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Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion

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TAKING CARE SERIOUSLY: RELATIONAL FEMINISM, SEXUAL DIFFERENCE, AND ABORTION

DONALD P. JUDGES*

Relational feminism, which celebrates a uniquely feminine approach to moral problem solving that embodies an "ethic of care," has been criticized by feminist writers who fear that its endorsement of traditionally feminine traits will impede women's progress toward equality and threaten women's reproductive freedom. In this Article, Professor Donald Judges argues that there is an overlooked middle ground between the view of feminists who advocate a rights-based approach to reproductive freedom and the relational feminists' care-based perspective. The author suggests that relational feminism's concept of care and connection, when developed to its fullest potential, can yield beneficial support for abortion rights. He concludes that a richer account of relation and care can supplement our conception of the constitutional values of autonomy and equality, and thereby enhance claims for abortion rights based on those values. Professor Judges urges relationists and anti-relationists to abandon the contrived conflict between rights- and care-based theories, and instead, to develop relationalism's potential to make a positive contribution to the case for abortion rights.

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INTRODUCTION

The power to describe can mean the power to control.¹ The

1. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 506 (1993); John Hardwig, *Should Women Think in Terms of Rights?*, 94 ETHICS 441, 449 (1984); Donald R. Kinder & Lynn M. Sanders, *Mimicking Political Debate with Survey Questions: The Case of White Opinion on Affirmative Action for Blacks*, 8 SOC. COGNITION 73, 74 (1990). "One of the prerogatives of the dominant class is that it gets to define what is real and what is good. The prevalent pictures and models are those generated by the dominant class, generally in the perceived interest of the dominant class." Hardwig, *supra*, at 449. Social scientists, as well as political operatives, have recognized that how discourse around a policy is framed heavily influences how the public receives that policy.

[F]rames lead a double life: they are internal structures of the mind that help individuals to order and give meaning to the dizzying parade of events they witness as political history unfolds; they are also devices embedded in political discourse, invented and employed by political elites, often with an eye on advancing their own interests or ideologies, and intended to make favorable interpretations prevail.

socially salient definition of “man” and “woman”—whether from a biological, psychological, political, or philosophical perspective—has until recently been largely the creation of men. The result has been descriptions of sexual difference that have sometimes served to justify the subjugation of women.² This legacy has led to a fundamental conflict among feminists, whose common goal is to eliminate male domination—including a kind of semiotic domination by description.

On the one hand, emphasis on women’s role in human reproduction and stereotypic descriptions of women—as less inclined to rational, abstract, and universalizable thought than men; as more nurturing, relational, and particularistic; and as more inclined to sacrifice principle in the name of care—have been deployed to justify women’s confinement to the domestic sphere (especially in the role of childbearer and childrearer) and their exclusion from many important aspects of public life.³ Accordingly, some feminists have sought equality by deconstructing the concept of difference and denying attributes stereotypically defined as feminine (especially those commonly associated with motherhood, such as nurturance).⁴

On the other hand, there are feminists who celebrate rather than deny sexual difference. Prominently associated with this view is Carol Gilligan, who has observed that the historical exclusion of women’s perspectives has impoverished prevailing descriptions of moral development.⁵ She and others assert that there is a uniquely

Kinder & Sanders, *supra*, at 74.

In short, it is the ability to apply the dualistic labels, and to thereby invoke an entire set of associations that go with them, that enables those with social power in society to believe, and to convince others, that the position they enjoy and the power they wield are natural and just. That is, the power to define others—to affect how they are perceived—is the power to control them.

Ehrenreich, *supra*, at 506.

2. Sylvia J. Yanagisako & Jane F. Collier, *The Mode of Reproduction in Anthropology*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 131, 137 (Deborah L. Rhode ed., 1990) (“A central dimension of male domination in most, if not all, societies is men’s authority to define their actions and the social relations they organize as constructing culturally valid collectivities.”).

3. E.g., Susan Moller Okin, *Thinking Like a Woman*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 145, 145-50.

4. *Id.* at 151-52.

5. Gilligan’s research was in part a response to the exclusion of a feminine perspective from samples used to derive theories of moral development, principally those of Lawrence Kohlberg and Jean Piaget, and to the corresponding perception that women’s moral development was being prejudicially evaluated by a male-centered standard. See *infra* notes 27-29 and accompanying text. Gilligan discovered a “disparity between women’s experience and the representation of human development, noted throughout the psychological literature, [that] has generally been seen to signify a problem in women’s

feminine approach to moral problem solving that embodies an "ethic of care," based on relationship and responsibility, and that stands in stark contrast to what she describes as a typically masculine approach that emphasizes the logic of abstract rights and justice. Under the gendered version of this dichotomy, women tend to value intimacy and connection and to define themselves in terms of their relationships to others; men tend to value separation and autonomy and to define themselves in terms of their personal achievements.⁶ For these "relational feminists,"⁷ women's disadvantage results not from the recognition of difference but from a male-constructed hierarchical ordering of values that places feminine attributes in an inferior position. In their view, denial of difference in our pervasively gendered culture inevitably would result in the further devaluation of women's experience.⁸

A number of legal scholars have drawn prescriptive inferences from this (partly) descriptive work. They have associated the masculine logic of justice described by Gilligan with what Robin West calls "liberal legalism," in which the atomistic holder of negative rights is insulated "against the judgment, scrutiny, sympathy, or simple understanding of presumably hostile dictators, majorities, communities, or fellow citizens."⁹ They also have linked Gilligan's ethic of care and relation to an approach to legal problem solving that includes responsibilities as well as rights, connection rather than separation, and community rather than stark individualism. These scholars have suggested that the world might be a better place if the

development." CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-2 (1982). Gilligan concluded that this disparity resulted from the exclusion of women from prevailing descriptions of moral development, producing "a limitation in the conception of human condition [and] an omission of certain truths about life." *Id.*

6. Whether these gender types correlate to sexual identity is problematic. See *infra* notes 79-106 and accompanying text.

7. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 140 (1987) [hereinafter West, *Women's Hedonic Lives*] ("Women's lives are *not* autonomous, they are profoundly relational."). West subsequently characterized this branch of feminist theory as "cultural feminism," to indicate its prevalent status in feminist thinking. Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988) [hereinafter West, *Jurisprudence & Gender*].

8. See *infra* notes 18-29 and accompanying text.

9. Robin L. West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 71 (1990) (footnotes omitted). For a discussion of West's views, see *infra* notes 56, 263 and accompanying text.

“feminine voice” were heard more clearly in the discourse that structures legal relations.¹⁰

Not surprisingly, endorsement of traditionally feminine qualities has drawn criticism from feminist writers who fear that it will retard women’s progress toward equality.¹¹ Recently, several legal scholars have argued in particular that the “ethic of care” may threaten abortion rights.¹² For example, Pamela Karlan and Daniel Ortiz contend that relational feminism’s emphasis on connection and responsibility makes defending abortion difficult.¹³ Elsewhere, Linda McClain suggests that “[a]bortion may be the most difficult test case for the translation of the relational approach and the ethic of care into substantive law. Ironically, recognizing a duty to aid that is derived from a feminist ethic of care and responsibility might threaten women’s reproductive freedom.”¹⁴ Both articles look to traditional forms of autonomy-talk to protect abortion rights.¹⁵

This Article argues that between these two camps lies an overlooked middle ground, exploration of which would yield valuable support for abortion rights. The real threat to equality and abortion rights derives not from recognition of care and connection as intrinsically fructuous values but from a cramped conception of the content of those values. This problem is partly abetted by relationalism’s preoccupation with sexual difference and its correlative group-based perspective. If care about individuals is regarded as worthy in itself, and not necessarily as an exclusively or even predominantly female concern, then a robust ethic of care would insist not only on care *by*, but also care *for*, unwanted pregnant women¹⁶ as people intrinsically worthy of care. The “anti-relationalist” objection, for its part, simultaneously places too much faith in more individualistic, neutralist defenses of abortion and overlooks an ethic

10. See *infra* notes 51-56 and accompanying text.

11. See *infra* notes 57-76 and accompanying text.

12. For a discussion of the division in feminist opinion on the issue of abortion rights, see Ronald Dworkin, *Feminism and Abortion*, N.Y. REV. BOOKS, June 10, 1993, at 27.

13. Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 N.W. U. L. REV. 858, 870-90 (1993).

14. Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1242 (1992).

15. McClain also includes equality-based arguments in her discussion of abortion rights. See *id.* at 1259-61.

16. I use this term throughout to refer to women facing an unwanted pregnancy. I intend “unwanted” to describe only their predominant position with respect to their pregnancy; I do not imply the absence of ambivalence about pregnancy or any characterization of their feelings or attitudes with respect to any other aspect of their lives.

of care's potential to reinforce autonomy- and equality-based claims to abortion rights. This Article considers how a richer conception of care could enhance the case for abortion rights. I argue that if real-world results are what matter,¹⁷ we should transcend this contrived conflict between supposed theoretical antinomies of sexual difference and make of both perspectives the practical best they can be in addressing the abortion issue.

Part I of this Article briefly describes Gilligan's influential work, the legal scholarship of relational feminists, and recent criticisms of those writings as applied to abortion rights. Part II suggests that relationalism sometimes stumbles in translating observations concerning sexual difference into policy decisions and interpretive theory, thereby feeding the fears of the anti-relationalists. I argue that ultimately the more important question is not the sexual distribution of an ethic of care, but the content and application of that ethic itself. Conversely, Part III challenges the anti-relationalists' endorsement of a more "masculinist" paradigm and argues that autonomy- and rights-talk standing alone fail to provide an adequate foundation for abortion rights.

Part IV explores the content of an ethic of care and contrasts it with rights. I explain that the perceived conflict between rights- and care-based perspectives results from a failure to bridge the gap between personal and impersonal relations. I suggest that particularistic care, which provides an ethical basis for regulating behavior in close personal relations, is replaced by abstract universalized rights in the impersonal realm. I propose that rights—including those relating to abortion—might usefully be interpreted to resemble more closely what they are a substitute for. In other words, care in the relationalist sense, which requires specific interpersonal encounters with others, is by definition out of its element in the impersonal, institutionalized, public sector. But we can still ask what a caring person "would like to have done," and thus seek care-like considerations, in defining the scope of rights in a given situation.

Part V shows how this approach might support recognition of abortion rights, a result consistent with the pro-choice orientation of some prominent relationalists. Part VI applies this framework to

17. This criterion is implicit in the result-orientation of both the Karlan and Ortiz and the McClain articles. The Karlan and Ortiz article is especially opaque on the issue of interpretive theory. See *infra* part III.B. (discussing masculine/feminine distinction and constitutional interpretation).

several Supreme Court abortion rights cases and demonstrates how the present injustice and inequality in the distribution of access to abortion has resulted in spite of, and in some instances directly because of, the dominance of the masculinist paradigm endorsed by the anti-relationalists.

I. RELATIONAL FEMINISM

A. *Who cares?*

Women do, men don't—according to the common understanding¹⁸ of Carol Gilligan's book, *In a Different Voice: Psychological Theory and Women's Development*.¹⁹ Gilligan and others have suggested that women and men view moral problems and human relationships in fundamentally different ways.²⁰ This "moderate" version, which has been so influential that Robin West has termed it the "official story" of feminism,²¹ "neither reject[s] male thought

18. E.g., West, *Women's Hedonic Lives*, *supra* note 7, at 140.

19. GILLIGAN, *supra* note 5.

20. E.g., NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 92-93 (1978); DOROTHY DINERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE 5-9 (1987); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 97 (1984) [hereinafter NODDINGS, CARING]; SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 7-12 (1989); Carol Gilligan, *Prologue: Adolescent Development Reconsidered*, in MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION vii (Carol Gilligan et al. eds., 1988) [hereinafter Gilligan, *Adolescent Development*]; Carol Gilligan, *Remapping the Moral Domain: New Images of Self in Relationship*, in MAPPING THE MORAL DOMAIN, *supra*, at 3; Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in MAPPING THE MORAL DOMAIN, *supra*, at 74; D. Kay Johnston, *Adolescents' Solutions to Dilemmas in Fables: Two Moral Orientations—Two Problem Solving Strategies*, in MAPPING THE MORAL DOMAIN, *supra*, at 50; Nona Plessner Lyons, *Two Perspectives: On Self, Relationships, and Morality*, in MAPPING THE MORAL DOMAIN, *supra*, at 23; Nel Noddings, *Ethics from the Standpoint of Women*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 160 [hereinafter Noddings, *Ethics*].

21. West, *Jurisprudence and Gender*, *supra* note 7, at 15. It might be more historically precise to characterize Gilligan's brand of feminism as an effort to synthesize two "intertwined strands" of feminist thought, which Karen Offen has labelled "relational" and "individualist" feminism. Karen Offen, *Feminism and Sexual Difference in Historical Perspective*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 13, 18. What she calls relational feminism "emphasizes the family, the couple, or the mother/child dyad as the basic social unit of the nation. . . . The requirements of community, not the needs of the individual, dictate[] the sociopolitical program, and what some call *womanliness* and others *femininity* was asserted as an enduring and worthy social characteristic." *Id.* In the other strand, "[p]hysiological differences and hence sociopolitical differences are muted, and equality of individuals and their claim to certain

'rights' or entitlements, based on an eighteenth-century model devised for male heads of households (not single men), is uncompromisingly asserted. Within individualist feminism womanly qualities are necessarily downplayed." *Id.* As discussed below, Gilligan's relational feminism attempts to recognize traditionally feminine qualities as morally worthy while asserting a claim to the moral value of female self-determination.

There are, however, other feminist perspectives. For example, Okin organizes the other principal feminist perspectives into two general categories. One shares the traditional view of women as "intellectually limited, overemotional, and partial in their perspective," but locates the source of those attributes politically in women's subordination rather than biologically in an intrinsically "feminine" nature. Okin, *supra* note 3, at 151. Okin identifies John Stuart Mill (applying the term "feminist" rather loosely in his case) and Simone de Beauvoir with this view. *Id.* at 152. Women will be liberated, these writers argue, when they "live as men do, independent and individual, in the previously male—and presumably always predominantly male—world of reason and transcendence." *Id.* At the opposite end of the ideological spectrum is a range of feminists who, while agreeing that women's thinking is more subjective, emotional, and particular, contend that it is also superior to men's thinking—which they see as the cause of most of what is wrong with the world. The more extreme version of this perspective asserts that "phallogocentric, logocentric thinking has dominated Western philosophy and literature because of its patriarchal social context and that it is the enemy, to be rejected or overturned in favor of female (preferably homosexual) thinking." *Id.* at 152-53.

In her *Jurisprudence and Gender* essay, Robin West describes feminist theory of human ontology as "sharply divided" into two camps: relational (which she calls "cultural") feminism and "radical" feminism. West, *Jurisprudence & Gender*, *supra* note 7, at 28. She divides "masculinist" jurisprudence into liberal legalism and critical legalism. The foregoing review of Gilligan's theory captures the essence of what West characterizes as the "official" masculinist and feminist stories:

Whereas according to liberal legalism, men value autonomy from the other and fear annihilation by him, women, according to cultural feminism, value intimacy with the other and fear separation from her. Women's sense of connection with others determines our special competencies and special vulnerabilities, just as men's sense of separation from others determines theirs. Women value and have a special competency for intimacy and nurturance, and relational thinking, and a special vulnerability to and fear of isolation, separation from the other, and abandonment, just as men value and have a special competency for autonomy, and a special vulnerability to and fear of annihilation.

Id. Her account of the "unofficial" stories summarizes the "other," radical feminist view: Against the cultural feminist backdrop, the story that radical feminists tell of women's invaded violated lives is "subterranean" in the same sense that, against the backdrop of liberal legalism, the story critical legal theorists tell of men's alienation and isolation from others is subterranean. According to radical feminism, women's connection to others is the source of women's misery, not a source of value worth celebrating. For cultural feminists, women's connectedness to the other (whether material or cultural) is the source, the heart, the root, and the cause of women's different morality, different voice, different "ways of knowing," different genius, different capacity for care, and different ability to nurture. For radical feminists, that same potential for connection—experienced materially in intercourse and pregnancy, but experienced existentially in all spheres of life—is the source of women's debasement, powerlessness, subjugation, and misery. It is the cause of our pain, and the reason for our stunted lives. Invasion and intrusion, rather than intimacy, nurturance and care, is the "unofficial" story of women's subjective experience of connection.

entirely nor seek[s] to reverse totally the patriarchal valuing of men's thinking over women's"; it also regards difference as a product of a "gendered social structure," rather than of biology.²²

The traditional "male-stream" perspective, including the views of psychologist Lawrence Kohlberg, "regard[s] women's moral peculiarities as functional for the private life of the patriarchal family, though not for political life."²³ Challenging Kohlberg's theory of moral development is a central focus of Gilligan's effort to describe a feminine perspective on morality.²⁴ Under his hierarchical system, which equates higher moral development with impartial, universalizable, abstract justice,²⁵ "the thinking of women is often classified

Id. at 28-29.

22. Okin, *supra* note 3, at 154.

23. *Id.* at 145, 148. For example, the writings of Plato, Hegel, Bentham, and Freud reflect the belief that

men's judgment is based on reason, but women's is based on sympathy and feelings, especially for the members of their families; that therefore they cannot be expected to uphold the principle of utility, the consideration for the happiness and suffering of all on which all good government and law must be built. While admirably suiting them for dedication to their families, their essential incapacity to universalize their moral judgments makes them a subversive force in the political arena.

Id. at 147 (paraphrasing JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 64 (J.H. Burns & H.L.A. Hart eds., 1970) (1789).

24. According to Gilligan, the point of reference for Kohlberg's six-stage theory of moral development is "conventional morality," which equates the right with existing norms. GILLIGAN, *supra* note 5, at 73. Thus, "preconventional judgment [stages one and two] is egocentric and derives moral constructs from individual needs; conventional judgment [stages three and four] is based on the shared norms and values that sustain relationships, groups, communities, and societies; and postconventional judgment [stages five and six] adopts a reflective perspective on societal values and constructs moral principles that are universal in application." *Id.*

Stages three through six are especially relevant to the issue of difference because Kohlberg found that many more men than women progress past stage three. Okin, *supra* note 3, at 149. At stage three, moral judgment is concerned with earning the approval of others by "being nice," by having good intentions, and by conforming one's behavior to the majority's stereotypical expectations. *Id.* Stage four consists of respect for law and order, established authority, and existing moral imperatives. *Id.* At stage five, the individual begins to see the possibility of modifying prescripts to achieve a desired end (such as enhanced utility) but remains committed to a legalistic approach to moral decisions (such as the refinement of procedural devices for shaping law). *Id.* At the sixth, most liberal stage, the moral agent acts on the basis of "self-chosen ethical principles," which are "universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individuals"; the legitimating characteristics of those principles are "logical comprehensiveness, universality, and consistency." *Id.* at 149; see LAWRENCE KOHLBERG, 1 ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 409-12 (1981).

25. Gilligan's writing prompted Kohlberg to speculate whether a yet higher stage of moral development might be reached which encompasses both care and justice. Kohlberg

with that of children."²⁶ Whereas Kohlberg originally based his theories of moral development on an all-male sample,²⁷ Gilligan's study included women; in comparison to prevailing models of moral development, "the women's voices sounded distinct."²⁸ Gilligan's work has helped both to describe that difference and to suggest that the cropped picture of women's moral development that emerges from Kohlberg's scale may reflect, not inadequacy in women's moral thinking, but a deficiency in his theory of moral development.²⁹

The presentation of sexual difference in moral development for which Gilligan seems to be best known derives from her "rights and responsibilities" study.³⁰ To illustrate her theory, she describes the responses of Jake and Amy, two bright and articulate eleven-year-olds, to one of Kohlberg's hypothetical moral dilemmas and to more focused questions about moral conflict, choice, and self. Jake approaches the dilemma, in which a man named Heinz contemplates whether to steal a life-saving drug which he cannot afford to buy for his dying wife, as a conflict between life and property that can be resolved by relying on abstraction, logic, hierarchical ordering of

concluded, however, that the moral resolution of justice problems must remain rooted in Stage 6 fairness principles. Okin, *supra* note 3, at 150 (citing LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 353-54 (1981)).

26. GILLIGAN, *supra* note 5, at 70.

27. Kohlberg's work originally was based on a 20-year longitudinal study of 84 boys. *Id.* at 18. Jean Piaget's work also focused almost exclusively on males; indeed the index to his study of child moral development "omits 'boys' altogether because 'the child' is assumed to be male." *Id.* (quoting JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 39 (1932)).

28. *Id.* at 1.

29. Okin, *supra* note 3, at 156-57. According to Gilligan, "the failure of women to fit existing models of human growth may point to a problem in the representation, a limitation in the conception of human condition, an omission of certain truths about life." GILLIGAN, *supra* note 5, at 2.

30. Three studies formed the basis for Gilligan's ideas on moral development and the contrast between an ethic of responsibility or care and an ethic of rights or justice. GILLIGAN, *supra* note 5, at 2, 17-22. The "abortion study" interviewed 29 women, whom Gilligan claimed were ethnically and socially diverse, who were considering first-trimester abortion. *Id.* at 3. They were not selected based on any particular views about abortion, but Gilligan believed that they were "in greater than usual conflict over the decision." *Id.* at 72. The "college student study," like the abortion study, asked the subjects to describe their experience of moral conflicts and self, rather than presenting them with specific problems for resolution. *Id.* at 2-3. Both studies also included follow-up interviews. *Id.* The third study, which Gilligan termed the "rights and responsibilities study," also collected responses to hypothetical moral dilemmas. *Id.* at 3. The sample included pairs of males and females matched according to age, intelligence, and socioeconomic variables at various points in the life cycle from ages six to 60. *Id.*

values, and law.³¹ He concludes that Heinz should steal the drug and that if Heinz is caught, the judge should take Heinz's dilemma into account in sentencing him. While Jake's eleven-year-old's judgment places him in Kohlberg's conventional category, his application of deductive logic, distinction between morality and law, and perception that law can err all reflect a developing autonomy that tends toward the higher stages of Kohlbergian moral maturity.³²

Amy's responses reveal a different approach to moral dilemmas.³³ She sounds unsure about whether Heinz should steal the drug, and does not quantitatively weigh property rights against the value of human life but instead qualitatively assesses the effect that Heinz's actions might have on his relationship with his wife.³⁴ Amy searches for an alternative that will protect that relationship and suggests that if Heinz and the druggist could only communicate, the druggist might realize the wife's needs and work out some solution other than Heinz's stealing the drug. Amy thus constructs the problem as "a narrative of relationships that extends over time" and views the dilemma as arising "not from the druggist's assertion of rights but from his failure of response."³⁵ Where Jake sees a conflict between competing claims that is to be mediated by math-like logic and law, Amy sees a "a fracture of human relationship that must be mended with its own thread" through communication.³⁶

31. *Id.* at 26. For example, at one point Jake appears as an 11-year-old utility maximizer who weighs the cost of a lost life against the cost of lost property. *Id.*

32. *Id.* at 27. In evaluating Jake's response, Gilligan explains:

In resolving Heinz's dilemma, Jake relies on theft to avoid confrontation and turns to the law to mediate the dispute. Transposing a hierarchy of power into a hierarchy of values, he defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims. In this way, he abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute.

Id. at 32.

33. *Id.* at 27-28. Of course, if Amy's perspective were considered the baseline of moral development, we would describe Jake's perspective as "different." See *supra* note 1.

34. *Id.* at 28. For example, Amy worries that if Heinz is caught and goes to prison, his wife might have a relapse and would have no one to care for her and no way to obtain more medicine. *Id.*

35. *Id.* at 28-29.

36. *Id.* at 29-31. One might object that Gilligan fails to address the possibility that Jake too would have preferred to solve the dilemma by, in effect, changing the facts of the hypothetical, but instead decided to cooperate with the implicit assumption that no amount of communication would save the life of Heinz's wife. See *id.* at 29. Gilligan does visit this issue in her discussion of challenges that other subjects explicitly raised to Heinz's dilemma. See *infra* notes 41-43 and accompanying text.

To Gilligan, Amy's responses reflect moral and cognitive maturity expressed through an ethic of care (just as Jake's do through the logic of justice). Measured against the Kohlbergian standards of moral autonomy, however, Amy's emphasis on relationship, communication, and nonviolent conflict resolution appears naive and powerless. She seems unable to reason systematically about moral problems, unwilling to challenge existing authority structures, and reluctant to act affirmatively to save a life.³⁷ This places her substantially behind Jake on Kohlberg's scale.³⁸ Under Kohlberg's view, Amy appears to be evading the dilemma; to Gilligan, however, Amy's approach has an intrinsic moral value that Kohlberg's theory fails to appreciate.³⁹

The subjects' responses to more general questions about self and morality also reveal different perspectives. Jake's description of self is premised on an "abstract ideal of perfection" and separation from others; responsibility to him means socialization in a world where "you have to live with other people."⁴⁰ Gilligan concludes that Jake "seeks rules to limit interference and thus to minimize hurt. Responsibility in his construction pertains to a limitation of action, a restraint of aggression. . . . Thus rules, by limiting interference, make life in a community safe. . . ." ⁴¹ By contrast, Amy "proceed[s] from

37. GILLIGAN, *supra* note 5, at 30.

38. *Id.* Gilligan noticed that the interviewer seemed to have trouble even hearing Amy's responses. *Id.* at 29. Kohlberg's conception assumes that the key questions are whether Heinz should steal the drug and by what justification. *Id.* at 31. Amy's interviewer reacted to her unexpected responses by repeating the questions over and over with evident frustration, as though Amy's answers were either not heard or were incorrect, until the 11-year-old's confidence and the coherence of her responses crumbled. *Id.* at 28-29. This breakdown in communication, which resulted in the interviewer's resort to domination, derived from the interviewer's (and Kohlberg's) failure to understand that Amy had reconstructed the moral dilemma from a self-contained problem in logic to a dialogue about relationships and responsibility, yet it is Amy's responses that were judged to be inadequate. *Id.* at 29-31.

39. *Id.* at 30-32. Contrasting Amy's response with Jake's, Gilligan asserts:

Her incipient awareness of the "method of truth," the central tenet of nonviolent conflict resolution, and her belief in the restorative activity of care, lead her to see the actors in the dilemma arrayed not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend. Consequently her solution to the dilemma lies in activating the network by communication, securing the inclusion of the wife by strengthening rather than severing connections.

Id. at 30-31.

40. *Id.* at 37.

41. *Id.* at 37-38. This difference in themes of separation and connection is highlighted in a study of the imagery of violence in college students' responses to pictures on the Thematic Apperception Test. *Id.* at 39. Gilligan and her associates found not only a higher incidence of violent images in male responses, but also sex differences in the

a premise of connection." To her, "responsibility signifies response, an extension rather than a limitation of action. Thus it connotes an act of care rather than the restraint of aggression."⁴² More generally, Gilligan found that women tend to see morality as defined by a responsibility to recognize and to meet the need for care; men tend to see it as a negative command to respect others' rights to noninterference with life and self-fulfillment.⁴³

substance of violent fantasies, which indicated differences in how men and women perceive social danger and relationships. *Id.* at 39-46. The study concluded that images of violence (and presumably perception of danger) in men's stories increase as characters in the test pictures were brought closer together, while such images in women's stories increased as the characters were moved further apart. *Id.* at 42. Gilligan's analysis identifies a fundamental difference in outlook:

The prevalence of violence in male fantasy, like the explosive imagery in the moral judgment of the eleven-year-old boy and the representation of theft as the way to resolve a dispute, is consonant with the view of aggression as endemic in human relationships. But these male fantasies and images also reveal a world where connection is fragmented and communication fails, where betrayal threatens because there seems to be no way of knowing the truth. . . .

Thus, although aggression has been construed as instinctual and separation has been thought necessary for its constraint, the violence in male fantasy seems rather to arise from a problem in communication and an absence of knowledge about human relationships. But as eleven-year-old Amy sets out to build connection where Kohlberg assumes it will fail, and women in their fantasies create nets of safety where men depict annihilation, the voices of women comment on the problem of aggression that both sexes face, locating the problem in the isolation of self and in the hierarchical construction of human relationships.

Id. at 45. This difference gives rise to differences in perspectives on rules: women are willing to change the rules to preserve relationships, while men, "in abiding by these rules, depict relationships as easily replaced." *Id.* at 44.

42. *Id.* at 38. Gilligan's report on the responses of Claire, a participant in the college student study, further illustrates the discrepancy between Kohlbergian moral maturity and the ethic of care. See *id.* at 51-62. Like Amy, Claire defines responsibility in terms of one's recognition of another's need and one's ability to provide a response. *Id.* at 53-54. In Claire's view, Heinz's obligation to his wife arises not from his affection for her, but from his awareness of her need. *Id.* at 54. In her first interview, Claire scored a four on Kohlberg's scale because of her ability to articulate the law in a systematic way. *Id.* In a follow-up interview five years later, however, her score actually *regressed*, even though she had resolved her own personal crisis and had achieved a much deeper understanding of her own identity. *Id.* at 55-56. She became impatient with Heinz's dilemma, seeing the druggist's claim to property rights as contradicting her conception of social reality as "a web of interconnection where 'everybody belongs to it and you all come from it.'" *Id.* at 57. This perspective caused her to "challenge[] the premise of separation underlying the notion of rights and [to] articulate[] a 'guiding principle of connection.'" *Id.* She thus conceived of morality as "the constant tension between being part of something larger and a sort of self-contained entity," and she saw the ability to live with that tension as the source of moral character and strength." *Id.*

43. See *id.* at 37-51. This theme also emerged in the college student study. See *id.* at 61-105. Gilligan's ethic of care in that study would further reconstruct Heinz's dilemma, attempting to particularize and to flesh out the context in order to engage the compassion

Gilligan's study of women's experience in making the abortion decision demonstrates an ethic of care in the context of women's special circumstances and seeks to synthesize the values of connection and autonomy.⁴⁴ She notes that

the exercise of such choice brings [a woman] privately into conflict with the conventions of femininity, particularly the moral equation of goodness with self-sacrifice. Although independent assertion in judgment and action is considered to be the hallmark of adulthood, it is rather in their care and concern for others that women have both judged themselves and been judged.⁴⁵

The insight that abortion poses "a dilemma whose resolution requires a reconciliation between femininity and adulthood" led Gilligan to suggest a three-part theory of moral development under which a woman's moral maturity is determined not by the outcome of the abortion decision, but by her commitment to protect self and others from exploitation and hurt, by the scope of her care, and by the integrity of her choice.⁴⁶ According to Gilligan's theory, a woman's

and tolerance that she sees as characterizing women's moral thinking. *See id.* at 95-96. Viewed this way, the ethic of care would challenge the assumed necessity of rendering a moral judgment on Heinz's conduct—which is the exclusive focus of Kohlberg's approach—and would instead shift the focus to the harm created by the dilemma itself and to Heinz's decision whether to sacrifice himself:

The morality of Heinz's theft is not in question, given the circumstances that necessitated it. What is at issue is his willingness to substitute himself for his wife and become, in her stead, the victim of exploitation by a society which breeds and legitimizes the druggist's irresponsibility and whose injustice is thus manifest in the very occurrence of the dilemma.

Id. at 103. Gilligan ultimately condemns the "blind willingness to sacrifice people to truth" and the "danger of an ethics abstracted [sic] from life" that can result from an extreme application of the logic of justice. *Id.* at 104. As an example, she contrasts the story of Abraham, who was prepared to sacrifice the life of his son to prove his faith, with "the woman who comes before Solomon and verifies her motherhood by relinquishing truth in order to save the life of her child." *Id.* at 104-05; *see also* NODDINGS, CARING, *supra* note 20, at 43-44 (analyzing the story of Abraham and Isaac).

44. *See, e.g.*, GILLIGAN, *supra* note 5, at 71-97. Curiously, Gilligan's abortion study, which takes up most of *IN A DIFFERENT VOICE*, received little attention in the law reviews until the Karlan and Ortiz critique. *See* Karlan & Ortiz, *supra* note 13, at 860-71.

45. GILLIGAN, *supra* note 5, at 70.

46. *See id.* at 73-74. The experience of 25-year-old Sarah, who faced the decision whether to have a second abortion, reflects a transition through all three perspectives and illustrates the importance of self-concept to a mature ethic of care. *See id.* at 91-95. Feeling that having a second abortion would be emotionally unbearable—it would make her feel like a "walking slaughter-house"—she initially attempts to protect herself by isolating herself from the decision and its consequences. *Id.* at 91. First she hopes that welfare officials would deny her benefits so that she could abort out of financial necessity, and then she misses her appointments at the abortion clinic when she discovers that she

moral maturity progresses from: (1) self-centered concern with survival; to (2) other-centered concern with "goodness" and acceptance; to (3) responsibility for choice as the woman "strives to encompass the needs of both self and others, to be responsible to others and thus to be 'good' but also to be responsible to herself and thus to be 'honest' and 'real.'" ⁴⁷

The morally mature woman casts off the "assumptions underlying the conventions of female self-abnegation and moral self-sacrifice" as "immoral in their power to hurt."⁴⁸ She universalizes the injunction against hurting as a self-chosen ethic, which includes a morally equal self and other within the circle of care.⁴⁹ In this way, women conceive of relationships in terms of dynamic interdependence rather than confining dependence, and they expand the concept of care from

is eligible for welfare after all. *Id.* Her thinking at this point straddles Gilligan's first two levels as it is shaped by her feelings of desperate loneliness, her perception of a threat to her psychic survival, and a desire to appear "good" to others (including the father, who has threatened to leave her if she has the child). *Id.* Her concept of goodness in this regard is one of self-sacrifice. Eventually, however, Sarah realizes that the dilemma she must confront includes taking responsibility both *for* herself and *to* herself. *Id.* at 91-92. She sees that some hurt is inevitable in this situation, recognizes that the decision is a serious one affecting others and herself, and understands that she must take responsibility for defining herself in the circumstances. *See id.* One aspect of this transition is to confront her relationship with the father, which she concludes she must end, but in a responsible way to minimize the hurt. *Id.* at 92-95.

47. *Id.* at 84-85. At the most basic level, a woman's care is directed primarily toward survival of her isolated self when she feels alone and powerless and experiences relationships as disappointing and hurtful. *Id.* at 76. "Should" at this level becomes equivalent to "would," and morality becomes "a matter of sanctions imposed by a society of which one is more subject than citizen." *Id.* at 79. At the next, transitional phase, concern begins to shift from "selfishness" to a recognition of connection to others and the concept of responsibility. *Id.* Here the good translates into care for others as morality is defined more by shared norms and "[c]onsensual judgment about goodness becomes the overriding concern as survival is now seen to depend on acceptance by others"; but the distinction between self-sacrifice and care remains confused (as it is in traditional models of femininity), and the woman herself is excluded from her own care. *Id.*

The woman now constructs a world perfused with the assumptions about feminine goodness that are reflected in the stereotypes . . . where all the attributes considered desirable for women presume an other—the recipient of the "tact, gentleness and easy expression of feeling" which allow the woman to respond sensitively while evoking in return the care that meets her "very strong need for security."

Id. (quoting Inge K. Broverman et al., *Sex-role Stereotypes: A Current Appraisal*, 28 J. SOC. ISSUES 59, 63 (1972)). This disequilibrium is reconciled at the third level, which "focuses on the dynamics of relationships and dissipates the tension between selfishness and responsibility through a new understanding of the interconnection between other and self." *Id.* at 74.

48. *Id.* at 90.

49. *Id.*

the limits of a self-isolating injunction not to hurt others to a more complex, enriching obligation to sustain connection by acting responsibly toward self *and* others.⁵⁰

B. Gilligan's influence on legal theory

Some legal scholars have endorsed Gilligan's ethic of care, connection, and responsibility as a distinctive perception of social relations and moral judgment, the inclusion of which would enrich and transform legal discourse. For example, some writers have criticized "[c]ontemporary constitutional interpretation [as] grounded on a thoroughly individualist liberal philosophy" based on stereotypically masculine values of autonomy and separation that emphasize noninterference and neutrality with respect to the good.⁵¹ Suzanna Sherry has suggested that an emergence of a "feminine jurisprudence, instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society."⁵² Robin West has observed that "[p]recisely

50. *Id.* at 148-49.

51. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543 (1986). According to Sherry, that atomistic constitutional vision displaced the civic republicanism of Jefferson, which "finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values." *Id.* at 551. Kenneth Karst has characterized constitutional law as "an institutional reflection of the view from the ladder; safety from aggression was to be found not in connection with others but in rules reinforcing separation and noninterference." Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486-87. Karst urges us "to anticipate the possibility that some of our constitutional assumptions may come to be modified, not by dismantling the ladder, but by taking account of the view from the web." *Id.* at 487. While Karst does not believe that amplification of women's voice in constitutional law will eliminate conflict, he hopes for a change in our approach to conflict resolution. *See id.* at 486-95. In Karst's idealized conception, women have little need "to climb the ladder to define themselves" and thus view power as a capacity to provide care rather than as a means to dominate. *Id.* at 487. Nevertheless, conflict will arise because resistance to (presumably male-initiated) domination will generate it. *Id.* "But the 'guiding principle of connection,' and the rejection of a view of life in society as a zero-sum game, encourage efforts to resolve conflicts by widening the range of inquiry, seeking ways for the conflicting parties to define new goals that they can share." *Id.* at 487-88 (footnote omitted).

52. Sherry, *supra* note 51, at 544. This transformation will occur, Sherry believes, as women bring their feminine perspective with them onto the bench. *Id.* at 592. For example, she has attempted to show that Justice O'Connor's opinions reflect the feminine paradigm of contextuality and community. *See id.* at 593-613; Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQUALITY J. 159, 165 (1986). For a critique of her argument as tainted by stereotype, see *infra* note 91.

Carrie Menkel-Meadow, also influenced by Gilligan, considers what impact the increased entry of women into the legal profession might have. She envisions an increase in alternative dispute resolution, a more egalitarian and pleasant work environment, some

because of its insistence on insularity, liberal legalism demands of the citizen almost none of the so-called 'civic virtues': mercy, compassion, public involvement, fellow-feeling, sympathy, or, simply, love."⁵³

Others have applied relational feminism to non-constitutional realms such as tort law, defining legal duty in terms of a feminist ethic of care, responsibility, and interconnectedness. For example, Leslie Bender has criticized tort law's no-duty-to-rescue-strangers rule as an indifferent, individualistic, and insulating approach to legal relations, which lends the law's legitimacy to instances of moral bankruptcy.⁵⁴ Bender sees people tied to each other in webs of connection: The bystander is connected to the person in peril as a fellow human being, and through the imperiled person to everyone with whom he or she is in turn linked (friends, co-workers, family, etc.). Those bonds form the moral basis for imposing a legal duty to aid strangers according to the proximity of the relation; in her view, no one is truly a stranger.⁵⁵ West also has criticized autonomy-based belief systems, including those underlying tort law, as unresponsive to the needs of others. She has instead urged that we "should pay close heed to the pains and

moderation of the adversarial system, and perhaps modification of evidentiary rules to encompass women's ideas of relevancy. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 51-60 (1985); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiations: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (considering the impact women will have on legal negotiations). For a detailed consideration of "the ways in which evidentiary rules reflect traditionally masculine norms" and suggestions for inclusion of a feminist perspective, see Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413.

53. West, *supra* note 9, at 71 (citations omitted). She argues that "[i]f 'We the People' rather than 'They the Court' are to be responsible in the future for the burden of individual freedoms, we may in the long run better protect those freedoms by seriously attending to our very concrete responsibilities, as well as to our abstract and dangerously threatened rights." *Id.* at 106.

54. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33-36 (1988) [hereinafter Bender, *Lawyer's Primer*]. More recently, Bender has applied relational feminist concepts of connection and responsibility more broadly to tort law. See Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 895-908 [hereinafter Bender, *Feminist (Re)torts*].

55. To Bender, "what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action. That seems more urgent, more imperative, more important than any possible infringement of individual autonomy by the imposition of an affirmative duty." Bender, *Lawyer's Primer*, *supra* note 54, at 34; see also McClain, *supra* note 14, at 1228-32 (discussing Bender's proposal to reform the tort law standard of care).

pleasures of others, we are a community, and their pains and pleasures are ours."⁵⁶

C. *Anti-relationalism*

The recent critique of relational feminism as antithetical to abortion rights is part of a larger objection to the relational perspective.⁵⁷ To more radical feminists, relational feminism's celebration of care, motherhood, and heterosexual intimacy "constitutes a form of denial, bad faith, and, ultimately, collaboration with patriarchy."⁵⁸ While admiring Gilligan's effort to lend dignity to the concept of sexual difference, Catharine MacKinnon ultimately regards relational feminism as "reifying" the damage of sexism into a theory of difference, which "is an insult to our possibilities" and contributes to the silencing of women's voices.⁵⁹ Even some moderate feminists

56. Robin L. West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1455 (1986).

57. These criticisms go beyond a feminist objection to the underlying gender role dualism (particularly the self-sacrifice of feminine domesticity on the one hand and the separation and self-interest of masculine autonomy on the other) that Gilligan describes, to attack relation itself as a worthy value for women. Joan Williams has distinguished criticisms of such dualism: "Gilligan's 'conventional feminine voice' reflects how conventional gender training instructs women to behave; her narratives demonstrate how many women internalize society's mandates. *In a Different Voice* is best understood as a status report on female gender ideology." Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1565-66 (1991). Gilligan herself suggests, however, that moral maturity requires women to challenge such female gender ideology. See *supra* note 47 and accompanying text.

58. West, *Jurisprudence & Gender*, *supra* note 7, at 43. According to Andrea Dworkin,

[t]here is the initial complicity, the acts of self-mutilation, self-diminishing, self-reconstruction, until there is no self, only the diminished, mutilated reconstruction. . . . So the act goes beyond complicity to collaboration; but collaboration requires a preparing of the ground, an undermining of values and vision and dignity, a sense of alienation from the worth of other human beings.

Andrea Dworkin, INTERCOURSE 141 (1987).

59. Criticizing Gilligan's conclusions, MacKinnon argues:

I do not think that the way women reason morally is morality "in a different voice." I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. . . . You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come.

CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987). MacKinnon sees the issue as one of power, not difference: "Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks,

view relationalism askance—as threatening women’s autonomy and equality.⁶⁰

More specifically, Pamela Karlan and Daniel Ortiz claim that relational feminism is “dangerous and misguided” because, in addition to “celebrat[ing] the terms of women’s oppression,” it also “stands in some tension with women’s felt needs, particularly as expressed in the feminist legal agenda . . . [and especially] in the context of perhaps the most central plank of that agenda: reproductive rights.”⁶¹ They argue that “the different voice speaks largely against abortion rights. Its communitarian underpinnings and tendency to impose moral responsibility in situations of need make defending abortion difficult. Compared to the traditional, masculinist autonomy regime, where individuals hold and assert rights, this brand of relational feminism is hostile to abortion.”⁶² Karlan and Ortiz seek to protect reproductive freedom by criticizing Gilligan’s work and arguing that “[t]he language of autonomy has provided the central rationale for protecting individual women’s control over the abortion decision.”⁶³ They also point to specific examples of how relational-talk has been both deployed by pro-life feminists in attacking *Roe v. Wade*⁶⁴ and advanced by the Supreme Court in narrowly interpreting *Roe*.⁶⁵

then we will hear in what tongue women speak.” *Id.* at 45.

60. For example, Nancy Chodorow warns:

[W]omen’s relational self can be a strength or a pitfall in feminine psychic life: it enables empathy, nurturance, and intimacy but threatens to undermine autonomy and to dissolve self into others. Women’s mothering itself shares this ambivalent position, as it both generates pleasure and fulfillment and is fundamentally related to women’s secondary position in society and to the fear of women in men.

Nancy Chodorow, *What is the Relation Between Psychoanalytic Feminism and the Psychoanalytic Psychology of Women?*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE*, *supra* note 2, at 121. Chodorow’s object-relations theory, like Gilligan’s interpersonal/relational approach, describes feminine qualities of “affiliativeness, relatedness, empathy, and nurturance” and explains how those qualities are devalued and damaged in a male-dominated culture. *Id.* at 120. Jean Baker Miller, while regarding women’s capacity for affiliation as containing “the possibilities for an entirely different (and more advanced) approach to living and functioning,” also has warned that some traditionally “feminine” attributes—such as submissiveness and dependence—are functional only for a subordinate role and derive from women’s powerlessness in a male-dominated society. JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* 83 (2d ed. 1986).

61. Karlan & Ortiz, *supra* note 13, at 860-61.

62. *Id.* at 861.

63. *Id.* at 876.

64. 410 U.S. 113 (1973).

65. Karlan & Ortiz, *supra* note 13, at 880-82. In addition to the sources cited by Karlan and Ortiz, for opposition to abortion that invokes relational or communal themes,

Linda McClain fears that a relational approach to “reproductive responsibility” will lead to coercive state efforts to ensure that a woman’s decision is based on the “proper” relational concerns, reminiscent of pre-*Roe* hospital screening committees,⁶⁶ and that Bender’s tort-law duty of care could be invoked to impose a “pro-life” duty of maternal care.⁶⁷ Unlike Karlan and Ortiz, McClain is less directly critical of an ethic of care itself and instead argues that the liberalism of John Rawls and Ronald Dworkin already recognizes care and connection.⁶⁸ Thus, where Karlan and Ortiz would privilege a more “masculinist” rights-based interpretation, McClain contends that liberal theory already incorporates an element of relationalism.⁶⁹ McClain’s ethic of care, however, is a relatively thin version. Her foundation remains primarily noninterventionist and individualistic, as she reasons that including elements of self-determination in an account of autonomy reflects adequate recognition of “connection.” Although self-definition is a point of intersection between McClain and relationalists like Gilligan,⁷⁰ her analysis fails to shift the focus

see Sidney Callahan, *Context of the Abortion Debate*, in 1 A DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: *WEBSTER v. REPRODUCTIVE HEALTH SERVICES* 17 (Roy M. Mersky & Gary R. Hartman eds., 1990) [hereinafter *MERSKY & HARTMAN*]; Brief of Covenant House and Good Counsel, Inc., *Amicus Curiae*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), reprinted in 3 *MERSKY & HARTMAN*, *supra*, at 3; Brief of Feminists for Life of America et al., *Amici Curiae*, *Webster* (No. 88-605), reprinted in 3 *MERSKY & HARTMAN*, *supra*, at 70.

66. McClain, *supra* note 14, at 1251-53 (referring to an article by Robin West that is discussed *infra* note 263).

67. *Id.* at 1256-58.

68. The feminist critique of liberalism, principally that of Rawls, relies in part on Michael Sandel, Alasdair MacIntyre, and Roberto Unger in describing liberalism as contractarian, atomistic, and insular. *Id.* at 1177-80. For a general treatment of the communitarian position, see Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL. & PUB. AFF.* 308 (1985). McClain criticizes West for ignoring that liberals “have justified legal protection of the abortion decision in terms of an allocation of decision making power and responsibility to the woman . . . [and that] liberal legalism has recognized that the pregnant woman’s decision making may well include relational concerns.” McClain, *supra* note 14, at 1248.

69. McClain also briefly mentions equality-based arguments that focus on “responsibility of self-determination as a component of equal citizenship and how restricting abortion ‘denies women the capacity of responsible citizenship,’ ” and on how reproductive freedom allows women to attend to their responsibilities and relationships in life. McClain, *supra* note 14, at 1249-50.

70. See *id.* at 1244. This concept overlaps West’s *Jurisprudence & Gender* article, *supra* note 7, and Sherry’s *Civic Virtue* piece as well, *supra* note 51. Gilligan’s third stage of feminine moral maturity includes a strong element of self-determination. See *supra* note 47 and accompanying text. McClain does identify an often-overlooked thread in the liberal literature that has become even more evident in Ronald Dworkin’s most recent writing about abortion, RONALD DWORKIN, *LIFE’S DOMINION* (1993), which, as discussed

to full consideration of robust care.

Like that of many others, these authors' approach to abortion rights relies heavily on Judith Jarvis Thomson's *A Defense of Abortion*.⁷¹ Thomson contends that abortion prohibitions force women to serve as involuntary gestational Good Samaritans by imposing an extraordinary obligation of life-sustaining care not generally required by law or morality and not justified by a woman's decision to engage in voluntary sexual intercourse.⁷² This argument rests on both autonomy and equality premises.

Although Thomson concedes that an unborn child might sometimes legitimately make such a claim on the pregnant woman, her autonomy premise asserts that in general "nobody is morally required to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive."⁷³ Written two years before *Roe v. Wade*, Thomson's equality premise observes that abortion prohibitions stood as a stark exception to the general no-duty-to-aid-strangers rule: "[I]n no state in this country is any man compelled by law to be even a Minimally Decent Samaritan to any person. . . . By contrast, in most states . . . women are compelled by law to not merely be Minimally Decent Samaritans, but Good

below, ties important relational themes to the abortion problem. See *infra* notes 270-76 and accompanying text.

71. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). McClain writes: "It has been suggested that the most powerful argument against laws prohibiting abortion, even if the pre-viable fetus is viewed as a full person, stems from the fact that our law does not require people in general to be Good Samaritans." McClain, *supra* note 14, at 1258; see Karlan & Ortiz, *supra* note 13, at 873-75. For examples of other writers who rely on Thomson, including some who also embrace relational feminism, see, Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1576 (1979); Suzanna Sherry, *Women's Virtue*, 63 TUL. L. REV. 1591, 1593 (1989); Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31-32 (1992).

Thomson's analysis is especially powerful because: (1) it asserts a moral basis for abortion rights even assuming fetal personhood (an assumption Thomson ultimately rejects) and voluntary sexual intercourse; (2) it recognizes fetal dependency on the pregnant woman; and (3) it considers the moral implications of pregnancy's unique burdens on women by repeatedly reminding us that pregnancy uses and occupies the woman's body. Thomson, *supra, passim*. Thomson thus avoids getting stuck in two different quagmires of the abortion debate—whether the fetus is a "person" entitled to claim a right to life and whether women's sexual subordination and victimization renders their "consent" to intercourse problematic—and thereby is able to reach the central problem of what it means to have a "right to life." See Thomson, *supra*, at 60-66; *infra* notes 72-75 and accompanying text.

72. Thomson, *supra* note 71, at 62-64.

73. *Id.* at 61-62.

Samaritans to unborn persons inside them."⁷⁴ Moreover, she rejects the notion that consent to intercourse estops a woman from claiming a right to abortion by pointing out that leaving open a window hardly precludes one from ejecting from one's home an intruder who enters thereby.⁷⁵

Finally, Karlan and Ortiz argue that Gilligan's "redescription of care"—her third stage of feminine moral development—transforms the ethic of care into something that looks suspiciously like the logic of justice in drag. They contend that the only way Gilligan can make her ethic of care work for women is to turn it into a thinly disguised form of masculinist rights theory.⁷⁶

74. *Id.* at 63. A Minimally Decent Samaritan would at least go to negligible trouble to aid someone who desperately needed help. Thirty-eight bystanders did not even pick up the telephone to call the police while they watched or listened to Kitty Genovese being murdered. *See, e.g.,* Joel Greenberg, *Why Do Some People Turn Away from Others in Trouble?*, N.Y. TIMES, July 14, 1981, at C1; *see also* Thomson, *supra* note 71, at 62-63. "Minimally Decent Samaritanism would call for doing at least that, and their not having done it was monstrous." *Id.*

Other writers have also emphasized similar equality arguments against abortion prohibitions. *E.g.,* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382-83 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984); Regan, *supra* note 71, at 1621-29; Sunstein, *supra* note 71, at 31-44.

75. Thomson argues:

If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, "Ah, now he can stay, she's given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle."

Thomson, *supra* note 71, at 58-59.

76. Karlan & Ortiz, *supra* note 13, at 890. The authors describe their observation: When pressed by women's experience, webs give way to hierarchies and the ethic of care unravels to resemble the logic of justice. As flattering as Gilligan's ethic of care may be to women, it remains inadequate in some crucial respects to enable them honestly and truthfully to live their lives.

Id.; *cf.* McClain, *supra* note 14, at 1262 ("The message of responsibility analysis of pregnancy and the abortion decision is ultimately not dissimilar to that of an autonomy analysis."). Karlan and Ortiz conclude by insisting on "the necessity of taking real world politics into account in constructing feminist ethics." Karlan & Ortiz, *supra* note 13, at 895. They fling the Parthian shot that "relational feminism devalues experience that differs from its measure" and "squashes those who dissent from the identity it would impose." *Id.* They further propose that a politically conscious feminist ethic requires "listening sympathetically to women's voices but in full awareness of the historical and cultural contexts in which women's needs, desires, and self-image have been allowed to find expression." *Id.* at 896.

II. WHAT'S THE DIFFERENCE?

Even if such a danger [of antifeminist use of feminist theory] materializes, however, feminists can ill afford to adopt a corrective strategy of silencing other female voices. An imposed unity of correct views can never be an appropriate goal for a movement devoted above all to the awakening of female consciousness.⁷⁷

Relationalism's critics make an important contribution in warning of the dangers inherent in sexual stereotypes. However, their fear that a particular feminist theory can be deployed to justify antifeminist goals manifests itself in an unfortunate "reverse-essentialist" backlash aimed at preempting discourse and denouncing relational theory itself rather than its antifeminist application.⁷⁸ It is therefore

77. Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 74, 85 [hereinafter Kay, *Perspectives*]; see also Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 21, 21 (arguing that "[f]eminist theory has long proved itself equal to the battle of difference between men and women. Its task today is to take into account differences among women").

78. The essentialism charge that Karlan and Ortiz level against Gilligan, *see supra* note 76, is puzzling. First, although Gilligan does seem to valorize the "feminine" perspective of care and connection that she describes, she has expressly recognized that not all women exhibit it. *See infra* notes 87-88 and accompanying text. Second, while acknowledging that relational theory has a strong resonance for many women, who feel uplifted and honored by Gilligan's account (and indeed may find in it a claim to moral superiority to men), Karlan and Ortiz seek to prescribe *their* own version of women's experience—defined largely in terms of opposition to stereotypic gender roles. Karlan & Ortiz, *supra* note 13, at 894-95. This effort to keep the issue of women's subordination in the foreground has instrumental political value, but it risks the same kind of essentialist imperialism of which the authors accuse relational feminism. In particular, the accusation that relational feminist theory "squelches" dissenting viewpoints, "imposes" an identity, or "silences women's voices" seems overblown and more than a little ironic. *See, e.g.*, David Margolick, *Catering to an Academic Superstar, Judges Find Themselves Tangled in Free-Speech Debate*, N.Y. TIMES, Nov. 5, 1993, at B11 (discussing allegations that feminists "who consider [MacKinnon's] views censorious and harmful to women have grown used to being unceremoniously dropped from programs at which she is scheduled to appear"). MacKinnon's response to the suggestion that she ought to engage in a dialogue with other women who have different views is revealing:

I do not allow myself to be used to orchestrate and legitimate a so-called "debate within feminism" over whether pornography harms women. It is my analysis that that is the pimps' current strategy for legitimizing a slave trade in women. I do not need to be suckered into the pornographers' strategy, period.

Id.

There is a further irony here. In a larger sense, Karlan and Ortiz follow a pattern more consonant with the ethic of care than the logic of justice. Theirs is not an argument from neutral principles of constitutional law; they are quite open in their result orientation.

advisable to distinguish objection to a theory from objection to a particular policy decision purporting to rest on that theory. This Part will consider the problem of difference and suggest a shift in focus from the sexual distribution of care to care itself.

A. *Snips and snails, sugar and spice*

Sexual difference is an unstable foundation for constructing an ethic of care. What difference means and the extent of its incidence are very much in dispute. Furthermore, the tensions that are created when theoretical perspectives on sexual difference translate into policy distinctions that can either liberate or oppress have produced a vigorous but inconclusive dialectic which at times shades into caricature.⁷⁹ There is a reductionistic tendency, as exploration of difference combines with a desire to attribute distinctive values to women, for the resulting description to sketch cartoonish figures of both sexes: Women are caring paragons of "feminine virtues" capable of experiencing richly textured relational lives that men cannot begin to imagine; men are unfeeling, logic-bound brutes who understand only power and domination.⁸⁰ The accuracy of these stereotypes

Their primary reason for rejecting relational feminism is their fear that it will yield undesirable consequences for women, not that it violates some canon of constitutional interpretation. In other words, they appear to care deeply about women's welfare, and their evaluation of theory and principle is largely a function of the impact that they believe it will have on women rather than its abstract logical coherence. Karlan & Ortiz, *supra* note 13, at 862 ("Our overall aim is to question the prominence of relational feminism by showing its tension with many women's felt needs.").

Finally, if anyone has occasion to complain of "essentialism" in relational feminism, as well as more radical feminist writing, it is—dare I say it?—men, who are so routinely and aggressively demonized and stereotyped as to cease to appear human. See *infra* notes 100-04.

79. McClain's account of the feminist critique of Rawlsian liberalism senses this problem. McClain, *supra* note 14, at 1203-28.

80. According to Robin West, for example, women value love and intimacy because they express the unity of self and nature within our own selves. More generally, women do not struggle toward connection with others, against what turn out to be insurmountable obstacles. Intimacy is not something which women fight to become capable of. We just do it. It is ridiculously easy. It is also, I suspect, qualitatively beyond the pale of male effort.

West, *Jurisprudence & Gender*, *supra* note 7, at 40.

According to some radical feminists, sex and motherhood constitute the existential murder of women, and men are irredeemable rapists, exploiters, and oppressors. See, e.g., DWORKIN, *supra* note 58, *passim*. For an overview of that viewpoint, see West, *Jurisprudence & Gender*, *supra* note 7, at 28-36. These kinds of essentialism, whether relational or radical, arise as the barely implicit "some" (or even "many") in the description of difference between women and men is consistently elided into just "women"

would seem to be an objective question, but descriptive claims about difference or sameness can be difficult to sort from prescriptive agendas about sexual equality (or inequality). This observation applies to accounts of difference's origins as well as its nature, whether described by traditional "male-stream" writers or modern feminists.⁸¹

and "men."

To be sure, the "official" version of the story often begins with a stock qualification, apparently intended to forestall criticisms of stereotyping and essentialism, that the "women" and "men" referred to are not actual women and men but rather shorthand for a statistical distribution of traits shared by real women and men alike. Karst provides one example:

Throughout this article, when I speak of the qualities of "women as a group" or "men as a group," the generalization I have in mind is not universal but statistical. I refer not to the traits of any particular woman or man, but to a characteristic more frequently found among one sex than among the other.

Karst, *supra* note 51, at 448 n.5. Such disclaimers, however, usually buried in the footnotes, quickly give way in the text to unqualified references to "women" and "men" as though they were homogenous, dimorphous groups for relevant purposes, and we are back to the problem of essentialism. See, e.g., *id.* at 472-75; West, *Jurisprudence & Gender*, *supra*, *passim*.

81. The extended, complex debate over whether difference is biologically or culturally determined illustrates this point. Much feminist activism has challenged the "prevailing cultural assumptions about females' limited physical, psychological, and cognitive capacities" underlying the nineteenth-century "separate spheres" view of sexual difference, which "served to justify a wide variety of inequalities in social status." Deborah L. Rhode, *Definitions of Difference*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE*, *supra* note 2, at 197, 199-200; see also Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 176-80 (1982) (describing separate-spheres view). That view is expressed, for example, in Justice Bradley's infamous concurring opinion in *Bradwell v. Illinois*, which invoked the "Law of the Creator" to conclude that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life," including the rough-and-tumble world of law practice. 83 U.S. 130, 137 (1872) (Bradley, J., concurring).

Particularly in the past several decades, some feminists have argued that the identities labeled "man" and "woman" are, apart from their respective procreative roles, culturally constructed. See, e.g., CHODOROW, *supra* note 20, at 11-39 (arguing that sexual differences are largely attributable to psychological impact of different roles in childrearing); Karst, *supra* note 51, at 448 ("Apart from the narrowest sort of biological characteristics, both woman and man are social constructs"); Judith Shapiro, *Anthropology and the Study of Gender*, 64 *SOUNDINGS* 446, 449 (1981) (arguing that the term "sex" refers to biological differences and "gender" to socially, culturally, and psychologically determined characteristics); Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797, 800-01 (1989) ("Gender differences do exist: That is, men as a group differ from women as a group not only on the basis of biological 'sex' differences, but on the basis of social 'gender' differences. What I reject is Gilligan's description of gender differences, which I think is inaccurate and potentially destructive."); see also *AMERICAN PSYCHIATRIC GLOSSARY* 58 (Jane E. Edgerton & Robert J. Campbell III, M.D., eds., 7th ed. 1994) ("Gender identity is distinguished from sexual identity, which is biologically determined.").

This feminist project of distinguishing sex from gender contends that sex roles reflect an historically and culturally constituted system of male dominance rather than result from biological differences. Yanagisako & Collier, *supra* note 2, at 131, 139-41. More recently,

however, biological accounts of sexual difference have seen a revival in the work of "sociobiologists," who offer neo-Darwinian explanations (in terms of "inclusive fitness") for stereotypic differences between male and female sexuality and childrearing roles. For example, under this view the male's reproductive role is, literally, to disseminate his genes; the female's role is to nurture the product of conception. His investment in reproduction is, relative to hers, extraordinarily cheap—his numerous gametes have no nutrients (compared to the female's much smaller number of nutrient-rich eggs), he does not make the prodigious investment of gestation, and he does not lactate. See Kay, *Perspectives*, *supra* note 77, at 76-78 (summarizing literature). Some sociobiologists point to those observations to explain stereotypic patterns of sexual and parenting behavior, and even to justify policy decisions such as a maternal preference in child custody disputes: Women are more sexually discriminating and form stronger, more nurturing attachments to offspring; men are more promiscuous, more easily aroused by visual stimuli, and less attached to their offspring. For an overview of this literature, see John Dupré, *Global Versus Local Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 47, 50-56; Ruth Hubbard, *The Political Nature of "Human Nature,"* in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 63, 65-68; Kay, *Perspectives*, *supra* note 77, at 76-80.

Some feminists see contemporary theories of biological determinism as a rear-guard action of a reactionary patriarchy that threatens to legitimize some of the most objectionable aspects of the status quo of male domination: male sexual aggression; the sexual objectification and degradation of women (including through prostitution and pornography); the exploitation and oppression of women through inequalities in allocation of childrearing and other domestic responsibilities; and a generalized resurgence in "separate spheres" mentality. Some of these writers would deem questions of biological difference inadmissible in discourse about gender and would focus instead on cultural forces. See, e.g., Dupré, *supra*, at 48, 50-56; Hubbard, *supra*, at 63, 65-68; Kay, *supra*, at 76-80. Others have challenged the purportedly neutral underpinnings of science itself, asserting that "scientific theory is permeated by masculinist biases." Dupré, *supra*, at 56-57 (reviewing the literature); see also Ehrenreich, *supra* note 1, at 532-45 (criticizing the (masculinist) "medical model of reproduction").

Not all feminists agree that recognition of biological difference is inherently incompatible with women's equality. Earlier in the twentieth century biological accounts of sexual difference served as a basis for asserting claims to advances in sexual equality and to justify what was then regarded as progressive reform legislation. Carl N. Degler, *Darwinians Confront Gender; Or, There Is More to It than History*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 33, 35. Some turn-of-the-century theorists drew from Darwinism (although Darwin himself seemed to regard women as biologically inferior to men) to propound a "gynecocentric view" of human development. *Id.* at 34-35. However, as Herma Hill Kay has observed,

To posit the existence of difference in the context of legal analysis . . . is to admit the possibility of rational classification between different groups. As Deborah L. Rhode has noted, historically, "arguments emphasizing sexual difference, even those designed to advance feminist causes, risked contributing to the stereotypes on which antifeminism rested." Mindful of the hazards they confronted, the earliest feminist reconceptualizations of legal equality began cautiously. They focused on the undeniable biological reproductive sex differences between men and women, primarily stressing pregnancy. They suggested that pregnancy might be taken into account under certain circumstances as an appropriate basis for the differential treatment of women and men in order to ensure substantive, rather than formal, equality.

Kay, *Perspectives*, *supra* note 77, at 75 (footnotes omitted) (quoting Deborah L. Rhode,

Perspectives on Professional Women, 40 STAN. L. REV. 1163, 1168 (1988)). Kay also wrote, “[f]or the past twenty-five years, American feminist legal scholars and practitioners have been trying to remove sex-based generalizations from the law. . . . This effort has sought to remove legal barriers that hindered both sexes in making nontraditional choices affecting their public and private lives.” *Id.* at 74. Rhode has explained that difference—even when invoked to defend progressive reform—has contributed to women’s disadvantage. Rhode, *Definitions of Difference*, *supra*, at 204-11. One example is protective labor regulations, upheld in *Muller v. Oregon*, 208 U.S. 412 (1908), to address the disparities resulting from workplace and family structures that tended to keep most wives out of the workforce in the late nineteenth and early twentieth century. “In the Court’s view, woman’s reproductive functions, physical limitations, and special ‘dispositions and habits of life’ placed her at a disadvantage in the ‘struggle for subsistence.’” Rhode, *Definitions of Difference*, *supra*, at 205. The ensuing debate over such laws split the feminist community for decades, and “also obscured the complexities of the concerns at issue.” *Id.* at 206. While such legislation tended to drive up the wages of working women, “the price of such protection was increased female unemployment and competitive disadvantage in contexts where male workers were available.” *Id.*

In any event, “[c]ontrary to what some recent opponents of biological explanations have contended, historically no necessary connection exists between the use of biological arguments and any particular social or political ideology.” Degler, *supra*, at 35. Biological theories can sometimes aid oppressed groups. For example, recent research suggesting that biological structure and genetics may play a substantial role in a person’s sexual orientation could significantly advance homosexuals’ struggle for equality by shifting the focus from arguments about lifestyle choices to issues of identity and self-hood. See Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 321 (1993); see also Robert Pool, *Evidence of Homosexuality Gene*, 261 SCIENCE 291, 291 (1993) (providing a nontechnical overview of the chromosomal study).

More recently, some feminists have rejected both cultural determinism and the notion that equality presupposes sameness. Alice Rossi, for example, simultaneously: (1) maintains that the universal cultural imperative for a close mother-infant bond has a biological, adaptive basis that differs from males’ role in reproduction; and (2) rejects the notion that this difference requires women’s subjugation. Alice S. Rossi, *The Biosocial Side of Parenthood*, 1 HUMAN NATURE 72, 79 (1978) (“Difference is a biological fact . . . [but] equality is a political, ethical, and social concept. No rule of nature or of social organization says that the sexes have to be the same or do the same things in order to be social, political, and economic equals.”). She argues that both biological difference and cultural forces must be taken into account in redefining sex roles. Alice S. Rossi, *Gender and Parenthood*, in GENDER AND THE LIFE COURSE 161, 177-86 (Alice S. Rossi ed., 1985) [hereinafter Rossi, *Gender & Parenthood*]. Fathers, she suggests, will require social training to compensate for their different evolutionary role in reproduction and the absence of the experience of pregnancy, birth, and nursing. *Id.* at 186. Sara Ruddick has suggested that:

Although most mothers have been and are women, mothering is potentially work for men and women. This is not to deny, in advance of future data, that there may be biologically based differences in styles of mothering. “Biology” is not fixed; we have no idea of the potentialities and limitations of male and female bodies in a society free of gender stereotypes and respectful of female humans. I am suggesting that, whatever difference might exist between female and male mothers, there is no reason to believe that one sex rather than the other is more capable of doing maternal work.

SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* 41 (1989).

Whether difference in moral thinking really exists also is in dispute. Some of Gilligan's critics challenge the empirical validity of the claim that men and women envision morality differently.⁸² Other critics note that Gilligan's studies fail to account for other important influences on identity, such as race, economic status, and sexual orientation.⁸³ Some studies, however, indicate that relational differences do exist, and research recently has pointed to possible hormonal influences on nurturing, affiliative, and sexual behavior.⁸⁴ More generally, salient sex differences in social behavior—especially

Others, however, have asserted a nonbiological basis for difference. Nancy Chodorow's object relations approach, challenging the traditional Freudian phallogocentric conception of gender identity, asserts that sexual difference results from the fact that parenting primarily is done by women. Because girls are mothered by women, they grow up to be mothers; their sense of self is continuous with others and relational. Boys, on the other hand, develop a sense of self based more on separation, denial of relation, and a repressed self-object world. This difference manifests itself in the hallmarks of a male-dominated society:

Notions of scientific objectivity, the technical rationality of advanced capitalism, individualistic political and social theories that assume the inevitability of hierarchy and the need to create society out of asocial individuals, practices of erotic, scientific, and technical domination—all find their psychological roots as defensive institutionalizations of a rigid separateness needed by the masculine psyche and are built on a latent structure of anger and repudiation of women.

Chodorow, *supra* note 60 at 116-19 (footnote omitted). This view thus "stands the traditional Freudian understanding on its head" and sees a connection between construction of masculine and feminine roles, and "it to some extent valorizes women's construction of self and makes normal masculinity problematic." *Id.* at 120.

82. They point to literature questioning that claim as well as other stereotypic notions of sex difference. *E.g.*, John Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597, 616-22 (1983). In fact, Broughton suggests that even Gilligan's own anecdotal data call her conclusions into question. He cites instances of "masculine" rights-talk in the transcripts of female subjects and a striking example of care-talk in the transcript of a male subject. *Id.* at 603-09.

83. For citations to criticisms of Gilligan's studies, see Karlan & Ortiz, *supra* note 13, at 869 n.57.

84. *See generally* Rossi, *Gender and Parenthood*, *supra* note 81, at 182-84 (reviewing research into sexual differences in sensory modalities and social and cognitive skills; concluding that there is "a good deal of evidence in animal and human research to support the view that sex hormones and sex differentiation in neurological organization of the brain contribute to these differences;" and suggesting biological role in differences in parenting behavior). One recent cross-cultural study found support for "the beliefs that women prefer a more caring moral perspective and that the differences exist across cultures." David Stimpson et al., *Cross-Cultural Gender Differences in Preference for a Caring Morality*, 132 J. SOC. PSYCHOL. 317, 320 (1991). Designed to test predictions from Gilligan's theory, the study found significant sex differences in samples from the People's Republic of China, Thailand, Korea, and the United States. *Id.* Recent research also has suggested a link between the hormone vasopressin and affiliative, sexual, and parenting behavior in male mammals. Natalie Angier, *What Makes a Parent Put up with it All?: The Uxorious Vole Offers a Clue to the Role of Hormones*, N.Y. TIMES, Nov. 2, 1993, at C1.

behaviors closely related to childrearing tasks of nurturing and socialization—have been linked to peer-group influences beginning in early childhood.⁸⁵

Gilligan's *In a Different Voice* begins by denying any generalization about either sex,⁸⁶ but the balance of her book seems largely to the contrary. In subsequent research, she found that while

85. Eleanor Maccoby has found in her own and others' research on sex differences in development that, when viewed from an individual differences perspective, "male and female persons are much alike, and their lives are governed mainly by the attributes that all persons in a given culture have in common." Eleanor Maccoby, *Gender and Relationships: A Developmental Account*, 45 AM. PSYCHOLOGIST 513, 513 (1990). Although research does show stable differences on some attributes—for example, performance on tests of mathematical and spatial aptitude, frequency of aggression, susceptibility to influence, and propensity to help others—the amount of variance between the two sexes is small relative to the amount of variance within the sexes. *Id.* For Maccoby's earlier work on sex difference, see ELEANOR E. MACCOBY & CAROL N. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974). In her 1990 article, she concluded that increasingly sophisticated research over the intervening 15 years had affirmed her basic conclusion that sex differences are limited in degree and kind. Her recent work, however, has found a strong tendency toward gender separation in children across cultures (observed as early as three years old and increasing in strength as children mature), which: appears spontaneously, is resistant to change, does vary depending on the situation (e.g., whether public or private, structured and supervised or unstructured), and is not much tied to sex-typed activities. Maccoby, *supra*, at 513-15. She argues that childhood's "segregated play groups constitute powerful socialization environments in which children acquire distinctive interaction skills that are adapted to same-sex partners." *Id.* at 516.

Summarizing studies of interactive patterns of sex-homogenous dyads or groups in childhood, adolescence, and adulthood, Maccoby suggests that: (1) "it is because women and girls use more enabling styles that they are able to form more intimate and more integrated relationships"; and (2) "it is the male concern for turf and dominance—that is, with not showing weakness to other men and boys—that underlies their restrictive interaction style and their lack of self-disclosure." *Id.* at 517. She posits that the emergence of sex-differentiated interaction styles may have less to do with either the fact that most childrearing is done by women or "identification with the same-sex parent, as Gilligan and others have claimed, than with peer-group influence." *Id.* at 519. Maccoby has explained that women's typical interactive style is appropriate to the traditional role of caregiver to infants and that men's typical style is appropriate to socializing children as they mature. *Id.* To Maccoby, "the peer group [is] the setting in which children first discover the compatibility of same-sex others, in which boys first discover the requirements of maintaining one's status in the male hierarchy, and in which the gender of one's partners becomes supremely important." *Id.*

86. Gilligan writes:

The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.

GILLIGAN, *supra* note 5, at 2.

most men and women tend to “focus” their attention either on justice or care concerns, statistically significant sex differences appeared in the direction of focus.⁸⁷ Almost all of the men who demonstrated focus oriented toward justice; slightly more than half of the women who demonstrated focus did so toward care. Thus, Gilligan concluded, “[c]are focus, although not characteristic of all women, was almost exclusively a female phenomenon. . . . If girls and women were eliminated from the study, care focus in moral reasoning would disappear.”⁸⁸ Other evidence, however, calls into question the conclusion that care focus is an exclusively female phenomenon.⁸⁹

B. Beyond difference

There are substantial risks in the categorical interpretation of sexual difference, which threatens to make us captives of a destructive form of gender politics.⁹⁰ Both sides in the relationalist/anti-

87. She reported “systematic evidence that people raise both justice and care concerns in describing moral conflicts and that these concerns organize people’s thinking about choices they make.” Gilligan, *Adolescent Development*, *supra* note 20, at xviii.

88. *Id.* at xviii-xix (describing results from study of three samples of well-educated North Americans).

89. The cross-cultural study mentioned above did not show an absence of a caring perspective by men; to the contrary, American and Korean men displayed a higher “caring rating” than Thai women. Stimpson et al., *supra* note 84, at 321 fig. 1. The study’s authors, however, made no observations concerning the potential significance of that disparity; indeed, they did not appear to notice it. Other research has found that men are more likely to help others. A.H. EAGLY, *SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL ROLE INTERPRETATION* 42-69 (1987).

90. Faced with an as-yet inconclusive debate about the origins, extent, and content of difference, I, like Robin West, am tempted to test the stereotypes “against the evidence of our own experienced lives, if not the evidence of art, literature and legal doctrine.” West, *Jurisprudence & Gender*, *supra* note 7, at 55. She concluded that the theories are incomplete rather than erroneous: that women (and men) experience real contradiction in their lives—although women do so within the further confines of patriarchy. *Id.* at 55-57. Gilligan’s description of women’s moral lives and care, as well as Andrea Dworkin’s description of how women are violated by intercourse and pregnancy, rang true for West and the women she knows. *Id.* Gilligan’s work touches upon a stereotype so familiar that it has become a cliché, but the implication that men categorically do not experience and seek deeply connected and caring relations is not consistent with my personal experience and what I perceive to be that of many men I know who are very connected and caring sons, brothers, husbands and fathers. Furthermore, more recent detailed studies of caring compassion, and communitarianism have been written by men. *E.g.*, JEFFERY BLUSTEIN, *CARE AND COMMITMENT: TAKING THE PERSONAL POINT OF VIEW* 11-13 (1991); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 247-50 (1993); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 133-73 (1982); ROBERT WUTHNOW, *ACTS OF COMPASSION: CARING FOR OTHERS AND HELPING OURSELVES* 282-310 (1991). Men are concerned about the harm that the abortion conflict is doing to real people, view a substantial part of the problem as one of a failure of response and relation, and try to address the problem

relationalist debate suffer from their own form of gender stereotyping, which ironically undermines their respective positions. Both are dogged by the process of “descriptive reification,” in which assessments of potential and estimates of probability with respect to sexual distribution of behaviors, attitudes, and outlooks that may statistically tend to be associated with sex often quietly slip into “inflexible and often ephemeral conceptions of the nature of woman and man.”⁹¹

in a way that is more inclusive of the felt needs of various sides. *E.g.*, DONALD P. JUDGES, *HARD CHOICES, LOST VOICES: HOW THE ABORTION CONFLICT HAS DIVIDED AMERICA, DISTORTED CONSTITUTIONAL RIGHTS, AND DAMAGED THE COURTS* xiii (1993); *infra* note 260.

91. Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE*, *supra* note 2, at 89, 90. Thus, using “a set of fallible indicators (e.g., a list of interests, opinions, or attitudes) . . . to indicate the likelihood that one is male (a categorical classification) [rather than] the degree to which one is masculine (a dimensional classification)” risks arbitrariness, unreliability, poor information retention (because “[m]embers and nonmembers of a category tend not to be homogenous with respect to criteria that were used to make the [classification]”), and inflexibility across a range of applications. Thomas A. Widiger & Allen J. Frances, *Toward a Dimensional Model for the Personality Disorders, in PERSONALITY DISORDERS AND THE FIVE FACTOR MODEL OF PERSONALITY* 19, 19-24 (Paul T. Costa, Jr. & Thomas A. Widiger eds., 1994). The statement of one of Gilligan’s male subjects that is cited by John Broughton, *see supra* note 82, which sounds relational to me and probably would be assumed to have come from a woman if the speaker’s sex were not known, raises the question whether Gilligan’s perception of her subjects’ responses has at times been colored by her expectations about their gender.

This problem pervades the feminist legal literature. A notable example is Suzanna Sherry’s conclusion that the opinions of Justice O’Connor manifest an ethic of care, a conclusion that seems to stretch the facts to conform to the stereotype. *See Sherry, supra* note 51, at 613. Even when Justice O’Connor’s opinions do reflect some abstract appreciation of context and relation, she is just as likely to lose that perspective in getting down to actual cases. For example, Justice O’Connor’s concurring opinion in *Lynch v. Donnelly* asked the key relational question by focusing on the problem of exclusion—whether the nativity display communicated “to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to the adherents that they are insiders, favored members of the political community.” 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). It is of more than incidental importance in assessing Justice O’Connor’s relational orientation, however, that she gave the wrong answer. *See, e.g.*, Donald P. Judges, *Keeping the Faith?: The Lower Courts’ Dubious Reading of Lynch v. Donnelly and Stare Decisis*, 24 U. WYO. LAND & WATER L. REV. 167, 186-90 (1989) (arguing that her answer was very wrong). Similarly, in *Employment Div., Dep’t of Human Resources v. Smith* she correctly concluded that the First Amendment required heightened judicial scrutiny of Oregon’s failure to make an exception to its controlled substances laws, and consequently to its unemployment compensation system, for the sacramental use of peyote. 494 U.S. 872, 902 (1990) (O’Connor, J., concurring). Her application of that scrutiny relied heavily, however, on abstract and sweeping generalizations about the problem of drug abuse, *id.* at 905, and failed to consider adequately the respondents’ claim in the context of *their* particular circumstances and to take seriously their strong showing that exceptions for sacramental use of peyote

The anti-relationalists, especially Karlan and Ortiz, unwittingly fall into this trap by failing even to *imagine* a conception of care that does not stereotypically place women in an oppressed role as unwilling caregiver.⁹² They seem to assume that because women traditionally have been consigned to that role, ascendancy of an ethic of care inevitably will exacerbate the historically unequal allocation of the burden of care-work; they fail to envision a world in which care consists not only of care *by* but also more care *for* women. Their conception shortchanges an ethic of care's possibilities and

are well-established and workable. Cf. *id.* at 909-19 (Blackmun, J., dissenting). In addition, her opinion for the Court in *Coleman v. Thompson*, which upheld denial of federal habeas review of Coleman's death sentence on the ground that he procedurally defaulted his federal claim because his lawyers filed his notice of appeal from state proceedings three days late, could serve as a model of "masculinist" devotion to abstract principle from the opinion's very first sentence: "This is a case about federalism"—rather than a case about the killing of a human being. 111 S. Ct. 2546, 2552 (1991); see Donald P. Judges, *Confirmation as Consciousness-Raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings*, 7 ST. JOHN'S J. LEGAL COMMENT. 147, 164-66 (1991) (discussing *Coleman* as an example of the Court's resistance to judicial empathy). More to the immediate point and as discussed more fully below, her *corpus juris* with respect to abortion taken as a whole can scarcely be regarded as the most "relational" on the Court—at least not in the sense described in this Article.

If one considers substance rather than stereotype, a much more promising candidate for the "Most Relational Feminist Justice" is Justice Harry Blackmun. From *Roe* to *DeShaney* to *Smith* to *Webster* to *Rust* to *Sullivan* to *Coleman* to *Casey*, and numerous other cases, Justice Blackmun has frequently connected—sometimes quite poignantly—with the real human elements underlying the legal principles and has been very responsive to the particular human contexts the legal questions present. Apparently Justice O'Connor agrees. See Henry J. Reske, *A Justice Defined by A Ruling: Blackmun's Roe Decision Inspired Women's Privacy Rights Movement*, 80 ABA J., June, 1994, at 20, 21 (commenting on his retirement, Justice O'Connor praised Justice Blackmun for his "compassion for individual litigants"). His dissent in *DeShaney* is an especially vivid example:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing. . . . [I]t is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all," that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

DeShaney v. Winnebago City Soc. Servs. Dep't, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting). Justice Blackmun seems more consistently sensitive and responsive to real human harm than Justice O'Connor has ever been. For example, Justice Blackmun's dissent characterized O'Connor's *Coleman* opinion as an "unjustifiable elevation of abstract federalism over fundamental precepts of liberty and fairness." *Coleman*, 111 S. Ct. at 2571 (Blackmun, J., dissenting). If such sensitivity and responsiveness is a valid test of relational feminist values, as I believe it is, then male judges can and do care.

92. See *supra* notes 61-64 and accompanying text.

demonstrates that endorsement of rights-talk is no talisman against even unintended gender-role stereotyping. To be sure, the concern that relational feminism itself risks glorifying oppressive stereotypes is legitimate; but the anti-relationalists miss an important opportunity to develop relationalism's message about the value of care beyond the dilemma of difference and the stigma of stereotype.

Furthermore, the anti-relational critique proceeds from a flawed premise not necessarily implied by relationalism: that the existence of statistical difference (here a greater care focus among women) justifies policy decisions based on stereotype (that women should therefore be coerced to act in the realm of reproduction in accordance with that statistical prediction). One function of the heightened judicial scrutiny applied under equal protection analysis is to expose governmental reliance on "archaic and overbroad" stereotypes lurking behind a scrim of purportedly legitimate policy concerns.⁹³ Underlying those principles are strong moral and political objections—consistent with relationalist values—to the use of characteristics such as race or gender as proxies for stereotypic generalizations in the allocation of rights and benefits (even if some correlation exists between characteristic and stereotype). First, such "[sex- or] race-based decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of [sex-based and] racial groups or on the related phenomenon of [sexually or] racially selective sympathy and indifference."⁹⁴ That stigmatic phenomenon is the "unconscious failure to extend to [the disfavored group] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."⁹⁵ Second, the distortions of the political process that result when one group is excluded because of morally irrelevant or suspect characteristics are at odds with

93. *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426-27 (1994) ("We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.' " (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991))); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642-43 (1975) (finding that Social Security Act's distinction between men and women in award of survivor's benefits rested on "archaic and overbroad" stereotypes about the male role as breadwinner); *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality) (reaching similar conclusion with respect to armed services' "dependent" allowance).

94. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-7 (1976).

95. *Id.* at 7-8.

relationalism's emphasis on connection and inclusion.⁹⁶

These observations also suggest how relationalists must themselves be careful that their concern with sexual difference does not degenerate into stereotyping that violates relationalism's own ethical precepts. First, stereotypes are antithetical to true care and relation. They encourage us to encounter another person not as a unique individual, but as the abstract construction that the stereotype depicts him or her as being.⁹⁷ According to relational theory, caring and connection arise in actual interpersonal relations rather than through intellectualized ideal.⁹⁸ We *care* about a person for himself or herself, not for his or her membership in a class alleged to possess qualities we might value.⁹⁹

Second, stereotypes can hurt anyone. The problem is more than descriptive accuracy: The attributes described by relational feminism are, by relationalism's own lights, morally significant and can have profound policy implications that immediately impact people's lives.¹⁰⁰ Stereotypes are the first long step down the path of dehumanizing self and others, a process that, experience teaches, all too easily facilitates the infliction of group-based harms that we might otherwise consider morally repugnant if done individually to someone about whom we personally cared. Stereotypes promote the infliction of harm by increasing both intra- and extra-psychic distance, and thus diminishing connection, care, and a sense of moral responsibility between individuals.¹⁰¹ Indeed, it has been argued that this very

96. For an overview of the antidiscrimination principle and an application of it in terms that bridge the polarities of individualism and collectivism, see Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007, 1022-27, 1054-61 (1991).

97. This problem is one risk of affirmative action programs, which often are justified in collectivist terms. See *id.* at 1036-39.

98. See *infra* notes 191-219 and accompanying text.

99. See Lawrence A. Blum, *Gilligan and Kohlberg: Implications for Moral Theory*, 98 ETHICS 472, 474-75 (1988) ("The moral agent must understand the other person as the specific individual that he or she is, not merely as someone instantiating general moral categories such as friend or person in need."); Hardwig, *supra* note 1, at 442.

100. Implicit in *In a Different Voice* is the reverse-Kohlbergian judgment that men are morally inadequate when judged by Gilligan's standards. See GILLIGAN, *supra* note 5, at 19-23. This theme also emerges in Noddings's writings. See NODDINGS, *CARING*, *supra* note 20, at 40-46; Noddings, *Ethics*, *supra* note 20, at 166-73; *infra* note 195.

101. Social psychologists have suggested a differential self-awareness theory that describes two alternative ways in which group orientation can facilitate the disinhibition of harmful behaviors toward others. Stereotyping (i.e., exaggeration or fabrication of in-group versus out-group differences) can foster (1) the process of deindividuation (i.e., the "loss of self consciousness and submergence in collective activity"), as well as (2) diffusion of responsibility. Steven Prentice-Dunn & Ronald Rogers, *Deindividuation and the Self-*

same process helps to fuel the fires of anti-abortion violence.¹⁰²

The “sameness/difference” approach also risks obscuring the basic systemic problem of women’s subjugation: “By taking difference as a given, traditional approaches deflect attention from broader issues surrounding its social construction and consequences. Part of the problem has been focus; legal analysis has been too much concerned with gender difference, too little with gender disadvantage.”¹⁰³ The anti-relationalists appear to have identified a particular risk of difference theory for feminist goals: that it can be invoked in defense of oppressive stereotypes (in particular concerning childbearing and childrearing). Further, if, as some feminists have contended, portraying women in subordinated roles contributes to their oppression (including through identification with the oppressor’s construction

Regulation of Behavior, in *PSYCHOLOGY OF GROUP INFLUENCE* 87, 90-91 (Paul B. Paulus ed., 2d ed. 1989). Arousal of group cohesiveness (for example by focusing on racial or sexual stereotypes) has been found to cause deindividuation by reducing private self-awareness (i.e., one’s awareness of thoughts, feelings, and perceptions), thus disabling the psychological behavior-regulating mechanisms of either natural care or internalized norms of social propriety. In other words, “uninhibited acts may result from decreased cognitive [and affective] mediation of behavior.” *Id.* at 94.

102. DALLAS BLANCHARD & TERRY J. PREWITT, *RELIGIOUS VIOLENCE AND ABORTION: THE GIDEON PROJECT* 13-15, 214-15 (1993). Only 10 days before the killing of Dr. David Gunn in Pensacola, Blanchard predicted that anti-abortion activists would soon resort to such extreme violence. John Balzar, *Abortion Foes Test the Limits*, *L.A. TIMES*, Sept. 30, 1993, at A1, A8.

103. Rhode, *supra* note 81, at 197. Catharine MacKinnon’s criticism has been more forceful:

According to this approach [to sex equality], which has dominated politics, law, and social perception, equality is an equivalence not a distinction, and gender is a distinction not an equivalence. The legal mandate of equal treatment—both a systemic norm and a specific legal doctrine—becomes a matter of treating likes alike and unlikes unlike, while the sexes are socially defined as such by their mutual unlikeness. That is, gender is socially constructed as difference epistemologically, and sex discrimination law bounds gender equality by difference doctrinally. . . . A built-in tension thus exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. . . . Sex equality becomes a contradiction in terms, something of an oxymoron.

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 216 (1989). In her view, the traditional approach to equality has left women looking as though they want to have it both ways—“the specialness of the pedestal and an even chance at the race, the ability to be a woman and a person too”—but getting little benefit from either. *Id.* at 233. Men, on the other hand, get to be the same when it suits them (e.g., by taking advantage of sex discrimination laws) and different when they want to be (e.g., when seizing some advantage). Her alternative approach is not to formulate abstract standards that will produce determinate outcomes in particular cases or to clarify difference, but instead to reallocate power wherever necessary to end men’s domination of women—as she defines it. *Id.*

of reality), perhaps stereotypically portraying men as at best relationally irresponsible and at worst innately evil abusers also has adverse consequences.¹⁰⁴ An additional problem is that difference theory's dualistic justice-versus-care paradigm tends to exclude the possibility that there are "persons who are both very fair and very caring and who, in addition, have finely honed sensitivities for perceiving moral salencies and seeing particular problems as problems of certain multifarious kinds."¹⁰⁵

In a larger sense, preoccupation with sexual difference in the distribution of values and behaviors can preempt consideration of the values and behaviors themselves. For one thing,

[i]t is necessary for us to remember, as we think critically about domination, that we all have the capacity to act in ways that oppress, dominate, wound (whether or not that power is institutionalized). . . . [I]t is first the potential oppressor within that we must resist—the potential victim within that we must rescue—otherwise we cannot hope for an end to domination, for liberation.¹⁰⁶

104. See *supra* note 101. Thus, perhaps both the sugar-and-spice-and-everything-nice/snips-and-snails-and-puppy-dog-tails approach to difference, and the more ideologically violent accusation that men are incipient rapists and oppressors and women are chronically powerless victims, can have destructive effects on the way men and women view themselves and each other. For an example of the latter accusation, see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE 15* (1975) (contending that rape "is nothing more or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear"). For a somewhat strident objection to that perspective, see Gerald Schoenewolf, *The Feminist Myth About Sexual Abuse*, 18 J. PSYCHOHISTORY 331, 331-32 (1991).

A recent unfortunate example of the harm that can occur was an Issues in Feminist Art class project at the University of Maryland, purportedly intended to highlight the issue of sexual assault, which posted leaflets around campus warning that "these men are potential rapists." The men's names listed on the leaflets were selected at random from a student telephone directory. The nine women art students also erected a wall with the names of 15,000 male students (almost every man in the phone book) under the heading "these men could be rapists." See Lisa Leff, *Kirwan Denounces Art Project; U-Md. President Calls Listing of "Potential Rapists" Regrettable*, WASH. POST, May 11, 1993, at B4. Another example is the proposal that men be banned from working with children. See, e.g., Angela Neustatter, *Should Men Work With Children?*, THE INDEPENDENT (London), Apr. 25, 1993, at 22.

105. Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622, 627 (1987).

106. Bell Hooks, *Feminism: A Transformational Politic*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 2, at 185, 186-87. Hooks recognizes that whites, blacks, men, and women all oppress and are oppressed, but she also believes that [f]eminism as liberation struggle must exist apart from and as a part of the larger struggle to eradicate domination in all its forms. We must understand that patriarchal domination shares an ideological foundation with racism and other

While the dialogue about difference has had the enormous value of concentrating attention on care in the first place, real transformation requires consideration of an ethic of care on its own terms. If caring is a valuable trait, it may matter less how it is sexually distributed than whether it is sufficiently actualized in the community as a whole. In the context of abortion, this means that the solution is neither to reject nor to dilute an ethic of care just because a gendered version of it may contribute to the subordination of women, as the anti-relationalists fear, but is instead to ask where a universalized, robust ethic of care might lead.

III. LIMITS OF THE "MASCULINIST" PARADIGM

The relationalists' misplaced emphasis on difference is matched by the anti-relationalists' mistake in testing a "feminine" ethic of care in a legal landscape constructed along "masculine," rights-talk lines. Both sides thus underestimate relational feminism's potential to challenge the ideological status quo. The proper question is not whether a feminine perspective can survive scrutiny in a masculine legal world any more than it is whether women can show that they can "take it like a man" and survive in a hostile, sexually harassing work environment.¹⁰⁷ Nor is the issue whether care can displace

forms of group oppression, that there is no hope that it can be eradicated while these systems remain intact.

Id. at 188.

107. One of the reasons for applying a gender-conscious standard to harassment claims is to avoid the tendency toward gender bias in the construction of the norms by which conduct is evaluated. (I make an analogous point below in observing more generally that relationalism argues for inclusion of a care focus along with the rationality norms traditionally applied to evaluate the legitimacy of policy-making.) The reasonable person standard "has a tendency to be male-biased, due to the tendency of courts and our society in general to view the male perspective as the objective or normative one." *Lehmann v. Toys "R" Us Inc.*, 626 A.2d 445, 459 (N.J. 1993) (adopting "reasonable person of the same sex" test for state law sexual harassment/hostile work environment claims). The *Lehmann* court recognized that "there is far from a uniform female perspective on sexual harassment," but concluded that sex differences in attitudes and perceptions were sufficiently well established to warrant legal recognition. *Id.* (citing Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1193 n.44 (1989)). For other cases adopting a similar position, see *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991); *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990); *Andrews v. Philadelphia*, 895 F.2d 1469, 1485-86 (3d Cir. 1990). *But see Radtke v. Everett*, 501 N.W.2d 155, 167 (Mich. 1993) (rejecting gender-specific test on the grounds, *inter alia*, that it tends to "pour into the standard stereotypic assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard. Such paternalism degrades women and is repugnant to the very ideals of equality that the act is intended to protect." (footnote omitted)). Citing *Ellison v.*

rights. I shall suggest below that rights are a necessary substitute for care in impersonal, disconnected relationships. The issue really is what, if anything, care can add to consideration of legal questions such as those concerning abortion rights.

By positing a polarized contest between autonomy and relational theory (as do Karlan and Ortiz), or by insisting that liberalism already includes most of what is worthwhile from relationalism (as does McClain), those authors mention but fail to develop the possibility that both perspectives can together enrich understanding of the abortion problem. Moreover, their push to reinvigorate a “masculinist” view of abortion rights seems oddly anachronistic, in view of the fact that the law struck down in *Roe* was rooted in a period of pervasive male domination.¹⁰⁸ Some limits of that approach are considered in this Part.

A. Critique of Thomson's defense of abortion

The autonomy premise of Thomson's argument is largely atomistic:¹⁰⁹ (1) no one, even if *in extremis*, has a right to demand much if any care from anyone else; and (2) one's claim to autonomy is largely insulated from any moral judgment about the uses to which it is put.¹¹⁰ That premise forms the moral baseline of tort law's no-duty-to-rescue rule, to which she refers in her equality premise to

Brady, the EEOC has proposed rules that would establish a “reasonable person” standard for hostile or abusive work environment claims. That standard would take into account the perspective of persons of the claimant's race, color, religion, gender, national origin, age, or disability. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266, 51267 (1993) (to be codified at 29 C.F.R. § 1609.1(c)).

To argue, as I do in the preceding section, that relationalism's overemphasis on difference is problematic is not to suggest that the potential for difference ought to be categorically ignored. A standard like that proposed by the EEOC allows a factfinder to consider whether sexual difference really exists in a context in which taking difference (if there is any) into account may lead to needed protection for women (or any other victimized person). Furthermore, there may well be room for consideration of difference in a relational account of abortion that also protects women from exploitation and hurt. See *infra* notes 332-61 and accompanying text. My objection is to a categorical, wholesale approach (either by rejection or adoption) to both difference and relationalism. They both have something to offer at the retail level, in the proper context.

108. See JUDGES, *supra* note 90, at 104, and sources cited therein.

109. McClain observes that relational feminists tend to conflate two distinct usages of the term “autonomy,” both pejorative, to mean atomistic self-interest and to mean self-determination or personal sovereignty. McClain, *supra* note 14, at 1175-76.

110. See *supra* notes 73-75 and accompanying text.

demonstrate the anomalous nature of abortion prohibitions.¹¹¹ It also tracks Gilligan's description of the masculinist view of justice as noninterference.¹¹² Relational feminism, however, implicitly questions the sufficiency of Thomson's syllogism, standing alone, as a defense of abortion rights. Her argument depends on the validity of (1) her autonomy premise that there is no general moral duty to aid strangers, and (2) her equality premise that abortion raises cognate moral questions and therefore should receive a similar answer if women are not to be discriminated against. Neither premise is self-evident, and the syllogism ultimately proves on scrutiny to be circular as a defense of abortion rights.

This circularity emerges in McClain's objection that Bender's relational critique of the no-duty-to-rescue rule, taken to its logical conclusion, would compromise abortion rights. McClain counters Bender's implicit relational challenge to Thomson's autonomy premise by pointing to that challenge's impact on abortion rights.¹¹³ Thus, McClain's anti-relational response is that no one owes much duty to anyone else because otherwise abortion would be difficult to defend; abortion is justified because no one owes much duty to anyone else. Archimedes, searching in vain for a place to stand, reaches for his own sandalstraps.

While McClain's objection to Bender's conception of duty between strangers may be sensible as tort policy, her conclusion about relationalism and abortion does not follow. McClain describes how more modest tort reform proposals, based on liberal conceptions of personhood, argue for a "duty of easy rescue" that does not impose "a significant disruption of [the rescuer's] own projects."¹¹⁴ By

111. Thomson, *supra* note 71, at 61-64; see also *supra* notes 73-75 and accompanying text.

112. See *supra* notes 41-43 and accompanying text.

113. McClain, *supra* note 14, at 1258. Recall that Thomson's premise also serves as the foundation for Karlan and Ortiz's autonomy-based defense of abortion. See *supra* notes 61-76 and accompanying text.

