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ARTICLE

TOWARD A JURISPRUDENCE OF DOUBT

Katherine C. Sheehan*

ABSTRACT

In the opening line of their joint opinion in *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter announce that "Liberty finds no refuge in a jurisprudence of doubt." Doubt, however, permeates every line of the joint opinion, which uneasily reaffirms *Roe v. Wade* while undermining the protection *Roe* provided for women's liberty. The Justices undertake to define liberty for women, but the expressive possibilities of the law are inadequate to the task. Through a series of increasingly abstract metonymic displacements, the Justices decide that the right protected by *Roe* is the right to make a decision about abortion. While it utterly fails to capture what is at stake for the pregnant woman unwilling to become a mother, this articulation enables the Justices to explore the issues in terms familiar to them: the Justices have nothing coherent to say about pregnant women, but they believe they know all about making decisions. The relentless pressure on the Court to redecide *Roe* has led these Justices to a new appreciation for the value of remaining faithful to a decision once made, however doubtful that decision might appear in retrospect. Unfortunately for liberty, the Justices deny the pregnant woman's decision the refuge they demand for their own. The implicit identification of the pregnant woman's right with the Justices' own responsibility, however, transforms the joint opinion into a critique of its own failure to do justice.

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I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt." So begins the joint opinion of Justices Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter in *Planned Parenthood v. Casey*¹ which reaffirms but redefines a woman's right to abortion established nineteen years earlier in *Roe v. Wade*.² In writing this joint opinion, the Justices hope to discharge the Court's responsibility "to define the freedom guaranteed by the Constitution's own promise, the promise of liberty."³ "Liberty," the Justices write, "must not be extinguished for want of a line that is clear."⁴ If the Justices meant by their opinion to

1. 505 U.S. 833 (1992). Justices O'Connor, Kennedy, and Souter announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I (introduction), II (examining *Roe v. Wade's* doctrinal basis), III (analyzing the application of stare decisis to *Roe v. Wade*), V-A (upholding § 3203 of the Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. § 3203 (1990), the definition of medical emergency), V-C (striking down § 3209, the spousal notice provision of the Act) and VI (conclusion); and an opinion with respect to Parts IV (setting forth the undue burden standard), V-B (upholding § 3205 of the Act, the informed consent provision), V-D (upholding § 3206 of the Act, the parental consent provision) and V-E (upholding §§ 3207 and 3214 of the Act, governing recordkeeping). Justices Blackmun and Stevens joined the opinion for the Court and filed separate opinions concurring in part and dissenting in part. Chief Justice Rehnquist filed a separate opinion, concurring in the judgment in part and dissenting in part, in which Justices White, Scalia, and Thomas joined. Justice Scalia filed a separate opinion, concurring in the judgment in part and dissenting in part, in which the Chief Justice and Justices White and Thomas joined.

2. 410 U.S. 113 (1973).

3. *Casey*, 505 U.S. at 901.

4. *Id.* at 869.

provide a refuge in certainty for the right to abortion, they were unsuccessful. Their failure reveals important tensions, anxieties, and contradictions in the law and in the ways the law can be expressed.

This Article is a close reading of the text of the joint opinion, identifying some of the difficulties encountered by the Justices in their futile search for certainty. Part II examines the terms chosen by the Justices to define women's liberty and explores the expressive possibilities and limits established by or reflected in that vocabulary. Part III analyzes the Justices' attempt to apply their definition of liberty to the challenged provisions of the Pennsylvania Abortion Control Act, and their failure to provide either certainty for the law or refuge for the pregnant woman's liberty. Part IV then looks for reasons why the Justices go to such lengths to reaffirm the pregnant woman's entitlement to the liberty they will not let her exercise. The Article concludes that the Justices are mistaken in believing that Liberty finds her refuge in a jurisprudence of certainty; liberty for women, and for all whose subordination to the Founders made the Constitution possible, can only be extended through a jurisprudence of doubt.

II. LIBERTY

A. *Liberty's Image*

What light can the opening image of liberty shed on the Justices' project? The first line of the opinion depicts liberty anthropomorphically — not liberty, but Liberty. Liberty, moreover, is not merely personified as the spirit animating the Court's endeavor; the Justices' Liberty has need of refuge and therefore appears to be embodied. That body, of course, is unmistakably feminine — every American's most familiar image of Liberty is the colossally female Statue of Liberty standing in New York Harbor. Having begun by invoking Liberty in this self-consciously literary way, the Justices might be expected to apostrophize her, to call upon her for guidance or enlightenment to assist them in their work. They do not. At the margin of an opinion seeking to define a liberty belonging uniquely to women, the Justices call up a female figure of their subject but do not ask her what she thinks.⁵ The Justices do not admit that Liberty

5. Liberty, Truth, the Muses, Justice, and other powerful forces and ideas are often portrayed allegorically as feminine. These figures, however, deny real women any role in the projects — government, philosophy, poetry, law — they enable. See

could have anything of importance to tell them about what she means for women. Liberty is not asked to testify; apparently, she has been summoned only to stand silent before them while they decide her fate.

And why must the Justices' Liberty seek shelter? We do not ordinarily think of Liberty in need of refuge; Liberty offers refuge, defying wind and weather to welcome the tired, poor, and homeless into the United States of America through the "golden door."⁶ Liberty calls the "tempest-toss't" of the world to come to her for protection; she gives no reasons, asks no help, seeks no advice, and heeds no whining from the sons of immigrants unwilling to share her attention. When she chooses to do so, Liberty wields a force that can dethrone kings and demolish empires. Liberty's destructive force severed the American colonies from England and cleared the way for the Founders to construct their new government. The Justices, as a part of that government, must exercise great caution in making Liberty's power available to its subjects. Before the Justices can think of allowing women access to Liberty, Liberty must be domesticated, silenced, diminished. The Justices thus take it as their mission to "define" Liberty — to limit her power, to pen her behind "a line

JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 166-67 (1982); cf. U.S. CONST. preamble ("to secure the Blessings of Liberty to ourselves and our Posterity" (emphasis added)). The majority's invocation of Liberty differs fundamentally from Liberty's usual iconographic role in that it is Liberty for Woman with which the Justices must be concerned — any liberty they acknowledge will be a liberation of Liberty herself. Under these circumstances, elaborate celebration of Liberty's power would be too threatening; hence the diminution of Liberty beginning in the first line of the opinion and continuing throughout. On the use of allegorical female figures to advance male projects, see generally BARBARA JOHNSON, *THE WAKE OF DECONSTRUCTION* 52-75 (1994), discussing women and allegory in connection with a painting of Theory as a woman by Sir Joshua Reynolds. See also SANDRA M. GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* 3-92 (1979) (exploring the use of the figure of woman to both construct the field of literature and exclude women from participating in it).

6. The verse by Emma Lazarus found at the base of the Statue of Liberty reads in part:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-toss't to me.
I lift my lamp beside the golden door.

These lines, always problematic for their crypto-racist condescension, have taken on an increasingly ironic tone as we in the United States seek to close our minds and our borders to refugees of any description. Whether or not her promise of refuge remains good, however, Liberty as we know her is in no need of refuge herself.

that is clear" — the danger of failing to do so is the extinction, not of Liberty, but of law.⁷

B. *Woman*

In the opening line of the opinion, the Justices speak not of a Liberty to be feared, but of Liberty in fear, beleaguered, seeking refuge she is unable to find. Surely this is not an image of Liberty. Who, then, is it? The obvious answer, of course, is Woman. The law will not see in Woman the kind of power flaunted by Liberty. Liberty's strength is public and aggressive; Woman's is private and passive. In the world of the law, Liberty needs no shelter, but Woman seldom ventures out of hers. Woman before the law is outside the confines of her traditional sanctuary, the private, domestic sphere;⁸ under these circumstances it is natural for the law to conclude that she seeks refuge.

When Woman comes to the attention of the law it is usually because she is having trouble with — or causing trouble for — some man, or because she is pretending to *be* a man — engaging in an activity defined by and once restricted to men. As a general matter, women are none of the law's business: whatever it is that Woman does *qua* Woman goes on, from the point of view of

7. The extension of true liberty to women, while it would be just, would lead to chaos in the interlocking American legal, economic, social, and symbolic systems, all of which are premised on the notion that the roles imposed on women in society are derived from nature or assumed by choice. The 19th-century antiabortion campaign that resulted in the enactment of restrictive abortion legislation succeeded, in part, because it was able to "persuade male leaders that 'abortion constituted a threat to social order and to male authority.'" Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 159 (David Kairys ed., rev. ed. 1990) (quoting CAROL SMITH-ROSENBERG, *DISORDERLY CONDUCT* 235 (1985)); see also JAMES BOYD WHITE, *Planned Parenthood v. Casey: Legal Judgment as an Ethical and Cultural Art*, in *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW & POLITICS* 153, 166 (1994) (noting that abortion laws, from one perspective, "represent a continuing effort by men — men in the legislature, in the courts, in the presidency — to see to it that the continuation of pregnancy, in every case caused by a man, is subject to male control. On this view, the idea that women should themselves decide when and whether to have children is deeply threatening . . ."). On law's uneasy — indeed, violent — relationship to justice generally, see Jacques Derrida, *Force de Loi: Le "Fondement Mystique de L'Autorite"/Force of Law: The "Mystical Foundation of Authority"*, 11 *CARDOZO L. REV.* 919-1045 (1990).

8. For a comprehensive account of the ideology of the public and private spheres, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983). See also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118 (1986); Taub & Schneider, *supra* note 7.

the law, behind closed doors.⁹ While the respective rights and obligations of contracting parties, or automobile drivers, or optometrists, can be minutely regulated by the law, the law is literally at a loss for words when asked to comprehend concerns assigned to women, among them pregnancy, childbirth, and abortion. Having undertaken in the joint opinion to define a woman's liberty to terminate her pregnancy, the Justices find in the law only the most meager resources available to help them understand either Liberty or Woman.

C. *Motherhood and Abortion*

How, then, do the Justices define the liberty at issue in *Roe* and *Casey*? Outside the walls of the Court the controversy rages over the "right to choose abortion." The Justices also write of choosing,¹⁰ but they are not consistent in their references to the liberty established by *Roe*: they also refer to "a woman's right to terminate her pregnancy in its early stages,"¹¹ and, most often, of her right to make a *decision* about abortion.¹² Each of these expressions skews the discussion in a number of ways. Fundamen-

9. Unless, of course, the woman in question is poor, in which case her private affairs are intensely scrutinized in connection with her receipt of various forms of government assistance. See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1050 (1970) (comparing being poor to "fill[ing] out an income tax return once or twice a week"). However, the law insulates itself from daily contact with women and the poor by the interposition of layers of clerks, bureaucrats, hearing officers, and lower court judges between the poor and the appellate opinion. Judith Resnik argues that the writings of all the legal actors between lay person and appellate judge should be read as part of the canon of legal writing and that the silencing of these voices is analogous to the silencing of women's voices in Western literature. See Judith Resnik, *Constructing the Canon*, 2 YALE J. L. & HUMAN. 221, 225 (1990). This comment is especially apt in the area of welfare law, where many of the legal actors, as well as most of the clients, are women. Information that might be used by the Justices to understand Woman is thus unlikely to be drawn from the encounters of poor women with the law. Poor people seldom become "casebook people," Wexler, *supra*, except when they commit crimes against people who are not poor.

10. See, e.g., *Casey*, 505 U.S. at 870 (stating that, before the fetus is viable, "the woman has a right to choose to terminate her pregnancy"); *id.* at 872 ("The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."). Over the course of the plurality and concurring opinions, the Justices use the words "choose" or "choice" to describe the pregnant woman's liberty 35 times.

11. *Id.* at 844; see also *id.* at 871 ("[T]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.").

12. See, e.g., *id.* at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.") (emphasis added); *id.* at 874 ("[The Constitution] protects the wo-

tally, each obscures the fact that what is really at stake in *Roe* and the cases following it¹³ is not freedom to abort a pregnancy or to perform any other particular act, but rather freedom *from* State-coerced motherhood.¹⁴ When the State denies a pregnant woman the abortion she seeks, the State forces her, against her will and without compensation, to become another person's mother.¹⁵

man from unduly burdensome interference with *her freedom to decide* whether to terminate her pregnancy.") (emphasis added).

13. Or what various Justices, demonstrating either a highly developed sense of irony or a complete insensitivity to language, occasionally call *Roe's* progeny. See, e.g., *id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part) ("The opinion frankly concludes that *Roe* and its progeny were wrong . . ."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 544, 559 (1989) (Blackmun, J., concurring in part and dissenting in part) (referring to "*Roe* or any of its progeny" and to "*Roe* and its numerous progeny"); *id.* at 523 (O'Connor, J., concurring) (referring to equally unlikely progeny of *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *id.* at 566 (Stevens, J., concurring) ("*Griswold* and its progeny").

14. Numerous commentators (but few judges) have acknowledged the scope of women's interest in abortion. See, e.g., ROBERT D. GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 56 (1988) (arguing that denial of abortion forces the unwilling pregnant woman "to be completely used as a taken-for-granted indestructible maternal environment"); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 194 (1984) ("While on the surface it is the embryo's fate that seems to be at stake, the abortion debate is actually about the meaning of *women's* lives . . ."); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES*, 97-99 (1990); Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 782 (1989).

15. *Roe* recognized that coerced motherhood is the outcome of abortion:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Roe v. Wade, 410 U.S. 113, 153 (1973). Over the years, Justice Blackmun has emphasized an increasingly radical formulation of this same idea; in his separate opinion in *Webster*, he accuses the plurality of attempting to "clear the way again for the State to conscript a woman's body." *Webster*, 492 U.S. at 557 (Blackmun, J., concurring). In his opinion in *Casey*, Justice Blackmun adds that, "[t]he State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part); see also *id.* at 941 ("The Chief Justice's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal."). *Roe's* otherwise relentless focus on abortion as a medical procedure, and not as a means of preventing coerced service to the State, however, has dominated the development of abortion law. Viewing the denial or restriction of abortion as the conscription of women — and only women — into uncompensated service to the State renders the equal protection implications of the

The contraction of women's liberty from fundamental freedom to elective surgery is reinforced when the right in question is called the right to *choose* abortion. The "right to choose" language implies an election between roughly equivalent choices. Almost invariably, the choice implied is between abortion and what the courts often call "normal childbirth,"¹⁶ as if the pregnant woman's whole desperate struggle were to avoid, not a lifetime of service, but only whatever might be left of her nine months of pregnancy.¹⁷ In the world of the law, the problems faced by a woman unwilling to be pregnant do not begin with the birth of a child, they end there; but for an exception to the justiciability doctrine,¹⁸ the legal aspects of the dispute would be

issue unmistakable. See *id.* at 928 n.4 (concluding that abortion restrictions as State-compelled motherhood "rest[s] upon a conception of women's role that has triggered the protection of the Equal Protection Clause").

