

# Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy

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# ABORTION, THE UNDUE BURDEN STANDARD, AND THE EVISCERATION OF WOMEN'S PRIVACY

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## INTRODUCTION

- I. EVOLUTION OF THE RIGHT TO REPRODUCTIVE PRIVACY
- II. PRIVACY AND ABORTION
  - A. *Belief and Conscience*
  - B. *Privacy in Familial Decision-making*
  - C. *Privacy in Medical Decision-making*
  - D. *Bodily Integrity*
- III. PRIVACY ENCROACHMENTS UNDER THE UNDUE BURDEN STANDARD
  - A. *Interference with Belief and Conscience*
  - B. *Intrusions into Family Decision-making*
  - C. *Intrusions into Medical Decision-making*
  - D. *Violations of Bodily Integrity*

## CONCLUSION: THE PARADOX OF PRIVACY UNDER THE UNDUE BURDEN STANDARD

### INTRODUCTION

*Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>1</sup> which upheld the basic right to abortion but established a new, less protective, constitutional standard for abortion restrictions, has had a paradoxical effect on women's constitutional right to privacy. By reaffirming that women have the right to make the ultimate decision about whether to bear a child, *Casey* reinforced the strand of constitutional privacy grounded in decisional autonomy over important personal decisions. At the same time, *Casey*'s "undue burden" test has fostered extensive encroachments on women's personal privacy.

In trying to strike an impossible compromise on abortion, the Court in *Casey* opened the door to physical, familial, and spiritual invasions of women's privacy that serve little purpose but public shaming and humiliation.<sup>2</sup> The constitutional right to abortion under *Casey*

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1. 505 U.S. 833 (1992).

2. By "public shaming" I do not mean that the shaming necessarily occurs in the public realm, but rather that a process of shaming, or moral condemnation, is imposed upon abortion patients by the public, through federal and state abortion laws.

accordingly has come to reflect a thin, impoverished notion of privacy, in which women retain the bare right to make a decision while having nearly all facets of that decision subjected to intense scrutiny.

While the Court's adoption of the undue burden standard in 1992 immediately enabled states to invade women's privacy in new ways,<sup>3</sup> the Roberts Court has interpreted *Casey* expansively, to permit even greater erosions of the privacy boundaries that once protected the abortion decision.<sup>4</sup> The *Casey* standard is amorphous enough to allow a wide range of respect for women's privacy.<sup>5</sup> Now that Justice Kennedy is the Court's swing vote on abortion issues, he has become the key interpreter of the undue burden standard.<sup>6</sup> *Gonzales v. Carhart*,<sup>7</sup> which Justice Kennedy authored, gives us a bleak picture of his interpretation of an undue burden and the encroachments on privacy that the Justice Kennedy undue burden standard will permit.

This Article is organized into three parts. Part I reviews the evolution of the constitutional right to privacy, from its articulation in cases involving parental decision-making, to contraception, to abortion. Part II canvasses the different facets of privacy implicated in the abortion decision — including belief and conscience, familial decision-making, medical decision-making, and bodily integrity — and reviews cases in which the Supreme Court has recognized or acknowledged these privacy interests. Part III describes how *Casey*'s undue burden standard, although protecting women's ultimate right to choose abortion, has severely curtailed privacy protection for abortion, allowing regulations that invade all of these dimensions of abortion decision-making. The Article's Conclusion suggests that, notwithstanding the widespread view that privacy as a basis for protecting abortion rights is passé (and was perhaps always ill-advised), a renewed focus on privacy, coupled with the newer formulations sounding in liberty or autonomy, and equality, would help ensure more robust protection of a woman's right to terminate unwanted or untenable pregnancies.

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3. See Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 683-89 (2004) (discussing *Casey*'s approval of a 24-hour waiting period and the implications of the undue burden standard).

4. See, e.g., *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 132, 167-68 (2007) (upholding first-ever federal ban on certain abortion procedures, despite the ban's similarity to a Nebraska ban struck down by the Court in *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000)).

5. See Borgmann, *supra* note 3, at 678-79, 688 (noting that the *Casey* standard is susceptible to judicial manipulation).

6. See Charles Lane, *All Eyes on Kennedy in Court Debate on Abortion; Justice Expected to Be Swing Vote in Ruling on Late-Term Procedure*, *WASH. POST*, Nov. 8, 2006, at A3 (describing Justice Kennedy's expected role as the Court's new swing vote on abortion issues).

7. *Carhart II*, 550 U.S. 124.

## I. EVOLUTION OF THE RIGHT TO REPRODUCTIVE PRIVACY

The Supreme Court's early articulation of reproductive privacy had a distinctly spatial sense. In *Griswold v. Connecticut*, the Court upheld the right of married couples to use contraception.<sup>8</sup> The majority opinion, by Justice Douglas, found privacy in the "penumbras" of many different constitutional provisions,<sup>9</sup> but in the context of the law before the Court, the opinion emphasized the sanctity of the marital bedroom and the unseemliness of government intrusion there. Expressing concern about how the contraception ban might be enforced, Douglas wrote, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>10</sup> This conception of the home as a protected space, the Court noted, is echoed in express constitutional provisions, such as the Third Amendment's prohibition on the quartering of soldiers in private homes and the Fourth Amendment's protection against searches and seizures.<sup>11</sup>

The Court acknowledged that the "zone of privacy" is not simply a physical space and includes more abstract dimensions such as the rights of association, conscience, and belief.<sup>12</sup> More relevant to the private marital space that the Court carved out in *Griswold*, the Court noted that privacy encompasses the liberty of parents to determine how to raise their children.<sup>13</sup> *Meyer v. Nebraska*, which held that a law forbidding the teaching of foreign languages violated parents' right to "bring up children,"<sup>14</sup> and *Pierce v. Society of Sisters*, which held that Oregon's compulsory public education law unconstitutionally

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8. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

9. *Id.* at 484-86. Justice Douglas's articulation was elaborated upon by the concurring Justices in *Griswold*. See *id.* at 486-99 (Goldberg, J., concurring) (relying on Ninth Amendment); *id.* at 499-502 (Harlan, J., concurring) (relying on Fourteenth Amendment's due process clause); *id.* at 502-03 (White, J., concurring) (relying on Fourteenth Amendment's references to "liberty" and "due process").

10. *Id.* at 485-86 (majority opinion).

11. *Id.* at 484 (noting that these provisions establish "zones of privacy" (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

12. *Id.* at 483. For example, the Court discussed the right of belief recognized in *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (compulsory flag salute for public schoolchildren violated First Amendment), and the right of political association recognized in *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (compelled disclosure of NAACP membership lists violated freedom of association), and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-47 (1957) (association with Communist Party not valid grounds to exclude lawyer from practice). *Griswold*, 381 U.S. at 483.

13. See *Griswold*, 381 U.S. at 482 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

14. *Meyer*, 262 U.S. at 399-400.

“interfere[d] with the liberty of parents . . . to direct the upbringing and education of [their] children,”<sup>15</sup> supported *Griswold*'s notion of a kind of protected sphere around familial decision-making.

Seven years later, in *Eisenstadt v. Baird*,<sup>16</sup> the Court shifted abruptly to a model of privacy that emphasized individual autonomy, in contrast to the familial or marital decision-making embraced in *Griswold*.<sup>17</sup> *Eisenstadt* addressed a law that forbade the distribution of contraceptives to unmarried persons.<sup>18</sup> Lacking the “sacred precinct” of a marital bedroom,<sup>19</sup> the Court could not apply *Griswold*'s reasoning to invalidate the law. Instead, Justice Brennan's majority opinion held that the law violated equal protection, since it permitted only married couples to obtain contraception.<sup>20</sup> The Court, applying rational basis review, found that the differential treatment of unmarried individuals served neither to deter fornication nor to protect public health.<sup>21</sup> It concluded that, “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”<sup>22</sup>

Having decided the case on equal protection grounds, the Court then turned to privacy, where its discussion was brief, but striking:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>23</sup>

While the passage was not central to the Court's legal analysis, *Eisenstadt* has come to be identified with these words, and for good reason.<sup>24</sup> *Roe* was already on the docket when *Eisenstadt* was decided.<sup>25</sup> Indeed, it seemed quite clear that Justice Brennan had

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15. *Pierce*, 268 U.S. at 534-35.

16. 405 U.S. 438 (1972).

17. *Id.* at 453.

18. *Id.* at 440-42.

19. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

20. *Eisenstadt*, 405 U.S. at 454-55.

21. *Id.* at 447-52.

22. *Id.* at 453.

23. *Id.*

24. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 542-44 (2d ed. 1998) (discussing significance of Brennan's “crucial sentence”).

25. See *Roe v. Wade*, 410 U.S. 113 (1973) (first argued on Dec. 13, 1971).

deliberately inserted the privacy language in *Eisenstadt* to help pave the way for the Court's decision in *Roe*.<sup>26</sup>

*Roe v. Wade* recognized the right to abortion as encompassed by the constitutional right to privacy.<sup>27</sup> Given *Griswold's* talk of penumbras, and the plethora of constitutional provisions discussed in that opinion,<sup>28</sup> it had been difficult for the plaintiffs in *Roe* to predict what line of attack would be most persuasive. The case was argued twice.<sup>29</sup> In the first argument, plaintiffs' counsel, Sarah Weddington, acknowledged that the plaintiffs had originally hedged their bets by invoking a number of different constitutional provisions.<sup>30</sup> By the second argument, plaintiffs had narrowed their claims to vagueness and "the Ninth Amendment rights of a woman to determine whether or not she would continue or terminate a pregnancy."<sup>31</sup>

Relying as it had in *Griswold* on the right to privacy, the Court in *Roe* this time settled firmly on the Fourteenth Amendment Due Process Clause as the location of this right.<sup>32</sup> Justice Blackmun wrote for the seven Justice majority, "[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>33</sup> "This right of privacy," the Court went on,

whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>34</sup>

Yet, while *Eisenstadt* had pointed in the direction of decisional autonomy in profoundly personal decisions, Blackmun's opinion did

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26. See GARROW, *supra* note 24, at 542 (describing Supreme Court clerks' awareness of the statement's import); see also Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 167 (2006) ("Justice Brennan used the opportunity . . . in *Eisenstadt* to build a doctrinal bridge between" the contraception cases and the abortion cases.).

