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Response

Rethinking the Choice of "Private Choice" in Conceptualizing Abortion: A Response to Erwin Chemerinsky and Michele Goodwin's *Abortion: A Woman's Private Choice*

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I. Introduction

In one of the most comprehensive and thoughtful accounts of the prevailing jurisprudence regarding reproductive freedom, Professors Erwin Chemerinsky and Michele Goodwin make the case for the urgency of re-conceptualizing abortion rights. In their article, Chemerinsky and Goodwin demonstrate how women's constitutional entitlement to their bodies and to choice may be in a precarious position in the post-2016-presidential-election era.[1] Not only did Donald Trump vociferously tout his opposition to *Roe v. Wade*[2]—going so far as to threaten abortion-seeking women with criminal liability—during the campaign, but the Republican Party platform itself called to abort *Roe v. Wade* and breathe new life into pro-life discourse no less than thirty-five times. After winning the elections, Mr.

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1. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEXAS L. REV. 1189 (2017).

2. Roe v. Wade, 410 U.S. 113 (1973).

Trump tellingly drew an arbitrary and unprincipled distinction between abortion rights and gay rights, stating that only the latter was off the proverbial political table, due to the fact that same-sex marriage was "already settled" in the Supreme Court.[3] The irony, of course, is that abortion rights have been similarly—and repeatedly—"settled" since *Roe v. Wade*, and most recently in *Whole Woman's Health v. Hellerstedt*.[4] This seems, puzzlingly, to have escaped Mr. Trump's attention.

The turbulent, shifting dynamics of American politics render Chemerinksy and Goodwin's article especially timely and topical. In the first part of the article, the authors outline a sound and comprehensive critique of the Court's flawed foundations for reproductive rights, beginning with such (in)famous and landmark decisions as *Buck v. Bell*[5] and *Griswold v. Connecticut*,[6] moving on through *Roe and Casey*,[7] and ending with *Stenberg v. Carhart*,[8] *Gonzales v. Carhart*,[9] and *Hellerstedt*. They assess critically the Court's framing of the judicial raison d'etre undergirding abortion rights, and take special issue with the lenient level of scrutiny namely the "undue burden test''—that was developed in Casey and is currently invoked to protect women's reproductive autonomy. This weakened form of judicial review, they contend, singles out abortion for a uniquely adverse treatment in comparison to the Court's strict scrutiny standard that is applied to other constitutionally sacrosanct fundamental rights.

With a view to rectifying the key shortcomings that characterize contemporary abortion jurisprudence, the authors develop, in Part II of the article, an alternative constitutional foundation, which offers a more solid defense of a woman's right to terminate her pregnancy. They argue that the right to abortion should be reconceptualized as "a private choice for each woman to make."[10] In this vein, the authors explain that, although the right to control over one's body and over one's reproduction are not specifically mentioned in the text of the Constitution, they have been protected by the Supreme Court throughout American history. Properly interpreted, these rights should encompass choices along a spectrum of pregnancy that do not favor pregnancy over abortion, thereby providing a stronger constitutional foundation for the right to abortion.

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3. Ariane De Vogue, *Trump: Same-Sex Marriage is 'Settled,' but* Roe v. Wade *Can Be Changed*, CNN POLITICS (Nov. 15, 2016), http://edition.cnn.com/2016/11/14/politics/trump-gay-marriage-abortion-supreme-court/ [https://perma.cc/TN7U-HCYW].

4. 136 S. Ct. 2292 (2016).

5. 274 U.S. 200 (1927).

6. 381 U.S. 479 (1965).

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

8. 530 U.S. 914 (2000).

9. 550 U.S. 124 (2007).

