Looking Back on Planned Parenthood v. Casey

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LOOKING BACK ON
PLANNED PARENTHOOD V. CASEY

Chris Whitman*

Scholarship that tells us what is really at stake in the lives of people affected makes the law honest and responsive. Whether or not it directly shapes doctrine, this type of scholarship can capture imagination and influence judgment. The Michigan Law Review has published some of the best of this work: Yale Kamisar's articles on coerced confessions,1 Terry Sandalow's essay on affirmative action,2 Joe Sax and Phillip Hiestand's description of the emotional impact of living in a slum,3 Martha Chamallas and Linda Kerber's demonstration of how injuries that uniquely befall women have been dismissed as merely emotional wrongs,4 and, most relevant to my project, Don Regan's article on abortion5 and Martha Mahoney's on separation assault.6

Civil rights doctrine is thin and vulnerable when it develops without any genuine effort to understand and articulate the significance of the right claimed to the protected class. The Supreme Court's abortion law is an important example of this phenomenon. A woman's right to choose to have an abortion free from state coercion was defined, developed, and constricted without any sustained effort on the part of the Court to articulate why such a right actually is important to women. The right has survived almost three decades but is now barely alive, apparently settled into a minimal existence, protected only against the most overwhelming of state incursions.

In this Essay, I explore the implications of this failure. Part I discusses the compromise reached by the Supreme Court a decade ago in


its last major abortion case, Planned Parenthood v. Casey. Part II argues that the undue burden test adopted in Casey protects women only against total prohibitions on their right to choose to have a safe abortion. Like traditional rules regarding rape, it requires women to resist to the utmost in order to preserve their liberty. Less serious burdens are classified as mere inconveniences. Part III points to two fine articles published in the Michigan Law Review as examples of scholarship informed by attention to women's lives that should have expanded the Court's perspective. Part IV contends that the choice to have an abortion is, for some women, both an unavoidable and an ethical decision. It argues that more attention to what abortion means to women ought to lead all the Justices to see the question as a true moral conflict, rather than a choice between morality on one side and convenience or amorality on the other.

I. THE CASEY COMPROMISE

Overall, the Court's record in understanding and articulating the perspective of women has been mixed. It has been quick to perceive how traditional stereotypes can harm untraditional women, as when it saw that Virginia's all-woman alternative to its state-run military institute for men would be inadequate for a woman seeking "adversative" training, or when it found sex discrimination in the negative evaluations of a female candidate for partnership at Price Waterhouse. But when it comes to protecting women in more traditional roles relating to sex and motherhood, the Court has been astonishingly obtuse. It failed to see gender discrimination in practices that burden pregnancy, and accepted the gender norm of male promiscuity as a justification for upholding citizenship regulations that distinguish between children born overseas to alien men and American women and those born overseas to alien women and American men.

Abortion may be uniquely difficult because it implicates both sexuality and the meaning of motherhood. The Court came the closest to articulating why abortion rights are important to many women as part of its constitutional analysis in Casey. Casey involved a challenge to a Pennsylvania statute that imposed a variety of constraints on women who seek abortions, and on the doctors and clinics that pro-

vide them. Immediate reaction to the opinion varied dramatically. Most moderate observers of the Court were surprised, and many were pleased, by the Court’s careful reaffirmation of Roe v. Wade, for the Court had seemed poised to reverse that decision. Those who had hoped for a reversal of Roe were dismayed, but so were abortion-rights advocates, many of whom regarded the opinion as a disaster. The opinion seemed to be written by several different authors who refused to listen to each other. It reaffirmed Roe in language sensitive to Roe’s importance to women generally and, simultaneously, limited constitutional protections severely, with an almost callous disregard for the women most in need of protection.

Since Casey, the Court has not returned to the broad question of whether the right to seek an abortion exists. Its subsequent abortion cases, Mazurek v. Armstrong and Stenberg v. Carhart, were treated as applications of Casey to new questions. In Mazurek, the Court, by a vote of six to three, held that laws specifically designed to discourage abortions would be constitutional, so long as they had little actual effect. In Stenberg, the Court, bitterly divided, struck down a state law that prohibited “partial-birth” abortions even when the mother’s life or health was at risk.