27. *Roe*, 410 U.S. at 153.

28. See *supra* note 9 (discussing the various constitutional provisions).

29. Transcript of Oral Argument, *Roe*, 410 U.S. 113 (No. 70-18), reprinted in 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 781, 807 (Philip Kurland & Gerhard Gasper eds., 1975) (initially argued Dec. 13, 1971, and reargued Oct. 11, 1972).

30. *Id.* at 788 ("We had originally brought this suit alleging both the due process cause, equal protection clause, the Ninth Amendment, and a variety of others.").

31. *Id.* at 808. The three-judge federal district court panel had enjoined the statute on these grounds. *Roe*, 410 U.S. at 121-22.

32. *Roe*, 410 U.S. at 164.

33. *Id.* at 152.

34. *Id.* at 153 (emphasis added).

not strongly emphasize women's autonomy. Instead, the opinion was oddly tentative in describing the effects of forced pregnancy, childbirth, and parenthood upon a woman. Using a detached, passive voice to describe these burdens, the Court wrote:

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. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>35</sup>

Aside from this single passage, women facing unintended pregnancies were largely absent from the Court's opinion in *Roe*. Insofar as the Court acknowledged the decision to be "private," the relevant private realm seemed to be the doctor's office.<sup>36</sup> The Court focused more intently on the abortion provider than the woman, referring to "the right of the physician to administer medical treatment according to his professional judgment," and describing abortion as "*in all its aspects . . . inherently, and primarily, a medical decision,*" for which "basic responsibility . . . must rest with the physician."<sup>37</sup>

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35. *Id.*

36. See Hunter, *supra* note 26, at 149. Rejecting the traditional view of *Roe v. Wade* as paying great deference to physicians, Nan Hunter claims that "the Justices who decided *Roe* shared a liberal belief in the value of medical authority because they assumed it to be a sphere which could operate independently of the state." *Id.*

37. *Roe*, 410 U.S. at 165-66 (emphasis added); see also *id.* at 164 (holding that, in the first trimester, "the *abortion decision* and its effectuation must be left to the medical judgment of the pregnant woman's attending physician") (emphasis added); *id.* at 163 (holding that, in the first trimester, "the attending physician, in consultation with his patient, is free to determine . . . that, in his medical judgment, the patient's pregnancy should be terminated"). Many commentators have attributed *Roe*'s focus on the physician as stemming from Justice Blackmun's personal admiration for the medical profession, given his experience as general counsel for the Mayo Clinic. See, e.g., Larry Gostin, *Guest Editor's Introduction*, 13 AM. J.L. & MED. 153, 153 (1987) (discussing Justice Blackmun's personal and professional relationship to the medical profession); Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J.L. & MED. 315, 320 (1987) ("*Roe v. Wade* bears many of the earmarks of . . . Justice Blackmun's early proclivity to trust too fully in the goodness of doctors."). But see Hunter, *supra* note 26, at 148-49 (disputing this account).

Since *Roe*, however, the Court's articulation of "privacy" in abortion decision-making (at least among the liberal Justices) has matured to embrace *Eisenstadt's* conception of personal autonomy in major life decisions. When the Court was poised to decide *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992,<sup>38</sup> it was not clear that the right to abortion would survive in any form.<sup>39</sup> But, while the Court in *Casey* let stand five out of the six provisions of the Pennsylvania Abortion Control Act it considered,<sup>40</sup> it upheld what it called *Roe's* "essential holding," reaffirming the right to privacy as encompassing the right to abortion.<sup>41</sup> Moreover, the Court's articulation of the right to privacy had evolved significantly since *Roe*. The joint opinion<sup>42</sup> expressly acknowledged that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>43</sup> It emphasized that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>44</sup>

The Court's framing of the right was welcomed by many as newly attentive to the importance of reproductive freedom to women's autonomy and equality.<sup>45</sup> Reacting to the decision, Professor Laurence Tribe

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38. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

39. See GARROW, *supra* note 24, at 688-92 (describing the political climate and changes in the Court's composition leading up to *Casey* and tensions surrounding the oral arguments); Borgmann, *supra* note 3, at 675-76 (discussing high stakes posed by the *Casey* decision); Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 319 (2006) ("As litigators for Planned Parenthood of Southern Pennsylvania and other Pennsylvania reproductive healthcare providers in the *Casey* litigation, we had awaited the day of the decision with foreboding.").

40. The Court invalidated only the statute's husband notification provision and the reporting requirement relating to that provision. *Casey*, 505 U.S. at 898-901. It upheld the medical emergency definition, 24-hour waiting period, parental consent requirement, and remainder of the reporting requirements. *Id.* at 880-87, 899-901; see also Borgmann, *supra* note 3, at 679 (discussing *Casey*).

41. *Casey*, 505 U.S. at 846, 874. But see Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. (forthcoming 2010) (manuscript at 11), available at <http://ssrn.com/abstract=1456026> (arguing that *Casey* reframed the right to abortion as rooted in liberty, not privacy).

42. The controlling opinion in *Casey* was jointly authored by Justice Kennedy, Justice O'Connor, and Justice Souter. *Casey*, 505 U.S. at 833.

43. *Id.* at 856.

44. *Id.* at 852.

45. See, e.g., GARROW, *supra* note 24, at 701 (recounting editorial and scholarly reactions to *Casey*); David B. Cruz, "The Sexual Freedom Cases"? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 357-58 (2000) (discussing scholarly interpretations of *Casey* as recognizing the gender equality implications of abortion regulation); Wharton et al., *supra* note 39, at 319, 329 (noting that the *Casey* joint opinion respected the connection between women's reproductive liberty and their autonomy and equality); Linda Greenhouse, *The Supreme Court: A Telling Court Opinion*, N.Y. TIMES, July 1, 1992, at A1 ("In contrast to the emphasis in *Roe v. Wade* on the



exclaimed, "This opinion makes sense and puts the right to abortion on a firmer jurisprudential foundation than ever before."<sup>46</sup> Justice Blackmun, who had partially dissented in *Casey* and argued for upholding *Roe*'s original strict scrutiny framework,<sup>47</sup> later praised the *Casey* joint opinion for its "robust view of individual liberty and the equal protection undertone."<sup>48</sup>

## II. PRIVACY AND ABORTION

*Casey*'s new conception of the right to privacy, while welcomed by many abortion rights supporters, was nevertheless somewhat cramped. In emphasizing the equality and autonomy aspects of the right to privacy, the *Casey* joint opinion seemed far less concerned about protecting the abortion decision from lesser governmental intrusions than in ensuring that women retain the ultimate choice of whether to terminate their pregnancies.<sup>49</sup> For example, the Court invalidated Pennsylvania's husband notification provision because it found that this restriction would be an insurmountable obstacle for some women:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.<sup>50</sup>

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medical and social hierarchy of abortion, this opinion placed the question of women's ability to control their reproductive lives in the context of modern doctrines of equality.".)

46. Greenhouse, *supra* note 45, at A1.

47. *Casey*, 505 U.S. at 922, 929-30 (Blackmun, J., concurring in part and dissenting in part).

48. Wharton et al., *supra* note 39, at 342 (quoting The Harry A. Blackmun Oral History Project, Interview by Harold Hongju Koh, Professor, Yale Law School, with Justice Harry Blackmun in New Haven, Conn., at 504 (June 20, 1995) (available in The Harry A. Blackmun Papers, Library of Congress, Madison Building, Manuscript Division)).

49. *See, e.g., Casey*, 505 U.S. at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."); Borgmann, *supra* note 3, at 684, 687-88 (arguing that the joint opinion suggests that only restrictions that are tantamount to a ban on abortion for some or all women constitute an undue burden).

50. *Casey*, 505 U.S. at 893-94. The joint opinion did suggest, although by no means unequivocally, that "undue burdens" might include certain lesser hindrances, including "significant" or "real" health risks, *id.* at 879-80, 886, and sufficient financial burdens, *id.* at 901. Nevertheless, other than the husband notification and related reporting provisions, the Court found that none of the Pennsylvania statute's provisions imposed a substantial obstacle. *See supra* note 40 (summarizing outcome of *Casey* decision).

This narrow focus on women's right to make the ultimate decision about abortion embraced autonomy at the expense of more traditional understandings of privacy. Indeed, some have suggested that *Casey* essentially abandoned privacy as a basis for abortion rights in favor of liberty.<sup>51</sup>

But when it comes to important personal decisions such as abortion or sexual intimacy, there is no distinct and obvious line between liberty and privacy. In *Eisenstadt*, Justice Brennan linked the two concepts when he declared, “[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>52</sup> Justice Kennedy opened his majority opinion in *Lawrence v. Texas* with a depiction of liberty as tightly interwoven with privacy:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>53</sup>

In *Casey*, Justices Stevens and Blackmun drew this same connection between liberty and privacy. In his partial concurrence and dissent, Justice Stevens noted, “[t]he woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.”<sup>54</sup> Justice Blackmun’s partial concurrence and dissent similarly explained how the right to privacy encompasses a right to make “critical life choices” free from governmental interference.<sup>55</sup> Blackmun criticized Chief Justice Rehnquist for failing to see how rights of personal liberty “are grounded in a more general right of privacy.”<sup>56</sup>

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51. See, e.g., Greene, *supra* note 41 (manuscript at 11) (noting that “[t]he right to privacy is mentioned just twice in the [*Casey*] joint opinion”).

52. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

53. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

54. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part); see also *id.* at 919 (“A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.”).

55. *Id.* at 926-28 (Blackmun, J., concurring in part and dissenting in part).

56. *Id.* at 940.