16. See, e.g., *Harris v. McRae*, 448 U.S. 297, 329 (1980) (White, J., concurring) ("[W]ithholding funds [for abortions] rationally furthered the State's legitimate interest in normal childbirth."); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) ("[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . ."). The per curiam opinion uses the word "choose" nine times with reference to the woman's decision whether to have an abortion (the word is also used on other occasions with reference to viewing the information provided, informing her husband of the abortion, etc.). Five of these occurrences refer specifically to choosing childbirth over abortion. E.g. *Casey*, 505 U.S. at 859 ("[*Roe* protects] a woman's right to choose to carry a pregnancy to term" as well as to terminate it); *id.* at 872 ("[A] certain degree of state assistance [is available] if the mother chooses to raise the child herself."); *id.* at 878 (concluding a state measure designed to persuade her to choose childbirth over abortion will be upheld); *id.* ("[State regulations] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."); *id.* at 883 (holding that the required provision of information about fetal development and state assistance "is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion").

17. The impact of the months of pregnancy, however, should not be underestimated. In addition to actually endangering the physical health of some women, the hard work of making a baby routinely subjects a woman to great stresses on her physical and emotional makeup. A pregnant woman's appearance changes, sometimes dramatically. She finds herself flooded with powerful hormones capable of altering her moods, her outlook, her concentration, the tone of her muscles, and the texture of her hair. Her appetite, her energy, and the integrity of her teeth and bones are affected by the job she is doing. All of the features we are accustomed to think of as making up a personality are subject to radical alteration during a single pregnancy, and to radical variation from one pregnancy to the next. These effects would undoubtedly constitute "cruel and unusual punishment" were they to be imposed on unwilling male convicts, no matter how heinous the crime. Cf. *Randolph v. Randolph*, 1 So. 2d 480, 482 (1941) ("[Man] may be called to the colors but he will risk the possibility of going to war or to hell rather than undertake the period of gestation.").

18. See *Roe*, 410 U.S. at 125 (finding that Jane Roe's case was not moot, despite the fact that she must have given birth long before the case reached the Supreme

mooted by delivery.¹⁹ The choice for the unwilling pregnant woman, however, is between abortion and motherhood.²⁰

Court, because issues relating to pregnancy are "capable of repetition, yet evading review") (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

19. Even those who argue in support of the right to abortion sometimes pose the problem as a temporary medical one. For example, Judith Jarvis Thompson's famous essay asks whether we would require a stranger with healthy kidneys to hook herself up to a talented violinist (indisputably a person, unlike the fetus) in need of dialysis in order to "rescue" the socially valuable musician at the cost of some temporary inconvenience to the rescuer. She concludes that our legal and moral institutions would not compel this assistance. Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 1 (1971), reprinted in 3 ABORTION LAW IN THE UNITED STATES: MODERN WRITINGS ON ABORTION 353, 354-72 (Paul Finkelman gen. ed., Jenni Parrish vol. ed., 1995). As applied to the pregnant woman's "rescue" of the fetus, this analogy understates the costs to the rescuer, who is asked to devote not a lifetime of love, but a few months of immobility to the rescued. The analogy is also objectionable because it reinforces the notion that the pregnant woman is a passive vessel for the fetus somehow nourishing and developing itself inside her. The analogy also obscures the fact that the fetus has value for society at large because of the woman's creative efforts in making it a person, not because its genetic coding might destine it to play the violin. Thompson's moral point, it should be noted, is only strengthened by these objections to her hypothetical; the problem arises not so much because of the original use Thompson made of her analogy but because it has, over the past 25 years, taken on a life of its own. For further criticism of Thompson's analogy, see DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* 47-53 (1995).

20. It will be objected that adoption is also an alternative for the unwilling pregnant woman. A woman who gives up her baby for adoption is nonetheless a mother of that child; the relationship between mother and baby begins long before birth when the mother acknowledges that there will be a baby. To give her baby up, a mother must either prevent herself from coming to know the person she is so intimately creating, or establish and then attempt to sever the bond between them. The number of people who devote their adult lives to the search for their lost natural parents or children, and the number of agencies springing up to help them, is evidence that the bond between birth mother and baby is difficult to avoid and difficult to sever. See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 53-61, 239 n.4 (1993) (describing the growing "search" movement and issues raised by the continuing connection between birth and adoptive families); GOLDSTEIN, *supra* note 14, at 68. Adoption in lieu of abortion cannot restore to the woman unwilling to be pregnant control over her own body and identity; it can merely relieve her of the responsibility of caring for the child her forced labor has created. Adoption can appear to be a solution to the problem of coerced motherhood only by trivializing the impact of involuntary pregnancy on the physical integrity and psychological well-being of the mother. In addition, the same social conditioning that produces unwanted pregnancy stigmatizes women who give up their children. In her complex and impassioned criticism of the politics of adoption, Bartholet calls for reform of the regulatory framework and financial support structures inhibiting adoption (including state and federal taxes, insurance and employer benefit plans), and of the negative stigma attached to adoption and to all participants in the process. BARTHOLET, *supra*, at xiii-xxii, 165-86, 230-35. In the world envisioned by Bartholet, abortion would be a far less important feature of women's liberty than it is today.

For many, perhaps most women, motherhood is the single most rewarding and fulfilling experience of life, capable of giving meaning and purpose to the hardest labor and the meanest circumstances. The magnitude of motherhood's benefits, however, is the measure of the burdens borne by women made to be mothers against their will.²¹ The woman whose liberty is limited by anti-abortion legislation is most likely young,²² single,²³ and poor.²⁴ She has already been subjected to myriad social, economic, legal, and cultural pressures, all operating with the full support and complicity of the state, urging her to become pregnant.²⁵ For her, abortion is the possibility of a kind of self-deter-

21. The pregnant woman unwilling to become a mother might be compared to a college senior who, after successfully applying to medical school, has decided he does not wish to become a doctor. The life of a physician can be one of immense satisfaction and incalculable rewards. Our nation, moreover, requires a continuing supply of health care professionals. Nevertheless, we would view any effort to force the unwilling student to devote his life to medicine as an unthinkable infringement of his liberty (even if he were well compensated financially for his efforts, which mothers rarely are).

22. Since 1975, almost two-thirds of abortions in the United States are performed for women in their teens or early twenties. See generally BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 257 (reporting that over 60% of abortions performed in the United States in 1987 were for women between the ages of 15 and 24); ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 143 (rev. ed. 1990) (reporting that approximately two-thirds of women obtaining abortions since 1975 were under 24). As occurs in *Casey*, substantial additional burdens may be placed on a minor's ability to even choose abortion, much less to carry out her choice.

23. See CRAIG & O'BRIEN, *supra* note 22, at 257 (reporting that 82.4% of women obtaining abortions in 1987 were single); see also *Casey*, 505 U.S. at 894 (noting that only 20% of women obtaining abortions are married).

24. "Poor women are *both* three times more likely than other women to get abortions *and* much more likely to be denied access to abortion." PETCHESKY, *supra* note 22, at 157. Abortion control laws typically restrict access to abortion by making it more expensive — for example, like the Pennsylvania statute at issue in *Casey*, they require greater physician involvement, more burdensome record-keeping, multiple trips to abortion providers, etc. — and by denying public funding for abortion. See *Harris v. McRae*, 448 U.S. 297 (1980) (permitting Congress to deny Medicaid funding for abortion); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut regulation denying public funding for abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (refusing to compel publicly-funded hospitals to provide nontherapeutic abortions). While these restrictions burden all women, they fall disproportionately on poor women, who are less able to raise the money needed to overcome them. For an argument that the disproportionate effect of restrictive abortion laws on the poor is itself a reason to find them unconstitutional, see MARK A. GRABER, RE-THINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996).

25. It is not easy — for many women, not possible — to avoid unwanted pregnancy. Social pressure to form heterosexual relationships from an early age, cultural

mination. Unless she is one of the comparatively few mothers who release their babies for adoption,²⁶ unwanted motherhood will greatly hinder, if not altogether deny, her the ability to make her life her own, harnessing her instead to the task of making life for another. The social and economic subordination of the woman's own choices to her maternal role is reflected in such locutions as "working mother": no man is ever referred to as a "working father."²⁷

emphasis on the value of heterosexual love, family, and motherhood, persistent race-based, class-based, and gender-based employment inequities, and ineffective controls on violence against women all work together to insure that most women will spend their reproductive lives having regular heterosexual intercourse, while inadequate sex education, inconsistent male cooperation, and the cost, risk, and restricted availability of effective contraceptives insure that so-called "unplanned" pregnancies will result. See MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 138-45 (1992). "[T]he option of abortion helps [women] to mediate the pressures of sexuality, intimacy, familism, and social and economic productivity when conflicts among these pressures threaten to alter their personal identities or become otherwise intolerable." Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & L. 175, 220 (1992). According to a survey conducted by Kristin Luker, however, antiabortion activists take the position that women who do not want to have children should abstain from sex. See LUKER, *supra* note 14, at 159-75. This oversimplified assumption that, apart from cases of rape and incest, pregnancy is something a woman volunteers for when she decides to engage in heterosexual intercourse is also implicit in much of the moral debate concerning abortion. See GOLDSTEIN, *supra* note 14, at 12-18 (discussing "good Samaritan" theories of the morality of abortion). But see Catharine A. MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 45-48 (Jay L. Garfield & Patricia Hennessey eds., 1984) (questioning whether any heterosexual intercourse is truly voluntary for women); WHITE, *supra* note 7, at 165 ("[A] great deal of 'normal' sexual relations, among the married and unmarried alike, are not really consensual on the woman's part, especially if by 'consent' one means a choice that is truly free and unconstrained.").

26. Most unwilling mothers do not release their babies for adoption, even when adoptive parents are available. See BARTHOLET, *supra* note 20, at 251 n.1 (citing a recent survey showing only 13% of women who were denied an abortion gave their babies up for adoption). Although it is sometimes suggested that the burdens of unwanted motherhood should be relieved through adoption rather than abortion, an adequate supply of adoptive parents may not exist to become the parents of all the babies who would be born if abortion were to be effectively prevented. Even before *Roe* there were never more than 175,000 adoptions annually in the United States; today, there are approximately 50,000 nonrelative adoptions each year. *Id.* at 238 n.6. In 1981, by contrast, there were approximately 1.6 million abortions. Robert D. Goldstein argues that the most optimistic predictions offer no basis for supposing that either adoptive parents or the states could possibly care for all the children who would be born if abortion were prohibited. Also, the current adoption system's inability to provide adequate care for nonwhite children and children with perceived disabilities would be intensified by a greatly increased number of adoptable babies. See Goldstein, *supra* note 14, at 63 n.68.

27. The all-encompassing nature of motherhood is also reflected in the distinction between "fathering" and "mothering" a child. To father a child is to engage in

Even the word "abortion" severely restricts the ways women's liberty can be discussed. To "abort" is to cancel a mission already underway. The word implies the miscarriage of a plan, the failure of an undertaking. Moreover, it focuses attention narrowly on the life of the fetus, obscuring the life of the pregnant woman. "Abortion" does not describe women's liberty from a woman's point of view. Rather, "abortion" takes the point of view of an unspecified third party whose purposes a woman is thwarting by her interference with the task her body has been assigned. From the point of view of the pregnant woman unwilling to become a mother, however, *childbirth* is abortion — the abortion of her own life, or what it might have become. When it denies the unwilling pregnant woman an abortion, the State diverts her life from its course. It is impossible to use the word "abortion" to refer to the saving of a life, to the preservation of a future; yet, that is what *Roe* and *Casey* are, or should be, about.

"Abortion," as used by the law to describe the woman's liberty, is a figure of speech. When the Justices, following the universal practice in legal and popular rhetoric, substitute "abortion" for "freedom from coerced motherhood" to refer to the woman's protected liberty, they are employing the rhetorical figure of metonymy, in which one signifier is replaced by another with which it is associated.²⁸ The medical procedure of abortion

the single act of intercourse by which the child is conceived. To mother a child is to devote oneself to the task of meeting all of the child's physical and emotional needs. This distinction is obscured in the quotation from *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), repeated three times in the joint opinion, that the Constitution protects "the decision whether to *bear or beget* a child." *Casey*, 505 U.S. at 851, 875, 896 (emphasis added). Begetting and bearing children are not equivalent activities. For a perceptive analysis of the law's tendency to reduce bearing to begetting, see Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101 (1992).

28. See M. H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 66 (5th ed. 1988). The specific form of metonymy being employed here is "synecdoche," the substitution of a part for the whole. *Id.* Synecdoche marks, or rather obscures, the line between metonymy and metaphor, the replacement of one signifier by another from which it is distinctly dissimilar as a whole, but with which it nevertheless shares some relevant similarity or necessary connection. *Id.* at 65, 67; see PAUL DE MAN, *ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST* 57, 62-63 n.8 (1979). In de Man's discussion of Proust, he argues that Proust's association of the buzzing of flies with summer, a synecdoche, functions as a metaphor, in part because the association between flies and summer is necessary rather than contingent: "There could be no summer without flies, no flies without summer." *Id.* at 62. By contrast, given adequate sex education, access to contraception, and reduced social and economic pressures mandating heterosexual relations, there could be freedom from coerced motherhood without abortion, while abortion could be a feature of state coercion rather than an escape from it. The association

bears no similarity to the liberation of women from service as mothers; the association between abortion and liberty arises from the fact that the former is one among many means by which the latter can be achieved (albeit the only one remaining to the woman already pregnant). Having made the metonymic substitution of abortion for liberty, the Court then forgets that the association is merely figurative:²⁹ all burdens on women's liberty are analyzed in terms drawn from the regulation of medicine, as if any tolerable regulation of the medical profession must, without further analysis, also be a tolerable burden on women's freedom. Thus, for example, requirements that would be permissible in obtaining a patient's "informed consent" to a kidney transplant are presumed to be permissible in obtaining a woman's "informed consent" to abortion.³⁰

D. Choice

The further substitution of "right to choose abortion" for "right to abortion" is another metonymic displacement diminishing the woman's freedom even more. As has become increas-

between abortion and liberty, therefore, is contingent rather than necessary, and the substitution of one for the other is metonymic. The psychological and literary characteristics of metonymy and metaphor as these figures appear in the legal rhetoric of takings jurisprudence are explored in Louise Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J. L. & HUMAN. 31, 37-41 (1996).