10. Chemerinsky & Goodwin, *supra* note 1, at 1198.

Part III is dedicated to delineating the range of ramifications that could stem from the article's reformative scholarly approach.[11] These ramifications include, primarily, the restoration of strict scrutiny as the appropriate standard of review with which to examine abortion-restrictive regulations; disallowing the government to deny funding for abortions as long as it subsidizes childbirth; and a wholesale invalidation of various types of restrictions on abortion, focusing in general on the so-called "targeted restrictions of abortion providers," and specifically on informed-consent and waiting-period laws.[12]

Among its valuable contributions, Chemerinsky and Goodwin's article brings to the forefront two pivotal issues. The first relates to the importance of rights-talk in the process of conceptualizing abortion law. This insight is especially significant in light of ongoing debates regarding the wisdom of *Roe v. Wade*'s strict rights-based approach to legal abortion and arguments in favor of strategic legislative compromises and conciliatory policy solutions to the issue of abortion.[13] We argue that a comparative look at Israeli law provides a compelling case study that validates the article's overarching thesis that constitutional rights discourse, as opposed to the give-and-take of the political process, is key in securing women's reproductive autonomy.

The second, interconnected issue builds on the general premise that endorses a rights framework and inquires as to which particular type of conceptualization might serve as a model constitutional foundation for protecting women's interests in the context of pregnancy termination. While Chemerinsky and Goodwin's article takes important and crucial steps in the right direction by grounding abortion rights in the constitutional building blocks of privacy and bodily autonomy, we hold that an alternative conceptualization of abortion seeking to promote true reproductive justice for women should also be predicated upon gender equality. In our view, Chemerinsky and Goodwin's reconceptualization of the abortion issue as "a woman's private choice"[14] could profit from a supplementary equality

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11. *Id.* at 1237–45.

12. *Id.* at 1198, 1237–45.

13. For arguments in this spirit, see the important works of Mary Ann Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Law*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93 (Susan E. Williams ed., 2011); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14, 65 (1991); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009). For a critical analysis of these arguments that questions their strategic desirability and normative coherence in light of relevant lessons from the Israeli case study, see Noya Rimalt, W*hen Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J. L. & FEMINISM 327 (2017).

14. Chemerinksy & Goodwin, *supra* note 1, at 1198.

framing that defines the scope and substance of the right to abortion on the basis of equal treatment standards and measures the female right against other comparable male rights. We take each of these points in turn.

II. When Rights Talk Keeps Silent: Israeli Law as a Case Study

Israel reformed its abortion law in 1977,[15] a few years after the U.S. Supreme Court declared that a woman's choice to terminate her pregnancy was a fundamental right. While it is clear that the Israeli parliament was aware of the details of *Roe v. Wade*, the two countries ended up taking very different paths to resolving the abortion issue. In contrast to *Roe*'s judicially imposed, strict rights-based approach to abortion, the reformation of Israel's abortion law was the product of a majoritarian decision in the legislature that conceptualized the need for abortion reform in terms that are at odds with any concept of individual rights.[16]

The primary motivation for reform in Israel was the desire to remedy a demonstrated dysfunction of the country's original abortion statute. This law, which originated in British Mandatory legislation, criminalized the performance of all abortions.[17] The relevant statistical abortion figures at the time, however, indicated that the law was mostly ignored and that the black market for illegal abortions flourished.[18] These figures were a source of particular demographic anxiety for policymakers and legislators concerned with the small size of the Jewish population in the newly established country, and the differential fertility rates between Arabs and Jews. In reforming the old abortion law, Israeli legislators sought to introduce a measure of governmental control into an area in which legal norms had largely ceased to matter. The assumption was that a more realistic and enforceable legal framework would be effective in restricting some abortions and consequently in protecting the country's paramount national interest in Jewish population growth.[19] At the same time, it was also viewed as imperative to discourage high birthrates among poor Jewish

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15. Noga Morag-Levine, *Abortion in Israel: Community, Rights, and the Context of Compromise*, 19 LAW & SOC. INQUIRY 313, 322 (1994); Mairav Zonszein, *Israel's Abortion Committees*, N.Y. TIMES, June 12, 2015, https://www.nytimes.com/2015/06/14/opinion/sunday/israels-abortion-committees.html [https://perma.cc/JD5S-TZZJ].

16. Rimalt, *supra* note 13 at 328–30.

17. *See* Morag-Levine, *supra* note 15, at 323 ("Israel's first abortion statute originated in British mandatory legislation and was adopted together with most of the mandatory criminal code when the state became independent in 1948.").