Abortion is one of the most personal, intimate decisions a woman can make, as several Supreme Court Justices have recognized. In his concurrence in *Roe*, Justice Stewart observed:

“Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school . . . or the right to teach a foreign language . . . .”<sup>57</sup>

In *City of Akron v. Akron Center for Reproductive Health*, Justice Powell described the decision as a “highly personal choice.”<sup>58</sup> Dissenting in *Webster v. Reproductive Health Services*, Justice Blackmun referred to “the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.”<sup>59</sup> He added:

As we recently reaffirmed[,] . . . few decisions are “more basic to individual dignity and autonomy” or more appropriate to that “certain private sphere of individual liberty” that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy.<sup>60</sup>

The abortion decision has both ethical and medical dimensions. Each of these dimensions evokes privacy concerns, and the combination of these elements into one decision only raises the intensity of the privacy at stake.<sup>61</sup> Abortion implicates many different facets of

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57. *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972)) (citations omitted).

58. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 n.1 (1983), *overruled by Casey*, 505 U.S. 833.

59. *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part).

60. *Id.* at 548-49 (quoting *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)). Justice Scalia has scoffed at his colleagues' references to privacy and intimacy, arguing that these are manipulable phrases used to disguise subjective judgments favoring a right to abortion. *See, e.g., Casey*, 505 U.S. at 983 (Scalia, J., dissenting) (accusing colleagues of “rattl[ing] off a collection of adjectives that simply decorate a value judgment and conceal a political choice”); *see also Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) (“A transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of that word.”).

61. End-of-life decision-making raises a similar fusion of ethical and medical privacy concerns. *See infra* text accompanying notes 104-08. *But cf.* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 325-26 (2007) (arguing that “it is no answer to say that in one case a constitutional right is involved and in another no such right is involved. The abortion cases present the same issue as the public-health cases: whether individuals have the

privacy, including but also going beyond the basic right to make an autonomous decision. These dimensions include belief and conscience, familial decision-making, medical decision-making, and bodily integrity.<sup>62</sup> In this Part, I discuss cases in which the Supreme Court has recognized or acknowledged these privacy interests. The case law has not always clearly established these as constitutionally protected under a “right to privacy.” My object here is simply to flesh out the myriad ways in which recognized privacy concerns pervade the abortion decision, regardless of whether that decision is constitutionally protected under a rubric of privacy, liberty or autonomy,<sup>63</sup> or equality.<sup>64</sup> Moreover, as a matter of fact, the *Roe* framework *did* protect these aspects of the abortion decision, whether or not the Court explicitly acknowledged it.<sup>65</sup> *Casey*, on the other hand, dramatically narrowed the scope of privacy protection for abortion, as I discuss in Part III.

#### A. *Belief and Conscience*

While the right to make a decision does not necessarily guarantee a private “space” within which to make that decision, the Court has in some contexts implicitly acknowledged the importance of such a (virtual) space in recognizing a right of conscience and belief. In his powerful dissenting opinion in *Olmstead v. United States*, Justice Brandeis emphasized the importance of individual freedom to determine one’s own moral code:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions

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right, in consultation with a physician, to protect their health and to make medical treatment choices without unwarranted government interference”).

62. See *infra* Part III (discussing how abortion restrictions permitted under *Casey* interfere with the belief and conscience, familial decision-making, medical decision-making, and bodily integrity dimensions of the abortion decision).

63. See, e.g., Greene, *supra* note 41 (manuscript at 11-13) (arguing that “liberty” provides a better foundation for abortion rights and describing the Supreme Court’s shift away from privacy and toward liberty and autonomy in abortion cases).

64. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-28 (1984) (arguing that laws governing reproduction, including laws restricting abortion, implicate equality concerns and proposing a test to determine when such laws violate equality norms); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 347-80 (1992) (employing historical and critical perspectives to analyze abortion-restrictive regulation in an equal protection framework).

65. See *infra* text accompanying notes 118-23 (discussing how *Roe* protected privacy interests in the context of abortion).

of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.<sup>66</sup>

In *Stanley v. Georgia*, the Supreme Court relied on this famous passage in addressing the right to possess pornography in the home.<sup>67</sup> In unanimously holding that the First and Fourteenth Amendments prohibited criminalizing the private possession of “obscene material” in the home, the Court declared, “Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>68</sup> The Court based its decision on the “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>69</sup> In a concurring opinion in *Brandenburg v. Ohio*,<sup>70</sup> Justice Douglas remarked, “[o]ne’s beliefs have long been thought to be *sanctuaries* which government could not *invade*. . . and government has no power to *invade that sanctuary* of belief and conscience.”<sup>71</sup>

As discussed in Part I, in *Eisenstadt*, the Court extended its earlier recognition of a right to privacy in belief and conscience to the reproductive rights context when it recognized the right of individuals to use contraception.<sup>72</sup> Some Supreme Court Justices have rightly observed that the abortion decision likewise strongly implicates this aspect of privacy. For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice Stevens emphasized the importance of self-determination in a woman’s abortion decision-making, stating that “no individual should be compelled to surrender the freedom to make that decision for herself simply because her ‘value preferences’ are not shared by the majority.”<sup>73</sup>

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66. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

67. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

68. *Id.* at 565.

69. *Id.* at 564.

70. 395 U.S. 444, 445-47, 449 (1969) (holding that a speech at a Ku Klux Klan rally could not constitutionally be punished as incitement where it was not “directed to inciting or producing imminent lawless action”).

71. *Id.* at 456-57 (Douglas, J., concurring) (emphases added).

72. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see supra* notes 17-23 and accompanying text (discussing *Eisenstadt*).

73. *Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists*, 476 U.S. 747, 777 & n.5 (1986) (Stevens, J., concurring) (“What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person’s responsibility for the results of this self-determination we give substance to the concept of liberty.” (quoting CHARLES FRIED,

A woman who must decide whether to have an abortion or whether to bring a new person into the world makes a significant moral decision.<sup>74</sup> She weighs her conception of the moral worth of the fetus with her other moral commitments. Perhaps she has existing children for whom she could not adequately care if she were to bear another child. Perhaps she is young, financially dependent upon her parents, and in the midst of pursuing her education. In that case, she may honor commitments to herself and to her parents to become self-sufficient before starting a family. Whatever choice a woman makes, she draws upon her own moral framework and her own conscientious beliefs.<sup>75</sup>

The joint opinion in *Casey* recognized that the abortion decision involves the exercise of belief and conscience, although it did not fully honor this recognition in its application of the undue burden standard.<sup>76</sup> The Court acknowledged the different moral frameworks within which a woman might either seek out or avoid pregnancy:

One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions [regarding contraception]. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.<sup>77</sup>

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RIGHT AND WRONG 146-47 (1978))), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288-89 (1977) (“[T]he concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’”); *see also* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 10 (2006) (stating that “the principle of personal responsibility . . . holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him”).

74. *See* Margaret Olivia Little, *Abortion and the Margins of Personhood*, 39 RUTGERS L.J. 331, 332, 342-46 (2008) (discussing the moral status of an embryo or fetus and the moral significance of abortion at different stages of pregnancy).

75. *See* Caitlin E. Borgmann, *The Meaning of ‘Life’: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 593-607 (2009) (discussing moral dimensions of the abortion decision); Caitlin Borgmann & Catherine Weiss, *Beyond Apocalypse and Apology: A Moral Defense of Abortion*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 40, 42-43 (2003) (same); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1796-1800 (2008) (arguing for the importance of respecting women’s dignity and self-sovereignty in making the abortion decision).

76. *See infra* Part III.A (discussing the ways in which cases interfere with a woman’s beliefs and conscience). Most significantly, the Court upheld Pennsylvania’s so-called “informed consent” and waiting period provision. *Casey*, 505 U.S. at 881-87.

77. *Casey*, 505 U.S. at 853.

Moreover, the Court emphasized the importance of women arriving at these moral positions without government coercion:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>78</sup>

The Justices added, "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>79</sup>

### *B. Privacy in Familial Decision-making*

While the Court has been far from consistent in how it treats privacy in family decision-making,<sup>80</sup> it has acknowledged in a number of contexts the importance of privacy in making decisions regarding the family and intimate relationships. In *Washington v. Glucksberg*, the Court catalogued these different familial contexts and the privacy right recognized in each.<sup>81</sup> The Court recognized, in *Meyer* and *Pierce*, the right to direct the upbringing and education of children;<sup>82</sup> in *Loving v. Virginia*, the right to marry;<sup>83</sup> in *Skinner v. Oklahoma*, the right to have children;<sup>84</sup> in *Griswold*, the right to marital privacy;<sup>85</sup> and in *Eisenstadt*, the right to use contraception regardless of marital status.<sup>86</sup> Since *Glucksberg* was decided, the Court issued *Lawrence v. Texas*, in which the Court relied upon these same decisions in recognizing the right to privacy in same-sex intimacy.<sup>87</sup>

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78. *Id.* at 851.

79. *Id.* at 852.

80. See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 528-29, 548-49 (2000) (describing incoherence of the Court's treatment of family privacy rights, despite its "rhetoric consistently exalting the fundamental nature of these rights").

81. 521 U.S. 702, 720 (1997).

82. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

83. 388 U.S. 1, 12 (1967).

84. 316 U.S. 535, 536 (1942).

85. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

86. *Eisenstadt v. Baird*, 405 U.S. 438, 443, 453-55 (1972).

87. 539 U.S. 558, 573-74 (2003). The Court did not clearly state the constitutional basis for its decision (whether privacy, equality, or other grounds). Yet the Court unquestionably recognized the privacy concerns at stake and the disturbing implications

The abortion decision likewise implicates familial decision-making because many, if not most, women will not make their decision wholly independently, but instead will seek the advice of their spouse or partner, a parent, or another family member.<sup>88</sup> The Court in *Casey* expressly identified “the right to make family decisions” as one of the “more general rights under which the abortion right is justified.”<sup>89</sup> The Court thus recognized the appropriateness of situating the abortion decision within the Court’s other cases on family decision-making. For example, the joint opinion noted that “[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>90</sup> Likewise, the opinion acknowledged that “[o]ur precedents ‘have respected the *private realm of family life* which the state cannot enter.’”<sup>91</sup> These passages suggest that privacy encompasses not only the individual’s right to make a personal, morally weighty decision about abortion free from excessive government intrusion and coercion, but a protected space for family decision-making within which the government generally should not intrude.

