AGAINST *ROE* EXCEPTIONALISM: DEGENDERING ABORTION

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Reproductive freedom is, inescapably, the core issue of women's equality and liberty. In 1973, when the United States Supreme Court announced its decision in *Roe v Wade* that the right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion,[1] it appeared to be a stunning victory for women's struggle for full citizenship. At the time, *Roe* represented a legal framework for abortion that most women worldwide could not obtain. It was the first judicial ruling to employ a framework of constitutional rights to justify the right to abortion. It called into question all state criminal abortion statutes in the US and inspired abortion reforms in other western countries.[2] However, almost half a century after *Roe v Wade* was decided, the issue of abortion remains extremely controversial in American politics. The constitutional right to abortion has been curtailed by several antiabortion measures that were upheld by the Court,[3] and ongoing legislative and political decisions are making abortions less and less available.[4]

The breadth of the political controversy prompted by *Roe v Wade* combined with the limits on the exercise of abortion rights, has stimulated debates among some feminists, progressive scholars and other prochoice advocates regarding the wisdom of *Roe v Wade* and its progeny. Most of this friendly critique has focused on the specific conceptualization of the right to abortion as a privacy right. The main argument put forward has been that an alternative or additional constitutional foundation for abortion rights such as equality, liberty or dignity could provide a more solid defense of a woman's right to terminate her pregnancy. This debate persists as women's constitutional entitlement to their bodies remains in a precarious position, especially in the post-2016 presidential election era.

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

[2] Two important examples are Germany and Canada. For a discussion of relevant legal developments in these countries, see Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J. L. FEM. 327, 370-72 (Canada), 373-76 (Germany) (2017).

[3] *See infra* notes 13-19 and accompanying text.

[4] For a comprehensive discussion of the substance of such decisions in recent decades as well as their roots and ramifications, see CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA (2017).

This essay focuses on the normative dispute regarding the best constitutional defense of abortion rights. It argues that feminist scholars and prochoice advocates considering the key shortcomings of abortion case law and searching for a stronger constitutional foundation have overlooked an important aspect of *Roe*. *Roe* did not simply conceptualize abortion as a privacy right; it also framed the abortion issue as raising a unique legal dilemma not comparable to any other constitutional issue previously resolved by the Court. In *Roe*'s conception, abortion was born as a unique feminine right. It was framed as stemming from the general right to privacy, but was restricted to a limited interpretation based on the Court's understanding of the issue as a classic case of gender difference that required a legal standard of its own. Within this framework, the Court was not obligated to justify, in a broader context, the ultimate scope of the right to abortion, thereby subjecting women to a standard of their own – a standard that imposes significant restrictions on their bodily integrity and autonomy. This framing of abortion as a special female right thus can explain the weakened form of judicial review that was developed in *Roe* and its limitations in establishing a solid defense of a woman's right to terminate her pregnancy.

This chapter supplements the intra-feminist and intra-progressive critique of *Roe* and the search for a stronger conceptualization of abortion rights with a challenge to *Roe*'s 'difference' approach to abortion. It elucidates the manner in which the legal terrain of abortion can and should be viewed as legally relevant for *both* sexes and suggests revisiting old feminist debates about the relevance and necessity of a comparative analysis for securing women's rights in cases which involve women's unique reproductive capacity. Drawing a link between developments in the context of abortion law and broader feminist deliberations about the limits of women's claim to equality in a (still) male-dominated world can expose the ways in which the male standard continues to determine the scope of legal protections women can hope to achieve with regard to their bodily integrity and autonomy. Therefore, the essay concludes, women's best bet for moving forward might well be a reconceptualization of abortion as an ungendered, unisex right which measures abortion rights against well-established (male) legal protections.

I. ABORTION BETWEEN PRIVACY, LIBERTY, DIGNITY AND EQUALITY

Abortion was conceived and born as a privacy right in 1973. *Roe v Wade* involved a challenge to a Texas law that prohibited all abortions except those necessary to save the life of the mother.[5] Justice Blackmun, expressing the views of seven members of the Court, held that the constitutional right to privacy, grounded in the Fourteenth Amendment's concept of liberty, encompasses a woman's decision

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[5] 410 U.S. 113 (1973). A companion case, Doe v Bolton, presented a challenge to a Georgia law that outlawed abortions unless a doctor determined that continuing the pregnancy would endanger a woman's life or health, it was likely that the fetus would be born with 'a grave, permanent, and irremediable mental or physical defect,' or the pregnancy resulted from rape. 410 U.S. 179, at 183 (1973).

whether or not to terminate her pregnancy.[6] The Court explained that, although the Constitution does not explicitly mention any right to privacy, a line of Court decisions going back as far as the end of the nineteenth century recognized a fundamental right to personal privacy as being implicit in the concept of liberty and as extending to activities related to marriage, procreation, contraception, family relationships, child rearing and education.[7] Justice Blackmun and the majority of the Court construed this penumbral privacy right to include a woman's right to abortion.

The Court further determined that the fetus cannot be considered a 'person' within the language and meaning of the Fourteenth Amendment and clarified that if personhood was established, the appellant's case would indubitably collapse.[8] The implied assumption was that the newly recognized right of a woman to terminate her pregnancy stood or fell on the status of the fetus. Once the Court concluded that a fetus was not a person entitled to the constitutional right to life, the woman's right was then balanced against state interests that the Court identified as important and legitimate: protecting the health of the woman as well as the potential human life of the fetus. Based on these interests, the Court created a trimester framework for legalizing abortion. Abortions performed by a licensed physician were fully constitutionally protected prior to the end of the first trimester.[9] After the end of the first trimester, when abortions become more dangerous than childbirth, the state was authorized to regulate abortion to the extent that such regulation related to the preservation and protection of maternal health.[10] With respect to the state interest in protecting prenatal life, the Court determined that the 'compelling' point was at viability, when the fetus had the capability for meaningful life outside the mother's womb. The state could then proscribe the performance of all abortions except those necessary to preserve the life or health of the mother.[11]

At the time it was decided and in its immediate aftermath, *Roe* seemed to be a great victory for American women. It gave constitutional protection to women's right to obtain abortions prior to fetal viability even in cases in which the pregnancy in question was a medically normal one, thereby calling into question the criminal abortion statutes of every state, including those with nominally less restrictive provisions than the Texas law that was challenged in *Roe*.[12] However, it soon became clear that *Roe* perversely stimulated rather than discouraged antiabortion measures. It

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[6] *Roe*, 410 U.S. at 152.