29. The law's reliance on tropes, or figures of speech, may be dangerous, particularly for the oppressed, because the use of these figures can obscure the contingent, political choices making up a legal regime, causing oppression to seem inevitable or rooted in nature. See, e.g., Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, in LAW AND THE ORDER OF CULTURE 162 (Robert Post ed., 1991). Nedelsky traces the effects of the law's rhetorical use of the metaphor of "boundary" to describe the tension between the individual and the collective. She notes that "[o]ne of the general problems with the boundary metaphor, like all metaphors that are so deeply established that they appear natural and obvious, is that it obscures the questions it was intended to answer, it closes down rather than invites inquiry." *Id.* at 174. Nedelsky concludes that the boundary metaphor must be rejected, but warns that "[w]e will need a new vocabulary, new metaphors to invoke if we are not to be sucked back into the forms we are resisting even as we argue against them." *Id.* at 181.

30. See *Casey*, 505 U.S. at 882-83. By the same reasoning, regulations whose only effect is to increase the price pregnant women must pay to avoid motherhood, such as the Pennsylvania requirement that pre-abortion counseling be provided by a physician rather than a trained counselor, are permissible because "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Id.* at 885 (citing *Williamson v. Lee*, 348 U.S. 483 (1955)).

ingly clear since *Roe* was decided, the law is prepared to protect a right to *choose* abortion, but not a right to *have* an abortion. Again, legal rhetoric has substituted a part of the liberty for the whole and, again, the resulting formulation is treated as if it captured the entire liberty. According to the authors of the joint opinion, "the underlying constitutional issue is whether the State can resolve these *philosophic questions* [about abortion] in such a definitive way that a woman lacks all choice in the matter."³¹ The authors of the joint opinion find the ability to make *choices* about intimate matters, "choices central to personal dignity and autonomy," to be "[a]t the heart of liberty."³² The pregnant woman must be able "to *define* [her] own *concept* of existence, of meaning, of the universe, and of the mystery of human life."³³ By this logic, the chief threat against which the liberty must be protected is not pretextual elevation of the cost of abortions, or arbitrary imposition of practical obstacles to obtaining them, but thought control: "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."³⁴ The pregnant woman's "attributes of personhood" will remain intact, in the logic of the joint opinion, so long as she is permitted to seek an abortion, even if the State has made it a practical impossibility for her to get one.³⁵ No one is

31. *Id.* at 850-51 (emphasis added).

32. *Id.* at 851.

33. *Id.* (emphasis added). It is only because the liberty is envisioned as the right to form beliefs about the "moral and spiritual implications of terminating a pregnancy," *id.* at 850, that the issue can be said to be one about which "[m]en and women of good conscience can disagree." *Id.* Men and women of good conscience have no basis for judging whether you or I should be a mother.

34. *Id.* at 851. Another danger might be the establishment of an official religious position. Ronald Dworkin makes a related argument when he suggests that the most stable constitutional foundation for the right to abortion may be found in the First Amendment's Establishment Clause. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 418-25 (1992), reprinted in 3 ABORTION LAW IN THE UNITED STATES: MODERN WRITINGS ON ABORTION 391, 428-37 (Paul Finkelman gen. ed., Jenni Parrish vol. ed., 1995). This approach is problematic, not because of its correct observation that opposition to abortion is primarily religious, a point Justice Stevens has repeatedly made in his abortion opinions, see, for example, *Webster v. Reproductive Health Services*, 492 U.S. 490, 566-72 (1989) (Stevens, J., concurring), but because the remedy for such unconstitutional State action is unlikely to free any real woman from coerced motherhood as a practical matter.

35. As Justice White observed, "[T]he ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 801 (1986) (White, J., dissenting), quoted in *Casey*, 505 U.S. at 969 (Rehnquist, C.J., concurring in part and dissenting in part).

required to perform abortions;³⁶ and neither the states³⁷ nor the federal government³⁸ has an obligation to ensure that women can afford to exercise their protected liberty. By contrast, when a criminal defendant faces the loss of his liberty at the hands of the State, the Constitution not only guarantees that he cannot be prevented from consulting an attorney, it requires that one be appointed for him at government expense³⁹ and that the State inform him of this right.⁴⁰ Presumably, a life sentence pronounced after police had persuaded the defendant not to consult an attorney would be constitutionally infirm, but the Court in *Casey* allows the State to forbid a woman to choose abortion until the State has tried and failed to talk her out of it.

E. Decision

Evidently, the Justices find even a much diminished right to "choose" abortion too unmanageable to write about coherently. Although they sometimes refer to women's liberty as a right to "choose," this locution more often gives way in the joint opinion to the right to "decide."⁴¹ To "choose" is to exercise a preference in accordance with one's own free will.⁴² "Decide," by contrast, connotes a more rigorous intellectual process.⁴³ In resolving legal disputes, for example, judges do not "choose"

36. See, e.g., PETCHESKY, *supra* note 22, at 127-28 (describing numerous New York hospitals' refusal in the 1970s to provide abortions despite enactment of permissive abortion legislation); *id.* at 157-58 (reporting studies showing that a minority of American doctors (including only half of American obstetricians) perform abortions, and that availability of in-hospital abortions declined between 1973 and 1977).

37. *Maier v. Roe*, 432 U.S. 464 (1977) (holding that states need not fund abortion, even if the failure to do so makes abortion unavailable to indigent women, and even if "normal childbirth" is funded).

38. *Harris v. McRae*, 448 U.S. 297 (1980) (holding that Medicaid funding restrictions denying reimbursement for medically necessary abortions do not impinge on the liberty protected by *Roe*).

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40. *Miranda v. Arizona*, 384 U.S. 436 (1966).

41. The words "decide" and "decision" are used 118 times in the plurality and concurring opinions. By comparison, these words are used only 98 times in the five separate opinions filed in *Webster*.

42. See "choose," III THE OXFORD ENGLISH DICTIONARY 162 (2d ed. 1989).

43. On another level, "decide" reverberates oddly in the context of abortion. The word "decide," which comes from the Latin "dēcidere," meaning "to cut off, cut the knot," is adapted from the Latin root "-cādēre," "to cut." See "decide," IV THE OXFORD ENGLISH DICTIONARY 329 (2d ed. 1989). Apart from uncannily echoing the actual abortion procedure, the word inevitably invokes the story of Solomon proposing to cut the disputed baby in half to decide who should be its mother. See Martha L. Minow, *The Judgment of Solomon and the Experience of Justice*, in THE STRUCTURE OF PROCEDURE 447-50 (Robert M. Cover & Owen M. Fiss eds., 1979).

outcomes, they "decide" cases. To decide, one should add up pros and cons, weigh alternatives, evaluate competing arguments, and, perhaps, conduct a cost-benefit analysis. The reasonable man⁴⁴ makes decisions this way all the time, but even the reasonable man is unlikely to fall in love or father a child by this process. The notion that women employ this method to choose motherhood is still more implausible.

By defining the woman's liberty as the right to make a decision, however, the Justices have alleviated one of the major difficulties they faced in writing their opinion: the lack of any coherent way to talk about Woman in the language of the law. Reading *Roe* as a decision about making decisions gives the Justices a vocabulary for writing about what the law finds incomprehensible. The law knows nothing about Woman, but it knows all about making decisions. The law has carefully structured procedures for identifying issues, gathering and analyzing evidence, hearing arguments, applying rules and principles, and pronouncing decisions. The Justices are at home in this framework; it is what they do⁴⁵ — or are supposed to do⁴⁶ — every day.

Through a chain of increasingly abstract substitutions, the Justices have translated a woman's freedom from forced motherhood into a right to have the last word on a question of philosophy. The Justices have tamed Liberty by this process. Indeed, the Justices' Liberty is so thoroughly domesticated that she de-

44. The turbulent relationship between women and the "reasonable man" in the law has been the subject of much scholarship. See, e.g., Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769 (1994); Kathleen A. Lahey, *Reasonable Women and the Law*, in AT THE BOUNDARIES OF LAW: FEMINISM & LEGAL THEORY 3 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); Robert Unikel, Comment, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992).

45. A judge's job is to *make* a decision, not to carry it out. Actual enforcement is the job of others, although the judge may, if presented with additional issues concerning aspects of enforcement, be required to make additional decisions.

46. But see Jerome N. Frank, *The Judging Process and the Judge's Personality*, in LAW AND THE MODERN MIND 100 (1930), reprinted in THE STRUCTURE OF PROCEDURE 183-87 (Robert M. Cover & Owen M. Fiss eds., 1979) (expressing doubt that judges, any more than the rest of humanity, reason from rules to conclusions and not the other way around); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929) (describing the role of intuition in deciding a case); Warren Lehman, *Rules in Law*, 72 GEO. L.J. 1571 (1984) (arguing for a form of moral and ethical "intuitionism" as an account of judicial decisionmaking). For a different perspective on the complexities of judges see Minow, *supra* note 43, at 447-50.

pends on them for her very existence: “[I]t falls to us to give some real substance to the woman’s liberty.”⁴⁷ No longer a power to be feared at the edge of the legal order, Liberty has been penned up at the very center of the law — she has become a decision.

At the same time that it enables them to master Liberty, however, the Justices’ definition of Liberty creates a wholly unprecedented identification between the Court — objectivity, reason, and law personified — and Woman, thus opening up new and unexpected rhetorical possibilities for Woman in the law. The pregnant woman has made a decision about abortion; so has the Court, in *Roe*. Relentless, vociferous opponents of *Roe* believe both the pregnant woman and the Court have made the wrong decision and hope to change their minds. Neither the pregnant woman nor the authors of the joint opinion want to reconsider their abortion decisions, but the Pennsylvania Abortion Control Act⁴⁸ has forced them to do so. The Justices’ treatment of each decision provides standards for judging the other. In the last analysis, the Justices fail to provide for the pregnant woman’s decision the refuge they create for their own; *Casey* is ultimately a failure to do justice for Woman. This failure, however, is an interesting and, perhaps, even a hopeful one. The remainder of this Article examines the ways in which the joint opinion fails, and the ways in which it succeeds, in highlighting and critiquing its own failures.

III. REFUGE

In the opening line of the joint opinion the Justices seem to promise refuge for women’s liberty. The Justices do not keep their promise. Indeed, they prove themselves almost incapable of imagining a pregnant woman who might be trusted with the much reduced liberty they have defined for her. They treat the task before them as one of balancing Woman’s right to make a decision against her presumed inability to do so properly. Far from granting the pregnant woman a refuge where she can search her own soul without State interference, the Justices turn her over to the State to be indoctrinated in the correct way to think about abortion.

47. *Casey*, 505 U.S. at 869.

48. 18 PA. CONS. STAT. §§ 3203-14 (1990) (reproduced in part in Appendix to joint opinion, *Casey*, 505 U.S. at 902-11).

A. *Woman as Decisionmaker*

Having read *Roe* as guaranteeing the pregnant woman a right to make the ultimate decision about abortion, the Justices demonstrate that they cannot imagine a woman actually exercising this liberty. The Justices are, evidently, very uncomfortable with the idea of a woman making any decision without assistance; the image of Woman as a competent decisionmaker is almost entirely absent from the joint opinion (a startling omission, in light of its authorship). When writing of other decisions protected by the Constitution, the Justices imagine the decisions being made by "persons,"⁴⁹ "individuals,"⁵⁰ or "couples."⁵¹ When referring to abortion in particular, the Justices often write of "the abortion decision" without reference to the decisionmaker.⁵² The image of the woman as decisionmaker appears in the joint opinion most often when she is firmly embedded in state mechanisms meant to control the process of reaching her decision. For example, "though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."⁵³ "What is at stake," the Justices write, to reassure themselves that they are not condoning

49. See, e.g., *Casey*, 505 U.S. at 849 ("[T]he Constitution places limits on a State's right to interfere with a *person's* most basic decisions." (emphasis added)); *id.* at 851 ("the most intimate and personal choices a *person* may make in a lifetime" (emphasis added)). Cf. *id.* at 856 (describing the availability of abortion as enabling "*people*" to organize relationships and make choices) (emphasis added).

50. *Id.* at 851 ("Our cases recognize 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . .'" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972))).

51. *Id.* at 849 ("[T]he Constitution does not permit a State to forbid a married *couple* to use contraceptives. That same freedom was later guaranteed . . . for unmarried *couples*." (emphasis added)).

52. E.g., *id.* at 852 ("[T]he *abortion decision* may originate within the zone of conscience and belief." (emphasis added)); *id.* ("[I]n some critical respects the *abortion decision* is of the same character as the decision to use contraception." (emphasis added)); *id.* at 871 (noting that cases subsequent to *Roe* "decided that any regulation touching upon the *abortion decision* must survive strict scrutiny") (emphasis added).

53. *Id.* at 872; see also *id.* at 873 ("It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."); *id.* at 877 ("Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.").

the unthinkable, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."⁵⁴

The Justices are not only unable to depict a woman making a decision for herself, they also seem unable to imagine the pregnant woman at all, or to guess why she might want an abortion. Perhaps in a case involving a real pregnant woman the Justices could learn to trust her,⁵⁵ but in *Casey* the Justices have only the pure symbol of Woman before them. No actual pregnant woman is included among the plaintiffs in *Casey*.⁵⁶ Taking the place of any pregnant woman in the flesh is "the woman" or "the pregnant woman" who lacks all human characteristics other than her pregnancy. Often, the fully-assembled pregnant woman disappears, leaving only her fetus,⁵⁷ her womb,⁵⁸ or her pregnancy⁵⁹ behind. Sometimes, as in the repeated references to "the abortion decision," the woman vanishes without any trace at all.⁶⁰ One searches the joint opinion in vain for an image of any real woman who might need to know whether the Justices will allow her to have an abortion. How can the Justices be certain *Roe*

54. *Id.* at 877. Compare this to Justice Stevens' description of the woman's deliberations: "A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision." *Id.* at 919 (Stevens, J., concurring in part and dissenting in part). Jane Maslow Cohen finds in Justice Stevens' opinion a framework for analysis of the political morality of a woman's right to deliberative autonomy. See Cohen, *supra* note 25, at 177.

55. In fact, the Justices come closest to imagining Woman as competent decisionmaker in the portion of the opinion striking down the spousal notification provision, perhaps because they immerse themselves in the details of the lives of battered women.

56. Petitioners in *Casey* were "five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services." *Casey*, 505 U.S. at 845. Real pregnant women have been largely absent from the abortion cases heard by the Court. Women are generally exempted from liability under restrictive abortion laws; abortion providers have therefore been the principal litigants in these cases. See Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 98-102 (1995).