### *C. Privacy in Medical Decision-making*

The Court has demonstrated respect for privacy in medical decision-making contexts outside of abortion, even if this recognition has not always been sufficient to overcome asserted state interests.<sup>92</sup> Where it has found a state interest in public health or safety, the Court has often deferred to the state’s factual claims about medical concerns and has not applied heightened scrutiny to regulations that infringe individuals’ medical decision-making.<sup>93</sup> In the abortion

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of government intrusion into this realm. *Id.* But see Greene, *supra* note 41 (manuscript at 3, 12) (arguing that *Lawrence* eschews “privacy” in favor of “liberty” as the basis for its decision).

88. *E.g.*, AMANDA DENNIS ET AL., GUTTMACHER INSTITUTE, THE IMPACT OF LAWS REQUIRING PARENTAL INVOLVEMENT FOR ABORTION: A LITERATURE REVIEW 6 (Mar. 2009), <http://www.guttmacher.org/pubs/ParentalInvolvementLaws.pdf> (“[A]pproximately 60% of minors say their parents know about their pregnancy and desire to have an abortion, even in states without parental involvement laws.”).

89. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); see also *id.* at 896 (stating that abortion laws touch “upon the private sphere of the family”).

90. *Id.* at 851.

91. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1994)) (emphasis added).

92. See Hill, *supra* note 61, at 329-32 (arguing that “the Supreme Court has already recognized a substantive-due-process right to make medical treatment choices,” but that “courts have avoided recognizing and properly analyzing this right” by deferring inappropriately to legislative findings of medical fact).

93. See *id.* at 282-85, 302-04 (discussing cases including *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (mandatory vaccination laws); *United States v. Oakland Cannabis*



context, however, *Roe* ensured stronger protection for the doctor-patient relationship.<sup>94</sup> As the Court stressed in *Roe*, abortion implicates not only the moral issue of whether to terminate a pregnancy but also medical decision-making.<sup>95</sup> Nan Hunter has suggested that Justice Blackmun deliberately emphasized the medical aspect of the abortion issue because he and his colleagues in the *Roe* majority assumed that medical practice existed within a sphere that was relatively safe from government interference. “More than any deference to or identification with physicians,” Hunter asserts, “the Justices who decided *Roe* shared a liberal belief in the value of medical authority because they assumed it to be a sphere which could operate independently of the state.”<sup>96</sup>

This assumption eventually turned out to be wrong with regard to abortion, as *Casey* whittled away the protections *Roe* had built around the doctor-patient relationship.<sup>97</sup> But under the *Roe* framework, the Court was skeptical even of measures ostensibly aimed at promoting women’s health. For example, in *Doe v. Bolton*, the companion case to *Roe*, the Court invalidated a number of abortion restrictions, including a hospital accreditation requirement and hospital abortion committee approval, as “unduly restrictive of the patient’s rights.”<sup>98</sup> The Court emphasized the importance of protecting physician discretion and judgment in order to protect abortion patients’ well-being.<sup>99</sup> In *Akron*, the Court struck down a law that purported to ensure that women gave their informed consent before an abortion,<sup>100</sup> and in *Planned Parenthood of Central Missouri v. Danforth*, the Court invalidated a ban on use of the saline amniocentesis method of abortion.<sup>101</sup> Even after fetal viability, the Court required that abortion restrictions be sufficiently deferential to physician judgment to ensure

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Buyers’ Coop., 532 U.S. 483 (2001) (medical marijuana); *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (terminally ill patients’ access to drug Laetrile); *Whalen v. Roe*, 429 U.S. 589 (1977) (state prohibition on certain prescription drugs)).

94. *See id.* at 294-95 (arguing that the Court’s “public health” cases have proceeded on a separate theoretical track from “autonomy” cases such as abortion, and arguing for a unified approach to medical treatment cases).

95. *Roe v. Wade*, 410 U.S. 113, 116-17 (1973).

96. Hunter, *supra* note 26, at 149, 194-95 (stating that, for Justices who decided *Roe*, “medicine helped to define what was private, with doctors serving as border patrols”).

97. *See infra* Part III (discussing *Casey*’s erosions of the *Roe* framework); *see also* Hunter, *supra* note 26, at 195-96 (describing how “[t]he Court’s delegation of power [to medical authority] ultimately failed” as an increasingly conservative Court began to withdraw its protection of the doctor-patient relationship).

98. 410 U.S. 179, 193-98 (1973).

99. *Id.* at 192, 199-200.

100. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1982), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

101. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79 (1976).

that women's health was not compromised. Thus, for example, in *Colautti v. Franklin*, the Court struck down a viability-determination provision on the grounds that the statute's vague wording impermissibly constrained physicians' discretion.<sup>102</sup>

But abortion is much more than a mere medical issue. The fact that abortion is also a morally significant decision enhances the private nature of the medical decisions women must make regarding their abortions.<sup>103</sup> In *Glucksberg*, Justice Stevens, concurring in the judgments, made a similar point regarding end-of-life medical decision-making.<sup>104</sup> He noted,

[S]ome state intrusions on the right to decide how death will be encountered are also intolerable. . . .

. . . Cruzan did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death. . . . The liberty interest at stake in a case like this differs from, and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die. It is an interest in deciding how, rather than whether, a critical threshold shall be crossed.<sup>105</sup>

A similar fusion of moral and medical concerns arises in the contraception cases, where the primary concern is pregnancy prevention, but where medical issues also abound.<sup>106</sup>

Of course, even under *Roe's* protective framework, recognizing privacy in medical decision-making did not foreclose all possibility of state regulation for the sake of public health.<sup>107</sup> As the Court noted in *Akron*, "[t]his does not mean that a State never may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy. Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives."<sup>108</sup>

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102. 439 U.S. 379, 390-97 (1979).

103. *But see* Hill, *supra* note 61, at 325-26 (arguing that medical aspects of abortion decision should be treated no differently than medical decision-making in other contexts).

104. *Washington v. Glucksberg*, 521 U.S. 702, 745 (1997) (Stevens, J., concurring in judgments).

105. *Id.* (Stevens, J., concurring in judgments).

106. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (referring to the importance of physician's role in prescribing contraception); Hill, *supra* note 61, at 306-09 (discussing public health aspects of *Griswold* and *Eisenstadt*).

107. *See Roe v. Wade*, 410 U.S. 113, 164 (1973) (stating that before viability the state could regulate abortion to extent that such regulation is "reasonably related" to promoting maternal health).

108. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 430 (1983).

### D. Bodily Integrity

Under common law, the right to bodily integrity was strongly protected. In *Union Pacific Railway Co. v. Botsford*, the Court declared, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>109</sup> Constitutionally, the cases have not been as consistent. In *Schmerber v. California*, for example, the Court upheld the forced drawing of blood for purposes of an alcohol-analysis test.<sup>110</sup> In *Washington v. Harper*, the Court upheld the right of the state under certain circumstances to administer anti-psychotic drugs to a prison inmate against his will, even as the Court admitted that “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”<sup>111</sup> Yet in *Rochin v. California*, the Court struck down the use of forced stomach pumping to produce evidence of illegal drugs, referring to the procedure as “breaking into the privacy of the petitioner.”<sup>112</sup> Similarly, in *Winston v. Lee*, the Court invalidated the use of compelled surgery to remove a bullet for evidentiary purposes, proclaiming that such an “intrusion into an individual’s body . . . implicates expectations of privacy . . . of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”<sup>113</sup> In *Buck v. Bell*, the Court upheld the involuntary sterilization of the “feeble-minded,”<sup>114</sup> while in *Skinner v. Oklahoma*, the Court struck down the compulsory sterilization of certain criminals.<sup>115</sup>

Concededly, the Court made clear in *Roe* that the Supreme Court has never recognized “an unlimited right to do with one’s body as one pleases.”<sup>116</sup> Nevertheless, the Court has recognized that state encroachments on a person’s bodily integrity must be justified by an appropriately weighty governmental interest. The *Casey* joint opinion specifically identified “physical autonomy” as one of the “general rights” under which abortion is subsumed.<sup>117</sup>

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109. 141 U.S. 250, 251 (1891) (holding the judge to be without authority under the common law to order a plaintiff in a personal injury suit to undergo surgical examination).

110. 384 U.S. 757, 761, 772 (1966).

111. 494 U.S. 210, 229, 236 (1990).

112. 342 U.S. 165, 166, 172, 174 (1952).

113. 470 U.S. 753, 759, 766-67 (1985).

114. 274 U.S. 200, 205, 207 (1927).

115. 316 U.S. 535, 536-38 (1942).

116. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Buck*, 274 U.S. 200)).

117. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); see also *id.* at

### III. PRIVACY ENCROACHMENTS UNDER THE UNDUE BURDEN STANDARD

Privacy in all of the above manifestations is eviscerated by *Casey*'s undue burden standard, especially as interpreted by Justice Kennedy. While the *Casey* decision itself is primarily responsible for this shift, the Court in *Roe* partially (if inadvertently) paved the way. Under *Roe*, the abortion decision was made in a protected space, one that existed from the moment of conception to the point of fetal viability. While the state could legislate regarding the time prior to fetal viability in order to protect women's health, it could not otherwise encroach on her decision-making in any way.<sup>118</sup> It could not moralize, or attempt to convince the woman to choose childbirth, or shame the woman for her choice.<sup>119</sup> It could not act to protect the embryo or fetus.<sup>120</sup>

Yet, while *Roe*'s standard effectively carved out this protected realm, and while some of the Court's language supported the concept of such an inviolate sphere, other language in *Roe* suggested potential limits to the woman's privacy in decision-making regarding abortion:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.<sup>121</sup>

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896 (asserting that state regulation of abortion implicates "the very bodily integrity of the pregnant woman").