Neither majority opinion questioned Casey’s formulation of the constitutional test. Casey appears to have defined a consensus that has reduced the pressure on the Court to reassess basic principles and that has endured for almost a decade. It is not unfair to see Casey as a vindication of the right articulated in Roe after two decades of political and academic challenge. The political challenge accomplished a great deal in limiting the breadth of the right to choose abortion, but it was not as successful as its organizers had hoped. When Casey was decided, the Court, for the first time, had a clear majority of Justices who had either written an opinion challenging Roe or had been appointed by a President committed to reversing the decision. Just three years earlier, in Webster v. Reproductive Health Services, there appeared to be four votes for abandoning any serious review of state restrictions on abortion, and many Court-watchers were confident that one of the newly appointed Justices — either Souter or Thomas — would provide a fifth vote for reversal.

The fifth vote never materialized. Justice Souter joined Justice O’Connor, who had been considered a possible vote against Roe, and Justice Kennedy, who had been part of the hostile four in Webster. Together they wrote an opinion describing itself as affirming “the es-

sential holding of *Roe.*" Justices Stevens and Blackmun were willing to go further in striking down the Pennsylvania restrictions under attack in *Casey.* They joined the others to form a five-Justice majority for its result. The other four Justices would have upheld the Pennsylvania statute in its entirety. Thus, Justices O'Connor, Kennedy and Souter formed the decisive bloc of the Court.

Those who had been dreading the reversal of *Roe* were exhilarated by the tone of the majority opinion. The Court reaffirmed *Roe* in ringing language rarely heard from the late twentieth-century Supreme Court. The opinion begins: “Liberty finds no refuge in a jurisprudence of doubt”\(^\text{16}\) and ends with a reference to “the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”\(^\text{17}\) It includes an extended, careful, and even deeply-felt discussion of the Court’s obligation to adhere to precedent. Justices O'Connor, Kennedy and Souter — all three appointed by Republican presidents who were looking for jurists who would be skeptical of the sort of judicial activism exemplified by *Roe* — appear, ironically, to have found in *Casey* an opportunity to demonstrate their commitment to the stability of law by reaffirming *Roe*.

The Supreme Court’s majority opinion in *Casey* is rare, even unique, among the Court’s abortion cases in that it contains more than a cursory discussion of what reproductive rights have meant for women, of what might be risked if these rights are not retained. *Roe* itself famously cast the right to choose an abortion as a medical decision, in which the woman’s interests are subordinate to her doctor’s professional commitment to provide appropriate care. In elucidating the “right of privacy” in *Roe,* Justice Blackmun did briefly describe the harms that might befall a woman deprived of choice. This description had little effect, however, perhaps because it seemed tentative, even cold. The woman, like Blackmun’s language, is largely passive.\(^\text{18}\) And in the end, the woman disappears completely as Justice

\[\text{\textsuperscript{15}}\text{ Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).} \]
\[\text{\textsuperscript{16}}\text{ Id. at 844.} \]
\[\text{\textsuperscript{17}}\text{ Id. at 901.} \]
\[\text{\textsuperscript{18}}\text{ Roe v. Wade, 410 U.S. 113, 153 (1973). Blackmun writes:} \]

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.

*Id.*
Blackmun's argument dissolves all concern for women into medical matters to be decided by a physician. 19

The majority opinion in *Casey*, too, spends only a few sentences describing the effect of restrictions on women who seek abortions. Nevertheless, in these few sentences the focus shifts from medical privacy to individual liberty. Professional medical decisionmaking has disappeared. Instead, the Court powerfully captures the despair at being turned to another's purposes that is at the core of this debate for many women:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman [sic] with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. 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. 20

The majority Justices' sensitivity to what *Roe* has meant for the ability of women to live according to their own goals and values comes up again in their discussion of the precedential effect of *Roe*, where they describe the critical role that decision played over the prior two decades in advancing the equal participation of women in the “economic and social life of the Nation.” 21 Because of *Roe*, women had, for the first time, been able to make life plans with some confidence that their dreams would not be derailed by an unexpected pregnancy. 22 Finally, in the Court's discussion of the spousal notification provision,

19. See *id.* at 165-66 (vindicating “the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician”).


21. *Id.* at 856.

