Reproductive choice jurisprudence has been developed as a freedom from government interference in a choice, rather than an affirmative provision of them. The treatment of pregnant women is crucial to the understanding of the consequences of not having a dynamic positive concept of equality. Arguing reproductive choice doctrine under a privacy argument may have been the best available tool for litigators at the time, but it has developed into a underwhelming and misguided delivery of both privacy and equality that has held women back from the public sphere and thwarted development of their full potential.

Chapter 3: Privacy and Reproductive Rights

Reproductive rights has developed out of a right to privacy. The privacy framework, in its broadest summary, has made the Court revisit and rebalance the state interest to protect fetal rights versus a woman's protected sphere of privacy. The Court, through reproductive rights case law, has battled with exactly what this intangible sphere of privacy includes in due process required from the state. In general, one approach is to ask for restraint from the state to not interfere with individual autonomy and decision making. The other asks for the guarantee that each individual has the same ability to make autonomous decisions for themselves. One interpretation sanctions the private sphere of society and the other calls into question the distribution of power in the public sphere that inherently affects how individuals make personal choices. If privacy is on a spectrum of requiring intervention from the state on one end and asking for space from the state on the other, reproductive rights has gone further on the negative end. There have been moments where the position of women in society has been acknowledged by the Court, but the laws and balancing tests out of this case history ultimately leave the distribution of power and the oppression of women unchallenged.

In the 1960s in Connecticut, contraception was not completely legalized. Paul and Pauline Poe, a traditional married couple, were seeking contraception due to Pauline's serious health concerns. The majority of the Court ruled in *Poe v. Ullman* (1961) that the plaintiffs lacked any sort of reason to challenge the law, since it was not enforced.[58] One

[58] Poe v. Ullman, 367 U.S. 497 (1961)

of the dissenters of the Court that day was Justice John Marshall Harlan. In his separate opinion, Justice Harlan wrote about an expanded view of liberty and an early articulation of a right to privacy that later informed Justice William Douglas's opinion in *Griswold v. Connecticut* (1965).[59] Justice Harlan viewed due process, or protection under the law, as a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[60] Justice Harlan saw no reason why the state of Connecticut should make a law to prohibit couples from buying contraception. The wording of "arbitrary impositions" and "purposeless restraints" was later developed into a compelling state interest. Without one, the government could not infringe on the freedom protected by Justice Harlan's expanded interpretation of due process.

Privacy was a vague idea, and for a while the Court grappled with exactly how much it would protect. A slippery slope argument was that privacy doctrine could eventually protect all of society's greatest "sins" and all social order would be backwards. Or in other words, there was a fear that the status quo would be disrupted if more autonomy was accessible for all citizens under the constitution. To ease this critique, Justice Harlan kept the concept of privacy nuanced and downplayed it. In *Poe*, Justice Harlan first assured that the right to privacy "is not an absolute. Thus, I would not suggest that adultery, homosexuality, fortification and incest are immune from criminal inquiry, however privately practiced." However as Justice Harlan was trying to establish the boarders of privacy, he made a specific note of the kind of relationship he thought was

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

[60] Poe v. Ullman, 367 U.S. 497 (1961)

especially deserving of sanction and privacy from the state, namely the relationship of marriage. Justice Harlan wrote that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage," and thus must enjoy protection from state interference.[61] Marriage, he continued, was "an institution which the State must not only allow, but which always and in every age has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law and the details of that intimacy."[62] For Harlan, privacy bolstered the value of marriage. *Poe* was one vote shy of overruling the Connecticut 1879 law. Harlan's dissent and the Court's ruling that the law lacked a way to challenge it paved the way to legalizing a right to privacy.

It is important to note the absolutes that Justice Harlan, and eventually the Court, recognized in whatever it was that privacy meant to them at the time. It was first articulated to protect a woman *and* her husband's joint liberty through the legitimacy of the institution that marriage was. Female autonomy, as it is understood and protected today, was founded on her link to her husband and through the legitimacy of marriage. How far has privacy doctrine really come from habitualizing and practicing this way of thinking? This understanding of privacy was made law in *Griswold*. After *Poe*, reproductive rights litigants took the ruling as a green light to start opening up women's

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[61] Poe v. Ullman, 367 U.S. 497 (1961)

[62] Poe v. Ullman (1961)

clinics that could give women access to contraception. One of these clinics was then shut down and criminalized under the same Connecticut law. Forced to reexamine the law, the Justices established a right to privacy when Justice Douglas wrote that there are "penumbras" in the Bill of Rights that create "zones of privacy" and this protected a married couples decision to use contraception or not.[63] Again, the privacy of the husband and wife as a unit was seen as protected from the State. The origins of female autonomy over the decision to have children or not was seen as a family decision made in joint with the male counterpart, rather than a choice the women is protected to make herself. Marriage and the male counterpart was essential for the Court's first understanding of privacy over sexual decisions. However salient this conservative way of thinking was in the Court, it was challenged by litigants ten years later.

A. The Legitimacy of a Right to Privacy

The next step the Court made in developing the right to privacy was to emphasize the protection individuals have from the State. In *Eisenstadt v. Baird* (1972), the Court overturned a Massachusetts law criminalizing the use of contraception by unmarried couples. The Court's argument relied in part on the Equal Protection Clause, noting the differential treatment between married and unmarried couples. Justice Willian J. Brennan emphasized that the right to privacy is expansive enough to encompass just the individuals' protection from state intrusion. He wrote:

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

> "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried person would be equally permissible...If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[64]

This expanded interpretation for what the right to privacy entails carried the Court to the landmark decision of *Roe v. Wade* (1973). The Justices were able to recognize the value of individualized privacy through the priming of legitimizing private sexual decisions married and heterosexual couples make as one. *Roe* was an attempt to extend this right to the individual, including specifically the female and her body.

In the facts of *Roe*, Texas, like most states at the time, outlawed abortion except to save a woman's life. This view of abortion gave no protection to female autonomy over the decision process. In the pre-*Roe* world, only a severe medical condition determined by a doctor could constitute an ability to exercise enough control over a pregnancy to make the choice to terminate. In a 7-2 decision, the Court honored the development of the role of privacy already articulated in the contraception cases. If the focus on liberty was expansive enough to protect a woman's decision to use contraception, then it was expansive enough to protect a woman's decision to have a child or not, even after the pregnancy was already started.

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[64] Eisenstadt v. Baird, 405 U.S. 438 (1972)

The Court drew on *Griswold* and ruled in *Roe* that the "concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras…" establishes the right for a women to terminate her pregnancy.[65] This decision honored the concept of privacy originated in *Poe*, emphasizing the "right to be left alone" from the state. At the time, it was not surprising that litigants on the pro-choice side chose to pursue the privacy argument. As a widely accepted logic, "Privacy was compatible with a legal tradition of non-interference in marriage; a tradition that buttresses the conservative idea that the personal is separate from the political, and that the larger social structure has no impact on private, individual choice. The privacy framework assumes that society bears no affirmative responsibility for individual choice or action."[66] Herein lies the problem of the Court's interpretation of privacy. Even though the movement as a whole was working towards and envisioning a concept of privacy that could hold the State accountable to the realities women faced when making reproductive decisions, the Court clung to the conservative and "hands off" way of treating sexual decision making as the basis for this protection from state interference in an individual's personal decision making.

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

[66] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming a Movement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

B. The Feminist Critique of *Roe*

The *Roe* decision has been subject to intense scrutiny, including among feminist legal scholars.[67] While the immediate backlash was robust, it is ongoing even though most feminist scholarship has turned to a focus on identity politics.[68] Constitutional scholar Jack M. Balkin started a dialogue among other legal scholars in a debate about the legal basis of *Roe*. The criticisms generated are filled with insightful critiques and interpretations of the law, many of which derive from legal theory not tapped into by the Court.