118. *Roe*, 410 U.S. at 163. The state was permitted to regulate abortion after the first trimester in order to promote women's health. *Id.* However, the main encroachments on the abortion decision traditionally have been grounded in moral opposition to abortion, not in a desire to protect women's health. Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 15, 31, 33 (2008) [hereinafter *Judicial Evasion*]; see Borgmann, *supra* note 75, at 561 (noting that commentators have observed a shift in anti-abortion rhetoric from focusing on the fetus's personhood to concentrating on the woman's mental and physical health). *But see Judicial Evasion, supra*, at 31, 33 (discussing post-*Casey* trend in which morally based abortion legislation is presented as scientifically based and in furtherance of women's well-being); Reva B. Siegel, Lecture, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1657 (2008) (discussing strategic transition from "argu[ing] the moral and political case against abortion in fetal-focused terms" to "woman-centered" claims).

119. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443-44 (1983) (striking down an Ohio "informed consent" law on grounds that it was designed to dissuade a woman from undergoing an abortion, rather than to inform her consent).

120. See *Roe*, 410 U.S. at 164 (holding that the state may act to further its interest in the fetus only after viability).

121. *Id.* at 159 (citation omitted).

However, the Court determined that the stage at which the state's interest in the fetus became sufficiently compelling to invade the woman's privacy was fetal viability.<sup>122</sup> By confining the time period of permissible morally based intrusion to the post-viability period, in which exceedingly few abortions are performed, the Court greatly reduced the potential for clashes between the government's interest in the fetus and the woman's privacy.<sup>123</sup> The protected domain for abortion decision-making under *Roe* therefore remained significant.

*Casey* abruptly invaded this space by changing the standard for abortion. In one of its major departures from *Roe*, *Casey* held that the state has a legitimate and important interest in the fetus from the very inception of pregnancy.<sup>124</sup> The Court found that *Roe*'s trimester framework "undervalue[d] the State's interest in potential life."<sup>125</sup> This of course created a dilemma for the three authors of the joint opinion, who claimed to uphold *Roe*, because the two interests it now recognized — that of a woman in terminating her pregnancy and that of the state in protecting the embryo or fetus — are seemingly diametrically opposed.<sup>126</sup> However, the joint opinion emphasized that before viability the state could not employ its interest in the fetus to stop, or even unduly burden, women seeking abortions.<sup>127</sup> Thus, the Justices explained, "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."<sup>128</sup>

At the same time, by formally acknowledging the state's role in pre-viability abortion decision-making, *Casey* opened the door and invited the state into the private space that, under *Roe*, protected

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122. *Id.* at 163-64.

123. Borgmann, *supra* note 3, at 690.

124. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 870-73 (1992).

125. *Id.* at 873.

126. See Borgmann, *supra* note 3, at 689-93 (detailing the ways in which *Casey*'s expanded recognition of the state's interest in the embryo or fetus imperils the woman's interest); see also *Casey*, 505 U.S. at 986-87 (Scalia, J., dissenting) ("Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated [to] hinder' a decision to have an abortion."); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 421 n.1 (1983) ("[T]he dissent would uphold virtually any abortion-inhibiting regulation [including a twenty-four-hour waiting period] because of the State's interest in preserving potential human life. . . . This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*"). But see Siegel, *supra* note 75, at 1737-38 (pointing out that state's interest in "potential life" is not necessarily concerned with preserving particular fetal lives, and describing other potential interpretations).

127. See *Casey*, 505 U.S. at 878 (holding that the state may not enact legislation with the purpose or effect of placing a "substantial obstacle in the path of a woman seeking an abortion before" viability).

128. *Id.* at 877.

women's decisions about abortion.<sup>129</sup> The joint opinion maintained that the presence of an embryo or fetus distinguishes abortion from other personal decisions and renders the abortion decision undeserving of a "zone of privacy." The Justices wrote:

What is at stake is the woman's *right to make the ultimate decision, not a right to be insulated from all others in doing so*. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.<sup>130</sup>

*Casey's* characterization of abortion as not solely a private concern finds its echo in *Roe's* claim that the abortion decision is "inherently different" from other significant, personal moral decisions, including marital intimacy or even procreation.<sup>131</sup>

With Justice O'Connor's retirement, Justice Kennedy now serves as the Court's swing vote on abortion issues.<sup>132</sup> It is therefore largely his interpretation of the undue burden standard that currently governs abortion regulation in the United States. Justice Kennedy's interpretation of the standard appears to be quite expansive. As this Part describes, *Casey*, as interpreted by Justice Kennedy, gives unprecedented weight to the state's interest in the embryo or fetus, thereby permitting all manner of encroachments on the privacy of women seeking abortion. Thus, more than two decades after *Casey*, women still retain the formal right to obtain an abortion, but the decision has significantly changed the landscape surrounding decision-making on abortion.

#### *A. Interference with Belief and Conscience*

Although *Casey* does not allow the government to force a woman to choose childbirth, it makes clear that it is the government's

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129. See Borgmann, *supra* note 3, at 693 (noting that *Casey* "granted the state far broader latitude" to hinder abortion access from the beginning of pregnancy).

130. *Casey*, 505 U.S. at 877-78 (emphasis added) (citation omitted).

131. See *Roe v. Wade*, 410 U.S. 113, 159 (1973).

132. Compare *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting) (arguing that Court should have upheld Nebraska "partial-birth abortion" ban) with *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 132 (2007) (authoring majority opinion upholding federal "partial-birth abortion" ban).

prerogative to try to “persuade the woman to choose childbirth over abortion.”<sup>133</sup> The way in which the government has exercised this prerogative is through so-called “informed consent” laws.<sup>134</sup> These laws require that abortion providers convey, either orally or via written materials, information compiled by the government with the goal of convincing women to reject abortion.<sup>135</sup> Earlier versions of such laws required women to receive nominally objective, though selectively chosen, information, such as the gestational age of the fetus and depictions of fetuses at various anatomical stages.<sup>136</sup> This type of law was originally declared unconstitutional in *Akron*, which was decided under the strict scrutiny framework established in *Roe*.<sup>137</sup> *Casey* overruled this portion of *Akron*, not only sanctioning the earlier informed consent laws but inviting innovation and experimentation as states continue to test the boundaries of what the “undue burden” standard will bear.<sup>138</sup>

New versions of “informed consent” legislation, for example, require that women be offered the opportunity to view ultrasounds of their fetuses or even to undergo an ultrasound and simultaneously hear a description of the ultrasound from the technician performing it.<sup>139</sup> Others require that abortion providers deliver a homily about the biological and spiritual significance of the fetus.<sup>140</sup> A South Dakota law requires physicians to tell their abortion patients “[t]hat the

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133. *Casey*, 505 U.S. at 878 (“To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”).

134. See Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 941-42 (2007) (describing South Dakota’s “informed consent” law for abortion).

135. Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER POL’Y REV., Fall 2006, at 6, 6-7, available at <http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.pdf> (describing abortion “informed consent” laws and the biased and inaccurate information they mandate be distributed).

136. *Judicial Evasion*, *supra* note 118, at 35. But see *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444-45 (1983) (taking issue with supposed neutrality of information conveyed by “informed consent” requirement before the Court).

137. *Akron*, 462 U.S. at 444-45.

138. See Borgmann, *supra* note 3, at 705 (arguing legislatures may perceive *Casey* as an invitation to experiment with abortion restrictions).

139. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 357-58, 375-76 (2008) (describing and citing mandatory ultrasound laws); see also *infra* note 196 and accompanying text (discussing Oklahoma’s mandatory ultrasound law).

140. The South Dakota law that takes this approach does not overtly identify the moral or religious significance of the fetus, but the law’s import is obvious. See *Judicial Evasion*, *supra* note 118, at 35-43 (discussing South Dakota law) (citations omitted); Post, *supra* note 134, at 941-42 (also discussing South Dakota law).

abortion will terminate the life of a whole, separate, unique, living human being.”<sup>141</sup>

In its recent decision in *Gonzales v. Carhart* (*Carhart II*), which upheld the federal Partial-Birth Abortion Ban Act of 2003,<sup>142</sup> the Court hinted that it might approve laws designed to warn women of the purported risk that they will regret their abortions. In an opinion authored by Justice Kennedy, the Court declared,

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . .

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. . . .

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed.<sup>143</sup>

It seems likely that some lower courts will interpret this dictum in *Carhart II* as expanding the scope and quality of the information the state can force the woman to consider,<sup>144</sup> and indeed the Eighth Circuit has already done so in upholding the South Dakota law.<sup>145</sup>

Laws like South Dakota’s, and indeed even the earlier “informed consent” laws, do more than simply attempt to ensure that women make fully informed, voluntary decisions. Rather, they insert the government as an advocate into the woman’s decision-making process and attempt to influence her “innermost thoughts”<sup>146</sup> and (re)shape her moral view to match that of the state. The Court in *Akron* recognized the difference between ordinary conceptions of informed consent and “informed consent” that campaigns for one position:

It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending

141. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2009).

142. *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 159-60 (2007). In *Carhart I*, the Supreme Court held that a nearly identical Nebraska ban violated the “undue burden” standard under *Casey*. *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 938-39 (2000).

143. *Carhart II*, 550 U.S. at 159.

144. See *Judicial Evasion*, *supra* note 118, at 28 (discussing how *Carhart II* paved the way for more intrusive “informed consent” requirements).

145. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735, 738 (8th Cir. 2008); *Judicial Evasion*, *supra* note 118, at 37-40 (discussing *Rounds*).