[7] *Id.* at 152-53.

[8] *Id.* at 156-57.

[9] *Id.* at 163.

[10] *Id.*

[11] *Id.* at 163-64.

[12] For an account of abortion laws that were in effect in the various states prior to the Supreme Court decision in *Roe v Wade,* see Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1210 (2017).

prompted both searing criticism of the Court and a variety of measures taken by Congress and state legislatures to contain and curtail the judicial decision. Subsequent Supreme Court decisions undermined women's ability to exercise the right granted in *Roe* by upholding congressional decisions to deny the use of public funding, facilities and personnel to perform abortions[13] and excluding even medically necessary abortions from Medicaid coverage.[14] The Court also determined that it was constitutional for the federal government and the states to protect the fetus by denying public funding for abortions even though such funding is provided for childbirth.[15] It was also determined that it is constitutional to prohibit the discussion of abortion as part of federally funded family planning programs.[16] In *Planned Parenthood v Casey*, the Court further weakened the right to abortion by replacing the trimester approach to legalizing abortion with an 'undue burden' test that made it constitutional for the state to regulate abortions as long as such regulations did not constitute 'a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'[17] As part of this redefined test, the Court affirmed as constitutional state regulations that compelled women seeking abortions to receive information about adoption options and about the exact state of fetal development involved in their pregnancy and required a 24-hour waiting period before a woman could obtain a requested abortion.[18] More recently, the Court has used the undue burden test to uphold a federal law prohibiting so-called 'partial birth abortions' that involve second trimester pre-viability abortions.[19]

Once the political controversy prompted by *Roe* became clear, and as the exercise of abortion rights became progressively limited, feminist scholars and pro-choice advocates started to question *Roe*'s constitutional justification for abortion rights and began searching for a stronger constitutional foundation. Over the years, an extensive body of critical work has focused on the limitations of *Roe* and its progeny and has highlighted alternative constitutional values seen as providing a better justification for protecting a woman's right to terminate her pregnancy. The central critique put forward was that conceptualizing abortion as a privacy right fails to capture the significance of reproductive freedom for women either as individuals or as a group.[20] It relegates the whole issue of reproductive concerns to the personal

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[13] Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

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

[15] Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

[16] Rust v. Sullivan, 500 U.S. 173 (1991).

[17] Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992).

[18] *Id.*

[19] Gonzales v. Carhart, 550 U.S. 124 (2007).

[20] DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 212 (1989).

realm and establishes it as a negative right.[21] States are thus required only to recognize a woman's theoretical right to choose an abortion; they are relieved of any responsibility to ensure that every woman can actually exercise this right.[22] Put differently, the right to privacy only entitles women to be free from state interference when deciding to procure an abortion and contains no guarantee of assistance from the state in order to obtain the desired pregnancy termination.

In their efforts to make a stronger case for abortion rights, some legal scholars stressed additional values that are implicit in the concept of liberty, such as dignity,[23] bodily integrity[24] or private choice in matters concerning one's body.[25] Most scholarship in this area, however, highlighted the relevance of equality to the evaluation of state limitations on women's access to abortion. Some theorists argued that equality is superior to privacy in defending the right to abortion;[26] others argued that equal protection arguments should be added to the list of plausible constitutional arguments for abortion rights.[27] Whatever the particulars of the various arguments, a broad consensus has emerged among feminist scholars regarding the potential benefits of conceptualizing abortion prohibitions as a form of sex-based discrimination.[28]

II. CHALLENGING ABORTION LAW ON EQUALITY GROUNDS

Four distinct explanations have been offered as to why restrictions on abortion violate constitutional principles of equality. First, some scholars pointed to the impact of such restrictions on women's ability to stand in relation to men as equal citizens.[29]

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[21] Lilian R. BeVier, *What Privacy is Not*, 12 HARV. J. L. & PUB. POL'Y 99, 101-02 (1989).

[22] *See, e.g.*, Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade, in* FEMINISM UNMODIFIED 93 (1987); Catharine A. MacKinnon, *Reflections on Sex Equality under the Law*, 100 YALE L.J. 1281, 1311 (1991). Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394 (2009).

[23] Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L. J. 1694 (2008).

[24] EILEEN MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 6 (1996).

[25] Chemerinsky & Goodwin, *supra* note 12.

[26] *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA L. REV 955 (1984); Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 29-44 (1992).

[27] Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1994-1995).

[28] For a thought-provoking attempt to rewrite the Court decision in Roe v Wade by adding equal protection as well as due process-liberty arguments to its central justification of abortion rights, see Robin West, *Concurring in the Judgment,* in JACK BALKIN, WHAT ROE V. WADE SHOULD HAVE SAID 121 (2005).

[29] *See, e.g.*, Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985); GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985); Law, *supra* note 26; Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV.