One such theorist is Reva B. Siegel, a feminist legal scholar and expert in Constitutional law. Siegel's scholarship is particularly insightful here, as her work provides a way to discuss both privacy and equality doctrine inherent in abortion case law. In her mock judicial opinion of *Roe*, Siegel advocates for the equality argument as the most compelling basis for a right to an abortion, rather than the privacy argument. Her argument derives from the concept of equality developed out of sex discrimination cases. In her view, abortion regulations should be reviewed under strict scrutiny, as "abortion restrictions are deeply tied to the stereotypical views about the sexes and about the duties of women."[69] Siegel draws on the concept of equality that the Court has available now. She notes that "as we have come to understand it, the equal citizenship principle

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[67] Balkin, Jack M. "What Roe v. Wade Should Have Said." The Nation's Top Legal Experts Rewrite America's Most Controversial decision (2005).

[68] Bartkowski, Frances, and Wendy K. Kolmar. "Feminist Theory: A Reader." McGraw-Hill Higher Education, 2010.

[69] Balkin, Jack M. (2005)

embodied in the Fourteenth and Nineteenth Amendments prohibits state action premised on traditional assumptions about the sexes that perpetuates second-class citizenship for women." Siegel cites *Reed* to illustrate that a proper use of equal protection could extend to abortion regulations, as they perpetuate stereotypes of women and the Court has a commitment to stopping this discrimination. She continues by making the point that women are not different citizens than men just because they can have children.

Siegel draws on the negative concept of equality, or "equality as sameness" principle that filled earlier feminist interpretation of gender discrimination. While I agree with Siegel's interpretation of what argument can be made given the equality doctrine in the Court currently, I am skeptical that even this legal basis of *Roe* would not garner any robust version of equality for women. Siegel's equality argument would not require the state to ensure that stereotypes of women do not occur, rather that abortions cannot be restricted if they coerce a women into pregnancy. However, this interpretation lacks any sort of intersectional concerns on the different experiences of women. For marginalized women, reproductive justice may require combating sterilization practices rather than abortion restrictions.[70] Reproductive justice is not just about securing abortion, but about creating institutions that allow women to author their own lives. I fear that Siegel's utility of equality focuses too much on citizenship and her view of what makes citizenship equal for women, rather than on developing female autonomy. While adopting a strict scrutiny review for abortion laws may lead to less restrictive laws, I am skeptical that this application of equality would change the focus of the Court's rhetoric. Siegel's argument

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[70] Dean Spade, "Intersectional Resistance and Law Reform," *Signs: Journal of Women in Culture and Society* 38, no. 4 (Summer 2013): 1031-1055.

still gives the state the ability to judge and regulate "good citizen bodies (those that are married, heterosexual, reproductive, and white)" and "noncitizen bodies (nonheterosexual, nonreproductive, engaging in sex for pleasure, and nonwhite)."[71] An emphasis on negative equality still treats women as the same as men, without embracing feminine experiences as different yet no worse and no better. Another strain of feminist critique of *Roe* stems from Justice Ginsberg herself.[72]

In 2013, Justice Ginsburg shared her critique of *Roe*, stating that as well as not using a gradual policy shift, the litigation approach wasn't women centered.[73] How could it be, when the rhetoric inside and outside the Court was largely focused on fetal rights and the anxieties of the New Right?[74] Justice Ginsburg advocates for a new lens to the legal analysis for abortion cases—one that considers the woman's position as the vocal point. Siegel may envision this change to come from the utility of the equality doctrine rather than the privacy doctrine. However, while Siegel's approach is radical in that it advocates for a new legal basis of *Roe*, it still utilizes the same logic behind the equality doctrine that has not produced effective equality for women. Legal scholarship has criticized the litigants behind reproductive rights for falling into the trap of staying too

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[71] Brandzel, Amy L. "Queering citizenship? Same-Sex Marriage and the State." GLQ: A Journal of Lesbian and Gay Studies 11.2 (2005): 179.

[72] Balkin, Jack M. "What Roe v. Wade Should Have Said." The Nation's Top Legal Experts Rewrite America's Most Controversial decision (2005). 11.

[73] http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit

[74] Beyond Backlash, Mary Ziegler (Mary Ziegler, Beyond Backlash: Legal History, Polarization, and Roe v. Wade, 71 Wash. & Lee L. Rev. 969 (2014)

close to the legal frameworks in the Court. Being afraid to ask for more has yielded little change and an illegitimately of the reproductive rights movement for some:

> "Central to the lessons one draws from...abortion...is that framing of the legal arguments tendered before the Court was important to the ultimate resolution of the issues. In both cases, initial "liberal" victories were forged and then lost, in significant part, because their defenders doggedly clung to their understanding of the Court's logic. This fatally constrained their ability to shift argumentational grounds when those victories came under threat. This was called the "tyranny of absolutes," the notion that legal arguments, once seemingly won, are absolute and defensible only on those grounds. Without the argumentational flexibility to adapt to new conditions, the tyranny of absolutes lead abolitionists and pro-choice advocates to dig their own doctrinal graves by ignoring alternative arguments that might have saved the underlying goals their initial victories were intended to achieve and protect."[75]

It is important to note that Epstein and Kobylka add to the scholarship on legal change by showing that the courts can be a place for the status quo to prevail and reiterate much of the same concepts at its origin. Feminist scholarship would add that this nature continues the gendered treatment of the law. When *Roe* was decided, it was inevitable that any doctrine used would be coming from a gendered place. Scholarship has show that changing the legal discourse within the courts is possible and if not attempted, the same norms will continue to be reinstated without a doubt. For women and abortion rights, this has meant a history of state interference on women's autonomy and therefore women equality.

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[75] Epstein, Lee. The Supreme Court and Legal Change: Abortion and the Death Penalty. Univ of North Carolina Press, 1992. 311.

C. Limits of Privacy

The trimester framework the Court outlined later in *Roe* perpetuated a logic of privacy that limited a woman's ability to participate fully in society because of her reproductive abilities. The Court honors the individual's right to be left alone in-so-far as the state cannot arbitrarily stop a woman from ending a pregnancy. While their ruling protects women from some groundless limitations on reproductive health decisions, the logic does not ensure the lifting of barriers for women. Under privacy, the state does not have to even the playing field for women when they are pregnant or trying not to be. Here we see it as a negative right; privacy does not require active protection. Rather, it is a off-hands approach to leaving women alone to make their decisions. In *Roe*, the trimester framework was the test the Justices set up to guide state's interference in the privacy of a woman and her childbearing decisions. Later, I will discuss how the transition from the trimester framework to a undue burden analysis allowed for interpretations of female autonomy that was so focused on fetal life that it took away from the practical right to an abortion.

After the Court established the right to an abortion, they outlined a balancing test to accommodate any state interest in protecting the well-being of the fetus. Called the trimester rule, the Court outlined the following scale of protection a woman could expect during her pregnancy:

> "First trimester: the decision is between a woman and her physician
> Second trimester: the states can "regulate the abortion procedure in ways that are reasonably related to maternal health."

> Third trimester: "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except when it is necessary...for the preservation or health of the mother…"[76]

At the time, this standard was considered medically driven and it ensured the autonomy of the woman in the first trimester. This unregulated autonomy, guaranteed in the first trimester at least, was later challenged in *Planned Parenthood v. Casey* (1992) and replaced with the "undue burden" standard. As defined by the Supreme Court, a undue burden analysis claims that a "law is invalid if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[77] But to see how the Court got to this analysis, it is important to see the immediate regression the Court took to the individual liberty supposedly guaranteed to women after its decision in *Roe*.

The immediate backlash of *Roe* established a well practiced routine the State and pro-choice litigators have been adding to ever since the decision in 1973. States push the boundary of how much they can restrict abortion access, while reproductive rights litigators try to defend and reiterate the privacy right of all women. Increasingly, the morality of protecting a fetus has taken precedent over the protected privacy of women. Already on weak footing, the logic in *Roe* did not translate into equality for women through a control over their reproductive lives. *Harris v. McRae* (1980)[78] is the most blatant departure from any logic towards a robust or positive rights concept of female

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

[77] Planned Parenthood v. Casey, 505 U.S. 833 (1992)

[78] Harris v. McRae, 448 U.S. 297 (1980)

equality. In *Harris*, Justice Stewart wrote for the majority opinion that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigence falls in the latter category."[79] Again we see privacy being interpreted as a negative right. The Court did not require state funding for abortion because of the "hands-off" approach to privacy it had drawn on in privacy doctrine. While the Court allowed abortion, the right to access it was not seen or treated as a necessary component of women's freedom. Instead, it was something in which the Court tried to refrain from interfering in. When Justice Stewart wrote that "indigence" was something a women created for herself, it showcased the limited understanding the Court had on discrimination against women, especially unprivileged women. Without state funding for abortion, access to already limited reproductive health care was only possible for women who were able to travel and pay for services. This reality was and is devastating for a movement that was first started in the 1960's for "…the woman of color who does not know she can space her children, who cannot afford to go to a private doctor, who is being discriminated against by the Connecticut law."[80] Estelle Griswold spoke those words when she first started her crusade for reproductive justice for Planned Parenthood in the 1960s. Another activist, Lee Buxon said that the problem "all adds up to the rich getting contraceptives and the poor getting children."[81]

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[79] Harris v. McRae, 448 U.S. 297 (1980)

[80] Garrow, David J. Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade. Open Road Media, 2015. pg.197.