22. See *id.* The Court noted:

[For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and, while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

*Id.*
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the one aspect of the Pennsylvania law that was found to be unconstitutional, the Justices acknowledged the pervasiveness of domestic violence and the actual constraint it can impose on individual women.\textsuperscript{23} Pennsylvania's requirement that a woman seeking an abortion certify that her husband has been informed, they said, would prevent "the significant number of women who fear for their safety and the safety of their children . . . from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases."\textsuperscript{24} Although the plurality did not draw the connection explicitly, it appeared to appreciate the feminist insight that a safe home environment is critically important to women's equality in public life.

II. THE "ESSENTIAL HOLDING" OF ROE

The majority opinion in \textit{Casey} revealed a sensitivity to the impact of legal rights on the actual lives of people that had been largely missing from majority opinions of the time.\textsuperscript{25} But, despite all this, \textit{Casey} can also be viewed as a significant betrayal of the hopes raised by \textit{Roe}. The plurality Justices — O'Connor, Kennedy, and Souter — actually make only the most grudging acknowledgment of the right to choose to have an abortion, perhaps because the Court came so late to the appreciation of \textit{Roe}'s significance for women's lives, or perhaps because that appreciation has never been integrated into a developed body of constitutional doctrine. The relative silence of the Court over the decade since \textit{Casey} confirms what many feared at the time: the stirring paragraphs of \textit{Casey} did not promise a new attention to the situation of women, but marked the outer boundaries of a compromise that will protect women only from the most overwhelming and total coercion.

\textsuperscript{23} \textit{Id.} at 897. The Court noted that:

For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in \textit{[Planned Parenthood of Central Mo. v.] Danforth} [428 U.S. 52 (1976)]. The women most affected by this law — those who most reasonably fear the consequences of notifying their husbands that they are pregnant — are in the gravest danger.

\textit{Id.} The opinion relied heavily on the District Court's findings of fact. \textit{Id.} at 888-91.

\textsuperscript{24} \textit{Id.} at 894.

\textsuperscript{25} Another exception was \textit{Lee v. Weisman}, 505 U.S. 577 (1992), decided the week before \textit{Casey}, which held school prayer in public schools to be unconstitutional. The majority opinion, written by Justice Kennedy, and joined by Justices Blackmun and Stevens as well as Justices O'Connor and Souter, spent some time considering "the position of the students, both those who desired the prayer and she who did not," \textit{id.} at 590, before concluding that the pressure to conform, both from the state and from peers in the state-created context, was real enough to infringe upon First Amendment rights. \textit{Id.} at 593.
Only Justices Blackmun and Stevens, who wrote separately in *Casey*, adhered to the more searching review of abortion regulation that had been used recently as the mid-1980s when Justices Brennan, Marshall, and Powell were still on the Court. The *Casey* plurality opinion did not reaffirm *Roe*; it only reaffirmed "the central holding of *Roe.*" It rejected *Roe*’s trimester framework, which prohibited all state regulation of abortion (other than the requirement that abortions be performed by physicians) in the first trimester of pregnancy. Instead, while continuing to treat viability of the fetus as the boundary beyond which a woman no longer possesses the "right to choose to terminate her pregnancy," the plurality held that states may regulate abortion procedures from the moment of conception in order to vindicate the states’ "profound interest in potential life."

The Court also said that states could constitutionally regulate in ways that clearly express hostility to the choice to have an abortion or in ways that impose increased costs upon and barriers to abortion, so long as the constraints adopted do not place an “undue burden” upon a woman who wants to exercise her right. An “undue burden” is one that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

The significance of *Casey*, then, turns on what is meant by “a substantial obstacle.” With this standard in mind, the language quoted above — that a spousal notification requirement would prevent a “significant number of women . . . from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases” — takes on a more troubling significance. That provision of the Pennsylvania law is the only one the Court held unconstitutional, so this language appears to describe the limits of what sort of regulations the Court will now find unconstitutional. If so, the only state restrictions that will be held unconstitutional will be those that constrain some women as completely as did the criminal prohibitions struck

26. *E.g.*, *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747 (1986) (a 5-4 decision written by Justice Blackmun, invalidating a requirement, among others, that certain reports be made and certain limitations be placed on post-viability abortions); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (a 6-3 decision, authored by Justice Powell, invalidating various regulations, including a mandatory waiting period and a requirement that all abortions after the first trimester be performed in a hospital).