146. *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969) (Douglas, J., concurring) (describing an investigator who “roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts”).



on her particular circumstances. [Our] recognition [in *Danforth*] of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.<sup>147</sup>

Mandatory ultrasound laws similarly intrude upon a woman's decision-making about her pregnancy in an effort to convince her not to choose abortion. Carol Sanger points out:

What . . . is the purpose of requiring ultrasound for women who do not intend to remain pregnant? The answer seems clear: to produce a confrontation, whether actual or notional, between the pregnant woman and her fetus that will result in a change of heart regarding the abortion. . . .

. . . Mandatory ultrasound disrupts the law's traditional respect for privacy, bodily integrity, and decisional autonomy in matters of such intimacy as reproduction, pregnancy, and family formation. It is harassment masquerading as knowledge.<sup>148</sup>

The Court has not done a good job of explaining why the government should be allowed to try to talk women out of abortions. It is hard to imagine that the Court would tolerate a law under which pregnant women were forced to hear a government-mandated script urging them to have abortions.<sup>149</sup> The interest that the Court has recognized as justifying so-called "informed consent" laws is its interest in "potential life."<sup>150</sup> But it is not self-evident what this interest encompasses and why it should override the pregnant woman's interests in making her decision privately. As Reva Siegel notes, "Remarkably little attention has been devoted to clarifying the character of government's interest in restricting abortion to protect potential life."<sup>151</sup>

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147. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443-44 (1983); see also Post, *supra* note 134, at 941-42 (distinguishing traditional medical informed consent doctrine from abortion laws such as South Dakota's "informed consent" statute).

148. Sanger, *supra* note 139, at 359-60.

149. In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. This right is neutral on the question of abortion: The [sic] Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The same holds true for the power to control women's bodies. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part) (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1965)) (citations omitted).

150. *Casey*, 505 U.S. at 881-83 (joint opinion).

151. Siegel, *supra* note 75, at 1746-47 (offering several possible explications of the government's interest including pronatalist, eugenic, life-saving, moral and expressive, and political).

Regardless, as Justice Kennedy interprets *Casey*, these startling intrusions into women's moral decision-making on abortion are likely not sufficient to constitute an "undue burden" on the woman's decision.<sup>152</sup>

### *B. Intrusions into Family Decision-making*

The privacy of minors seeking an abortion is particularly vulnerable under the Court's abortion precedents, which have upheld laws that force teenagers to involve their parents in their abortion decisions even though such mandated involvement can be dangerous for some minors.<sup>153</sup> While these laws are often pitched as enhancing family communications, evidence shows that teenagers are equally likely to involve their parents when no such law applies.<sup>154</sup> Contrary to their stated purpose, these laws can instead intrude on the decision-making of custodial parents. For example, in states that require the involvement of both parents,<sup>155</sup> teenagers may be forced to contact parents from whom they are estranged or who are abusive.<sup>156</sup> If the second parent cannot be found, or if the teenager and her custodial parent deem it unwise to contact that parent, the minor is forced to seek permission through the court system, even though her custodial parent supports her decision.<sup>157</sup>

In most states that require parental involvement, the minor's only way around the requirement is to seek permission from a judge.<sup>158</sup> Minors who are subject to psychological or physical abuse at home and who are therefore afraid to consult their parents must instead reveal intimate details to a judge.<sup>159</sup> Some of these judges are morally opposed to abortion and either routinely deny permission or berate minors in the courtroom.<sup>160</sup> While the proceedings are required to

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152. See *Casey*, 505 U.S. at 883 ("[R]equiring that the woman be informed of . . . information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice . . . . This requirement cannot be considered a substantial obstacle . . . .").

153. HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 13, 15 (2007) (relating the American Medical Association's conclusion that some minors would be endangered by such laws but noting the Supreme Court has upheld these provisions so long as they included a bypass alternative).

154. DENNIS ET AL., *supra* note 88, at 6.

155. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 424-25, 448, 450 (1998) (upholding such a law in light of its judicial bypass mechanism).

156. SILVERSTEIN, *supra* note 153, at 13-14.

157. See *id.* at 27-28 (noting that three states require both parents' involvement and petitions to bypass this requirement nearly always must be heard by a court).

158. *Id.* at 15.

159. See *id.* at 13, 15, 27-28 (recognizing that some minors may be in abusive homes, and describing judges' discretion in judicial bypass proceedings).

160. See *id.* at 65, 84-85 (recounting phone interviews with court employees in Tennessee and Alabama who said their judges are pro-life and refuse to grant abortions to minors).

respect minors' confidentiality,<sup>161</sup> the reality — especially in small towns — is that it can be difficult for minors to negotiate the judicial process and make their court appearance without someone recognizing them.

While it might seem logical that minors' health care decision-making should be more heavily regulated than that of adults, abortion restrictions are an anomaly in regulations concerning minors' access to sensitive medical care. Most states recognize that mandating parental involvement for sensitive medical treatment will risk deterring many minors from seeking care at all.<sup>162</sup> Accordingly, as the Guttmacher Institute reports, "The legal ability of minors to consent to a range of sensitive health care services — including sexual and reproductive health care, mental health services and alcohol and drug abuse treatment — has expanded dramatically over the past 30 years."<sup>163</sup> Minors in most states can consent to services including contraception, prenatal care, and treatment for sexually transmitted infection.<sup>164</sup> In many states, minors can even relinquish their children for adoption and consent to medical care for their children.<sup>165</sup>

Parental involvement requirements were held permissible even under the *Roe* framework, provided they did not give parents an absolute veto over a minor's abortion decision.<sup>166</sup> But *Casey's* application of the undue burden standard to Pennsylvania's parental consent provision underscored the standard's elasticity and the Court's tendency to tolerate invasions of privacy with which it is less sympathetic.<sup>167</sup> For example, the Court recognized the inappropriateness of interfering in spousal communications when there could be domestic violence involved.<sup>168</sup> This conclusion contrasted starkly with the Court's refusal to acknowledge that minors likewise can be subjected to abuse if they are either forced to consult their parents about their abortions or if their clandestine decisions to obtain an abortion with court permission are uncovered.<sup>169</sup> Thus, while the Court was unwilling to

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161. *See id.* at 33 (quoting TENN. CODE ANN. § 37-10-304(g) (2001)).

162. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF MINORS' CONSENT LAW (2009), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OMCL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf).

163. *Id.*

164. *Id.*

165. *Id.*

166. *E.g.*, *Bellotti v. Baird*, 443 U.S. 622, 639-40 (1979) (opinion of Powell, J.) (stating that properly drafted laws requiring parental consent or notice for abortion are constitutional).

167. Borgmann, *supra* note 3, at 683.

168. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888-94 (1992).

169. *See* Borgmann, *supra* note 3, at 683-85 (contrasting the *Casey* joint opinion's approach to Pennsylvania's husband notification with its treatment of the parental involvement requirement).

tolerate governmental intrusion into the marital relationship, it was untroubled by intrusions into parent-child relations, even in the face of evidence that such intrusions could seriously harm minors.<sup>170</sup>

### *C. Intrusions into Medical Decision-making*

State intrusions on medical decision-making have typically been justified as promoting public health or safety.<sup>171</sup> Few abortion measures, however, can truly be defended as necessary for public health. First, their proponents' clear motive is to hinder abortion access, not to promote women's health.<sup>172</sup> While anti-abortion-rights advocates often cast proposed restrictions as beneficial to women's health and well-being, these claims are mere rhetoric designed to make the restrictions politically more palatable.<sup>173</sup> Second, as discussed below, these restrictions invade women's privacy, do not in fact promote women's health, and may in some cases impose serious health risks on women.

In many states, abortion providers are targeted with onerous and discriminatory facility regulations, purportedly to safeguard women's health.<sup>174</sup> These laws are commonly referred to as Targeted Regulation of Abortion Providers, or TRAP laws.

TRAP laws are generally defined as laws that single out physicians' offices and outpatient clinics where abortions are performed, and subject them to wide-ranging medical, administrative, and facility requirements that are not imposed on comparable medical facilities. . . . [Some of these] laws require offices of physicians that provide abortions to obtain licenses from state health departments, even though medical offices and clinics in general are typically not licensed. . . . [Some impose] formalized administrative

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170. See *Casey*, 505 U.S. at 895 (declaring that invalidation of husband notification provision is not inconsistent with upholding parental involvement laws based on the "quite reasonable assumption that minors will benefit from consultation with their parents"); see also SILVERSTEIN, *supra* note 153, at 12-13 (documenting the risks of parental abuse when teenagers are forced to tell their parents about their decisions to seek an abortion).

171. See Hill, *supra* note 61, at 282-85, 302-04 (discussing cases in which government intrusions on medical decision-making were defended on public health grounds).

172. See Memorandum from James Bopp, Jr. & Richard E. Coleson, Pro-Life Strategy Issues 6 (Aug. 7, 2007), available at [http://www.montanacc.org/directors\\_pages/PDFs/10March08/BoppMemo-re-ProlifeStrategy1.pdf](http://www.montanacc.org/directors_pages/PDFs/10March08/BoppMemo-re-ProlifeStrategy1.pdf) (communicating the views of two attorneys influential in the anti-abortion-rights movement and describing various abortion restrictions as serving to change "hearts and minds" and to encourage opposition to all abortions).

173. *Id.*; *Judicial Evasion*, *supra* note 118, at 34-35; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 992-93 (2007).