[81] Garrow, David J. (2015) pg.197.

Harris showcased that the Court did not understand abortion from a positive rights framework or feminist equality approach. Abortion was not valued as a necessity that needed to be made available for women, but rather something it wanted little involvement in. The fear behind granting women comprehensive sexual health care is really a fear of disrupting the status quo. Only certain women are able to access the resources to make a fully autonomous decision over when to have a family or not. The scarcity of this freedom makes female autonomy or ability to control almost shameful. Perhaps this is due to an interest in unborn life, but also because of the underlying assumption that women are solely meant to be mothers and do not have full autonomy as individuals. Rhonda Coplan writes that "The explosive response to *Roe* attests to the deeply radical nature of the demand, first by feminists and then by lesbians and gays, for a power so fundamental in our traditional liberal constitutional scheme as control over one's body."[82] Putting aside the gay rights movement for now, abortion was at its core a movement asking for women's equality, even though the legal doctrine did not reflect that. On the ground, women and doctors were organizing services, campaigns, and trainings to do everything they could to protect a woman's power over her reproductive health. From sexual education to abortion access, the reproductive rights movement, especially after the shock of *Webster*, strove to be an inclusive feminist movement

[82] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming aMovement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

focused on individual equality, rather than "privacy."[83] However, these intentions, no matter how thought out and articulate they were, got lost in the legal logic.

Why was this so? David Garrow invites the nuance that "Rather than simply viewing the women's 'crusade against abortion' as manifesting as a primary concern for fetuses, their activism should instead be seen as a 'symbolic defense of traditional conceptions of morality.'" The attitudes of the Pro-Life movement were shown to be more than they let on in their legal arguments. Garrow writes that:

> "'There exists beneath the surface in young pro-life groups a deeply rooted respect and admiration of the traditional women and the glories of motherhood. This is accompanied by a corresponding disrespect for and hatred of the modern women as depicted by the feminist movement.' For many right-to-lifers, this commentator recounted, the abortion crusade was essentially a 'means to an end,' for it was a highly viable way of 'fighting the anti-family and animi-traditional image that abortion is seen to promote.' A less sympathetic professor made the same point more bluntly: 'the meanings resonating from abortion politics have more to do with compulsory heterosexuality, family structure, the relationship between men and women and parents and children, and women's employment, than they do with the fetus.'" [84]

These motivations contrasted to the actual legal arguments preoccupying the Court, showing an unfocused reasoning of the rights that were at stake for women in the next abortion rights cases. If the pro-life movement was really there to keep traditional femininity alive in the laws, then the focus on privacy and state interest almost seemed off-base. The necessary conversation was on stereotypes and how limitations were

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[83]Fried, Marlene Gerber. "From Abortion to Reproductive Freedom: Transforming a Movement." South End Press, 1990.

[84] Garrow, David J. "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade." Open Road Media, 2015. pg. 197.

safeguarded by abortion regulations and violated women's equal standing in society. However, the Court was caught up in a very different logic.

The next series of cases dealt with states' regulations limiting abortion access. In *City of Akron v. Akron Center for Reproductive Health Care,* (1983) the Court was asked to determine the constitutionality of a Ohio law that had a hospital requirement for abortion, a minor consent requirement, an information requirement, a 24-hour waiting period, and a disposal requirement. The Court struck down these provisions as a departure from the trimester framework and ruled that Ohio lacked a compelling interest for these limitations on women's access to abortion services. Although the decision was good news for pro-choice litigators at the time, Justice O'Connor's dissent began the debate over changing the balancing test the Court would use to protect female liberty. While the *Akron* decision could be interpreted to focus on the position of the woman to make a free choice, Justice O'Connor attempted to turn the focus to the viability of the fetus and the developing state interest in protecting viable life in light of a fast changing medical world. This shift would propel the discussion away from a woman-centered rhetoric for abortion.

In *Akron*, Justice O'Connor's dissent urged the Court to adopt a new framework for determining the legality of abortion laws. She advocated to get rid of the trimester framework because she thought the *Roe* standard was "…on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus,

the point of viability is moved further back toward conception."[85] Her logic stems not from the value of protecting female autonomy, but from protecting any life that could live outside the womb and how the Court should legally balance a fetal right to life with a women's right to privacy. Justice O'Connor was concerned that the courts will have to speculate about what was "accepted medical practice" at any point in time, rather than supporting their decisions on legal doctrine.[86] To remedy this, Justice O'Connor outlined an "undue burden" standard for the first time in her *Akron* dissent. Her focus was on the state's role: "*Roe* is intended to protect against state action 'drastically limiting the availability and safety of the desired service'…"[87] The Court eventually adopted this standard in *Casey* after several more battles of state interest and privacy rights in *Thornburgh v. American College of Obstetricians* (1986) and *Webster v. Reproductive Health Services* (1989).

In *Thornbourgh*, the Court evaluated a Pennsylvania state law that required informed printed consent from the woman, an extensive warning of risks of an abortion, certain reporting procedures of abortion by the provider, the use of specific medical techniques after viability, and the presence of a second physician for post-viability cases. The Court struck down these requirements as provisions used to deter a women from having an abortion. Then three years later in *Webster*, the Court was asked again the same question of constitutionality for a Missouri law that restricted state funds and employees from performing or assisting with abortion. Further the restrictions imposed counseling

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[85] City of Akron v. Akron Center for Reproductive Health Care, 462 U.S. 416 (1983)

[86] City of Akron v. Akron Center for Reproductive Health Care (1983)

[87]City of Akron v. Akron Center for Reproductive Health Care (1983)

on abortion for women. While not so much different than the Pennsylvania law in *Thornbourgh*, the Court upheld the restrictions in *Webster*. *Webster* was written in a way that restricted public funding of abortion, encouraged adoption in place of abortion, and strengthened the influence of the State after twenty weeks gestation. The Court interpreted this to not break any standard set in *Roe* "as no affirmative right to the use of state aid for non-therapeutic abortions existed."[88] The Court's legal interpretation of the restriction in *Webster* may have been justified to honor *Roe*, but the material effects of legislation that works to restrict abortion through a emphasis on fetal life had the same materialized limiting effect for women and their autonomy.

After *Webster* it was clear to many advocates and scholars of the reproductive rights movement that their strategy needed to change. The study of social movements is a study of multiple variables, many of which unknown and unmeasurable, interacting with each other to create "change". While this paper is a study of the Court and legal doctrine, it is important to understand the rhetoric behind litigants of reproductive rights and the larger context in which they were working. As the pro-choice side did its work, so did the pro-life side. However, the pro-life side at the time of *Webster,* and building up to *Casey*, was hostile to women's rights and any development of a positive right to privacy. Furthermore, the pro-life side had politics on its side with the election of President Ronald Reagan. The Reagan Justice Department worked to make abortion an entrenched political issue when they sent representatives into Court to fight strongly against it. During *Akron* and *Thornburgh*, it was "the first time since Roe that, pro-choice advocates

[88] Webster v. Reproductive Health Services, 492 U.S. 4090 (1989)

faced effective opposition from the national government instead of state attorneys with minimal interest or limited expertise in the subject of Supreme Court advocacy."[89] Additionally, the replacement of Powell and Stewart with O'Connor and Kennedy opened up the Court for the infiltration of an anti-choice sentiment.