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

28. Id. at 870.

29. Id. at 878.

30. Id. at 876-78.

31. Id. at 877.

32. Id. at 894.
down in Roe. Not just burdens, but only total barriers, are in fact “un-
due.” That, apparently, is Roe’s “essential holding.”33

This reinterpretation of Roe led the plurality Justices to uphold provisions of the Pennsylvania statute that would have been unconstitutional under prior law. For example, the Pennsylvania statute included an “informed consent” provision that required a woman seeking an abortion be given certain specified information before the procedure and that the information be both conveyed by a physician and provided to the woman at least twenty-four hours in advance of the abortion.34 Ten years earlier, in Akron v. Akron Center for Reproductive Health (Akron I),35 written for the Court by Justice Powell, the Court had held a similar “informed consent” provision unconstitutional because it was designed to discourage abortion rather than to promote valid state interests in the health of the woman. Akron I struck down a requirement that information be communicated by a physician on the grounds that the regulation was “unreasonable,”36 and it invalidated a mandatory 24-hour waiting period after “consent” because the waiting period unnecessarily increased the costs of abortion.37 The Court noted that a waiting period would require women to make two separate visits to the abortion provider.38 An additional visit could mean greater expense, longer travel time, increased exposure to harassment by anti-abortion protestors, and greater difficulty for women who live in parts of the country where abortion providers are

33. The few post-Casey abortion cases are consistent with this interpretation. In Mazurek v. Armstrong, a per curiam opinion from which Justices Stevens, Ginsburg, and Breyer dissented, the Court found no “undue burden” in a Montana law that may have been purposefully designed to discourage abortions. 520 U.S. 968 (1997). The Court summarily reversed a preliminary injunction issued by the Ninth Circuit against a law that restricted the performance of abortion to licensed physicians. Plaintiffs had argued that the law specifically targeted one particular physician’s assistant who had been performing abortions in a state with relatively few doctors. The Court found dispositive the lower courts’ conclusion that the effect of the ban was not substantial. In Stenberg v. Carhart, the Court did strike down a Nebraska law that banned “dilation and extraction” abortions. 530 U.S. 914 (2000). Justice O’Connor, who provided the fifth vote for the majority, thought it critical that the law lacked any exception for abortions that were necessary to preserve the life or health of the pregnant woman. She suggested that the law would be constitutional if “there were adequate alternative methods for a woman safely to obtain an abortion before viability.” Id. at 951.

34. 18 PA. CONS. STAT. § 3205 (1990). This information included “the nature of the procedure, the health risks of the abortion and of childbirth, and the ‘probable gestational age of the unborn child.’ ” Casey, 505 U.S. at 881. The woman would also be offered optional printed materials that described the fetus, informed her about the support obligations of the father of a child, and listed agencies that could help with adoption. Id.


36. Id. at 448.

37. Id. at 449-51.

38. Id. at 450.
rare.\(^{39}\) After *Casey*, similar regulations are permissible. While the plurality understood that these regulations were designed to discourage abortions and could be very burdensome, it held that they do not pose "substantial" obstacles.\(^{40}\) They do not infringe the woman's constitutional right, but only make the right more difficult to exercise.\(^{41}\) To complain about having to wait an extra day, as the three Justices saw it, was to insist upon "abortion on demand."\(^{42}\)

Despite its sensitivity elsewhere in the opinion about what abortion rights have meant for women, in the sections adopting the "undue burden" test, the *Casey* plurality is suspicious about what motivates a woman's choice to have an abortion and insensitive to the weight of burdens that fall short of total obstruction. In fact, the opinion turns the "pro-choice" rhetoric of *Roe* supporters against a sympathetic interpretation of the right recognized in that opinion. The Court seems to ask: how can women who argue for "choice" object to being fully informed, to hearing that "there are philosophic and social arguments of great weight . . . in favor of continuing the pregnancy,"\(^{43}\) to being subject to state persuasion? According to the plurality, requirements like the twenty-four hour waiting period simply further choice by ensuring that it is "thoughtful and informed."\(^{44}\)

Although the expected deathblow to *Roe v. Wade* was not delivered, when the plurality concludes its discussion of the Pennsylvania statute, it is apparent that only a sliver remains. What *Casey* gives a woman is simply "some freedom to terminate her pregnancy"\(^{45}\) if she does so before the fetus becomes viable.