114. McClain, *supra* note 14, at 1237-38 (discussing Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 292 (1980)). For example, as McClain observes, Weinrib has argued for a "duty of easy rescue" based in part on a Kantian morality in which each individual "concede[s] to others the right to physical integrity that he implicitly and inevitably claims for himself." Weinrib, *supra*, at 288, quoted in McClain, *supra* note 14, at 1237. Liberalism's concern with autonomy is sheltered in Weinrib's proposal by his recognition that conditions of helplessness and dependency may preclude contractarian arrangements that liberalism normally assumes govern obligations to others, and by hypothesizing an *ex ante* consent to a mutual right (and reciprocal duty) to physical security (and aid). For an analogous justification of the tort system generally and a purported account of the autonomy interests it affects, see RICHARD A. POSNER, THE

contrast, Bender's Good Neighbor proposal threatens to require Very Good Samaritanism,¹¹⁵ undervalues individual self-determination,¹¹⁶ and disregards other responsibilities the potential rescuer might have.¹¹⁷

McClain's warning that Bender's approach might undermine

ECONOMICS OF JUSTICE 60-87 (1981). Weinrib responds to the traditional objections to a duty to aid strangers—its indeterminacy and potential voraciousness—by limiting the duty to cases sufficiently specific to be capable of enforcement and that do not impose much burden on the rescuer. Weinrib, *supra*, at 292. McClain suggests that such limited “[p]roposals for reform of the [no-duty-to-rescue] doctrine and its erosion through recognition of special relationships giving rise to a duty to rescue, illustrate the extent to which concerns about care and connection not explicitly identified as feminist are already or could be present in law.” McClain, *supra* note 14, at 1232. McClain thus concludes:

If connection connotes only our immediate web of relationships, then viewing the stranger as a neighbor to others, whom we should treat as we would treat our neighbors, might be a necessary step in order to attempt to expand the circle of care. But if an ethic of care can recognize a web of connection based on our common humanity, then it shares with liberalism the notion of duties arising out of personhood. Such duties could, and perhaps should, provide a basis for a legal duty to aid when there is no significant risk or burden to oneself.

Id. at 1242 (citations omitted). This duty of “easy rescue” resembles Thomson's Minimally Decent Samaritanism. See Thomson, *supra* note 71, at 61-63; *supra* notes 73-75 and accompanying text.

115. McClain pragmatically argues that Bender's reliance on a good neighbor standard of care “is flawed because one cannot, however regrettably, assume a certain level of care among neighbors” and because of the problems of indeterminacy flowing from a standard that varies from neighborhood to neighborhood. McClain, *supra* note 14, at 1240-41. She also points out that Bender's resort to a good neighbor standard is unnecessary, because a model based on notions of equal citizenship described by Weinrib (and by John Rawls) would also impose a duty of care. *Id.* at 1241.

116. *Id.* at 1239-40. This extreme result is not mandated by a more moderate form of relational feminism. As McClain observes, Carol Gilligan's relational feminism warns against equating an ethic of care with female self-sacrifice, urging instead that the final stage of moral development is recognizing the need for personal integrity through focusing on the self as well as on others, what she calls bringing justice to the care perspective, or the integration of rights and responsibilities. *Id.* at 1240 (footnote omitted); see also *supra* notes 44-50 and accompanying text. This aspect of Gilligan is not, as Karlan and Ortiz assert, simply a disguised form of liberalism (in the extreme sense used by Thomson). See *supra* note 76 and accompanying text. Instead, as McClain has explained, Gilligan's recognition of this notion of integrity and rejection of the ethic of self-sacrifice shows that relational feminism in this sense and liberalism in the Rawlsian and Dworkinian sense have something in common—but that thing is not what Karlan and Ortiz think it is. See *supra* notes 68-69 and accompanying text. The problem with McClain's approach, and ultimately with Gilligan's, is the absence of careful consideration of what care might constructively mean in real life. Gilligan is too worried about difference, and McClain is too worried about defending her vision of abortion rights. Bender's contribution here is to get us thinking about what care means, even if she might take it in an unworkable direction in the context of tort law.

117. McClain, *supra* note 14, at 1239.

abortion rights parallels Karlan's and Ortiz's fear of Gilligan:¹¹⁸ If people with whom we have no prior relation are not "strangers" because of the basic interconnectedness of all people, and if duty is a function of propinquity, then "the pregnant woman-fetus relationship presumably would be at the highest level of duty, because of the high degree of 'intersubjectivity' and 'connection.'" ¹¹⁹ Bender's relation-talk thus "may unwittingly describe (for some) the pregnant woman-fetus relationship. . . . Could a caring woman ignore the interest of the fetus, a potential human being, in a sense *a part of her*, in becoming a person?"¹²⁰

I argue below that it is possible to answer "probably not," but nevertheless to conclude that a caring person would not force someone unwillingly to continue pregnancy.¹²¹ From the anti-relationalists' perspective, however, the intolerable implication of Bender's position is that it questions the assumptions underlying Thomson's claim that a woman has no moral obligation to meet pregnancy's demands of Good (indeed Most Excellent) Samaritanism.¹²² Because that result might raise a moral objection to abortion, McClain reasons, Bender must be wrong in her relational account of moral duty.¹²³

Perhaps McClain has it backwards. Bender's relationalism would indeed take pregnancy out of the Samaritan analogy.¹²⁴ Whatever

118. It must be noted that Bender's analysis of the no-duty-to-rescue rule does not consider its impact on abortion rights and gives no indication of being intended to produce the result McClain fears. Indeed, the anti-relationalist critique usually characterizes such results as unintended.

119. McClain, *supra* note 14, at 1257.

120. *Id.* at 1256-57.

121. See *infra* notes 263-331 and accompanying text.

122. Bender's relationalism thus implicitly challenges the not-too-much-trouble constraint of the "easy rescue" duty in the abortion context because "if the fetus is the stranger in peril, we must include the fetus's life-sustaining connection to the pregnant woman in the woman's web of relationships" (as well as the fetus's connection to others, such as the father). McClain, *supra* note 14, at 1258. Keep in mind that, as McClain notes, "Thomson's argument does not contradict recognition of either a natural or legal duty of mutual aid," because Thomson is concerned with a burden much greater than Weinrib's minimal duty of "easy rescue." *Id.* at 1259.

123. *Id.* at 1239-42.

124. Bender's fundamental point with respect to the no-duty-to-rescue rule is an important one that she and other relational feminists have made in a variety of contexts: Viewed from a more "relational" perspective, we simply are not strangers to each other. "In defining duty, what matters is that someone, a human being, a part of us, is drowning and will die without some affirmative action." Bender, *Lawyer's Primer*, *supra* note 54, at 34.

the limits of Bender's tort proposal, that outcome may make sense.¹²⁵ It is strained and artificial to describe the conceptus¹²⁶ as a stranger-in-peril and the pregnant woman as a bystander. While *lawyers* may query "And who is my neighbor?," few *mothers* wonder "And who is my child?" Likening the conceptus to a burglar is even more bizarre. Those moves, so central to Thomson's argument, rely on the kinds of abstractions from real life that relational feminists properly decry.¹²⁷

Thomson's assumptions beg what she herself identifies as the key question: Does the conceptus-pregnant woman relationship impose a duty of care? Her argument that the conceptus has no "right" to "expect" any sustenance from the woman requires Thomson to redefine that relationship into something alien to maternity, in which the conceptus and woman are at best atomistic strangers and the conceptus resembles a hostile intruder (the kind of person whom, in

125. Recall the context of the Good Samaritan parable: "And, behold, a certain lawyer stood up, and tempted him, saying, 'Master, what shall I do to inherit eternal life?' " *Luke* 10:25 (King James). Jesus instructed the lawyer to love God, and also to love "thy neighbor as thyself." *Id.* at 27. He related the parable of the Good Samaritan in answer to the lawyer's question, " 'And who is my neighbor?' " *Id.* at 29-37.

126. According to a generally accepted medical text, the term "conceptus" refers "to all products of conception, i.e., embryo (fetus), fetal membranes, and placenta. In particular, the conceptus includes all tissues that develop from the zygote, both embryonic and extraembryonic." F. GARY CUNNINGHAM, M.D., ET AL., *WILLIAMS OBSTETRICS* 40 (18th ed. 1989). I use the term "conceptus," which covers all stages of gestation from fertilization to parturition, rather than the more commonly used term "fetus," which actually does not apply until the eighth week after fertilization, to avoid obscuring the fact that most abortions performed in the United States technically "are not abortions of fetuses but rather of embryos in the last stages of embryonic development." *JUDGES, supra* note 90, at 52. In view of gestational development's central place in the abortion conflict (legally, politically, and emotionally), technical accuracy would appear to be indicated.

127. Those moves also could be countered with other, perhaps no less artificial, thought experiments. Implicit in Thomson's argument is the contractarian assumption that the famous violinist, who has been hooked to the woman's circulatory system, would not have any reasonable expectations (as opposed to fervent unilateral hopes) unfairly frustrated if the woman turned around and unplugged him. After all, if she has no moral duty to make large sacrifices of health and life plans for his benefit, it should hardly come as a disappointment that she declines to volunteer. Imagine, though (fantastically), that the conceptus is capable of forming "expectations." How can we say that the conceptus has no reasonable expectations of continued care? Indeed, infants seem to be filled with nothing but the unrelenting expectation that they will be cared for immediately, completely, and endlessly. Does Thomson seriously mean to imply that a baby crying at 2 a.m., or a conceptus kicking vigorously at eight months, has "unreasonable expectations?"

other circumstances, the law allows one to shoot on sight).¹²⁸ Her reference to the no-duty rule could be inverted to demonstrate how special that relationship is. The law already recognizes numerous "special relationships" in which duties of care arise. A characteristic feature of such relationships is the care-claimant's dependence on the person from whom care is claimed.¹²⁹

128. For similar criticism, see LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1356 (2d ed. 1988):

The underlying problem with both approaches is that they seek to fit the relationship between a pregnant woman and the fetus she carries into the pigeonholes framed to deal with other problems in the law. We do not get much farther by comparing abortion to a nonculpable omission or a justifiable homicide than we would by analogies to property law that might try to place the fetus within the framework of uterine invitees, licensees, and trespassers. The relationship of woman and fetus is unique; it requires a unique legal analysis.

129. As one treatise explains:

During the last century, liability for "nonfeasance" has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare.

W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 373-74 (5th ed. 1984). Examples of such special relations (which seem at least no less analogous to pregnancy than Thomson's violinist hypothetical) include common carriers and their passengers; innkeepers and their guests; ships and their sailors who fall overboard; employers and their employees; businesses and their invitees; jailers and their prisoners; schools and their pupils. *Id.* at 376-77. Indeed, Prosser's treatise includes among "other relations calling for the same conclusion" the relationship between "parent and child, where the duty to aid has been established in the criminal law." *Id.* at 377 (footnotes omitted). For recognition of a constitutional duty arising out of a custodial relation, see *Youngberg v. Romeo*, 457 U.S. 307, 315-19 (1982) (finding Fourteenth Amendment duty to protect liberty interests of mentally retarded individual subject to involuntary custody); *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (recognizing duty to prisoners required both as a matter of procedural due process and the Eighth Amendment's prohibition on cruel and unusual punishment). Furthermore, duties of reasonable care to secure the safety of another while in the actor's charge and not to leave the other in a worse condition than when the actor took charge arise when one, under no duty to do so, "takes charge of another who is helpless adequately to act to protect himself." *RESTATEMENT (SECOND) OF TORTS* § 324 (1977). Comment g of the *RESTATEMENT* provides:

The fact that the actor gives another gratuitous assistance does not require him to continue his services until the recipient of them gets all of the benefit which the actor is capable of bestowing. . . . Thus, while A, who has taken B from a trench filled with poisonous gas, does not thereby obligate himself to pay for B's treatment in a hospital, he cannot throw B back into the same trench, or leave him lying in the street where he may be run over.

Id. cmt. g. Thomson's argument implies that terminating pregnancy is equivalent to refusing to pay for the helpless person's hospitalization, rather than to throwing the conceptus back into the trench or leaving him or her lying in the street. The persuasiveness of that implicit assumption is open to question.

More fundamentally, it is doubtful whether pregnancy can coherently be considered through tort and property law's generally individualistic lens of rights and duties.¹³⁰ What if pregnancy and parenthood really are unique? The law and social mores already impose substantial obligations of care on parents. Child abuse and neglect are grounds for state intervention¹³¹ and are increasingly regarded as a moral outrage.¹³² Thomson's assertion that "nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive"¹³³ surely would surprise responsible parents, who do precisely that for more than twice nine years to raise their own children.¹³⁴ To be sure, childrearing does not involve the direct biological link of pregnancy, but it routinely entails significant, protracted, and sometimes prodigious, sacrifices of health and life projects.¹³⁵

130. See *supra* note 128. Indeed, one wonders why Thomson did not also rely on a property owner's privilege to use reasonable force to defend her right of exclusive possession. See RESTATEMENT (SECOND) OF TORTS § 77 (1977).

131. See, e.g., ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 381 (2d ed. 1989).

132. No "deadbeat parent" will be heard to object, for example, that he or she owes no duty to his or her offspring beyond that which causes the parent no inconvenience. See, e.g., Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified as amended at 18 U.S.C. § 228, 42 U.S.C. §§ 3796-97, 12301 (Supp. V 1992)).

133. Thomson, *supra* note 71, at 61-62.

134. This argument, like Thomson's, assumes that the prenatal-postnatal distinction is irrelevant to the question of moral duty. As discussed below, on one view the loving parents' motivation to care for their children arises naturally out of the caring relation and not out of abstract moral principle. See *infra* notes 193-219 and accompanying text. It is the application of this perspective to abortion that anti-relationalists fear will ground a moral duty to bring a pregnancy to term.

135. Cass Sunstein focused on the biological distinction to argue, Thomson-like, that neither conventional morality nor law requires a parent to donate a kidney to his or her child. Sunstein, *supra* note 71, at 34. It is not clear that his analogy is apt either. Arguably, organ transfer is such an exceptional experience that it lies outside normal realms of care, whereas the burden of pregnancy—however substantial it may be—is one virtually every single one of us has "imposed" on a woman and is the quintessence of the commonplace.

Sunstein's analysis apparently would regard such an observation as a nonneutral, "undefended and reflexive" political act. With respect to abortion, he argues that abortion can be "seen as a killing rather than a failure to allow conception only because of the perceived naturalness of the role of women as childbearers." *Id.* at 35. Such assumptions, in his view, rest on "constitutionally unacceptable stereotypes about women's natural or appropriate role." *Id.* The problem raised by abortion restrictions thus is that not only do they burden women, but they effectively prescribe by law different roles for men and women that contribute to women's second-class citizenship.

I agree that abortion restrictions can have that effect, and attempt to elaborate that relationship *infra* notes 332-61 and accompanying text. And I find exciting his insight that

Perhaps it is simply not sensible to speak of gestation in the adversarial or transactional terms of "claims," "rights," and "burdens"; maybe no relationship is analogous, and abortion may well exceed the capacity of analogical analysis. Thomson's argument thus rests on a faulty foundational assumption—that the conceptus-pregnant woman relationship is like any other, to be tested by the same norms of expectations, reciprocity, and individuality that we apply to relationships between post-natal people.¹³⁶

The point here is certainly not that abortion rights are morally indefensible from a relational perspective. To the contrary, an ethic of care that also extends to care for the unwanted pregnant woman would tolerate and protect (even while regretting and mourning) abortion rights.¹³⁷ Nor is the point that equality and autonomy arguments are inapplicable. Such arguments can be substantially enriched by the addition of relationalism's concern with exclusion and harm.¹³⁸ Rather, the point is that Thomson's defense is inadequate standing by itself.

As McClain observes, any workable resolution of the duty-to-aid problem—including its application to abortion—surely involves a balancing formula that weighs both autonomy and equality interests. While even Thomson recognizes that abortion in some circumstances might be morally unacceptable, she provides no guide for distinguishing the more typical early-term abortion scenario—apart from the circular assertions that pregnancy imposes more than minimal demands and that people generally owe nothing more (if anything)

we must not confuse an assumption about the way things are with a choice about the way things ought to be. (Others have made this general observation in different contexts. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-65, 1372 (1984); see also *infra* notes 164-78 and accompanying text). But I approach the problem from a different direction for at least two reasons: First, my broader project is to explore whether and how the value of care might be manifested in legal policy. While equality is part of that project, it is not its total. Second, an intuitive preference for parsimony inclines me to resist an argument that seems to require one to regard human reproduction, which has been going on for millennia and is arguably a singularly natural human event, as socially constructed or as the normative equivalent of organ transplant, which is, relatively speaking, a very recent technological advance and is arguably an extreme example of heroic and artificial prolongation of life.

136. Goldstein's contribution to the abortion debate, ROBERT GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* (1988), raises serious questions about that assumption. See *infra* part V.C.

137. See *infra* part V.B.

138. See *infra* part V.D.

than Minimally Decent Samaritanism to one another.¹³⁹ However, pregnancy unavoidably imposes enormous and unequal burdens on the pregnant woman in any imaginable circumstances—from abortions that Thomson apparently would find no more morally exceptional than walking away from a boring guest at a cocktail party to those abortions that even she would find morally intolerable.

An essential ingredient of an intelligible balancing approach is an ethic of care.¹⁴⁰ Thomson's enterprise, like many defenses of abortion, tries to argue away the uneasiness and ambivalence abortion causes by erecting an unassailable deductive fortress around the decision.¹⁴¹ Whatever its merits as logical analysis, and despite its sensitivity to some exploitative aspects of abortion prohibitions,¹⁴² Thomson's *Defense* presents an unlikely image of the conceptus-pregnant woman relationship. The next section of this Article will offer additional grounds for doubting that the best approach to abortion rights is "masculinist" and will raise some questions about the limits of this dualistic, labelling approach to jurisprudence.

B. *Limits of masculinist focus in constitutional analysis*

The anti-relational reaction is silent on *Roe's* place in a general theory of constitutional interpretation. That omission is puzzling because a court's willingness even to consider recognizing a right to abortion in the first place—whether articulated in individualistic or more collective terms—will depend on the court's interpretive model.¹⁴³ The masculinist-feminist distinction may shed little light

139. Thomson, *supra* note 71, at 65-66 ("It would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion just to avoid the nuisance of postponing a trip abroad.").

140. See *infra* part V.D.

141. See generally JUDGES, *supra* note 90, at 4-6 (recognizing the heated moral and social debate associated with abortion); Stephen L. Carter, *Books: Strife's Dominion*, NEW YORKER, Aug. 9, 1993, at 86. Carter notes that

[w]hat is remarkable about the recent spate of serious pro-choice tomes is the consistency with which their authors underestimate the commitment of their opponents. They seem unwilling to accept the idea that pro-life activists are as sincere and as thoughtful in striking the balance in favor of the fetus as abortion-rights activists are in striking the balance the other way.

Id.

142. For discussion of this problem and of the feelings of women facing unwanted pregnancy, see *infra* notes 287-89, 308-18, 332-53 and accompanying text.

143. I am placing to one side for a moment the Critical Legal Studies objection that interpretive-theory-talk follows and paints, rather than produces, the result in a given case. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES. As discussed below, however, this problem of the indeterminacy of rights is another reason to be wary

on the basic interpretive problems presented by the abortion question, and it may not lead ineluctably to the pro-choice result Karlan, Ortiz, and McClain advocate. This is so for at least two reasons. First, "masculinist" thinking arguably is more consistent with strict constitutional interpretivism, under which theory a court would regard the tough value choices presented by a claim to abortion rights as outside the judicial ken. Second, judicial willingness to undertake noninterpretive review—which as described below is arguably a more "feminine" approach to constitutional interpretation—is no guarantee of a pro-choice result. Reliance on difference dualism thus may prove less helpful than careful attention to the particular implications of the constitutional question at hand.

1. Interpretivism

A "masculinist" approach to problem solving has been described as less flexible, more rule-like and categorical, and insensitive to the particulars of a given context; it strives for certainty and consistency. It also has been characterized as more deferential to formal hierarchical authority and more willing to sacrifice people's interests to abstract principles. Feminine problem solving, by contrast, has been described as more flexible, particularistic, and contextual; in a sense, it is more standard-like, tolerant of ambiguity, and prone to sacrifice principle to avoid harm to people.¹⁴⁴ This distinction sifts not only autonomy- and privacy-based rights from communitarian responsibility, but also separates interpretive from some forms of noninterpretive review.¹⁴⁵ Thus, a masculinist (i.e., pure interpretivist) approach to constitutional interpretation might well leave an issue like abortion to legislative resolution.

The sitting Justice most closely associated with the interpretivist perspective is Antonin Scalia.¹⁴⁶ He eschews close judicial engagement with what claims of autonomy, privacy, spheres of intimacy, and bodily integrity might mean to people living at the close

of the position of Karlan and Ortiz. See *infra* notes 163-79 and accompanying text.

144. See *supra* notes 20-50 and accompanying text; *infra* notes 194-219 and accompanying text.

145. As one self-described "defender of noninterpretive review" put it, "constitutional theory . . . must be sensitive to context—the context of our time." MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 119 (1982).

146. According to Kathleen Sullivan, he favors rules at both the interpretive and operative levels. He has, however, taken a standard-like approach to stare decisis, presumably to preserve the primacy of rules at the other two levels. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, 112-13 (1992).

of the twentieth century.¹⁴⁷ He apparently seeks safety from the “minority tyranny” of judicial aggression in clear boundaries.¹⁴⁸ For him, those boundaries are formed by categorical interpretive rules that reduce many constitutional questions to a purportedly objective search for the most narrowly defined, specific “tradition.”¹⁴⁹

147. In Justice Scalia’s view, expressed in *Casey*, the Court was exercising raw power rather than “reasoned judgment” in *Roe*. In his view, the only defense of *Roe* that some of the best legal minds in the country have been able to offer is to “rattle off a collection of adjectives [about privacy, intimacy, and personal choice] that simply decorate a value judgment and conceal a political choice.” *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). But, he continues, “[t]hose adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally ‘intimate’ and ‘deeply personal’ decisions involving ‘personal autonomy and bodily integrity,’ and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable.” *Id.* at 2874-76 (Scalia, J., concurring in the judgment in part and dissenting in part). For another example of Scalia’s approach to such problems, see *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (arguing that federal courts have “no business” entertaining Nancy Beth Cruzan’s claim to a right to commit “suicide”).

148. One theorist whose approach also fits this description is Robert Bork, who believes that courts lack the authority to develop flexible constitutional standards that reflect evolving social norms. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971). His interpretivism resembles the masculine perspective described by Gilligan: Negative rules are necessary to constrain aggression, to limit interference with others, and thereby to make life in the community safe. GILLIGAN, *supra* note 5, at 35-38. To Bork, danger lies in an unconstrained judiciary. “Where constitutional materials—[the text and the history, and their fair implications]—do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other.” Bork, *supra*, at 2. In other words, the only way to protect against judicial aggression—to avoid “minority tyranny” by the courts—is to insist that judicial review be exercised within the confines of interpretivism. I am using the term “rules” here to refer to rules of interpretation. Kathleen Sullivan refers to this usage as “interpretive rules,” as distinguished from “operative rules” (or standards) that might result from application of interpretive rules. Sullivan, *supra* note 146, at 76-94. Bork identifies *Roe* as the archetype of unchained judicial aggression. “The years of the Burger and Rehnquist Courts also saw the ‘right of privacy’ invented by the Warren Court mature into a judicial power to dictate moral codes of sexual conduct and procreation for the entire nation.” ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 110 (1990). His objection to *Roe* thus is that it lacks any clear basis in the text apart from the open-ended term “liberty,” which the framers and ratifiers of the Fourteenth Amendment plainly did not contemplate would include abortion rights. Ironically, Bork’s nomination to the Supreme Court was defeated through the same political process that he believes should determine matters like a woman’s right to abortion, in part because of his very views on that subject. The further irony is that he complained—albeit not in constitutional terms—about the political process that produced that result. *Id.* at 282-321.

149. This discussion gives Justice Scalia the benefit of the doubt with respect to the internal coherence of his interpretive theory. Others have suggested that Justice Scalia has been somewhat less consistent than his professed fondness for rules might lead one to expect. See Sullivan, *supra* note 146, at 88 (“In other words, if the rule doesn’t work, take

Under those rules, the more abstract, remote, and hierarchical the sources of authority the better; constitutional interpretation is governed by the value preferences expressed by individuals in power in past centuries.¹⁵⁰ Whether this view of the Constitution is driven by historicist nostalgia for those particular value preferences, an anxious desire to find some anchoring transgenerational normative structure, a sincere concern about the hazards of unchecked judicial power, or faith in an originalist contractarian political legitimacy,¹⁵¹ the end result is to situate the important constitutional work as far as possible from any intersubjective relation between the courts and contemporary life. Safety, for both the community and the courts, lies in maximizing judicial distance from the kind of messy, intimate involvement with real contemporary life that inheres in the value-laden work of substantive due process.

Scalia's interpretive approach thus parallels that of the male respondents in Gilligan's studies: She could have been talking about Scalia's approach when she described Jake's view of responsibility.¹⁵² Scalia's desire for the safety of judicial distance, and fear of judicial involvement with the painful flesh-and-blood dilemmas raised by issues like abortion, is evident from his opinion in *Planned Parenthood v. Casey*.¹⁵³ Justice Scalia often invokes categorical rules to

two aspirin and try the nearest standard." For a telling example of the facility with which an historical record can be disregarded in the context of religious exemptions from generally applicable laws, compare *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Justice Scalia's opinion for the Court in *Smith* virtually ignored the historical record. It relied instead on two discredited cases and "parade-of-horribles" policy arguments in declining to apply the usual First Amendment balancing approach to a Free Exercise Clause claim for an exemption from Oregon's controlled substances law for the sacramental use of peyote. *Smith*, 494 U.S. at 1601-02. Professor McConnell's detailed review shows that Justice Scalia's central, undefended premise—that the free exercise clause does not provide First Amendment protection for religiously motivated conduct from generally applicable laws—is contradicted by the historical record. See McConnell, *supra*.

150. This theme is evident, for example, in Scalia's recourse to positivist sources of authority for his interpretation of the "discontinuous historical past." Sullivan, *supra* note 146, at 114. It further emerges in his positivist epistemology, as Sullivan observes: "Texts and traditions are facts to study, not convictions to demonstrate about." *Id.* (citing *Casey*, 112 S. Ct. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part)).

151. For a description of originalism in these terms, see KELMAN, *supra* note 143, at 214.

152. Recall that in Jake's view, responsibility is "a limitation of action, a restraint of aggression. . . . Thus rules, by limiting interference, make life in a community safe" GILLIGAN, *supra* note 5, at 37-38; see also *supra* notes 30-43 and accompanying text.

153. In *Casey*, Justice Scalia concluded that

keep the constitutional question of abortion at a reassuringly "objective" distance.¹⁵⁴ Abortion, like bigamy, is not constitutionally protected in his view because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."¹⁵⁵

The portion of the Court's opinion in *Casey* that explicitly reaffirmed a general commitment to substantive due process, by contrast, more closely resembles Gilligan's description of feminine problem solving.¹⁵⁶ Although the Court's reference to individual liberty at first glance appears to follow a masculinist model, at a higher level of abstraction we see a more "feminine" interpretive theory that strives for flexibility, is responsive to context, and is willing to live with a measure of uncertainty and ambiguity—all of which characterize noninterpretive review.¹⁵⁷ Furthermore, although the Court also invokes "tradition" as an interpretive guide, its

[a]s long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public-high-school graduation ceremonies; if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different.

Casey, 112 S. Ct. at 2884-85 (Scalia, J., concurring in the judgment in part and dissenting in part) (citation omitted). Justice Scalia's reference to *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (Scalia, J., dissenting), illustrates the distinction. For him, the only important fact in that case was the historical practice of religious invocations at public events. He derided the majority's "test of psychological coercion" as a "bulldozer of its social engineering." *Id.* at 2679. For the majority, the crucial fact was indeed how the nonadherent might *feel* in the particular circumstances—coerced to attend a state-sponsored religious exercise and pressured once there "to pray in a manner her conscience will not allow." *Id.* at 2658.

154. Scalia's opinion in *Casey* suggests that he sees a threat not only to society from an aggressive judiciary, but also to the judiciary from a rebellious populace. See *Casey*, 112 S. Ct. at 2884-85 (Scalia, J., concurring in the judgment in part and dissenting in part); *supra* note 153. In this way, his view even more completely tracks the masculine model described by Gilligan, for he sees engagement as dangerous to all concerned.

155. *Casey*, 112 S. Ct. at 2874 (Scalia, J. concurring in the judgment in part and dissenting in part).

156. See *Casey*, 112 S. Ct. at 2816-17. The Court's disposition of the various provisions of the Pennsylvania law is another matter. See discussion *infra* parts VI.B-C.

157. See *Casey*, 112 S. Ct. at 2816, 2818. Moreover, Gilligan's higher level of moral development includes a substantial autonomy component. See *supra* notes 44-50 and accompanying text.

conception of tradition is more a vehicle for engagement with, rather than a device for separation from, real-life, fluid circumstance.¹⁵⁸

In this way, the opinion resembles the female response in Gilligan's study.¹⁵⁹ The Court views the judicial role in developing substantive due process as mediated through an on-going process of communication between the courts and society—in contrast to Justice Scalia's process of categorization and judicial isolation. These characteristics, again at a very high level of interpretive generality (the more concrete operative level is quite another matter and will be discussed below), are evident in the majority opinion in *Casey*:

[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.¹⁶⁰

The Court thus sees engagement with substantive due process claims as a judicial *responsibility* calling for flexibility and sensitivity, not as a form of aggression to be contained by isolating the courts through rigid categorical rules. Danger inheres in separation from, not in engagement with, the complexities of substantive due process.¹⁶¹

158. See *Casey*, 112 S. Ct. at 2797, 2801. Balancing tests “incline a judge to be ‘contextual,’ ‘reconciliatory,’ and ‘dialogic,’—to ‘confront the parties in the flesh’ rather than ‘take refuge [in supposed] objective determinacy lodged in some force other than herself,’ as rules-based adjudication might encourage her to do.” Sullivan, *supra* note 146, at 68-69 (alteration in original) (quoting Frank R. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34-35 (1986)).

159. GILLIGAN, *supra* note 5, at 38. (“To the question about conflicting responsibilities, Amy again responds contextually rather than categorically by saying, ‘it depends’ and indicating how choice would be affected by variations in character and circumstance.”).

160. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992).

161. The Court went on to quote from Justice Harlan's dissent in *Poe v. Ullman*: Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived

If the anti-relationalists' preference for masculinist approaches to problem solving were applied to the threshold issue of general interpretive theory, therefore, the courts very well might isolate themselves from abortion's conflicts by largely abandoning the substantive due process enterprise.¹⁶² That was where Justice Scalia and his dissenting colleagues parted ways with the majority in *Casey*. The Court was willing (indeed felt responsible) to get close to the problem and to respond in a continuing dialogue about national values; the Court saw greater risks in severing that communication. Justice Scalia wanted to separate the Court as far as possible from that dialogue; he feared the consequences of such connection.

2. Limits of rights-talk and autonomy-talk

The anti-relationalists are also mistaken in two other assumptions. First, just as endorsement of "masculinist" thinking generally is no guarantee that a court will even reach (much less answer affirmatively) the question of abortion rights, "rights-talk" likewise provides no sure answer.¹⁶³ Second, the simple privileging of autonomy claims over other-directedness fails to address fully abortion's relational complexities.

Deconstructionist challenges to rights-talk show that the anti-relationalists' strategic reliance on it is no substitute for critical

is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Casey, 112 S. Ct. at 2805 (quoting *Poe*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

162. This point may be implicit in McClain's argument that liberalism is relational, but she does not explore the interpretive implications of her critique.

163. At least one feminist has warned that liberalism, at least in its atomistic sense, threatens the feminist project. Writing from an historical perspective, Karen Offen has emphasized that "[f]eminism is a political project" in which the central question raised by a particular theoretical model is: "Will it help us to eradicate the subordination of women as a group by men as a group?" Offen, *supra* note 21, at 15. Offen observes that women's solidarity has always been foundational to effective political action, and she warns that the "fragmentation of identities . . . threatens the historical feminist project." *Id.* She argues that America's "atomistic focus on the liberation of the human individual—a sort of Hobbesian or Leibnizian monad devoid of distinguishing characteristics"—is an "exceptional" phenomenon (compared to other cultures) that contributes to the fragmentation and isolation of identities. *Id.* at 16. She concludes: "What some take to be our 'cultural assumptions' are the result of once radical assertions that were deployed as weapons in a unique, successful attack on hierarchical religious and political authority in a society where men have systematically subordinated women since at least the thirteenth century." *Id.*

examination of underlying values.¹⁶⁴ Mark Tushnet, for example, has argued that claims to abortion rights¹⁶⁵ are inherently unstable because incremental, nonrevolutionary societal changes¹⁶⁶ could produce a social context “in which it would be impossible for a woman’s situation to implicate the kind of right to reproductive choice that is the focus of current concern.”¹⁶⁷ Suppose, for example, that medical technology allowed early-term removal of the conceptus without causing its destruction.¹⁶⁸ Such a medical breakthrough, while currently unlikely, would hardly render our society unrecognizable,¹⁶⁹ but it would nullify Thomson’s arguments for abortion

164. The incoherence critique in Mark Tushnet’s *Essay on Rights*, for example, has two branches: (1) that rights are inherently unstable because the recognition of specific rights themselves is both contingent on and constitutive of a specific culture, whereby small plausible changes in social settings undermine the coherence of a particular rights claim; and (2) rights-talk is indeterminate and therefore “can provide only momentary advantages in ongoing political struggles.” Tushnet, *supra* note 135, at 1363-65, 1372. His other critique warns that: (1) “[t]he concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake”; and (2) contemporary rights-talk “impedes advances by progressive social forces.” *Id.* at 1364.

165. His explanation of this choice describes moves in the debate between leftists and “rights-ists” that resemble the anti-relationalist response:

Because leftists have developed the critique of rights in the contemporary United States, a favorite countertactic is to identify a leftist sort of right which, it is said, leftists must recognize as *not* relative lest they lose their political credentials. The usual example is the right to reproductive choice.

Id. at 1365.

166. His point is to demonstrate the relative and socially contingent nature of rights by examining a particular rights claim in a society not very different from our own and continuing to possess what John Rawls characterized as the “‘circumstances of justice’—moderate scarcity in material goods and pervasive differences among people over what constitutes the good for people.” *Id.* at 1364-65 (quoting John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 536, 539 (1980) (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 126-28 (1971)).

167. *Id.* at 1366.

168. In other words, suppose the point of viability were pushed back very early in pregnancy. Abortion today involves both removing and destroying the conceptus. By definition, “abortion” always means the destruction of the conceptus. See JUDGES, *supra* note 90, at 66. Post-viability removal of the living conceptus is a premature delivery.

169. When Tushnet wrote in 1984, this hypothetical scenario was believed by some to be not so hypothetical. Cf. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 420-36 (1983) (analyzing the consequences of various types of collaborative conception, including artificial insemination, ovum donation, womb donation, and surrogate mothering). At one time Justice O’Connor, extrapolating from substantial gains in neonatology, predicted that medical technology would move the point of viability “further back toward conception” and proclaimed that “[t]he *Roe* framework, then, clearly is on a collision course with itself.” *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983). Her analysis, however, overlooked the matter of fetal lung development, which mainstream medical opinion today recognizes as establishing an “anatomic threshold” for fetal survival

rights, which implicate only removal of the conceptus.¹⁷⁰ Any remaining right to destroy the conceptus would have to depend on other, similarly contingent arguments.¹⁷¹ Because other, nontechnological changes might also undermine the coherence of reproductive rights claims, such rights are as contingent on prevailing attitudes as they are on extant technology.¹⁷²

Furthermore, one could recognize the "essential aspects of the debate over the morality of abortion—the large sacrifices imposed by compulsory pregnancy, the interference with self-definition, and the importance of choice and control over oneself"¹⁷³—and yet conclude, on balance, that *Roe* was wrongly decided.¹⁷⁴ First, neither ad hoc nor categorical balancing produces determinate results: "a balancer who wants to 'recognize' a right can choose the necessary measure of value, the necessary consequences, and the necessary level of generality."¹⁷⁵ Second, cases can often be presented as a conflict

at about 23-24 weeks. See JUDGES, *supra* note 90, at 62-65.

170. Thomson, drawing a distinction between refusing to sustain and killing, recognizes that the right to be disconnected from the violinist does not include the right to turn around and slit his throat if by some miracle he survives being unplugged. See *supra* notes 71-75 and accompanying text.

171. For example, such a right might rest on a variety of psychological claims such as uncertainty about her offspring's identity or a desire to control one's genetic heritage. Tushnet shows the weakness of these claims and their lack of resemblance to what we currently understand abortion rights to be about. For instance, such claims presumably could just as legitimately be advanced by putative fathers, and thus are "entirely independent of the issues of gender that shape our current understanding of the right to reproductive choice." Tushnet, *supra* note 135, at 1367-68. For one court's treatment of the claim to control one's genetic legacy, in the context of a dispute over the disposition of "frozen pre-embryos," see *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

172. Suppose the following: (1) widespread availability of and education about contraceptive devices; (2) de-stigmatization of bearing illegitimate children; (3) acceptance of a view of health and illness that made pain and discomfort a natural part of life not to be treated unless threatening to life or long-term health; and (4) acceptance of pregnancy as "a disfiguring and moderately painful condition that some people choose to have and that others have visited upon them." Tushnet, *supra* note 135 at 1369. In such a society, which would not require violent upheaval to attain, "asking whether a woman has a right to an abortion would be like asking our contemporaries whether we have a right not to get the flu." *Id.*

173. Karlan & Ortiz, *supra* note 13, at 876.

174. Indeed, Michael Perry and John Hart Ely do just that—albeit from different premises. See *infra* notes 178-86, 330-31 and accompanying text.

175. Tushnet, *supra* note 135, at 1373. First, a balancing of interests requires some substantive theory through which to assign common measures of value. The Supreme Court has failed to provide one, however, and many interests seem to be incommensurable. One of the criticisms of *Roe* is that the Court failed to explain how it assigned values in balancing the respective interests of "potential life" and the woman's autonomy. See JUDGES, *supra* note 90, at 158-65. Those difficulties recently have become more apparent as the Court substantially reduced *Roe's* scope while professing allegiance to its principles

between selections from a catalogue of protected rights and interests—such as abortion’s “clash of absolutes” between personal autonomy and “life”—and in “any particular case a court can draw items from that catalogue and balance them as it chooses.”¹⁷⁶ Third, much depends on one’s assumptions about what is foreground and what is background—such as the atomistic assumptions underlying a privacy defense of abortion.¹⁷⁷ Fourth, it may be “impossible to connect [an] abstract right—‘autonomy’ or ‘equal concern and

in *Casey*; see *infra* notes 410-54 and accompanying text.

Second, meaningful balancing must account for all relevant interests, yet accurate identification of affected interests is far from certain. Tushnet suggests as an example the possibility that *Brown v. Board of Education*, 347 U.S. 483 (1954), led to the election of Ronald Reagan through a complex chain of factors including white backlash and a general rightward trend. Tushnet, *supra* note 135, at 1372. An at least equally (and perhaps more) plausible example would be the connection between *Roe v. Wade* and Reagan’s election. See LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 16-18 (1990).

Third, balancing competing interests also involves identification of the level of generality at which the interests are defined. Tushnet gives the example of Justice Frankfurter’s balance of the detailed, scary risks of communist subversion versus the general interest of free speech in *Dennis v. United States*, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring). Tushnet, *supra* note 135, at 1372-73. Although Tushnet does not put the problem in precisely these terms, his argument intuitively recognizes that outcomes can be determined by judgmental biases that influence decisionmaking.

Research in cognitive psychology has identified several related “mental shortcuts” that can affect judgment: (1) the “vividness bias,” under which the decision maker tends “to place more weight on concrete, emotionally interesting information than on more probative abstract data”; (2) the “availability bias,” under which people “judge the probability of an event not by the actual likelihood of its happening, but by the ease with which they can recall particular instances of the event’s occurrence”; and (3) the “saliency bias,” which is “the tendency of ‘colorful, dynamic, or other distinctive stimuli [to] disproportionately engage attention and accordingly affect judgments.’” Harry S. Gerla, *The “Reasonableness” Standard in the Law of Negligence: Can Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 199, 210-11 (1990) (alteration made but not noted in original) (quoting Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 190, 192 (Daniel Kahneman et al. eds., 1982)). To be sure, Gerla’s description of the problem of biases reflects skepticism about the reliability of balancing by tort juries and not appellate judges. But judges are human too and not immune from such errors.

Roe itself arguably reflects this problem. On one side of the balance the Court described the pallid abstraction of “potential life.” On the other, the Court recognized a much more vivid and detailed account of unwanted pregnancy’s impact on the pregnant woman. See JUDGES, *supra* note 90, at 142-45; see also *infra* note 329 and accompanying text.

176. Tushnet, *supra* note 135, at 1373.

177. See *supra* notes 62-76. Indeed, Karlan and Ortiz’s reliance on both privacy-based defenses of abortion and MacKinnon as the correct feminist voice seems incongruent in view of MacKinnon’s position that the “privacy” concept conceals a host of sins of male domination—particularly in the abortion context. See Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology, in ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 46-54 (J. Garfield & P. Hennessey eds., 1984).

respect⁷—to any particular outcome without fully specifying a wide range of social arrangements that the proponents of the right take for granted but that another person who believes in ‘autonomy’ might reject.”¹⁷⁸ Indeed, these observations find some confirmation in the shifting fortunes of abortion rights in the Supreme Court where, contrary to the impression created by the Karlan and Ortiz article, a rights-based approach has predominated.

Just as “masculinist” rights- and autonomy-talk are no guarantee of reproductive freedom, conversely it also is insufficient simply to endorse a “feminine” perspective on constitutional interpretation. What is more, not all “feminist” objections to *Roe* are based on (1) the conclusion that altruistic moral obligations arise from the pregnant woman-conceptus relationship, or (2) devaluation of individual self-definition. There ultimately is no substitute for coming to terms with what real care means for abortion rights.

Michael Perry’s richly textured position on *Roe* illustrates the limitations of feminist-masculinist dualism.¹⁷⁹ In his view, the Court properly reached the question of abortion rights but gave the wrong answer.¹⁸⁰ He objects to *Roe* not because it permitted violation of a woman’s moral obligation to the life within her or lacked an adequate textual or historical basis, but because it cut off productive moral discourse, preempted the possibility of deliberative, transformative politics with respect to the deeply divisive issue of abortion,

178. Tushnet, *supra* note 135, at 1375. Sunstein’s analysis of nonneutral assumptions recognizes this point. See *supra* note 135.

179. Another example of the limitations of the labelling game is *Lochner v. New York*, 198 U.S. 45 (1905). At the level of interpretive approach, it does reflect an active judicial engagement rather than isolation. At the level of the operative result, however, it could hardly be described as feminist because of its insensitivity to the real-world conditions facing the bakery workers and the actual impact of the law on their lives. Indeed, the kind of measures invalidated in that case were then being vigorously advocated by reform-minded women’s groups. See generally Rhode, *supra* note 81, at 204-07 (describing the tension between feminists over the value of sex-based protective legislation passed in the early part of this century).

180. Explaining his view, Perry asserts:

[T]o conclude that, contrary both to the originalist critique and to Ely’s nonoriginalist critique, abortion is indeed a proper part of the Court’s business, is not to conclude that the Court gave the right answer to the question it set for itself in *Roe*. It is to conclude merely that the Court was not wrong to set the question for itself. In my view—my *nonoriginalist* view—the Court gave the wrong answer to the question it set for itself.

MICHAEL J. PERRY, MORALITY, POLITICS & LAW 174 (1988).

some extent defied norms of the American constitutional community.¹⁸¹

Perry's conception of the judicial role also shows that not all notions of judicial restraint are based in an abstraction-seeking, distance-creating, disengagement model. To the contrary, the court Perry envisions—like the facilitative feminine response sketched by some writers¹⁸²—engages by listening as well as by speaking, by its receptivity as well as by its response, and by a search for common ground rather than an attempt at domination.¹⁸³ Amy-like, he constructs the constitutional dimension of the abortion conflict as a

181. Perry readily acknowledges a constitutional principle recognizing “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.” *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 169-70 (1973) (Stewart, J. concurring) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971))). While abortion clearly implicates that principle, however, Perry doubts that “sensitive application” of such a constitutional principle supports the result in *Roe*:

Such a conclusion seems to me to require a premise—that the protection of fetal life is not a good of sufficient importance—obviously not entailed by that principle. Moreover, because the issue the premise addresses—the value of fetal life—is so widely contested in American society, and further, because the issue is one as to which people of good will and high intelligence (among others) seem irresolvably to disagree, it is not at all clear that the premise is an appropriate basis for constitutional judgment. To the contrary, reliance on the premise as a basis for constitutional judgment seems plainly imperial.

PERRY, *supra* note 180, at 175.

Perry nevertheless believes that the Court should have held the Texas statute unconstitutional in *Roe* because it failed to except cases of significant threat of serious damage to the mother's health (under the statute it was a crime to procure an abortion except “by medical advice for the purpose of saving the life of the mother,” *Roe*, 410 U.S. at 117-18 & n.1 (citation omitted)), abortions to terminate a pregnancy caused by rape or incest, and abortions to terminate “a pregnancy that would result in the birth of a genetically defective child whose life would be short and painful.” *Id.* In effect, Perry's position would approximate the modest liberalization of abortion laws proposed by the American Law Institute in 1962 and subsequently adopted in one form or another in more than a dozen states. See generally JUDGES, *supra* note 90, at 107-08 (discussing 1962 proposed Model Penal Code revisions to state abortion laws).

182. See, e.g., *supra* note 85 and accompanying text.

183. Indeed, in the conclusion immediately following his analysis of *Roe*, Perry points to the emergence of feminist jurisprudence as a “bright spot” on the horizon of political-moral theory. “Feminist thought is an important discursive space where the question of the human is not invariably marginalized—where, indeed, that question is often the central concern. At its best and at its root, feminist theory is perhaps best understood as an effort to struggle with the question of what it means to be authentically human.” PERRY, *supra* note 180, at 183.

problem in communication and relation between members of the political community.¹⁸⁴

Perry's position does not rest on a stereotypic model of feminine self-sacrifice or disregard for autonomy,¹⁸⁵ however, but derives instead from his recognition of our society's deeply pluralistic nature.¹⁸⁶ Of course, some advocates might argue that preventing the harm that restrictive abortion laws cause to women outweighs the value of a broader societal discourse, and that women do not have an equal voice anyway. Such arguments consider, however, what care and relation actually mean in the abortion context—which is where critique should aim—rather than suggest that Perry somehow has a screw loose for viewing *Roe* in his own relational terms.

184. Perry writes:

[T]he constitutional dialogue between the judiciary and the political community as a whole will proceed more productively if the judiciary acts cautiously and incrementally rather than radically or imperially. . . . No conversation is likely to be productive if one of the interlocutors assumes an arrogant stance, pontificating rather than listening patiently and patiently searching for common ground.

The question of what public policy regarding abortion should be is surely an unusually difficult one, and the Supreme Court is an obviously fallible institution. The Court should not have tried to preempt discourse about the question. Rather, it should have acted so as to enhance such discourse. . . . And the Court should have acted that way not simply because that would have been the more "democratic" thing to do, but also, and more fundamentally, because the Court, like the rest of us, might have learned something useful from the ensuing discourse—a discourse hopefully informed by the Court's insistence that the constitutional principles of due process and equal protection were at stake.

Id. at 177.

185. With respect to altruism, Perry concludes that "[i]t is an open question, then, whether a sound naturalist moral theory must be altruistic." *Id.* at 21-22. Legal outcomes premised on an affirmative answer to Perry's question are, in essence, what the anti-relationalists fear. With respect to individual self-definition, Perry believes that moral knowledge is knowledge of how to live so as to flourish, to achieve well-being. "More precisely, it is knowledge about how *particular* human beings—the particular human being(s) I am, or we are, or you are, or she (or he) is, or they are—must live if they are to live the most deeply satisfying lives of which they are capable, or at least lives as deeply satisfying as any of which they are capable." *Id.* at 11.

186. *Id.* at 55. "Different moral communities within the society adhere to different—sometimes very different—conceptions of human good, of how it is good for (some or all) human beings to live their lives, of how they must live their lives if they are to flourish, to achieve well-being." *Id.* He rejects the liberal vision's "ambition to achieve a [value-neutral] politics that transcends the deep, pervasive, persistent differences among us." *Id.* He places his faith instead, particularly in the context of constitutional adjudication, in "productive moral discourse and of the sort of politics of which moral discourse is a prime constituent: a deliberative, transformative politics, as distinct from a politics that is merely manipulative and self-serving." *Id.* at 76.