18. *See id.* at 322–24 (discussing the history of abortion law in Israel, asserting the early laws "continued to be ignored, and the private abortion market flourished," and that the abortion-law "reform effort was largely propelled by a search for greater governmental commitment to abortion law enforcement and frustration with the total irrelevance of what was until then a categorical legal ban").

19. NOYA RIMALT, LEGAL FEMINISM FROM THEORY TO PRACTICE: THE STRUGGLE FOR GENDER EQUALITY IN ISRAEL AND THE UNITED STATES 138–40 (2010).

families.[20] An increased governmental commitment to pregnancy termination law enforcement was perceived to be an important measure in promoting both pro-fertility and family-planning state interests.[21] Hence, as opposed to the United States, individual rights discourse was not a driving force in galvanizing abortion reform in Israel whatsoever.

A particular characteristic of the Israeli legal system at the time that sheds light on the manner in which most Israeli legislators approached the issue of abortion was the lack of a constitution or a bill of rights. Legislation that was drafted in the 1970s depended exclusively on a majority vote in the Israeli parliament and was shielded from judicial review.[22] Moreover, in the absence of a guiding framework of constitutional guarantees, legislators were not accustomed to considering the normative restraints of individual rights when formulating new legislation. In addition, patriarchal attitudes toward women were prevalent during this era, and women's contribution to the nation was often conceptualized in terms of their reproductive capacity and maternal function.[23] These gender-normative attitudes were inspired by the national ethos underlying the founding of the State in 1948, according to which Israel was predestined to bring about the rejuvenation of the Jewish people in their homeland.

These aspects of Israeli law and society contributed to the relative marginality of the feminist movement in those years and rendered arguments in favor of gender equality negligible and ineffective in terms of shaping public discourse. Indeed, they facilitated the 1977 enactment of a problematic abortion law that violated women's rights and failed to respond to women's actual reproductive needs.[24]

Israel's 1977 abortion law was enacted as an amendment to the Penal

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20. For a discussion of abortion law as a reformative tool designed to curb the fertility of Oriental or Mizrachi poor Jewish women, see KARIN CARMIT YEFET, M-OTHERNESS: MOTHER AS THE OTHER IN ISRAELI LAW AND SOCIETY (forthcoming).

21. Rimalt, *supra* note 13, at 335–36.

22. It was only in 1992 that Israel enacted two basic laws that guarantee several fundamental rights: Basic Law: Human Dignity and Liberty, 5752–1992, §§ 1–2, 4, 1391, (1992–150) (Isr.), and Basic Law: Freedom of Occupation, 5752–1992, 1387, (1992–90) (Isr.). These laws were designed to eventually be codified into a comprehensive bill of rights, and they are currently regarded as Israel's "semi-constitution," granting courts the power to strike down any legislation that violates the basic rights guaranteed by the two Basic Laws. However, according to the Basic Laws themselves, legislation that was in effect before enactment of these laws is immune to any type of judicial review. This implies that the abortion law enacted in 1977 will remain unaffected by this partial constitutional revolution and by the newly embraced discourse of individual rights.

23. Nitza Berkovitch, *Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel*, 20 WOMEN'S STUD. INT'L F. 605, 607 (1997); Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 97, 104–08 (2007).

24. *See* Morag-Levine, *supra* note 15, at 324–27 (discussing the cultural motivations for the legislative reform).

Law. It imposed a general criminal prohibition on the performance of abortions, while authorizing statutory Abortion Termination Committees consisting of two physicians and a social worker to approve abortions under one of four criteria: (1) the woman is under marriage age or over forty; (2) the pregnancy is the result of criminal, incestuous or extramarital relations; (3) the fetus is likely to have a physical or mental defect; (4) continuation of the pregnancy is likely to endanger the woman's life or cause her physical or mental harm.[25] Originally the law included a fifth ground for abortion—a socioeconomic clause that sanctioned abortions due to difficult social conditions—but this ground was abolished in 1979, two years after its enactment, mainly as a result of political pressures by religious members of the government coalition.[26]