57. See, e.g., *Casey*, 505 U.S. at 872 (permitting prohibitions on abortion "when the fetus is viable"); *id.* at 876 (arguing that, while *Roe* acknowledged that "the State has an interest in protecting fetal life," *Roe* failed to allow the State to "advance that interest before viability").

58. See *id.* at 870 (noting that viability is the time when "there is a realistic possibility of maintaining and nourishing a life outside the womb").

59. See *id.* at 853 (describing the view that "any pregnancy ought to be welcomed and carried to full term").

60. See also *id.* at 851 ("Beliefs [whose?] about these matters could not define the attributes of [whose?] personhood were they formed under compulsion of the State.").

was right in trusting "the pregnant woman" to make a decision if they know nothing about her?

On closer inspection, however, it appears that the Justices do know something about "the pregnant woman." They know she is Woman. On that basis, they can — indeed, they must — assume she is not rational. The law's whole notion of what it means to be rational depends on the irrationality of Woman. In the text of our law rationality is imagined as the ability to exercise pure reason, distinguished from and uncontaminated by passion, emotion, desire, and context.⁶¹ Real people, however, do not reason out of context, nor can we separate reason from emotion and desire. The law, however, demands that a valid decision be the product of "reasoned judgment."⁶² From the time of the Ancient Greeks, reason has been identified as that which distinguishes human culture from nature: rational knowledge is the ability to control, transcend, or bring order to natural forces.⁶³ Woman, on the other hand, is identified with Nature, passion, the body, and all that reason overcomes, an identification based in large part on Woman's ability to give birth.⁶⁴ The gendered oppositions between culture and nature, mind and body, form and matter, reason and passion, and man and woman pervade all of

61. The dogma that legal reasoning must proceed without any taint of emotion or passion is demonstrated and tested in the area of divorce law. See, e.g., AUSTIN SARAT & WILLIAM F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995). In reporting the results of their observation of lawyer-client interactions in 40 divorce cases, Sarat and Felstiner repeatedly note the lawyers' insistence on the legal irrelevance of the emotional aspects of their clients' divorces and the determination with which the lawyers avoid discussing, or permitting their clients to discuss, these issues. *Id.* at 128-33.

62. *Casey*, 505 U.S. at 849.

63. This account is based on the work of Genevieve Lloyd, who traces the roots of modern gendered ideas of scientific knowledge and reason through Ancient Greek mythology, Plato, Aristotle, Francis Bacon, and Nietzsche. See Genevieve Lloyd, *Reason, Science and the Domination of Matter*, in *FEMINISM AND SCIENCE* 41, 41-53 (Evelyn F. Keller & Helen E. Longino eds., 1996). Aristotle regarded women as inferior beings with defective reasoning capacities. ARISTOTLE, *POLITICS* 59 (Harvard Univ. Press 1959), noted in Leslie Bender, *Lawyer's Primer on Feminist Theory*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 58 (D. Kelly Weisberg ed., 1993); see also GERDA LERNER, *THE CREATION OF PATRIARCHY* 209 (1986). Kant also opined that women "act on feelings, not reason." IMMANUEL KANT, *OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME* 76-81 (University of Cal. Press 1960), quoted in Bender, *supra*, at 62.

64. For a thoughtful discussion drawing together the work of Margaret Whitford, Luce Irigaray, and Jacques Derrida to explore the origins of reason and the legal subject in the repression of passion and the female, see Sheila Duncan, *Law As Literature: Deconstructing the Legal Text*, 5 *LAW AND CRITIQUE* 3, 8-12, 15-16 (1994).

Western intellectual life: their preservation is essential to the definition of the rational Man, whose existence is essential to the law.⁶⁵ The notion that the law must permit pregnant Woman to exercise "Reasoned judgment" and thereby arrive at a decision not to give birth throws these orderly oppositions, and the definitions dependent on them, into an incoherent jumble. Woman's ability to reason is not only suspect, but threatening to the meaning of law and of Man.

The symbolic divide between reason and Woman poses two problems for the authors of the joint opinion. First, in order to reaffirm *Roe* as they read that case, the Justices must entrust Woman, the very symbol of all that is not rational, with a decision; for this to be a rational outcome from the law's point of view, the Justices must find a way to ensure that the pregnant woman will make a rational decision. The difficulty of this task lies, in part, in the fact that the law's notion of rational decisionmaking is far too limited and sterile to be of use in determining whether one should be a mother, and no one would use it for that purpose unless compelled to do so. Second, given the perceived necessity and grave difficulty of the first problem, the Justices must find a way to account for their decision to entrust Woman with a decision at all; this task, too, is made immeasurably more difficult by the Justices' belief that their decision must be the product of reason alone to be legitimate.⁶⁶ The Justices attempt to solve the first problem by adopting the "undue burden" standard, and the

65. Many feminist scholars have argued that the perspectiveless "rationality" enshrined in the law is peculiarly male, while women are more "relational" in their thinking. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39 (1985); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987). Much of this discussion builds upon the famous work of Carol Gilligan identifying different approaches to moral reasoning exhibited by males and females. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Gilligan's work does not make clear whether she believes the "ethic of care" she identifies to be a universal characteristic of the female sex. See FRUG, *supra* note 25, at 38-49 (1992) (offering progressive and conservative readings of Gilligan and describing the legal and political consequences of each). Inasmuch as women have been symbolically and, to a lesser extent, practically confined to social roles for which "rationality" as it is idealized in the law would render them unfit, while men have constructed for themselves a public world in which an "ethic of care" would be maladaptive, one would expect each gender to exhibit these qualities in different combinations regardless of their natural endowments.

66. See, e.g., *Casey*, 505 U.S. at 849, 850 (explaining that the Justices can neither overrule policy choices with which they disagree nor mandate their own moral code but must instead exercise "reasoned judgment").

second through reliance on *stare decisis*. Arguably, however, both problems evade solution entirely, forcing the Justices to give birth to a jurisprudence of doubt.

B. *Woman Burdened*

In order to balance the pregnant woman's Constitutional right to decide against Woman's Constitutional inability to do so rationally, the Justices permit the State to help the pregnant woman decide, so long as the State's assistance does not "impose[] an undue burden on a woman's ability to make this decision."⁶⁷

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.⁶⁸

If some burdens are undue, others must be due; the State, it appears, has not just a right but an obligation to interfere with the woman's decision.

The right recognized by *Roe* is a right to be free from *unwarranted* governmental intrusion Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe's* terms it undervalues the State's interest in the potential life within the woman.⁶⁹

67. *Id.* at 874. The concept of the undue burden originated with Justice O'Connor, who first used the term in her separate opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 458-59 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part). A portion of the joint opinion almost certainly authored by Justice O'Connor admits that the definitions of the undue burden standard in Justice O'Connor's various opinions have not been entirely consistent. *Casey*, 505 U.S. at 876. Justice Scalia makes this point as well. *Id.* at 988-89 (Scalia, J., concurring in judgment in part and dissenting in part). Although Justice O'Connor was the first and, for twelve years, the only woman on the Supreme Court, her jurisprudence has never been marked by a special understanding of the situations of women. See FRUG, *supra* note 25, at 30-38 (expressing disappointment with Justice O'Connor's refusal to write as a woman). Justice O'Connor's undue burden standard, as a vague, multi-factored test to be flexibly applied, gives minimal protection for women's rights and maximum play both to the biases inherent in the legal text and to the effects of money and power in litigation. The undue burden standard has been analyzed and criticized by several authors. See, e.g., Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025 (1994); Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard — Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295 (1995); Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003 (1993).

68. *Casey*, 505 U.S. at 877.

69. *Id.* at 875 (emphasis added).

The State's interference is not merely permitted, it is *warranted*. State intervention is called for, the run-on sentence clearly implies, because without it the woman is sure to make the presumptively wrong decision to abort "the potential life within" her. Any indication that the woman may decide to abort the fetus *warrants* state intrusion.

Despite the abstract and cerebral nature of the woman's liberty as the Justices define it, the image of a woman exercising her liberty that emerges from this portion of the joint opinion is concrete and rather disturbing. An undue burden is described repeatedly as an "obstacle in the path" of the woman seeking to abort the fetus.⁷⁰ This image arrays the parties in space: at the end of the path is the doomed fetus; coming ever closer is the unthinking woman bent on destroying it; and standing over the fetus to defend it from the onrushing woman is the State, erecting physical barriers between them. We throw up obstructions to defend ourselves against floods, landslides, and wild animals, but not against people with whom we think we can reason; the traditional identification of woman with the force of Nature, the antithesis of reason, clearly shapes this image.

Although the Justices forbid the State from erecting an obstacle that will actually bar the pregnant woman from having an abortion, they do permit the State to "protect[] fetal life"⁷¹ by catching the pregnant woman in a "structural mechanism"⁷² that will turn her away from the abortion clinic, at least until she "apprehend[s] the full consequences of her decision."⁷³ The Justices acknowledge that subjecting the pregnant woman to the State's decision-making structure will in fact burden the woman's freedom,⁷⁴ but so long as this burden is "calculated to inform the woman's free choice, not hinder it,"⁷⁵ the Justices will not find it undue.⁷⁶

70. See *id.* at 877 (describing undue burden twice as an "obstacle" in the woman's "path"); *id.* at 878 (holding a law is invalid if its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion").

71. *Id.* at 876.

72. *Id.* at 877.

73. *Id.* at 882.

74. "All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy." *Id.* at 875.

75. *Id.* at 877.

76. One is tempted to dismiss the Justices' reading of the Pennsylvania Abortion Control Act as a "mechanism" designed to facilitate wise decision making as Kafkaesque. Kafka's state, however, did not pretend that the process by which Joseph K was deprived of his life was meant to help him. See generally FRANZ KAFKA,

Thus, to determine whether the Pennsylvania Abortion Control Act is Constitutional, the Justices do not ask whether it permits women to choose the lives they will lead, or allows them to abort unwanted pregnancies, or even respects the choices women make; instead, employing the undue burden standard, the Justices ask whether the Act facilitates wise decisionmaking. On that basis, the Justices uphold, almost without discussion,⁷⁷ the requirement that a minor obtain the informed consent of a parent, guardian, or judge before having an abortion⁷⁸ because it ensures that the abortion decision will be made by a mature person.⁷⁹ The Justices presume that minors, because they are not adults, are incapable of making mature decisions: "It is reasonable to assume that they will benefit from consultation with their parents."⁸⁰ Given this logic, it is somewhat surprising to find that the Justices do not approve the spousal notice provision of the

THE TRIAL (E.M. Butler ed., Willa Muir & Edwin Muir trans., Secker and Warburgh 1956) (1925).

77. The Justices devote less than two of the almost 60 pages of the joint opinion to the parental consent provision of the Act. Arguments against this provision are dismissed with an airy "We have been over most of this ground before." *Casey*, 505 U.S. at 899. In fact, they had not. The District Court noted that "no abortion statute considered by the Supreme Court has required parental 'informed' consent." 744 F. Supp. 1323, 1383 (E.D. Pa. 1990) [hereinafter *Planned Parenthood I*]. In calling for *informed* parental consent, the Act apparently requires written consent obtained after a parent had been provided with mandated information in a face-to-face meeting with a physician at least 24 hours prior to the abortion. See *Casey*, 505 U.S. at 938 n.10 (Blackmun, J., concurring in part and dissenting in part). The District Court found that the parental consent provision placed an undue burden on a minor's right to terminate her pregnancy because it exaggerated the delay and attendant health risks already inherent in the termination of minors' pregnancies by forcing the pregnant minor to wait to have her abortion until both she and one of her parents are ready and able to visit the clinic in person. *Planned Parenthood I*, 744 F. Supp. at 1355-58, 1382-84.

78. See *Casey*, 505 U.S. at 899-900. The parental consent provision of the Act, 18 PA. CONS. STAT. § 3206 (1990), is reproduced in the Appendix to the joint *Casey* opinion. *Id.* at 904-06.

79. A pregnant minor unable to obtain the required parental consent may apply to a court for a determination that she is mature enough to consent to an abortion on her own. If the minor woman is not mature enough to make the decision, the judge can decide that an abortion would be in her best interests. § 3206(c); *Casey*, 505 U.S. at 905. Motherhood cannot be in the best interests of a child too immature to consent to abortion, and in fact most such petitions are granted. See PETCHESKY, *supra* note 22, at 306.

80. *Casey*, 505 U.S. at 895. For a strong criticism of the Court's treatment of minors as a last stronghold of the male-chauvinistic common law, see Leonard Berman, Note, *Planned Parenthood v. Casey: Supreme Neglect for Unemancipated Minors' Abortion Rights*, 37 How. L.J. 577 (1994).

Act.⁸¹ In a world where all parents have the best interests of their children at heart,⁸² all wives benefit from consultation with their husbands. The spousal notice provision, moreover, imposes less of a burden on the pregnant woman than the parental consent requirement does. The husband need only be notified of his wife's plans — his consent is not required by the Act — and he need not appear in person at the clinic before his wife can have an abortion.⁸³ The Justices, however, find the burdens imposed by the spousal notice provision to be undue.

The portion of the joint opinion in which the Court strikes down the spousal notice provision is full of surprises. After a brief description of the provision, the Justices state, “[t]he District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute.”⁸⁴ Even this matter-of-fact observation is startling, coming as it does on the forty-fourth page of a fifty-seven page opinion that, to this point, has betrayed no interest either in the circumstances of the pregnant woman's life or in the bases for the District Court's rulings. With no further preamble, the Justices devote the three following pages to quoting the District Court's findings of fact about domestic battering and abuse: “[O]ne of every two women will be battered.”⁸⁵ “[B]attering can . . . be gruesome and torturous.”⁸⁶ “[I]t is common for the battering husband to also abuse the children.”⁸⁷ The shocking effect on the reader of this sudden shift in tone — like a fistfight breaking out in a philosophy class — is hard to overstate.

The disruption continues: “These findings are supported by studies of domestic violence.”⁸⁸ Two more full pages of gritty reality, backed with citations to eight different sociological studies follow. “Many abused women who find temporary refuge in shelters return to their husbands”⁸⁹ “Thirty percent of fe-

81. See *Casey*, 505 U.S. at 887-98. The spousal notice provision of the Act, § 3209, is reproduced in the Appendix to the joint *Casey* opinion. *Id.* at 908-09.

82. *Id.* at 895.

83. § 3209; *Casey*, 505 U.S. at 908-09.

84. *Casey*, 505 U.S. at 888.

85. *Id.* (quoting *Planned Parenthood I*, 744 F. Supp. at 1360-62 (Finding of Fact number 281)).