The purpose here is neither to join the assault on rights-talk nor to suggest that a "feminine" perspective is necessarily bad for abortion rights. The suggestion instead is that merely asserting the primacy of rights-talk and reducing care- and connection-based theory to "care-talk" is no substitute for coming to grips with the real-life complexities of the abortion debate, including the feminist effort—as Perry put it, "to struggle with the question of what it means to be authentically human."¹⁸⁷

IV. ETHIC OF CARE REVISITED

A. *What's love got to do with it? Care versus rights*

What can relational feminism tell us about what it means to be "authentically human," especially in the face of abortion's terrible moral dilemmas? The risk that relational feminism can be deployed to justify anti-feminist policies derives in part from preoccupation with difference and the concomitant problem of stereotype. If relational feminism is mainly about perpetuating stereotypic differences between men and women, the anti-relationalist worry that policy decisions derived from it will likely confine women to their stereotypic role as caregiver—in this connection as childbearer—is understandable. It would be a shame, though, to sacrifice needlessly relational feminism's insights on moral judgment, relation, and care: "[A]lthough an ethic of care could be an important intellectual concern for feminists, the debate around this concern should be centered not in discussions of gender difference but in discourse about the ethic's adequacy as a moral theory."¹⁸⁸

Relationalism offers a moral perspective that differs from the dominant "impartialist," rights-based conception of morality.¹⁸⁹ As

187. *Id.* at 183. In Tushnet's view, "the indeterminacy of rights-claims means that the debate is always about what the society is *and* what it ought to be." Tushnet, *supra* note 135, at 1370. Even if one does not accept all of the moves in Tushnet's analysis or his deconstructionist goals, his critique of rights does counsel against taking rights-talk too seriously and mistaking claims about how power relationships ought to be different for claims about how power relationships are. For a critique of Tushnet's critique, see Michael Perry, *Taking Neither Rights-Talk Nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405, 1411-16 (1984).

188. Joan Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 646 (1987). Tronto further observes that "[i]f the ethic of care is separated from a concern with gender, a much broader range of options emerges." *Id.* at 647.

189. The latter view is premised on universal, rational, and impersonal principle—which "has been the dominant conception of morality in contemporary Anglo-American moral philosophy, forming the core of both a Kantian conception of morality and important

Lawrence Blum has noted, "care and responsibility within personal relationships constitute an important element of morality itself, genuinely distinct from impersonality."¹⁹⁰ The task is to map these two ethical categories of impartialist rights and particularistic care onto the two moral domains of relatively impersonal relations, on the one hand, and close personal relationships such as friendship and family on the other.¹⁹¹

The resulting cartography illustrates what care might offer to the interpretation of rights. First, healthy close personal relations are mediated mostly by particularistic care; one is motivated to act or refrain from acting by care for the particular other person. Impartialist rights help to constrain power and to prevent oppression when care is diminished, unreliable, or absent in relations that are relatively impersonal. One is motivated to act or to refrain from acting in such relations by moral obligation or legal compulsion based on impartially derived norms. Rights are thus care's substitute in impersonal relations, and reliance on rights evidences care's absence.¹⁹² Second, the endogenous particularistic motivational aspects of personal relation mean that care, in this relational sense, is not something that the state can mandate. As we shall see below, this observation has special relevance to abortion rights.¹⁹³ Third, the realm of impersonal relations might better serve everyone if rights were interpreted to resemble more closely what they are a substitute for. In other

strands in utilitarian (and, more generally, consequentialist) thinking as well." Blum, *supra* note 99, at 472-73.

190. *Id.* at 473. Blum observes that the criticisms of impartialism by Bernard Williams (as inadequately considering personal integrity and purely personal concerns) and Thomas Nagel (as undervaluing personal concerns as reason-generating considerations) "do not capture or encompass . . . the phenomena of care and responsibility within personal relationships and do not explain why care and responsibility in relationships are distinctively moral phenomena." *Id.* (citing Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 135-50 (Bernard Williams & J.J.C. Smart eds., 1973); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 171-75 (1986)).

191. I am using the terms "personal" and "impersonal" rather than "private" and "public" because the former distinction focuses on proximity of relation while the latter sometimes reflects a conclusion—premised on nonneutral baseline assumptions—about the grounds for legal intervention. See Sunstein, *supra* note 71, at 30-36. Some feminists have criticized the public/private distinction as hiding oppression behind closed bedroom doors, see, e.g., MacKinnon, *supra* note 177, at 51-54 ("In feminist terms, I am arguing that the logic of *Roe* consummated in *Harris* translates the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy."), and closed boardroom doors, see Bender, *Feminist (Re)torts*, *supra* note 54, at 885-88.

192. Hardwig, *supra* note 1, at 443-45.

193. See *infra* part V.C.

words, by asserting the independent moral worth of care, relational feminism is best regarded as urging inclusion of a generalized caring *perspective*—that is, care-like considerations—in the interpretation of rights (including abortion rights), but it need not be understood to require abandonment of the necessary protection that rights offer in a less-than-caring world.

Personal, caring relations are characterized principally by (1) the kind and degree of one's *receptivity* to the other's circumstances and (2) the *motivation* of one's conduct toward the other.¹⁹⁴ An ethic of care thus is defined by motivation and attitude, rather than a predetermined set of behaviors or operative principles,¹⁹⁵ and therefore must be understood "from the inside."¹⁹⁶ Relationalist Nel Noddings has referred to this first element as "constitutive engrossment"—an especially receptive, transformative orientation toward "receiv[ing] the other into myself, and . . . see[ing] and feel[ing] with the other."¹⁹⁷ One who cares sees through the eyes of the other and is directly and personally, not instrumentally and abstractly, affected by the ebb and flow of the other's well-being.¹⁹⁸

194. My usage of the term "care" is by definition in the relational sense. Of course, the word also connotes "to like" or "to prefer," "to provide for," or "to attend to," and to be instrumentally "concerned" with an outcome. One can also care negatively in these various senses. For description of these usages and their distinction from care in the interpersonal sense, see BLUSTEIN, *supra* note 90, at 28-31.

195. Noddings' rejection of the ethics of principles overlaps some of the criticisms directed at rights as contingent, unstable, and incoherent. NODDINGS, *CARING*, *supra* note 20, at 5; see also *supra* notes 162-76 and accompanying text. She further objects that "too often, principles function to separate us from each other. We may become dangerously self-righteous when we perceive ourselves as holding a precious principle not held by the other. The other may then be devalued and treated 'differently.' Our ethic of caring will not permit this to happen." NODDINGS, *CARING*, *supra* note 20, at 5.

196. NODDINGS, *CARING*, *supra* note 20, at 14, 28.

197. *Id.* at 30. The fullest development of the content of an ethic of care in the relational literature is not to be found in Gilligan, who is primarily concerned with difference, but instead in Nel Noddings' writing. Although she too has taken up the difference banner, see Noddings, *Ethics*, *supra* note 20, at 160, 166, her most complete work on the ethic of care, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION*, *supra* note 20, concentrates on the question of what a caring morality might mean.

198. See generally BLUSTEIN, *supra* note 90, at 30 (noting that one who cares about another is deeply invested in the other's well being—so that a set-back to the other is a direct set-back to the one who cares).

To care for another person, I must be able to understand him and his world as if I were inside it. I must be able to see, as it were, with his eyes what his world is like to him and how he sees himself. Instead of merely looking at him in a detached way from outside, as if he were a specimen, I must be able to be *with* him in his world . . .

A caring person *wants to know* about the other's welfare: "[A] reliable sign of real caring is the intolerance of ignorance about the current state of what we care about. . . . [N]o news is not good enough."¹⁹⁹

The motivational element of a caring relationship involves *commitment* to the other's flourishing. "When we see the other's reality as a possibility for us, we must act [or refrain from acting, as appropriate] to eliminate the intolerable, to reduce the pain, to fill the need, to actualize the dream."²⁰⁰ Caring is motivated by a natural selfless desire to advance the other's welfare, rather than to achieve advantage.²⁰¹ In other words, in a caring relationship, "you can be one of *my ends*."²⁰² This commitment endures over time, as the one who cares becomes a trustee for the well-being of the other.²⁰³

This motivational element distinguishes care-oriented from rights-oriented behavior.²⁰⁴ We are naturally motivated in close personal relationships by love for the particular other, not by the impartial obligations or desire for reciprocal advantage involved in respecting

MILTON MAYEROFF, ON CARING 30 (1971). A caring person "*identifies* himself with what he cares about in the sense that he makes himself vulnerable to losses and susceptible to benefits depending upon whether what he cares about is diminished or enhanced." Harry Frankfurt, *The Importance of What We Care About*, 53 SYNTHESE 257, 260 (1982).

199. Annette C. Baier, *Caring About Caring: A Reply to Frankfurt*, 53 SYNTHESE 273, 274 (1982). Blustein has qualified Baier's assertion by noting that the psychological need for denial may arise at times even in a caring relation. See BLUSTEIN, *supra* note 90, at 33. Baier herself actually explicitly recognizes the utility of denial at a later portion of her article. See Baier, *supra*, at 288.

200. NODDINGS, *CARING*, *supra* note 20, at 14. Despite her emphasis on the affective foundation of morality, Noddings points out that the ethic of care is neither panglossian nor misty-eyed sentimentality. Objective, analytical thinking is usually necessary to solve life's problems, but Noddings urges that such thinking must remain tied to the relational connection lest we get carried away in abstraction and lose sight of the person who is cared for as attention shifts from the person to the problem. *Id.* at 33-34. Neither does she assume that all people are disposed toward goodness. While Noddings urges gentle moral education to heighten the moral sensitivity of others, she recognizes that some people do not and probably will not feel pain in response to the pain of others—they simply don't care—and may have to be restrained from inflicting harm. *Id.* at 90-92.

201. BLUSTEIN, *supra* note 90, at 188.

202. John Hardwig, *In Search of an Ethics Of Personal Relationships*, in *PERSON TO PERSON*, 63, 70 (George Graham & Hugh La Follette eds., 1989).

203. See MAYERHOFF, *supra* note 198, at 6; see also BLUSTEIN, *supra* note 90, at 188 (noting that "friends are mainly concerned about each other, not their relationship," though changing the caring nature of the relationship may undermine this primary concern).

204. Thus, "[t]he motivation for doing good things for those who are close to us or for not harming them must be different from the motivation involved in respecting rights." Hardwig, *supra* note 1, at 442-43.

rights.²⁰⁵ By contrast, “[t]hinking in terms of rights rests on a picture, first sketched by Hobbes and then made more palatable by Locke, of the person as atomistic, primarily egoistic, and asocial—only accidentally and externally related to others.”²⁰⁶ In that impersonal adversarial world, relationships are defined primarily by power,

and we have need to talk in terms of rights, to make claims against each other, to define obligations that limit the pursuit of independent self-interest—all in the hope that, if we do so and these rights are respected, no one will get trampled in our pursuits of our independent and [sometimes] conflicting interests.²⁰⁷

Of course, there are degrees of relation (and hence caring) and relations can change over time.²⁰⁸ Therefore, “the structure of rights is not constitutive of social life, but instead [can] be understood as a position of fall-back and security in case other constituent elements of social life ever come apart.”²⁰⁹ Rules and customs do help to sustain “gentle and pleasant interpersonal relations” and to titrate caring’s endless demands even among intimates.²¹⁰ Nevertheless, the extent of actual insistence on rights is inversely proportional

205. Indeed, “my responsibilities in personal relationships cannot be fulfilled out of a sense of obligation without seriously undermining the whole relationship or revealing thereby that it is not what we had hoped and wanted it to be.” *Id.* at 443. Hardwig continues:

I remember a student bringing my lecture on Kant’s ethics to a grinding halt by asking, “Is Kant saying that I should sleep with my boyfriend out of a sense of duty?” And if a faithful husband of thirty-seven years were, on his deathbed, to turn to his wife and say, “My conscience is clear, Helen, I have always respected your rights,” her whole marriage would turn to ashes.

Id.

206. *Id.* at 446. Rights derive from universal impersonal moral imperatives, such as the Kantian imperative to respect others as ends-in-themselves rather than as means to one’s own ends. In a personal relationship with me, however, you do *not* want impartiality in the sense that anyone in a similar position could successfully assert the same claims; you want instead personal particularistic affirmation in the sense of my relation to you. “If the dying husband or my dutiful ethics student were to add, ‘And I would have done the same for anyone in your situation,’ that would only make matters worse.” *Id.* at 443-44.

207. *Id.* at 446.

208. “While I care for my children throughout our mutual lifetimes, I may care only momentarily for a stranger in need. The intensity varies. I care deeply for those in my inner circles and more lightly for those farther removed from my personal life.” NODDINGS, CARING, *supra* note 20, at 16.

209. Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL’Y 625, 629 (1988).

210. NODDINGS, CARING, *supra* note 20, at 51. Although many of the “demands” of natural caring are not felt as demands at all but as sources of joy, the energies of one who cares—and the circle of care—are, after all, finite. *Id.* at 51-52.

to the parties' confidence in each other's care. At some point, centrifugal emphasis on rights becomes incompatible with intimacy in personal relations: "It teaches us to think of 'I' and 'I versus you' instead of 'we.' Through accepting this picture and living in it, we become more like enemies, antagonists, or traders, at best—less like brothers, sisters, lovers, and friends."²¹¹ This turning point is particularly evident when the parties begin seeking resolution of their differences in external sources of authority, such as legal principles and their coercive application through an impartial tribunal.²¹²

This distinction traces a watershed in our legal system and the measure of relation. For example, the law of commercial interaction offers a system of rules, rights, and obligations to presumably ontologically distinct parties pursuing a rational agreement to advance

211. Hardwig, *supra* note 1, at 448. It is painful to realize that your loved one or dear friend has begun punctiliously respecting your rights: "I don't want you to respect my separate interests; I want to mean enough to you that you will have an interest in those interests. And if I care for you, I will want your well-being, and thus your well-being will be essential to mine too." *Id.*

212. Consider a hypothetical marriage that disintegrates from a close caring relation to adversarial separation. When the relationship was strong and intimate, the partners paid relatively little attention to their "rights" against each other (beyond perhaps the creation of informal "rules" about allocating chores and managing resources). Cf. James Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 *IND. L.J.* 467, 468-70 (1976) (describing difference between legal claims and interpersonal appeals for consideration). Their children were cared for in a natural flow of selfless attention. Conflicts were resolved through a process of communicating needs, hurts, and desires to a partner who was trusted basically to be receptive and committed to the other's well-being—normal tears, anger, frustration, and disappointments notwithstanding. As faith in that basic assumption crumbles and personal distance in the family widens, however, the members' communication becomes increasingly dominated by assertions and counter-assertions of rights. If matters deteriorate far enough, the parties will no longer communicate directly with each other at all but will instead interact through lawyers, whose decisions and actions will be dominated by reference to rights and whose communication will be structured by the rules of discovery and evidence. All of the family's major decisions—including allocation of financial assets and burdens, their support for each other, and especially provision for the children's welfare—will be determined by a process managed by "impartial" strangers who act in accordance with formalized (even if sometimes highly discretionary) and impersonal standards and rules.

I do not mean to deny that serious problems might arise such as, for example, the unequal distribution of caretaking responsibilities. Hardwig suggests, however, that the first recourse for promoting equality in interpersonal relationships is to raise consciousness and thereby to harness caring motivation rather than to create distance by insisting on "rights." Hardwig, *supra* note 1, at 450-55. He does not mean that equality is a matter of the good grace of the dominant class; instead, he suggests that we might try to preserve the value of intimacy while effecting social change. Of course, if caring is not reciprocated and if positive relation is rebuffed, or if the relation is abusive, then the other's motivations cannot be trusted, the relation is not a personal caring one, and it will be time to resort to less-than-caring remedies—including insistence on rights.

their respective separate interests.²¹³ A central concern of family law—especially the law of child abuse, neglect, support, and custody—is the determination of when caring can no longer be counted on to prevent harm and to promote well-being.²¹⁴ Couples begin to think of their “rights” under domestic relations law as their relationship and care for each other deteriorate.²¹⁵ Tort law seeks to coerce a minimal degree of attention to the safety of foreseeable others and responsiveness when one’s lapses cause them harm. By creating “entitlements,” the modern welfare state attempts to supply publicly and generically concrete forms of care previously supplied privately and particularly. Emerging legal protections against sexual harassment and other forms of abusive conduct attempt to make up for a perceived lack of even basic civility and common decency in a range of non-intimate personal relations. Some individual constitutional rights could be viewed from this perspective as protecting persons particularly at risk—in ways that implicate important impersonal values²¹⁶—from political factions that have moved from not caring to collective antagonism.

These observations neither devalue rights nor suggest that recourse to rights correlates with apathy. Rights sometimes are one’s only hope; many legal conflicts are contextual, multifaceted, and involve considerable passion.²¹⁷ Further, the availability of rights,

213. For example, one writer has developed “a theory of secured financing that posits a debtor-creditor relationship much more complex and refractory than that conceived by conventional analysis.” Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 903 (1986). Scott asserts that, because

the manifestations of self-interested behavior are difficult to anticipate, and their interaction with other variables is often complex and unpredictable[,] . . . the parties are frequently unable to achieve their mutually beneficial objectives through conventional contractual arrangements. Thus the impetus for secured financing derives from the financing relationship itself and from the parties’ desire to exploit it fully.

Id.

214. See generally MNOOKIN & WEISBERG, *supra* note 131, ch. 3 (explaining legal implications of child abuse and neglect).

215. Waldron, *supra* note 209 *passim*.

216. For a discussion of the concept of impersonal value—i.e., an objective value which inheres in something apart from one’s caring about or desiring it—see BLUSTEIN, *supra* note 90, at 43-44.

217. As Hardwig expresses it:

[R]ights are like the net underneath the tightrope act. The net keeps people and their lives from being ruined if they fall off the wire. But the act is ruined if the net actually comes into play. Maybe it would be foolish to get up on the wire if we did not know there was a net underneath us, and yet the act would be even better if we could have enough confidence in ourselves and each other to do it

in addition to securing traditional, extant relations, can also facilitate the dynamic, evolutionary quality of relations: They "provide a basis for new beginnings and for moral initiatives which challenge existing affections, driving them in new directions or along lines that might seem uncomfortable or challenging to well-worn traditional folkways."²¹⁸ Nevertheless, reliance on rights indicates that motivation has originated not in the natural selflessness of care but instead in concern with one's survival or the instrumental calculation of reciprocal or unilateral advantage.²¹⁹

without thinking of the net at all.

Hardwig, *supra* note 1, at 453.

218. Waldron, *supra* note 209, at 631.

219. The case of Baby Jessica is an example of how complex the relationship between rights and caring can be. The Schmidts cannot really be said to care for the DeBoers but they apparently care about their relationship with Jessica, and readily resorted to legal process to resolve their dispute. The DeBoers plainly care deeply for Jessica and were forced to counter-assert rights to protect their relationship with her (and, they believed, to look out for Jessica's welfare). See *DeBoer v. DeBoer*, 501 N.W.2d 193 (Mich. App. 1993), *aff'd*, *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993) (per curiam), *stay denied*, 114 S. Ct. 11, 11 (1993). Whether the Schmidts care for Jessica herself—in the sense of constitutive engrossment and displaced motivation—is problematic in view of the likely relational harm that their custody battle will inflict on a little girl who apparently was happy, well, and safe with the DeBoers. But they say they do and they back up that claim with biological parenthood. Noddings's and Gilligan's reference to Solomon's Judgment suggests that they might regard the Schmidts' conduct as inconsistent with an ethic of care. See *supra* note 43. For a description of the factual background to the case, see Lucinda Franks, *The War for Baby Clausen*, NEW YORKER, Mar. 22, 1993, at 56. For Justice Blackmun's dissent from the Supreme Court's denial of application for a stay from the Michigan Court of Appeals's decision, see *DeBoer*, 114 S. Ct. at 11-12 (Blackmun, J., dissenting) ("This is a case that touches the raw edges of life's relationships.").

While detailed consideration of the case is beyond the scope of this Article, I briefly note some relational aspects of the matter. Apart from the jurisdictional questions, the underlying issue in the Iowa proceedings really required a choice between two relations—the already strongly formed bond between Jessica and the DeBoers, and the relation asserted by the Schmidts. The odd thing is that of all the actors in this drama, the person whose relational tie would seem the weakest is Dan Schmidt's, based as it is solely on genetics. Yet it is his legal right as the biological father that decided the case. His wife, Jessica's biological mother, had the additional deep tie of having carried and given birth to Jessica (without Dan's involvement). In the realm of rights, though, she had surrendered hers and subsequently asserted a derivative claim based only on Dan's not having relinquished his. Note also how the Michigan court framed the issue—as though the state were actually wrenching Jessica from her biological parents and giving custody of her to complete strangers. *Clausen*, 502 N.W.2d at 650-51. That is the picture painted from the perspective of the rights at stake, but it could not be farther from reality as far as Jessica's actual relations were concerned.

B. Taking it impersonally: Care-informed rights

If a rights-based perspective stands in some tension with a care-based one—so that something valuable is lost in human relations as the question of how to behave toward others increasingly is answered by reference to external, impersonal sources—what place, if any, is there for care in the impersonal realm of rights? Relationalism suggests that care is too important, both intrinsically and instrumentally, to be confined to the personal realm.²²⁰ It therefore is worth considering whether and how interpretation of rights might be informed by care-like considerations, even if the necessarily impersonal nature of the relation and impartiality of the norms governing it will preclude care in the personal sense.²²¹

1. Care, relation, and ethics

Relational feminism describes the intrinsic worth of care and its ethical dimensions. Noddings argues that moral philosophy's reliance on traditional Kantian criteria of universality and objectivity "has led to a serious imbalance in moral discussion."²²² The universals of Noddings's ethic are attitudinal and motivational rather than

220. For discussion of the objection that relational feminism would confine its ethic of care to the private realm, see *infra* notes 281-83 and accompanying text.

221. Rights typically are associated with impartial ethical universalism. See *supra* part IV.A. For a neo-Kantian argument that ethical universalism can in some circumstances (e.g., voluntary and intimate associations) justify ethical particularism, see Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 294-96 (1988). Gewirth is careful, however, to note that "the justification of the family and other particularistic groups with their preferential relations cannot extend to violating the moral rights of other persons." *Id.* at 295. Thus, while it may be ethical to prefer one's own family members' interests over those of strangers in the disposition of one's time, treasure, and energy, such particularism would be unethical, for example, when one holds some official institutional position, such as a judge. *Id.* In that case, "[t]he officials have accepted those duties and the impartiality they involve as part of the roles they have undertaken in accordance with the respective institutions." *Id.* Rather than sustaining the common understandings and expectations for particularism of members of a voluntary association, particularism in the latter case would infringe the rights and expectations of others to impartiality. *Id.*

222. NODDINGS, *CARING*, *supra* note 20, at 28.

One reason why, from the standpoint of an ethic of justice, care seems to be such an inadequate moral position is that an ethic of care necessarily rests on a different set of premises about what a good moral theory is. As Alasdair MacIntyre [has] noted, the prevailing contemporary notion of what counts as a moral theory is derived from Kant. . . . [I]t is universalizable, impartial, and concerned with describing what is right.

Tronto, *supra* note 188, at 657 (citing ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS* 190 (1966)).

behavioral.²²³ “[A]n ethic of caring locates morality primarily in the pre-act consciousness” of the one who cares.²²⁴ Caring and relatedness thus are desirable ends in themselves; caring is not an *obligation* that one must discharge to achieve morality.²²⁵ To the contrary, “[w]e want to be *moral* in order to remain in the caring relation and to enhance the ideal of ourselves” as persons who care.²²⁶ Morality under this view derives from a natural desire to become and to remain related, which gradually unfolds in a succession of caring relations.²²⁷ Such relations allow “identity-conferring commitments,” that: reveal personal integrity; provide the sense that one’s life has meaning, foundation, and a place in the community; and elicit the values of patience, trust, and a moderation of manipulative striving.²²⁸

While the caring relation is the ethical ideal, even when the empathic connection is strong and a motivation to act naturally arises

223. NODDINGS, *CARING*, *supra* note 20, at 92 (“The caring attitude that lies at the heart of all ethical behavior is universal.”). Noddings describes a young son (sophisticated enough to intuit a theory of marginal utility) who asks his mother whether it would be wrong to steal from a large chain store or a rich person to buy her a present. *Id.* at 93. Rather than setting up an objective (and, as Heinz’s dilemma illustrates, unstable) moral principle that it is wrong to steal, his mother

[s]lowly, patiently . . . explains the position of [one who cares]. *Each one* who comes under our gaze must be met as [one who cares]. When I want to please X and I turn toward Y as a means for satisfying my desire to please X, I must now meet Y as [one who cares]. . . . I may not cause him pain by taking or destroying what he possesses. [So the son asks,] “But what if I steal from a bad guy—someone who stole to get what he has?” Ms. A, [touched by her young son’s struggle with his] ethical responsibility, [replies]: “Unless he is an immediate threat to you or someone else, you must meet him, too, as [one who cares].”

Id.

224. *Id.* at 28. Caring is not “that form of act-utilitarianism commonly labeled ‘situation ethics.’ Its emphasis is not on the consequences of our acts, although these are not, of course, irrelevant.” *Id.* Consequences do matter because one who cares wants to avoid, so far as possible, causing hurt. *Id.*

225. *Id.* at 5. To some extent, this distinction tracks one proffered conceptual distinction between egoistic and altruistic motivation: “[E]goistically motivated helping is directed toward increasing the end-state goal of increasing the helper’s own welfare,” for example, by relieving guilt or shame, attaining praise or material rewards, enhancing self-esteem, or avoiding punishment. C. Daniel Batson et al., *Is Emphatic Emotion a Source of Altruistic Motivation?*, 40 J. PERSONALITY & SOC. PSYCHOL. 290, 291 (1981). “Altruistically motivated helping is directed toward the end-state goal of increasing the other’s welfare,” even if one’s own welfare is also increased (for example, because the helping produces feelings of personal satisfaction) as a by-product. *Id.*

226. NODDINGS, *CARING*, *supra* note 20, at 5.

227. *Id.* at 83.

228. BLUSTEIN, *supra* note 90, at 47, 57; MAYEROFF, *supra* note 197, at 30-34.

the individual can choose whether to accept and act upon or to reject that feeling.²²⁹ Furthermore, in some personal encounters such sentiments either do not arise naturally at all or do so only faintly and are displaced by other feelings such as hostility or revulsion. In such cases an individual may summon motivation from remembrance of his or her own natural caring and being cared for, to take care of his or her ethical self.²³⁰ Noddings refers to this process as “ethical caring.”²³¹

An ethic of care thus “is a natural derivative of the desire to be related. It springs from our experience of caring and the inevitable assessment of this relation as ‘good.’ What we seek in caring is not payment or reciprocity in kind but the special reciprocity that connotes completion.”²³² This ethic of care leads to self-fulfillment; it does not require self-sacrifice on the altar of abstract altruistic ideal.²³³ Moreover, the roles of caring and being cared for are neither static nor predetermined, but shift over time and between persons.²³⁴

229. NODDINGS, CARING, *supra* note 20, at 83.

230. This notion traces its roots to David Hume. *See infra* notes 248 and accompanying text.

231. To Noddings, then, the “moral imperative” arises out of caring:

I am obliged, then, to accept the initial “I must” when it occurs and even to fetch it out of recalcitrant slumber when it fails to awake spontaneously. *The source of my obligation is the value I place on the relatedness of caring.* This value itself arises as a product of actual caring and being cared-for and my reflection on the goodness of these concrete caring situations.

NODDINGS, CARING, *supra* note 20, at 84 (emphasis added) (footnote omitted). In this sense, an ethic that involves striving to maintain a caring attitude is dependent on, and not superior to, natural caring. Thus, interest in moral behavior, in the actualization of the ethical self, arises in the first instance out of a natural impulse to care (or recollection of an experience of care).

232. *Id.* at 151. Blustein objects that caring cannot be an adequate moral basis by itself. He argues that because caring sometimes can be problematic, for example by smothering the one who is cared for or distracting the caring person from others who require care, moral judgments must be made about caring itself. BLUSTEIN, *supra* note 90, at 40. Although Noddings might respond that such consequences indicate that something else besides real care is happening, such a response assumes the existence of a metric with which to distinguish “real” from “not-real” care. Noddings’s assertion of an injunction to avoid hurt if possible sounds like a return to a universal Kantian moral imperative. But Blustein, while urging a measure of modesty in the claims made on behalf of an ethic of care, does not call for abandonment of that ethic itself. In any event, because I am not contending that care ought to displace rights, but only that rights ought to be interpreted from a caring perspective, I need not resolve this dilemma.

233. NODDINGS, CARING, *supra* note 20, at 100.

234. Furthermore, completion of caring is not always possible. Care can indeed involve conflict—especially as one moves outside the natural circles of caring—between the demands of various others or between one’s own needs and projects and the demands of

A caring attitude is not enough, though; there must be connection.²³⁵ Because personal caring requires engrossment, some relationalists disclaim the notion of universal caring (i.e., caring for everyone) "on the grounds that it is impossible to actualize and leads us to substitute abstract problem solving and mere talk for genuine caring."²³⁶ Thus, while one can "care about" everyone and maintain a readiness to greet others with care, "caring for" refers to actual caring in relation and not its mere possibility. As discussed below, this relational conclusion means that there are limits to the care that the state can coerce, including care with respect to the unborn.²³⁷

2. Transposing an ethic of care to the impersonal realm

An important test of relationalism's practical power is the extent to which it can transpose an ethic of care, with its origins and orientation in the personal and the particular, to the impersonal realm, with its requirements of universality and impartiality.²³⁸ If difference theorists are correct that care focus is primarily (or exclusively) a female phenomenon, then women's equality demands its acknowledgment in public life; otherwise, women will be required to sacrifice their moral integrity as the price for entering the male-

others. Resolution of such conflicts requires decisions and choices, including reasoned analysis and argument, but ultimately one who cares will turn back to the persons and concrete situations at hand. *See id.* at 51. "The ethical self does not live partitioned off from the rest of the person." *Id.* at 100. Instead, "[t]he ethical responsibility of [one who cares] is to look clear-eyed on what is happening to *her* ideal and how well she is meeting it." *Id.* at 100 (emphasis added).

235. Just as Noddings describes ethical care by the person who cares—care that does not arise naturally but must be summoned out of concern for the ethical self—she also describes a kind of ethical or "magnanimous receptivity" to care by the person who is cared for. *Id.* at 76. This response involves a willingness to take in the care that is offered, a kind of tolerance for normal lapses of care, and an encouragement or inducement to the other to resume care so that the other may fulfill his or her ethical ideal of caring. *Id.* Like caring itself, of course, this receptivity to care has its limits. At some point the person who is ostensibly occupying the role of the one who cares (e.g., a parent) may so fail to fulfill it that a caring relation is no longer possible—either because that person is really the one who requires care or because caring (natural or ethical) simply does not arise toward the other. *Id.*

236. *Id.* at 18.

237. *See infra* part V.C. (discussing Goldstein's views on abortion and mother-love).

238. As one writer explains:

If an ethic of care is to be taken seriously as a moral position, then its advocates need to explore the assumptions on which such a moral position is founded. Unless the full social and philosophical context for an ethic of care is specified, the ethic of care can be dismissed as a parochial concern of some misguided women.

Tronto, *supra* note 188, at 656.

dominated public sphere and their distinctive voices will continue to be undervalued.²³⁹ This difference-based view would criticize a constitutional jurisprudence cast predominantly in terms of rights, autonomy, and even equality as "inadequate to express what women seek for themselves, let alone what they envision as the core values of social life."²⁴⁰ If care is (or can become) a cross-gender phenomenon, its inclusion is necessary to begin to unwind constricting gender-role stereotypes.²⁴¹ Finally, if relationalists are correct about the intrinsic value of care, it would be a shame not to apply the lessons learned from it as society struggles with relations between people who do not care.²⁴²

The relationalist limitation of an ethic of care to specific interpersonal encounter with others is driven principally by two concerns.²⁴³ One is the practical constraints on the resources of the one who cares and the potential voraciousness of strangers' demands.²⁴⁴ The other

239. NODDINGS, *CARING*, *supra* note 20, at 127-29.

240. Karst, *supra* note 51, at 504.

241. *Cf. supra* note 81 (citing Alice Rossi's discussion of retraining fathers).

242. A striking example of a more caring approach to policy formulation can be seen in Hillary Rodham Clinton's work on health care reform. Her foreword to the Clinton administration's proposal expresses in relational terms the impact on her of others' suffering and her commitment to do something about it:

As a mother, I can understand the feeling of helplessness that must come when a parent cannot afford a vaccination or well-child exam. As a wife, I can imagine the fear that grips a couple whose health insurance vanishes because of a lost job, a layoff or an unexpected illness. As a sister, I can see the inequities and inconsistencies of a health care system that offers widely varying coverage, depending on where a family member lives or works. As a daughter, I can appreciate the suffering that comes when a parent's treatment is determined as much by bureaucratic rules and regulations as by doctors' expertise. And as a woman who has spent many years in the workforce, I can empathize with those who labor for a lifetime and still cannot be assured they will always have health coverage.

Health Security, The President's Report to the American People: Full Text from President Clinton's Health Reform Package, the "Health Security Act," and Summary of Key Changes from Earlier Draft, available in NEXIS, NEWS Library, CURNWS File, at 1993 DER 207 d101 (Oct. 28, 1993) (foreword by Hillary Rodham Clinton).

243. Despite her insistence that caring (whether natural or ethical) can be completed only in a specific interpersonal relation, Noddings recognizes the need to live conservatively to protect future generations and remote others. She also acknowledges that the cries of help from remote others (too far removed for care to be activated and completed with respect to those others) may eventually reach those within her circles of care to whom she must respond. NODDINGS, *CARING*, *supra* note 20, at 152-53.

244. Strangers who cross the path of the one who cares are greeted with "wary anticipation" and "rusty grace" because "I fear a request I cannot meet without hardship." *Id.* at 47. As discussed above, this point is a weakness in Bender's tort duty. *See supra* notes 118-20 and accompanying text.

concern is the inverse of that animating the anti-relationalist movement: While the anti-relationalists fear that recognition of an ethic of care would force women into private relations that they do not really want, some relationalists worry that construction of an ethic not based on a personal encounter would tear women out of relations that provide moral sustenance and would drag them into the masculine wilderness of abstraction and loneliness.²⁴⁵ Noddings warns that “[i]n a deep sense, no institution or nation can be ethical. It cannot meet the other as . . . one trying to care. It can only capture in general terms what particular [persons who care] would *like to have done* in well-described situations.”²⁴⁶

Considering care’s intrinsic value, however, it would seem misguided, and inconsistent with relationalism’s aspirations toward fostering a greater sense of interpersonal responsibility and moral wholeness, to discount the importance of what a care-*like* approach might mean in the impersonal sphere.²⁴⁷ Despite the relatively recent vintage of relational feminism as a distinct theoretical movement, the human capacity to perceive the suffering of others and to feel motivated to act to relieve it has long been recognized.²⁴⁸ A

245. See *supra* notes 203-19 and accompanying text (noting that rights are inconsistent with motivations of particular intimate personal relationships); NODDINGS, *CARING, supra* note 20, at 94-103.

246. NODDINGS, *CARING, supra* note 20, at 103. Noddings adds:

Laws, manifestos, and proclamations are not, on this account, either empty or useless; but they are limited, and they may support immoral as well as moral actions. Only the individual can be truly called to ethical behavior, and the individual can never give way to encapsulated moral guides, although she may safely accept them in ordinary, untroubled times.

Id.

247. Indeed, Noddings, like other relational feminists, see *supra* part II.B., envisions a world transformed by an ethic of care:

Today we are asked to believe that women’s “lack of experience in the world” keeps them at an inferior stage in moral development. I am suggesting, to the contrary, that a powerful and coherent ethic and, indeed, a different sort of world may be built on the natural caring so familiar to women.

NODDINGS, *CARING, supra* note 20, at 46.

248. David Hume, Arthur Schopenhauer, and Adam Smith have commented on the phenomenon, and Noddings draws heavily on more modern ethicists. Hume, for example, described the capacity to convert the idea of another’s emotions into the emotion itself—the sympathetic capacity. LAUREN WISPÉ, *THE PSYCHOLOGY OF SYMPATHY* 7-8 (1991). Even Adam Smith—who once asserted that “society may exist . . . without any mutual love or affection” given law, order, and justice—recognized the importance of beneficence and sympathy. *Id.* at 11-12. Smith described sympathy in phenomenological terms as the capacity to render emotionally meaningful the subjective feelings of another—“changing places in fancy.” *Id.* at 15. And Schopenhauer described three basic moral choices—to struggle for one’s self without regard to harm to others (egoism), to

recurrent theme is the central place of identification with others—the awareness of a common human connection—in generating such motivation.²⁴⁹ More recent theorists, building on David Hume's insight that embedded in everyone's past is some experience of nurturance and connection (to which Noddings's description of the process of ethical caring bears some correspondence), have posited a link between justice and care:²⁵⁰

[T]he moral disposition to be just normally presupposes not only that the agent is attached to certain abstract concepts and ideals, but also, more fundamentally, that he is attached to and cares for his community, and that he has a sense that his own good and that of those he cares for most is associated with general adherence to these ideals.²⁵¹

If individuals are able to connect with the suffering of others (even if only through imagination or cognition), to recall their own

inflict intentionally harm on others (malice), and to act with regard to the welfare of others (compassion). *Id.* at 19-20. He divided compassion into two general categories: the virtue of voluntary justice, which is essentially a negative avoidance of harm to others; and the virtue of love, which is a positive encouragement of active help to others. *Id.* Hume's moral theory, based on character traits or virtues exhibited in actual contextual relations with others, has been described as largely consistent with Gilligan's views. Annette C. Baier, *Hume, the Woman's Moral Theorist?*, in *WOMEN AND MORAL THEORY* 37 (Eva Feder Kittay & Diana T. Meyers eds., 1987). John Stuart Mill suffered a crisis of spirit when he realized that his education

had nurtured in him the capacity to reason abstractly about rules, but not, as he came to see, to care about the people whose welfare was affected by his breach or observance of them. And because he did not care about them, he could get no joy or happiness from promoting their welfare.

BLUSTEIN, *supra* note 90, at 18.

249. Philosophers have offered a variety of descriptions of altruism. Schopenhauer, for example, drawing on the Shaivistic concept of "Maya," or the veil of the illusion of individual separateness, spoke of people everywhere sharing the same fate in suffering. WISPÉ, *supra* note 248, at 21-23. By piercing the veil of Maya, one sees that one is not separate from the other and thus understands that the other's suffering is also one's own. *Id.* See generally JAIDEVA SINGH, ŚIVA SŪTRAS: THE YOGA OF SUPREME IDENTITY (1979) (presenting an overview of the concept of Maya). Hume posited that sympathy is strongly affected by identification with the other. WISPÉ, *supra* note 248, at 7. Identification in various forms also figures prominently in a neo-Darwinian/Freudian account of altruism. CHRISTOPHER R. BADCOCK, *THE PROBLEM OF ALTRUISM: FREUDIAN-DARWINIAN SOLUTIONS* 71-76 (1986).

250. See Owen Flanagan & Kathryn Jackson, *Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 *ETHICS* 622, 628 (1987) (describing Hume's point). Thus, even a Hobbesian state of nature could not arise without some semblance of a family and nurturance to carry the human race past a single generation.

251. *Id.* at 630. Flanagan and Jackson continue: "Without such cares and attachments, first to those one loves and secondarily to some wider community to which one's projects and prospects are intimately joined, the moral disposition to justice—as opposed to purely prudential disposition to justice—has no place to take root." *Id.*

experiences of care and connection, and to experience an urge to relieve others' suffering and to promote well-being, it is difficult to see why that capacity—no less than the capacity for abstraction and reason—ought not to be engaged (to the extent possible) when individuals make decisions for institutions and bodies politic as well as for their own private lives. Inclusion of a caring perspective in the impersonal sector will not be “care” in the sense described because it will not entail particularistic personal relation.²⁵² We still can ask, though, what a caring person “would like to have done” in a given situation. After all, laws and policies are ultimately the manifestations of the decisions of individuals, even if acting collegially or collectively. Moreover, if a propensity to care is constitutive of the ethics of a substantial segment of the population, whose claim to an equal voice in public affairs is beyond dispute, then equality and justice require inclusion of care-based values along with rationality in the norms used to test the validity of policy choices and the means by which those choices are implemented.²⁵³

In advocating the development of a care-based “contextual metaethical theory” as an alternative to the Kantian model, some

252. We certainly do not want, for example, judges deciding cases as though only one of the litigants were his or her close personal friend or relation. See Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283 (1988).

253. One might object to an effort to map an ethic of care derived from interpersonal relations onto the impersonal realms of political process and interbranch relations. This kind of mapping, however, is implicit in relational feminist legal theory; it is defensible (despite its limitations) because (1) institutions (courts) are made up of people (the Supreme Court is a notably finite collection of individuals), and (2) operative problem-solving paradigms are recognizable in courts' work (or at least that is a working assumption of much legal scholarship outside the masculinist/feminist area). The argument, advanced most prominently by Joseph Goldstein, that the Supreme Court has an obligation to speak in terms “We the People” can understand ought not to overlook the importance of including consideration of care-based values in constitutional interpretation. See JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 1-20 (1992). Thus, an interpretation that focused exclusively on rationality as the vehicle for expounding the Constitution would appear incomplete to a substantial portion of “We the People.” *Id.*

Second, my project is distinct from the communitarianism movement, which seems to hold out the hope of “impersonal” caring and thereby suggests that rights are often not needed. My view is somewhat different. The problems are that it is not always easy to tell what the community is, not every voice gets heard, sometimes the community cannot be trusted to care, and sometimes faith in its ability to mediate conflicting interests is not well founded. The suggestion I am offering is less radical because it does not involve doing away with rights and placing faith entirely in the community's care. Instead, my argument would require the community to act as though it did care sometimes—rather than simply trust it to do so.

feminists have argued that "morality cannot be determined by posing hypothetical moral dilemmas or by asserting moral principles. Rather, one's moral imagination, character, and actions must respond to the complexity of a given situation."²⁵⁴ An ethic of care thus is best built brick by brick out of specific context, rather than described in the whole as a grand theory. To have public impact, however, considerations of care must also arrive at some level of generality across a range of cases. To bring the discussion both down to a more specific context as well as to address a general legal problem, Part V of this Article will apply these concepts in the context of abortion.

This approach need not ignore sexual difference. In developing an ethic of care, it is useful to draw on the experience of care givers. Traditionally, those persons have often been female and the mother-infant relationship has been seen as the quintessence of care.²⁵⁵ But even assuming that it is meaningful to speak of "thinking and feeling like a woman," the real question is not, as the anti-relationalists fear, how the law should treat pregnant women and abortion in view of the way many women are stereotypically assumed to think and feel, but instead how the law should address abortion if more "feminine" thinking were globally included in society's approach. Even if the engrossment and responsiveness of healthy motherhood approaches the moral ideal under an ethic of care, it does not follow that it is ethical for anyone else to coerce a woman into that relationship. To the contrary, taking care seriously would constrain society's power to restrict abortion. This position does not depend on assumptions about the bimodal sexual distribution of relational styles. The fundamental transformative challenge of relational feminism ultimately is *not* harmfully to coerce care from that portion of the population stereotypically associated with greater care focus, but rather to demand a more active and pervasive application of care.

254. Tronto, *supra* note 188, at 658.

255. Cf. Kari Waerness, *The Rationality of Caring*, 5 ECONOMIC AND INDUSTRIAL DEMOCRACY 185, 204-05 (1984). Waerness comments:

[T]o reorganize the public care system in such a way that practical experience in caregiving work and personal knowledge of the individual client can be an independent basis for greater influence, at the expense of professional and bureaucratic control and authority, [it is necessary that m]ore decision-making power [be given] to women on the basis of their personal experiences from practical caregiving work in the private sphere and from working class jobs in the public caregiving services.

Id.; see also NODDINGS, *CARING*, *supra* note 20, at 129 (arguing that women should express their natural care-giving orientation in public life).

V. CARE AND RECOGNITION OF ABORTION RIGHTS

A. *Opening discourse to different voices*

The dialectics of caricature evident in discourse about sexual difference have a cousin in the twenty-year dominance of an "official story" in the abortion debate, and in the anti-relationalists' invocation of it to silence or at least to contain relationalism.²⁵⁶ That story has several distinctive features. It rigidly frames the abortion question as a dualistic conflict between the woman's ethically neutral claim to privacy and autonomy (as self-definition) and the state's claim to protect prenatal life. It is uncomfortable with ambiguity or questions about the morality of abortion, fearing a slippery slope to intrusive regulation. It now worries that care-talk will erode abortion rights by founding a legal duty of gestational care on the intimacy of the pregnant woman-conceptus relation.

The existence of "feminist" opposition to abortion is hardly news. The anti-abortion ranks and leadership include many women,²⁵⁷

256. Relational theory might suggest that this urge to monopolize the terms in which the abortion debate is framed derives from anti-relationalists' fear that opening the floor to different voices may result in a loss of control and annihilation of their position. This dynamic would be consistent with what Gilligan and West have described as a typically masculine pattern. Closeness is perceived as threatening betrayal, domination, and annihilation by the other (in this case by alternative paradigms for considering abortion rights). Chodorow might add that masculine fears typically identify women as the source of such threats (in this case, the feminine voice of relation). Rules are required to maintain distance (in this case distance from those alternative paradigms, maintained by rule-like constructions that constrain what counts as legitimate argument about abortion rights). The parties feeling threatened resort to a form of rhetorical aggression (in this case by testing a hostile reading of "care-talk" by the standards of an atomistic morality).

While Gilligan and West may assign gender valence to this description, it also could be applied to some feminist writing. See *supra* note 78. Once again, the point is not sexual difference but whether we want to treat the issue in this fashion. Alternatively, and perhaps more cynically, if relationalism is the official version of feminism and describes the experience of many women, then the anti-relationalist attack on it arguably could be seen as driven by the belief that the defense of abortion rights is too important to entrust to women (or at least to "feminine" ones).

257. Paige Cunningham, for example, of Americans United for Life, testified in opposition to Justice Ruth Bader Ginsburg's confirmation. See Joan Biskupic, *Ginsburg Confirmation Hearings Conclude: Most Witnesses on Final Day Hail Court Nominee, But a Handful Oppose 'Radical Feminist,'* WASH. POST, July 24, 1993, at A7. For discussion of women's involvement in the anti-abortion rights movement, see generally *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). Now, with Rachel Shannon's alleged shooting of Dr. George Tiller, women apparently have also crossed the line from anti-abortion protest to anti-abortionist violence. See *infra* note 260.

many feminists have deplored abortion for over a century.²⁵⁸ Although, as discussed below, opposition to abortion is not necessarily the same thing as opposition to abortion rights, some modern opponents of abortion rights have explicitly raised relational objections to *Roe*.²⁵⁹ But the anti-relationalist conclusion—that relational feminism is bad for abortion rights and therefore bad for women—does not follow from the existence of female opponents to abortion or the deployment of relation-talk against abortion rights. Those facts establish only that one's position on abortion probably is not biologically determined and that arguments from relational theory are not themselves determinate.²⁶⁰

258. For example, in the latter half of the nineteenth century, during the formative years of the era of restrictive abortion laws that was brought to a close by *Roe*, many feminists spoke out against abortion as a degrading evil made necessary by men's sexual dominance and advocated abstinence or contraception as alternatives. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* 111-13 (1978). Their position in some respects anticipated Catharine MacKinnon's views. See *supra* note 191.

259. For a review of "pro-life feminism," see Karlan & Ortiz, *supra* note 13, at 880-82. Indeed, several such groups, including one calling itself "Feminists for Life America," have filed amicus briefs urging the Supreme Court to overrule *Roe*. E.g., Brief of Feminists for Life America et al., as *amici curiae* in support of appellants, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605), reprinted in 3 MERSKY & HARTMAN, *supra* note 65, at 69; Brief of Feminists for Life America et al., as *amici curiae* in support of respondents and cross-petitioners, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902).