Highlighting the various unequal social structures that subject men and women to different standards and demands based on their different reproductive capacities, the argument here was that abortion prohibitions have specific negative consequences for women's position in society and their ability to take full charge of their life's course, as compared to men. More broadly, commentators have stressed in this context that the ability of women to have control over their reproductive capacities is a precondition for first class citizenship and full participation in society.[30]

A second explanation as to why restrictions on abortion violate constitutional principles of equality has focused on the manner in which abortion restrictions enforce suspect judgments about the maternal role of women. The argument here was that constitutional principles of equality are inconsistent with abortion restrictions that reflect or enforce traditional sex-role stereotypes. Such restrictions are therefore suspect and violate the US constitution.[31]

A third line of equality reasoning for abortion law referred to the discrimination between well-off and poor women that is simultaneously masked and legitimized by the conceptualization of abortion as a private choice.[32] Proponents of this line of reasoning have argued that privacy-based restrictions on abortion funding contribute to a reality in which only well-off women can make the choice whether or not to terminate their pregnancy, while poorer women are effectively denied any reproductive freedom. While making this important argument, scholars have acknowledged its current limits in the American constitutional context in light of past Court decisions holding that the poor are not a suspect class and that discrimination on the basis of wealth does not trigger heightened scrutiny. [33]

Finally, the fourth proposed equality-based justification for abortion rights has relied on a comparative approach. Following the lead of philosopher Judith Jarvis Thomson,[34] several scholars have suggested analyzing abortion rights in terms of Good or Bad Samaritan principles, arguing that a key point of comparison between pregnant women and other individuals is their right to be Bad Samaritans by refusing to donate

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261 (1992); Deborah L. Rhode, *Reproductive Freedom, in* FEMINIST JURISPRUDENCE 313, 305-21 (Patricia Smith ed., 1993); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. 160 (2012).

[30] Ginsburg, *supra* note 29; Rhode, *Reproductive Freedom*, *supra* note 29; Law, *supra* note 26; Siegel, *supra* note 29, at 265, 377-79.

[31] Siegel & Siegel, *supra* note 29.

[32] West, *supra* note 28, at 1412; Ginsburg, *supra* note 29, at 383-85; Chemerinsky & Goodwin, *supra* note 12, at 1213.

[33] Ginsburg, *supra* note 29, at 384; Chemerinsky & Goodwin, supra note 12, at 1213. Both refer to San Antonio Indep. Sch. Dist. v Rodriguez, 411 U.S. 1, 28 (1973).

[34] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUBLIC AFFAIRS 47 (1971).

their body to others.[35] In the early 1970s, Thomson argued that, even if the fetus *is* a person, a woman's right to terminate her pregnancy should prevail, since it is a well-established principle that the state cannot compel a person to use her body in order to keep another person alive.[36] Likewise, Donald Regan contended that a corollary principle that further sustains the primacy of a woman's right to abort the fetus is that a parent cannot be forced to donate a kidney or even blood in order to keep a child alive.[37] Just as the law does not require people to be Good Samaritans and to donate their bodily organs to save other people's lives, so too the state should not require a woman to donate her body against her will to house a fetus. Others have pointed to common principles of self-defense as similarly justifying the termination of an undesired pregnancy.[38]

Eileen McDonagh took this argument one step further.[39] She added that the issue is not simply that the woman has a right to be a Bad Samaritan, but rather that, in cases of undesired pregnancy, the fetus intrudes on the woman's body and liberty against her will. In such cases, a woman must therefore not only have a right to self-defense – comparable to others in our society – which includes the right to use deadly force on her own behalf to stop the fetus from taking over her body, but she must also have a right to equal access to the resources of the state to provide for that self-defense, by means of abortion funding.[40] According to this view, the key right involved in abortion is not just a woman's right to choose whether or not to terminate her pregnancy, but also her right to consent to what another party, the fetus, does to her body. Once the focus shifts from choice to consent, it becomes clear that well-established legal principles in the area of self-defense justify not only her right to abort the fetus but also her right to expect state assistance in defense of her bodily integrity and liberty.[41]

Curiously, not all scholars who discussed or endorsed the Good Samaritan or self-defense analogies regarding abortion conceptualized these as sex-based anti-discrimination arguments.[42] Rather, the argument was typically characterized as

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[35] *See, e.g.*, Donald H. Regan, *Rewriting Roe v. Wade* 77 MICH. L. REV. 1569, 1569 (1978-1979); Rhode, *supra* note 29; MCDONAGH, *supra* note 24; West, *supra* note 28.

[36] Thomson, *supra* note 34.

[37] Regan, *supra* note 35, at 1569.

[38] Ellen Willis, *Abortion: Is a Woman a Person?, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 474 (Ann Snitow et al., eds., 1983); MCDONAGH, *supra* note 24.

[39] *Id.*

[40] *Id.*

[41] For an argument that further develops the idea of shifting the focus of abortion rights from choice to consent and explains its potential contribution to the liberal justification of abortion rights *see*: Robin West, *Liberalism and Abortion*, 87 GEO. L. J. 2117 (1999).

[42] *See, e.g.*, Law, *supra* note 26 at 1021-22 n. 239 (referring to Donald Regan work and noting that his argument is not about sex-based discrimination; rather it is about the exclusion of pregnant women from the protection of deeply rooted legal principles regarding aid

resting on a comparison of pregnant women to other 'individuals' who are not compelled to serve as Good Samaritans.[43] As part of this gender-neutral analysis, advocates of this argument highlighted constitutional values such as liberty and bodily integrity as the sole values that demand the expansion of Good and Bad Samaritan standards to women. The insight that denying pregnant women the ability to make autonomous decisions with regard to their bodies – a legal protection that is commonly available to men in all other comparable contexts – amounts to sex-based discrimination was not emphasized, or in many cases even noted. Despite the fact that the comparative approach to abortion pointed to a sex-based discriminatory system of uneven application of general principles of law, this important implication of the analysis was not always specifically articulated as such.