The decision in *Webster* was in part set up by a change in political and judicial environment. However, some scholars have argued that this hostility was not enough to disempower the legal advocates of reproductive rights. Instead, their challenge resulted in part from the legal strategy they decided to take. In *Webster*, the pro-choice side could have benefited from gauging Justice O'Connor's position much more than it did. It was her approval and advocacy of the undue burden standard that lead to the constitutional gutting of a right to an abortion post *Webster*. In *Webster*, pro-choice litigants "used amici in much of the same way" it had in previous cases "to bring attention to the Court's different perspectives on abortion and to fill in medical, psychological, policy, and women's interests gaps left open in their essentially legalistic efforts."[90] Legal scholars Epstein and Kobylka argue that "Herein, through, lies the problem: given the obvious changes in the political and legal environments…pro-choice arguments and strategies *should* have changed as well."[91] The reproductive rights movement was not oblivious to their loss and failure of strategy. Within the movement, advocates were hard at work re-thinking the best way to defend a right to an abortion and women's rights in general.

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[89] Epstein, Lee. "The Supreme Court and Legal Change: Abortion and the Death Penalty." Univ of North Carolina Press, 1992.

[90] Epstein, Lee. The Supreme Court and Legal Change: Abortion and the Death Penalty. Univ of North Carolina Press, 1992. pg. 295.

[91] Epstein, Lee (1992) pg. 295

At this point, however, I do not want to downplay the hostility that was rampant then and still today towards a woman's right to an abortion and all the societal implications that right has. As one feminist legal scholar reiterated:

> "As Justice Blackmun warned in Webster v. Reproductive Health Services, the new majority on the Supreme Court is chillingly hostile to ceding this power, for its denial is a cornerstone of patriarchal power whether expressed in the enslavement of African-American people, the reproductive servitude of women, or the denial to gays and lesbians of the right to love. Given the need to stave off further erosion in the Supreme Court as well as to secure these fundamental rights in Congress and state courts and legislatures throughout the country, it is important that we understand the limitations of these rights heretofore recognized by the Court, in this case the right to privacy."[92]

Feminist critique pushes my analysis here to decipher the privacy and equality argument, keeping in mind that privacy has been used as a "cornerstone of patriarchal power" in the Court thus far. The gap in the rhetoric between fetal rights and a woman-centered approach to abortion is synonymous with upholding patriarchal power versus dismantling it. Justice Blackmun stated in *Webster* that "The simple truth is that *Roe* no longer survives…I rue the violence that has been done to the liberty and the equality of women. I rue the violence that has been done to the liberty and equality of women. I rue the violence that has been done to our legal fabric and to the integrity of this Court."[93] There was no commitment to a robust concept of equality for women in the decisions the Courts, both State and Federal, on the rulings on abortion. But this was due to the fact that the legal framing of abortion was not founded on a commitment to female autonomy,

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[92] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming a Movement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

[93] Garrow, David J. "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade." Open Road Media, 2015. pg. 677.

but on a commitment to resisting arbitrary state intervention in personal life. There was room for interpretation to focus on women's societal limitations in connection to abortion, but the fetal rights framework has won out regardless of these efforts.

D. Re-Emergence of an Equality Argument

Planned Parenthood v. Casey (1992) was a moment in which the Court was persuaded fiercely to honor the gender equality argument inherent in the right to an abortion that had been cast aside in the previous decisions of the Court.[94] *Casey* was an attempt to legitimize to the Court that a woman's affirmative control and protection of her own right to her body was key for women's equality. In her oral argument to the Court, Kathryn Kolbert stated:

> "Since this Court's decision in Roe v. Wade, a generation of American women have come of age secure in the knowledge that the Constitution provides the highest level of protection for their child-bearing decisions. This landmark decision, which necessarily and logically flows from a century of this Court's jurisprudence, not only protects rights of bodily integrity and autonomy, but has enabled millions of women to participate fully and equally in society...Government may not chip away at fundamental rights, nor make them selectively available only to the most privileged women."[95]

Kolbert linked equality with privacy for women in her oral argument for *Casey*. Her argument that upholding *Roe* was not important for the sanctity of married life, but essential for women to be full individuals freed from state imposed gendered limitations,

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[94] Planned Parenthood v. Casey, 505 U.S. 833 (1992)

[95]Garrow, David J. "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade." Open Road Media, 2015. pg. 690.

echoed Ruth Bader Ginsburg's argument to the Court that such legalized stereotypes towards women amounted to discrimination. Kolbert additionally pointed out the flaw in *Harris* to construe abortion as a hands-off right that only created more inequality among women themselves, arguing that the State cannot make rights "selectively available only to the most privileged women." The *Casey* decision was contentious in that it had a contradictory logic. *Casey* was stuck in the "double edged sword" of privacy that emerged after *Webster*. Rhonda Copelon, a reproductive rights activist, wrote after *Webster* that "There has emerged a sharp tension between two notions of privacy: the liberal idea of privacy as the negative and qualified right to be left alone...and the more radical ideal of privacy as the positive liberty of self-determination and an aspect of equal personhood. Both practically and theoretically, the privacy doctrine is double-edged, having within it the tendency to constrain as well as to expand reproductive rights."[96] The two sides of privacy, positive and negative, were two very different arguments to be made to the Court. One was about sexual liberation for those traditionally oppressed by social institutions, such as women and queer people, and the other was about protecting the right to be left alone. Both arguments would materialize to mean very different realities for how we understand autonomy in this country. In *Casey*, Kolbert tried to push the Court towards recognizing the more positive notes of privacy. It is important to note how much was against this argument. The "tyranny of absolutes" gave litigators something to hold onto in a hostile Court and political environment. But *Casey* showed that holding on

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[96] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming a Movement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

to off-beat arguments, even to appease the Court's way of thinking, would not lead to material equality for women.

By continuing the privacy logic already established with the Court, *Casey* was a convoluted victory and defeat for abortion rights. On one hand, *Casey* reaffirmed *Roe* and its central holding. The Court echoed Kolbert's argument when they acknowledged personal choice: "Our obligation is to define the liberty of all, not to mandate our own moral code."[97] With these words, Justice O'Connor placed privacy and personal liberty above any prescriptions of morality. However, the newly articulated undue burden standard to justify the state's control over the female access to abortion services created a sliding scale that pushed the State closer and closer to controlling a women's ability to make free reproductive decisions. The Court explained that the new standard will focus on the viability of the fetus. The majority opinion declared that:

> "Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term, and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."

On this premise, the Justices revisited the trimester framework and concluded that "the trimester framework suffers from these basic flaws: in its formulation, it misconceives the nature of the pregnant woman's interest; and in practice, it undervalues the State's interest

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[97]Garrow, David J. Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade. Open Road Media, 2015. pg. 694.

in potential life, as recognized in Roe." From this, they adopted Justice O'Connor's previously articulated "undue burden" standard. Essentially, the majority explained,

> "a finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."

The Court protected the state's interest in potential life and in doing so, gave states a tool to further restrict the "zone" of privacy women had around their bodies. The undue burden standard was lenient enough to justify regulations such as 24-hour waiting periods and mandatory counseling as an effort to "inform the woman's free choice". The Court has revisited exactly how much a women's privacy protected her right to an abortion, and almost every case the protection encompasses less and less. Yet, in some ways, *Casey* was a positive decision in that it reaffirmed *Roe*, though the integrity of the holding of *Roe* being about women's rights was slipping away. Justice Harry Blackmun recognized this loss at the time of *Casey* and wrote in his partial concurrence that,

> "a State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care."

Essentially, the Court's development of privacy ignored the impact on womens potential entry into the public sphere, instead burdening women with their private duties as child

bearers. Laws regarding women's reproductive health viewed the continuation of pregnancy as the default for women and any other decision did not receive as much support or institutionalized protection or normalcy. *Casey* was a moment when it seemed as though at this point in the Courts development, all of the lines towards an equality argument were there for reproductive freedom. It just needed to be linked together, but the link was not recognized by the Court or the litigants.