86. *Id.* at 889 (quoting *Planned Parenthood I*, 744 F. Supp. at 1360-62 (Finding of Fact number 285)).

87. *Id.* (quoting *Planned Parenthood I*, 744 F. Supp. at 1360-62 (Finding of Fact number 288)).

88. *Id.* at 891.

89. *Id.* at 892.

male homicide victims are killed by their male partners."⁹⁰ And, finally, "the primary reason women do not notify their husbands [when they intend to have abortions] is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence."⁹¹ Here, for the first time, the Justices articulate a link between violence and the spousal notice provision of the Act:

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, *they may have very good reasons* for not wishing to inform their husbands of their decision to obtain an abortion.⁹²

With these observations the Justices plant the seeds of a true jurisprudence of doubt. The Justices acknowledge that the world in which men and women live may not be the world imagined by the law. For most purposes today, the law purports to treat men and women as ungendered individuals.⁹³ The law provides remedies for individuals who are battered by other individuals. The law permits individuals in unhappy marriages to divorce themselves from their spouses, and certainly requires no unmarried individuals to remain together. The law, therefore, cannot understand why abuse continues, why women stay with and return to their abusers, and why battered women choose to forgo legal remedies available to them. The Justices accept these facts despite their inconsistency with the logic of the law and do not ask how they can be true. In this respect the joint opinion bears a strong resemblance to *Brown v. Board of Education*.⁹⁴ The Court in *Brown* did not even attempt to articulate a legal argument to prove that separate and equal was not equal.⁹⁵ Instead,

90. *Id.*

91. *Id.*

92. *Id.* at 892-93 (emphasis added).

93. For a particularly extreme example of the Court's desire to erase gender, see *Geduldig v. Aiello*, 417 U.S. 484 (1974), characterizing a state disability program denying benefits for pregnancy as merely distinguishing between pregnant persons and nonpregnant persons.

94. 347 U.S. 483 (1954).

95. The only cases mentioned in *Brown* were cited to show the development of the principle of separate but equal and to establish that the issue of its constitutionality had not been addressed since *Plessy v. Ferguson*, 163 U.S. 537 (1896), was decided 42 years earlier. Thomas Ross contends that *Brown's* "howling silence" on the

the Court turned to sociology and psychology to prove a point it found unreachable by legal analysis.⁹⁶ In the same way, the authors of the joint opinion conclude that requiring the pregnant woman to tell her abusive husband of her pregnancy and abortion gives the husband effective control over his wife's decision.⁹⁷ Faced with truth the law finds incomprehensible, the Justices defer to the battered pregnant woman herself to decide what she must do. The decisions made by these battered women, to inform their husbands or not, are not to be second-guessed by the State or the Court; indeed, here is found the *only* image of Woman as competent decisionmaker anywhere in the joint opinion: "They may have very good reasons."⁹⁸ For centuries the law has reinforced men's power over women in marriage by refusing to second-guess a husband's decisions about how to treat his wife. Here, the Court portions out a small measure of power to women by declining to second-guess their decisions to keep secrets from their husbands.

Having thus concluded, on the basis of evidence about battered wives, that required spousal notice is the equivalent of required spousal consent, the Justices hold that this provision of the Act embodies "a view of marriage . . . repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."⁹⁹ Presumably, Pennsylvania could hold a repugnant view of marriage without necessarily offending

subject of the embodiment of white racism in the law both facilitated foot-dragging and obstruction in the "implementation of its abstract pronouncement[s]" and left us with law providing "no real basis for change." THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* 38-40 (1996).

96. The Court in *Brown* cited four historical works, *Brown*, 347 U.S. at 489-90 n.4, and seven socio-psychological studies, *id.* at 494-95 n.11, to demonstrate the effects of racial segregation in schooling.

97. The Justices conclude that only abusive husbands will benefit from the spousal notice provision because all women will voluntarily notify nonabusive husbands of their conditions and plans with or without a statute requiring them to do so. The Justices assume that requiring women to tell abusive husbands about their abortion plans will cause women either to forgo abortions for fear of abuse or to be prevented from carrying out their decisions by physical force or psychological or economic coercion. *Casey*, 505 U.S. at 897. Thus, by requiring notice to the husband the Act "enables the husband to wield an effective veto over his wife's decision." *Id.* Oddly, the Justices do not consider the third possibility: that the woman will undergo both the abortion and the abuse. Perhaps the omission is inadvertent, but it is also consistent with the Justices' focus on decision making to distinguish between a husband who overrides his wife's decision and a husband who merely beats her for making one.

98. *Id.* at 893.

99. *Id.* at 898.

the Constitution, where the existence of marriage is detectable only in the Framers' expectation that they would have "Posterity" with whom they would share the blessings of Liberty they were securing for themselves. On its face, the spousal notice provision of the Act is consistent with most of the history of marriage in Anglo-American law. Until comparatively recently, free married women had no civil identity separate from their husbands,¹⁰⁰ who had full control of their wives' reproductive capabilities.¹⁰¹ The question of whether their wives must be permitted to obtain abortions without their knowledge could not even have occurred to the Founders; at most, they might have been able to ask whether one man could perform an abortion on another man's wife without his consent,¹⁰² and the answer to this question would clearly have been no. Although the legal institutions that deprived married women of personhood are mostly gone from the law, the legal text in which they were once embedded remains largely unaltered. The Justices have very little to work with in their effort to explain why the Constitution requires an outcome so inconsistent with its original notion of what it meant to be a person before the law. The Justices therefore have a great deal of difficulty reasoning and writing a coherent legal explanation of why their definition of women's liberty means that a wife cannot be required to consult her husband before de-

100. The feudal doctrine of "coverture" deprived married women of all legal autonomy until the institution began to be demolished in the United States in the mid-19th century. See Taub & Schneider, *supra* note 7, at 10.

101. Neither slave husbands nor their wives controlled slave women's reproductive capabilities, which were legally owned by and exercised on behalf of slave owners. See, e.g., *M'Cutchen v. Marshall*, 33 U.S. 220, 226 (1834) (rejecting the possibility that slave children, born after their mothers were designated for freedom but before they were actually freed, might belong to their own mothers, "for they were slaves at the time, and could hold no property," and concluding such "increase" of slaves belonged to the distributees of their mothers' owner's estate).

102. Abortion control statutes, the Pennsylvania Abortion Control Act included, maintain this male-centered focus (although today not all persons who perform abortions are men): on their faces, these statutes govern the conduct of abortion providers, not abortion clients. See, e.g., PA. CONS. STAT. § 3209(e) (1990):

Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his or her license for the practice of medicine . . . shall be subject to suspension or revocation In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child

Casey, 505 U.S. at 909. The Act includes no penalty for the pregnant woman who obtains an abortion in violation of this provision, see § 3209(e), although if she did so by falsely swearing she had informed her husband she might be found guilty of perjury.

cing not to become a mother. Their difficulty is evident in the writing in this section: the Justices commit telling lapses of both logic and law.

The Justices' argument that the view of marriage embodied in the Act is not only repugnant but also unconstitutional is founded entirely on the premise that required notification is required consent. The Justices' argument, however, establishes that premise only with respect to abused wives. The Justices extend their reasoning to all wives by what amounts to an act of force rather than legal reason: they simply refuse to allow the Act to distinguish between victims of spousal abuse and other wives.¹⁰³

Nor do the Justices themselves distinguish very well between batterers and other husbands. In sharp contrast to the Justices' expression of confidence in the value of a pregnant minor's consultation with her parents, the possibility that a woman's husband might have information of use to her — about his own feelings, about his willingness to provide and care for mother and child, perhaps about resources unknown to her — is never mentioned.¹⁰⁴ There is no hint that even a husband who has a "deep and proper concern and interest . . . in his wife's pregnancy"¹⁰⁵ might be able to help her in her deliberations. Although the Justices never ask whether the husband has anything to offer, they imply that he does not by postponing the only discussion of the husband's interest *anywhere* in the joint opinion until immediately after they have established that the only husbands benefited by the Act are wife batterers.¹⁰⁶ Clearly, such men can have nothing to contribute to wise decisionmaking.

So difficult do the Justices find their task of rewriting the meaning of marriage in the law that they forget they are dealing with a facial challenge to the Pennsylvania statute and freely ad-

103. The Act allowed a wife to obtain an abortion without notifying her husband if she was prepared to swear, *inter alia*, that he had made her pregnant by sexually assaulting her or that he would cause her bodily injury if he were told of the abortion. See *Casey*, 505 U.S. at 887. The Justices reject these exceptions as too narrow, *id.* at 893, but do not suggest how they can be remedied.

104. Chief Justice Rehnquist argues that the husband, if given the opportunity to do so, might provide useful information about family finances or his own point of view, and could in any event engage with his wife in "collaborative decisionmaking." *Id.* at 974-75 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). The joint opinion does not respond to this suggestion.

105. *Id.* at 895.

106. *Id.* The Justices conclude that all abusive husbands will not be notified voluntarily by their wives. *Id.* at 892-93.

mit that the undue burden they have identified will affect, at most, one percent of the women seeking abortions.¹⁰⁷ Ordinarily the Court will reject the contention that a statute is unconstitutional on its face if there is any application of the statute that does not offend the Constitution.¹⁰⁸ The Justices are so distracted by their struggle to write women's liberty in the language of law that they introduce this elementary doctrinal confusion into an opinion that promised an end to doubt in abortion jurisprudence.

Unfortunately, the Justices' interest in rewriting marriage exceeds their concern to provide refuge from abuse. The shelter that the joint opinion appears to hold out for battered women and their decisions turns out to be illusory, and the Justices' ap-

107. The joint opinion notes that only 20% of abortions are performed for married women; of these women, 95% notify their husbands of their own volition. *Id.* at 894.

108. The Justices' ruling upholding a facial challenge to this provision after finding that the provision could unconstitutionally burden, at most, 1% of all possible cases, has touched off a debate in the lower courts about the standard to apply in facial challenges to state legislation. Prior to *Casey*, the contention that a state abortion statute was unconstitutional on its face could prevail only if it could be shown that there existed no circumstances under which the statute could constitutionally be applied. *See id.* at 972-73 n.2 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (complaining that the joint opinion's focus on the "worst case" scenario to invalidate the statute on its face fails to apply the proper standard for a facial challenge); *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Justices exacerbate the confusion by citing, in support of their conclusion that the law's constitutionality depends upon its effect on the minority for whom it operates as an undue burden, and not on the majority for whom it is irrelevant, a case from the First Amendment area, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where overbreadth is a basis for upholding facial challenges to legislation. Lower courts following *Casey* have divided about whether the joint opinion adopted a new standard for facial challenges to legislation regulating previability abortions. *See Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995) (describing various views and ultimately deciding to go by what the joint opinion did rather than what it said or failed to say); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992) (refusing to find that *Casey*, while explicitly overruling several abortion cases, had also silently overruled cases relying on *Salerno* to determine facial challenges); *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (on remand) (indicating, in dicta, that a new standard had been adopted). As the *Miller* court noted, even the Justices cannot agree on where the standard for facial challenges has been left. Justice Scalia has contended that *Salerno* remains good law in the abortion area. *See Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting from denial of certiorari). Justice O'Connor, on the other hand, joined by Justice Souter, has stated that an abortion regulation will be found unconstitutional on its face if, for a "large fraction" of the women to whom it will apply, it poses a substantial obstacle in the way of obtaining an abortion. *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in the denial of a stay pending appeal).

preciation of the facts of women's reality highly selective.¹⁰⁹ While striking down the spousal notice provision of the Act, the Justices approve the "informed consent" provision,¹¹⁰ which prohibits abortion unless, at least twenty-four hours prior to the abortion, the pregnant woman has been offered certain information designed to ensure that her "choice contemplates the consequences for the fetus"¹¹¹ so as to further the State's interest in "protecting the life of the unborn."¹¹² Because of its required twenty-four hour waiting period, this provision was found by the District Court to be "particularly burdensome"¹¹³ for battered women whose absence from home would arouse the suspicions of their abusers.¹¹⁴ The Justices do not dispute the District Court's findings; instead, they demonstrate that their reliance on the facts of women's lives was more rhetorical than real by simply disregarding those facts they find inconvenient, barely attempting to conceal this arbitrary exercise of power from the reader. The District Court made almost four hundred numbered findings of fact in connection with its review of the Act. The Justices quote only eighteen of these findings, including the District Court's numbers in their quotations. The quoted findings include those numbered 281 through 291 and 294 through 298; the omission of findings numbered 292 and 293 could not be made more plain. The omitted findings read, in part, as follows:

292. Battered women are monitored very closely by their abusers. Battered women are often expected to explain any absence from the home or work. . . .

293. Battered women would find it extremely difficult to get to an abortion clinic because of the problem of accounting for her time. A 24-hour waiting period would be especially harsh

109. In this respect, the joint opinion in *Casey* again resembles *Brown v. Board of Education*, which went to great lengths to articulate a new constitutional wrong, then provided no remedy for it. See *Brown*, 347 U.S. 483, 495 (1954) (declining to grant relief and instead setting the case for reargument on this issue).

110. 18 PA. CONS. STAT. § 3205 (reproduced in the Appendix to the joint opinion). *Casey*, 505 U.S. at 902-04.

111. *Casey*, 505 U.S. at 873.

112. *Id.*

113. *Id.* at 886.

114. Either a battered woman's male partner will find out about her first visit to the abortion provider and, "through physical force or psychological pressure or economic coercion" prevent her from returning after the 24 hours has elapsed, or the fear that he will find out will prevent her from attempting to obtain an abortion in the first place. Either outcome would constitute an undue burden, according to the Justices. *Id.* at 897.

upon battered women, since she [sic] would have to make two trips to the clinic.¹¹⁵

The inescapable conclusion of the findings omitted by the Justices, when combined with the findings they do quote, is that the twenty-four hour waiting period, because it necessitates two separate trips to the abortion provider,¹¹⁶ will prevent battered women from obtaining abortions just as surely as the spousal notice provision would. Moreover, the waiting period will burden more women because it applies to single as well as married women and allows exceptions only for medical emergencies. Yet the Justices strike down the spousal notice provision while approving the more burdensome informed consent provision.¹¹⁷

The Justices' definition of women's liberty as the right to make a decision, their mistrust of Woman's decisionmaking ability, and their sterile notion of how decisions must be made, lead them to this inequitable result. They read the spousal notice provision as prohibiting a woman from making a decision without informing her husband, while the informed consent provision, on its face, not only leaves the decision with the pregnant woman but purports to help her make that decision. Thus, because the Justices define women's liberty as a right to make decisions, they uphold the informed consent provisions "in the context of this facial challenge."¹¹⁸ The Justices are willing to forgo the hus-

115. *Planned Parenthood I*, 744 F. Supp. 1323, 1362 (E.D. Pa. 1990).