The Court's opinion does not have a single, identified author. This is unusual. It seems to be a technique adopted to communicate that a subset of Justices\(^{46}\) is uniquely united behind an approach to a par-

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\(^{39}\) The plurality in *Casey* acknowledged that the district court in that case had found these to be the consequences of the waiting requirement there. *Casey*, 505 U.S. at 885-86 (citing Planned Parenthood v. *Casey*, 744 F. Supp. 1323, 1351-52 (1990)).

\(^{40}\) *Id.* at 886-87.

\(^{41}\) *Id.* at 887.

\(^{42}\) *Id.*. The *Casey* plurality also upheld the constitutionality of reporting requirements similar to those struck down in *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747 (1986).

\(^{43}\) *Casey*, 505 U.S. at 872.

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 869 (emphasis added).

\(^{46}\) As in *Buckley v. Valeo*, 424 U.S. 1 (1976), a group of three Justices joined in all sections of the opinion, while other Justices joined only certain parts. Some sections — Part IV (which rejects *Roe*’s trimester framework and adopts undue burden analysis), Part VB (which upholds the "informed consent" requirement), and VD (holding the parental consent requirement to be constitutional) — are joined in only by Justices O'Connor, Kennedy, and Souter. Another, Part VE (invalidating the record-keeping and reporting requirements), is joined only by those three and Justice Stevens. The rest speak for a five-Justice majority.
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particularly controversial constitutional question. But in Casey the technique is unsettling because the Court adopts an internally inconsistent view of the situation of women. For example, although the section overturning the spousal notification requirement contains an extensive and powerful discussion of the dire situation of a battered woman in an abusive relationship, elsewhere, writing about the reliance of women on Roe, the majority suggests in passing that the only reasons why a woman might find herself pregnant with an unwanted child are lack of planning and contraceptive failure. It does not, apparently, occur to the author of this section that abusive husbands (or lovers or strangers) might force sex on women or refuse to use contraceptives — unless this sort of coercion is encompassed by the opinion’s reference to “unplanned activity,” a cold phrase for a painful reality.

In the discussion of spousal notification, the Court understands that an abusive husband may have so much physical and psychological control over his wife that he can make it impossible for her to obtain an abortion. The Court sees the husband’s power over his wife, given legal significance by the state through the spousal notification requirement, as the equivalent of the requirement of spousal consent struck down in Planned Parenthood of Central Missouri v. Danforth. For women in dependent or abusive relationships, consent and notification can have the same effect as the criminal prohibition on abortion struck down in Roe. This is the only specific example of an “undue burden” in Casey. Undue burdens create total barriers to terminating a pregnancy even for very determined women.

“The essential holding of Roe” as reaffirmed in Casey is simply this: states cannot pass laws preventing a woman, no matter how committed, clever or desperate she is, from getting an abortion in the early stage of her pregnancy. Governments may not constitutionally make abortion impossible, but they may insist that women fight hard to exercise their right.

There is something familiar about this approach to the consequences of sex for women. The plurality’s version of the appropriate standard for protecting women’s right to choose abortion — its application of the undue burden test — has much in common with the common law’s traditional approach to consent in rape cases. Rape law once, and not so long ago, required evidence of considerable physical


48. Casey, 505 U.S. at 856 (“Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control . . . .”).

49. Id. at 897.


51. Casey, 505 U.S. at 846.
resistance from a woman before it would accept that force, rather than consent, led to intercourse. In *Casey*, we find another version of this argument: only when a woman resists to the utmost and still fails to determine the uses to which her body will be put will the law find that her rights have been violated. In all other cases, whatever the persuasion, the pressure, and the difficulties that have been put in her way, she will be deemed to have chosen her fate.

It should not be surprising to find that the constitutional law of abortion and the criminal law of rape are similar. Both involve sexual situations that are inherently ambiguous. Pregnancy and sexual intercourse can be eagerly sought, the source of deep happiness for women, or they can be extraordinarily painful, even ruinous — depending on the context and the woman’s sense that they are freely chosen. A particular individual woman can be joyous about one pregnancy and in despair about another, just as she can welcome sex in some situations and resist it in others. This is most often, of course, a rational response on her part to real differences, but the phenomenon seems to have given rise to a deep suspicion that women may not know their own minds, or that their minds are changeable.