A close analysis of the Israeli legislation highlights the consequences of an abortion regime devoid of any concept of individual rights,[27] thus bolstering Chemerinsky and Goodwin's insistence on further developing constitutional rights discourse as a precondition for securing women's reproductive autonomy and private choice. The fact that the Israeli abortion law lacked any framework of rights contributed to a legislation that made abortion access dependent on a statutory committee's approval. Furthermore, the lack of a rights framework facilitated the repeal of the socioeconomic ground for abortion—arguably the law's most important clause—on behalf of religious concerns. Indeed, the 1979 repeal of the socioeconomic clause undermined the significance of the entire abortion reform. Relevant data in Israel in the 1970s indicated that the majority of abortions were performed because of familial, economic, or social reasons and were not medically or criminally related.[28] Thus, following the socioeconomic clause's repeal, the formal scope of access to abortion was

25. Penal Amendment (Interruption of Pregnancy) of 1977, 5737–1977, SH No. 842p.70 (Isr.) (as amended). The law was passed by the Knesset in January 1977. Section 12 of the law stated that it would go into effect one year after its enactment. The law's provisions were integrated into the Penal Law as sections 312–21 under a new chapter entitled "Interruption of Pregnancy."

26. *See* Morag-Levine, *supra* note 15, at 325–27 (discussing the socioeconomic conditions clause and its repeal).

27. It is impossible to present a thorough analysis of the Israeli case study in this framework. For a project that uncovers the complex implications of an abortion legislation that lacks any framework of fundamental rights, *see* Rimalt, *supra* note 13. *See also* Karin Carmit Yefet, *Born to Be a Mother: Anatomy, Autonomy, and Substantive Citizenship for Women in Israel*, 39 HARV. J. L. & GENDER 257 (2016).

28. A public committee report that served as a basis for the abortion reform in 1977 referred specifically to this point, revealing that among underprivileged groups, 82.1% of requests for pregnancy termination were based on socioeconomic reasons. Gabai Committee Report, Report of the Committee for the Study of the Ban on Induced Abortions, 17(4) Public Health 427, 469 (1974). This data was corroborated by another study of socially deprived families, in which respondents identified the problem of unintended pregnancy as a major predicament, third only to financial and housing difficulties. *See* LOTTE SALZBERGER ET AL., PATTERNS OF CONTRACEPTIVE BEHAVIOR AMONG JERUSALEM WOMEN SEEKING PREGNANCY COUNSELING 1980-1989 at 7 (1991).

drastically diminished, leaving Israeli women without legal recourse in the vast majority of cases. The Israeli legislation thus once again became unrealistic for most Israeli women and therefore unworkable. This prompted two problematic dynamics that continue to shape the lives of women who seek to terminate an unwanted pregnancy in Israel to this very day.

The first dynamic is what we term "a culture of deceit." Simply put, an Israeli woman who seeks to control her reproductive destiny must often lie her way to an abortion and deceive the statutory committee about the true reasons for requesting to terminate her pregnancy. The statistical data tells a compelling story according to which women invoke most often either mental harm or adultery as grounds for abortion. In other words, in order to obtain reproductive freedom Israeli women are driven to present themselves as either "mad" or "bad."[29] Moreover, within this culture of deceit, women's access to abortion is not guaranteed and is contingent on the discretion of the abortion committees, which are vested with exclusive decision-making power over the female womb and fate of each pregnancy.[30]

Since Israeli abortion law was born in a legal atmosphere lacking entrenched concepts of individual rights and constitutional restraints, Israeli women face a regime that violates their privacy and decisional autonomy in the most literal sense. In fact, to this day the 1992 Bill of Rights exempts abortion law from judicial review.[31] As sociological research has shown, the committee's working procedures function as a complex mechanism of social control designed to discourage abortions even when the legal requirements are met and to discipline deviant women who diverge from collective sexual and reproductive norms. In common practice, a woman seeking an abortion must complete a comprehensive questionnaire detailing her social and medical history, including previous applications for abortion permits, ethnic background, marital status, education, occupation, living conditions, past and present use of contraceptives, as well as her reasons for her request for pregnancy termination. The woman must then meet for a preliminary session with the social worker on the Committee, who questions her orally about her written answers in a manner that "exposes the