Many feminist legal scholars have outlined the downsides the privacy argument can have for the position of women in society. The privacy argument has been used to maintain the status quo, or the subordination of women, through a protection of the private/domestic sphere. These critiques on privacy have centered on the implementation of a negative framework of privacy.[98] The feminist critique is that this hands-off approach to government does not account for the fact that "choice cannot be fully free" when we live "in a world riddled by racism, sexism, homophobia, poverty, and exploitation."[99] This concept of privacy does not account for the coded hierarchies in society that put bodily autonomy in reach for some women and out of reach for others. Further, the current utilized concept of privacy does not account for the fact that this distribution is systematic and cannot be solved on an individual basis. In short, there are very real material effects to the Court's decisions on the value of women's lives.

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[98] Stein, Laura . "Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality." Minnesota Law Review 77.1153 (1993): n. pag. LexisNexis. Web. 1 Mar. 2017.

[99] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming a Movement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

Post-*Roe* and beginning with *Harris*, the constitutional retrenchment on a right to an abortion has systematically disadvantaged some women over others. In *Harris*, the Court ruled that state funding for abortion was not required. Because of this, the state can actively

> "chose to favor the fetus over the woman…the consequences for women's access is profound. Hospitals are used by women who often have no alternative: poorer women, women of color, rural women, as well as women needing late abortions. Excluding abortions from any hospital with a public connection will marginalize the practice of abortion, and threatens to remove it from the curriculum of medical schools which conduct their training in hospitals tangentially related to the state."[100]

Webster and *Casey* reiterated this logic and remains the leading dynamic. This logic and limitation of a right to an abortion brings us to where we are now. Targeted Regulations of Abortion Providers (TRAP) Laws are introduced every year and in every state. In 2016, nearly 400 anti-abortion bills were passed.[101] Although each bill has a different method of limitation they all try to accomplish the same goal: to materially eliminate access to an abortion.

There have been two recent reproductive rights cases since 2012 that confirm the fears many reproductive rights advocates had post *Casey*—the constitutional right to an abortion is vulnerable to severe limitation. Although not dealing directly with the right to an abortion nor the equality or privacy doctrine, *Burwell v. Hobby Lobby* (2014) is

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[100] Copelon, Rhonda. "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom." From Abortion to Reproductive Freedom: Transforming a Movement, ed. Marlene Gerber Fried (Boston: South End Press, 1990): 27-43.

[101] http://www.rollingstone.com/politics/news/nearly-400-anti-abortion-bills-were-introduced-last-year-20160104

important to mention here.[102] The case involved a closely held for-profit corporation owned by a Mennonite family who believed that some contraception covered by the Affordable Care Act (ACA) was equivalent to an abortion. Because of this, they wished to opt-out of the contraception mandate of the ACA for their female employees as they believed this coverage violated their First Amendment rights as well as the Religious Freedom Restoration Act (RFRA). Again, the Court was asked to investigate if the belief that life begins at conception constitutes a compelling state interest to interfere with women's bodily autonomy. The Court ruled in the favor of the Hahn Family and thus, the precedent was set that religious rights of employees trumps a women's material ability to control her reproductive life.

Important in this case was Justice Ginsburg's thirty five page dissent that she read from the bench. The argument Justice Ginsburg makes in her dissent is an appeal to women's autonomy, and how this decision severely violates any concept of female individual autonomy. To begin her dissent, Justice Ginsburg drew attention to powerful words that the Court has previously regarded as law, that "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[103] This quote speaks directly to the female employee's autonomy over her body and her health. To advance this claim even further into the relevant facts of the case at hand, Justice Ginsburg traced the logic behind the contraceptive mandate in the Affordable Care Act (ACA). She began with Senator

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[102] Burwell v. Hobby Lobby, 573 U.S (2014)

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

Barbara Mikulski, who introduced the Women's Health Amendment (WHA), which integrated women's preventative health care services into the ACA. For this part of her argument, Justice Ginsburg cited senators who were involved in the passage of the WHA and different medical research groups that gave empirical evidence to the senators, such as a report from the Institute of Medicine (IOM). Once she illustrated the rationale behind why the Senators who drafted the ACA included women's health concerns, Justice Ginsburg moved on to show that the application of the Religious Freedom Restoration Act (RFRA) by the Court severely deprives women of the autonomy over her body that the ACA was very intentionally supposed to support.

Justice Ginsburg used amicus briefs to support her women's autonomy argument. In the relevant facts of the case, the Justice had ample medical research to back up her claim on the specific importance of the kind of contraception to which the Hanhs objected to. Research groups such as the Guttmacher Institute have done extensive investigation into measuring the social, economic, and political effects of women's reproductive health. Their amicus brief supports the Court with thousands of examples of how female health directly affects their ability to be equal citizens in our communities. But while the Guttmacher Institute investigates the material effects of comprehensive reproductive rights, it cannot change laws. Justice Ginsburg pulls this medical discourse into her legal analysis, giving medical research on women's health a legitimate stake in legal decisions. In addition to the Guttmacher Institute, Justice Ginsburg cites the American College of Obstetricians and Gynecologists, the Ovarian Cancer National Alliance, and the National Health Law Program. While all of these briefs have slightly

different angles of analysis, they all bolster Justice Ginsburg's autonomy argument in a very similar way—they provide empirical medical, economic, and ethical research evidence that supports the role contraception plays in women's lives.

Legal scholars have documented the social movement's reaction to this dissent, recognizing that Justice Ginsburg was trying to put the female's individual rights front and center to the Court and its considerations.[104] This effort was seen again two years later in a case dealing head-on with abortion regulations.

In 2016, the Supreme Court heard the case of *Whole Women's Health v. Hellerstedt* (2016), in which one such law in Texas was challenged for imposing an undue burden.[105] Planned Parenthood filed a amicus brief that extensively outlined the impact shutting down clinics that didn't meet hospital standards would have on all Texas women. Means to travel, the flexibility of a work schedule, childcare arrangements, and overnight stay arrangements all directly burden women without the resources for these accommodations.[106] Justice Ginsburg directed her questions at oral arguments towards the application of the undue burden standard. The Justice managed to direct counsel to showcase how this law was not only an "undue burden" on Texas women, but also played no role to *advance* their health at all.

Justice Ginsburg asked the first and last questions of the oral arguments. What was relevant in this case is how the oral arguments and the decision utilized the "undue

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[104] Eversley LR. "#JOINTHEDISSENT: Ruth Bader Ginsburg and the Hobby Lobby Effect." *Albany Law Review* 79.1 (2016): 26995. Print.

[105] Whole Woman's Health v. Hellerstedt, 579 U.S. (2016)

[106] Brief of the Planned Parenthood Federation of America

burden" standard and what concepts of equality and privacy they were drawing from. Justice Ginsburg pushed the Court in a clear direction. She wanted to determine the material effect the Texas law had on the autonomy of women.

Scott Keller, representing Texas, made the argument that the laws were for the health of the women. Immediately Justice Ginsburg pointed out the flaw in this argument. Keller was trying to downplay Justices Kagin, Sotomayor, and Ginsburg's line of questioning about how many women lived an appropriate distance from a clinic. The evidence suggested that the majority of women living in Texas of reproductive age were located over 200 miles from a clinic, and this would only increase if the law would go up. However, Keller rebutted this ratio by suggesting that women could always go to a clinic in New Mexico that was near the border. Justice Ginsburg pointed out that Texas has no jurisdiction over New Mexico's facilities, so how could they protect the health of women with this law if the material effect was forcing women to go across state lines for reproductive health services? This suggested that the law was not advancing any interest on the women's behalf, but only placing an undue burden on their ability to access abortion:

"Justice Ginsburg: That's—that's off that you point to the New Mexico facility.
New Mexico doesn't have any surgical—ASC requirement, and it doesn't have any admitting requirement.
So if your argument is right, then New Mexico is not an avail way out for Texas because Texas says to protect our women, we need these things.

But send them off to Mexico—New Mexico— New Mexico where they don't get it either. No admitting privileges, no ASC.

And that's perfectly all right. Well, if that's all right for the—the women in the El Paso area, why isn't it right for the rest of the women in Texas?"[107]

This line of questioning utilizes the bare minimum of the undue burden standard to show that this law has a direct negative effect on the health of women, and no beneficial effect. Texas comes back to say that the standards it imposes will benefit the women who can access the clinics. But this is not enough for Justice Ginsburg. She urges the Court to interpret more along a positive right of women to access health care when she interprets the Casey standard to ask not only if there is a undue burden, but are any women actually helped by the legislation?