Further, the comparative approach to abortion provides a solid defense of abortion rights that does not depend on the personhood status of the fetus. As explained earlier, the conclusion that the fetus is not a person entitled to constitutional protection under the Fourteenth Amendment was central to the *Roe* decision. The underlying assumption was that if the constitutional right to life of the fetus were to become relevant to the analysis of abortion, this right would unquestionably outweigh and negate the pregnant woman's right to terminate her pregnancy. The comparative analysis approach to abortion rights challenges the assumption regarding the primacy of the humanity of the fetus in a way that other equality approaches to abortion fail to do. Other equality justifications of *Roe* that identify abortion laws as discriminatory only because they have a disparate impact on women or reflect suspect judgments about women do not address *Roe*'s central pillar that abortion rights stand or fall on the human status of the fetus. They also fail to explain why the government's interest in protecting fetal life is not sufficient to justify abortion restrictions. In contrast, the comparative approach tackles the humanity issue directly by showing that the proposed legal protections for abortion rights are consistent with those offered to others in our society in comparable situations. The comparative argument, again, is that a fetus's imposition, even in a medically normal pregnancy, exceeds the latitude recognized by the law for one person to intrude on the bodily integrity and liberty of another. Since the Constitution prohibits the protection of some already-born people by means of requiring other already-born people to donate their bodies to them, even if the people in question are related by kinship ties, the same should hold for the pregnant woman seeking to abort a fetus. In essence, then, the state must protect people from injuries caused by pre-birth human life because '[t]o do otherwise violates the Equal Protection Clause.'[44] Hence, the comparative analysis approach to abortion provides a stronger equality defense of

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requirements to others); Rhode, *supra* note 29, at 313 (presenting the Good Samaritan analogy to abortion as distinct from arguments of equal protection).

[43] Rhode *Id.*

[44] McDonagh, *supra* note 24 at 145.

abortion rights through its ability to confront directly the personhood issue in a manner that is grounded in well-established legal principles.

Over the years, some of these equality justifications for abortion rights have been gradually embraced by a few Supreme Court justices. For instance, almost two decades after *Roe* was decided, Justice Blackmun, the author of the *Roe* decision, added in *Casey* that 'State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality.'[45] Focusing specifically on the impact of abortion restrictions on the lives of women as well as the suspect views of women that these restrictions express, he explained:

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption – that women can simply be forced to accept the 'natural' status and incidents of motherhood – appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."[46]

Along the same line of reasoning and based on quotations from the plurality opinion in *Casey*, Justice Ginsburg added in *Gonzales v Carhart:*

> Women, it is now acknowledged, have the talent, capacity and right "to participate equally in the economic and social life of the nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.[47]

Following these statements, some scholars contended that the Court had now come to perceive the right to abortion as an equality right as well as a liberty right.[48] While this conclusion appears to overstate the role of equality in shaping

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[45] Casey, 505 U.S. at 928 (Blackmun, J., Concurring in part, concurring in the judgment in part, and dissenting in part).

[46] *Id.* at 928-9 (citations omitted).

[47] *Carhart*, 550 U.S. at 171 (Ginsburg, J., dissenting) (citations omitted).

[48] Siegel & Siegel, *supra* note 29.

contemporary abortion case law,[49] anti-stereotype and impact-based equality arguments for abortion rights have clearly added to modern judicial understanding of the consequences of abortion restrictions. Yet the equality arguments thus far embraced by the Court and most commentators do not simultaneously challenge the assumption regarding the primacy of the humanity of the fetus. Nor do they provide well-grounded legal explanations as to why the government's interest in protecting fetal life is not sufficient to justify abortion restrictions. Only the comparative approach to abortion does what other equality approaches to abortion fail to do: it directly confronts the personhood issue in a manner that is grounded in well-established legal principles. It thereby provides a stronger equality defense of abortion rights.

Interestingly, the comparative analysis approach to abortion was presented to the Court as early as *Roe*. A few pro-choice organizations involved in the litigation presented an analogy-based argument to the Court in support of the appellant Jane Roe.[50] Specifically they argued:

> The law does not give a person whose kidneys or other body parts are not functioning the right to demand another person's kidneys or body parts. . . Abortion laws alone compel the contribution of one individual's organs, blood, breath and life support system for another individual, either fully or partially formed. Unless . . . the state finds the freedom and bodily integrity of pregnant women to be less valuable than that of other potential donors, the state must be assumed to maintain in the abortion conflict at least the same position as it does in any similar conflict between two living persons. . .[51]

Indeed, comparative arguments have always been at the margin of abortion litigation. Most of the pro-choice litigators in the *Roe* litigation, including the appellant Jane Roe herself, relied on privacy-liberty based arguments in defending a woman's right to terminate her pregnancy.[52] Nonetheless, the *Roe* Court was clearly presented with a comprehensive articulation of an analogy-based framework for the critical evaluation of restrictions on abortions. Almost twenty years later, in *Casey*, a comparative argument was raised again by one of the pro-choice lawyers involved in

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[49] A telling example is the latest Supreme Court decision on abortion, *Hellerstedt*, in which the Court invalidated on undue burden grounds two provisions of a Texas law that imposed restrictions on abortion clinics and on doctors performing abortion without a single reference to equality arguments. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[50] Brief for the California Committee to Legalize Abortion et al. as Amici Curiae Supporting the Appellants, *Roe*, 410 U.S. 113, Doe v. Bolton, 410 U.S. 179 (1973), 1972 WL 126045.

[51] *Id.* at 15.

[52] Law, *supra* note 26, at 981.

this case.[53] However, neither the *Roe* decision nor the *Casey* decision acknowledged the relevance of this argument to the legal resolution of the abortion debate. In fact, the written opinions in these two iconic cases do not even reveal that such an argument was made before the Court.