29. Rimalt, *supra* note 13, at 369; Yefet, *supra* note 27, at 275.

30. The Ministry of Health's statistics indicate that the overwhelming percentage of requests for abortions are granted. *Pregnancy Terminations by the Law, 1990-2014*, DATA DIVISION, MINISTRY OF HEALTH 10 (Dec. 2015), http://www.health.gov.il/publicationsfiles/preg1990_2014.pdf [https://perma.cc/Z58S-8CUC]. However, the high rates of approval do not detract from the severe violation of privacy that the Israeli procedure entails and do not compensate for the fact that for Israeli women, abortion is not "a woman's private choice."

31. *See* Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM. J. COMP. L. 293, 298–99 (discussing the limited ability for judicial review of Basic Laws in Israel); *see also* Rimalt, *supra* note 13, at 378.

pregnant woman to control on the most intrusive level."[32]

In most cases, the abortion-seeking woman is subsequently forced to undergo a hearing before the whole committee. In this formal forum, which functions as a normalizing mechanism in the Foucaultian sense, the woman is again made to reveal extremely personal and embarrassing details of her intimate life, including her commitment to motherhood.[33] This symbolic ritual is practiced even upon those women who unequivocally satisfy the legal criteria for abortion; for example, an unmarried woman who is entitled to an automatic abortion permit under the law may still be forced to explain her failure to marry her partner and legitimize her child.[34]

This oppressive abortion regime has generated a second dynamic that attests to the abysmal failure of the legislation: The startling number of private illegal abortions performed in Israel annually, either because women do not meet the statutory conditions for abortion or because they seek to avoid the committee's humiliating procedures.[35] According to one estimate, the number of illegal abortions performed in the black market—19,000 per year—equals the number of legal abortions, rendering the Israeli ratio of illegal to legal abortions arguably the highest in the Western world.[36] The fact that doctors are rarely prosecuted and illegal abortions flourish reveals the reality that the legislation has ceased to matter, just as it did four decades ago, and that abortion regulation itself is conducted in the shadow of the law.

In sum, back in the 1970s, when the Israeli abortion law was enacted, a very narrow common ground united the legislators who ultimately supported the liberalization of the abortion legislation. They agreed that it was important to create more realistic and enforceable legal arrangements in order to gain greater governmental control over women and to respond to national demographic concerns. Looking backwards, it is clear that this narrow goal was not achieved. Moreover, unrestricted by judicial review or by the restraints of constitutional rights, the majority of Israeli legislators were free to ignore the reproductive needs of women by enacting a law that profoundly undermines sex equality and gender justice.

The Israeli abortion regime thus attests to the potential limitations and

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32. Delila Amir & Orly Biniamin, *Abortion Approval as a Ritual of Symbolic Control*, *in* THE CRIMINALIZATION OF A WOMAN'S BODY 5, 18 (Clarice Feinman ed., 1992).

33. *See* Delila Amir & Orly Benjamin, *Defining Encounters: Who Are the Women Entitled to Join the Israeli Collective?*, 20 WOMEN'S STUD. INT'L F. 639, 644–45 (1997).

34. Amir & Binaimin, *Abortion Approval*, *supra* note 32, at 15, 17; Amir & Benjamin, *Who are the Women*, *supra* note 33, at 644.

35. Rimalt, *supra* note 13, at 368–69.

36. *See* Yael Yishai, *Public Ideas and Public Policy: Abortion Politics in Four Democracies*, 25 COMP. POL. 207, 214–15 (1993); *see also* Renee Ghert-Zand, *Black Market Abortions in Israel*, FORWARD (Feb. 5, 2013), http://forward.com/sisterhood/170506/black-market-abortions-in-israel/ [https://perma.cc/WR5P-A2CL].

harmful gendered effects of a political resolution of the issue of abortion that is not rights-based.[37] By providing a cautionary tale regarding the role of a guiding framework of rights in shaping access to abortion, the Israeli example powerfully validates Chemerinsky and Goodwin's effort to reinforce the constitutional foundation for women's private choice over their bodies. The question that remains is what particular shape this constitutional foundation ought to take.