260. As we have seen, however, the same could be said about pro-choice arguments based on individualist liberal theory. See *supra* notes 164-78 and accompanying text. The presence of many men on the pro-choice side also supports the conclusion that one's position with respect to abortion is not gender-specific. For description of some of the courageous and caring men who worked to help women facing unwanted pregnancy during the pre-*Roe* era, see ELLEN MESSER & KATHRYN E. MAY, *BACKROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* 171-214 (1988). Indeed, some have taken enormous risks and made large sacrifices in the cause of abortion rights. Dr. David Gunn, for example, has become a kind of pro-choice martyr. See, e.g., William Booth, *At Abortion Clinic, A Collision of Causes: Doctor, Accused Killer Both Impassioned*, WASH. POST, Mar. 12, 1993, at A1; Bill Hewitt et al., *In Life's Name: Dr. David Gunn's Unswerving Belief in a Woman's Right to Choose Fired a Rage that Led to His Murder*, PEOPLE, Mar. 29, 1993, at 44; Eloise Salhol et al., *The Death of Doctor Gunn: A Physician Becomes a Casualty of the Abortion Wars as Pro-Life Militants Step Up Their Campaign*, NEWSWEEK, Mar. 22, 1993, at 34. Dr. George Tiller, who was back in his Kansas City clinic the day after being shot in both arms (allegedly by an anti-abortion activist), also has become even more of a hero to the pro-abortion rights side than he was during the siege of his clinic by Operation Rescue. See, e.g., Patricia Ireland, *National Organization for Women Press Conference: Abortion Shooting*, FEDERAL NEWS SERVICE, Aug. 20, 1993, Major Leader Special Transcript, available in LEXIS, Nexis Library, Newfed File. In Fayetteville, Arkansas, Dr. William Harrison, who personally has delivered more than 6,000 babies, has been demonstrating his enduring commitment to choice notwithstanding death threats, harassment of his patients, vandalism and firebombing of his offices, and disruption of his

The anti-relationalists' argument does suggest, however, how overemphasis on difference can crystallize the organic, fluid concept of relation-based care into an inflexible rule that can be used to hurt pregnant women. The label "care-talk" thus counsels skepticism of thin forms of relationalism that ignore the content and effect of particular relations and that devote insufficient attention to real-world harm. The anti-relationalists overshoot the mark, however, when they insist that relationalism therefore must go.

Relationalism reveals several key points about the official story. First, the official version conflates two moral issues: (1) the woman's decision to abort; and (2) the state's decision to interfere.²⁶¹ Second, the official story tends to desiccate into lifeless abstraction the moral questions it does recognize. Thomson's version sanitizes the woman's decision into an abstract thought experiment that is devoid of affective content. No wonder anti-abortion advocates wave "bloody-fetus" images.²⁶² Conversely, by talking in abstract terms about "state interests," the official story also downplays the fact that abortion restrictions constitute actual decisions and actions by one group of people that can seriously hurt others. Third, critical examination of the anti-relationalist position reveals that "care-talk" is not the same thing as actual care.

B. *Abortion and an ethic of care*

Relational accounts of abortion that expressly support abortion rights offer a useful starting place for considering how to take care seriously in the context of reproductive choice.²⁶³ Noddings

OB/GYN practice. See JUDGES, *supra* note 90, at 44-45.

261. As Gilligan observes: "In the absence of legal abortion, a morality of self-sacrifice is necessary in order to ensure protection and care for the dependent child. However, when such sacrifice becomes optional, the entire problem is recast." GILLIGAN, *supra* note 5, at 83.

262. See JUDGES, *supra* note 90, at 289-91.

263. Curiously, neither the Karlan and Ortiz nor the McClain articles discuss Noddings's views on abortion, although both cite her book. Karlan & Ortiz, *supra* note 13, at 859 n.6; McClain, *supra* note 14, at 1200-01 n.144. Karlan and Ortiz do discuss Goldstein in a footnote, but hardly do him justice, Karlan & Ortiz, *supra* note 13, at 873 n.70; and no one seems to have noted Gilligan's own comments about abortion, see *supra* note 261.

With several important exceptions, those writers who embrace relational feminism have generally devoted relatively little detailed attention to the specific application of the ethic of care to the problem of abortion rights, but it is plain that they do not believe they are campaigning against choice. For example, Karst's description of a reconstructed "Woman's Constitution" does not come directly to terms with the abortion dilemma. Instead, his focus is on discrimination generally and the application of doctrines that tend

to rob such constitutional litigation of its context, such as the state action and intent requirements. See, e.g., Karst, *supra* note 51, at 463-72. Elsewhere, however, Karst has spoken of a constitutional protection "against the enforced intimate society of unwanted children, against an unchosen commitment and a caring stained by reluctance, against a compelled identification with the social role of parent." Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 641 (1980).

Sherry contrasts liberalism's recognition "only that the woman has a right to an abortion (or that the fetus has a right to life), regardless of the circumstances," with a feminine, contextual approach which would distinguish a "virtuous" decision to abort a child whose life would be filled with pain from a "less virtuous" decision to abort based on gender selection. Sherry, *supra* note 51, at 568. Elsewhere, Sherry has relied on autonomy-like arguments, including Thomson's, in favor of abortion rights. Sherry, *supra* note 71, at 1591. Menkel-Meadow has suggested that "a woman's concern over reproduction [might] be seen as more her own and less the doctor's." Menkel-Meadow, *supra* note 52, at 61.

West has offered several perspectives on abortion. As described below, she has defended abortion rights as essential to preserve women's existential integrity while urging that such rights be redefined to account for women's perspective on sexuality and pregnancy. West, *Jurisprudence & Gender*, *supra* note 7, at 35-66; see also *infra* note 349. More recently, however, West has described a "responsibility-centered" approach to liberty, which shares themes with relational feminism (especially Gilligan's third phase of moral development). Under this view, "the freedom most important to individuals is the freedom to assume moral responsibility for the consequences of their actions and the content of their beliefs through a life lived in truth, not the freedom to exercise rights, indifferent to the effect of those acts on others." West, *supra* note 9, at 69. A key contrast between this position and legal liberalism is that "[p]recisely because of its insistence on insularity, liberal legalism demands of the citizen almost none of the so-called 'civic virtues': mercy, compassion, public involvement, fellow-feeling, sympathy, or, simply, love." *Id.* at 71.

Applying this vision to "reproductive responsibilities," West warns that liberal legalism's insulation of the moral quality of the abortion decision from community consideration may actually threaten the existence of the right. *Id.* at 81-82. But

by insisting that the "right" to an abortion, like all rights, is not contingent on the morality of the right-holder or the moral quality of the conduct the right protects, the liberal legalist understanding may inadvertently bolster rather than challenge the pernicious and false claims that the decision to abort is more often than not based on nothing more than a woman's "convenience," is generally necessitated by her sexual promiscuity, and, at the extreme, is the moral equivalent of the decision to commit a premeditated murder.

Id. at 81-82 (footnotes omitted). Yet West also recognizes that implementing a "responsibility-based" approach risks subjecting the woman's decision to the dictates of a state "morality monitor," whose good faith and understanding of women's needs not only cannot be assumed, but is indeed unlikely. *Id.* at 83.

Ultimately West urges a shift in the focus of arguments about reproductive freedom, not a complete abandonment of the concept of "rights." She suggests that [b]y focusing on the moral quality of reproductive decisions rather than insulating them from understanding, liberals could redirect societal attention toward this web of shared responsibilities and societal failures. We might then begin to recognize that we have a collective responsibility to address the variable causes that result in unwanted pregnancies, from the pervasive acceptance of sexual violence in our culture to our collective refusal to provide meaningful material assistance for the nurturing of children and families.

describes how an ethic of care might distinguish the moral question of a woman's own decision to abort from the very different moral question of others' response to her decision. To Noddings, the important focus is not abstract debate about personhood but is instead real-life relation: One who cares "is concerned not with human tissue but with human consciousness—with pain, delight, hope, fear, entreaty, and response."²⁶⁴ Speaking strictly for herself, Noddings would regard her own pregnancy not as simply a genetic "information speck" but as a child-to-be who is "endowed with prior love and current knowledge," is "joined to loved others through formal chains of caring," and is "linked to the inner circle in a clearly defined way."²⁶⁵ Even though she might wish she were not pregnant, *she* "cannot destroy this known and potentially loved person-to-be" with whom a relation (albeit indirect and only partly formed) is already established.²⁶⁶ Her "decision is an ethical one born of natural caring."²⁶⁷

Noddings has a very different reaction when the pregnant woman is not Noddings herself but is another, say her daughter, for whom pregnancy may be harmful (perhaps because of a disintegrating marriage):

I might like to convey sanctity on this information speck; but I am not God—only mother to this suffering [daughter]. It is she who is conscious and in pain, and I as [one who cares] move to relieve the pain. This information speck is an information speck and that is all. There is no formal relation, given the breakdown between the husband and

Id. at 85. Karlan and Ortiz thus mischaracterize West's position when they elide her ultimate conclusion. See Karlan & Ortiz, *supra* note 13, at 873 n.70.

Most recently, West has argued that a strong version of abortion rights, as under *Roe*, is necessary as a second-best alternative until our society learns how not to oppress women (especially disadvantaged ones), not to devalue childrearing, and not to sexualize dominance and violence. Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HAST. L.J. 961, 964-67 (1994).

264. NODDINGS, CARING, *supra* note 20, at 88. She regards an incipient embryo as an "information speck—a set of controlling instructions for a future human being," and her discussion is influenced by the fact that many "are created and flushed away without their creators' awareness." *Id.* at 87. She is at least correct that many fertilized ova are spontaneously aborted. See JUDGES, *supra* note 90, at 66 (noting that estimates range from 20 to 60%). The implications of that fact for the morality of induced abortion, especially late in the first or throughout the second trimester, are of course much in dispute.

265. NODDINGS, CARING *supra* note 20, at 88.

266. *Id.*

267. *Id.*

wife, and with the embryo, there is no present relation; the possibility of a future relation—while not absent, surely—is uncertain.²⁶⁸

Noddings also recognizes, however, that the relational potential is dynamic. As the conceptus grows, it becomes more and more capable of response as one who is cared for; the possibility of meeting it as one who cares also increases in certainty (as does the likelihood that the pregnant woman will do so).²⁶⁹

Noddings's account dovetails somewhat with Ronald Dworkin's recent "quasi-relational" position.²⁷⁰ Both find abortion inherently troublesome, and both see the problem primarily in terms of the conceptus's growing connection with the rest of the world. Dworkin regards abortion as morally problematic throughout pregnancy because it wastes an exquisite—perhaps "divine"—natural creative investment.²⁷¹ Later-term abortion compounds that loss with the additional waste of increased human investment, which is partly a function of relation with others.²⁷² He argues that the liberal position on abortion reflects a judgment that it is even *more* of a shame to waste (through coerced continuation of an unwanted pregnancy) the much more deeply textured human investment in an adult woman's ambitions, talents, training, experience, and relations.²⁷³ Dworkin thus includes relation as an important element of life's sanctity on *both* sides of the abortion balance, and he

268. *Id.* Ironically, Noddings's response as she imagines her own daughter facing an unwanted pregnancy resembles that of both former President Bush and former Vice President Dan Quayle—which evidences the difference that real relation can make even to ostensibly anti-choice advocates. Asked during a live interview, "What if your daughter grew up and had a problem, came to you with that problem? How would you deal with it?" Quayle replied: "I hope that I never do have to deal with it. But obviously . . . I would counsel and talk to her and support her on whatever decision she made." Interviewer Larry King pressed the point: "And if the decision was abortion, you'd support her, as a parent?" Quayle replied, "I'd support my daughter." Later, George Bush also stated that, while he would attempt to talk his granddaughter out of an abortion, it would be *her* decision; if she so chose, he would stand by her. JUDGES, *supra* note 90, at 19.

269. For a discussion of the likelihood that many women who carry even unwanted pregnancies to term eventually will develop attachment and care, see *infra* part V.C.

270. In RONALD DWORBIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993), the author basically argues from a liberal autonomy perspective, but one enriched substantially by an awareness of an individual's connection to others.

271. *Id.* at 68-101.

272. *See id.* at 169-71.

273. *Id.*

mentions that "reasons of beneficence" as well as "reasons of autonomy" argue against state interference with choice.²⁷⁴

Like Dworkin, Noddings concludes that, translated into impersonal legal terms, her position resembles the Court's decision in *Roe*. As the embryo becomes a fetus, "our obligation grows from a nagging uncertainty—an 'I must if I wish'—to an utter conviction that we must meet this small other" with care.²⁷⁵ She clearly hopes that the pregnant woman will eventually form a caring relation with the conceptus, but she also seems to believe that, if the woman does not do so, then the conceptus's potential for relation with others will have become sufficiently strong by viability to justify interference in the pregnant woman's choice—to substitute the force of law for her failure of care: "It is not a question of when life begins but of when relation begins."²⁷⁶

Noddings's position with respect to pre-viability abortion seems contradictory. One suspects that, if pressed, she would have to admit that she regards at least some (if not most) pre-viability elective abortions (especially later in the second trimester) as unethical—as a failure by the pregnant woman to summon ethical care when care did not arise naturally.²⁷⁷ This inference sounds like the "different voice" speaking against *abortion*.²⁷⁸ Yet Noddings's open endorsement of *Roe* speaks in favor of abortion *rights*. Some anti-relationalists would criticize her position as making only moral and not legal demands, ceding the public sector to masculinist values and retreating into the private realm when the going gets tough. Anti-relationalists argue that this kind of move recapitulates the individualistic value of autonomous choice, denies coercive power to the feminist message of care (rendering it effectively voiceless in an

274. *Id.* at 213 (discussing state interference with euthanasia).

275. NODDINGS, *CARING supra* note 20, at 88.

276. *See id.* Once the infant

is capable of relation—of the sweetest and most unselfconscious reciprocity—one who encounters the infant is obligated to meet it as [one who cares]. . . . If the mother does not care naturally, then she must summon ethical caring to support her as [one who cares]. . . . She may not ethically ignore the child's cry to live.

Id. at 89.

277. This assessment would be accurate if her position were tested by Kantian principles of universality. Even by Noddings's own criteria, however, the unwanting pregnant woman would have sacrificed her ethical ideal by rejecting a present, concrete opportunity for the most intimate of relations.

278. *See Karlan & Ortiz, supra* note 13, at 881-82.

uncaring masculine world), and threatens to revive the separate spheres regime.²⁷⁹

That critique overlooks the possibility that abortion presents at least *two* moral issues to which an ethic of care might provide distinct responses.²⁸⁰ It also ignores relationalism's power to focus the law's critical scrutiny on the practical effects of abortion restrictions. A woman confronting an unwanted pregnancy and other persons encountering her *both* are in a position to respond with care (or its impersonal counterpart). To Noddings, one who cares

in considering abortion as in all other matters, cares first for the one in immediate pain or peril. . . . If the incipient child has been sanctified by [relation with] its mother, every effort must be made to help the two to achieve a stable and hopeful life together; if it has not, it should be removed swiftly and mercifully with all loving attention to the woman, the conscious patient.²⁸¹

Thus, the failure to respond with care to the needs and suffering of the unwanting pregnant woman would be unethical because the woman is present and in extant relation (at a minimum in the sense described by Dworkin). Even less ethical would be the use of coercive force to preclude from caring for herself the woman who has made the painful choice of abortion. Sometimes caring means, at least, not interfering.

Far from reflecting a retreat into purely private morality, Noddings's endorsement of *Roe* implies that the case can be understood as addressing both moral issues raised by abortion. Before viability, *Roe* compels a minimally ethical care-like response from the public at large by disabling its regulatory power to hurt the pregnant woman—with whom it already has a "relation" through her presence and substantial investment in society—by interfering with her decision.²⁸² This result reflects care's surrogate in the imper-

279. *Id.* at 891-92. To be sure, there are indications that Noddings herself tends in that direction, see NODDINGS, *CARING*, *supra* note 20, at 89-90, but application of a caring perspective in the public sphere suggests a different interpretation.

280. Noddings seems to be saying that the answer depends on context. The key factor may be who is pregnant—me or thee.

281. NODDINGS, *CARING* *supra* note 20, at 89.

282. As discussed above, this argument extends an ethic of care beyond interpersonal relations. Noddings's care is, after all, elicited by a hypothetical situation featuring her *daughter*. Faced with the alternative of accepting the inevitability of a totally uncaring public sphere, however, I would rather first attempt to preserve care-like considerations and thereby protect the ethical ideal. This is the crucial step that Noddings has overlooked. She says that the "public life [of one who cares] is limited by her insistence

sonal sphere making legal demands on the political community in the pregnant woman's behalf through the injunctive power of constitutional law. After viability, *Roe* allows the state in turn forcibly to extract a form of care from the pregnant woman by coercing her into continuing to sustain, and potentially to develop a relationship with, the conceptus.²⁸³

One who cares would recoil at the power of restrictive abortion laws to hurt women. Most tangibly, such laws enormously increase the physical risks to women who are seeking to care for themselves (and for others with whom they have established relations) by terminating pregnancy. Abortion rights substantially protect the physical health of such women both by reducing the incidence of illegal abortion and by allowing legal abortion to become much safer.²⁸⁴ Restrictive abortion laws also can inflict substantial emotional harm. Abortion, of course, has psychological implications;

on meeting the other as [one who cares]." *Id.* at 89. Noddings also says that when public life threatens to destroy her care or drastically to reduce it, the caring one retreats and renews her contact with those who address her. "If her retreat becomes a flight, an avoidance of the call to care, her ethical ideal is diminished." *Id.*

283. Karlan and Ortiz oddly ignore *Cooper v. Aaron*, 358 U.S. 1 (1958), and the fact that law speaks in negative as well as positive commands. *Brown's* injunction, after all, was enforced at the point of a bayonet in Little Rock.

284. See JUDGES, *supra* note 90, at 73-79. For example, according to the American Medical Association, "85% of the decrease in abortion deaths between 1972 and 1974 reflected reductions in mortality from unlawful abortions." Brief of American Medical Association, et al. as amici curiae in support of appellees at 12, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605), reprinted in 5 MERSKY & HARTMAN, *supra* note 65, at 341, 366. In attributing this protection to *Roe*, I am bypassing the objection raised in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 173-74 (1991), that the Court's role in producing such change is minimal. My point is that liberal abortion laws, whether mandated by the judiciary or the legislature, can be understood as embodying the impersonal version of care.

In countries with strict anti-abortion laws, the death rate from illegal abortion remains shockingly high. For example, "[i]n Latin America, complications of illegal abortion are thought to be the main cause of death in women between the ages of 15 and 39 years." PREVENTING MATERNAL DEATHS 110 (Erica Royston & Sue Armstrong, eds., 1989); see also Marlise Simons, *Abortions Across Latin America Increase Despite Illegality and Risks*, N.Y. TIMES, Nov. 26, 1988, at A1 (noting the high death rate in child-bearing age women as a consequence of unsafe, illegal abortions). Illegal abortion accounted for as much as 86% of maternal deaths in Romania in 1984. Stanley K. Henshaw, *Induced Abortion: A World Review*, 1990, 22 FAM. PLAN. PERSP. 76, 82 (1990). The increased safety of legal abortion has been attributed to several factors made possible by liberalization of abortion laws: (1) the routine practice of legal abortion, like any surgical procedure, increases the physician's manual skill; (2) the medical profession has developed much safer techniques, such as suction curettage, as abortion has moved closer to the mainstream of legitimate medical practice; and (3) legal abortions are increasingly being performed earlier in pregnancy, when the risks of complication are significantly lower. JUDGES, *supra* note 90, at 77.

nevertheless, according to the American Psychological Association, evidence indicates that "for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects."²⁸⁵ Women are more likely to suffer psychological damage from abortion when the decision is forced on them by medical necessity or by someone else, as well as when their decision is not supported by people important to them.²⁸⁶

Relational feminism not only asserts a collective moral responsibility for the harm that restrictive abortion laws inflict but also illuminates the uniquely *relational* nature of that harm: Abortion prohibitions operate to *exclude* or to *separate* the pregnant woman from the community's circle of care when she acutely needs it. If the difference theorists are correct that women especially value relation, then such a tearing of connection hits unwanted pregnant women where it hurts the most. Infliction of such harm is contrary to an ethic of care transposed to the impersonal realm, which requires that *all of us*, not just women experiencing unwanted pregnancies, increase the level of care for, accept our responsibilities to, and recognize our interrelatedness with others. Among other things, this means that not only the unwanted conceptus, but also the unwanted pregnant woman, must be included within our circle of care.

The anti-relationalists' failure to appreciate the implications of this more complete ethic of care illustrates how easily real-life consequences are lost in abstract debate about principles. This failure follows directly from the reduction of an ethic of care to a rigid

285. Brief of American Psychological Association as *amici curiae* in support of Appellees at 19-20, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (88-605), reprinted in 5 MERSKY & HARTMAN, *supra* note 65, at 419, 449-50. According to the American Psychological Association, "the great majority of women who have had an abortion express feelings of relief." While some anti-abortion activists have asserted that overruling *Roe* is necessary to protect women from alleged adverse psychological effects of abortion, the mainstream health care establishment strongly disagrees. See JUDGES, *supra* note 90, at 79-80. Current research has tended to focus "on [identifying] the variables that predict diverse emotional responses to abortion. Abortion does not take place independently of a woman's intrapersonal and interpersonal context." Brief of American Psychological Association, *supra*, at 21, reprinted in 5 MERSKY & HARTMAN, *supra* note 65, at 450.

286. The APA argues that one can even find evidence of positive psychological changes following abortion, including stress reduction, increased use of contraceptives, and increased feelings of autonomy, self-directedness, and efficacy. Brief of American Psychological Association as *amici curiae* in support of appellees, at 21, *Webster*, 492 U.S. 490 (No. 88-605), reprinted in 5 Mersky & Hartman, *supra* note 65, at 450. For an anecdotal account of the positive aspects of abortion, see PATRICIA LUNNENBORG, *ABORTION: A POSITIVE DECISION* (1992).

formula. While any legal consideration of abortion perforce must operate at a general and institutional, rather than a strictly interpersonal, level, the deafening effect of abstraction can be mitigated by listening to the stories of persons who have actually experienced the harm of such exclusion.

Predictably, pre-*Roe* narratives describe hemorrhages, infections, and bloody coathangers. They also tell of the emotional wounds suffered by women: feelings of isolation, degradation, fear, desperation, exploitation (including sexual abuse), helplessness, and being trapped by a hostile, male-dominated system.²⁸⁷ One woman compared the relational agony she felt at putting her daughter up for adoption in 1962, when abortion was illegal, with the "great relief" she felt after a "safe, legal abortion" in 1977: "*There is no comparison between the loss of a fetus to an abortion and the loss of my real baby girl to adoption.*"²⁸⁸ Other women describe covert meetings in shabby hotel rooms, sleazy abortionists, and the constant feeling of *aloneness*. One woman, Caroline, relates how, after a saline injection administered in a seedy house by an abortionist who doubled as a bookie, she later aborted all alone in her dormitory room, hemorrhaging "more blood than I ever imagined." Frightened and isolated, she continued to bleed almost to death over the next

287. *E.g.*, MESSER & MAY, *supra* note 260, at 31-37. One rape victim, for example, for whom the abortion option was unavailable, tells of the rejection and hostility she endured, as well as the pain caused by putting the child up for adoption. *Id.* In *Webster*, 2,887 women who had abortions joined a brief arguing that *Roe v. Wade* was "a wise and just" decision necessary to the safety and well-being of women, that the abortion/childbirth decision is a profound one for every woman that involves a weighing of numerous responsibilities, and that the decision is therefore better left to each individual woman and not to legislators. Attached to the brief were selected letters from those women detailing their views and experiences. Brief of Women Who Have Had Abortions and Friends of *Amici Curiae* as *amici curiae* in support of appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (88-605), *reprinted in* 8 MERSKY & HARTMAN, *supra* note 65, at 171 [hereinafter Brief of *amici curiae* Women Who Have Had Abortions].

288. Brief of *amici curiae* Women Who Have Had Abortions, *supra* note 287, at app. B, letter 5, at B5, *reprinted in* 8 MERSKY & HARTMAN, *supra* note 65, at 285. One 58-year-old grandmother related her two experiences with illegal abortion in the 1950s. One of the men from whom she sought an abortion subjected her to a painful pelvic examination (during which he sexually molested her), then exposed himself to her and proposed various sexual encounters in exchange for the abortion service. Another man invited her to participate in live sexual performances and pornographic productions as part of the abortion procedure. Her first abortion resulted in a "crippling infection," the second subjected her to a near-fatal injection of antibiotics. In addition to her physical trauma, she also describes the "psychic scars" that she bears, and the resultant harm to her children, as a consequence of the ordeal she was put through to obtain an abortion. *Id.* at app. B, letter 125, at B24-33, *reprinted in* 8 MERSKY & HARTMAN, *supra* note 65, at 304-13.

month—"terrified of [obtaining urgently needed medical attention] because I didn't want my parents to find out and I didn't want to be arrested."²⁸⁹

Consideration of women's welfare highlights the need for skepticism about the conclusion that relationalism cannot be trusted to participate meaningfully in the abortion debate. Just as some abortion opponents, sailing under feminist colors, have invoked an ethic purportedly based on care and connection to argue against

289. MESSER & MAY, *supra* note 260, at 10. She concluded:

I certainly wouldn't want anyone to have to live through the experience that I lived through. There's no need for it. I did make choices: I considered and chose not to choose marriage. I chose not to be an unwed mother. Abortion was the option of last resort, but I chose it because it seemed the only option that would allow me to go on with my life, even at the risk of losing it.

Id. Caroline's life was saved by the care of an Episcopal rector, "a gentle Christian man," who arranged for her to receive medical treatment—which involved hospitalization, a dilation and curettage, a transfusion of five units of blood, and for the Church to pay her hospital bill. *Id.* at 9. "He remarked that he had lots of parishioners who had money to fly to Sweden to get an abortion, and it was really criminal that just because I didn't have money I'd had to go through this kind of experience." *Id.* at 10.

Refreshingly, one collection of narratives includes a young man's story. He speaks eloquently of how frightening, confusing, and painful it was to be 15 with his 14-year-old girlfriend pregnant. His story reveals the especially difficult plight of teens faced with unwanted pregnancy under pre-*Roe* law, how abortion restrictions hurt others connected to the pregnant woman, and the serious suffering of men with respect to relation:

It really wasn't a joke, even though there really wasn't any responsibility I could bear except for guilt. I mean, what could I do? I couldn't give her money, I couldn't marry her. I couldn't do anything except say goodbye [when she was forced to go away to have the baby and put it up for adoption].

...

Not that abortion is an easy way out, but it's easier than something that wasn't her choice. . . . There was no option. No option whatsoever. A fifteen-year-old kid at that time—it was hard enough to know what was going on, much less to try and negotiate the criminal aspect of dealing with something like abortion. How could a fifteen-year-old move into the crime world and make a deal and be assured of her safety?

...

[After she went away] I was really grieving—it really was very hard. When she came back, I couldn't handle my feelings, or the situation, and she couldn't either. We had no knowledge, we didn't know what our emotions were, we didn't know what we should feel, or why, or who was lying, which everybody was. Nobody told us—useful information was not available to us, on an emotional basis or a practical basis, there wasn't anything. Even my peers that knew about it, who wanted to be supportive, had no idea either, so they were supportive by saying things like, "Ha ha ha, you got away with it," which, of course, made me want to puke.

Id. at 65-67. Messer and May also include stories from abortion providers and pro-choice activist men. *Id.* at 176-214. For other stories from this perspective, see ARTHUR B. SHOSTAK & GARY MCLOUTH, *MEN AND ABORTION: LESSONS, LOSSES, AND LOVE* (1984).

abortion rights, some also have contended that abortion rights have created a massive "public health disaster."²⁹⁰ While the practice of legal abortion in the United States is not without its risks and difficulties,²⁹¹ the overwhelming weight of credible medical opinion finds legal abortion to be an exceptionally and increasingly safe procedure both physically and psychologically, and to be safer than childbirth throughout pregnancy.²⁹² Whatever the shortcomings of some abortion practice, it is difficult to believe that women's physical and psychological health would be *improved* by a return to pre-*Roe* restrictive policies.

Just because groups calling themselves feminist have deployed leaky arguments about abortion's impact on women's health in opposition to abortion rights hardly means that *Roe*'s supporters should or will abandon the field of abortion rights arguments premised on women's welfare. The response instead should be, and has been, to expose the distortions and inaccuracies in those arguments as well as to work for safer, more equally accessible legal contraception and abortion. The place in the abortion debate of accurate information about women's health is too crucial to relinquish that issue simply because it is subject to adversarial exploitation.

The same is true of care and relation. Although the controversy about relationalism concerns moral judgment and conceptual coherence, rather than quantifiable medical facts, it is equally necessary to test the anti-abortion application of relationalism for completeness and fidelity. It would be an equally unfortunate mistake for abortion rights advocates to turn their backs on care.²⁹³

290. Brief of Feminists for Life America, et al. as *amici curiae* in support of appellants at 3, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (88-605), *reprinted in* 3 MERSKY & HARTMAN, *supra* note 65, at 69, 77. Anti-abortion advocates also have collected stories of women being harmed by legal abortion. *E.g., id.* at app., *reprinted in* 3 MERSKY & HARTMAN, *supra* note 65, at 107-34; DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987).

291. *Cf.* Robert D. McFadden, *Abortion Mills Thriving Behind Secrecy and Fear*, N.Y. TIMES, Nov. 24, 1991, at A1 (describing problem of unregulated, unlicensed abortion "mills").

292. *See supra* notes 284-86 and accompanying text.

293. An analogy derives from *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the State of Virginia attempted to defend the policy of its anti-miscegenation law by quoting at length from sources warning of the evils of mixed-race marriages on eugenic, social, and psychological grounds (including the allegedly higher divorce rates and harmful effects on the offspring of interracial unions). Appellee's Brief at 38-50, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 789, 831-43 (Philip B. Kurland & Gerhard Casper eds., 1975). Some of those grounds could be interpreted as

In particular, pro-life feminists have argued that liberal abortion laws do not liberate women, denigrate women's status by depicting a uniquely feminine process as a burden, and valorize the individualism and domination inherent in male patterns of sexuality.²⁹⁴ Even if there is something to all of that, it still does not mean that women would be better off without *Roe*. Abortion may come at high cost to at least some women, but history shows that repressive abortion laws do so as well.²⁹⁵ The foregoing anti-abortion argument relies on an idealistic vision to test a proposition that must live in the real world.²⁹⁶ Abortion may sometimes reflect "expediency, inequality, and violently destructive solutions to human problems,"²⁹⁷ but

a "relational" defense of laws against interracial marriage. In a striking unmasking of the advocate's role, however, Chief Justice Warren's questioning during oral argument forced Virginia's Assistant Attorney General, R.D. McIlwaine, III, to distance himself personally from the argument that he was offering in behalf of his client. See MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955, at 277, 281 (Peter Irons & Stephanie Guitton eds., 1993). In his closing argument, the Lovings's counsel, Bernard Cohen, invoked a poignant image of actual care and connection to focus the Court's attention on the personal, intensely relational aspects of the constitutional question:

The enormity of the injustices involved under this statute merely serves as indicia of how civil liabilities amount to a denial of due process to the individuals involved. . . . [N]o matter how we articulate this, no matter which theory of the due process clause, or which emphasis we attach to it, no one can articulate it better than Richard Loving, when he said to me: "*Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia.*"

Id. at 285 (emphasis added).

294. In the foreword to ABORTED WOMEN: SILENT NO MORE, *supra* note 290, Nancyjo Mann, the self-proclaimed "victim of this Pandora's box" of legalized abortion who founded Women Exploited By Abortion, asserts that "legalized abortion has become a tool for the manipulation and exploitation of women" in four ways: (1) it frees men to exploit women sexually, leaving women to face the risks and guilt of abortion alone; (2) abortion separates women from "their reproductive potential" and erodes "the natural pride which women enjoy in being able to conceive and bear children—a creative wonder which no man can duplicate"; (3) legalized abortion reflects society's abandonment of women facing unwanted pregnancy; and (4) "[i]nstead of helping women to be strong, independent, and capable of handling their lives in spite of the social prejudices against 'problem' pregnancies, the expediency of abortion encourages women to be weak, dependent, and incapable of dealing with unexpected challenges." *Id.* at x-xii.

295. See JUDGES, *supra* note 90, ch. 3-4.

296. Robin West has observed that abortion rights are a necessity, despite their troublesome implications, in a society where women are pervasively oppressed and exploited. See *supra* note 263. For a general criticism of the kind of move described in the text—in which an advocate attacks an existing system (which must struggle with all the complexities of real life) by comparing its obvious defects to the hypothetical advantages of some ideal system—see Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 738-40 (1985).

297. Sidney Callahan, *Context of the Abortion Debate*, in 1 MERSKY & HARTMAN, *supra* note 65, at 17, 19.

women will not be better off if just that part of the perceived problem is altered. In the real world, of course, women will continue to have intercourse and become pregnant. For some, the desire not to have children will be strong enough for them to seek abortion. Kicking needy, distressed women out of the community's circle of care is a peculiar way indeed to start redressing patterns of sexual domination.

Furthermore, as Gilligan has observed, moral maturity requires women to have the opportunity to choose.²⁹⁸ A woman who chooses abortion may be less free in the eyes of pro-life feminists than one who chooses "life."²⁹⁹ But the woman is surely not at all free who, because of the coercive intervention of the state, has no choice to make at all.

C. *Abortion and mother-love*

The other relationship centrally implicated by abortion rights, in addition to the one between the pregnant woman and her community, is of course the pregnant woman-conceptus relationship. Whereas the anti-relationalists fear that consideration of that relationship will undermine abortion rights, Robert Goldstein argues that a proper understanding of it supports abortion rights.³⁰⁰ His analysis offers a richer conception of choice than Thomson's bodily autonomy argument and shows how abortion restrictions make much greater demands of care on the unwanted pregnant woman than *Roe* makes on the community.

Relying on psychoanalytic concepts of symbiotic attachment, Goldstein posits that "there is no such thing as a baby, there is only a dyadic mother-infant unit."³⁰¹ This dyadic unit is even more inseparably intertwined in the case of the pregnant woman-conceptus relationship. He defends *Roe* not as a matter simply of bodily autonomy, but instead as allowing the woman a reasonable opportunity to decide "whether she will enter into a physical and emotional symbiosis with the fetus-infant and, more generally, into a love relationship of parenting."³⁰² Focusing on the intensity and the depth of commitment required by that relationship, he argues that

298. See *infra* notes 325-26 and accompanying text.

299. See *supra* note 294 and accompanying text.

300. Goldstein's work is not self-consciously aligned with relational feminism, although he does mention Gilligan. GOLDSTEIN, *supra* note 136, at 36.

301. *Id.* at 47.

302. *Id.* at 54.

“[I]ove is generally thought to be outside the competence of the state”.³⁰³

The commitment of psyche and soma of motherhood, the inner strength and capacity that allows a woman to mother, the grace required by a demanding child of gargantuan loving (and subsequently, hating) proportions, all belong to the realm of free will. Not the self-definitional aspect alone but the *givingness* of intimate association requires freedom. . . . [T]he extraordinary demands of primary love—to be completely used as a taken-for-granted indestructible maternal environment—are such that the consent of the caregiver is necessary for her active participation.³⁰⁴

Goldstein explains that there are limits to what the state can coerce. For example, although the state can compel a husband and wife to remain together by prohibiting divorce, it cannot force them to care for each other. While adults may be able to find alternative sources of love and acceptance (for example, in children, friends, community), infants (and *a fortiori* conceptuses) lack such capacity and must depend on mother for care. Yet the state cannot command mother-love. Assuming that human life requires more than mere satisfaction of bodily needs and depends on some “concrete, rock-bottom form of human interaction,” Goldstein concludes that “[t]his psychosoma need is a fact that sets an absolute limit to government coercion.”³⁰⁵

303. *Id.* at 55.

304. *Id.* at 55-56 (emphasis added). Goldstein points out that, in our society in which kinship ties are generally weak and a woman’s social status is not enhanced by motherhood, “choice may be an important source of commitment, and privacy the protection that may encourage personal involvement in wise family arrangements.” *Id.* He further argues that the motives to engage in intercourse hardly “include the kind of deep, complex, and realistic wish for and commitment to a child on which society or a child would want to rely. The claim of obligation from intercourse denigrates what a mother gives and what a fetus-infant needs.” *Id.* at 57.

305. *Id.* at 57-58. Those infants whose enormous needs are met with “a degree of intolerable ambivalence, hostility, or nonacceptance . . . may grow ill in mind and body”; some may physically survive only to suffer deeply inside or “to inflict the lovelessness of their origins on others,” while some may simply wither and die. *Id.* at 58. According to Noddings,

[m]any researchers—among them, Sanger, Montagu, and Wengraf—present evidence that even the fetus is affected by the attitude of acceptance or rejection by its mother. A review of the undesirable effects that may be induced in children, both prenatal and postnatal, by maternal attitudes of rejection can be found in Edward Pohlman’s discussion on birth planning.

NODDINGS, *CARING supra* note 20, at 67-68 (citing M.F. ASHLEY MONTAGU, *PRENATAL INFLUENCES* (1962); EDWARD POHLMAN, *THE PSYCHOLOGY OF BIRTH PLANNING* (1969); 4 *THE SIXTH INTERNATIONAL NEO-MALTHUSIAN AND BIRTH CONTROL CONFERENCE*:

Goldstein therefore questions what it really means for the government to assert that it is seeking to protect its interest in potential life. He contends that the "state cannot assure the survival and growth of infants any more than it can command good poetry. There must be an intervening act of human grace and creativity."³⁰⁶ Goldstein realizes, however, that not every child carried unwillingly to term will be neglected, abused, and damaged—although there is reason to believe that such children may be at greater risk³⁰⁷—for many women will come to care for their infants in any event. Instead, he argues that

[i]n using coercion to discourage abortion, governments do not achieve their aim directly, but rather exploit the good grace of many women to love their babies and to suffer and transcend their ambivalence in procreative communities whose existence, membership, or size is not of their own choosing. But the power to exploit women who would otherwise choose abortion should not be confused with the power to protect potential human life. That is a "power"

THE RELIGIOUS AND ETHICAL ASPECTS OF BIRTH CONTROL (Margaret Sanger ed., 1926); FRITZ WENGRAF, *PSYCHOSOMATIC APPROACH TO GYNECOLOGY AND OBSTETRICS* (1953)). Furthermore, the causal effects appear to derive more from attitude than from observable behavior (in the form of childrearing practices). *Id.* at 68 (citing R.R. SEARS ET AL., *PATTERNS OF CHILD REARING* (1957); E.S. Schaefer & R.Q. Bell, *Patterns of Attitudes Toward Child Rearing and the Family*, 54 J. OF ABNORMAL PSYCHOL. 391 (1957); Gregory Zilboorg, *The Clinical Issues of Postpartum Psychopathological Reactions*, 73 AM. J. OBSTETRICS & GYNECOLOGY 308 (1957)).

306. GOLDSTEIN, *supra* note 136, at 58.

307. JUDGES, *supra* note 90, at 81.

[Anti-abortion advocates have argued that] abortion has adverse effects on surviving children—by weakening maternal ties, by fostering a societal attitude that children are "expendable," and by leaving them with a profound sense of insecurity about their own survival. Some . . . also contend that *Roe* has not mitigated the problems of unwanted children, out-of-wedlock births, and child neglect and abuse; to the contrary, each of those problems has become worse since 1973.

The assumption underlying these arguments is open to question. While liberal abortion policy may not solve the problems of unwed motherhood, teenage pregnancy, child abuse, neglect, and abandonment (that abortion could do so has never been at the heart of the pro-choice argument anyway), which result from a combination of factors, it is difficult to see how prohibiting abortion by itself would do so. It is especially hard to believe that restrictions on abortion would notably improve parents' care and commitment for their children. To the contrary, several European studies indicate that the children resulting from unwanted pregnancies are at significantly higher risk for psychosocial problems during their developmental years—delinquency, inferior school performance, and treatment for nervous and psychosomatic disorders.

Id.

that is confined to the one who makes a personal commitment to the child.³⁰⁸

According to Goldstein, *Roe* allows the “dyad’s adult constituent”—the only part of the dyadic unit able to make and implement decisions—a reasonable period of time within which to resolve her ambivalence and to decide whether to enter into the symbiotic relationship of pregnancy and parenthood.³⁰⁹ He further develops the relational aspects of abortion rights in responding to the anti-abortion rights argument that adoption is the “nonviolent alternative,” and he emphasizes that the relational “fullness of motherhood” (including the extreme intimacy of gestation) produces an emotional fusion that strengthens upon birth.³¹⁰ A coercive policy of substituting adoption for abortion, by contrast, would institute as an accepted norm the tearing of the dyadic relation formed during pregnancy.³¹¹

Goldstein also confronts the main liberal objection to communitarianism, and, implicitly, the anti-relationalist’s worry about relational feminism: that it “strengthen[s] the state’s claim for imposing a particular vision of the good on the uncomprehending or resisting citizen. . . .”³¹² Goldstein describes a more “‘liberal’ reading” of that position, which offers a citizen a richer self-description so “that [she] may deepen [her] self-comprehension and thereby make possible an enlargement and fulfillment of [her] identity

308. GOLDSTEIN, *supra* note 136, at 59.

309. *Id.* at 71.

310. *Id.* at 66. Goldstein writes:

The physical evolution of pregnancy points the way toward further intimacy with the infant to be: the tender soreness of the breasts, enlarging for suckling; the body’s broadening, suggesting the offspring’s passage through to the outside world; the butterfly flutterings of the newly quickened fetus, drawing the inner designs that only the woman knows. . . . The woman’s experience of pregnancy and anticipation of motherhood in the last trimester, as well as hormonal changes, have typically led to a deep self-absorption that she can make available to her newborn. Through this powerful identification with the fetus within and then with the infant who “at first seems like a part of herself,” women in health achieve a very powerful sense “for what the infant needs.” This “primary maternal preoccupation” forms her predisposition for symbiotic attachment.

Id. at 66-67 (footnotes omitted). Goldstein also voices practical doubts about the adequacy of adoption services (or the availability of communal care) in our society. *Id.* at 179 n.68.

311. As Goldstein explains, “[t]hat state policy would now arise within a cultural logic of relationship that is premised on separation and not attachment, and would depend on the alienation of a woman from her generative body, of her self from the offspring she brings into being. *Id.* at 68 (footnote omitted).

312. *Id.* at 77.

through greater participation with others in a common community."³¹³

In contrast to the liberal model of a thin self, which purports neutrally to protect women from unchosen ends (such as motherhood), however arbitrary such choice may be, Goldstein offers a different model of a "woman of character, a thickly conceived self."³¹⁴ She

has substantial reasons for choosing whether to parent, reasons that relate deeply to her core self-in-relation and her generative purposes, to her attachments and the procreative community of which she may already be a part—as well as reasons that relate deeply to the potential person that would develop out of a constitutive attachment to her.³¹⁵

Research indicates that the abortion decision for most women is indeed a complex one based on a constellation of factors.³¹⁶ Women who choose abortion usually have weighed various aspects of their ability to sustain a caring relationship with the infant-to-be and the impact of motherhood on other relationships and responsibilities in their lives.³¹⁷ Because abortion involves such an intricate web of

313. *Id.*

314. *Id.* at 78.

315. *Id.*

316. One study examined data from 1,900 abortion patients. Several results stand out. First, for most women the decision to have an abortion is complex and rests on more than one factor. Many women cited three to five reasons, and some listed up to nine. Among even the small percentage of women whose pregnancy resulted from rape or incest, 95% reported at least one additional reason for the decision to abort. Six factors were mentioned most frequently: concern about how having a baby would change the woman's life (76% gave this as a reason), inability to afford a child (68%), problems in the relationship or not wanting to be a single parent (51%), not wanting others to know that the woman was pregnant or sexually active (31%), and not being mature or old enough for a child (30% of the sample, but most common among the youngest patients). One quarter of the women said they had all the children they wanted or had grown-up children, and 23% gave as a reason their partner's wishes that they have an abortion. When asked to rank the reasons in order of importance to their ultimate decision, the women in the sample most frequently cited not being able to afford a child and not being ready (equally so). The study also found that race and poverty were not significantly related to any of the reasons. See Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 170 (1988).

317. See *supra* note 316. Goldstein's model, however, is not drifting toward an argument in favor of a state "choice monitor." No state official (or other third person, for that matter) has access to or the capacity to integrate the "complex conscious and unconscious motivations" bearing on the woman's abortion decision. Both Goldstein and Noddings do express qualified support for some form of informed consent, but their position bears little similarity to the coercive, hostile system upheld by the Supreme Court in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). See *infra* part VI.B.

conscious and unconscious motivations, only the woman ultimately is in a position to make decisions concerning the commitment of her mother-love. The state cannot realistically perform that function any more than it can reassure a baby crying in the night.³¹⁸

D. Care and connection in constitutional right

I have discussed above how a noninterpretive approach to the Constitution, which considers the problem of abortion as appropriate for judicial consideration, can be regarded as consistent with relational thinking. The Court has addressed the uncertainty inherent in interpreting vaguely defined constitutional values in a changing world "by increasingly relying on a balancing methodology that purportedly accounts for the indeterminacy of the enterprise."³¹⁹ It therefore is appropriate to examine the assumptions about the nature of moral thinking that are embedded in the balance—in both the Court's identification and its weighing of interests. This Article contends that inclusion of a more relational, caring perspective in publicly recognized norms would enrich the process of constitutional balancing. Moreover, if the difference theorists are correct that a relational orientation is exclusively or largely female, then it is appropriate to consider its implications for that constitutional issue of singular importance to women.

The foregoing accounts of care and relation can provide support at several key points for constitutional claims to abortion rights.³²⁰ First, relationalism lends moral weight to claims based on constitutional values of privacy and autonomy. Second, relationalism reinforces and elaborates equality-based claims. In this way, relationalism supplements rather than supplants the interests to be

318. The implications of state efforts to channel or to have an impact on the decision making process, for example through informed consent and waiting period laws, are considered below. See *infra* part VI.B.

319. David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 642 (1994); see also *id.* at 645 ("In the twentieth century, balancing has swiftly overtaken formalism as the preferred method of constitutional adjudication across the entire constitutional spectrum."). The topic of constitutional balancing has inspired several symposia. See, e.g., *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535, 535-761 (1992).

320. Application of relationalism in this context is care-like, not true care, because it must be impartial. I am not suggesting that the courts care about a particular woman for the person that she is, the way one would care for a dear friend. The courts could, however, interpret her rights as though they cared about someone in her position—i.e., impersonally. See *supra* part IV.B.

weighed in the constitutional balance. This project thus does not try to identify novel constitutional values; rather, it seeks to understand familiar ones from a caring perspective so that they can better represent the political community they serve.³²¹

1. Relationalism and autonomy

Relationalism in several important respects supports autonomy- and privacy-based claims to constrain coercive state impositions on liberty. Generally, it can help to fill the ethical gap that is a frequent target of criticism of such claims by showing that preservation of others' autonomy is a form of care. The stereotypical terms of both difference theory and the abortion debate describe an abstract, inert, and atomistic conception of privacy rights at one extreme and the smothering interference of relation at the other.³²² It is a mistake, though, to assume that a caring relationship necessarily confines the one who is cared for. To the contrary, one who really cares naturally wants the other to pursue his or her own projects and to flourish.³²³ Under an ethic of care, individuals are not indifferently left to shift for themselves like so many head of cattle on the range. Instead, the one who is cared for "is free to be more fully himself in the caring relation."³²⁴ The ethic of care thus recognizes the positive value inherent in a relation that allows the other to flourish on his or her own terms. Autonomy is not seen negatively through caring eyes as simply the absence of a justification for interference against a baseline assumption of apathetic atomism. Nor is relation an excuse for meddlesome, self-serving manipulation.

More specifically, relationalism supports privacy-based defenses of abortion in several ways. First, its conception of the protection of self-determination and self-fulfillment as a positive value—something we ought to want for others—has special significance in the abortion context. For example, Gilligan's abortion study describes how reproductive choice is crucial to a woman's moral development as she confronts the dilemma of unwanted pregnancy.³²⁵ Of course

321. This view reflects Gilligan's position that relational thinking does not supplant Kohlbergian thinking, but rather helps to complete the picture. See GILLIGAN, *supra* note 5, at 18-22.

322. For a thorough description of this caricature in the difference debate, see McClain, *supra* note 14.

323. See NODDINGS, CARING, *supra* note 20, at 72.

324. *Id.* at 73.

325. GILLIGAN, *supra* note 5, at 70-105. Gilligan explains:

Gilligan is not recommending that women get themselves pregnant so they can realize the personal growth potential of reproductive choice. Rather, she is suggesting that unwanted pregnancy brings a woman face-to-face with her responsibilities of care for self and others and with society's expectations and role definitions for her.³²⁶

Second, the consistency between respect for another's decisional autonomy and concern for his or her well-being has a strong empirical basis. Bruce Winick, reviewing principles of cognitive and social psychology, has demonstrated that

there is considerable psychological value in allowing people to make choices for themselves. . . . Exercising choice and experiencing a sense of control over important events in their lives may be an essential ingredient in producing mature, self-determining, well-adjusted, happy, and successful members of society. In contrast, when government forces people to act in certain ways, denying them the ability to choose such conduct for themselves, the results may be counterproductive.³²⁷

These conclusions about "[a]llowing individuals to be self-determining in important areas of their lives—for example, in the areas of health,

[T]he conflict precipitated by the pregnancy catches up issues that are critical to psychological development. These issues pertain to the worth of the self in relation to others, the claiming of the power to choose, and the acceptance of responsibility for choice. By provoking a confrontation with choice, the abortion crisis can become a "very auspicious time. You can use the pregnancy as a sort of learning, a teeing-off point, which makes it useful in a way." The same sense of a possibility for growth in this crisis is expressed by other women, who arrive through this encounter with choice at a new understanding of relationships and speak of their sense of "a new beginning," a chance "to take control of my life."