116. Both the District Court and the Justices assume that the Pennsylvania Abortion Control Act requires that the information be given to the pregnant woman in person and thus necessitates two trips to the clinic. *Casey*, 505 U.S. at 886. A similar provision in North Dakota's abortion statute, N.D. CENT. CODE § 14-02.1-02.5a, was considered in *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994). Relying on an opinion provided by North Dakota's Office of the Attorney General, the court found that the statute did not require that the information be given to the pregnant woman in person, nor did it require that the written consent be given 24 hours in advance of the abortion. The statute, therefore, did *not* require the pregnant woman to make two trips to the abortion provider and, on that understanding, did not constitute an undue burden on her protected liberty. *See id.* at 530-31.

117. The Justices, in alluding to the District Court's findings on the 24 hour waiting period, merely pronounce them "troubling in some respects." *Casey*, 505 U.S. at 886.

118. *Id.* at 887. The joint opinion's confusing qualification that the decision to uphold the 24 hour waiting period, was made "on the record before us, and in the context of this facial challenge" had the effect of prolonging the proceedings on remand by approximately another year. *Casey* was remanded by the Supreme Court "for proceedings consistent with this opinion, including considerations of the question of severability." *Id.* at 901. The Third Circuit determined that the unconstitutional spousal notice provision was severable from the rest of the Abortion Control Act, and remanded the case to the District Court. 978 F.2d 74, 78 (3d Cir. 1992). The District Court, relying on the joint opinion's references to "this record" in up-

band's potential contribution to his wife's decision because *all* pregnant women will be subject to the informed consent provision which they read as creating a "reasonable framework for a woman to make a decision,"¹¹⁹ thus ensuring "a decision that is mature and informed."¹²⁰

The Justices' description of the "reasonable framework" within which the pregnant woman is required to make her decision reveals how deeply they confuse the pregnant woman's decision about abortion with their own. First, the Justices do not acknowledge that the woman can have made *any* decision worthy of their consideration before arriving at the clinic door where she first comes within the framework of the Abortion Control Act.¹²¹ Like a judge outside the courthouse, she has been outside the law; her decision, if she has made one, is entitled to no more weight than the initial inclination of a judge or juror before the litigants present their arguments and evidence.¹²² Before the pregnant woman can be allowed to make her decision, she must

holding other provisions of the Act, reopened the record to permit additional evidence on the question of whether the Act imposed an "undue burden" as newly defined by the Court. 822 F. Supp. 227 (E.D. Pa. 1993). Defendants obtained interlocutory review of that order, and the Third Circuit reversed. 14 F.3d 848 (3d Cir. 1994). Plaintiffs then presented an application to Justice Souter to stay the issuance of the mandate by the Third Circuit while they petitioned for certiorari. In an unusual opinion, Justice Souter denied the application. Assuming without deciding that the undue burden standard articulated by the joint opinion was the proper test to apply to the Act, Justice Souter explained that the parties had already had an adequate opportunity to produce evidence prior to the Supreme Court's ruling, the Court had considered the case on the merits under the new standard, and no additional evidence was needed or should be admitted to dispose of plaintiffs' facial challenge to the Act. 510 U.S. 1309 (1994).

119. *Casey*, 505 U.S. at 873.

120. *Id.* at 883.

121. Apparently it does not occur to the Justices that the abortion clinic is probably the least rational place for the State to choose to "express its profound respect for the life of the unborn." *Id.* at 873. The creation and nurturance of attitudes favoring bearing and caring for children would be much better accomplished, with no need to burden protected liberties at all, through programs of general education and support for mothers and families, rather than through eleventh-hour efforts to turn back women seeking abortions.

122. Judges are presumed to be ignorant of the cases before them — and thus incapable of making decisions about them — until information is presented to them by the parties. Indeed, the standard response of judicial nominees to the inevitable confirmation queries about their stands on abortion is that they cannot make a decision one way or another until presented with a particular case to decide. *See, e.g.*, David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36 (reporting that Justice Souter stated during his confirmation hearings in 1990 that he did not know whether *Roe* should be overruled and would not know until the issue was presented to him for decision).

let the State "express[] a preference for normal childbirth."¹²³ The State must be permitted to offer "philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term,"¹²⁴ arguments "designed to dissuade her from having an abortion."¹²⁵ The objection that the presentation is entirely one-sided will not be entertained so long as the information offered is "truthful" and "nonmisleading";¹²⁶ it is not the responsibility of a litigant to present arguments against his own position. After the presentation of arguments and evidence against abortion, the "reasonable framework" requires the pregnant woman to wait at least a day before deciding because "important decisions will be more informed and deliberate if they follow some period of reflection . . . particularly where the statute directs that important information become part of the background of the decision."¹²⁷ Like a judge having been presented with the parties' briefs, the pregnant woman ought to read and think about them before deciding.

However, in contrast to the judge entering the courthouse, the woman entering the clinic has already made up her mind. She is not the judge, she is one of the adversaries (if only because the Justices invite the State to oppose her). Moreover, unlike the institutionally passive Court at the center of the adversary system, she is not required to let the law frame the "Question Presented" for her. The law sets up a framework for decision-making that determines both the questions that can be asked and the answers that can be accepted. The choice to be made by the pregnant woman comes from beyond the law, however, beyond even the capacity of her own language to express without fundamental distortion.

Even allowing that the pregnant woman might need additional information to help her make a choice she can live with, the law cannot say what that information might be. In the lan-

123. *Casey*, 505 U.S. at 873 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 492 (1989) (quoting *Poelker v. Doe*, 432 U.S. 519, 521 (1977))).

124. *Id.*

125. *Id.* at 882.

126. *Id.*

127. *Id.* at 885. The Justices' reasoning assumes that the information will be provided at least 24 hours before the decision is made. *Id.* at 902-03. The Abortion Control Act actually requires that, before she gives her written consent and at least 24 hours before the abortion takes place, the woman be informed of the availability of information. 18 PA. CONS. STAT. § 3205 (1990). There is no necessary lapse of time between the actual provision of the "important information" and the woman's written consent to abortion. *See id.*

guage of the law, the question to be answered by the woman considering abortion is "should I kill the fetus?" The pregnant woman need not accept the meaning the law seeks to impose on her pregnancy, her abortion, and her life, but it is difficult not to accept this meaning when it is so hard to put into any other words.¹²⁸ Not only law, but all language available to women has been developed to express and serve the ideas, needs, and feelings of men.¹²⁹ A man's experience of pregnancy comes only from being born, never from giving birth. Men and the law cannot yet know what pregnancy is for Woman because it is not yet possible for any but the most extraordinary women¹³⁰ to express these meanings in language men can understand (and, perhaps, only the most extraordinary men will listen to them). It is not surprising, then, that the State's intervention at the door of the clinic is "aimed at ensuring that a woman's choice contemplates the consequences for the fetus"¹³¹ because that is the point of

128. Drucilla Cornell argues that the ability to give her own meaning to pregnancy and abortion is essential to the pregnant woman's effort to protect both her bodily integrity and her psychic well-being, but that society's "demonization" of abortion makes this process difficult. See CORNELL, *supra* note 19, at 66. Drawing on the clinical work of Graciela Abelin-Sas, Cornell reports that "the meaning of abortion is completely singular to the history and circumstances of each woman." *Id.* (quoting Graciela Abelin-Sas, *To Mother or Not to Mother: Abortion and Its Challenges*, 1 J. CLINICAL PSYCHOANALYSIS 607 (1992)).

129. To the extent that language, like law, is a product of precedent, it must be drawn almost entirely from the work of men. Although there have been women writers and thinkers as long as there has been writing to memorialize their work, they have been systematically marginalized, suppressed, and ignored by the arbiters of literature and philosophy. Even recent efforts to uncover and celebrate the lost work of women has led to controversy, not all of it the product of male chauvinism. Apart from a female's ability to excel by standards drawn from male accomplishments, how is the soundness of female ideas and expression to be judged? Similarly, women's participation in writing law has been extremely limited over time, and the few women to succeed in this male arena have done so by playing strictly (and extraordinarily well) by rules made by and for men. There is, thus, virtually no body of expression available to explain why one should, or must, or will, or cannot be a mother that is not wholly the creation of people who do not know. For a wealth of insight into the history and criticism of women's writing, see *THE NEW FEMINIST CRITICISM: ESSAYS ON WOMEN, LITERATURE AND THEORY* 19-104 (Elaine Showalter ed., 1985), discussing the systematic marginalization and devaluation of women's writing in the male academy.

130. The meaning of abortion may best be captured in women's poetry. Barbara Johnson examines a selection of lost children/abortion poetry in her chapter *Apostrophe, Animation and Abortion*, in BARBARA JOHNSON, *A WORLD OF DIFFERENCE* 184-99, 209-11 (1987) (discussing poetry by Gwendolyn Brooks, Anne Sexton, Lucille Clifton, and Adrienne Rich).

131. See *Casey*, 505 U.S. at 873; *id.* at 882 ("Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision.").

view from which the law understands abortion. The informed consent provision of the Act is not only an effort to seize control of the pregnant woman's question, it also seeks to force the woman to explain her answer to the fetus.¹³² A woman who accepts the State-imposed meaning of abortion may be unable to proceed with her plan unless she denies her never-to-be-born child any humanity at all, thus depriving herself of the ability to mourn its loss.¹³³

In approving the informed consent provision, the Justices allow the State to inflict on the pregnant woman what the Justices themselves should recognize as psychological abuse. The Justices describe the ability to make decisions as central to the integrity of both individual personalities and national institutions.¹³⁴ The Justices' own anguish in having to make and remake the decision about abortion is evident from the very first line of the joint opinion. Yet before the Justices will allow the pregnant woman to carry out her constitutionally protected decision to terminate her pregnancy — before the joint opinion and the State will even acknowledge that she has made a decision worthy of respect — she may be turned away from the clinic, forced to consider the State's arguments against abortion, and ordered to decide the

132. Some of the complexity of this aspect of abortion — the felt need to justify one's action to the aborted child — as well as the near impossibility of expressing what motherhood, abortion, and life are about, is illuminated by Toni Morrison in her novel *Beloved*. In the novel, former slave Sethe kills one of her four children in an effort to prevent any of them from returning to the enslaved life they have escaped. Her action preserves the family's freedom but alienates Sethe from her children, her community, and her self. She cannot reclaim her own life until her killed baby girl returns to her as the mysterious young woman, Beloved. Sethe obsessively tries to make Beloved see that it was necessary to kill her until the effort nearly destroys what remains of Sethe and her family. Morrison's rich portrayal of Sethe's act and of her efforts to express her understanding of it can stand as a criticism of the law's facile, simplistic formulation of these issues and its impoverished framework for making the woman's choice. See generally TONI MORRISON, *BELVED* (1987).

133. See JOHNSON, *supra* note 130, at 191 (criticizing the binary logic of the public debate on abortion for assuming that the woman who chooses abortion has no right to mourn, "that no case *for* abortion can take the woman's feelings of guilt and loss into consideration, that to take those feelings into account is to deny the right to choose the act that produced them").

134. Compare *Casey*, 505 U.S. at 851 (noting that liberty includes the right to make "choices central to personal dignity and autonomy") with *id.* at 868 (linking the Court's "authority to decide constitutional cases" to our understanding of ourselves as "a Nation of people who aspire to live according to the rule of law").

matter again. The pregnant woman may have spent much¹³⁵ and traveled far.¹³⁶ She may have struggled through the ring of protesters outside the clinic trying to overrule her decision,¹³⁷ but she must return, her hands full of brochures, to face them again, and yet again. The weary pregnant Woman finds no refuge in the joint opinion.

IV. JURISPRUDENCE AND DOUBT

The question of refuge brings us back to the first line of the joint opinion. Who or what do the Justices believe might seek refuge in jurisprudence and fail to find it in doubt? Evidently not the pregnant woman: the joint opinion permits greater restrictions on her ability to obtain an abortion than have been permitted in any other post-*Roe* case. In any event, if jurisprudence is to be Woman's only refuge, it is not at all clear that a jurisprudence of certainty would be an improvement over one of doubt; the opinions of Justice Scalia and the Chief Justice concurring and dissenting are free of all doubt, yet they would deny women's liberty any effective Constitutional protection at all.¹³⁸ Furthermore, doubt is not a prominent characteristic of the public controversy over abortion. All sides tend to adopt unbending positions and to steadfastly refuse to see any ground for compromise.¹³⁹ Whether the Court acts to affirm or reverse *Roe*, greater certainty inside the Court will not still the clamor outside its walls. Jurisprudential certainty, however, might stem the flow of abortion cases to the Court's docket.¹⁴⁰

135. The District Court found that the requirement that certain information be provided only by physicians would raise the cost of abortion. *Planned Parenthood I*, 744 F. Supp. 1323, 1380 (E.D. Pa. 1990).

136. The District Court found that "many women must travel substantial distances to reach the nearest abortion provider." *Id.* at 1379 n.34.

137. The District Court found:

194. Two trips to the abortion provider would subject many women to the harassment and hostility of anti-abortion protestors demonstrating outside a clinic . . . on two separate occasions.

Id. at 1323.

138. Indeed, as Justice Scalia pointed out, "The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid." *Casey*, 505 U.S. at 985 (Scalia, J., concurring in judgment in part and dissenting in part).

139. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 6-10 (1993); TRIBE, *supra* note 14, at 3-9.

140. Justice Scalia, in urging the Court to leave abortion entirely to the states to regulate, *Casey*, 505 U.S. at 999-1000 (Scalia, J., concurring in judgment in part and

A. A Doubtful Court

The joint opinion locates the impediments to certainty about *Roe* in the Court's own decisions. The position of the Court as a whole on *Roe's* viability is in doubt so long as some of its members continue to call for its reversal: "The Chief Justice admits that he would overrule the central holding of *Roe*."¹⁴¹ So long as it appears that the Court might reverse its decision in *Roe*, cases importuning the Justices to do just that will continue to present themselves to the Court.¹⁴² The authors of the joint opinion are,

dissenting in part), and to "get out of this area," *id.* at 1002, implies that relief from the obligation to decide abortion cases would be the result of explicitly overruling *Roe*. Justice Blackmun, however, finds this prediction "uncharacteristically naive," *id.* at 943 n.12, and contends that state regulation of abortion in a post-*Roe* world would raise "a host of distinct and important constitutional questions meriting review by this Court." *Id.*

141. *Id.* at 845.