III. Unique and Unequal: Abortion as a Gender Equality Right

Professors Chemerinsky and Goodwin conclude that the best approach to the abortion issue is for the Court to reconceptualize the decision of whether or not to terminate a pregnancy as a woman's *private choice*. Drawing on the work of Judith Jarvis Thomson[38] and Donald Regan[39] they thoughtfully explain:

> The state cannot compel a person to use her body to keep another person alive. Likewise, parents cannot be forced to donate a kidney or even blood to keep a child alive. A corollary of this principle is that it is a private judgment for each person to make as to whether and how her body will be used to sustain another life.[40]

This approach would also be consistent with traditional tort and criminal law postulates. It "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 need of assistance. . . . [O]ur law does not require people to be Good Samaritans."[41] "Just as the law does not require individuals to donate body organs to save other people's lives," argue Chemerinsky and Goodwin, "so should the state not require a woman to donate her body, against her will, to house a fetus."[42]

This reasoning uncovers that, on a fundamental level, the legal terrain of abortion can and should be viewed as legally relevant for both sexes. A woman's right to have an abortion raises questions that are not unfamiliar to the law in other contexts, such as the scope of a person's rights over his or her own body and the resulting conflict between one's right to bodily integrity and a third party's right to life in circumstances in which the subordination of one's body to a third party is a necessary condition to save that party's life. Evaluating the issue of abortion from this perspective reveals that in other contexts, the law unsurprisingly *does not* impose on people a legal obligation to subordinate their body to a third party, even not

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37. Rimalt, *supra* note 13.
38. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).
39. Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).
40. Chemerinksy & Goodwin, *supra* note 1, at 1234.
41. Regan, *supra* note 39, at 1569.
42. Chemerinsky & Goodwin, *supra* note 1, at 1235.

in similar cases regarding the bodily obligations of a parent *vis-a-vis* his or her child. When framed thusly, the bodily burden to which women are subjected by virtue of antiabortion legislation appears to be unprecedented in comparison to the significantly limited legal duty to rescue another person by means of bodily subordination recognized in other contexts. Indeed, the Court's consistent rulings have provided a vigorous defense of a person's right over *his or her* body and strictly forbade intrusive invasions of bodily autonomy, corporal punishment, or any other act that would subject a person to bodily pain.[43] As Chemerinsky and Goodwin justly conclude, once these corollary principles are brought to the forefront, *Roe*'s trimester framework and the decision to mark viability as the point at which the State may legitimately prohibit abortions become dubious.

The implicit question that Chemerinsky and Goodwin's analysis raises but does not fully resolve, however, is why Justice Blackmun's opinion in *Roe* failed to acknowledge the relevant analogies between the right to abortion and other well-established constitutional principles of bodily integrity that regularly surmount any duty to sustain another's life. The answer to this conundrum, we argue, requires a close look at the manner in which Justice Blackmun's opinion in *Roe* framed the abortion issue as raising a unique legal dilemma not comparable to any other constitutional issue previously resolved by the Court:

> The pregnant woman cannot be isolated in her pregnancy. She carries an embryo and, later a fetus, if one accepts the medical definitions of the developing young in the human uterus. *The situation therefore is inherently different* from marital intimacy or bedroom possession of obscene material, or procreation, or education . . . .[44]

For the *Roe* Court, a woman's right to terminate her pregnancy was a right without any parallel or analogy to any other right recognized under the doctrine of constitutional privacy.[45] This narrow and myopic framing thus spared the Court from the burden to address the issue of abortion in the larger relevant context of available legal precedent. While the Court ruled that the abortion decision does indeed stem from the right to privacy, it stressed the uniqueness of this female right and viewed the issue as a classic case of biological difference between the sexes. The Court thus created a distinction between a woman's right to choose to terminate her pregnancy and other rights in the protected domain of constitutional privacy, failing to subject the right to abortion to principles of equal treatment.[46]

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43. *See, e.g.*, Regan, *supra* note 39, at 1571–72 (outlining that generally there are no Good Samaritan laws requiring these types of invasions).