174. Amalia W. Jorns, Note, *Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy*, 105 COLUM. L. REV. 1563, 1568 (2005).

practices and policies that might not otherwise be in place, or would have been conducted informally; training and qualification specifications for staff members; mandatory testing of patients for sexually transmitted diseases, even if unnecessary for their treatment; requiring employees to submit to physical examinations; and requirements regarding the physical design and function of the clinic itself. These facility requirements can involve such a degree of specificity that they have been described as “micromanaging everything from elevator safety to countertop varnish to the locations of janitors’ closets.” Finally, certain TRAP laws authorize state health departments to inspect the offices and medical records of abortion providers who are subject to these licensing schemes without a warrant or probable cause to search.<sup>175</sup>

While TRAP laws are often defended as public health measures, in fact, their underlying intent is to force abortion clinics to shut down.<sup>176</sup>

By meddling so deeply in abortion practice, TRAP laws infringe the privacy of women seeking abortions. Many of the provisions override medical judgment and discretion with no discernable benefit to patients. Some intrude more directly on women’s privacy, for instance by calling for unnecessary testing<sup>177</sup> or by allowing warrantless searches of abortion facilities and private abortion records.<sup>178</sup> They can also hamper access to abortion services by increasing the costs of operating a clinic.<sup>179</sup> Nevertheless, these laws have been upheld under *Casey*’s undue burden standard.<sup>180</sup>

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175. *Id.* (citations omitted); see CTR. FOR REPROD. RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS: AVOIDING THE “TRAP,” 1, 2-4 (2003), available at [http://reproductive-rights.org/sites/crr.civicaactions.net/files/documents/pub\\_bp\\_avoidingthetrap.pdf](http://reproductive-rights.org/sites/crr.civicaactions.net/files/documents/pub_bp_avoidingthetrap.pdf) (providing numerous examples of these laws).

176. See Memorandum from James Bopp, Jr. & Richard E. Coleson, *supra* note 172, at 6 (anti-abortion strategy memo, referring to benefits of “‘incremental’ efforts” to eliminate abortion, including “clinic regulations (which often shut down clinics)”).

177. See S.C. CODE ANN. REGS. 61-12 § 304(B)-(C) (requiring that certain laboratory tests be administered prior to the abortion procedure, including “[d]etermination of Rh factor (including the Du variant when the patient is Rh negative)” and “testing for Chlamydia and gonorrhea”).

178. See Jorns, *supra* note 174, at 1570-71 (describing “significant patient privacy concerns” posed by warrantless inspections of abortion providers).

179. See, e.g., *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000) (rejecting claims of increased costs as a basis for invalidating South Carolina TRAP law).

180. See *id.* (upholding South Carolina’s TRAP law as promoting “the health and appropriate care of women seeking abortions”); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 871-75 (2007) (describing difficulty of challenging TRAP laws under *Casey*); Jorns, *supra* note 174, at 1572-76 (same). *But see* B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 546-47 (2009) (arguing for a right-to-health framework that “would invoke heightened security for TRAP laws”); Jorns, *supra* note 174, at 1590 (proposing that a Fourth Amendment purpose-based doctrine be extended to the warrantless search provisions of TRAP laws).

As discussed in Part III.A, some state legislatures use so-called “informed consent” laws to control the physician-patient dialogue.<sup>181</sup> South Dakota’s informed consent law requires doctors to tell abortion patients that the abortion will “terminate[] the life of a whole, separate, unique, living human being.”<sup>182</sup> While South Dakota has defended this statement as simply conveying accurate, scientific information to the abortion patient, the law’s clear purpose is to force abortion providers to transmit the state’s own moral judgment on abortion.<sup>183</sup> Abortion providers promptly challenged this law in federal court, alleging in part that it violated their freedom of speech.<sup>184</sup> In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the Eighth Circuit ruled that the requirement was permissible because, although “the State cannot compel an individual simply to state the State’s ideological message,” it can require doctors “to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.”<sup>185</sup> In reaching this conclusion, the Court in *Rounds* relied upon Justice Kennedy’s expansive reading of the undue burden standard in *Carhart II*.<sup>186</sup>

Fetal pain measures are another example of laws that impede physician discretion and intrude on the doctor-patient relationship.<sup>187</sup> As Harper Jean Tobin argues,

Fetal pain provisions are purportedly aimed at encouraging women to request anesthetic to make the procedure more humane. However, legislative histories and the laws’ proponents suggest another purpose: to shock women choosing abortion into abandoning that choice. Even if their aim is not actually to frighten and discourage, false or misleading fetal pain provisions are just as objectionable as those addressing, for example breast cancer risk. They may unnecessarily exacerbate the anxiety women feel during and after the abortion and anesthetic measures carry a real risk of complications for the patient.<sup>188</sup>

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181. *Judicial Evasion*, *supra* note 118, at 34-40.

182. Hill, *supra* note 180, at 540 n.166 (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) and citing the South Dakota informed consent statute).

183. *Id.* at 539-40.

184. *Id.*

185. *Rounds*, 530 F.3d at 734-35; see also *Judicial Evasion*, *supra* note 118, at 39-40 (discussing *Rounds*).

186. *Rounds*, 530 F.3d at 734-35.

187. See Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 122, 140-49 (2008) (discussing and analyzing fetal pain laws in context of medical informed consent principles). Several states have passed such laws, and Congress has considered a fetal pain measure, the Unborn Child Pain Awareness Act of 2006. *Id.* at 141 n.169.

188. *Id.* at 148 (citations omitted).

Some of these laws attempt to dissuade a woman from having an abortion by requiring that she be informed that, “[b]y 20 weeks’ gestation, the unborn child has the physical structures necessary to experience pain.”<sup>189</sup> Some states require doctors to administer anesthesia to the fetus if the woman consents.<sup>190</sup> While the laws requiring this information purport to provide “value-neutral, scientific information,” they are in fact aimed at making women reconsider their decision to end the pregnancy by conjuring an image of fetuses as morally indistinguishable from babies.<sup>191</sup> What is not reflected in the information is the uncertainty within the scientific community regarding whether and when these fetuses actually do perceive pain.<sup>192</sup> Laws that require physicians to offer to anesthetize the fetus go beyond mere intrusion into the doctor-patient dialog. These laws encourage the administration of a procedure that is not without medical risks to the women, not for health and safety reasons but to discourage abortions.

Ultrasound requirements similarly insert the state into the provider-patient relationship by co-opting the abortion provider to deliver the state’s anti-abortion message.<sup>193</sup> Some states require that a physician perform an ultrasound on the fetus before it is aborted and that the woman complete a form acknowledging either that she has viewed the ultrasound or that the physician offered her the chance to do so and she refused.<sup>194</sup> “The core and motivating belief [behind these statutes] is that a woman who sees her baby’s image on a screen will be less likely to abort.”<sup>195</sup> Oklahoma’s law mandates that an ultrasound be performed, and while the woman may avert her eyes, she is forced to listen to the technician describe what the ultrasound shows.<sup>196</sup> It is far from clear whether these laws would be held unconstitutional under *Casey*, especially under Justice Kennedy’s interpretation of that decision.

Abortion procedure bans are yet another vehicle for government intervention into medical decision-making. In the late 1990s,

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189. ARK. CODE ANN. §§ 20-16-1103, -1105 (2005); see *Judicial Evasion*, *supra* note 118, at 43-45 (describing fetal pain laws and the motives underlying them).

190. ARK. CODE ANN. § 20-16-1104 (2005).

191. *Judicial Evasion*, *supra* note 118, at 44.

192. See *id.* at 45 (“Although the laws purport to reflect scientific research showing that fetuses may experience pain after a certain stage of pregnancy, the scientific community is divided on this claim.”).

193. See, e.g., S.C. CODE ANN. § 44-41-330 (2007) (outlining the information a physician is required to provide a patient prior to performing the requested abortion).

194. Sanger, *supra* note 139, at 357-58.

195. *Id.* at 358.

196. OKLA. STAT. tit. 63, § 1-738.3b (2009). This law has been enjoined by a state trial court as violating the Oklahoma Constitution’s “single-subject” requirement. An appeal is pending. Center for Reproductive Rights, *Nova Health Systems v. Henry (OK)*, <http://reproductiverights.org/en/case/nova-health-systems-v-henry-ok> (last visited Jan. 24, 2010).

numerous states passed so-called “partial-birth abortion” bans, laws that purported to ban a single abortion method but in fact were much broader in scope.<sup>197</sup> As with other abortion restrictions, the bans were presented in part as protecting women’s health.<sup>198</sup> Other state interests cited in support of these bans included “concern for the life of the unborn,”<sup>199</sup> “prevent[ing] cruelty to partially born children,”<sup>200</sup> “preserv[ing] the integrity of the medical profession,”<sup>201</sup> and “protect[ing] fetal dignity by fending off a ‘coarsening’ of the culture that would lead to widespread indifference to the lives of newborns and ‘all vulnerable and innocent human life.’”<sup>202</sup> However, it is well-documented that the bans were deliberately created as part of a political strategy to appeal to moderates on the abortion issue, while gradually whittling away the ultimate right to choose abortion.<sup>203</sup> In fact, the bans potentially endangered women’s health by forbidding doctors to use procedures that might well be the safest for some women and by failing to include an exception allowing the banned methods to be used when necessary to protect a woman’s health.<sup>204</sup>

In 2007, the Supreme Court upheld a federal ban virtually identical to the Nebraska ban the Court had invalidated in 2000.<sup>205</sup> Justice Kennedy wrote the majority opinion, demonstrating that his interpretation of the undue burden standard now controls and that the standard permits the government to micromanage the medical details

197. See *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914 (2000) (striking down Nebraska’s ban as imposing an undue burden because it prohibited too many procedures and lacked a health exception); see also *Judicial Evasion*, *supra* note 118, at 47-53 (describing “partial-birth abortion” bans).

198. *Judicial Evasion*, *supra* note 118, at 26, 49-50 (describing findings underlying the federal Partial-Birth Abortion Ban Act of 2003); see also Borgmann, *supra* note 3, at 700 (“Although the ‘partial-birth abortion’ bans’ proponents argue that the procedure they claim to target is never medically necessary and in fact is sometimes dangerous to women, this has never been the professed motive for the bans.”).

199. *Carhart I*, 530 U.S. at 930.

200. *Id.*

201. *Id.*

202. *Judicial Evasion*, *supra* note 118, at 29-30 (quoting *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 157 (2007)).