"Justice Ginsburg: May I ask you one question? You earlier in your argument, you were quoting how many women are within a reasonable range of the clinic. But don't we know from Casey that the focus must be on the ones who are burdened and not the ones who aren't burdened? There— there is— and the district court said this, you know, there is not a problem for women who have means to travel, that those women will have access to abortion, anyways. So—in Texas or out of Texas.

So Casey is quite precise in this, when it's talking about husbands and notifications. You don't look to all the women who are getting abortions. You look only to the—to the— the women from who this is a problem And so the only women we would be looking at is not all of the women who are—who live in Austin or in Dallas, but the women who have the problem who don't live near a clinic.

Mr. Keller: Well—

Justice Ginsburg: Isn't that the clear message of Casey…But this is about—what its about is that a women has a fundamental right to make this choice for herself. Thats what we sought as the starting premise. And then this is certainly about—Casey—Casey made that plain, that it—the focus is not he women, and it has to the on the segment of women who are affected."[108]

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[107] Whole Women's Health v. Hellerstedt, 579 U.S. (2016) at page 37

[108] Transcript of Oral Argument at page 72, Whole Women's Health v. Hellerstedt, 579 U.S. (2016)

Justice Sotomayor makes this point as well in the beginning of oral argument that Justice Ginsburg expanded on with her questions about the mileage and the intention behind the *Casey* standard and how it was interpreted by Texas:

"Justice Sotomayor: I'm not talking about the doctrine. I'm talking about the question I asked, which is, according to you, the slightest health improvement is enough to impose on hundreds of through sands of women—-even assuming I accept your argument, which I don't, necessarily, because it's being challenged—but the slightest benefit it enough to burden the lives of a million women. That's your point?"[109]

Subsequently, the lines of questioning were intended to focus on the women and not only the burden she encounters with this legislation, but the benefit it has on her autonomy and the "fundamental right to make this choice for herself", as Ginsburg emphasized in her last question. The *Whole Women's Health* case was a step towards drawing on a concept of privacy, protected with the undue burden standard, that requires more from the State. Ginsburg asks the Court to focus on the women who are disadvantaged to start and how this legislation affects their right to make decision themselves. Along this line of logic and utility of the privacy doctrine, there could be a argument made that the state needs to deliver this right by providing more accommodations to women who are not regarded as the "neutral" under the law. This would be a positive interpretation of privacy. Texas was treating the subject of the law as women who can already access abortion, when really the focus should be on the scope of autonomy guaranteed to all women and making sure it is leveled. This could mean the state putting more resources towards protecting the autonomy of women under an undue

[109] Transcript of Oral Argument at page 40, Whole Women's Health v. Hellerstedt, 579 U.S. (2016)

burden standard. Indeed the Court did focus on the health of the women in their decision to outlaw the restrictions on clinics in Texas:

> "We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health. We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case."[110]

By putting female autonomy as the focus of the "undue burden" analysis, Justice Ginsburg was taking a step towards a positive rights interpretation inherent in privacy. The positive side of privacy would ask for affirmative protection of female autonomy. In the context of reproductive rights, this would be more comprehensive and preventive health care and securement of abortion services. The reality right now is extremely far from this ideal, but the positive interpretation of a privacy right at least puts female autonomy as the main issue and perhaps can build a platform to talk about what protection women need from the state to be equal citizens. Additionally, it can be observed that a equality argument and positive rights interpretation of privacy asks for similar affirmative protection. The re-entrenchment of the private sphere and subordination of women results from the use of a negative concept of either the equality and privacy right. I will now turn to marriage equality case law to outline the lessons the reproductive rights movement can learn by using a equality argument as the movement's legal basis.

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[110] Transcript of Oral Argument at page 37, Whole Women's Health v. Hellerstedt, 579 U.S. (2016)

Chapter 4: Same-Sex Marriage Case Law

The shared privacy and equality arguments of same-sex marriage and reproductive rights showcases the limitations of both doctrines for a feminist agenda. Early feminist legal scholars and activists for reproductive justice called for the unity of both movements, as they both dealt with themes of gender, sexuality, autonomy, and state protected sanctity. Mains and Poggi urged for a broader inclusiveness of reproductive rights after the *Casey* decision. The activities pointed out that, "Informed by feminism, reproductive freedom and gay liberation agendas aim for more than the acquisition of rights. Both movements call for a dismantling of traditional sex roles and for a radical change in social norms."[111] Inherent in rights discourse is the criticism that when you make an inclusionary argument before the Court, it comes with the cost of someone else being excluded. In law, there cannot in an "in" unless there is an "out". Women of color feminism has made this criticism and called for inclusion ever since Simone De Beauvoir started documenting the oppression of white middle class women as representative of

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[111] "United We Are Going to Get Somewhere" by Mains, Shelly and Poggi, Stephanie in Fried, Marlene Gerber. From abortion to reproductive freedom: Transforming a movement. South End Press, 1990.

every female experience.[112] With rights discourse, there is an “othering" of the group that doesn't get to be included in the new iteration of a call for change. The history of marriage equality informed the Courts concepts of privacy and equality that has consequences for the reproductive rights of women making a similar claim for abortion.

The roots of marriage equality can be traced back to the litigation strategies that first mobilized to get rid of sodomy laws. Sodomy laws date to colonial times as a effort to protect the sanctity of marriage.[113] The first court to ever define sodomy described certain sexual acts out of marriage as “vile and detestable.”[114] In the 1940s, all non-traditional forms of intercourse were criminalized. When the American Law Institute (ALI) developed the Model Penal Code in the 1970s, its understanding of abortion and sodomy had a ripple effect on state criminal law statues.[115] Embedded in it was a liberal notion that sodomy and abortion should not be criminalized. While only 14 states decriminalized abortion, states started dropping sodomy laws rapidly.[116] But this was not of concern for homosexual couples who did not have the protection of marriage to engage in sexual acts in privacy. In fact, the states that did not adopt the blanket Model Penal Code explicitly re-wrote their sodomy laws to exclude same-sex couples. So while

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[112] Bartkowski, Frances, and Wendy K. Kolmar. “Feminist Theory: A Reader.” McGraw-Hill Higher Education, 2010.

[113] Andersen, Ellen Ann. “Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation.” Ann Arbor: University of Michigan, 2005. Print

[114] Prindle v. State (1893)

[115] Andersen, Ellen Ann (2005)

[116] Andersen, Ellen Ann (2005)

sodomy laws were outdated for straight couples, they remained pertinent for same sex couples due to legal ideology rooted in morality.

Cases in reproductive rights gave the gay rights movement the legal hook they needed to bring sodomy laws to the Court. The right to privacy in *Griswold* was first articulated as a way to protect marital intimacy in the home. It was this appeal to intimacy within marriage that gave gay rights activists a way to speak to the Court about gay men and women's intimacy that also needed protecting. *Griswold* provided the hook to privacy and *Carey v. Population Services* (1977) explicitly linked privacy, abortion, and sodomy when Justice Brennan stated that "The Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits State statutes regulating private consensual sexual behavior among adults."[117] Here was an opportunity to revisit sodomy laws after failures to challenge the state statutes before. The outcomes of New York's *People v. Onofre* (1980) and Texas's *Baker v. Wade* (1982) gave gay rights litigators the opportunity to revisit sodomy reform under both a privacy and equality argument. Onofre was caught in his home engaging in sexual activity with his younger male partner. It was Onofre's private lawyer that tried to protect his client under his right to privacy and equal protection under the law. While the trial court denied these claims, the appeals court ruled in Onofre's favor asserting that his private morality was protected under the right to privacy and the state did not have compelling interest to intervene.[118] This was the first time a state sodomy law was struck down as applied for same-sex

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[117] Carey v. Population Services International, 431 U.S. 678 (1977)

[118] Andersen, Ellen Ann. "Out of the Closets and into the Courts : Legal Opportunity Structure and Gay Rights Litigation." Ann Arbor: University of Michigan, 2005. Print.

sexual acts. To give the litigators even more material, the Court ruled favorably for sodomy reform two years later. Baker, a teacher described as a "model citizen" but for his sexual orientation, also advocated for both his privacy and equality. The U.S. District Court agreed with Baker's case and drew the same comparison as Justice Brennan did between contraceptive use and sexual acts. The Court ruled that "the right of two individuals to choose what type of sexual conduct they will enjoy in private is just as personal, just as important, just as sensitive—indeed, even more so—than the decision by the same couples to engage in sex using a contraceptive to prevent unwanted pregnancy."[119] While this ruling was not representative of all, it is a good example of when gay rights litigators benefited from the legal precedent previously established by the reproductive rights movement.