In rape law, that suspicion has been exacerbated by a legitimate desire to tip the balance in favor of a defendant whose freedom is at stake. In abortion law, that suspicion finds expression in the concern that abortion not be “on demand” and, perhaps, in *Casey*’s willingness to find ever serious burdens like the twenty-four-hour waiting period not “undue.” In both contexts, the law has struggled to distinguish between those situations in which women have been or will be happy despite their immediate doubts, and those that are truly terrible for the woman involved. There is even an undercurrent that questions her despair: how burdensome really is this particular instance of intercourse or this particular pregnancy when other women, and even this woman at another time, would choose it voluntarily? How much is she really being asked to bear?

This uneasiness and lack of certainty is revealed in *Casey*’s two voices. One voice is fully attentive to the critical significance of abortion rights in allowing women during the last decades of the twentieth century to play a much larger role in American political and economic life and also deeply aware of the way in which domestic violence can close off all options for some women. The other is willing to let a woman suffer the consequences if she is not strong or assertive enough to overcome financial, physical, or psychological barriers placed before her by the state. Despite its willingness to reaffirm *Roe*, the *Casey* opinion suffers from the Court’s failure to develop a coherent and

confident theory of what abortion rights have meant for women over the years since Roe was decided.

III. ATTENTIVE SCHOLARSHIP

There is an excellent body of legal and non-legal scholarship that has attempted to bridge the gap between sensitivity and suspicion. Two of the very best essays, quite different from each other, were published in the Michigan Law Review. One of them, Donald Regan’s 1979 article, Rewriting Roe v. Wade,\(^5\) develops an equal protection argument for abortion rights that holds even if the fetus is regarded as a full legal person. Along the way he describes, in frightening detail, the physical burdens of pregnancy and childbirth. The other, Martha Mahoney’s Legal Images of Battered Women: Redefining the Issue of Separation,\(^6\) is not about abortion. Instead, it answers the domestic violence question, “why didn’t she walk away?,” by identifying the physical risks faced by women who try to leave their abusers. Mahoney’s analysis is directly relevant to the spousal notification question before the Court in Casey, but she also paints a powerful picture of what it means to be a mother and of how a woman’s individual interests are subordinated to the demands of her children even in life-threatening situations. Both articles illustrate what is being imposed on women when they are forced to become mothers.

The physical burdens of childbirth and pregnancy are central to Regan’s analysis. He argues that anti-abortion laws require women to undergo physical impositions of a kind that the law otherwise refuses to impose on people who are in a position to aid their fellow humans: “[i]t is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance.”\(^5\) An unwillingly pregnant woman, uniquely, and therefore unconstitutionally, is asked to undergo significant pain and risk for another, with permanent consequences for her body. Regan’s detailed description of what happens to a woman’s body even during a normal and healthy pregnancy is both daunting and familiar. Even the most minor consequences can be very unpleasant. They include:

complaints involving general inconvenience or discomfort: a tendency to faintness (generally limited to the first fourteen weeks); nausea and possibly vomiting (generally limited to the first fourteen weeks); tiredness (pronounced in the first fourteen weeks, then disappearing, to reappear near the end of pregnancy); insomnia (difficulty going to sleep caused by inability in late pregnancy to find a comfortable position in bed, com-

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53. See Regan, supra note 5.
54. See Mahoney, supra note 6.
55. Regan, supra note 5, at 1570.
pounded by difficulty going back to sleep when wakened by a kicking fetus or by the need for frequent urination which accompanies pregnancy, also compounded by general disruption of the body's internal temperature-regulation mechanism; slowed reflexes; poor coordination; uncertainty of balance (caused by increase and redistribution of body weight); manual clumsiness in the morning (caused by swollen fingers and carpal-tunnel syndrome); shortness of breath following even mild exertion; and new aversions to certain foods or smells (especially fatty or spicy foods). 

Regan goes on to describe the more serious common physical effects, including permanent painful consequences, and the small risk of serious complications leading to death.