Id. at 94-95.

326. *Id.* at 95. In Gilligan's words:

The willingness to express and to take responsibility for judgment stems from a recognition of the psychological costs of indirect action, to self and to others and thus to relationships. Responsibility for care then includes both self and other, and the injunction not to hurt, freed from conventional constraints, sustains the ideal of care while focusing the reality of choice.

Id.

327. Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755, 1767 (1992). For collections of essays on "therapeutic jurisprudence," that is, the study of law's impact on the psychological well-being of the individuals whom it affects, see THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); Symposium, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). For an argument that the value of decisional autonomy with respect to risk ought to be taken into account in formulation of tort policy, see Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1 (1993).

education, occupation, and family³²⁸—apply especially to abortion rights.

Third, focus on relation supports the conclusion that the woman is the appropriate decision maker. Goldstein's description of mother-love argues that, in a very real sense, she is the *only* decision maker (on behalf of the symbiotic dyad). He suggests that (1) the relevant decision is whether to make the psychic and physical commitment of motherhood, and (2) perforce only the woman is in a position to make it. Furthermore, Gilligan's abortion study (as well as other research) illustrates the deeply contextual nature of the abortion decision—a decision which involves a complex web of responsibilities and relationships, of hurt and of care, the strands of which all converge on the pregnant woman. Only she is in a position to feel and to balance the tug of each thread.

Fourth, relationalism's concern for the unwanted pregnant woman as a suffering person in need of care supports a legal injunction against interference with her choice. Care-like concern means receptivity to the practical implications of restrictive abortion laws. I have already touched on the actual, severe harm to unwanted pregnant women that such laws inflict and how an ethic of care would constrain the imposition of such harm. Justice Blackmun's opinion for the Court in *Roe* demonstrates that sensitivity to the harm inflicted on women by unwanted pregnancy and by restrictive abortion laws has a place in the Court's constitutional balance.³²⁹

Anti-abortion legislation implicates an ethic of care in another way as well. John Hart Ely has pointed out that no fetuses sit in the legislatures;³³⁰ he might have added that a conceptus is no one's actual constituent and a member of no interest group. Ely argued *against* abortion rights under his representation-reinforcing theory of

328. Winick, *supra* note 327, at 1766.

329. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Id. at 155.

330. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973). For discussion of Ely's argument, see *infra* note 353.

noninterpretive judicial review. I want to emphasize the relational implications of the fact that all anti-abortion legislation is sponsored and enacted by post-natal people. Whether sincerely well-intentioned or not, such laws constitute the enactment into positive law of the discomfort some people personally feel about abortion. Abortion restrictions force the unwanted pregnant woman to bear the burden of that discomfort by exploiting her capacity for mother-love.³³¹ In relational terms, those people have rejected motivational displacement with respect to the pregnant woman, have failed to receive *her* suffering, and therefore have ceased to care for her. Instead, they have used the law to attempt to force the pregnant woman to take care of *them* by relieving their pain at the thought of her abortion.

Roe steps in here. It firmly reminds such people that not they, but the pregnant woman, requires care—at least within the limits of *Roe*'s compromise—if she is to be allowed to flourish on her own terms (as one who cares would want her to do). As Noddings explains, the caring person would greet the pregnant woman with compassion, acceptance, and help in her distress—at least until the relational potential of the conceptus to the community reaches a compelling threshold of concreteness. *Roe* requires the minimally ethical, care-like response of at least not making matters worse for the woman up to that point. It thus protects the “privacy” and “autonomy” of the pregnant woman in this situation—at least until viability—by insulating her from being forced to become the caretaker not only of the conceptus but also of people who are uncomfortable with abortion.

2. Relation and equality

The inclusion of relation also provides much-needed support for equality-based claims to abortion rights, which, like Thomson's, typically argue that abortion prohibitions “impose upon women burdens of unwanted pregnancy that men do not bear.”³³² The prevailing constitutional model of equality has had difficulty coming to terms with pregnancy. That model requires identification of a recognizable class, a showing of some kind of intent, and, in the gender context, resolution of the sameness-difference conundrum. If

331. See *supra* part V.C. Restrictive abortion laws thus place on the woman greater demands of caring—of the most intensely interpersonal kind—than *Roe*'s generalized and more abstract requirement of care-like restraint by the community.

332. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016 (1984).

pregnancy is regarded as “unique” or “different” in a shallow way, then the Court is inclined to reason as it did in *Geduldig v. Aiello* when it upheld denial of benefits to pregnant women: “While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”³³³

Almost twenty years later, the Court extended *Geduldig*'s reasoning from denial of a benefit to active and sometimes violent harm. In *Bray v. Alexandria Women's Clinic*,³³⁴ the Court ruled that a conspiracy to preclude women from obtaining abortions did not involve discrimination under the Civil Rights Act of 1871. The Court reasoned that

opposition to voluntary abortion cannot possibly be considered . . . an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and

333. 417 U.S. 484, 496 n.20 (1974). In that case, a state employee benefit plan covered all medical conditions except pregnancy, *id.* at 489, including male-only procedures such as prostatectomies, *id.* at 499-500 (Brennan, J., dissenting). Relegating the issue to a mere footnote, the Court concluded that the policy did not even involve a gender-based classification because it simply distinguished between “pregnant women” and “non-pregnant persons.” *Id.* at 496 n.20. Presumably gender would have been at least implicated had the policy drawn a distinction between pregnant women and pregnant men. As Deborah Rhode has observed, “the Court’s characterization assumed what should have been at issue and made the assumption from a male reference point. Men’s physiology set the standard against which women’s claims appeared merely ‘additional.’” Rhode, *supra* note 81, at 208.

Prevailing notions of equality also have failed to recognize the potentially disadvantageous effect of acts that attempt to treat pregnancy the “same” as other conditions. For example, Deborah Rhode has described how modern maternity leave policies, implemented following enactment of the sameness-based federal Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (1994), (which constituted the legislative response to *Geduldig*, 417 U.S. 484 (1974)), have prompted a schism among feminists concerning whether “special” treatment of pregnancy is appropriate. On the one hand, treating pregnancy the same as other medical conditions (which could result in a no-leave policy, additionally burdening pregnant women) ignores the reality that men and women are not equally situated with respect to pregnancy: “Why require females’ assimilation to a male norm rather than fair recognition of their separate capacities?” Rhode, *supra* note 81, at 209. On the other hand, “[w]hile pregnancy is in some important sense unique, stressing that uniqueness has often exacerbated women’s economic disadvantage and the stereotypes underlying it.” *Id.*

334. 113 S. Ct. 753, 760 (1993).

women are on both sides of petitioners' unlawful demonstrations.³³⁵

In this view, the relationship between pregnancy and gender is, without more, purely coincidental and irrelevant (as is the conspirators' deliberate choice of violent, intimidating, and unlawful means). What matters is the irrationality of the actor's thoughts, not the nature or context of the harm that the actor inflicts.

Something is missing from a model of equality that fails to recognize the discrimination inherent in actions (especially violent ones) that manifestly and inevitably hurt women based on their most intrinsically female characteristic, even if some women are spared and some are among the perpetrators, and even if reason can be deployed to explain the harm done.³³⁶ The problem lies in the Court's focus on an abstract conception of the intentions of the actor, which allows the kind of formalistic moves evident in *Geduldig* and *Bray*.³³⁷

Inclusion of a relational perspective would shift that focus. In general terms, relationalism's pragmatic concern with real-life harm would demand more from an equality norm than good intentions: Its observation that caring begins by receiving the other would emphasize certain effects of the actor's conduct on that other. One effect of particular concern to an equality norm that encompassed relation and connection would be on the other's sense of being *excluded* from the community.

The (albeit fitful) appearance of traces of these themes in the school desegregation cases shows that the implications of a relational or caring perspective for constitutional equality are generalizable

335. *Id.* (citing *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)). Justice Scalia's opinion overlooked, among many other things, the fact that Operation Rescue targets clinics, not procedures; it prevents women from receiving a range of services in addition to voluntary abortion. Furthermore, his imprecise terminology conceals a potential hole in his logic. It is not clear what Justice Scalia means by "voluntary" abortion. He may mean "elective" abortion (i.e., at the woman's request and not for reasons of impaired maternal health or fetal disease) as opposed to "therapeutic abortion." See generally F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 501 (18th ed. 1989) (explaining the distinction between elective and therapeutic abortions). If so, he may well be mistaken in his implicit assumption that many of the conspirators would find the distinction morally relevant. Their actions at least raise the inference that they are quite prepared, for the sake of their cause, to make large sacrifices of the health and well-being of pregnant women. The willingness to write off the well-being of an entire class of persons at least raises an inference of disdain for its members.

336. See *infra* part VI.D.

337. For a critique of the Court's intent test, see Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 617-20 (1992).

beyond problems centered around sex discrimination or pregnancy. The doctrine of "separate but equal" is the apotheosis of heartless (indeed, mean-spirited) formalism masquerading as equality. One of the striking aspects of *Brown* was the Court's sensitivity to the very real harm being done to the black school children and recognition that their feeling of being excluded from the community was constitutionally relevant: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³³⁸ The Court's ensuing struggle with school desegregation, however, reflects both the limits of an equality jurisprudence in which the Court loses sight of such concerns and the Court's deep ambivalence about making a constitutional commitment to a concept of equality that does include them.³³⁹ Care involves not just a receiving of the other, but also motivational displacement—an *enduring* commitment to act (or not to act, as appropriate) to relieve the other's suffering.³⁴⁰

Application of relationalism to the abortion context also would go beyond a formal equality—in this case "*different* but equal"—to focus on actual inclusion and harm. As discussed above, Thomson's equality premise—that abortion prohibitions unjustifiably impose a duty of care on women that they do not impose on anyone else—founders on the Court's sameness-difference approach because it fails to explain why pregnant women are not "different." A

338. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

339. The federal courts did not begin to make any real progress with school desegregation until the Court made a commitment to act by repudiating the inertial consequences of "all deliberate speed" and "freedom of choice" plans in favor of a range of flexible affirmative remedial measures that "promises to work and to work now." See generally Judges, *supra* note 337, at 623-27 (describing the succession of desegregation cases). The Court further expanded its receptivity to the harm being done by recognizing a *prima facie* case based on liberal presumptions tying the existence of segregation to government policy. *Id.* Eventually, however, the Court's ambivalence came to dilute its commitment. Although the Court extended desegregation to northern schools, and later reaffirmed the availability of sweeping equitable powers in federal district courts, its imposition of a district-specific intent requirement and its upholding of school financing systems based on local property taxes (which create large, often racially correlated interdistrict disparities in funding) have substantially compromised the achievement of equality. *Id.*

340. See *supra* part IV.B.1. Not surprisingly, the Court's opinions in this direction have been characterized by an increased formalism and dedication to abstractions and a diminished sensitivity to the palpable effects of government action. See Judges, *supra* note 337, at 601-29.

relatively thin version of relationalism would undermine Thomson's equality premise by contending that the supremely intimate pregnant woman-conceptus relation imposes a singularly compelling moral obligation of care and thus justifies the differential treatment of pregnant women. Interference with abortion could be seen from this perspective as not irrationally and invidiously directed at women and therefore not to violate a rigid, intent-based equality norm.

Real care, however, would construct the problem not simply as one of difference but also as one of exclusion and harm.³⁴¹ I have argued elsewhere that the Civil War Amendments collectively describe a "caste-abolition principle," which would provide a remedy for conditions or actions that tend to disadvantage one group systematically and severely enough to create or to perpetuate a kind of second-class citizenship.³⁴² This principle would consider the context of the group's real position in society, rather than simply the members' most visible characteristics (skin color, sex). Moreover, it would synthesize individualism and relationism into an autonomy-respecting form of care that would recognize our intrinsic worth as self-defined individuals, would respect our autonomy to find our own meaning and fulfillment in life, and would also respond with care to the social injustice of large and identifiable inequalities in the distribution of power and opportunity.

This principle has its historical roots in America's revolution to abolish an especially heinous and overt system of caste. The core attributes of that social institution were the utter dehumanization of its victims by the systematic domination of key aspects of their lives, a crushing deprivation of their personal integrity and dignity, and their effective exclusion from the remainder of society. Slavery demonstrates that the central feature of such a system is its effect, not the intentions of its authors; neither actual malice toward the victims nor irrationality are necessary elements of such a system. Instead, "[t]he dehumanization process was less a conscious and deliberate attempt on the part of the slaveholders to deprive the slaves of their

341. With respect to equality, such a perspective would understand the constitutional guarantee of equal *protection* to promise equal *care*—that is, equal receiving of the other and commitment to act.

342. Judges, *supra* note 337, at 659-82. Other writers also have considered the constitutional significance of caste. In addition to the works cited in Judges, *supra* note 337, see Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard Toward Review of Race Cases*, 30 WAYNE L. REV. 1, 5-16 (1983).

humanity than it was a natural consequence of the system."³⁴³ The problem is not so much, as the Court's intent requirement assumes, that such a system offers a vehicle for the expression of pre-existing hatred (although at least a kind of malignant indifference may be a necessary component of so ruthless a system). Rather, the key is the systematic appropriation of the "self" of other human beings so that they may be exploited to advance their oppressors' goals, whether rational (such as economic advantage) or not.³⁴⁴

Relational application of this principle to abortion would involve a deeper understanding of the implications of unwanted pregnancy for the woman's relation to the community, herself, and the unwanted conceptus. The important relational issue is not the reductionistic syllogism portrayed by anti-relationalists and others: If relation is good, then close relation must be better, and therefore the state is

343. STANLEY FELDSTEIN, *ONCE A SLAVE: THE SLAVES' VIEW OF SLAVERY* 41 (1971). Feldstein observed:

The basic purpose of the slave system was surely *not* a grand design to perpetuate a horrendous crime on the black race. Notwithstanding the psychological motivations that are the source of racial prejudice and, later on, the fear of a black revolt against the masters, *the system was designed primarily for its economic advantages to the masters*. Nevertheless, in order to perpetuate the institution, and simply to make it work, it was essential that a strict code of rules, regulations, punishments, and controls be established and followed. The enforcement of these rules resulted in what I call the slave's dehumanization—his eventual inability to fulfill his natural human desires, needs, instincts and to maintain his integrity and dignity.

Id. at 41-42 (emphasis added).

344. For decades the received wisdom concerning American slavery included the beliefs that it was economically inefficient and in steep economic decline on the eve of the Civil War, and that slave agriculture was less efficient than freehold agriculture. One of the stereotypic assumptions, sometimes expressed and sometimes not, has been that agricultural slaves were typically averse to hard work and were unproductive. The work of cliometricians, however, has challenged these propositions concerning the efficiency of slavery. *E.g.*, ROBERT W. FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 191-201 (1974). Fogel and Engerman concluded:

Slavery was not a system irrationally kept in existence by plantation owners who failed to perceive or were indifferent to their best economic interests. The purchase of a slave was generally a highly profitable investment. . . . The slave system was not economically moribund on the eve of the Civil War. . . . Slave agriculture was not inefficient compared with free agriculture. . . . The typical slave field hand was not lazy, inept, and unproductive. On the average he was harder-working and more efficient than his white counterpart.

Id. at 4-5.

To account for some white supremacist attitudes, Nicholas Lemann has suggested that "people can create social systems first and then invent ideas that will fulfill their need to feel that the world as it exists makes sense." NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 24 (1991).

morally justified (and perhaps obligated) to use the law's force to coerce the closest of all relations. Real care is not some mindless connection-maximizing machine that is blind to the consequences of a particular relation. Some relationships are quite destructive.³⁴⁵ Care requires concern for the content, quality, and effect of the relation.

Goldstein's analysis points toward one way that this real caring concern translates into a constitutional objection based on the caste-abolition principle, especially if the abortion restriction results in the woman carrying the pregnancy to term.³⁴⁶ He explains that when the state prohibits abortion, it effectively exploits the likelihood that the woman will form a relationship of mother-love with her offspring.³⁴⁷ In effect, anti-abortion laws appropriate a woman's quintessentially feminine characteristic—her capacity for mother-love—into the means of her own exploitation. As Goldstein explains, pregnancy involves nothing less than the transformation of the woman into a somatically and psychically different entity—the pregnant woman-conceptus dyad.³⁴⁸ When the state coerces a woman to enter that relationship, it effectively usurps her personal sovereignty by making her very being, not only her body, an instrument of the state's purposes.³⁴⁹ Society's willingness to coerce such a fundamental alteration in the woman's subjectivity, and concomitantly to frustrate her ability to flourish on her own terms, not only violates her autonomy but also effects a kind of existential domination that

345. After all, the master and slave in some respects shared a very close, albeit unequal relation (as do a loving parent and child, as do an egregiously abusive parent and child).

346. For an argument that abortion prohibitions violate the Thirteenth Amendment, see Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990). Koppelman focuses primarily on abortion prohibitions as forced labor and on their violation of the woman's physical sovereignty. *Id.* at 483-84. He relies on the Thirteenth Amendment to establish a stronger textual basis than privacy-based claims and to avoid the difference problem inherent in equality-based claims. *Id.* at 493-511. In some respects Koppelman's effort to avoid reliance on the Fourteenth Amendment resembles Akhil Amar's Thirteenth Amendment-based claim to minimal subsistence. See Akhil R. Amar, *Forty Acres and A Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 40 (1990). My emphasis here is on the relational and intrapsychic implications of abortion prohibitions. I explain in *Bayonets* why all three Civil War Amendments form the basis for the caste-abolition principle. For one thing, much more can be involved in the creation and perpetuation of a caste than involuntary labor—including "labor" in the sense of gestation and parturition. Judges, *supra* note 337, at 677-700.

347. GOLDSTEIN, *supra* note 136, at 59.; see also *supra* part V.C.

348. GOLDSTEIN, *supra* note 136, at 47; see *supra* text accompanying note 301.

349. See GOLDSTEIN, *supra* note 136, at 47-59; see *supra* notes 301-11 and accompanying text.

amounts to a serious diminishment of her status as a complete human being and an equal citizen.³⁵⁰ Coerced maternity is especially insidious because it changes the woman from the inside out into a different person, not of her own definition, who is more susceptible to being used by the state to serve its ends.³⁵¹

This process—dehumanization for the purposes of exploitation—implicates the caste-abolition principle regardless of the state's motives; the principle's focus on special kinds of effect illustrates the shortcoming of the Court's preoccupation with irrationality and animus. The caste system of slavery—and contemporary conditions and actions that tend to recreate or to perpetuate analogous conditions of severe disadvantage, powerlessness, discounted citizenship, and exclusion—violate the principle even if the dominant party has entirely rational motives and sincerely believes that such a system is in the oppressed party's best interests, and even

350. Slave narratives describe an analogous process. See Judges, *supra* note 337, at 677-82.

351. Radical feminism's perspective on pregnancy and intercourse, although cast in autonomy terms, supports and elaborates this theme. One need not believe that Andrea Dworkin, for example, speaks for all women, or that she accurately captures all women's experience of intercourse and pregnancy, to accept the value of her perspective with respect to *unwanted* pregnancy. According to Robin West, the

danger an unwanted fetus poses is not to the body's security at all [as masculine jurisprudence would construct the problem], but rather to the body's integrity.

Similarly, the woman's fear is not that . . . she will die, but that she will cease to be or never become a self. The danger of unwanted pregnancy is the danger of invasion by the other, not of annihilation by the other.

West, *Jurisprudence & Gender*, *supra* note 7, at 60. According to the radical feminist view, "[t]he material, sporadic violation of woman's body occasioned by pregnancy and intercourse implies an existential and pervasive violation of her privacy, integrity and life projects." *Id.* at 35. Wanted and unwanted pregnancy, and consensual as well as nonconsensual intercourse, irreparably invade and intrude, rendering impossible existential wholeness. *Id.* at 41. Men's autonomy claim is to be left alone to pursue one's own projects. Women's autonomy claim under radical feminism is to be left alone "*to be* the sort of creature who might have and then pursue one's 'own' ends." *Id.* at 42. It is really a claim to *individuation*, which is an existential precondition to assertion of a claim to autonomy.

West concludes that the feminist project is to explain the harms and dangers of invasive pregnancy. We need to explain that this harm has nothing to do with invading the privacy of the doctor-patient relationship, or the privacy of the family, or the privacy of the marriage; but that rather, it has to do with invading the physical boundaries of the body and the psychic boundaries of a life.

Id. at 66. Masculine jurisprudence's misunderstanding of this perspective, and corresponding effort to pose the problem as the kind of threat men understand, has as its practical consequence "that women are *objectified*—regarded as creatures who can't be harmed." *Id.* at 59-60.

if both parties develop a close personal relationship.³⁵² It is objectionable regardless of whether it fits into the Court's difference-based notions of equality. Similarly, abortion restrictions violate the principle even if they are motivated not by the kind of misogynist malice required by the Court in *Bray*, but simply by discomfort (albeit sometimes acutely and deeply felt) with abortion.³⁵³

The caste-abolition principle suggests another objection to abortion restrictions. I have elsewhere argued that members of the economically, politically, and socially marginalized group sometimes referred to as the "underclass" are subjected to a distinct pattern of such entrenched and severe disadvantage and exclusion that conditions and actions tending to aggravate or to perpetuate their

352. Indeed, at one time slaves who ran away from their master were diagnosed as having the mental disorder "drapetomania." Jerome C. Wakefield, *The Concept of Mental Disorder: On the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOLOGIST 373, 373 (1992). See generally Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624 (discussing science, social science, and the use of scientific theories in race relations cases).

353. Care forms a necessary element of this equality analysis. The elements of discreteness and immutability in the Court's equality formula might preclude recognition of unwanted pregnant women as a "suspect class." John Hart Ely has endorsed noninterpretive review in cases implicating "participational values" that reinforce representative democracy, typically in the First Amendment and equal protection areas. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75 (1980). While expressing sensitivity to the burdens of unwanted pregnancy and women's politically disadvantaged status, Ely nevertheless believes that the heightened judicial scrutiny of state abortion laws mandated by *Roe v. Wade* is not warranted by the representation-reinforcement principle's limits on noninterpretive review. Ely, *supra* note 330, at 923.

Ely's analysis is incomplete. For one thing, he fails to consider the possibility of surrogate representation. Certainly post-natal people who are distressed by the practice of abortion have an incentive to make fetal survival a political issue. Their representatives sit in the legislatures and have little difficulty making themselves heard. If anything, the amplitude of their voice has tended to exceed the proportion of their constituency. For discussion of the principle of surrogate representation generally, see TRIBE, *supra* note 128, at 410-13. For judicial acknowledgement of the principle, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05, 427-29 (1819). For criticism of Ely's limitations on noninterpretive review as artificial, see PERRY, *supra* note 145, at 119-22.

Care-based considerations would recognize that unwanted pregnant women are uniquely vulnerable to the kind of hurt inflicted by abortion regulations. To be sure, they have some access to the political process; but one might argue, with some force, that prohibiting abortion might well compromise the ability of at least some of those women to participate meaningfully in that process. Stopping there, though, would miss the deeper point that there might be some values beyond representation reinforcement that are constitutionally protected and some harms that are constitutionally forbidden. The discussion in the text suggests that such values and harms might be defined by interpreting the caste-abolition principle through an ethic of care.

subordination implicate the caste-abolition principle.³⁵⁴ Abortion restrictions have always hit this group especially hard, and have simultaneously exploited and contributed to their disadvantage and powerlessness. The highest abortion rates are among young, nonwhite, unmarried, and poor women.³⁵⁵ Contraceptive failure and teen pregnancy rates are much higher in this group.³⁵⁶ Unwanted parenthood is an important ingredient in the underclass process, in which single mothers are especially vulnerable to social and economic disadvantage.³⁵⁷ It adds more links to the forces that chain the mother to her underclass status and compounds the disadvantages confronting her offspring.³⁵⁸ Moreover, as explained below, factors that hinder and delay access to abortion disproportionately impact minorities and economically disadvantaged classes—further aggravating their already distressed health care circumstances.³⁵⁹ Anti-abortion funding restrictions may effectively make abortion unavailable to such groups. Finally, economically and socially

354. One example is gross inequality in the distribution of public educational opportunity, which tends to perpetuate the plight of America's socioeconomic underclass. See Judges, *supra* note 337, at 682-702.

355. See JUDGES, *supra* note 90, at 34-37.

356. See, e.g., Jonathan Crane, *Effects of Neighborhoods on Dropping Out of School and Teenage Childbearing*, in THE URBAN UNDERCLASS 299, 311 (Christopher Jencks & Paul E. Peterson eds., 1991) ("Childbearing probability is highest by far in the very worst neighborhoods."); Dennis P. Hogan & Evelyn M. Kitagawa, *The Impact of Social Status, Family Structure, and Neighborhood on the Fertility of Black Adolescents*, 90 AM. J. SOC. 825, 846 (1985) (noting that teen pregnancy rates are much higher in most disadvantaged neighborhoods); Dennis P. Hogan et al., *Social and Environmental Factors Influencing Contraceptive Use Among Black Adolescents*, 17 FAM. PLAN. PERSP. 165, 167-68 (1985) (finding contraceptive use much lower in worst neighborhoods).

357. Some indication of the chronic disadvantages facing single mothers can be found in data on their staggeringly high and persistent over-representation among families below the poverty line. For the twenty-year period between 1970 and 1990, the percentage of single-mother families below the poverty line held steady at between 42 to 46%, compared to a rate of 12 to 15% for all families, 11 to 16% for families with children, and 6 to 8% for married couples. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1992 460, tbl. 727 (112th ed. 1992).

The picture is even more bleak from the children's perspective. For example, the poverty rate for children under 18 years of age in a single-mother family was 54.6% (compared to 10.2% for married couples). *Id.* at 457 tbl. 719. For children under six years old the rate was 61% (compared to 12.1% for married couples). *Id.* The disparity is even more drastic when race and ethnicity are considered. The poverty rate for children under six years old in white, single-mother families was 49.9%; for blacks the rate jumped to 69.1%; for Hispanic persons the rate topped 72%. *Id.*

358. See, e.g., Elijah Anderson, *Neighborhood Effects on Teenage Pregnancy*, in THE URBAN UNDERCLASS 375, 382-90 (Christopher Jencks & Paul E. Peterson eds., 1991).

359. See *infra* part VI.D.

disadvantaged women may be especially vulnerable to access-inhibiting factors that prey on the unsophisticated and distressed.³⁶⁰

Cumulatively, these problems create a category of second-class rights. Economically and socially disadvantaged women are at much greater risk to choice-defeating governmental policies that the Court is willing to tolerate. Because their circumstances make them more dependent on constitutional rights to protect their choice from interference by the state than are women of independent means (who often can purchase ways to circumvent state-created obstacles to abortion), the Court's demotion of the status of abortion rights means that indigent women are at greater risk of becoming second-class citizens in the exercise of those rights.

An additional equality-based objection to abortion prohibitions from a relational perspective is their isolating effect on the pregnant woman who, in what might be considered an act of existential heroism, resists the state's efforts to appropriate her being and seeks an illegal abortion. Abortion prohibitions can make an unwanting pregnant woman an outsider in her own community by precluding her from receiving even a basic level of care—the safe, legitimate, normal medical treatment that she needs—and can force her into the dangerous and marginal world of criminality. Such laws can turn an experience that in the best of circumstances involves difficult conflicts concerning attachment into a nightmare of exclusion and isolation that can leave enduring scars. The harm may extend beyond the woman's relationship with the community to her personal relations. If her family and friends are not supportive, the fact that she must seek her care covertly and illegally may further strain relations. If they are supportive, she is forced to the added ethical dilemma of choosing between involving them in the perilous experience of illegal abortion and depriving herself of badly needed comfort.³⁶¹

VI. CARE AND DEFINING THE SCOPE OF ABORTION RIGHTS

So far I have examined some problems in constructing the question of whether to recognize a constitutional right to abortion as a gendered conflict between care and justice. In particular I have endeavored to respond to the anti-relationalist critique that relational

360. See *infra* notes 435-39 and accompanying text (noting the trial court findings in *Casey*).

361. Furthermore, all of these problems are aggravated for disadvantaged women, who must overcome even more formidable odds and take greater risks to protect their subjective integrity.

feminism proves to be its own worst enemy in the crucible of the abortion conflict by suggesting that a richer account of relation and care can supplement our conception of the constitutional values of autonomy and equality in support of abortion rights.

The anti-relationalists have missed another important point. While safe abortion obviously is more readily available now than during the pre-*Roe* era, American abortion policy remains seriously flawed. Those difficulties cannot defensibly be blamed on social scientists' and legal theorists' study of an ethic of care. To the contrary, they have arisen at least despite, and in some instances directly because of, the dominance of a "masculinist," rights-based approach to abortion. This Part will consider how the Court's interpretation of abortion rights might be enhanced by inclusion of a care perspective.

The most salient deficiencies involve inequalities in access to abortion. Not surprisingly, the burden tends to fall disproportionately on personally, socially, and economically disadvantaged women. A woman is more likely to succeed in exercising her "right" to choose abortion: if she lives in a metropolitan area; has money; has the support of friends or family; can distinguish a real abortion clinic from one that is a sham; can withstand personal abuse from the usual demonstrators at the clinic; happens to have access to a clinic not targeted for more extreme forms of violence; can afford to miss several days from school, home, or work; and is self-reliant enough to resist the state's efforts to enlist her doctor's assistance in dissuading her. On the other hand, women who happen to: depend on government-subsidized health care; live in remote or rural areas; are unsophisticated, young, frightened, alone, or abused; tend to defer to express and implied medical opinion; and have difficulty being away from work or home may well wind up unwillingly carrying their pregnancy to term, or at least suffering needless additional trauma not endured by their more fortunate sisters.³⁶²

If abortion rights are mainly about protecting women's *autonomy* to determine for themselves what is in their best interests in such an intimate and momentous matter, then the Court's approach to abortion rights is headed in the wrong direction. The foregoing factors simply distinguish privileged women from disadvantaged ones—not the right from the wrong but the financially, socially, and personally weak from the strong. Indeed, considered in terms of their

362. See JUDGES, *supra* note 90, at 254-57.

cumulative effect, government actions contributing to this state of affairs arguably are not even rational in any but the most trivial sense, and thus frustrate a basic requirement of just law-making. Nor are these conditions acceptable from a perspective of care. The losers in this lottery are not being cared for.

Much of this harm has been sanctioned under the “masculinist” logic of justice that has dominated the Court’s abortion-rights cases for two decades, not a real ethic of care. Yet the Court’s efforts to maintain a facade of reasoned decision-making has become less and less convincing as a badly divided Court in *Casey* overruled precedent, announced and then inconsistently applied a hopelessly indeterminate new standard, and substantially cut back on abortion rights—all while extolling the virtues of consistency, certainty, and individual liberty. An unfortunate side-effect of *Casey*’s tortuous approach has been the creation of a new, down-sized model of constitutional right, which the state may deliberately seek to infringe provided it does not do so too vigorously. The anti-relationalists’ faith in rights-talk, considered in light of their concern for practical results, thus seems curiously misplaced.

The occasions for judicial involvement in determining the scope of abortion rights can be grouped into four categories: (1) public funding of abortion and abortion-related services; (2) measures that seek directly to influence the abortion decision, such as informed-consent procedures, waiting periods, and notice and consent requirements; (3) regulation of the medical procedure itself; and (4) the judicial response to private interference in access to abortion. Review of several examples from these categories exposes the fallacy in the suggestion that the problem with abortion policy in this country is too much concern with care and not enough with autonomy.

Autonomy-based arguments tend to frame the issue, as appellants argued in *Roe*, as an all-or-nothing contest between total noninterference in the woman’s decision and pursuit of the state’s interest in regulation.³⁶³ Once the Court determines, as it surely will, that on at least some occasions the state’s interest trumps the woman’s interest in being left alone, judicial review slides into a relatively abstract assessment of the means-ends rationality of a particular regulation. The constitutional force of the autonomy claim thus largely spends itself in putting the state to the burden of justification

363. In *Roe*, for example, the appellant argued “that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reasons she alone chooses.” *Roe v. Wade*, 410 U.S. 113, 153 (1973).

and in elevating the intensity of judicial scrutiny, but it does little to help inform the content or scope of that examination. Adding a care focus would remind the Court that real women are still very much present and vulnerable to the adverse effects of the state's action, and it would direct the Court's attention contextually to the real harm done.

A. *Abortion funding cases*

Two prime examples of cases that are consistent with the kind of "masculinist" logic endorsed by anti-relationalists, yet subject to criticism under a robust ethic of care, are *Harris v. McRae*³⁶⁴ and *Rust v. Sullivan*.³⁶⁵ In upholding the Hyde Amendment's denial of Medicaid funding for most abortions, the Court in *Harris* reasoned that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."³⁶⁶

In *Rust*, the Court upheld federal regulations prohibiting federally funded family planning clinics from discussing abortion as an option with their clients—even if the health-care provider believed that such information would be in the woman's best medical interests.³⁶⁷ In rejecting a free speech challenge to this "gag rule," the Court reasoned that the regulations merely defined the scope of the Title X program as limited to reproductive health and family planning issues apart from abortion and did not censor disfavored ideas or mislead women "into thinking that the doctor does not consider abortion an appropriate option for her."³⁶⁸ The Court pointed out that government is free to spend its money promoting its chosen policies without being obligated to pay for alternative viewpoints.³⁶⁹ In also rejecting an abortion rights challenge to the gag rule, the Court concluded that government is not constitutionally required to fund

364. 448 U.S. 297 (1980).

365. 500 U.S. 173 (1991).

366. *Harris*, 448 U.S. at 316.

367. *Rust*, 500 U.S. at 179-80, 203 (citing 42 C.F.R. §§ 59.8(a)(1), 59.8(b)(5) (1989)). The regulation in question was subsequently suspended. See 58 Fed. Reg. 7462-63 (1993) (suspending 42 C.F.R. § 59.8 (1993)).

368. *Rust*, 500 U.S. at 193-94, 200.

369. As Chief Justice Rehnquist observed, "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism." *Id.* at 194.

abortion counseling any more than abortion itself. The Court reasoned that the regulations do not infringe a woman's reproductive freedom because the gag rule "leaves her in no different position than she would have been if the government had not enacted Title X."³⁷⁰

As even some anti-relationalists have conceded, relationalism plainly supports abortion rights by exposing the artificiality of the Court's analysis in these cases.³⁷¹ For example, the Court's assertion in *Harris* that the state has done nothing to interfere with a woman's choice is abstract logic, not real life. Surely poor women who are in effect bribed to choose childbirth over abortion reasonably feel that the state has done something tangible and substantial to them.³⁷² *Rust's* conclusion that the gag rule does not affect women's choices about abortion in a constitutionally meaningful way is even more doubtful. As a practical matter, women are *not* in the same position they would have occupied had there been no Title X. The gag rule would have distorted communication between women and their doctors by providing ideologically slanted medical information for Title X clients to rely upon.³⁷³ When a woman's state-subsidized

370. *Id.* at 202. The Court reasoned further that "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." *Id.*

371. Citing *Harris*, for example, Karlan and Ortiz recognize that "[i]f anything, some of its conclusions reflect precisely the kind of abstract, out-of-this world, principled rigidity that relational theorists squarely condemn." Karlan & Ortiz, *supra* note 13, at 882. They go on to observe that "[o]nly a Court completely out of touch with the realities of poor women's lives, for example, could conclude with a set of straight faces that paying for maternity services but not for abortions would have no coercive effect on women's decisionmaking about whether to have an abortion." *Id.*

372. See generally TRIBE, *supra* note 128, at 1346-47 (arguing that the Court's position is "neither as neutral nor as passive" as a majority of the Court supposes).

373. For many of these indigent women, their first visit to the Title X grantee is for pregnancy testing rather than contraception. Title X clients, like anyone, necessarily depend upon their health care providers to give them candid and complete advice in the providers' best judgment—including referral for appropriate treatment. That expectation is reinforced by physicians' ethical and legal obligations to do so, and the dependency that everyone has on his or her health care provider is magnified for those women because of their poverty. See Judges, *supra* note 337, at 610-11.

The Court's implicit distinction between acts and omissions, in the context of medical treatment, is especially unconvincing. For example, some jurisdictions have extended a physician's duty to provide informed consent to include warning of the risks of *forgoing* procedures as well as undergoing them. In *Truman v. Thomas*, 611 P.2d 902, 906-07 (Cal. 1980), the California Supreme Court ruled that malpractice liability (under an informed consent theory) could be based on a physician's failure to inform the patient of a pap smear's purpose and the risks of forgoing it. At a minimum, a physician's duty to recommend and to disclose procedures is controlled by the physician's duty of professional care; and the doctor will have to answer in malpractice for breach of that duty. *Id.*; see generally John H. Derrick, Annotation, *Medical Malpractice: Liability for Failure of*

physician remains silent concerning abortion or recites the administration's prescribed message, she very well may be misled into thinking that the doctor does not consider abortion an appropriate option for her.³⁷⁴

There is another problem in *Harris* and *Rust* beyond simply that they were decided by Justices who are out of touch with the realities of life below the poverty line, a problem that derives from the very same constitutional vision that the anti-relationalists would privilege. The underlying issue is the Court's individualistic negative rights paradigm, which regards individuals as existing in their own atomistic spheres distinct from the state and which conceives of the Constitution as protecting a discrete set of rights from a limited range of active, tangible intrusions by government. The Constitution thus specifies (either implicitly or explicitly) a finite set of negative rights—*prohibitions* against a defined range of government *action*. This paradigm does not conceive of a positive constitutional *obligation* to address social conditions; it operates on the level of rights rather than responsibility and separation rather than connection.³⁷⁵ The Court was speaking from this perspective when it concluded in *Harris* that *Roe* "did not translate into a constitutional obligation . . . to subsidize abortions,"³⁷⁶ and when it took that analysis to its logical conclusion in *Rust* by reasoning that if government is not constitutionally required to fund abortion itself, it can scarcely be obligated to fund speech about abortion.³⁷⁷

Physician to Inform Patient of Alternative Modes of Diagnosis or Treatment, 38 A.L.R.4TH 900 (1985) (discussing cases that consider physician liability for failure to obtain informed consent of patient for procedures performed and others not offered).

374. See *Rust*, 500 U.S. at 217 (Blackmun, J., dissenting). Justice Blackmun observed:

The undeniable message conveyed by this forced speech . . . is that abortion is nearly always an improper medical option. Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the Regulations' mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

Id. (Blackmun, J., dissenting).

375. Judges, *supra* note 337, at 606-13.

376. *Harris v. McRae*, 448 U.S. 297, 314-15 (1980) (citing *Maher v. Roe*, 432 U.S. 464, 475-76 (1977)).

377. *Rust*, 500 U.S. at 192-200.

This paradigm effectively denies the constitutional significance of poverty and powerlessness as a social condition in many circumstances; and its concomitant formalistic view of the relationship between the individual and the state ignores the pervasive and powerful ways in which government does affect people's lives, especially those of the poor and vulnerable.³⁷⁸ As Chief Justice Rehnquist put it, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Instead, the Due Process Clause is "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."³⁷⁹

The privacy model of abortion rights advocated by the anti-relationalists is quite at home with the negative rights paradigm. That model's primary concern is to keep abortion on the menu of individual rights insulated from affirmative state action. It contributes little to understanding the constitutional implications of the modern activist welfare state.³⁸⁰ Its perspective resembles that of Jake in Gilligan's study—constitutional responsibility consists of constraining state aggression. By demanding nothing more than the right to be left alone, the privacy model invites the *Harris* and *Rust* distinction between direct encouragement of one choice and outright prohibition of the other and the *DeShaney* distinction between Robert

378. Judges, *supra* note 337, at 606-13. For example, it underlies the Court's refusal to recognize a constitutional claim to minimal subsistence, *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970), or to equal educational opportunity, *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973), despite the close nexus between such benefits and even minimal participation in citizenship and regardless of the claimants' desperation. It led to the Court's conclusion that the Winnebago County Department of Social Services could not be held constitutionally responsible for standing ineffectually by while Robert DeShaney savagely beat his four-year-old son Joshua into a state of severe and permanent brain damage—even though the county had positioned itself to be Joshua's only real hope of protection. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201-02 (1989). The Court reached that conclusion notwithstanding the fact that the county maintained an administrative network that funnelled all child-abuse information into itself, purported to exercise exclusive jurisdiction over such matters, and actively monitored and dutifully recorded numerous indications that Joshua DeShaney was being badly abused. *Id.* at 208-09 (Brennan, J., dissenting). In fact, on one occasion, the county actually obtained temporary custody when Joshua was admitted to the hospital with multiple bruises and abrasions, but the county shortly thereafter persuaded the juvenile court system to dismiss the child protection case and return Joshua to his tormentor. *Id.* at 192.

379. *DeShaney*, 489 U.S. at 195.

380. On the implications of the modern welfare state, see Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, 43 HASTINGS L.J. 1321, 1329-34 (1992).

DeShaney's beating his son and the county's deplorable failure to stop him.³⁸¹ The dark side of this paradigm is that, while it may help Norma McCorvey (a.k.a. Jane Roe) tell Texas to mind its own business, it also lets Winnebago County tell poor, helpless Joshua DeShaney to mind his. This is a description of a Constitution that does not care.

The negative rights paradigm and the related privacy model of abortion rights expressed in *Harris* and *Rust* play a significant role in the unequal and arbitrary allocation of abortion services. Although the possession of money has nothing whatsoever to do with the moral issues at stake in abortion, the Hyde Amendment in effect makes it a criterion for obtaining safe abortion for a significant number of women. The cost of abortion both limits its availability among the poor and makes it more dangerous: Some women forgo abortion as the result of the Hyde Amendment, while others delay.³⁸² One reason for delay in having an abortion is raising enough money: "Women who obtain abortions usually must pay for them with cash in advance."³⁸³ Yet delay substantially increases both the cost of abortion and the risk of complication.³⁸⁴

Relationalism challenges the negative rights paradigm by showing that *Harris* begs the key question. The assertion that poverty, and not the Hyde Amendment, actually restricts a woman's choice simply dresses in causation terms the normative judgment that government bears no constitutional responsibility for her circumstances. Relationalism, like Amy in Gilligan's study,³⁸⁵ would see

381. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), discussed *supra* note 378.

382. One reason women delay is difficulty making arrangements, including raising the money and locating a provider. See JUDGES, *supra* note 90, at 38.

383. Stanley K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63, 69 (1987).

384. See *infra* note 438 and accompanying text. The average cost of first-trimester abortion with local anesthetic is \$250 (much higher in some locales); in the second trimester the cost can increase from \$400 to more than \$1000 (not including ancillary costs such as repeat visits, medication, transportation, etc.). See JUDGES, *supra* note 90, at 42-43. *Rust* also could have had a sweeping impact, given the scope and demographic profile of the Title X program, had the Clinton administration not intervened to rescind the gag rule. The constitutional principle with all its implications, of course, remains on the books. Although under 42 C.F.R. § 440.230(b) (1993), participating states may not deny Medicaid funds to a patient solely because of her pregnant condition, the Hyde Amendment restricts Medicaid funding for abortion to the relatively few cases that involve either a threat to the pregnant woman's life or promptly reported incest or rape. *Harris v. McRae*, 448 U.S. 297, 316 (1980) (citing Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)).

385. See *supra* notes 30-43 and accompanying text.

constitutional responsibility in more *positive* terms. An ethic of care would examine the *relationship* created by Medicaid or Title X between the woman and her government in the matter of her health-care financing, the real-life *impact* of government's decisions, and the *obligations* that might follow from that relationship.

Considering the vast inequality of that relationship and the state's affirmative decision to provide generally for the indigent woman's medical care, the Court's view of state responsibility seems cramped and artificial. In other contexts, the law routinely intervenes (and departs from an atomistic paradigm) to preclude *private* parties from exploiting similar kinds of vulnerabilities, and to protect important public policies in ways that are consistent with an ethic of care.³⁸⁶ If anything, the argument seems even stronger for constitutional consideration of the unequal power relationship between Medicaid recipients and the state. They are, after all, hardly strangers to one another. The Court ought to be especially sensitive to the threat of overreaching when one of the parties is the state and the interest at stake is a constitutional right, and when judicial intervention would enhance both autonomy *and* relational values.³⁸⁷

To be sure, the Court's negative rights paradigm rests largely on legitimate deference to legislative judgments about how to spend society's money and the potential voraciousness of positive constitutional claims to welfare benefits.³⁸⁸ Yet Cora McRae did not assert a right to state-subsidized health care in general or even

386. For example, recognizing that a deal between parties of extremely unequal bargaining power may not reflect a real choice, courts will decline to enforce unconscionable contracts. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“[W]here the element of unconscionability is present at the time a contract is made, the contract should not be enforced.”). Furthermore, to shift the costs of accidents to persons who can better bear and spread them, and to deter wrongful and harmful conduct, courts sometimes will not enforce disclaimers of implied warranties or liability waivers. *E.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 95 (N.J. 1960) (“[A]ttempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.”) In such cases courts properly reject the argument that the more powerful party is not responsible for the weaker party's vulnerability or for hurt that may result from exploitation of that vulnerability. Instead, the relation between the parties gives rise to minimal obligations of good faith, fair dealing, and due care. *See, e.g.*, *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 447 (Cal. 1963) (en banc) (holding that although hospital may be selective in admitting patients, it cannot contract to release itself from negligence liability).

387. By contrast, the cases described *supra* note 385 can, depending on the context, be seen as promoting or compromising personal autonomy. *See* Judges, *supra* note 327, at 111-13.

388. For a brief overview of these concerns, see Judges, *supra* note 337, at 660-64.

reproductive health care in particular.³⁸⁹ The state had already undertaken to enter a relationship of care with her that included such benefits. Nor did Dr. Irving Rust and his patients really demand that government set up an abortion information agency.³⁹⁰ The federal government already had undertaken to involve itself quite intimately in their reproductive health-care decision making.³⁹¹ Neither the Hyde Amendment nor the gag rule was really about saving money.³⁹²

By directing attention to the obligations that might flow from relationships that government *has already established*, an ethic of care shows what is fundamentally wrong in *Harris* and *Rust* beyond the flimsiness of the Court's syllogism about state action. As discussed above,³⁹³ relationalism would constrain the state's ability to exclude an unwanted pregnant woman from its circle of care. Yet such exclusion is precisely the effect (and purpose) of both the Hyde Amendment, which excludes the woman in her need for abortion services from a circle of care that the community had already defined to consist of governmentally subsidized comprehensive health care, and the gag rule, which excludes her in her need for abortion information from a circle of care that consists of governmentally assisted family planning and reproductive health clinics. This refusal of needed care, in a relationship in which government has otherwise taken responsibility to provide health care, is unethical.

Harris and *Rust* thus violate the relational account of abortion rights described above in two ways. First, both cases are probably better understood as resting more on judicial deference to a legislative judgment not to fund a practice that some influential constituents find abhorrent than on the Court's doubtful conclusions about the statute's

389. See *Harris v. McRae*, 448 U.S. 297 (1980); see also *supra* notes 364, 366 and accompanying text.

390. See *Rust v. Sullivan*, 500 U.S. 173 (1991); see also *supra* notes 365, 367-74 and accompanying text.

391. This observation reveals the flaw in the Chief Justice's analogy in *Rust* to the National Endowment for Democracy. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). The problem is not that the government's *advocacy* of childbirth and adoption creates an obligation to fund speech about abortion. Rather, the government's *provision* of medical services creates a *relation* which gives rise to an obligation to provide services in a way that does not mislead women into forgoing constitutional rights and their own medical needs.

392. Indeed, the voraciousness concern is misplaced in this context. Given the social costs of unwanted pregnancy and the insignificant marginal cost to either program of the services prohibited by either the Hyde Amendment or the gag rule, neither measure can be rationally justified as necessary to conserve finite fiscal resources.

393. See *supra* notes 280-99 and accompanying text.

or the regulations' impact on choice. Those provisions thus attempt to shift the burden of that discomfort with abortion to the pregnant woman by excluding her from the medical care that she requires and otherwise would be entitled to receive. As discussed above, such a rejection of motivational displacement with respect to the pregnant woman and a refusal to receive her plight in the special circumstances of abortion amounts to a failure of care's impersonal counterpart.

Second, those measures—like the others discussed below—can realistically be seen as part of a broader anti-abortion campaign to interfere with the availability of abortion on as many fronts as possible. This “incrementalist” approach counts as a victory each abortion prevented by whatever legal impediment, however unprincipled, and is driven by the hope that eventually a sufficient number of barriers can be erected to make abortion effectively unavailable in all but the most extreme cases.³⁹⁴ Official attempts to exploit a woman's capacity for mother-love by interfering with abortion violate a relational interpretation of the caste-abolition principle, and for indigent women that principle is especially implicated by the particular role that unwanted pregnancy plays in the underclass process. The Hyde Amendment and the gag rule compound these objections by preying on poor women's reliance on government, which reliance is encouraged by government, for health care. Not only do those provisions in practical effect make abortion more difficult to obtain (and for a problematic reason), which would be bad enough for women in general and poor women in particular, but they do so by taking advantage of the women's dependent and vulnerable position in what government affirmatively misled them to believe was a care-like relationship.