The legal precedent, while not well established, was there for litigators to make both a privacy and equal protection argument against sodomy laws. Litigators debated about which argument to rest their case on and eventually went with the privacy argument—Hardwick was arrested in his own bedroom and no situation seemed more compelling as that to rest a privacy argument on. However, the plan failed as the Court viewed the privacy argument to exist in notions of family, marriage, and procreation rather than more individual notions of privacy. Thus, they ruled that there was no protected right for same-sex sexual activity. Gay men and women, as well as pro-abortion arguments, were seen as destroying the "social fabric" by attempting to disrupt the

[119] Baker v. Wade, 478 US 1022 (1986)

"maternal destiny" of women.[120] It would take convincing the Court that gay *couples* were deserving of state legitimacy to protect sexual intimacy for homosexuals. This strategy would exclude single gay men and women, or couples uninterested, unable, or unwilling to assimilate to the traditional "social fabric" marriage provided.

While the 1980s seemed bleak for both movements, the separate struggles of each showed the emerging strength within the gay rights movement. While this is a comparative legal history, it is important to note what was occurring in the political climate of the time period.[121] While reproductive rights were under attack by the New Right, "not a single state decriminalized sodomy in response to *Bowers*."[122] Meanwhile, abortion was made a wedge issue in the 1980 election and States were introducing, and still do, introduce an overwhelming amount of anti-abortion laws.[123]During the reign of the New Rights, feminist scholars again linked abortion rights with gay rights:

> "In both the propaganda and policies of the Right, hostility to women's autonomy is the unifying link between opposition to abortion and opposition to other feminist goals. Abortion rights are central to and have come to symbolize women's control. The Right opposes that control in the broadest sense. That is why they oppose sex education, government-funded contraception and family planning clinics, gay rights… But their fight against abortion is the most virulent, and they have made real gains."[124]

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[120] "United We Are Going to Get Somewhere" by Mains, Shelly and Poggi, Stephanie in Fried, Marlene Gerber. From abortion to reproductive freedom: Transforming a movement. South End Press, 1990.

[121] Goldberg, Suzanne B. "Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights." Colum. J. Gender & L. 29 (2015): 1.

[122] Andersen, Ellen Ann. "Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation." Ann Arbor: University of Michigan, 2005. Pg. 98. Print.

[123] Ziegler, Mary. "Beyond Backlash: Legal History, Polarization, and Roe v. Wade." Wash. & Lee L. Rev. 71 (2014): 969.

[124] Fried, Marlene Gerber. "From Abortion to Reproductive Freedom: Transforming a Movement." South End Press, 1990.

The Court had to keep on revising exactly how much a woman's privacy protected her right to an abortion, and in almost every case the protection encompassed less and less. While the blanket ruling of *Roe* created a ceiling for reproductive rights, it has also established a very conservative way of speaking about abortion rights that had more to do with the debate over the beginning of life and less to do with female autonomy. While the fight for abortion was in legal retreat, gay marriage litigators had the opportunity after *Bowers* to change the direction of their litigation.[125] A state-based strategy was a viable option for gay-rights advocates. The U.S. District Court's ruling in *Baker* was starkly different than the more dismissive ruling The Supreme Court made in *Bowers*. This was an indicator that the state constitution might be more inclusive to the rights of same-sex couples. Further, if the laws were litigated in state court, they would never reach the then hostile Supreme Court.[126]

Gay rights litigators from the ACLU and Lambda enacted this state-based litigation strategy after *Hardwick*. Each case challenged a sodomy law through a privacy argument. If the State's law only referred to same-sex acts, then the lawyers would bring an equality argument as well. There was not uniform success, but from 1992 to 2003, nine States struck down sodomy laws. By the time the Court heard *Lawrence v. Texas* (2002), the strategy of the litigators had changed. This time, the lawyers were bringing both a federal and a state claim, thus getting ready to go to The Supreme Court with

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[125] Andersen, Ellen Ann. Out of the Closets and into the Courts : Legal Opportunity Structure and Gay Rights Litigation.Ann Arbor: University of Michigan, 2005. Print.

[126] Andersen, Ellen Ann (2005) Pg. 100

sodomy reform again. Some scholars deemed Lambdas efforts towards sodomy reform and marriage equality a success after the introduction of the equal protection argument. Lawrence overturned Bowers "in sweeping terms that recognized the dignity and worth of lgb people."[127] What can be observed was that after litigants utilized equal protection within the Court, they started winning cases.

After litigants for same-sex marriage adopted a equality argument, their movement succeed much more than the reproductive rights movement that was under privacy. Justice Sandra Day O'Connor concurred in *Lawrence* stating that Texas's moral dislike of gays "is an interest that is insufficient to satisfy a rational basis review under the Equal Protection Clause."[128] From here, Lambda won the case and established precedent in *Lawrence v. Texas* (2003) on an equal protection argument. The same year, GLAD won its first marriage equality case in Massachusetts by only using a equal protection argument in *Good Ridge v. Department of Public Health* (2003).[129] The strength in the Equal Protection argument under a moral theme originated in the jurisprudence of reproductive rights. The privacy argument appeased the morality of normative sexual encounters, just as the equal protection argument for same-sex marriage appeased the traditional ideology in marriage. But just as privacy failed to secure women's autonomy in the face of anti-abortion legislation, so will equality. For gay rights, dealing with similar restrictions on sexuality, an Equal Protection argument based in the institution of marriage holds more legal ground when faced with disapproval from

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[127] Andersen, Ellen Ann (2005) pg. 121

[128] Lawrence v. Texas, 539 U.S. 558 (2003)

[129] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003)

judges. Yet if equality doctrine is adopted in this same logic by the reproductive rights movement, no real gains will be made towards sustaining an ideal of autonomy for women that is comparable to mens. I argue that this is because the concept of marriage that was used to inform the courts understanding of equality was an extension of the same private/public sphere logic that is ill suited to adequately provide women with the tangible rights necessary for full autonomy over their lives.

A. Marriage as a Heteronormative Institution and the Construction of Female Autonomy

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Gay rights and the surrounding scholarship on sexuality is much more than a focus on marriage. What started as a break from feminism, queer theory was suppose to challenge everything normative.[130] This certainly included the institution of marriage, which had been well interpreted by feminists as a tool of "'cultural regulation' and is not only a 'vehicle for public policy' but *the* vehicle by which the state shapes the public order into a 'gendered order.'"[131] Cott, Pateman, and Brown all established a critique of the institution of marriage as the states tool to keep the maternal role of women as the status quo. When marriage equality became the agenda for the gay rights movement, it

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[130] Jagose, Annamarie. "Feminism's Queer Theory." Feminism & Psychology 19.2 (2009): 157-174.

[131] Brandzel, Amy L. "Queering citizenship? Same-sex marriage and the state." GLQ: A Journal of Lesbian and Gay Studies 11.2 (2005): 171-204.; Nancy F. Cott, "Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century," in U.S. History as Women's History: New Feminist Essays, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish
Sklar (Chapel Hill: University of North Carolina Press, 1995), 107–21.

seemed almost counterintuitive for many activists. Throughout the legal and cultural fight for marriage equality, many notions of what equality is informed what a social movement was trying to make a singular discourse. Linking equality to the institution of marriage constructed not only what marriage was before the Court, but what notions of individual equality and privacy meant as well.