142. *Casey* is a perfect example of a case engendered by the Court's own doubt. Many of the provisions of the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act of 1982 at issue in *Casey* were identical to provisions already found to be unconstitutional by the District Court, Third Circuit Court of Appeals and U.S. Supreme Court. *Planned Parenthood I*, 744 F. Supp. 1323, 1326-28 (E.D. Pa. 1990); see American College of Obstetricians and Gynecologists v. Thornburgh, 552 F. Supp. 791 (E.D. Pa. 1982), *aff'd in part and rev'd in part*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986). The 1982 Act was based on a model drafted by Americans United for Life, a nonprofit organization. See *Planned Parenthood I*, 744 F. Supp. at 1327; Nancy Nolan, Comment, *Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach*, 87 DICK. L. REV. 373, 382 n.84 (1983). With the 1989 amendments, enacted shortly after the Supreme Court decided *Webster*, "the Pennsylvania legislature [came] full circle by re-enacting many provisions of the Act which were deemed unconstitutional [in the *Thornburgh* actions]." *Planned Parenthood I*, 744 F. Supp. at 1325-26; see also *Utah Women's Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1484 (D. Utah 1994) (including 1989 Pennsylvania abortion amendments among those enacted in response to *Webster*, along with laws passed in Guam, Louisiana and Utah). An even more explicit challenge to *Roe* was enacted by the Utah legislature in 1991. Entitled "An Act Relating to Abortion; Prohibiting Abortion Except Under Specified Circumstances," the act

was clearly in conflict with *Roe v. Wade*. It was passed with the hope that *Roe* would be overturned. The Governor publicly stated that the law would not be enforced until its constitutionality had been determined by the courts. The state did not hide the fact that the law was passed in anticipation of the reversal of *Roe v. Wade*.

Leavitt, 844 F. Supp. at 1484-85. At the same time it enacted the abortion act, the Utah legislature also set aside funds in an "Abortion Litigation Trust Account." *Jane L. v. Bangertner*, 61 F.3d 1493, 1495 (10th Cir. 1995), *rev'd sub nom*, 116 S. Ct. 2068, *modified*, 102 F.3d 1112. Commenting that the Utah act "patently violated *Roe v. Wade*," *id.*, the *Bangertner* court noted that, "Utah's attempt to play a significant role in toppling *Roe v. Wade* did not succeed." *Id.* See Sandra L. Tholen & Lisa Baird, Comment, *Con Law Is As Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971 (1995).

in large measure, responsible for this doubt. While other justices have remained loyal to their positions on abortion,¹⁴³ Justices Kennedy and O'Connor have proved themselves to be riddled with doubt. Justice O'Connor apparently found it difficult to decide whether to reconsider *Roe* at all, and drew the particular scorn of Justice Scalia as she shifted position,¹⁴⁴ then shifted again.¹⁴⁵ In 1989, Justice Kennedy joined an opinion in *Webster* which, had it garnered a majority, would have had the practical effect of overruling *Roe*.¹⁴⁶ Three years later, Justice Kennedy, too, shifted his position and was no longer willing to overrule *Roe*. Unwilling to declare a position in one camp or the other, the authors of the joint opinion offered no basis for either side to give up the struggle.

143. Justice Blackmun, the author of *Roe*, as well as Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, Powell, and Stevens were loyal to the preservation of the right recognized in *Roe*. Chief Justice Burger and Justices Stewart and Powell did, however, permit the city, state and federal governments to deny public funding for abortion. See *Harris v. McRae*, 448 U.S. 297 (1980). Chief Justice Rehnquist and Justice White remained equally steadfast in the opposition articulated in their dissents to *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973). Justice Scalia unhesitatingly assumed the anti-*Roe* position that was an implicit, if not explicit, condition of his appointment. Lastly, notwithstanding his claim not to have one, Justice Thomas' opinion on *Roe* was never really in doubt. Justice Stevens tallied the votes of all of the Justices serving on the Court since *Roe*. Justice Stevens found that 11 supported *Roe's* central holding and four (all of whom are currently on the Court) opposed it. *Casey*, 505 U.S. at 912 n.1 (Stevens, J., concurring in part and dissenting in part).

144. Three years before *Casey*, Justice O'Connor drew the wrath of Justice Scalia, expressed in quite personal terms, when she chose, apparently at the last minute, not to reach the issue of *Roe's* continued vitality in *Webster*. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1988) (Scalia, J., concurring) ("Justice O'Connor's assertion . . . that a fundamental rule of judicial restraint requires us to avoid reconsidering *Roe*, cannot be taken seriously.") (citations and internal quotation marks omitted).

145. Justice Scalia took Justice O'Connor to task in *Casey* for abandoning her own position in earlier cases on the nature of the "undue burden" standard. Justice O'Connor originally described an undue burden as a "severe" limitation or "absolute" obstacle to abortion, see *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting), and stated that even medical regulations posing such a burden could be upheld if they were "reasonably related" to the preservation of maternal health. See also *Casey*, 505 U.S. at 988-89 (Scalia, J., concurring in judgment in part and dissenting in part) (quoting *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 505 (1983)). By contrast, the joint opinion defines (or attempts to define) an undue burden as a "substantial" obstacle, *Casey*, 505 U.S. at 877, and holds that a regulation imposing such a burden is unconstitutional. *Id.*

146. *Webster*, 492 U.S. at 516-21 (Rehnquist, C.J., joined by Justices White and Kennedy) (rejecting *Roe's* trimester framework and holding that any regulation reasonably related to a legitimate state interest should be permitted).

The Justices also confess that the decisions of the Court interpreting *Roe* "cast doubt upon the meaning and reach of its holding."¹⁴⁷ In light of the Court's recent plethora of plurality opinions on abortion, the Third Circuit in *Casey* was uncertain what standard to apply even to begin deciding the case.¹⁴⁸ These doubts, too, can be laid at the feet of the authors of the joint opinion. Unhappy with *Roe* but unwilling to reverse it, Justice O'Connor struggled to enunciate an understanding of her undue burden standard to which she could commit herself. Until *Casey* no other justices were willing to join her in this effort, but Justice O'Connor's occupation with this project deprived any alternative standard of her vote.

While such doubts about the interpretation of *Roe* persist, leaving the lower courts divided about how to apply it, the Court will remain under pressure to accept review of the abortion cases that its uncertain loyalty to *Roe* will continue to generate.¹⁴⁹ Thus, although jurisprudential certainty would be unlikely to free Woman or to unshackle Liberty, it might offer the Justices and the Court relief from the need to return again to redecide *Roe*. The opening line of the joint opinion is not a promise of shelter for Liberty or for Woman, but a plea by the Justices themselves for a refuge where they can escape the relentless questioning both of the Court's uncertain abortion decisions and of their own.

Confirming this reading, the joint opinion continues, "the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*."¹⁵⁰ These Justices do not want to decide over and over whether to reverse *Roe*, but the State and the United States are forcing them to do so. Language of duress, applied to the Justices themselves, is evident throughout the

147. *Casey*, 505 U.S. at 845.

148. See *id.* (describing the Court of Appeals's effort to determine whether to apply undue burden standard to determine validity of statute); *id.* at 950 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). Even after *Casey*, Justice Blackmun continued to argue that strict scrutiny, rather than the undue burden standard proposed by the joint opinion, governs challenges to abortion regulations. *Id.* at 926-30 (Blackmun, J., concurring in part and dissenting in part).

149. It appears, however, that the Justices are determined to resist such pressure. The Court has not granted review of any case challenging either *Roe* or *Casey* since *Casey* was decided, despite the fact that the circuits are already split on how to understand and apply *Casey*.

150. *Casey*, 505 U.S. at 844.

opinion.¹⁵¹ The Justices “accept our responsibility *not to retreat*.”¹⁵² *Roe* is “a rule of law and a component of liberty we *cannot renounce*.”¹⁵³ To reverse *Roe* would be to “*surrender to political pressure*”¹⁵⁴ and to “*overrule under fire*.”¹⁵⁵ The unmistakable image is one of the Justices clinging to an embattled position, defending it against siege by superior forces, stubbornly refusing to let go even when their desire for repose and their own conflicting loyalties urge them to do so.¹⁵⁶ The Justices believe the position they are tenaciously defending to be the woman’s right to make a decision about abortion. As we have seen, however, they are extremely skeptical of the woman’s ability to make any decision at all, much less one of “such profound and lasting meaning,”¹⁵⁷ and at least two of the three authors of the joint opinion seriously doubt that *Roe* was correct in protecting women’s right to make this decision at all. It is reasonable to ask why, under these circumstances, the Justices feel it necessary to reaffirm any part of *Roe*. A careful reading of Part II of the joint opinion, in which the Justices explain why *Roe* is a decision to be respected, may supply an answer.

B. *A Doubtful Doctrine*

From the outset, the Justices demonstrate that they are very ambivalent about their decision. Announcing their conclusion that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed,”¹⁵⁸ the Justices attempt to state what that holding is “with clarity.”¹⁵⁹ The statement that follows is anything but clear. *Roe*’s holding, they write, has three parts:

151. “We find it *imperative*” to review the principles of *Roe*. *Id.* at 845 (emphasis added). “It is also *tempting*,” *id.* at 847 (emphasis added), to resort to an easy definition of due process, but we cannot “*shrink*” from our duties. *Id.* at 849 (emphasis added). The exercise of reasoned judgment in this area is “*inescapable*.” *Id.* (emphasis added). It is “*imperative to adhere*” to the *Roe* Court’s original decision. *Id.* at 869 (emphasis added). “The promise of constancy, once given, binds its maker for as long as the power to stand by the decision *survives*.” *Id.* at 868 (emphasis added).

152. *Id.* at 901 (emphasis added).

153. *Id.* at 867 (emphasis added).

154. *Id.* (emphasis added).

155. *Id.* (emphasis added).

156. This is also how Justice Blackmun characterizes the joint opinion. “Make no mistake, the joint opinion of Justices O’Connor, Kennedy, and Souter is an act of personal courage . . .” *Id.* at 923 (Blackmun, J., concurring in part and dissenting in part).

157. *Id.* at 873.

158. *Id.* at 846.

159. *Id.*

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.¹⁶⁰

In other words, a woman has a right to choose to end her pregnancy at any time before the fetus is capable of surviving without her, but the state has a legitimate interest in protecting that fetus's life. The Justices then make the unprovoked assertion that "[t]hese principles do not contradict one another, and we adhere to each."¹⁶¹ These principles *do* contradict each other, and have done so since they were first articulated in *Roe*,¹⁶² or the Justices would not feel compelled to issue this denial. It is manifestly impossible both to protect the life of the fetus and to permit the pregnant woman to abort that fetus.¹⁶³ *Roe* was able to mediate this contradiction through the use of the much-maligned trimester framework, which saved the law from having to serve simultaneously both the woman's right to choose abortion and the State's right to stop her.¹⁶⁴ In refusing to include the trimester

160. *Id.*

161. *Id.*

162. The very notion that the State's interest in protecting fetal life in the context of abortion could be a *legitimate* interest contradicts the principle that the woman has a constitutional right to choose abortion. Robert D. Goldstein argues that the joint opinion's requirement that, to be valid, state regulations must "inform the woman's free choice, not hinder it," saves the joint opinion from "falling into hopeless contradiction." Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL OF RTS. J. 787 (1996). Perhaps the contradiction is not entirely hopeless, but it is certainly a contradiction.

163. The genius of the trimester framework established in *Roe* was that it resolved these irreconcilable interests by giving effect to first one — the woman's essentially unrestricted right to end her pregnancy in the first two trimesters — and then the other — the State's interest in protecting the life of the fetus by prohibiting abortion. It did not require both interests to be served at the same time.

164. *Roe* held that the State's interest in protecting fetal life "grows" with the fetus itself. See *Roe v. Wade*, 410 U.S. 163 (1973). Under *Roe*, the State's interest in fetal life becomes "compelling," that is, strong enough to take on a life of its own, independent of the pregnant woman's wishes, "at viability," when the fetus is capable of "meaningful life outside the mother's womb." State regulation of abortion for the purpose of protecting fetal life was thus not permitted to burden the woman's right to choose until the third trimester. *Id.* *Roe* never explained why the fetus's

framework as a part of *Roe's* "essential holding,"¹⁶⁵ the authors of the joint opinion leave themselves nowhere to hide the contradiction inherent in trying to both allow a woman to have an abortion and prevent her from obtaining one at the same time. The State's interest in protecting fetal life and the pregnant woman's interest in abortion cannot both be served in the context of one woman's pregnancy: ultimately, the fetus will be aborted or it won't — abortion is an all or nothing proposition. To avoid facing the legal impossibility of the conclusion to which they have committed themselves, the Justices can only issue their flat denial that any contradiction exists, and move on to "consider the fundamental constitutional questions resolved by *Roe*."¹⁶⁶

This discussion begins with a strong doctrinal statement: "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."¹⁶⁷ The Justices immediately undermine that assertion by confessing that "a literal reading of the Clause" does not support it.¹⁶⁸ The Due Process Clause, however, "has been understood to contain a substantive component" for over 105 years.¹⁶⁹ Apparently, the doctrine of substantive due process, like *Roe* itself, might well be wrong but is protected by *stare decisis*. The Justices emphasize their evident doubt of the soundness of *Roe's* foundations by quoting from Justice Brandeis (joined, the Justices note, by Justice Holmes) who observed, "*Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.*"¹⁷⁰ The reader is left with the distinct im-

supposed ability to enjoy meaningful life *outside* the womb was a sufficient reason to require that the woman keep it *inside*.

165. The Justices abandon the trimester framework, which they "do not consider to be part of the essential holding of *Roe*," because it "misconceives [!] the nature of the pregnant woman's interest" and "undervalues the State's interest in potential life." *Casey*, 505 U.S. at 873.

166. *Id.* at 845.

167. *Id.* at 846.

168. *Id.*

169. *Id.*

170. *Id.* at 846-47 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (emphasis added)). Robert A. Ferguson notes that judicial opinions are ordinarily written so as to make it appear that the judge is forced to an inevitable conclusion. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 *YALE J.L. & HUMAN.* 201, 206-07 (1990) ("The one thing a judge never admits in the moment of decision is freedom of choice."). According to Ferguson, the judicial opinion writer delivers his opinion as a monologue, but relies on language of inevita-

pression that, while the weight of authority may support this doctrine, clearly identified here as the source of Constitutional protection for women's liberty, the wisdom of authority seems to be against it.