Mahoney argues that remaining within an abusive relationship is often a rational response to a very real physical threat of "separation assault." The woman who stays has not learned "helplessness," but instead accurately perceives that she will increase the danger to herself and her children by trying to leave her abuser. Focusing on the domestic violence context, Mahoney challenges the law's expectation, also found in rape and abortion cases, that women can be required to vindicate their own interests by forceful, aggressive action. She uses women's stories of their own experiences to capture what it is like to live within an abusive relationship and gives us a powerful picture of the responsibilities of motherhood. Mahoney's stories are drawn from her own conversations with women and from the work of others. As a whole, they form a powerful picture of how intelligent, competent women live with abuse. One woman's story of being distracted by the demands of her children immediately after a violent attack, will sound familiar even to mothers who have never been in such a terrifying situation:

Two days after he broke the glass in the door, it was the middle of a hot summer afternoon. My son was asleep in his crib in my room, my daughter was taking a nap in hers. I was lying in bed reading. Suddenly, I heard a popping noise, and glass started crashing to the floor. Someone was shooting through my windows. There were no bullets flying around — I remember wondering if it was an air rifle. The windows kept shattering, and I didn't know what would happen if anything hit the baby.

I grabbed him out of the crib, got down toward the floor, and half-crawled out of the room. I took him downstairs. Of course, he was only three-months-old, when he woke up he had to nurse. Then I had to change his diaper. Then my daughter started crying — she had waked up from her nap. Then I had to change her diaper. Then she was hungry. Then I had to change his diaper again. By then he had to nurse again . . . .

56. Id. at 1579-80.
At 5:30 when I took them upstairs for their baths, I noticed the glass all over the floor. That was when I remembered what had happened...

Regan's and Mahoney's articles ask lawmakers to face reality. To require a woman to carry a fetus to term, and to make her a mother imposes an extraordinary burden. That these burdens may be accepted and even welcomed at some points in a woman's life does not make them insignificant even when they are chosen. When they are compelled, they can be intolerable.

IV. MORAL CONFLICT

To fully appreciate why many women feel that significant restrictions on abortion force them to give their lives over to the purposes of others, it is important to understand that the choice to have an abortion, like the choice to bear a child to term, may be based on an understanding of one's ethical obligations. It is unfair to characterize the debate over abortion as turning on the balance of morality and convenience, or even on the weighing of obligations to others versus self-actualization. Each side has its own moral vision. On both sides, the critical question is one of responsibility to future generations. For those who believe that a fetus is equivalent to a living person, the moral choice is to carry the pregnancy to its term. For those who do not share this belief but who have a strong sense of a mother's obligations to her living children, it may be immoral to give birth to a child unless these obligations can be fulfilled.

Some people think that the dilemma is easily avoided. A woman who does not want to carry a child to term, they say, can simply avoid intercourse or use contraceptives. These are real options for many women, and they are more real now than they were at the time of Roe v. Wade was decided. Roe is less universally significant than it was in the 1970s. In many communities, single motherhood is no longer an overwhelming disgrace. Contraceptives are both more safe and more reliable.

57. Mahoney, supra note 6, at 22-23 (quoting Lenore Weitzman, The Divorce Revolution, at x (1985)).


In the vast majority of cases, especially at the time that Roe was decided, pregnancy occurs only after peno-vaginal intercourse. If a woman did not wish to bear the burdens of continuing a pregnancy to term and giving birth to a child, or if a couple did not want to risk a pregnancy, she could forgo such intercourse. The availability of this alternative means that most women, at least so far as statutory prohibitions or commands are concerned, could avoid the restrictions imposed by abortion bans, such as the one struck down in Roe, by giving up one kind of sex.

Id.
But being a parent, whether single or married, is still accompanied by uniquely disruptive long-term obligations that can overwhelm everything else in life, and contraceptives are not yet perfect. In some communities, being an unwed mother brings disgrace upon the entire family. Abstinence is not always an option even for the most prudent. Even putting rape aside, few marriages are based on the expectation that there will be no intercourse until the wife has decided that she wishes to bear a child.