203. See, e.g., Siegel, *supra* note 118, at 1651-52 (documenting and analyzing shift to “woman-protective” anti-abortion argument); Cynthia Gorney, *Gambling with Abortion*, HARPER’S MAGAZINE, Nov. 2004, at 33, 39, 41-42 (discussing political strategy behind “partial-birth abortion” bans); Memorandum from James Bopp, Jr. & Richard E. Coleson, *supra* note 172, at 6 (advocating incrementalist strategy for banning abortion in order to “change hearts and minds”); see also Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 21-24 (2009) (describing the legislative push in the 1990s to ban so-called “partial birth abortion” as a public relations campaign intended to foster public outrage against abortion generally).

204. See *Carhart I*, 530 U.S. at 932 (discussing Nebraska’s failure to demonstrate that “banning [the partial-birth abortion procedure] without a health exception may not create significant health risks for women”).

205. *Carhart II*, 550 U.S. at 156.



of abortion without a clear public health or safety rationale.<sup>206</sup> Moreover, Justice Kennedy approved such a restriction even though it did not clearly vindicate the state's interest in the fetus, since according to the state (and the Court), the ban would not prevent a single abortion from occurring but instead would merely require doctors to use other methods.<sup>207</sup>

These kinds of restrictions no longer need to be justified as public health or safety measures. Under *Roe*, pre-viability regulation of abortion was permissible only if it advanced these goals.<sup>208</sup> But the myriad new encroachments on medical decision-making are now permissible thanks to *Casey*'s recognition of a state interest in the fetus sufficient to justify intrusive abortion regulations at all stages of pregnancy.

#### *D. Violations of Bodily Integrity*

Some would argue that any law designed to pressure or coerce a woman into continuing an unwanted or untenable pregnancy violates her bodily integrity.<sup>209</sup> Even under a narrower conception of bodily integrity, it is clear that several of the new abortion restrictions directly invade the sanctuary of a woman's body. TRAP laws that require unnecessary testing and laws that give a woman no choice but to submit to an ultrasound subject a woman to physical interventions without regard to whether she or her physicians thinks it in her best medical interests. Likewise, abortion procedure bans force doctors to tailor their methods to vindicate not the woman's safety but some vaguely articulated moral indignation on the part of the state.<sup>210</sup>

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206. See *Judicial Evasion*, *supra* note 118, at 50 (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 878 (7th Cir. 1999) (Posner, J., dissenting) ("These statutes do not seek to protect the lives or health of pregnant women, or of anybody else. . . . But as banning "partial birth" abortions is not intended to improve the health of women . . . it cannot be defended as a health regulation.")).

207. *Carhart II*, 550 U.S. at 181 (Ginsburg, J., dissenting).

208. As Justice Stewart, concurring in *Roe v. Wade*, noted:

[Among] [t]he asserted state interests [for the challenged abortion law] are protection of the health and safety of the pregnant woman . . . . These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures . . . . But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law.

*Roe v. Wade*, 410 U.S. 113, 170-71 (1973) (Stewart, J., concurring).

209. Borgmann, *supra* note 75, at 603; see, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 53 (1971) (arguing that abortion should be permitted even if the fetus is a person, since a woman has a right to defend her body against the invasion of an unwanted pregnancy).

210. See *supra* notes 198-202 and accompanying text (discussing asserted state interests supporting "partial-birth abortion" bans).

Women may be forced to resort to a different, and perhaps more uncomfortable or emotionally traumatic, abortion procedure,<sup>211</sup> or to undergo the injection of substances into the uterus in order to ensure fetal demise before an abortion.<sup>212</sup> Fetal pain laws so far do not mandate that a doctor anesthetize a fetus against an abortion patient's will. Even so, the biased and misleading way in which these laws present information to women seeking abortion furnishes a subtle coercion.<sup>213</sup> What woman would refuse fetal anesthesia upon being told in so many words that her "unborn child" will otherwise suffer during an abortion?

Abortion restrictions that utilize the woman's own body to pressure her not to exercise her right to abortion are particularly invidious violations of bodily integrity. In the early stages of pregnancy, women can deliberate privately about whether to continue the pregnancy because they usually do not feel or look pregnant.<sup>214</sup> Mandatory ultrasounds undermine a woman's feeling of control regarding the profoundly personal and disruptive, if not frightening, circumstance of an unintended pregnancy.<sup>215</sup> "Mandatory ultrasound is meant to solidify the idea of a child so that the norms of maternal solicitude and protection begin to take hold."<sup>216</sup> Required ultrasounds, then, use a woman's body to conjure an image of the fetus as a baby in order to convince the woman that she is already a mother and that she should continue with the pregnancy. Fetal pain measures similarly make a physically intrusive claim upon the woman's body in order to vivify the state's moral message opposing abortion. If all of these measures are ultimately upheld under the undue burden standard, it will be thanks to *Casey's* expanded solicitude for the state's interest in the embryo or fetus.<sup>217</sup>

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211. *But see* David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 33-34 (predicting that *Carhart II* will not have a significant impact on abortion practice).

212. *See Carhart II*, 550 U.S. at 147 (discussing potential use of digoxin injections as a way to evade bans' proscriptions); Garrow, *supra* note 211, at 31-34 (arguing that "*Gonzales v Carhart* [sic] has done little more than require the modest number of physicians who perform intact D&Es to utilize in all late second-trimester procedures an injection protocol that most of them already used and that credible clinical studies hold to be completely safe").

213. *See* Tobin, *supra* note 187, at 148-49 (describing the emotional trauma fetal pain laws can impose on women).

214. Sanger, *supra* note 139, at 382.

215. *Id.*

216. *Id.* at 383.

217. *But cf.* Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1336-37 (2009) ("The few states that have pushed the *Casey* boundaries have not succeeded in spurring on a wave of stringent antiabortion regulation. . . . Outside of partial-birth abortion, where two states (Louisiana and Nebraska) enacted partial-birth bans that mirrored the federal law approved in [*Gonzales*

CONCLUSION: THE PARADOX OF PRIVACY UNDER THE UNDUE  
BURDEN STANDARD

Abortion is not the only medical context in which a state may intrude on privacy concerns without the need to justify its regulations as related to public health or safety. In the right-to-die cases, states have asserted justifications including the protection of the integrity of the medical profession, protection of vulnerable patients, and protection of life.<sup>218</sup> However, in the abortion context, the *Roe* framework provided that pre-viability laws could not be justified on any grounds other than the woman's health. Thus, it was *Casey* that opened the door to other, morally based government justifications for pre-viability regulations of abortion that do not impose substantial obstacles to abortion access.

The "compromise" that *Casey* struck is an untenable one. *Casey* held that the state may regulate abortion throughout pregnancy, even for the sole purpose of vindicating its interest in the embryo or fetus, so long as these restrictions are "truthful and not misleading" and do not prevent a woman from obtaining an abortion.<sup>219</sup> This encouraged legislatures to pass abortion restrictions in fact based on moral norms but couched as grounded in scientific evidence.<sup>220</sup> Although the regulations discussed in this Article do not directly prevent a woman from getting an abortion, they sharply invade women's privacy in making a decision about abortion. Justice Kennedy, however, seems willing to tolerate such intensely intrusive restrictions on the abortion decision so long as women are still assured the ultimate choice.<sup>221</sup> Women must now go through a kind of public shaming in order to "earn" their abortions. They are forced to endure state-scripted speeches from their physicians conveying the state's claim that an abortion kills a child.<sup>222</sup> They are told that the abortion will make that

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*v.] Carhart*, states do not see the Court's apparent shift on abortion rights as a rallying call to enact a new wave of stringent antiabortion restrictions.").

218. See *Washington v. Glucksberg*, 521 U.S. 702, 728, 731 (1997) (discussing the legitimate interests promoted by the state's ban on physician-assisted suicide).

219. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it.").

220. *Judicial Evasion*, *supra* note 118, at 56.

221. See Borgmann, *supra* note 3, at 702 (discussing Justice Kennedy's later opinion in *Carhart II*, in which he "openly displayed virulent personal revulsion at abortion," "point[ed] an accusing finger at Justice O'Connor . . . [and] gave every impression of a Justice who had been lured into joining *Casey's* controlling opinion on the assumption that the decision would rarely interfere with states' discretion in enacting abortion restrictions").

222. *But see* Borgmann, *supra* note 75, at 586-99 (questioning the consistency and credibility of claims that abortion is tantamount to murder).

child suffer pain. Women are urged to see an ultrasound of the fetus in order to confront face to face the purported child they are killing.

Thus, although *Casey* strongly affirmed the woman's right to make the ultimate choice about whether to have a child, *Casey* also sanctioned measures that open up the woman's decision to all kinds of public scrutiny. At the same time, according to *Casey*, that scrutiny can never directly achieve its proponents' goals of halting abortions. Under the undue burden standard itself, any restrictions that directly prevent women from getting abortions are unconstitutional.<sup>223</sup> So all of these measures are ultimately senseless, permissible only if they fail their fundamental purpose.

Many scholars have argued that reliance on privacy as a basis for the right to abortion was never wise.<sup>224</sup> Many were also glad to see *Casey* reframe the right in terms of equality and autonomy.<sup>225</sup> It seems, though, that the cost of winning *Casey* is that women have protection for the ultimate abortion decision, but almost no protected zone of privacy in which to make that decision. Perhaps the right to abortion would benefit from renewed attention to the more familiar sense of privacy — not just privacy as an awkward and unsuitable synonym for equality, liberty, or autonomy in a minimally decisional sense, but privacy as a protected space within which a person can make these kinds of important moral decisions without interference from the state.<sup>226</sup>

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223. *Casey*, 505 U.S. at 874 (“Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause.”).

224. See, e.g., WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (offering a collection of scholars' alternative opinions for *Roe v. Wade*, both for and against the right to abortion); Greene, *supra* note 41 (manuscript at 1) (“‘Privacy’ again? I'm afraid so, but I come to bury the benighted doctrine, not to praise it.”) (internal citation omitted).

225. See *supra* notes 45-48 and accompanying text (describing favorable reactions to *Casey* opinion).

226. See Borgmann, *supra* note 75, at 599-607 (“It is likely that the law can never sufficiently capture the thick conceptions of life and motherhood in order to dictate whether a particular abortion is morally permissible.”).