In *Goodridge,* the Massachusetts Supreme Court explicitly relied on the respectability of marriage to ground their rationale that same-sex couples should be allowed to enjoy this institution too. The Court decided that same-sex couples advocating for a right to marry "do not want marriage abolished. They do not attack the binary nature of marriage…" and thus there is no reason why they are denied to enjoy its protection. The Court ruled:

> "Without question, civil marriage enhances the 'welfare of the community.' It is a 'social institution of the highest importance.'…Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds…"[132]

This excerpt clearly shows the assumptions about the "binary nature of marriage" and the roles individuals play to maintain this social order that will only prevail if gay people are allowed into the institution of marriage. In a liberal political tradition, marriage provides the bedrock for competitiveness that continues the production of society. While the civil sphere is nasty towards citizens, marriage and its feminized and privatized nature sustains safety and wellbeing for citizens. Protection is derived from the private sphere, yet it cannot survive without a maternal figure in it.

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[132] Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)

Gay marriage sustaining the "binary nature" of marriage is important because it informs what protections the maternal figure receives as an individual. Indeed, many queer critiques have come out against marriage equality, pointing out the extremely exclusionary nature of its rights discourse and thereby illegitimacy of any other forms of intimacy that are not binary.[133] However, these critiques focus mostly on the economic side of the marriage argument and the effects neoliberalism has to freedom. Brandzel points out that "While it is true that same-sex-marriage advocates have critiqued the male/female and homosexual/heterosexual binaries latent in marriage, they have not attempted to undermine the sanctity of the domestic couple."[134] Yet while all of these critiques are important to the social movement, it has yet to inform the Courts rhetoric in its utility of the equality argument for marriage. For female individual rights, there are consequences of using the equality argument when this is its bedrock. Same-sex marriage discourse has informed the jurisprudence and thus the assumed status quo we live in. A status-quo that subordinates the feminine and disallows for women to be authors in their life. Married or not, white or not, straight or not, women are limited in their fluidity between the public and private. The feminine construction of individual autonomy derives from a logic that places deserving citizens as mothers in the home. While privacy is found behind closed doors of some assimilated married couples, it has not extended to women of all situations looking to make decisions about their bodies that yields the most integrity for *them*.

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[133] Conrad, Ryan, ed. "Against Equality: Queer Critiques of Gay Marriage." Against Equality Pub. Collective, 2010.

[134]Brandzel, Amy L. "Queering Citizenship? Same-Sex Marriage and The State." GLQ: A Journal of Lesbian and Gay Studies 11.2 (2005): 194.

VI: Conclusion

I write as an advocate for women and reproductive rights. What is the best constitutional basis for women's equality? To answer this question, I began by defining what I mean when I say equality. Given its many definitions and conceptions, I carved out a definition of gender equality that utilizes both liberal feminism and legal feminist theory: "every person should have the same freedom to structure his or her life" and you must apply leveled subjectivity to treat cases similarly in proportion to their differences. I followed the legal feminist methodology to uncover how the law negates difference to uphold the male norm. This discussion was critical for me to analyze what women need for equality in a patriarchy.

My hook into this feminist agenda was the prior research scholars such as Jill Lepore have started on the usefulness of the equality doctrine for the reproductive rights movement. Transparently, I began this research with the full intention of setting out to bolster the equality argument for a feminist agenda. But once I got to applying a feminist lens to the rhetoric of the Court, I discovered a unsettling yet freeing conclusion: no doctrine will be the feminist holy grail. It is far more important the arguments that litigants make and the focus drawn from these arguments that will reap benefits for women.

Partly this research has been a discovery of the traps our words can fall into when we try to push one agenda over another. Gender discrimination case law showed how pushing for equality without addressing gender difference left reproductive rights under a much more restrictive protection of privacy. And in same-sex marriage, the use of equality left us with a re-entrenchment of the private/public dichotomy. A binary that scholars such as Carole Pateman have shown this dichotomy's oppressive nature towards women. I conclude that the pitfall litigants and advocates ran into when utilizing the equality doctrine previously was a misconception of female autonomy. As stated above, for gender equality, there must be protected autonomy and leveled subjectivity. Gender discrimination case law used a "equality as sameness" approach, which resulted in a misapplication of leveled subjectivity. As seen in the pregnancy discrimination case law, women were left in the trap of having to prove their similarity to men as a prerequisite for equal treatment. Pregnant women were not able to do this due to the blatant exposure of their reproductive abilities, and thus received inadequate protection for being pregnant in the work place. The legal fight for same-sex marriage also utilized an equality argument that relied on the image of the feminine remaining in the private sphere. Both of these histories have contributed to a concept of female autonomy that does not result in gender equality.

In the recent arguments made by Justice Ginsburg in *Hobby Lobby* and *Hellerstedt*, there is a logical treatment of female autonomy that if followed, would deliver a robust delivery of women's equality. Currently, the reproductive rights movement is limited in the arguments it can make due to its roots in the privacy doctrine.

Thus, we must be very trepidacious in every argument inside and outside the Court. I have documented how the privacy doctrine has been criticized by feminists as being inherently oppressive to women and the equality doctrine has also contributed to female oppression through its negative right interpretation. However, there has been moments of genuine delivery and activism towards gender equality in both of these doctrines histories. Katheryn Kolbert's oral argument to the Court in *Casey* relied on rhetoric in *Griswold* that recognized that a woman cannot be truly equal in society without full control over her reproductive health life. *Casey* asked the Court to determine how abortion restrictions explicitly take away female autonomy over her own body and reproductive decisions. Casey resulted in the undue burden standard, which subsequently turned the abortion debate to be more focused on the protection of fetal life, rather than women's autonomy. But in *Hellerdest*, Justice Ginsburg applied the undue burden standard in a new light. Instead of asking if the abortion restriction limits women, the Justice asked how it explicitly helps women. Our basis of review should strive for a affirmative protection of women, not just a limiting harm to them. This logic utilizes a positive concept and affirmative protection of female autonomy.

I argue for a legal path forward that is not tied to any one doctrine as a source of gender equality and substantive reproductive rights. The literature, and my own analysis, leads me to believe that it is far more important to weigh what logic is available within the Court against the necessary advocacy that must be done for a cause. I believe that the use of equality and privacy doctrine have worked against the reproductive rights movement with the hope of speaking the Courts language to itself. The tyranny of

absolutes, the masculine norm of law, and the perceived threat to the status quo that is innate in an ask for abortion rights all work against the reproductive rights movement. Yet, the history has shown me that advocating for women with the goal of a robust delivery of gender equality is possible, even within these conditions. In an ideal world with progressive legal, cultural, and political conditions, I envision a very different legal approach than the one I see as possible right now. I believe that a positive approach to equality is the highest level of affirmative protection reproductive rights advocates can work towards in a liberal political system. Demanding contraception coverage, abortion access, childcare, maternity leave, and welfare programs to accommodate for women's reproductive capabilities is the most inclusive way to make genuine authorship and autonomy for women a reality. But we are far from living in this world, and I am aware of that. Yet I believe that working with that legal basis as the goal can inform the movements language and legal decisions. If we cannot have positive equality now, that does not mean we need to continue to work along the logic that has already worked against the movements goal. Curtailing arguments and doctrine to advance women's position, resources, respect, individualism, and autonomy is the way forward. For now, I have documented what the limitations and strengths of the privacy and equality doctrine are for the reproductive rights movement. I acknowledge that my analysis has only been on these limited histories so far, yet I conclude with a freeing notion-doctrine should not be treated as a linear way of thinking about reproductive rights. Reproductive rights is a highly variable and dynamic concept, unique and essential for every women's autonomy. Such a robust aspect of life, the very continuation of life, should not be restricted to

limited concepts of any doctrine the Court has developed thus far. Every argument should work towards creating inclusive precedent, rather than refining the argument to the norms already prevailing in law and culture. Legally, I believe a positive rights iteration gives even privacy this possibility- as seen in the work of Justice Ginsburg.

At the beginning of this thesis, I wished to find hope in the synergy between equality and privacy frameworks that if used together, can give way to a robust concept of female autonomy that will advance the feminist goal of articulating what gender equality requires in a patriarchy. I conclude that at all criticisms and successes of privacy and equality doctrine weave into the suppression and protection of female autonomy. At the intersection of privacy and equality positive rights, there is a robust concept of autonomy that would free women from the private sphere and allow for a dismantling of the private/public gendering that works to limit femininity.