394. See JUDGES, *supra* note 90, at 27-28. During the Reagan and Bush administrations, this strategy produced a complex patchwork of obstacles to abortion in a variety of realms touched by federal law. Additionally, as explained *infra* notes 409-54 and accompanying text, the Supreme Court's *Casey* decision openly invites state legislatures to continue their incrementalist efforts.

Among President Clinton's first orders, however, were directives “to separate our national health and medical policy from the divisive conflict over abortion.” 29 WEEKLY COMP. PRES. DOC. 57, 85 (Jan. 22, 1993). President Clinton's initial orders included: lifting the moratorium on federal funding for fetal tissue research; suspending the Title X “gag rule”; repealing the so-called “Mexico City” policy, which applied the gag rule to organizations that received funds from the Agency for International Development; lifting the ban on privately funded abortion at military facilities; and activating FDA review of the health and safety risks of Mifepristine (“RU-486”). *Id.* at 85-86.

B. *Direct interference in choice*

Anti-relationalists Karlan and Ortiz sift through various Justices' opinions from recent cases in this category—including *Hodgson v. Minnesota*³⁹⁵ and *Casey*³⁹⁶—to unearth evidence of judicial deployment of relation-talk in opposition to abortion rights. They do indeed find some rhetorical artifacts in dissenting, plurality, and a few majority opinions.³⁹⁷ Yet the keystone anti-relationalist conclusion that they draw from this archeology—that the deployment of relation-talk against abortion rights reveals fundamental flaws in relationalism³⁹⁸—does not follow and fails to distinguish care-talk from real care.

For one thing, the logic of this anti-relationalist syllogism is defective. If the anti-relationalists really mean to adhere consistently (in “masculinist” fashion) to the principle of their reasoning, then they must be prepared to reject arguments based on liberty and autonomy as well. After all, relationalism is hardly the first ideology to be stood on its head: The Supreme Court has similarly invoked autonomy- and liberty-talk much to the detriment of real autonomy and liberty. One familiar example is *Lochner v. New York*, which is replete with rhetoric about protecting the bakery workers' autonomy to decide whether to overwork themselves for substandard wages.³⁹⁹ Under the anti-relationalists' own reasoning, *Lochner* demonstrates that liberty-as-autonomy is an inherently untrustworthy concept with little

395. 497 U.S. 417 (1990).

396. 112 S. Ct. 2791 (1992). They also include *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990), discussed *infra* note 407.

397. See Karlan & Ortiz, *supra* note 13, at 883-85. Karlan and Ortiz note many examples, including: the concern of Justices Stevens and O'Connor with “the family's decisional power” rather than the minor's autonomy in *Hodgson*, see *infra* note 401; Justice Kennedy's *Hodgson* dissent, see *infra* notes 402-08 and accompanying text; Justice Kennedy's plurality opinion in *Ohio v. Akron Ctr. for Reproductive Health*, see *infra* note 407; and the joint opinion's observation in *Casey* that “[a]bortion is a unique act. It is fraught with consequences for others,” *Casey*, 112 S. Ct. at 2807.

398. Karlan and Ortiz argue:

[T]he fact that an emphasis on communication and connection can so easily be employed to limit a woman's freedom to choose for herself whether to have an abortion, as well as how and to what extent to engage in communication with others about that decision, should give us pause before we inject provisions based on relationships and responsibilities into our legal policy.

Karlan & Ortiz, *supra* note 13, at 885.

399. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down New York labor law that mandated maximum limit on working hours for bakers as unduly interfering with freedom of contract).

to offer constitutional discourse—a conclusion that bears a striking resemblance to the objection that pure interpretivists frequently raise against *Roe* and the other privacy cases.⁴⁰⁰

If they were to confront this dilemma, surely the anti-relationalists would explain that *Lochner's* problem lay not in the coherence of autonomy itself as a constitutional value, but in the Court's assumptions about its content, application, and the conditions predicate to its existence. But this explanation involves looking behind the rhetoric at substance. The enlistment of relation-talk in the service of anti-abortion goals in itself does not warrant the peremptory abandonment of caring values in the consideration of abortion rights, any more than the analogous inversion of liberty and autonomy concepts justifies rejection of those values. Applying the substance of care in the cases canvassed by Karlan and Ortiz shows that concern with real care and relation generally supports, rather than undermines, abortion rights.

1. *Hodgson*

In *Hodgson*, a badly fragmented Court held unconstitutional Minnesota's requirement that *both* parents be provided forty-eight hours notice before an abortion may be performed on a minor.⁴⁰¹ The Court ruled that the statute was saved by its judicial bypass provision, however, which became effective upon a court's striking the notification requirement.⁴⁰² Karlan and Ortiz focus on Justice Kennedy's opinion dissenting on the first point as "more explicit in [its] privileging of relational values."⁴⁰³ He invoked "our most revered institutions" in concluding that the two-parent notification requirement would be constitutional standing on its own because it

400. For a brief overview of this debate, see JUDGES, *supra* note 90, at 149-68.

401. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2937-41, 2945-47 (1990). The statute made no exception for a divorced parent, a noncustodial parent, or a biological father who never lived with the pregnant minor's mother. It did except cases in which only one parent was living or could be located, in which the minor's life was at risk, or in which the minor was the victim of abuse (provided the abuse was reported promptly to the authorities, whose ensuing investigation could involve the parents). *Id.* at 2931-32.

402. *Id.* at 2950-51, 2969-71. Karlan and Ortiz also complain that Justices Stevens and O'Connor, who concluded that the two-parent requirement did not reasonably further any legitimate state interest, in effect were more concerned with shielding the *family's* decision-making rather than the *minor's* autonomy. Karlan & Ortiz, *supra* note 13, at 883.

403. Karlan & Ortiz, *supra* note 13, at 883. Justice Kennedy was joined by Chief Justice Rehnquist and Justices White and Scalia. *Hodgson*, 110 S. Ct. at 2961.

merely attempted to enhance parents' ability to provide guidance and support to their daughter.⁴⁰⁴

Justice Kennedy's *Hodgson* opinion is to real care and connection what Justice Peckham's *Lochner* opinion is to real autonomy: all the right words in all the wrong places. Kennedy's opinion privileges an idealized, almost wistful, vision of the American family that bears little resemblance to the actual life experience of many persons. The problem inheres in his assumptions and commitments, not in the value of care. While Kennedy is *talking* about connection, communication, and responsibility, by applying a deferential standard of judicial review he is actually *avoiding* connecting with the problem, communicating with the facts, and taking responsibility for recognizing harm to pregnant minors and their families in the context of abortion rights. His willingness to sacrifice real people to preserve the state's (and apparently his own) almost mystical notion of family life—"our revered institutions" and our "constitutional tradition"—is exactly the sort of disconnected devotion to abstraction that relationalists decry.⁴⁰⁵ His conception of the judicial role—that the Court ought to distance itself from the realities of individual misconduct, parental failures, and social ills—is all Jake and no Amy.⁴⁰⁶

A caring perspective would connect with the situation, face the facts, and feel the hurt.⁴⁰⁷ It would look with clear eyes at the

404. *Hodgson*, 110 S. Ct. at 2963-64 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy wrote:

Minnesota has done no more than act upon the common-sense proposition that, in assisting their daughter in deciding whether to have an abortion, parents can best fulfill their roles if they have the same information about their own child's medical condition and medical choices as the child's doctor does; and that to deny parents this knowledge is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support. The Court does the State, and our constitutional tradition, sad disservice by impugning the legitimacy of these elemental objectives.

Id. at 2964.

405. See *supra* notes 41-43 and accompanying text.

406. On other occasions, however, Justice Kennedy has exhibited sensitivity to the real impact of government action on people. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2655-61 (1992) (considering how a non-believer might feel when coerced to attend and to participate in state-sponsored religious exercise).

407. In *Ohio v. Akron Ctr. for Reproductive Health*, another case discussed by Karlan and Ortiz, Justice Kennedy wrote an opinion for the Court upholding Ohio's single-parent notification statute which contained a complex judicial bypass provision. 110 S. Ct. 2972, 2977-78 (1990). Karlan and Ortiz find relation-talk in Part V of Kennedy's opinion, which was joined only by the Chief Justice and Justices White and Scalia, in which Kennedy commented on the need for society to require that "each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by

a woman who is considering whether to seek an abortion." Korlan & Ortiz, *supra* note 13, at 884 (citing *Akron Ctr.*, 110 S. Ct. at 2983). Justice Kennedy pointed out that the woman's decision will affect not only her life, but also "the origins of the other human life that lie within the embryo." *Akron Ctr.*, 110 S. Ct. at 2983. And he concluded that the state may assume that, "for most of its people, the beginnings of that understanding will be within the family, society's most intimate association," and that "in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Id.* at 2983-84.

Once again, a real care focus reveals a story quite different from Kennedy's abstract and idealized portrait of family life and teen pregnancy. Such a focus would take a hard look at the state procedures' practical impact on minors' welfare and would be skeptical of state efforts to justify the harm. The Ohio statute required, subject to certain exceptions, 24-hour notice to one parent (or guardian) before a physician could perform an abortion on a minor. *Id.* at 2977 (citation omitted). The most important exception concerned judicial bypass, which contained the standard provisions concerning the minor's maturity or best interests but also included several provisions that are especially troublesome from a caring perspective. *See id.*

First, the bypass procedures' technical and complex pleading requirements, which forced the minor to choose from among three pleading forms, were a trap for unwary and uncounseled minors—especially when facing the stress of an unwanted pregnancy. Second, the law required the minor to prove her allegations of maturity, pattern of abuse, or best interest by the stringent standard of clear and convincing evidence. The practical effect of elevating the standard of proof is to tilt the court's decision in favor of denying the minor's request to bypass notification of her parents; in other words, the law simply made it harder for young women to obtain abortions. In other contexts the Court has held that the Constitution *requires* clear and convincing evidence before *government* may deprive an individual of certain very important interests. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 752-57 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 425-33 (1979) (civil commitment proceedings). *Akron Center* is unusual in that the standard is being applied by the state *against* the assertion of an individual's rights; a similar criticism might be made against *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990). The Court reasoned that it was proper to raise the minor's standard of proof because in most cases she would be the only party, with no one else present to challenge her testimony—as though, *mirabile dictu*, it was the *state* that needed protection from a single frightened adolescent girl. *Akron Ctr.*, 110 S. Ct. at 2981-82.

Third, the bypass requirement could involve significant delay and consequently could increase the cost and risks of abortion. It appeared that the statutory five-day time period for judicial decision could stretch out to 22 days in certain circumstances if business instead of calendar days were used. Although the Court was able to dodge the question in this facial challenge, it seemed to suggest that such a delay might pass constitutional muster. *Id.* at 2980-81.

Justice Kennedy's relational rhetoric notwithstanding, it was the dissenters who seemed genuinely concerned with the harm the law might actually inflict. Justices Blackmun, Brennan, and Marshall dissented largely on the basis that the Ohio statute deliberately and unjustifiably placed a pattern of obstacles in the path of a minor seeking an abortion. *Id.* at 2985 (Blackmun, J., dissenting). Unlike the majority, the dissenters considered the aggregate practical impact on the minor of the entire process in addition to considering each provision of the Ohio law individually. *Id.* (Blackmun, J., dissenting). The dissenters criticized the majority for failing to require the state to justify setting a "procedural trap" for the minor, who is bound to be confused and upset at such a difficult moment in her life. *Id.* at 2985-86 (Blackmun, J., dissenting). Justice Blackmun also was particularly concerned about the adverse effects of the clear and convincing evidence

district court's findings, largely undisputed on appeal, concerning the statute's real purpose and effect. First, it is apparent that the state was trying not only to encourage minors to consult with their parents but also to deter them from choosing abortion.⁴⁰⁸ I have discussed above the general relationalist objections to the latter purpose. The state's attempt to exploit both the vulnerability of the pregnant minor's youth and any conflict in her relationship with her parents is especially callous and unethical. Second, someone who really cared would be appalled at the overwhelming evidence that the law not only failed to promote the minor's welfare or to enhance her relationship with her family but actively inflicted considerable harm on both.⁴⁰⁹

requirement on sexually or otherwise physically abused minors. *Id.* at 2990-91 (Blackmun, J., dissenting). He reasoned that a judicial bypass proceeding is traumatic enough without the added stress of a heightened standard of proof, the chief effects of which would be to turn the judge into an adversarial inquisitor about a quite painful subject and possibly to force the minor to the cruel dilemma of carrying the pregnancy to term or confronting the abusive parent or parents. *Id.* at 2984-93 (Blackmun, J., dissenting).

408. See *Akron Ctr.*, 110 S. Ct. at 2984-93 (Blackmun, J., dissenting).

409. The trial court found that only half of the minors in Minnesota live with both parents, and a third live with one parent. *Hodgson*, 110 S. Ct. at 2938. The two-parent requirement had especially harmful effects on both the custodial parent and the pregnant minor when parents were divorced or separated. *Id.* The requirement also had detrimental effects in two-parent families, especially when domestic violence was a serious problem. *Id.* at 2839. The exception for cases of sexual or other physical abuse was not a practical alternative because of the authorities' involvement and the ensuing parental contact. *Id.* Almost all bypass petitions were granted. *Id.* at 2940. "The judges who adjudicated over 90% of these petitions testified; none of them identified any positive effect of the law." *Id.* at 2938-40.

Not only would a caring perspective reveal Justice Kennedy's opinion for what it is, but such an approach is needed to come to terms more generally with the special problem of abortion and minors. To be at all helpful, analysis must do more than simply assert a claim for the minor to be left alone. As Justice Powell observed in *Bellotti v. Baird*, 443 U.S. 622 (1979), minors' constitutional rights are more limited than those of adults for three reasons: "[1] the peculiar vulnerability of children; [2] their inability to make critical decisions in an informed, mature manner; and [3] the importance of the parental role in child rearing." *Id.* at 634-35. He viewed the Court's task therefore as to balance minors' interest in autonomy against their special circumstances and needs, particularly "in the making of important, affirmative choices with potentially serious consequences." *Id.* Justice Powell observed, however, that abortion poses special problems: The abortion decision, which is problematic for minors, cannot be simply postponed; and the burdens of pregnancy and childbirth can be especially severe for minors. *Id.* at 642. Because some parents might seek to obstruct both abortion and access to court, out of strongly held anti-abortion beliefs, Justice Powell concluded that every minor must have an opportunity to seek judicial approval without first notifying or consulting her parents. *Id.* at 647. He went on to describe the criteria for so-called "judicial bypass" procedures, which eventually became the point of departure for subsequent cases involving both consent and notice. *Id.* at 647-48.

Justice Powell's thoughtful approach seems to reflect a genuine care and relational focus in recognizing the need of some minors for parental guidance in confronting

2. *Casey*

Karlan and Ortiz point to language shards in the *Casey* joint opinion recognizing that abortion “is an act fraught with consequences for others”⁴¹⁰ and they conclude that the opinion “carried this relational perspective forward into its enunciation of a new, more deferential test for reviewing state abortion regulations.”⁴¹¹ Beyond this scrap of relation-talk, in the realm of what the joint opinion actually does, lies a more complex picture. *Casey* is, if nothing else, an object lesson in the need to look behind rhetoric to results, and this is just as true for the joint opinion’s extensive autonomy-talk as it is for the opinion’s occasional references to relation.

unwanted pregnancy. Simply asserting the involvement of the parent-child relationship is not the end of the inquiry, however; real care also would consider the practical impact of legislative attempts to coerce parental consultation and Court-mandated judicial bypass procedures. There are reasons to be skeptical. For one thing, the kind of close personal care required to withstand the strains on family relations imposed by unwanted teen pregnancy is something the state is simply powerless to coerce. Thus, in a well-functioning and supportive family, state-mandated parental consultation is likely to be unnecessary; in an unsupportive or abusive one it is likely to do little good and much harm. Cf. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976), in which the Court noted:

It is difficult . . . to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

Id.

Next, as Justice Stevens observed in his *Bellotti* concurrence, requiring a minor to pursue judicial proceedings to obtain an abortion may well be at least as burdensome, if not more so, than forcing her to confront her parents; Justice Powell’s indeterminate “best interests” and “maturity” standards leave the minor’s autonomy interests vulnerable to the judge’s personal beliefs. *Bellotti*, 443 U.S. at 655-56. What is more, most minors who seek judicial authorization get it, so that in practice “these statutes force minors to bear the emotional strain of going to court to receive judicial authorization that amounts to little more than a rubber stamp.” Gene Lindsey, *The Viability of Parental Abortion Notification and Consent Statutes: Assessing Fact and Fiction*, 38 AM. U. L. REV. 881, 884 (1989) (internal quotation marks omitted). The consequence thus is that, once again, who obtains an abortion is largely a function of chance and personal resources (here the ability to negotiate the judicial environment) rather than legal, moral, or philosophical principle. Finally, one might marvel at a constitutional rule which contemplates that a young woman could be too immature to decide whether to terminate pregnancy but would nevertheless be mature enough to be a mother. In any event, whatever difficulties are presented by judicial bypass generally are aggravated by the additional onerous requirements involved in the Minnesota and Ohio laws. See *id.*

410. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992).

411. Karlan & Ortiz, *supra* note 13, at 885.

One of many striking things about *Casey* is the contrast between the joint opinion's professions of fidelity to liberty and substantive due process in the abstract and its actual application of its new standard.⁴¹² The Court's ringing defense of the underlying concept of substantive due process and individual liberty in the realms of intimate relations, family, marriage, and procreation, and its passionate plea that overruling *Roe* would seriously undermine the very foundation of the Court's moral authority,⁴¹³ lead one to expect a forceful reaffirmation of *Roe* and a clear message to the states that the Court will no longer tolerate their efforts to subvert that decision. What follows in the joint opinion, however, is a substantial downsizing of *Roe*, the overruling of important post-*Roe* case law, and an invitation to legislatures to continue the cat-and-mouse game of testing *Roe*'s newly relaxed limits⁴¹⁴—all of which exacerbate the arbitrary allocation of abortion rights. The contrast is, to borrow a metaphor, "like a spectacularly successful football rally followed by a lost game."⁴¹⁵ The result is objectionable from both an autonomy and a care perspective.

The *Casey* joint opinion gives much more weight to the state's pre-viability interest in preserving potential life, at the expense of the woman's welfare, than did *Roe* and post-*Roe* cases.⁴¹⁶ Repudiating *Roe*'s command that the only legitimate basis for pre-viability state intervention is the protection of maternal health, the joint opinion expressly allows the state deliberately to make the woman's right

412. Another is the contrast between the joint opinion's extensive analysis of the reasons why the principle of stare decisis requires preservation of *Roe*, 112 S. Ct. at 2808-09, and the joint opinion's willingness both to redefine *Roe* and to overrule *Roe*'s progeny, *id.* at 2816-33. These inconsistencies are even more glaring in the light of the Court's repeated invocation of the need for certainty, continuity, and steadfastness in the protection of liberty. *See id.* at 2803, 2810, 2817. The Court's stare decisis analysis reflects more rhetorical than substantive commitment. The only facts that have changed since *Roe* are that abortion has become safer than childbirth throughout pregnancy, protests have continued and escalated, and the Court's personnel has changed. None of those facts warrant dilution of *Roe* or suggest a problem in *Roe*'s analysis. The trimester framework could have been adjusted simply to remove women's health as a state objective during the second trimester, or to have increased judicial scrutiny of measures purporting to be justified by that interest. The anguilliform compromise reflected in *Casey* hardly portrays a Court steadfastly maintaining its commitment in the face of public criticism.

413. *Casey*, 112 S. Ct. at 2804-08.

414. *Id.* at 2808-33.

415. WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972*, at 87 (1973).

416. As discussed above, both Noddings and Goldstein have offered relational defenses of the Court's use of viability as a legal threshold. *See supra* parts V.B-C.

more difficult to exercise from the earliest moments of pregnancy.⁴¹⁷ The abortion right under *Casey* thus is no longer “a right to decide whether to have an abortion ‘without interference from the State’ ”,⁴¹⁸ rather, it is now a right to seek an abortion *in spite of* state interference.

The only substantive limit that *Casey* imposes on the state is that its interference not constitute an “undue burden,” defined as a “substantial obstacle.”⁴¹⁹ Although the joint opinion asserts that the state may seek to inform, but not to hinder, the woman’s choice,⁴²⁰ the joint opinion’s application of its standard demonstrates that the Justices cannot mean what they say. Instead, the state apparently may interfere in the woman’s decision, on grounds that not only are unrelated to her health, but actually may be detrimental to it, provided the state doesn’t go too far.⁴²¹ The locus of that boundary is uncertain, but the joint opinion’s disposition of the various provisions of the Pennsylvania law suggests that the state may go quite far indeed. This result clearly manifests a diminution in care for the pregnant woman by expressly allowing states to shift some of the burden of constituents’ discomfort with abortion to her before viability.

The Pennsylvania Abortion Control Act challenged in *Casey* contained both an informed consent and a twenty-four-hour waiting

417. *Casey*, 112 S. Ct. at 2818.

418. *Id.* at 2819 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 51, 61 (1976)).

419. *Id.* at 2820. The joint opinion explained that

[a] finding of an undue burden is a shorthand for 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.

Id.

420. *Id.*

421. The joint opinion thus inverts the Court’s previous application of the “undue burden” standard in other constitutional contexts. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court stated that “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.” *Id.* at 220. The Court there was using the undue burden standard to *protect* constitutional rights against even *unintentional* governmental interference. By contrast, the joint opinion in *Casey* invokes the phrase to uphold *deliberate* governmental attempts to interfere with the exercise of a constitutional right.

period requirement, as well as a spousal notification requirement.⁴²² The Court previously had held that *Roe* barred the state from mandating specific information to be given to the woman "designed to influence the woman's informed choice between abortion or childbirth."⁴²³ The Court previously had not been "convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course."⁴²⁴ *Casey* overruled those prior decisions.

One difference between the Court's earlier rulings and *Casey* is a weakening of the Court's commitment to protect women from state laws intended to pressure them not to have abortions even before viability.⁴²⁵ Because the informed consent requirement mandated communication of facially truthful information that was, in the joint opinion's view, rationally related to the state's legitimate interests in fostering informed decision making and preserving fetal life, the three Justices concluded that it did not impose an undue burden.⁴²⁶ The

422. 18 PA. CONS. STAT. §§ 3205, 3209 (1990). The law requires a physician, as opposed to a qualified assistant, to inform the woman of the nature of the abortion procedure, the health risks of abortion and childbirth, and the probable gestational age of the child. *Id.* § 3205(a)(1) (1990). The act further requires that the woman be informed, by either the physician or a qualified assistant, of the availability of printed materials published by the state describing the fetus and giving information about medical assistance for childbirth, about child support from the father, and a list of agencies that provide adoption services. *Id.* § 3205(a)(2). Before having an abortion, the woman must certify in writing that she was given the foregoing information. *Id.* § 3205(a)(4). The act also requires the woman to wait 24 hours after receiving the prescribed information before having an abortion. *Id.* § 3205(a)(1). Those requirements are subject to an exception for "medical emergencies." *Id.* §§ 3205(b), 3209(c). The act also contains spousal notification, *id.* § 3209, and parental consent provisions, *id.* § 3206, as well as recordkeeping and reporting requirements, *id.* § 3214.

423. *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 444, 450 (1983).

424. *Id.* at 450.

425. The relational value of commitment is discussed *supra* part V.D.

426. *Casey*, 112 S. Ct. at 2823-24. The district court found, however, that in many cases the prescribed litany may actually mislead or confuse the pregnant woman. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1354 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992). For example, the requirement that the physician inform the woman about the availability of benefits or child support payments may mislead her into believing that meaningful economic support will be at hand to provide for her and her baby. *Id.* at 1354-55. In reality, most child support orders are not enforced (only one-quarter were enforced in 1988), and even when enforced are often insufficient. As the trial court concluded, Pennsylvania's informed consent requirements had neither the purpose nor the effect of helping women who are facing the difficult abortion decision, but instead "are poorly veiled attempts by the Commonwealth to disguise elements of discouragement of the abortion decision." *Id.* at 1355.

joint opinion concluded that the waiting period, while undeniably burdensome and plainly not in the woman's best medical interests, also was rationally related to the state's interests and not "unduly" burdensome.⁴²⁷

The uncaring implications of the joint opinion's conclusions are revealed by the district court's findings. First, the physician-only requirement would needlessly increase the costs of the procedure by placing additional demands on physicians' already full schedules.⁴²⁸ Second, the state's mandate of the content of the informed consent dialogue, as opposed to allowing the health-care professional to tailor the dialogue to the specific needs of the individual patient, is contrary to standard medical practice and can be affirmatively harmful.⁴²⁹ Third, the informed consent requirement is unnecessary because most women, before scheduling an abortion, decide that abortion is in their best interest "only after a great deal of careful thought, consultation with a family member or other trusted individual, or a medical provider."⁴³⁰ Finally, far from assisting women in their decision, the requirement would actually "create undesirable and unnecessary anxiety, anguish, and fear."⁴³¹

The contrast between the trial court's findings with respect to the twenty-four-hour waiting period and the joint opinion's treatment of that issue further reveals *Casey's* compromise of *Roe* as a matter of both autonomy and care for unwanted pregnant women. It also shows how abstract relational concerns ought to yield to genuine care in the face of findings of harm to real people.⁴³² Both Noddings and Goldstein have suggested a relational role for counseling and deliberation as a woman contemplates abortion,⁴³³ but they en-

427. *Casey*, 112 S. Ct. at 2825-26.

428. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1353 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992). This burden results from the Act's requiring doctors to perform a task that could as easily (and in some ways better) be performed by trained counselors. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. Indeed, autonomy-talk also could be used to *defend* burdensome informed consent and waiting period requirements. The underlying policy served by the recognition of a tort duty of informed consent is preservation of the patient's bodily sovereignty. KEETON, *supra* note 129, at 190. This kind of argument has been deployed by states, including Pennsylvania, to defend their informed consent provisions. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986), *overruled in part by*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2823 (1992).

433. GOLDSTEIN, *supra* note 136, at 82-89; NODDINGS, CARING, *supra* note 20, at 89 (suggesting that one who cares "might suggest a brief and direct form of counseling in

visioned a much different set of circumstances than those created by Pennsylvania's law. Noddings had in mind a preexisting, personal caring relationship concerned with the pregnant woman's welfare—not an adversarial, authoritarian one mandated and defined by the state—and she explicitly warned that care requires “retreat[] when the questions obviously have been considered and are now causing great pain.”⁴³⁴ Goldstein was referring to the Court's pre-*Casey* “primary reliance on the general legal obligation of health care professionals to obtain informed consent, rather than on detailed state regulation of what must be disclosed and how” when he endorsed a process of interpersonal dialogue between pregnant women and their physicians concerning abortion.⁴³⁵

The waiting period's arbitrarily harmful impact on women was palpable. The trial court found that the waiting period served no legitimate medical interest and would be “burdensome” to women in a number of respects. Delays occasioned by the requirement could stretch from forty-eight hours to two weeks.⁴³⁶ The trial court concluded that the requirement

will be particularly burdensome to those women who have the least financial resources, such as the poor and the young, those women that travel long distances, such as women living in rural areas, and those women that have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave.⁴³⁷

Moreover, delay in obtaining an abortion substantially increases the risk of complications and mortality: “Beyond eight weeks gestation, the risk of complications (by approximately 30%) and mortality (by approximately 50%) increase with each additional week of gestation.”⁴³⁸ For some women, the delay will push a first-trimester abortion over to a second-trimester one, substantially increasing both cost and risk.⁴³⁹ Finally, the court found that very few women are

which a young expectant mother could come to grips with her feelings”).

434. NODDINGS, CARING, *supra* note 20, at 89.

435. GOLDSTEIN, *supra* note 136, at 82-83.

436. The court also noted that the repeat visits would subject women to the harassment of anti-abortion protestors outside clinics. *See infra* notes 470-511 and accompanying text.

437. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

438. *Id.* For discussion of the increase in risk caused by delay of the abortion procedure, see JUDGES, *supra* note 90, at 66-79.

439. *See* JUDGES, *supra* note 90, at 42-43, 66-77.

undecided about having an abortion when they come to a clinic and that, in addition to the increased medical risk and expense, the waiting period would also adversely affect women's psychological health.⁴⁴⁰

While acknowledging that the foregoing findings were troubling, the joint opinion concluded that the waiting period did not create an "undue" burden on its face.⁴⁴¹ The joint opinion first suggested that the exception for medical emergencies (discussed below) in most cases would mitigate any increased medical risk.⁴⁴² Second, the joint opinion understood the district court not to have found that the waiting period imposed a "substantial obstacle" but rather to have held the waiting period unconstitutional under *Roe's* trimester framework, a view that the Court overruled.⁴⁴³ Third, the joint opinion did not read the district court's conclusion that the waiting period was "*particularly* burdensome" as equivalent to a finding of "*undue* burden."⁴⁴⁴

The joint opinion scuttles carcinomorphically to avoid the plain import of the district court's findings that, in at least some if not many cases, the waiting period would impose serious economic, physical, and psychological harm on women seeking abortion. The trial court's phrase "particularly burdensome," read in context, obviously means *especially* burdensome. In other words, the court clearly found that the waiting period would have a very real negative impact on many women seeking abortion, and inflict even worse harm on a vulnerable class of women—the poor, the young, the battered, and those living in remote areas. If a law that materially (in view of what is at stake) increases the cost, stress, and risk of injury or death is not a "substantial obstacle," it is difficult to imagine what is.⁴⁴⁵

440. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

441. *Casey*, 112 S. Ct. at 2825.

442. *Id.* at 2822.

443. *Id.* at 2818, 2825-26.

444. *Id.* at 2825-26. "A particular burden is not of necessity a substantial obstacle. . . . [T]he District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it." *Id.*

445. The *Casey* brief by the American College of Obstetricians and Gynecologists, joined by other mainstream health organizations, also argued that the informed consent provision was "antithetical to informed consent as currently understood and practiced," and that the waiting period "will significantly increase the risk of death and other complications associated with abortions which correlate directly with gestational age." Brief for the American College of Obstetricians and Gynecologists, the American Medical Women's Association, the American Psychiatric Association, the American Public Health

The joint opinion's reference to the medical emergency exception as buffering the increased medical risk⁴⁴⁶ is largely nonresponsive to the record. The testimony showed that the risk of harm that the woman might suffer *during and after* the *abortion* procedure itself increases substantially with the delay created by the waiting period. A statutory exception that requires an extraordinary emergent complication of *pregnancy*, which necessarily *precedes* an abortion procedure, would appear to be inapplicable to some complications of abortion (such as the risk of uterine perforation or infection, which is amplified by delay).⁴⁴⁷

Association, the Association of Reproductive Health Professionals, the National League for Nursing, and the National Medical Association as *amici curiae* in support of petitioners, at § II.B., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Nos. 91-744, 91-902).

446. *Casey*, 112 S. Ct. at 2822.

447. The joint opinion left open the possibility, however, that a waiting period could be held unconstitutional on an adequate record. The opinion was careful to note that the Pennsylvania law was challenged on its face and enjoined before it had ever been enforced. 112 S. Ct. at 2803. The evidence of burden, strong as it was, therefore necessarily had a speculative and hypothetical aspect. It may well be that evidence of actual harm, or stronger evidence of specific prospective harm, might satisfy the undue burden standard. This possibility is reinforced by the joint opinion's conclusion, discussed immediately below, that the spousal notice requirement did impose an undue burden. *Id.* at 2826-31. So far, however, results have not been encouraging. For example, in *Barnes v. Moore*, 970 F.2d 12, 13-14 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992), the Fifth Circuit in effect ruled that facial challenges to provisions like those upheld in *Casey* will not succeed. *Barnes* suggests that challengers to laws like those upheld in *Casey* will not be able to prevail before the laws go into effect by showing the likely and foreseeable impact of such measures. *Id.* at 14 (showing that to succeed in a facially unconstitutional challenge, plaintiffs must " 'establish that *no* set of circumstances exists under which the act would be valid.' " (emphasis added) (quoting *Casey*, 112 S. Ct. at 2870 (Rehnquist, C.J., dissenting in part); *United States v. Solerno*, 481 U.S. 739, 745 (1987)). Instead, the presumption is heavily in favor of constitutionality, the burden is on the plaintiff, and that burden presumably can be carried, if at all, only by showing that women actually are being precluded from choosing abortion. *See Casey*, 112 S. Ct. at 2821 (concluding that regulations by which the state shows profound respect for fetal life are an undue burden only if they are a "substantial obstacle to the woman's . . . right to choose").

The Eastern District of Pennsylvania reached a different conclusion and allowed the *Casey* plaintiffs to "supplement the record with new evidence—evidence that was not necessary under the less rigorous strict scrutiny standard—that will show that the challenged provisions are unconstitutional under the new undue burden standard." *Planned Parenthood v. Casey*, 822 F. Supp. 227, 233 (E.D. Pa. 1993) (opinion on remand), *rev'd*, 14 F.3d 848 (3d Cir. 1994). In rejecting the Fifth Circuit's analysis, the district court reasoned that *Casey* was not a typical facial challenge in which the question is whether the law is constitutionally applicable to any situation. *Id.* at 235. To the contrary, as the Supreme Court specifically noted with respect to the spousal notice provision, the law was to be tested for its effects on "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* (quoting *Casey*, 112 S. Ct. at 2829). The Third Circuit, however, reversed the district court's decision, holding that the Supreme Court's ruling had left no issues in the case open for further consideration, apart from the question

The joint opinion thus is troubling when viewed from a caring perspective. First, its semantic quibbling over the trial court's use of the term "particularly burdensome," rather than "unduly burdensome," is the kind of artificial—even cynical—legalistic distinction that relationalists condemn and that provokes skepticism about the coherence of rights. Second, it would be a cruel constitutional rule indeed that required women actually to suffer predictable (and probably inevitable) physical or psychological harm before an undue burden could be shown; the availability of an "as applied" challenge will do the already-injured women no good by the time it grinds its way through the courts. The joint opinion's disposition of the waiting period requirement tends in that direction, although its treatment of the spousal notice provision points the other way. Third, the joint opinion does not adequately reconcile its respective outcomes on those two provisions. While the evidence of the spousal notice requirement's burdensomeness was forceful, there also was ample evidence of harm from the waiting period as well. This inconsistency casts doubt on the undue burden standard's ability to protect women when needed.

The Court held the spousal notice requirement unconstitutional.⁴⁴⁸ The anti-relationalists' position implies that such a result demonstrates that the only way to protect abortion rights is to sacrifice relational concerns (e.g., communication between spouses about a matter of great importance to them both) to the pregnant woman's autonomy claim to unfettered discretion over the abortion decision.⁴⁴⁹ This argument, however, would rest on a thin conception of care. To the contrary, the Court's analysis reflects a caring responsiveness to actual harm while also protecting autonomy interests.

of severability of the unconstitutional spousal notice provision. 14 F.3d 848, 860 (3d Cir. 1994). Justice Souter denied the application for a stay of the Third Circuit's mandate pending submission of a petition for certiorari. *Planned Parenthood v. Casey*, 114 S. Ct. 909, 909 (1994).

Other post-*Casey* plaintiffs similarly have had little success in challenging laws modeled after the Pennsylvania Act. See, e.g., *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1490-95 (D. Utah 1994) (rejecting facial challenge to Utah law, finding that factual allegations of undue burden do not differ materially from those in *Casey*, and going so far as to find plaintiffs' claim was brought in bad faith and therefore ordering plaintiffs to pay defendants' costs and attorneys' fees).

448. *Casey*, 112 S. Ct. 2826-32.

449. Although Karlan and Ortiz did not advance this argument, it is consistent with their overall anti-relational position. See *supra* part I.C.

The spousal notice requirement would have seriously hurt some women. The trial court found that while most married women voluntarily consult their husbands before having an abortion, the risk of both physical and psychological abuse, along with the practical unavailability of the statutory exceptions for reported cases of sexual assault or fear of bodily injury, in many instances would mean that the spousal notice requirement would preclude some women from having an abortion.⁴⁵⁰ The Supreme Court accepted and even supplemented those findings with an extensive recital of the problem of domestic violence in the United States, concluding that the requirement would go beyond making abortion more expensive or difficult to actually imposing a "substantial obstacle."⁴⁵¹

The Court's analysis reflects a caring responsiveness to the plight of battered women and the harmful impact of Pennsylvania's law on their lives. The Court regarded the notification requirement as tantamount to a spousal veto, because of the potentially devastating consequences for the women it affects, and reaffirmed the balance it previously had struck between the husband's interest and the pregnant woman's.⁴⁵² The Court also specifically noted that, even in a facial challenge, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."⁴⁵³ Because the consequences to affected women are potentially so severe, the Court struck the provision even though the affected class is relatively narrow. Finally, the Court recognized that the provision violated equality norms by relegating women to second-class status under an outmoded, patriarchal vision of gender roles.⁴⁵⁴

The joint opinion's failure adequately to distinguish the waiting period from the spousal notice requirement, or fully to explain how time has undermined its precedent in one case and not the other, illustrates the difference that the presence of a genuine care focus can make. The inconsistency may be attributable to the Court's own ambivalence about abortion rights, and that difficulty shows the extent

450. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1360-62 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

451. *Casey*, 112 S. Ct. at 2827-30.

452. *Id.* at 2831 (reaffirming *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)).

453. *Id.* at 2829.

454. *Id.* at 2831 ("[The statute] embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.").

to which the abortion conflict has compromised the Court's commitment to care.

The harm likely to follow from the waiting period requirement is of a kind largely considered in the special context of abortion restrictions. To be sure, mandatory delay of many surgical procedures for nonmedical reasons might create or increase risk. But because abortion has been the singular target of such regulations, one tends to associate the problem of delay with that procedure. The problem of domestic violence and sexual abuse, by contrast, is more generalized and less related specifically to abortion regulation. The Court therefore may have been more receptive to the harm that spousal notice requirements can cause. Although the record with respect to the waiting period requirement, fairly read, also established a serious burden for at least some women (and, as the Court noted, a law is to be tested for its impact on the affected group), the Court appears to be much less receptive to the prospect of harm that is more "abortion-specific." The spousal notice requirement is inconsistent with modern, constitutionally enforceable norms of gender equality. As discussed above, restrictive abortion laws in general also violate those norms. Once again, however, the spousal notice provision's threat to gender equality is not abortion-specific. Instead, the problem is that the statute seeks to reestablish the husband's dominant position in the marital relationship by vesting him with "this troubling degree of authority over his wife."⁴⁵⁵

The Court's apparent ambivalence is cause for concern. Affected women suffer serious physical and psychological harm from either delayed abortion or domestic violence. The record abundantly established that the Pennsylvania law increased both risks. The joint opinion offered no reason to suppose that the legal significance of harm is a function of its *source*—for example, that a broken nose is constitutionally distinguishable from a perforated uterus. Similarly, sex discrimination is wrong whether or not the state also enlists an abusive husband's participation in its campaign to exploit the woman's capacity for mother-love or her socioeconomic vulnerabilities.

It is disturbing to think that the Court's sensitivity to such problems is *diminished* when they are associated with a burden on constitutional rights. If anything, one would expect the Court to be *more* "care-full" in such a case. The joint opinion's contrary reaction in *Casey*—apparently taking "abortion-specific" harm less serious-

455. *Id.* at 2829-31.

ly—indicates a lapse in the Court's commitment to protecting unwanted pregnant women from some people's opposition to abortion and consequently a failure of care.

Casey's inconsistencies, while troubling, are not surprising—even to someone who does not embrace Justice Scalia's extreme interpretivism. The centrifugal forces binding the Court to *Roe* are barely stronger than the centripetal forces pushing the Court away. At least two of the authors of the joint opinion, if not all three, probably would have voted against the right recognized in *Roe* were the Court writing on a clean slate. The four dissenters in *Casey* plainly would have done so. That left only two aging Justices fully committed to *Roe*. The authors of the joint opinion thus apparently were writing largely in the service of abstract ideals—*stare decisis* and autonomy rather than relation and care, mind you—that they would rather not have applied to the case at hand. Little wonder that those Justices stopped far short of giving *Roe*, or even their new undue burden standard, full effect.

C. *Regulating the medical aspects of abortion*

Anti-relationalists might argue that allowing states broad regulatory power over the medical aspects of abortion would be consistent with an ethic of care, under the assumption that government needs a free hand to ensure (in good faith) that women receive adequate health care. As mentioned, some advocates, including those calling themselves feminists, complain that *Roe* unleashed a horde of unregulated and unscrupulous abortionists on an unprotected public. Real care, however, would not accept that assumption at face value in view of what is at stake for the woman and past experience with governmental regulation of abortion. It would instead warily examine the actual impact of state regulatory measures for their capacity to hurt women in the complex special circumstances created by abortion. It would also protect unwanted pregnant women from being singled out for interference in their health care needs.

Until recently, the Court's review of regulations in this category has been relatively protective of women's welfare. *Roe's* trimester framework recognized protection of maternal health as a legitimate state objective for regulation of second-trimester abortions, based on the assumption that the risks of abortion after the first trimester

exceeded those of childbirth.⁴⁵⁶ The Court's pre-*Webster* application of this standard at least tried to protect women from laws that unnecessarily interfered with the independence of the physician's medical judgment about pre-viability abortion and that appeared to single out abortion for burdensome requirements. Those cases not only reflect concern about the privacy and autonomy of the abortion decision, but also include some measure of care.

For example, the Court has held unconstitutional sweeping requirements that all abortions or all second-trimester abortions be performed in hospitals.⁴⁵⁷ In addition to interfering with medical judgment, by more than doubling the cost of the procedure and imposing additional travel burdens for women living in remote areas, such requirements "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."⁴⁵⁸ The Court has, however, upheld laws requiring second-trimester abortions to be performed in facilities that meet the standards of outpatient surgical facilities.⁴⁵⁹ Although such requirements can significantly increase the cost of abortion, the Court has regarded them as sufficiently based in the state's interest in protecting maternal health.⁴⁶⁰ The Court has rejected, however, state laws that seek to prescribe potentially more dangerous methods for second-trimester abortions.⁴⁶¹ The Court has also exhibited a

456. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

457. *Doe v. Bolton*, 410 U.S. 179, 195 (1973).

458. *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 438 (1983). The Court's conclusions in *Doe* and *Akron Center* are supported by the greatly increased safety of second-trimester abortions. The American Public Health Association has, since *Roe*, abandoned its recommendation that second-trimester abortions ought to be performed in hospitals. *Id.* at 436-37. Similarly, the American College of Obstetrics and Gynecologists has revised its position to recommend that abortions could be performed safely in an outpatient clinic until the fourteenth week of pregnancy and in a free-standing surgical facility until the eighteenth week. *Id.* at 437.

459. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506, 516-17 (1983).

460. *Id.*

461. For example, the Pennsylvania law held unconstitutional in *Colautti v. Franklin*, 439 U.S. 379 (1979), required, for fetuses that "may be viable," that physicians "use the abortion method that would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 380-81 n.1 (quoting PA. STAT. ANN. tit. 35, § 6605(a) (1977)). At that time, saline amino-infusion, which is almost always fatal to the fetus, was the physician's method of choice in the second trimester. Other methods that increase the chances of fetal survival—such as hysterotomy—involve serious disadvantages for the woman. The statute's constitutional defect lay in its muddled interference in medical judgment. *Id.* at 393-98. The law was unclear whether (and under what conditions) the physician was required to compromise the woman's welfare against incremental increases

care focus by remaining concerned about women's health—even after setting aside concern for her autonomy—in its review of laws regulating post-viability abortion methods.⁴⁶²

in the chances of fetal survival. *Id.*

The Court also has held unconstitutional more clear-cut interference with the physician's choice of pre-viability abortion method. For example, the Court in *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976), rejected Missouri's attempt to prohibit saline amniocentesis after the first trimester. Missouri contended that the prohibition was reasonably related to the preservation of maternal health. *Id.* Quite to the contrary, saline amniocentesis was at the time the most prevalent procedure nationwide and was much safer than continuation of the pregnancy. *Id.* at 76. The Court concluded that this forced choice of less safe methods was an unreasonable and arbitrary regulation designed to inhibit the vast majority of second-trimester abortions. *Id.* at 79. The Court further held unconstitutional a provision, enforced by threat of a manslaughter charge, requiring physicians to use their skill to save the life of the fetus regardless of when in the pregnancy the abortion is performed. *Id.* at 81-84.

462. After viability under *Roe*, the state may seek to protect fetal life to the extent consistent with protection of the pregnant woman's health. Accordingly, some states have required the attendance of a second physician at post-viability abortions to take care of any child born alive. The Court has upheld such measures so long as they do not require compromise of maternal health. *E.g.*, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482-86 (1983). An example of a second-physician requirement upheld by the Court is Missouri's statute requiring that a second physician attend all post-viability abortions and provide medical care to a child born as a result of the abortion. *Id.* at 418-79 n.1 (citing MO. REV. STAT. § 188.030.3 (1983)). The statute also required both physicians to take all reasonable steps—that did not increase the risk to the woman—to preserve the child's life and health. *Id.* Missouri further forbade use of abortion procedures fatal to the fetus in medically necessary post-viability abortions, unless alternative procedures would pose a greater risk to the health of the woman. *Id.* In their plurality opinion in *Planned Parenthood Ass'n v. Ashcroft*, Justice Powell and Chief Justice Burger concluded that, given the ability of the second physician to tend to the fetus while the primary physician looks after the woman, the statute reasonably furthered the state's compelling interest in preserving the life and health of the fetus. *Id.* at 485-86. They reached that conclusion notwithstanding the significant increase in cost and the relatively unlikely chance that the fetus could be saved in any event. *Id.*

The Court has invalidated second-physician requirements that it viewed as threatening the woman's health. *See, e.g.*, *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986). In *Thornburgh*, the Pennsylvania law, for example, imposed two requirements. First, a second physician was required to take all "reasonable steps necessary, in his [or her] judgment, to preserve the child's life and health." *Id.* at 769 n.15 (quoting 18 PA. CONS. STAT. ANN. § 3210(c) (1982)). Second, the law mandated use of the abortion procedure that would provide the greatest opportunity for the fetus to be aborted alive unless that "method or technique would present a significantly greater medical risk" to the woman's life or health. *Id.* at 768 n.13 (quoting 18 PA. CONS. STAT. ANN. § 3210(b) (1982)) (emphasis added). Because the statute dictated a "trade-off" between the woman's health and fetal survival and did not ensure that the woman's health would be the primary physician's paramount concern, the Court in *Thornburgh* held the standard-of-care provision unconstitutional. *Id.* at 769-71. Furthermore, unlike the Missouri statute, Pennsylvania's second-physician requirement lacked an exception for endangerment of the woman's health caused by delay in arrival of the second physician. *Id.*

One of the very few changes in circumstances since *Roe*, apart from changes in the Court's membership, is that abortion has become safer than childbirth throughout pregnancy.⁴⁶³ That development, considered from the perspective of one who cares for the woman, should have led firmly to even *greater* judicial mistrust of state efforts to interfere with medical judgment at *any* point in pregnancy. *Casey*'s undue burden standard, however, lurches in the opposite direction. The Court's decision to uphold Pennsylvania's medical emergency exception to the Abortion Control Act's other requirements represents a departure from its previous receptivity to the threat that abortion regulations can present to women's health.

That exception is available when an immediate abortion is necessary "to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."⁴⁶⁴ The trial court had found that the exception's definition of a medical emergency was "inconsistent with the generally accepted definition of medical emergency in the medical profession" and would chill the physician's exercise of medical judgment with the threat of loss of license or criminal prosecution.⁴⁶⁵ The district court concluded that the Act singled out the abortion procedure from all other treatments for allowing state-mandated delays that could cause a risk of an impairment of a bodily function, so long as the risk was not "serious," the impairment not "substantial and irreversible," and the bodily function not "major."⁴⁶⁶

Rather than come to grips with those broad objections, the Court focused instead on three specific examples of serious conditions that the trial court found were not covered by the statutory exception: preeclampsia; inevitable abortion; and premature ruptured membrane.⁴⁶⁷ Adopting the interpretation of the court of appeals that those conditions were covered, the Court upheld the statute's command that physicians must adhere to the Act's other provisions (apart from the spousal notice requirement)—even if to do so would

463. See JUDGES, *supra* note 90, at 75.

464. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822 (1992) (quoting 18 PA. CONS. STAT. ANN. § 3203 (1990)).

465. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1346-47 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (1992).

466. *Id.*

467. For a brief overview of the risks of pregnancy, see JUDGES, *supra* note 90, at 74-76.

be medically contraindicated and would create some risk of impairment of the woman's bodily functions.⁴⁶⁸

In effect, the joint opinion allows states to interfere with the woman's choice in a way that jeopardizes her health and forces doctors to disregard their best medical judgment—provided that the state does not perpetuate certain very serious conditions. This outcome is directly at odds with one of the central premises in *Roe* and most other pre-*Webster* cases,⁴⁶⁹ and with what simple care for the woman obviously requires—that the pre-viability abortion decision and procedure are matters between the woman and her doctor in which the state may not interfere in a way that does not protect the woman's health.⁴⁷⁰ *Casey* unethically authorizes states in some circumstances to hold women's health and safety hostage to some constituents' discomfort with abortion.