Why did the Court fail to see or address the argument that abortion can be compared to other situations already recognized by law in which people have the right to be protected from wrongful injuries imposed by third parties? While other equality approaches to abortion had some impact in shaping judicial reasoning in this context, proponents of the comparative approach 'have run into a brick wall.'[54] Eileen McDonagh argues that to understand this omission in the Court's analysis, we must turn to the culture that law reflects and recognize its bias against the least powerful in society.[55] With regard to women, that bias (against the least powerful) is reflected in the manner in which the law still fails to completely protect their right to bodily integrity and liberty in a range of areas.[56]

Law's failure to redress or even address the subordinated status of women is an important starting point for exploring the failure of the comparative approach in the Court, but it is not sufficient. To fully understand why the Court completely ignored the comparative analysis, we should also turn to the language of *Roe* itself, and specifically the manner in which the Court conceptualized pregnancy and abortion. Such analysis reveals that abortion was not only born as a privacy right. It was also born as a unique female right that cannot be analogized to any other privacy right previously recognized as implicit to the concept of constitutional liberty.

III. ABORTION IS BORN AS A UNIQUE FEMININE RIGHT

While the *Roe* Court determined that a fundamental right to personal privacy – implicit in the concept of liberty – can be extended to a woman's right to terminate her pregnancy, it nevertheless emphasized that the woman's right to terminate her pregnancy is inherently different from all other fundamental rights previously recognized as an extension of personal privacy and liberty. Specifically, Justice Blackmun explained:

> 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

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[53] Eileen McDonagh notes that attorney Kathryn Kolbert argued in oral argument: 'Surely, if the government cannot require individuals to sacrifice their lives or health for human beings who are born for other compelling purposes, they cannot do so for purposes of protecting potential fetal life.' MCDONAGH, *supra* note 24, at 130-31.

[54] *Id.* at 131.

[55] *Id.* at 155.

[56] *Id.* at 155-62.

> possession of obscene material, or procreation or education with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it 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.[57]

For the *Roe* Court, abortion was without parallel to any other situation previously recognized as deserving constitutional protection. The right of every woman to terminate her pregnancy was conceived as a unique female right; the situation of pregnancy was perceived as 'inherently different' from other legal dilemmas previously resolved by the Court. This framing of the abortion dilemma as entirely distinct from other issues relating to a person's rights over his or her own body relieved the Court of the burden of addressing the issue of abortion in the larger relevant context of available precedent. Moreover, once abortion was conceptualized as a clear case of gender difference and a distinction was drawn between a woman's right to choose to terminate her pregnancy and other rights in the domain of constitutional liberty and privacy, equal treatment analysis became irrelevant to the discussion. The search for an explanation as to why comparative and equal protection arguments failed to impact abortion jurisprudence should therefore start by acknowledging the rhetoric of difference that shaped the judicial evolution of abortion rights.

An immediate implication of this difference approach to abortion is the manner in which the Court balanced a woman's right to terminate her pregnancy against other conflicting rights and interests. As discussed above, the Court explicitly assumed that the right to life of the fetus (if the fetus is a human being), unquestionably outweighs and negates a pregnant woman's right to terminate her pregnancy.[58] In support of this proposition, the Court merely noted that the appellant 'conceded as much.'[59] But does this conclusion withstand the test of previous Court rulings relating to potential clashes between one person's fundamental rights over his or her body and another's right to life? Does the right to life always outweigh other constitutional rights? The Court did not feel the need to answer any of these questions in *Roe.* It assumed, to the contrary, that abortion and the legal questions to which it gives rise are without parallel to any other constitutional dilemma. Their embrace of this difference-based

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[57] *Roe,* 410 U.S. at 159 (citations omitted) (emphasis added).

[58] *Supra* note 8 and accompanying text.

[59] Indeed, when asked by the Court in oral argument about her position if 'it were established that the unborn fetus is a person' protected by the Fourteenth Amendment, Sara Weddington, the appellant's attorney, replied: 'I would have a very difficult case here.' W.B. LOCKHART, CONSTITUTIONAL LAW 428 (7th ed. 1991).

understanding of pregnancy and abortion precluded any consideration of the comparison or analogical equality argument.

Similarly, the logic of difference guided the Court when establishing the trimester framework for legalizing abortion. That framework was based on a set of state interests that served to limit and constrain the newly recognized right of every woman to terminate her pregnancy. While the declared non-personhood status of the fetus enabled the birth of the abortion right, the Court still subjected this right to the limits imposed by the compelling state interest in safeguarding potential human life (as the fetus develops). Hence, the right to abortion as originally framed by the *Roe* Court was born not only as a special female right, without parallel to any other right, but also as a right limited in scope, due primarily to unique third party considerations relating to the fetus.

Almost 20 years after *Roe* was decided, Justice O'Connor, writing the plurality opinion in *Casey*, articulated this difference approach to abortion once again:

> *Abortion is a unique act.* It is an act fraught with consequences for others: for a 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 at stake is in a sense unique to the human condition and so unique to the law.*[60]

Thus, a woman's right to terminate her pregnancy was born not only as a privacy right. It was simultaneously conceptualized as a special female right, one that is limited in scope and without parallel or potential comparison to any other right. Within this framework, the Court was not obliged to justify the scope of the right in a broader context or the numerous limitations it ultimately applied to it: first, *Roe*'s trimester framework and, later, *Casey*'s undue burden test. Put differently, the rhetoric of difference and uniqueness that dominated early abortion case law spared the Court from the obligation to apply comparative principles of equal treatment and to consider how it compared to 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 comparative analysis. Unconstrained by principles of equal treatment, the Court deemed it legitimate to subject women's 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 rights.

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[60] *Casey*, 505 U.S. at 852 (emphasis added).

This conclusion revisits old feminist debates about the relevance and necessity of a comparative analysis for securing women's rights when issues regarding women's unique biological capacity – such as pregnancy – are involved. The next section turns to those debates.