The odds of avoiding unwanted pregnancies have improved, but many women are still faced with them. Some of these women will be at risk of harm or in despair. What they choose to do will depend upon their deepest beliefs. Whether a pregnant woman considers herself to be bearing a child who has a human identity from the moment of conception, or perhaps to be undergoing a natural process that begins with the splitting of cells and ends in a live birth, will depend on her upbringing, reading, reflection, and religious affiliation. The experience of pregnancy does not help resolve the matter, for how a pregnant woman interprets her bodily sensations turns on what she expects to feel. Some women find it impossible, especially in the early stages, to think of themselves as harboring a separate person.

When abortion is made difficult or unavailable to these women, they are forced to conform to someone else’s spiritual vision. We understand how painful that can be when a fundamentalist government, like the former regime in Afghanistan, requires women under its authority to wear the veil. Although the consequences of forbidding abortion are much more intimate, painful and long-lasting, both situations impose religious views held by only some members of society on all women. Both ask women to accept another’s definition of their life possibilities. Women who are constrained from seeking abortions that do not violate their own sense of moral imperatives are being asked to subordinate their lives to the purposes of others — not just to their unwanted children, but also to ethical and spiritual views that they do not share.

Nor is bearing a child and putting it up for adoption an easy alternative. Just as some women regard abortion as morally unacceptable, others consider it unethical to avoid responsibility for a child after birth. To these women, ignoring the existence of a child born of them, and living in their world, rejecting all ties and obligations to that child, can be much more morally reprehensible than having an abortion. To require these women to carry a child to term places them, according to their own ethical scheme, in a situation without options. From this perspective, choosing abortion is not a selfish insistence on one’s own convenience precisely because choosing to give birth to a child creates an enduring ethical commitment they would not shirk.

By insisting that decisionmakers take a hard look at what abortion restrictions can mean for women, ethically as well as physically and...
emotionally, I do not claim that there will be easy solutions to the constitutional questions. *Casey* preserved *Roe* while suggesting that most state restrictions on abortion will survive constitutional scrutiny. This is a consequence, I believe, of the plurality's failure to appreciate the depth of the moral conflict involved. And *Roe* itself was vulnerable because it paid so little attention to the anguish on both sides of the question. Life itself, what it means to live a life, and what we owe to our children are at stake for both. I do want to suggest that any compromise — assuming that a case like *Casey* is meant to be a compromise — should be more consistently self-conscious that it is demanding large sacrifices from both sides.

Nothing helpful is achieved by rhetorical wars of description. These just lead to bitter confrontations like the recent, disheartening example of *Stenberg v. Carhart*, where the majority and the dissent fought over the proper way to talk about a “dilation and extraction” procedure. The case reaffirmed that state restrictions on abortion must exempt situations where a woman's life or health is in danger, but there was very little discussion in *Stenberg* of what was actually at stake for women. The dissents were furious, even though the statute on its face would require some women to face very serious physical risk. The *Casey* plurality, and perhaps its grudging compromise, dissolved, for Justice Kennedy wrote one of the several angry dissents. His outrage was suggested by his repeated references to the plaintiff as an “abortionist” rather than a “physician,” an explicit slap at the doctor's motives and competence. Words, especially enraged and contemptuous words, will not resolve this debate, for what is clear to either side is contested by the other.

The constitutional question posed by abortion cannot be “when does life begin.” Legal analysis cannot answer that question, so it cannot be the test or doctrinal structure on which the right to abortion hinges. Justice Breyer began his majority opinion in *Stenberg* by defining his task as the search for a law that could “govern a society whose different members sincerely hold directly opposing views.” Although it was not seriously addressed by the Court, that is the only sensible question. This is a debate where there are strong moral commitments on both sides, not an argument between those who believe that a fetus is life and others who do not want to be inconvenienced. The constitutional question at the core of the abortion dispute must be about our political community: how do we live together when we cannot reach consensus, when we have deeply held, but inconsistent, moral beliefs? And what we can require of each other in the service of

60. E.g., id. at 953-54, 959-60, 965, 968, 975-79.
61. Id. at 921.
our own beliefs? This question cannot be answered without a genuine effort to understand why each side cares so much. Otherwise, we do not appreciate what we ask of each other. The jurisprudence of abortion has been handicapped by the Court’s failure, from the beginning, to articulate why the issue is so important to both sides. Scholarship that reminds us, if it is heeded, makes for more credible and more stable legal doctrine.