D. Private interference with access to abortion

The sometimes violent harassment and intimidation of abortion providers and their patients has restricted the accessibility of abortion services and made the procedure even more stressful. The practical result can be as harmful as state legislative efforts to interfere with access to abortion, and in some cases perhaps more so. The Court's ruling in *Bray v. Alexandria Women's Health Clinic*—that harassment campaigns like that of Operation Rescue do not violate the Civil Rights Act of 1871⁴⁷¹—precluded recourse to an important source of protection for women seeking abortion and probably, had Congress not intervened, would have stimulated an increase in harassment activity. A caring perspective might have produced a different result in *Bray*, the reasoning of which remains a troublesome precedent despite enactment of the Freedom of Access to Clinic Entrances Act.⁴⁷²

468. *Casey*, 112 S. Ct. at 2822.

469. The parental consent and notice cases are exceptions.

470. As noted above, Robin West has explained that abortion rights are not simply about the confidentiality of the woman's relationship with her doctor but are fundamentally about allowing the woman to preserve her physical and psychic integrity. See West, *Jurisprudence & Gender*, *supra* note 7, at 15. Nevertheless, while protection of the privacy of that relationship may not be a sufficient basis for abortion rights, it surely is a necessary prerequisite as a practical matter.

471. 113 S. Ct. 753, 760-62 (1993) (citing 42 U.S.C. § 1985(3) (1988)).

472. Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (Supp. 1994)); see also *infra* note 509.

The Civil Rights Act of 1871 provides a federal cause of action against conspiracies “for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.”⁴⁷³ The Supreme Court earlier had interpreted the 1871 Act as requiring a showing of “class-based animus” which is “aimed at” interfering with rights protected against private conduct.⁴⁷⁴ As noted above, the Court found in Operation Rescue’s activities only opposition to abortion and no indication of bias against women.⁴⁷⁵ Although of

473. 42 U.S.C. § 1985(3) (1988). The federal law in question was originally enacted as the Ku Klux Klan Act of 1871 as part of the post-Civil War civil rights legislation. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. “The central theme of [§ 1985(3)’s] proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.” United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 836 (1983). Section 1985(3) covers two kinds of claims: one for conspiracies to deprive plaintiff of certain rights (a “deprivation” claim), and one for preventing or hindering government officials from providing persons within the state with the equal protection of the laws (a “preventing” or “hindering” claim). The Court denied the respondents’ petition to brief the prevention issue. *Bray v. Alexandria Women’s Health Clinic*, 113 S. Ct. 14 (1992).

The plaintiffs in *Bray*, nine clinics providing abortion-related services and various women’s rights organizations, alleged that Operation Rescue and certain individuals had conspired to deprive women of their constitutionally protected right to travel from one state to another to obtain an abortion and their privacy right to abortion, and had also violated plaintiffs’ rights under state tort law, including the law of trespass and nuisance. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-96 (E.D. Va. 1989), *aff’d*, 914 F.2d 582 (4th Cir. 1990), *rev’d in part and vacated in part sub nom. Bray v. Alexandria Women’s Health Clinic*, 113 S. Ct. 753 (1993). The trial court found for plaintiffs on their travel, trespass, and nuisance claims and enjoined defendants from blockading or impeding access to plaintiffs’ facilities. *Id.* at 1496-97. The trial court declined, on First Amendment grounds, to enjoin defendants from activities that tend to intimidate, harass, or disturb patients or potential patients. *Id.* at 1497-98.

474. *Scott*, 463 U.S. at 833; *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

475. *Bray*, 113 S. Ct. at 759-62. The Court in *Bray* reasoned that the abortion clinics could meet the class-based animus requirement only if one of the following propositions were true: “(1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and class-based animus can be determined solely by effect.” *Id.* at 760. The Court rejected both propositions. *Id.* at 760-62. Justice Stevens’s dissent pointed out that *Griffin’s* animus requirement derived from the Court’s concern about constitutional limitations on congressional power to enact a general federal tort law. *Id.* at 783-84 (Stevens, J., dissenting). He observed that no such concern arises in interpreting § 1985(3) “to provide a remedy against the violent interference with women exercising their privilege—indeed, their right—to engage in interstate travel to obtain an abortion.” *Id.* at 784-85 (Stevens, J., dissenting). *See also id.* at 800 (O’Connor, J., dissenting) (indicating that the class-based animus requirement comes from the Court’s earlier efforts to “avoid[] the constitutional difficulties of federalizing every crime or tort committed by two or more persons, while giving effect to the enacting Congress’ condemnation of private action against individuals on account of their group affiliation”).

course only women can become pregnant and therefore need abortions, the Court's intent requirement cannot be met even by such inexorable and notorious coincidence. Instead it must be shown that the action was taken "at least in part 'because of,' not merely 'in spite of,' " its adverse impact on the particular class.⁴⁷⁶ With respect to the "aimed at" requirement, the Court ruled that the only right protected against private encroachment at issue in *Bray* was the right to interstate travel (not abortion). Operation Rescue opposes abortion, not interstate travel, the Court reasoned: The blockades do not erect "actual barriers" to interstate movement, nor do they discriminate against out-of-state women.⁴⁷⁷

Bray's remorseless celebration of abstract principle, which is almost other-worldly in the perfect lifeless logic of its conclusion that the violent harassment of abortion clinic patients and staff has nothing particularly to do with women, is bad news indeed for abortion-rights advocates in particular and women's rights advocates in general. Yet it is, as discussed above, entirely consistent with a masculinist approach to legal problem solving.⁴⁷⁸ I have already discussed two conceptual bases on which an ethic of care would question the Court's premises in *Bray*. One involves an ethic of care's view of equality under the caste-abolition principle as concerned with exploitation, domination, and marginalization rather than intent.⁴⁷⁹ Another derives from the related critique of the Court's negative rights paradigm, which underlies the intent requirement.⁴⁸⁰

An interpretation informed by the caste-abolition principle would be more faithful to the normative and remedial choices embodied in section 1985(3) than is Justice Scalia's approach to the case "as though it presented an abstract question of logical deduction."⁴⁸¹ As Justice Stevens explained in his *Bray* dissent, section 1985(3) provided a federal judicial remedy as "a response to the massive, organized lawlessness that infected our Southern States during the post-Civil War era."⁴⁸² Those conditions, like the black codes, perpetuated former slaves' caste status by effectively depriving them—through terrorist rather than de jure means—of the ability to participate in the

476. *Id.* at 760 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

477. *Id.* at 762-64.

478. *See supra* part III.B.

479. *See supra* notes 332-61 and accompanying text.

480. *See supra* notes 375-93 and accompanying text.

481. *Bray*, 113 S. Ct. at 780 (Stevens, J., dissenting).

482. *Id.* at 779 (Stevens, J., dissenting).

civil community.⁴⁸³ By the same token, Operation Rescue's use of unlawful and violent means to oppose abortion, their purpose to target a protected class on account of a class characteristic to prevent class members' exercise of a variety of rights, and "the deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting legitimate activities" have an analogous impact.⁴⁸⁴ Indeed, such action has been characterized as a form of

483. Cf. *Blyew v. United States*, 80 U.S. 581 (1871) (Bradley, J., dissenting). Justice Bradley argued in his dissenting opinion:

Suppose that, in any State, assault and battery, mayhem—nay, murder itself, could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that State? . . . To deprive a whole class of the community of this right [to bring the offender to justice], to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.

Id. at 597-99 (Bradley, J., dissenting).

484. *Bray*, 113 S. Ct. at 802 (O'Connor, J., dissenting). Assuming that women are a protected class, under Justice O'Connor's view § 1985(3) would reach "conspiracies whose motivation is directly related to characteristics unique to that class." *Id.* (O'Connor, J., dissenting). The relevant class characteristics are the ability to become pregnant and to terminate pregnancy. *Id.* (O'Connor, J., dissenting). The Supreme Court has not yet decided whether gender bias falls within § 1985(3), although one case expressed doubt whether discriminatory animus other than racial bias would be within the statute. *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 836 (1983). Most Courts of Appeals to consider the question, however, have ruled that § 1985(3) does reach gender-based animus. See *National Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *rev'd in part and vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (collecting citations).

Justice Souter, who concurred in the judgment largely on the basis of stare decisis, admitted that while the Court's "class-based animus" requirement

did, of course, effectively narrow the scope of the clause, it did so probably to the point of overkill, unsupported by any indication of an understanding on the part of Congress that the animus to deny equality of rights lying at the heart of an equal protection violation as the legislation's sponsors understood it would necessarily be an animus based on race or some like character.

Bray, 113 S. Ct. at 772 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter also would have reached the hindrance or prevention claim, would have concluded that it was not subject to the same strictures as the deprivation claim, and would have found a violation when a conspiracy's "purpose is to hinder or prevent law enforcement authorities from giving normal police protection to women attempting to exercise the right to abortion recognized in [*Casey*]." *Id.* at 777 (Souter, J., concurring in the judgment in part and dissenting in part). Justice Souter would have reached the latter conclusion under a rational basis test: "[A] classification necessarily lacks any positive relationship to a legitimate state purpose, and consequently fails rational basis scrutiny, when it withdraws a general public benefit on account of the exercise of a right otherwise guaranteed by the Constitution." *Id.* (Souter, J., concurring in the judgment in part and

terrorism.⁴⁸⁵ Justice Stevens roundly criticized the Court's context-blind reliance on rationality as the test of discriminatory intent as "inappropriate in the civil rights context, where what seems rational to an oppressor seems equally irrational to a victim. Opposition to desegregation, and opposition to the voting rights of both African-Americans and women, were certainly at one time considered rational propositions."⁴⁸⁶

dissenting in part). Since *Bray*, at least one court of appeals has recognized a hindrance claim against clinic harassment. *National Abortions Fed'n v. Operation Rescue*, 8 F.3d 680, 687 (9th Cir. 1993).

485. One study has concluded that

[a]ccording to official and academic definitions, most of the violence against abortion clinics should be counted as terrorism. This is clearly so in cases of bombings and arson. Many other incidents of terror inducement usually considered harassment should also be included because of their fit with the definition. Frequently they are forms of criminal activity aimed toward creating fear in a manner that has affected personal practices and social policy and have resulted in the attainment of certain political objectives.

Michele Wilson & John Lynxwiler, *Abortion Clinic Violence as Terrorism*, 11 TERRORISM 263, 270 (1988).

486. 113 S. Ct. at 788 (Stevens, J., dissenting). Justice Scalia's reasoning thus has difficulty standing on its own two feet. One commonly understood meaning of the term "rational" is a principle of comprehension and consistency: Rational persons "know their own interests more or less accurately; they are capable of tracing out the likely consequences of adopting one practice rather than another; [and] they are capable of adhering to a course of action once they have decided upon it." John Rawls, *Justice as Fairness*, in *POLITICAL AND SOCIAL PHILOSOPHY: TRADITIONAL AND CONTEMPORARY READINGS* 315, 319 (J. Charles King & James A. McGilvray eds., 1973). "Rational" also implies the opposite of emotional. Neither definition compels Scalia's result. The requirement of consistency with given premises tells us nothing about the normative content of those premises. A person who hates women, or who (not necessarily maliciously) believes that their "paramount destiny and mission are to fulfil the noble and benign offices of wife and mother," (to quote Justice Bradley's concurrence in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873)), could easily be acting "rationally," that is, dispassionately and consistently with such a belief system, in opposing abortion. Reason often has been deployed to justify racism and sexism. See generally Hovenkamp, *supra* note 352, at 627-37 (noting that late nineteenth and early twentieth century social science's belief in harmful effects of racial intermixing was cited in defense of state-mandated segregation). Conversely, those evils have often been most successfully opposed by activating the emotional responses of compassion for their victims and outrage at the injustice. See, e.g., MAHATMA GHANDI, *THE ESSENTIAL GHANDI: AN ANTHOLOGY OF HIS WRITINGS ON HIS LIFE, WORK, AND IDEAS* (Louis Fischer ed., 1962).

Justice Stevens agreed that it is sufficient to show that the conspiracy targets "conduct that only members of the protected class have the capacity to perform"; that is, "[i]t is enough that the conspiracy be motivated at least in part by its adverse effects on women." *Bray*, 113 S. Ct. at 787 (Stevens, J., dissenting) (internal quotations omitted). Stevens also added that Operation Rescue's conduct was motivated, at least in part, by "the invidious belief that individual women are not capable of deciding whether to terminate a pregnancy, or that they should not be allowed to act on such a decision." *Id.* at 788 (Stevens, J., dissenting) ("Petitioners' conduct is designed to deny every woman the

The Court's constricted approach to the "aimed at" requirement also overlooks the practical impact of harassment activities.⁴⁸⁷ A substantial number of women travel interstate for abortion, a choice that may result from several possible factors: the unavailability of abortion services (either any at all or the kind needed) in their community; the increasing differences in abortion laws from state to state; concerns for confidentiality; and a desire to escape the kind of harassment inflicted by petitioners in *Bray*.⁴⁸⁸ The net result of the Court's test is to ignore the cumulative effect of the conspiracy and its interaction with laws like those upheld in *Casey*. It also perversely allows the conspirators to acquire immunity from liability under the

opportunity to exercise a constitutional right that *only* women possess.").

487. As mentioned above, the "aimed at" requirement derives from the Court's concern over the extent of congressional authority under § 5 of the Fourteenth Amendment to regulate purely private action. The various opinions in *Bray* describe several approaches to this problem.

One approach is to find, as did Justice Stevens under his more effects-oriented "intent" test, an intent to obstruct respondents' right to interstate travel. There was ample record evidence to support that conclusion; between 20 and 30% of the patients at one of the respondent clinics and over half of the patients at another were from out of state. *Bray*, 113 S. Ct. at 792 (Stevens, J., dissenting). More generally, the Alan Guttmacher Institute reports that 26% of the women from a 10-state area traveled to other states to obtain abortion services. Stanley Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987-88*, 22 FAM. PLAN. PERSP. 102, 105 (1990). "Making their destination inaccessible to women who have engaged in interstate travel for a single purpose is unquestionably a burden on that travel. That burden was not only a foreseeable and natural consequence of the blockades, but indeed was also one of the intended consequences of petitioners' conspiracy." *Bray*, 113 S. Ct. at 792 (Stevens, J., dissenting). The Court recognized an analogous problem in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe*, in which it ruled that an in-state residency requirement for access to abortion violated that right. The fact that Georgia also imposed restrictions that burdened in-state residents hardly saved the measure. *Doe*, 410 U.S. at 200.

Another approach would find a violation of the second clause of § 1985(3), which prohibits conspiracies "for the purpose of preventing or hindering . . . any State . . . from giving or securing to all persons . . . the equal protection of the laws." 42 U.S.C. § 1985(3) (1988). The Court concluded that such a "hindrance" claim was not properly before the Court, and suggested that even if it were, the animus and aimed at requirements probably would apply to defeat it as well. 113 S. Ct. at 758-62. Justice O'Connor would have allowed respondents to advance their hindrance claim. She would have applied to it her much less demanding intent test and also would have found that the hindrance clause covered conduct aimed at obstructing local law enforcement. *Id.* at 804 (O'Connor, J., dissenting). Justice Souter also would have reached the hindrance claim. In his view, the conspirators' act of thwarting state officials in the exercise of state authority "would be tantamount to state action" and therefore well within congressional authority under § 5 of the Fourteenth Amendment. *Id.* at 776 (Souter, J., concurring in the judgment in part and dissenting in part).

488. Brief for the National Abortion Federation & Planned Parenthood Federation of America, Inc., as *amici curiae* in support of respondents at 20-23, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

1871 Act for the harm they inflict on women who need to travel interstate to obtain abortion services by the simple expedient of including some domestic victims.⁴⁸⁹

The opinions of Justices O'Connor, Souter, and Stevens demonstrate, from a variety of approaches, that neither the text nor the history of section 1985(3) compel the Court's result.⁴⁹⁰ A Court sensitive to the role of clinic harassment in the broader problem of access to abortion would see that extending federal protection to abortion patients would be consistent with the goals of the statute transposed into a modern setting.⁴⁹¹ By precluding, through the exercise of lawless violence, harassment victims from exercising their rights, clinic harassment campaigns in effect turn those victims into second-class citizens in their need for abortion services—just as Klan violence combined with other forces to perpetuate former slaves' subjugation.⁴⁹² This caste effect is evident, for example, from the fact that the kind of harm inflicted on blockade victims specifically targets their uniquely female circumstance as abortion patients.⁴⁹³

489. Justice Stevens pointedly tied this criticism of the Court's discrimination test to the purposes of the 1871 Act:

The Reconstruction Congress would have been startled, I think, to learn that § 1985(3) protected freed slaves and their supporters from Klan violence not covered by the Thirteenth Amendment only if the Klan members spared local African-Americans and abolitionists their wrath. And it would have been shocked to learn that its law offered relief from a Klan lynching of an out-of-state abolitionist only if the plaintiff could show that the Klan specifically intended to prevent his travel between the states.

Bray, 113 S. Ct. at 795 (Stevens, J., dissenting).

490. See *supra* notes 486-88.

491. As Justice Stevens observed, the record in *Bray* showed "a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Klan Act of 1871 and gave it its name." *Bray*, 113 S. Ct. at 782 (Stevens, J., dissenting).

492. See *supra* notes 483-84.

493. The trial court in *Bray* specifically found that the defendants' actions created a substantial risk to clinic patients of physical and mental harm. 113 S. Ct. at 780 & n.5 (Stevens, J. dissenting). In addition to the stress and anxiety caused to women who attempt to brave the demonstrators to enter the clinics, the court found that the demonstrators sometimes succeeded in closing clinics temporarily and thus caused substantial harm to those "patients requiring the laminaria removal procedure or other vital medical services[, who] must either postpone the required treatment and assume the attendant risks or seek the services elsewhere. Uncontradicted trial testimony established that there were numerous economic and psychological barriers to obtaining these services elsewhere." National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part sub nom.* *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). Indeed, such activities have interfered with women's health care generally, because targeted clinics often provide a range of gynecological services in addition to abortions.

The need for federal protection in such circumstances parallels in several important respects conditions that prompted enactment of the 1871 Act. Absent congressional action, clinics face the disadvantages of reliance on state law that resemble the problems toward which section 1985(3) was directed.⁴⁹⁴ State and local courts may be more vulnerable to local political pressure from anti-abortion rights groups. Even clinics that obtain injunctive relief would be dependent on state and local law-enforcement resources to enforce a court order. A frequent tactic is for demonstrators to overwhelm the capacities of local police forces and courts.⁴⁹⁵ Women's rights are left with

494. Justice Kennedy suggested in his concurring opinion in *Bray* that respondents were not entirely without recourse to federal relief. *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring). Under 42 U.S.C. § 10501, states may seek federal assistance when state resources are inadequate to protect state citizens and property or to enforce the criminal law. Such a request would allow the Attorney General of the United States to make available to the state the full range of federal law enforcement resources.

Section 10501 is hardly satisfactory from the patients' or clinics' perspectives. It first requires them to persuade the state to make such a request. Even then, the request falls within the discretion of the Executive branch, which until recently has been overtly hostile to this very problem. For example, President Reagan promised not to prosecute clinic blockaders, and the Bush administration sided with Operation Rescue in *Bray*. See JUDGES, *supra* note 90, at 43-44. Section 1985(3), by contrast, provides for a prompt, individual, judicial claim of right.

495. The amicus curiae brief submitted by the city of Falls Church, Virginia, in support of the abortion clinics in *Bray* describes the difficulties faced by localities targeted for Operation Rescue blockades:

Falls Church, Virginia was the site of Operation Rescue blockades enjoined in this case, and the city . . . urge[s] the Court to affirm the injunction. Operation Rescue repeatedly summoned hundreds of people to Falls Church to mass around Commonwealth Women's Clinic and seal it off, barring women's access to the clinic for abortions or other medical care. Faced with concerted efforts to incapacitate them, the 30-member Falls Church police force cannot secure access to the clinic premises and adjacent public streets. After entry of the injunction under 42 U.S.C. § 1985(3), however, the illegal blockades stopped. The federal injunction has been critical to effective law enforcement in Falls Church. Operation Rescue is a nationwide effort, and purely local solutions are unrealistic and inappropriate. Injunctions under state law must be litigated on a case-by-case basis, and pertain only to a particular property. Once one clinic is protected, others in the state bear the brunt of the blockades. Moreover, jurisdiction to prosecute persons in contempt of state court injunctions is only state-wide, and many of the blockaders are from out of state.

Brief for Falls Church, Virginia, as *amicus curiae* in support of Respondents at ii, *Bray* v. Alexandria Women's Clinic, 113 S. Ct. 753 (1993) (No. 90-985). Falls Church explained that local prosecutorial resources may also be inadequate to process charges against the busloads of arrestees. *Id.* Falls Church, for example, employs only one full-time City Attorney and a part-time assistant, who were swamped by the hordes of arrestees. *Id.* Similar limitations constrain local judicial resources. Again in Falls Church, the city had to consolidate the defendants' trials and hold them in the community center gymnasium, the only facility large enough to handle the crowd. *Id.* These problems are nationally

ineffective, and certainly not equal, legal protection at the state level.⁴⁹⁶

Unlike the Court, blockade activists plainly understand all too well the interaction between their activities and other factors that render access to abortion difficult for many women.⁴⁹⁷ The number of abortion providers in the United States is decreasing and their geographic distribution is becoming less uniform.⁴⁹⁸ By several measures, access to abortion services has become increasingly difficult for many women living outside of metropolitan areas.⁴⁹⁹ Other

significant. The National Abortion Federation reports that between January 1987 and December 1990, 419 clinic blockades resulted in over 26,000 arrests. The blockades involved destruction of property, invasion of clinics, and overrunning of police lines. Brief for the National Abortion Federation and Planned Parenthood Federation of America, Inc., as *amici curiae* in support of Respondents at 4-6, *Bray v. Alexandria Women's Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

496. Here Judith Thomson's equality argument has considerable force. Men are simply not subject to the kind of abuse inflicted on women by clinic harassment campaigns. The very absence of a fitting and non-absurd parallel example (vasectomy or urology clinic blockades?) demonstrates the inevitable inequality produced by these campaigns.

497. For data on the declining number of abortion providers, see *infra* notes 498-500. In response to the data, Operation Rescue spokesman Bob Jewitt proclaimed: "We feel we've had a significant impact. We're scaring the tar out of abortionists." *Access: Drop in Providers Due to Residency Training*, AMERICAN POLITICAL NETWORK: ABORTION REPORT, Apr. 15, 1992 [hereinafter *Drop in Providers*].

498. Between 1982 and 1985, for example, the number of providers declined by 8%. Stanley K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63, 68 (1987). Between 1982 and 1988, the number of providers fell by more than 300. *Drop in Providers*, *supra* note 497 (quoting data from the Alan Guttmacher Institute).

499. For example, 82% of American counties have no identified provider (up from 78% in 1982); yet 30% of women of childbearing age live in those counties. Henshaw et al., *supra* note 498, at 65. Further, 92% of the U.S. counties, which house 43% of the women, lack providers who perform more than 400 abortions per annum (and who are much more likely to provide services on request rather than restricting service to the physician's established patients or only in limited circumstances). *Id.* AGI also found that 79% of all nonmetropolitan women live in counties with no providers at all. *Id.* Because "there is abundant evidence that the local availability of abortion services has an important effect on the utilization rate," the large disparity in abortion rates between states is additional evidence of unequal access to abortion services. *Id.* at 66. Many women in rural states like Arkansas—which has only a handful of overt abortion providers for the entire population (operating in Little Rock in central Arkansas and in Fayetteville in the northwest corner of the state), some very remote counties, and a relatively underdeveloped transportation infrastructure—thus face substantial obstacles in obtaining access to abortion services. Nationwide, rural states or states in which transportation to urban areas might be difficult have some of the highest percentages of counties without clinics or hospitals for abortions. For example, the following states have the highest such percentages: Alabama, 91%; Arkansas, 96%; Kentucky, 98%; Louisiana, 92%; Minnesota, 94%; Mississippi, 96%; North Dakota, 94%; Oklahoma, 95%; South Dakota, 98%; Missouri, 94%; Nebraska, 98%; Texas, 91%; West Virginia, 95%; and Wisconsin, 92%.

factors also limit access to abortion services. One is the shrinking number of hospitals that perform abortions and the limited number of all providers who perform late-term abortions. The number of providers is likely to continue to decrease.⁵⁰⁰ The cost of abortion

Compare the percentages for the following states: Connecticut, 13%; Delaware, 0%; Maryland, 14%; District of Columbia, 0%; New York, 23%. NAF: *Legal Abortions Tougher to Get*, AMERICAN POLITICAL NETWORK: ABORTION REPORT, May 1, 1992 (quoting chart compiled by USA Today from National Abortion Federation data).

Developments in North Dakota, which does not even have a Planned Parenthood affiliate, illustrate the problem. No public funds are available for abortions and public hospitals are prohibited from performing abortions. In 1990, the only physician among the state's 1200 who would perform abortions (he did about 450 a year) retired at the age of 72. The women's health clinic in Fargo has to fly doctors in from Minnesota to perform the procedure. *Lambs of Christ: "60 Minutes" on Lambs Who Won't Be Silenced*, AMERICAN POLITICAL NETWORK: ABORTION REPORT, Feb. 3, 1992 (excerpting Leslie Stahl's report on Fargo clinic and Dr. Susan Wicklund's airplane commute from out of state); *North Dakota: A Hostile Landscape for Abortion*, AMERICAN POLITICAL NETWORK: ABORTION REPORT, May 7, 1990 (reporting on Dr. Robert Lucy's retirement).

500. The number of medical school obstetrics/gynecology programs that provide training in first trimester abortions has decreased from nearly 25% in 1985 to 12% today. Only seven percent offer such training for second trimester abortions. *Drop in Providers*, *supra* note 497 (quoting study by Dr. Trent McKay, University of California at Davis); Julie Johnson et al., *Abortion: The Future is Already Here*, TIME, May 4, 1992, at 26, 29. Furthermore, there has been an increase (from 27% to 31%) in the number of programs that provide no abortion training at all. *Drop in Providers*, *supra* note 497. These factors disproportionately affect younger and minority women, who tend to delay abortion longer. JUDGES, *supra* note 90, at 36.

The shrinking provider pool has led to several controversial proposals. Recently, the executive board of the American College of Obstetricians and Gynecologists ("ACOG") recommended that trained non-physicians (i.e., physicians' assistants) should be allowed to perform routine, low-risk abortions. A 1986 study of 2,500 cases found no significant difference in the complication rate between abortions performed by physicians and those done by their assistants. Sandra G. Boodman, *Should Non-Physicians Perform Abortions? Shortage of Trained Providers of the Procedure Leads to a Controversial Proposal*, WASH. POST, Feb. 15, 1994, at Z7. The ACOG proposal, which is advisory only, does not provide immediate relief from state laws requiring that abortions be performed by physicians; it does, however, undermine the contention that such laws are justified by the state's interest in protecting maternal health. See *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428-39 (1983) (referring to ACOG and American Public Health Association recommendations in reaffirming *Roe's* trimester framework and in invalidating, as not reasonably related to protecting maternal health, Ohio law requiring that second-trimester abortions be performed in hospitals). One could argue that, because of the availability problem and the cost of physician time, a physician-only requirement constitutes a substantial obstacle to pre-viability abortions if it is not justified on the basis of protecting women's health.

Another proposal to address the availability problem is to require residency programs to train OB/GYNs in abortion techniques (unless the resident has a religious or moral objection). A committee of the Accreditation Council of Graduate Medical Education has recommended such a requirement. Sara Aase, *Many See Need for Abortion Training; Many in Medical Profession Support Making Procedure Required Learning*, ST. PAUL STAR TRIBUNE, Feb. 10, 1994, at 7B; Boodman, *supra*, at Z7. Several metropolitan counties are

services also obviously is an important factor, particularly for the poor.⁵⁰¹ Given the Supreme Court's current trend toward permitting a variety of cost-increasing restrictions on abortion, as well as the declining number of providers, it seems likely that costs will increase.

Regardless of whether the Supreme Court ever completely overrules *Roe v. Wade*, access to abortion services may continue to contract—especially for indigent and rural women.⁵⁰² Viewed in this context, harassment of abortion providers undoubtedly has an adverse impact on accessibility. Although polls indicate that most people oppose such tactics, anti-abortion harassment is widespread in the United States.⁵⁰³ Harassment campaigns frequently target stand-

considering similar proposals for the hospitals under their control. Aase, *supra*, at 7B. As this Article was going to press, the Accreditation Council adopted the abortion training requirement. Elisabeth Rosenthal, *Finances and Fear Spurring Hospitals to Drop Abortions*, N.Y. TIMES, Feb. 20, 1995, at A1, col. 1.

501. See *supra* notes 364-94 and accompanying text.

502. The Clinton administration has made some modest progress, for example in removing a number of federal restrictions and in rescinding the gag rule, see *supra* note 394, but many access-inhibiting conditions remain in force.

503. Jacqueline D. Forrest & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 FAM. PLAN. PERSP. 9, 13 (1987). According to a recent poll by Political/Media Research (sponsored by the Sioux Falls, South Dakota *Argus Leader*), the lowest disapproval rating of Operation Rescue tactics has been 76%. "Just about everywhere we've [taken a poll], they're kind of viewed as being on the level of the (Ku Klux) Klan, really viewed like slime." *South Dakota: 55% Want Abortion Legal, 39% Do Not*, AMERICAN POLITICAL NETWORK: ABORTION REPORT, Apr. 9, 1993 (quoting Political/Media Research Vice-President Del Ali).

To obtain a picture of the extent and nature of harassment activity nationally, the Alan Guttmacher Institute ("AGI") surveyed providers in 1986, receiving responses from 722 hospitals and 927 nonhospital facilities. AGI reports that, in addition to being the target of picketing:

[A]lmost half (42-48 percent) [of respondents] reported such activities as distribution of antiabortion literature inside the facility, bomb threats, physical contact with or blocking of patients by picketers, numerous no-show appointments made to disrupt the scheduling of legitimate patients and demonstrations loud enough to be heard inside the facility. Twenty-nine percent of facilities were invaded by demonstrators in 1985, and almost as many were vandalized. More than 20 percent of facilities had their telephone lines jammed. . . . Nineteen percent of the providers said their staff members had received death threats, and 16 percent reported that the homes of staff members had been picketed. Sixteen percent of the providers reported that patients had been harassed with phone calls or visits at home

Forrest & Henshaw, *supra*, at 10. Furthermore, according to the National Abortion Federation, 51 providers received bomb threats in 1986, five were the victims of arson or bomb attempts, and six facilities were actually damaged or destroyed. *Id.* at 9. AGI reports that anti-abortion harassment was most widespread and severe in the Midwest and South. *Id.* at 11. More recent accounts indicate that threats and violence continue. For example, "it is estimated that antiabortion violence has resulted in \$7.6 million in direct damages." Brief of the National Abortion Federation and Planned Parenthood Federation

alone clinics, where most abortions are performed. Harassment ranges from peaceful picketing to blockades, firebombing, chemical attacks, death threats, and now assassination.⁵⁰⁴ While such cam-

of America, Inc., as *amici curiae* in support of Respondents at 4-6, *Bray v. Alexandria Women's Clinic*, 113 U.S. 753 (1993) (No. 90-985).

According to a national survey reported by The Fund for the Feminist Majority, *one-half* of all responding abortion clinics had been subject to some form of violent harassment in the first seven months of 1993. Roni Rabin, *Study: Clinics Under Fire; Bill Seeks to Halt Attacks on Abortion Centers*, *NEWSDAY*, Nov. 5, 1993, at 17. The actions included death threats (20%), bomb attacks (18%), chemical attacks (10%), arson, and blockades (16%). *Id.* A survey conducted by the anti-abortion group Life Dynamics (which disguised its orientation for purposes of the survey by calling itself "Project Choice") boasted that 87% of the respondents reported being victims of anti-abortion harassment or violence. *Activists: Pro-Lifers Conduct "Deceptive Survey," AMERICAN POLITICAL NETWORK: ABORTION REPORT*, Apr. 16, 1993.

504. See *supra* note 503; Forrest & Henshaw, *supra* note 503, at 9. Operation Rescue in particular has been very active in campaigns in a number of cities, including Atlanta, New York, Buffalo, Wichita, and Baton Rouge. The *Georgia State Bar Journal* describes Operation Rescue's tactics during the "Siege of Atlanta" in the summer of 1988:

Demonstrators arrived en masse, swarming onto the private property of the clinics, sometimes invading inside the clinic by deception or force. Then locking arms, sitting down, crawling and sprawling, they refused to move or allow any person access into or out of the clinics for hours at a time. Meanwhile, hundreds of demonstrators unwilling to risk arrest marched, chanted, screamed, and prayed for the television cameras amidst gory pictures, plastic fetuses, and graphic placards.

Elizabeth J. Appley, *Two Decades of Reproductive Freedom Litigation and Activism in Georgia: From Doe v. Bolton to Atlanta v. Operation Rescue*, 28 *GEO. ST. B.J.* 34, 38 (1991). Operation Rescue often hopes to overwhelm municipalities' law-enforcement capabilities with thousands of arrestees. See *supra* note 495. Its campaigns have imposed substantial costs on target communities.

Dr. William Harrison, the only remaining open abortion provider in northwest Arkansas, relates his experiences with harassment. His Fayetteville Women's Clinic, which offers a general OB/GYN practice that includes abortions, has been vandalized twice and firebombed once. Protesters would congregate in front of his clinic and scream at his patients. He has had numerous threats made against his life, several in person and apparently serious. According to Dr. Harrison, the firebombing was committed by a 14-year-old boy who, after being shown the film "Silent Scream" and being told that babies were being killed in the clinic, placed an incendiary device in the clinic's basement window.

Dr. Harrison states that before the harassment began in earnest in Fayetteville, coincident with political exploitation of the abortion issue in the 1982 off-year election, 13 physicians openly provided abortion services in northwest Arkansas; now he is the only one. As a result of the harassment, Dr. Harrison lost two partners (neither of whom did abortions to begin with) and two employees. Although well-respected in the medical community, he remains unable to attract a partner because of the threat of harassment. His casualty insurance was canceled after the second vandalism attack and he was unable to obtain replacement coverage for four years; his premiums increased six-fold. *JUDGES, supra* note 90, at 44-45.

Of course, the shooting of Dr. David Gunn has become a symbol of anti-abortion excesses. According to Florida abortion clinic owner Patricia Baird-Windle, two of her three doctors abruptly quit within 12 hours of the Gunn shooting. *Clinic Access: Pro-*

paigns have been largely unsuccessful in directly closing many clinics, both abortion and nonabortion patients are scared away or delayed.⁵⁰⁵ Furthermore, "the effects of such harassment on women who are already undergoing a stressful experience can only be adverse, . . . [and] patients seeking other types of care may encounter harassment as well."⁵⁰⁶ Such tactics are a powerful disincentive for health care providers to enter the field.⁵⁰⁷ Harassment also can combine with the distribution problem to have a greater impact on access for many women than what the numbers might first suggest.⁵⁰⁸ In states that have only a few providers, the closing of even one clinic or the chasing out of one provider can have a devastating impact on access to abortion for the women who happen to live there.⁵⁰⁹

Choicers Link Violence to Access, AMERICAN POLITICAL NETWORK: ABORTION REPORT, Oct. 15, 1993.

505. For example, Operation Rescue's extended "Summer of Mercy" campaign in Wichita, Kansas failed to close any clinics; it did, however, focus extensive media attention on its cause and is estimated to have interdicted at least 29 abortions. Georgia M. Sullivan, *Protection of Constitutional Guarantees Under 42 U.S.C. Section 1985(3): Operation Rescue's "Summer of Mercy,"* 49 WASH. & LEE L. REV. 237, 238 (1992).

506. Forrest & Henshaw, *supra* note 503, at 13; *see also* Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 668-69 (Fla. 1993), *aff'd in part and rev'd in part sub nom.*, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2522 (1994) (relating trial court findings that attempted blockade of Florida clinic increased stress to, and interfered with treatment of, clinic patients and drove patients away, causing delay and thus increased risk).

507. For example, Dr. Harrison belongs to the dwindling pre-*Roe* generation of physicians who remember the harm inflicted on women by illegal abortion. His willingness to endure the disruption, discomfort, abuse, and danger of extended harassment derives from his commitment to the welfare of his current patients informed by his memory of the harm suffered by his past patients. He also has concluded that speaking out publicly on the abortion issue is the best antidote to harassment, and his willingness to do so—along with community opposition to harassment and vigorous enforcement of criminal trespass laws—has played a large role in the decline of anti-abortion harassment in Fayetteville. *See* JUDGES, *supra* note 90, at 44-45. An entire generation of post-*Roe* physicians, however, have now entered the profession with no such perspective.

508. Another problem encountered by abortion providers is cancellation of insurance or difficulty with local officials, including denial of necessary permits. Johnson et al., *supra* note 500, at 28. For example, approximately 32% of the providers in the AGI study were notified that their malpractice insurance was being canceled or not renewed; 22% faced an analogous problem with their fire and casualty insurance. "Twenty-six percent said they had been asked to meet new or newly interpreted licensing requirements. . . ." Forrest & Henshaw, *supra* note 503, at 12.

509. *See supra* note 499 (discussing North Dakota's experience with a shortage of providers). An additional impact is increased costs for abortion providers, especially for security and legal services.

Congress, goaded by the outcry following *Bray* and the escalation of clinic violence, has now provided relief.⁵¹⁰ There is much to be said for a specific, contemporary political commitment to protect clinic patients from harassment.⁵¹¹ But legislative relief notwithstanding, *Bray* remains an unfortunate example of how rights interpreted without care can become no rights at all.⁵¹²

CONCLUSION

Is a care-based approach to abortion simply too “good” to be true? And is the abortion debate inevitably a Rorschach test for one’s own personal perspective? In addition to the problem of difference discussed above, potential external and internal critiques of relationalism with respect to abortion merit response. First, the relational account of abortion described above could be challenged as

510. On May 26, 1994, President Clinton signed into law the Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (Supp. 1994)), which provides both criminal and civil relief for actual or attempted force, threats, or physical obstruction to injure or interfere with anyone providing or receiving abortions or other reproductive services.

511. Too much should not be made of this argument. *Bray* did not involve an unenumerated constitutional right, it involved interpretation of a statute. Congress has not attempted to undo the Court’s reinvigoration of the Reconstruction era legislation. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (declining to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976), in part for that reason). To the contrary, in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991) (codified as amended in scattered sections of 42 U.S.C.), Congress strengthened § 1981 by overruling *Patterson’s* distinction between hiring and conditions of employment. Democratic-process arguments, without more, thus do not provide a complete defense of *Bray*. Indeed, an argument could be made that the legislative inertia ought to be cast in the other direction. Because the claim in *Bray* fit comfortably within the language and purposes of § 1985(3), perhaps groups who would defy those purposes ought to be put to the burden of having to seek relief in Congress. In *Patterson*, the Court reasoned that its previous interpretation of § 1981 in *Runyon* had not proved by experience to be at odds with prevailing notions of social justice or social welfare; “[t]o the contrary, *Runyon* is entirely consistent with our society’s deep commitment to the eradication of discrimination based on a person’s race or the color of his or her skin.” *Patterson*, 491 U.S. at 174. The opposite result in *Bray* would also be entirely consistent with our national norms. The issue is clinic violence, not simply opposition to abortion, and such lawlessness runs counter to national values concerning the rule of law and respect for rights of others.

512. To be sure, some federal protection is also now available under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988) (“RICO”). The Court’s interpretation of civil RICO not to require proof of economic motive allows civil enforcement actions in some cases to be brought against clinic harassers. See *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 806 (1994). Nevertheless, the broader and more far-reaching problem of the Court’s limited equality paradigm persists. Furthermore, § 1985(3) would have been a much more sensible statute to apply, as its origins and broad purposes are much closer to the problem of clinic harassment than are those of the already much-overworked RICO statute.

far too one-sided in its sensitivity to the woman's needs and its willingness to sacrifice the conceptus. From an external perspective, this objection invokes the familiar anti-abortion argument that the conceptus is a "person" equally entitled to the most basic human rights; and "official-story" pro-choicers would complain that relationalism thus fails adequately to counter the anti-abortion assertion of the unborn's interests.

Those objections assume that there ultimately is a correct resolution to the "personhood" paradox and would set a test for validity and coherence that neither the pro-life nor the liberal pro-choice side yet have met. The liberal pro-choice side's response to the personhood problem is incomplete and flawed whether formulated as a matter of constitutional law or morality. While even *Roe's* critics concede that the Court's reading of text and historical intent on the question of personhood is accurate,⁵¹³ it is difficult to see why the text should be read more strictly and historical intent should be more controlling when interpreting the constitutional term "person" than when adjudicating a claim to abortion rights. The liberal abortion-rights position thus begs the question whether the meaning not only of "liberty" but also of "person" can evolve.⁵¹⁴ Further, the Court's refusal in *Roe* on epistemological grounds to admit arguments concerning when "life" begins reflects a diffidence not evident in the Court's consideration of what "liberty" includes.⁵¹⁵ The proposition that one's constitutional status as a "person" depends upon the Court's definitional criteria has been powerfully criticized.⁵¹⁶

More particularly, resort to equality-based arguments concerning the unique burdens that pregnancy imposes on the woman conflates the question of the conceptus's personhood with the issue of balancing

513. See, e.g., Arnold H. Loewy, *Why Roe v. Wade Should Be Overruled*, 67 N.C. L. REV. 939, 942 n.21 (1989) ("There is not one shred of historical evidence, of which I am aware, that would suggest that the framers thought of fetuses as persons against whom the state could not act except with due process of law.").

514. Anti-abortion forces point to a range of developments—advances in embryology, fetology, and genetics; recognition of claims for wrongful fetal death; and prosecutions for in utero exposure to controlled substances and for fetal homicide—as evidencing the law's growing acknowledgement of the fetus as a person. See JUDGES, *supra* note 90, at 150.

515. The Court's professed agnosticism ignores several points: (1) there is something undeniably human and individually unique about the conceptus (at least at some point relatively early in gestation); (2) the conceptus is "alive" if a sensible definition of that term is the entity's dynamic ability to establish itself and to flourish; and (3) a conceptus arguably is much more of a human being than is a corporation, which the Court peremptorily concluded is a "person" under the Fourteenth Amendment. See *id.* at 151.

516. E.g., John Noonan, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668, 672-73 (1984).

the competing interests at stake. Such anomalous arguments implicitly, and disturbingly, assume that one's status as a "person"—and thus one's claim to the law's most basic protections—can be contingent on the impact that recognition of one's personhood has on the interests of another. Liberal pro-choicers shift to the opposite extreme, as in Thomson's effort to provide a moral defense of abortion. As discussed above, Thomson's analysis accords so much "personhood" status to the conceptus (to avoid the relational implications of gestation) that it hardly resembles a conceptus at all.⁵¹⁷

Nor does the range of anti-abortion rights arguments on the personhood question withstand close scrutiny. For one thing, some anti-abortion arguments reveal the mirror image of the pro-choice interpretive inconsistency. They often insist on a strict interpretivist approach to the question of a right to reproductive freedom, yet rely heavily on natural law theory to support their contention that a conceptus is a "person" under the Fourteenth Amendment—even though "liberty" is arguably a more capacious and flexible noun than is "person."⁵¹⁸ Next, at least some formulations of the pro-life personhood argument (1) can lead to such dubious conclusions as that spermicide amounts to homicide, and (2) are oblivious to the enormous differences among various stages of gestational development. Finally, Thomson's defense implicitly suggests how the personhood element of the anti-abortion argument may be more powerful than even its proponents would admit: If the conceptus, after all, is an ontologically distinct person, what then justifies its extraordinary and voracious claim to occupy, consume, and perhaps threaten the soma and psyche of its host?

From an internal perspective, the anticipated critique of this Article is two-fold. First, Goldstein's argument might be turned on itself to conclude that just as society cannot command mother-love, so too does the Court lack the power to force society to care for the unwanting pregnant woman in her distress. Second, as the anti-relationalists argue, abortion rights are arguably inconsistent with an ethic of care for the conceptus, who after all is the party least able to care for itself.

One response to the first point is that the level of care, in most cases, is not the same. The care demanded by *Roe* of the state is not

517. See *supra* notes 109-42 and accompanying text.

518. See JUDGES, *supra* note 90, at 150-51.

personal care, but instead is an impersonal substitute for it. The care demanded of the woman by abortion restrictions, by contrast, is personal in the strongest sense of the word. The state can coerce the woman into providing minimal sustenance, but not the fullness of mother-love necessary to the infant's flourishing. The care extracted by *Roe* is the minimal care-like response of not interfering. Unlike abortion restrictions, *Roe* does not exploit a special, innate sensitivity of an historically oppressed group, nor does it appropriate the existential integrity of the burdened group (persons uncomfortable with abortion) and transform that group's members into physically and psychologically different entities to accomplish the state's ends. *Roe's* demands therefore are not subject to equality objections informed by an ethic of care. Nor does *Roe* inhibit the flourishing of those persons who are distressed by abortion in the persistent, global way that unwanted coerced pregnancy constrains the woman; it therefore is less objectionable on autonomy grounds interpreted through an ethic of care.

The foregoing point is evident from *Casey's* outcome. The informed consent and waiting period provisions upheld in that case were not really about saving babies' lives or promoting informed consent. Such measures, while seriously affecting the women they do impact, will produce no more than a negligible decrease in the total number of abortions. And, as explained above, they add little to what is usually an already carefully considered decision. What such measures are really about, then, is the political appeasement—through largely symbolic legislation—of constituents troubled by abortion. That goal is achieved largely by the unethical bullying of the most vulnerable, disadvantaged women.

Fundamentally, as both aspects of this internal critique illustrate, the dilemma of abortion is that someone will inevitably be forced into the role of unwilling caregiver. The combination of unwanted pregnancy and the technological availability of safe abortion creates one of those painful situations in which it is impossible to avoid hurting someone. *Roe* seeks to strike a compromise—an appealing approach to such an intractable conflict—which is rendered more intelligible by adding considerations of care to liberty- and equality-based arguments.

Roe puts the burden on society when it arguably can better be borne there, and on the woman when arguably it can't. Whether the Court has identified the optimal fulcrum for shifting that burden is

open to question.⁵¹⁹ But reference to some gestational datum is intelligible from a variety of angles: the growing relational potential of the conceptus;⁵²⁰ the conceptus's increasing capacity for characteristically "human" functions such as cognition;⁵²¹ the conceptus's increasing morphological resemblance to a small person, the dismemberment of whom is morally repugnant to our shared sense of empathic kinship with our fellow human beings; the intuitive fairness of requiring the woman to make up her mind before any or all of these forces become too compelling; and the increasing likelihood that she will have made a commitment at some level anyway, even if she would much prefer not to have done so.

Given the divisive nature of the abortion controversy, it is not surprising to find rifts within the pro-abortion rights side that are almost as deep as those between pro- and anti-abortion rights activists. The predominance of an adversarial, power-oriented approach to abortion's painful dilemmas encourages polarization and exaggeration. To the extent that "masculinist" thinking is characterized by those attributes, the abortion debate has seen far too much of it already. Most participants seem to regard others with different views as opponents to overcome rather than as neighbors to understand, and the overall issue as a battle to win rather than a wounded relation to heal. Unencumbered by much sense of responsibility for the hurt inflicted by the conflict itself, activists are free to devote all their attention to tactics. The anti-relationalists in their own way perpetuate this approach. Their pro-choice partisanship perceives care-talk as imperiling abortion rights and therefore seeks to stamp out the threat, with little or no thought given to the harm occasioned by the dominance in this area of the individualistic, adversarial paradigm that they champion. This Article does not contend that relationalism offers the definitive, exclusive argument for reproductive freedom. It seems doubtful whether *any* conceptual system can do that, although most advocates appear determined to try.

I have not attempted to win the abortion wars here; I have argued only that relationalism has a positive contribution to make to the case for abortion rights. To be sure, the relationalist approach has

519. See, e.g., *id.* at 280-95.

520. See *supra* notes and accompanying text at 263-83.

521. CARL SAGAN, *THE DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE* 209 (1977); Carl Sagan & Ann Druyan, *Is It Possible to Be Pro-Life and Pro-Choice?*, *PARADE MAGAZINE*, Apr. 22, 1990, at 4.

its limits; but to require that it be beyond criticism would demand more from relationalism than any of the other leading perspectives on abortion have managed to provide. I have argued elsewhere that partisans on either side of the abortion debate could learn something valuable from each other if they could find a way to shout less and listen more.⁵²² Similarly, differing theorists who share the ultimate goal of securing women's equality and freedom have little to lose and much to gain from reconsidering the doubtful formulation of the issue as a contest between antipodal values of autonomy and connection. The real harm to women in that regard has resulted not from too little justice-talk and too much care-talk but from just too much talk and not enough real justice or care.

522. JUDGES, *supra* note 90, at 280-95.