IV. Revisiting the Sameness/Difference Debate

Roe was decided in an era in which liberal feminism, also known as equal rights feminism, dominated the legal struggles of the women's movement. In their efforts to secure the equal protection of the laws for women, feminist scholars and litigators of the 1970s highlighted the ways in which women and men share relevant and comparable characteristics.[61] In light of the historical role of assumptions about the significance of sex-based biological differences providing the prime justification for creating a separate and inferior legal status for women, these scholars and activists sought to challenge assertions of fundamental differences between the sexes.[62] Some of these scholars insisted on promoting 'sameness' arguments, even concerning laws which directly governed reproductive biology.[63] They were wary of any and all legal rules that subjected women to a unique legal standard based on their different reproductive capacities; they believed that 'a dual system of rights inevitably produces hierarchy.'[64] Their assumptions were that even laws concerning a reproductive capacity unique to women (such as pregnancy) should be challenged with an equality doctrine of similar treatment that the Court might be persuaded to employ.

Wendy Williams was a prominent advocate of the sameness position in the 1970s and 1980s. Williams argued that pregnancy can and should be conceptualized simply as a human experience, which, in many contexts, creates needs and problems fundamentally similar to those arising from other human experiences unrelated to pregnancy.[65] Focusing on the appropriate treatment of pregnancy at work, Williams argued that drawing analogies between pregnancy and other disabling physical conditions, such as illness or temporary disability, serves to highlight the manner in which all such conditions might be handled adequately on the same legal basis in the employment context. According to this view, analogizing between pregnancy and other

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[61] Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure*, 37 RUTGERS L. REV. 825 (1985).

[62] Law, *supra* note 26, at 957-62. For an earlier discussion of the damage that protective legislation does to women, see BARBARA BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 26-53 (1975).

[63] Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 14 WOMEN'S RTS. L. REP. 151 (1981) (hereinafter, *The Equality Crisis*); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U REV. L. & SOC. CHANGE 325 (1984-1985) (hereinafter, *Equality's Riddle)*; Taub & Williams, *supra* note 61.

[64] Williams, *Equality's Riddle*, at 329.

[65] *Id.*

human conditions would guarantee that pregnant workers were not subjected to special and less favorable treatment based on assertions of unique physical difference. The equal treatment model was thus the basis for insisting on the incorporation of pregnancy into existing benefits schemes. It focused on the employment context and sought to guarantee that pregnant employees were treated in the same manner as other sick or disabled employees for all employment related purposes.

Proponents of the sameness approach to pregnancy undertook two major efforts in the 1970s to convince the Court to bring pregnancy within the equal treatment model: first in 1974, through the Equal Protection Clause, and then in 1976, through Title VII. [66] In both cases, the Court was asked to view pregnancy as comparable to other physical conditions that affect workplace participation for men and women and therefore to equate an employer's treatment of pregnancy to its treatment of other physical conditions such as disability or illness. After the Court rejected the analogy between pregnancy and other disabling conditions at work, the sameness approach was integrated into Title VII with the passage of the Pregnancy Discrimination Act (PDA) in 1978, which determined that pregnant workers should be treated in the same manner as other disabled workers for all employment-related purposes. [67]

These legal developments triggered debates among feminists about the limits of the sameness approach to pregnancy. Opponents of the sameness approach argued that pregnancy cannot be compared to any other condition or experience. Therefore they claimed that the equal treatment of the sexes, when issues involving sex-specific physical characteristics are at stake, results in inequality for women, in that it ignores the unique quality of the reproductive experiences of women and sets the male standard as the norm.[68] Rather than equal treatment, proponents of the difference approach to pregnancy endorsed special accommodations for pregnant workers. These debates intensified in the 1980s, when legislation granting pregnant workers special benefits was challenged in court.[69]

In a deeper sense, and beyond its specific application to the question of workplace treatment of pregnant workers, the sameness/difference debate centered on the nature of the promise of gender equality that courts can or cannot deliver. The question became whether women can expect more than assimilation into a preexisting male world. The question posed by this debate was ultimately about the scope and limits of women's claim to equality and whether (white) male interests and values

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[66] Geduldig v. Aiello, 417 U.S. 484 (1974); Gen. Elec. v. Gilbert, 429 U.S. 125 (1976).

[67] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2012)).

[68] Linda J. Krieger & Patricia Cooney, *The* Miller-Whole *Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985).

[69] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Miller-Whole Co. Inc. v. Commissioner of Labor and Industry, 479 U.S. 1050 (1987).

should necessarily shape this claim. Proponents of the equal treatment model insisted that even when issues involving sex-based reproductive differences were directly at stake, women could not hope for more than obtaining existing male privileges that they were previously denied. They cautioned that history provides too many illustrations of the way in which the conceptualization of pregnancy as unique legitimized 'special' treatment of women that was in fact unfavorable treatment.[70] 'Uniqueness,' according to this view, had always served as a trap, informing the ideology of 'separate spheres' and allowing the Court to view men and women as inherently different, thus foreclosing the possibility of applying an equality model to the sexes.[71] Proponents of the difference approach, on the other hand, argued that women could escape the uniqueness trap by focusing on the effects of the very real sex difference of pregnancy on the relative positions of men and women in society.[72] Rather than accepting maleness as the norm, these proponents added, women should strive for 'equality of opportunity and effect within a heterogeneous "society of equals".'[73]

Despite the fact that the sameness/difference debate touched upon a central concern of feminist jurisprudence regarding the reconciliation of gender equality with a reality of reproductive differences between men and women, it was relatively limited in scope and substance. While the debate implicitly raised a set of fundamental questions relating to the scope and limits of women's claims to equality in a masculine world, the explicit focus was on the appropriate treatment of pregnancy at work and on the propriety of analogizing pregnancy to temporary disability. This restricted framework of the debate might explain why abortion case law that developed in the 1970s and 1980s, in parallel to the sameness/difference debate, was not perceived as relevant to this debate. Proponents of the equal treatment model focused their efforts solely on applying the equal treatment model to the legal regulation of pregnancy at work; abortion was not mentioned as an additional relevant domain in which arguments of equal treatment could and should be applied.[74] Opponents of this model, on the other hand, referred to abortion only as an example that demonstrated the inherent limits of the liberal equal treatment model that analogized pregnancy to temporary disability. For example, Linda Krieger and Patricia Cooney argued:

> The capacity to become pregnant is unique to women; it is an inherent, not a normative sex difference. Therefore in order to apply the liberal view's essential principle of like treatment of similarly situated individuals, the proponent [of equal treatment] would have to rely . . . on

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[70] Taub & Williams, *supra* note 61, at 834-35.