44. *Roe v. Wade*, 410 U.S. 113, 159 (1973) (internal citations omitted) (emphasis added).

45. *See id.*

46. For a more comprehensive critique of the Court's "difference" approach in *Roe* and *Casey*

An immediate implication of the differentiated status granted to the issue of abortion, as compared to other issues relating to a person's rights over his or her body, can be seen in the manner in which the Court addressed the potential conflict between the right to abortion and the right to life. The Court ruled that if the fetus were considered a "person," then that person's right to life would certainly outweigh and negate a pregnant woman's right to terminate her pregnancy.[47] To what extent does this conclusion withstand the test of previous judicial rulings relating to potential clashes between one person's fundamental right, and another's right to life? Does the right to life always outweigh other rights? The Roe Court was not required to answer any of these questions due to the basic assumption that the issue of abortion and the legal questions raised therein are unique and unparalleled by any other fundamental legal issue, and therefore should not be determined based on existing legal precedents. Interestingly, this assumption was not contested by the plaintiff.[48]

Twenty years later in *Planned Parenthood v. Casey*,[49] the Court reiterated the same view, accentuating the difference and uniqueness of the abortion right:

> *Abortion is a unique act*. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life . . . .[*T*]*he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law*.[50]

In this way, both *Roe* and *Casey* laid the foundation for the conceptualization of abortion as a special female right, one that is limited in scope and without parallel or similarity to any other right or freedom. Within this confined framework, the Court was exempted from the juridical and intellectual work of justifying, in a broader context, the ultimate scope of the right, thereby paving the way for various limitations and restrictions in the regulation of abortion, starting with *Roe*'s trimester framework and later including *Casey*'s undue burden test. Indeed, as Chemerinsky and Goodwin note, Justice Blackmun's opinion in *Casey*, acknowledged that

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and the implications for women and the struggle for gender equality, see RIMALT, *supra* note 19, at 31–38.

47. *Roe v. Wade*, 410 U.S. 113, 156–59 (1973).

48. When asked by the Court about her position if "it were established that the unborn fetus is a person" protected by the Fourteenth Amendment, Sara Weddington, the Plaintiff's attorney, replied: "I would have a very difficult case here." W.B. LOCKHART, CONSTITUTIONAL LAW 428 (7th ed., West Publishers, 1991).

49. 505 U.S. 833 (1992).

50. *Id.* at 852 (emphasis added).

laws restricting abortion may properly trigger the protection of the Equal Protection Clause as they rest on impermissible sex-role assumptions about women's unique maternal role in society. However, his understanding of the relevance of equality considerations to the issue of abortion was limited to value judgments concerning women's designated roles and functions that underlie abortion restrictions but are no longer consistent with the constitution. The potential of questioning the physiological paradigm of gender difference within which abortion was traditionally analyzed was thus not explored even when equality was eventually mentioned.

Put differently, the rhetoric of difference that dominates abortion caselaw spared the Court from the obligation to apply *principles of equal treatment* and to consider men's access to similar rights. This conceptual failure led to the formation of a narrower, more vulnerable, and less stable *female* right than the right which could have been established on the more solid constitutional foundation of equal protection. Unconstrained by principles of equal treatment, the Court deemed it legitimate to "discriminate" against women's right to private choice of abortion by subjecting their reproductive autonomy and bodily integrity to a special—and more diluted—standard of judicial review. In this way, the Court held women's bodies to a stricter legal standard than that which is applied to men seeking to realize similar fundamental guarantees.

This final insight might suggest that Chemerinsky and Goodwin's reconceptualization of the abortion issue as "a woman's private choice" could benefit from a supplementary equality framework. A critical reading of the Court's past abortion decisions reveals that, in order for the constitutional right of privacy to fully serve women, it must be interpreted and applied based on equal treatment standards that measure this female right against the treatment of other comparable male rights. In other words, women's full reproductive autonomy and private choice will ultimately be secured only when the right to abortion is properly understood as a *male* right as well.