[71] Williams, *The Equality Crisis*, *supra* note 63, at 170.

[72] Krieger & Cooney, *supra* note 68; Ann Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981).

[73] Krieger & Cooney, *supra* note 68, at 542.

[74] *See, e.g.*, Williams, *Equality's Riddle*, *supra* note 63.

> analogizing pregnancy to some condition unique to men . . . Thus the principle of equal treatment requires that women be able to choose to have an abortion on the same basis that men can choose to have a vasectomy, a hair transplant, or any medical procedure. . . To condition a woman's right to abortion on the acceptability of such an analogy would be a grave tactical error.[75]

Hence, both proponents of the equal treatment model for pregnancy and its opponents had a very limited understanding of what a comparative approach to pregnancy could mean. Proponents focused solely on analogizing pregnancy to disability in the employment context. Opponents discredited the equal treatment model for pregnancy, in part by characterizing the model as analogizing women seeking abortions to men seeking hair transplants.[76] Indeed, restricting the comparative analysis in the sameness/difference debate to the physical analogy drawn between pregnancy and disability carried the implication that abortion was completely irrelevant to the comparative analysis. Thus, the limited interpretation of a comparative analysis in the context of workplace rights surrounding pregnancy and disability failed to acknowledge the existence of a parallel comparative approach that was beginning to develop with regard to abortion, one which might have offered a more sophisticated analogy to pregnancy – an analogy that focused not on the physical characteristics of pregnancy but rather on its function. That is, a pregnancy involves requiring a person to donate her body to the aid of others.

In other words, comparative analysis of reproductive differences was not restricted at the time to the treatment of pregnancy at work or to the analogy of pregnancy to disability. Abortion was another domain in which legal scholars had sought to establish and promote arguments of equal treatment by highlighting the ways in which pregnancy and abortion are not unique human experiences. As opposed to the sameness position in the debates over the treatment of pregnancy at work, the comparative analysis approach that was developed in the context of abortion offered a much more expansive understanding of the meaning of 'similarly situated.' The more sophisticated analysis of sameness in the abortion context enabled drawing a comparison between abortion and other lived experiences that went well beyond the analogy of a woman's decision to have an abortion and a man's decision to have a hair transplant. This comparative analysis focused on comparing women seeking abortion to men who are fully protected from demands for involuntary bodily sacrifices to others.

Nevertheless, despite the fact that the sameness argument in the pregnancy-as-disability context and the comparative argument in the abortion debates produced strikingly different analogies, they still rested on a shared premise. Both positions sought to promote and apply a standard of comparative equality to issues involving

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[75] Krieger & Cooney, *supra* note 68, at 541.
[76] *Id.*

reproductive differences between the sexes. In addition, in both contexts, the ultimate goal was the incorporation of pregnancy (and abortion) into existing legal rules. Yet, despite these shared aims, it is clear that the sameness/difference-debate about the appropriate treatment of pregnant workers was perceived by scholars and activists engaged in this debate as doctrinally distinct from parallel scholarly arguments about the possibility and necessity of equating the treatment of abortion with the treatment of other comparable human conditions. Each discourse therefore developed in isolation, without any attempts to build a doctrinal bridge between the two bodies of scholarship.

In retrospect, this lack of convergence between the two doctrinal efforts to develop comparative arguments in the context of laws directly governing reproductive biology was unfortunate. It prevented feminist scholars and activists engaged in these efforts from seeing the broader picture in which both legal developments raised similar concerns and exemplified the inherent limits of courts and legislatures in delivering a full promise of gender equality. In fact, the evolution of abortion case law and the legal developments in the context of the treatment of pregnancy at work supplemented each other by providing opposite sides of the same complex story about the limitations on women's ability to obtain equality in a legal world, in which the male standard still sets the norm.

In the years that followed the sameness/difference debate, equal treatment feminism continued to shape the legal treatment of pregnancy at work. In 1993, the principle of providing similar treatment to pregnant workers and other disabled employees that was originally embedded in the PDA was supplemented with the passage of the Family and Medical Leave Act (FMLA).[77] At its core, the FMLA requires the employer to render employees a limited amount of unpaid leave when necessary to accommodate personal illness, childbearing or family caregiving responsibilities. The strategic linkage between pregnancy and disability that was originally proposed by sameness feminism in the 1970s had thus become the guiding legal standard for the protection of pregnant employees, as well as for the allocation of employment-related benefits.[78] This process was hardly beneficial for working women, in that it rested on a stringent analogy comparing pregnant women to other disabled workers and ignored the more substantive aspects of pregnancy that involve the exercise of basic rights, such as the right to procreate and become a parent. Women's reproductive concerns were thus addressed only insofar as they were correlated to the concerns of other (male) disabled workers.

[77] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 9 (codified as amended at 29 U.S.C. § 2601 (2012)).

[78] For a comprehensive analysis of these legal developments and their problematic implications for working women, see Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 101 (forthcoming 2018).

In the sphere of abortion, on the other hand, the more sophisticated comparative approach to abortion rights had no impact whatsoever on the development of abortion case law. As discussed above, rather than acknowledging the ways in which pregnancy is not unique, the Court did the opposite. *Roe* conceptualized pregnancy and abortion as wholly incomparable to any other human condition, and subsequent cases further stressed this concept of uniqueness. Hence, while in the employment context lawmakers were willing to grant pregnant workers a limited set of rights based on a very narrow comparative approach to pregnancy, in the abortion context, the more sophisticated comparative approach to pregnancy was rejected from the outset. Rather than granting women similar treatment before the law, the Court subjected women to unique and unfavorable legal treatment based on their inherent difference from men.

When measured against each other, these two legal developments tell a nuanced story about the current prospects of and constraints on women's quest for equality. These developments also take us back to the basic foundations of the sameness/difference-debate. We must recall that liberal feminism's insistence on equal treatment was grounded in deep skepticism toward legal rules that singled out women for special treatment. It rightly pointed out that throughout history the conceptualization of pregnancy as unique had allowed courts and legislatures to subject women to different rules that perpetuated their inferior position in society. Indeed, liberal feminism's solution to the problem – analogizing pregnancy to temporary disability – was simplistic and deficient, but its skepticism toward legal rules that singled out women for different treatment was just and substantiated. Liberal feminists feared that subjecting men and women to separate systems of rights 'inevitably produces gender hierarchy.'[79] At the same time, opponents of equal treatment argued with similar force that an equality doctrine that implicitly dictated that women could claim equality only insofar as they were similar to men was inherently deficient.[80]

The manner in which abortion case law evolved may suggest that these mutual concerns are still relevant for a critical evaluation of judicial standards that were developed and enforced in this context. Abortion case law indicates that the Court's failure to acknowledge the ways in which pregnancy and abortion are not unique human experiences is yet another manifestation of the same antiquated process, in which real or assumed differences between men and women provide the primary justification for legal structures that produce gender hierarchy. It highlights once again the dangers of singling women out for special treatment based on assertions of gender difference and, consequently, the significance of developing and applying a standard of comparative equality to situations wherein biological reproductive differences are directly involved. At the same time, contemporary abortion

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[79] Williams, *Equality's Riddle*, *supra* note 63.

[80] Law, *supra,* note 26.

jurisprudence might also imply that the male standard persists in setting the norm and determining the scope of protection women can hope to obtain in regard to their reproductive needs and concerns.

This final conclusion is troubling, but it also carries some hope for change in regard to abortion law. It reaffirms the contention that women can claim equality only insofar as their needs and concerns correlate to the needs and concerns of men. Nonetheless, it can be argued that, in the abortion context, an application of the male standard carries some promise of progress. Such an application could rescue women from the current 'uniqueness'-trap and guarantee a more comprehensive protection of their bodily integrity. With all its limits, a comparative approach to abortion that relies on the male standard may yet provide women with what they currently lack – the ability to make autonomous decisions about their bodies.

CONCLUSION

In her classic essay *Difference and Dominance*, radical feminist Catharine MacKinnon criticized the sameness/difference theory to sex equality and explained:

> What the sameness standard fails to notice is that men's differences from women are equal to women's differences from men. . . The difference approach misses the fact that hierarchy of power produces real as well as fantasied differences, differences that are inequalities. . . Why should you have to be the same as man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of its gender, so that it is women – women who want to make a case of unequal treatment in a world men have made in their image. . . – who have to show in effect that they are men in every relevant respect. . .?[81]

Rather than grounding women's claims to equality in sameness arguments and demanding equal treatment, McKinnon suggested diverting the focus to granting women 'equal power in social life.'[82] Her proposed constitutional standard for evaluating the inequality of legal rules was an impact-based test that would ask 'whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.'[83] She added that 'to require that one be the same as those who set the standard – those which one is already socially defined as different from – simply means that sex equality is

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[81] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 37 (1987).

[82] *Id.* at 45.

[83] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979).

conceptually designed never to be achieved. . . Doctrinally speaking, the deepest problems of sex inequality will not find women "similarly situated" to men.'[84]

The lack of reproductive freedom for women is indeed one of the deepest problems of sex inequality disguised by legal narratives of gender difference. As this essay has argued, contemporary abortion law is grounded in perceptions that conceptualize abortion as unique and incomparable to any other human condition, thereby justifying women's subjection to a standard of their own – a standard that legitimizes and enforces the adverse treatment of women and their inferior status in society. This adverse treatment is a clear byproduct of a male-dominated world. MacKinnon and numerous other feminists argued that, in a just legal system, the male standard should not set the norm for rights and privileges, women's needs and concerns should be protected based on their own entitlement, and a proper equality doctrine should measure the status of women in society in terms of their relative share of power and opportunities. In other words, in a just world we would dismiss a comparative approach to abortion rights as unjust.

However, because the exaggeration of the significance of biological difference has historically been central to the oppression of women, especially in the reproductive context, a comparative approach to abortion might be the first necessary step for moving forward and rescuing abortion law from the current 'uniqueness' trap. Indeed, the comparative approach to abortion uses the male standard as providing the original entitlement for abortion rights. At the same time, it uncovers the double standard of the law by highlighting how women are subjected to legal standards that are perceived as unacceptable in comparable contexts that involve men's bodily integrity and autonomy. To destabilize masculine structures that still guide the allocation of rights and legal protections might first require the exposure, once again, of the dominance of these biased structures. Exposing the male norm for the protection of one's bodily integrity and autonomy reveals that respect for human life at all cost is not absolute in the eyes of the law. Rather, the unwelcome intrusion on one's body is always prohibited; individuals are never required to donate their bodies to the aid of others, even if doing so might be the morally desirable thing. In other legal contexts, the right to life of third parties does not justify requiring bodily sacrifices from others, even from one's own kin. In theory, an equality approach to abortion rights that acknowledges the distinct reproductive needs and concerns of women and protects them on their own terms is clearly the end to which we should aspire. But in practice, a comparative approach might be more useful in actually moving us forward. At this point in time, it appears that women's best bet for reproductive justice is the conceptualization of abortion as a unisex right that is grounded in well-established (male) legal protections.

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[84] *Id.* at 44.