The portrayal of *Roe's* base as a shaky one continues. The right to choose abortion is not one of those recognized in the Bill of Rights and, on that basis, incorporated into the Fourteenth Amendment. "It is tempting" to suppose that no other rights are protected by the Due Process Clause.¹⁷¹ "It is also tempting" to suppose that the liberties protected by the Due Process Clause are only those protected at the time of its ratification.¹⁷² "But of course this Court has never accepted" these views.¹⁷³ Again, this is hardly an endorsement of the solidity of *Roe's* foundations; it simply says they have not yet been demolished.

What makes these two rejected views "tempting" is that either might mark the boundaries of due process with "a simple rule."¹⁷⁴ The Justices wish for a simple rule because without one they are at a loss to know how to decide this case.¹⁷⁵ The Justices' extensive reliance on the second Justice Harlan's opinion

bility to invoke the concurrence of the community of right-thinking people as "an implied chorus of support in the background." *Id.* at 207. The authors of the joint opinion, by contrast, go out of their way to make their conclusion appear weakly supported. For example, the Justices could have quoted Brandeis to the effect that the substantive component of due process "is settled," without the equivocating introductory clause. The shortened quotation would have had the effect of including both Brandeis and Holmes's "chorus of support" for the doctrine. Instead, by including in the quotation Brandeis's prefatory remark that contrary arguments "seemed to me persuasive," the Justices count both Brandeis and Holmes among the critics of the point they are making. The authors of the joint opinion may be doubtful about their analysis, but nothing requires them to express this doubt in an opinion for the Court. One might be tempted to attribute this less overbearing and doctrinaire style to the feminine influence on the Court; however, expressions of doubt are far more characteristic of Justice Kennedy's late writing than they are of Justice O'Connor's.

171. *Casey*, 505 U.S. at 847.

172. *Id.*

173. *Id.*

174. *Id.* at 849.

175. Justice Scalia asserts that "no government official is 'tempted' to place restraints upon his own freedom of action The Court's temptation is in the quite opposite and more natural direction towards systematically eliminating checks upon its own power; and it succumbs." *Id.* at 981 (Scalia, J., concurring in judgment in part and dissenting in part). Apart from an allusion to Lord Acton's aphorism that "[p]ower tends to corrupt," Justice Scalia offers no support for his theory of the "natural" tendencies of persons in government; his remarks are plainly inapplicable to the authors of the majority opinion and thus, to a greater extent than the language he is criticizing, Justice Scalia's statement is "rather rhetoric than reality." *Id.*

dissenting from the denial of certiorari in *Poe v. Ullman*¹⁷⁶ emphasizes the difficulty of their position; of the sources they quote, Justice Harlan's is the least clearly defined concept of the scope of substantive due process.¹⁷⁷ Justice Harlan even refused to join Justice Douglas's opinion for the Court in *Griswold*, not because he found the Court's definition of due process too vague, but because he thought it too *restrictive*.¹⁷⁸ Over time, moreover, Justice Harlan's version of due process presents a moving target: each "new decision must take its place in relation to what went before and further [cut] a channel for what is to come."¹⁷⁹ Thus, neither the Due Process Clause itself, nor the interpretation of due process on which the Justices have chosen to rely, gives the Justices any simple rule by which to decide this case. The need "to exercise that same capacity which by tradition courts always have exercised: reasoned judgment,"¹⁸⁰ is, as the Justices put it, "inescapable."¹⁸¹

The Justices no sooner announce that they must fall back on reasoned judgment than they deprive themselves of that possibility as well. "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."¹⁸² The Justices have thus put the Court in the untenable position of having to decide this case without any rule to go by and without taking into account what they as individuals may think about the matter. Whose "reasoned judgment" are the Justices to exercise, if not their own? The Justices do not explain what they mean by "reasoned judg-

176. 367 U.S. 493 (1961).

177. "The Due Process Clause of the Fourteenth Amendment stands on its own bottom." *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring). Justice Harlan himself was no judicial activist. See Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 26 (1991); Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 *FORDHAM L. REV.* 2241 (1996). However, Justice Harlan's formulation of due process specifically rejected the possibility of clear rules to be mechanically applied. Ackerman, *supra*, at 26-29; Cicia, *supra*, at 2275.

178. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) ("While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations.")

179. *Poe v. Ullman*, 367 U.S. 493, 544 (1961) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Harlan, J., dissenting)).

180. *Casey*, 505 U.S. at 849.

181. *Id.*

182. *Id.* at 850.

ment" or how it might differ from the process by which some of the Justices, as individuals, have reached the conclusion that abortion is offensive. Reasoned judgment must be a strange operation indeed if it enables a judge (and not an "inanimate machine"¹⁸³) to reach a conclusion on abortion contrary to his or her own most basic principles of morality.

To this point, then, in what at first appears to be a straightforward recitation of the Constitutional basis on which *Roe*, and any decision to reaffirm *Roe*, must rest, the joint opinion has in effect undermined or rejected any basis the Justices would be willing to accept for making the decision. The reader cannot help wondering how the Justices will escape from the trap they have written themselves into. But, like the heroes of a second-rate cliffhanger, the Justices make their escape between reels (or, in this case, between paragraphs) and begin a new discussion without acknowledging that there was no plausible resolution for their previous predicament. The Court's entire analysis of *Roe's* foundations proceeds in this disjointed way. Points in the argument are merely juxtaposed; rarely are legal or logical links made explicit, and the entire exposition is overtly ambivalent.

The Justices next restate the Constitutional problem in the most abstract terms yet: "The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter."¹⁸⁴ Because this "philosophic" question is one about which "reasonable people disagree,"¹⁸⁵ it is a "theorem" of Constitutional doctrine that the State can adopt one position or another, except where the choice "intrude[s] upon a protected liberty."¹⁸⁶ In what is evidently meant to be a comparable example, the Justices point out that the State may not compel unwilling persons to salute the flag.¹⁸⁷ There is a certain poetic justice in the analogy between a woman who rejects motherhood and a citizen who refuses to salute the flag.¹⁸⁸ Nevertheless, it seems unlikely that

183. *Id.*

184. *Id.*

185. *Id.* at 851.

186. *Id.*

187. *Id.*

188. The connection between motherhood and the flag is one of great and problematic depth. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (permitting the state to limit the hours women may work in mechanical establishments, factories, and laundries because, "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to

reasoned judgment will produce any real justice for either, if it requires or even enables the Court to approach a problem on the level of generality at which persons unwilling to be mothers resemble persons unwilling to salute flags. Although the question posed is, again, whether the right to choose abortion is protected under the Constitution, the Justices are no nearer a solution.

Again, the Justices begin a new discussion without either explicitly concluding the prior point or linking it to what follows. "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."¹⁸⁹ "Our cases recognize" these rights and "our precedents" respect them.¹⁹⁰

These matters . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁹¹

The Justices are unable to come right out and say here that decisions about abortion are included among those that define personhood.¹⁹² We are left to infer this connection from the placement of this discussion in an opinion about abortion, and from the oblique statement that "[t]hese considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it,"¹⁹³ which immediately follows this discussion

preserve the strength and vigor of the race"). A public interest in fertility has often been asserted as a reason for special protections or restrictions on women's activities. This interest is typically racist, either implicitly, *see Muller*, or explicitly. The mid-nineteenth-century campaign to restrict the availability of abortion, for example, was supported by arguments that the decline in white birth rates must be reversed to prevent the nation from being overrun by immigrants. *See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 297-300 (1992).

189. *Casey*, 505 U.S. at 851.

190. *Id.*

191. *Id.*

192. They do, however, casually make this point in passing later when they are discussing *stare decisis*. *See id.* at 858 (the recognition afforded women's liberty by *Roe* "fits comfortably within the framework of the Court's prior decisions"). One would expect a more definitive assertion of this point, inasmuch as it is the critical doctrinal difference between the joint opinion's reaffirmance of *Roe* and the Chief Justice's argument that *Roe* should be overruled. *See id.* at 953 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) ("The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.").

193. *Id.* at 852.

of the *Griswold* line of cases. The relationship between the beliefs defining personhood and the abortion decision is further obscured in the very next paragraph, which begins again as if no connection between the *Griswold* interests and abortion had yet been made: "It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception" ¹⁹⁴ Inasmuch as the Justices have told the reader repeatedly that they find a woman's decision to have an abortion "offensive to our most basic principles of morality," it is not surprising that they have trouble stating that they also find it to be defining "of the attributes of personhood."¹⁹⁵

Without ever having clearly placed abortion within the interests protected by *Griswold*, the Justices go on to distinguish the choice of abortion from marriage, child rearing, and education in that it involves action while the other matters involve only belief: "Though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise."¹⁹⁶ Abortion, moreover, "is a unique act" and one "fraught with consequences for others."¹⁹⁷ Here the reader expects, finally, to be told that abortion differs from other decisions made in the "private realm of family life" because abortion kills a potential member of the family;¹⁹⁸ regardless of whether the fetus is legally

194. *Id.*

195. If the interests at issue in *Roe* and *Casey* were more accurately described as the right to decide whether to be a mother, there could be no reason to doubt its place among those choices central to personal dignity and autonomy. Relentlessly focusing the discussion on the surgical procedure by which this interest is to be given effect renders the philosophical problem presented to these Justices essentially insoluble.

196. *Casey*, 505 U.S. at 852. It might be observed that the precedents cited by the Justices protect the rights to *get* married, *use* contraception, *form* and *maintain* family relationships, and *have, rear, and educate* children, not simply to have "beliefs about these matters." *Id.*

197. *Id.*

198. As Chief Justice Rehnquist is quick to point out, "One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus." *Id.* at 952. The Chief Justice, somewhat unfairly, goes on to quote Justice Scalia's statement from *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989): "To look 'at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.'" It begs a large number of philosophical, moral, social, and constitutional questions to equate terminating one's own pregnancy with shooting somebody else. See generally BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* (1992) (exploring these questions from a philosophical perspective). Nevertheless,

a person, surely the opposition to abortion draws much of its power to persuade from the imagery of abortion's consequences for the fetus.¹⁹⁹ The Justices, however, do their best to blunt the impact of that imagery by placing the fetus both last and least on their list of those for whom abortion has consequences.

First, the Justices explain that abortion has consequences "for the woman who must live with the implications of her decision."²⁰⁰ They make no effort here or anywhere else in the joint opinion to spell out the consequences of abortion for the pregnant woman; they do not write of burdens lifted, lives resumed, freedom restored; they make no effort to imagine girls returning to their studies, mothers to their children, women to their work. The only effects of abortion for the pregnant woman that the Justices seem able to put into words are the "devastating psychological consequences" of learning "that her decision was not fully informed."²⁰¹ Just as Woman as competent decisionmaker is almost wholly absent from the joint opinion, Woman enjoying her protected liberty is missing as well. Evidently the Justices must decide what sort of burden on women's liberty is "undue," without having any idea what women will do with that liberty.

In addition to unspecified consequences for the pregnant woman herself, the Justices state that abortion has consequences for the persons who perform and assist in the abortions²⁰² (without acknowledging that these consequences result entirely from abortion control laws and the efforts of lawless abortion opponents), and "for the spouse, family, and society."²⁰³ "Spouse" is a very peculiar word to use here, not only because the gender neutral term is oddly out of place in a context where the "spouse" referred to is surely a husband, but also because the vast majority of abortions are obtained by unmarried women.²⁰⁴ Don't the Justices mean "father"?²⁰⁵ If they do not, then the par-

the Chief Justice is right to note that the joint opinion attempts to decide what to do about *Roe* without ever really addressing any of the interests at stake.

199. The history and use of the imagery of fetus as baby by antiabortion groups is perceptively explored by Rosalind Pollack Petchesky. See PETCHESKY, *supra* note 22, at 330-67.

200. *Casey*, 505 U.S. at 852.

201. *Id.* at 882.

202. *Id.* at 852.

203. *Id.*

204. *Id.* at 894 (noting that married women account for only about 20% of abortions).

205. It is a feature of how difficult this whole subject is to write about in a legal opinion that "father" seems not quite the right word either but no suitable alterna-

ticular consequences of abortion for the man who would have been the biological father of the child, had it been born, are not included at all in the Justices' list of consequences rendering abortion a unique act. Even if "spouse" is meant to indicate the father, his interest is implicitly downplayed by the opinion, which lumps him together with "family" and "society." Surely the consequences of abortion for the father of the never-to-be-born child differ in some way from the consequences of that same act for society. The Justices, however, are so determined to speak of abortion as a philosophical question susceptible of resolution by reasoned judgment that, even when trying to explain why abortion is not just an event in the zone of conscience, they are unable to situate it in a context involving real people. Perhaps this is why their strongest expression in the "abortion as murder" vein is found, not in connection with the consequences for the fetus, but in connection with the offense that the idea of abortion may give to some members of society who deem abortion to be "nothing short of an act of violence against innocent human life."²⁰⁶ When the Justices finally articulate the consequences for the fetus itself, they equivocate: "depending on one's beliefs, [there are consequences] for the life or potential life that is aborted."²⁰⁷

tives suggest themselves. The Justices never refer to the pregnant woman as the "mother," an aspect of the opinion that signals more clearly than anything the Justices actually do say that they recognize what is really at stake for the pregnant woman. It is hard to find an alternative to "father," however, that does not suggest livestock breeding (sire? inseminator?), place the woman in an unduly passive role in the process of conception ("the man who impregnated her?" *id.* at 887), or is not, for many women, as fictional as "husband" (lover? partner?).

206. *Id.* at 852.

207. *Id.* at 833. Compare this oblique language with the Chief Justice's: "the decision to abort necessarily involves the destruction of a fetus," *id.* at 953, or Justice Stewart's: abortion "involves the purposeful termination of potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980), *quoted in Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). The Justices' displacement of violent consequences from the fetus to society accurately reflects the socially constructed nature of the "fetus" as it is used as a symbol in the abortion controversy. The effects of abortion on the fetus are experienced only by the pregnant woman of whom the fetus is, until abortion or birth, literally a part. The division of fetus and pregnant woman is a rhetorical device, the primary purposes of which are to induce the public to identify with the fetus against the pregnant woman seeking to destroy it and to trivialize the creative labor that goes into giving birth to a child. The vagueness of the joint opinion's formulation of the consequences of abortion for the fetus also reflects the emptiness of the notion that the fetus exists independent of the pregnant woman, who can then be viewed as a passive container for the self-developing person inside her. This imaginary separation of the life of the fetus from the life of the pregnant woman, possible linguistically but not physically, morally, or

The Justices' list of "others" for whom abortion has consequences has one more very odd feature — there is no immediately identifiable person to whom these "others" are other — pregnant woman, abortion provider, father, family, society, and fetus are all included in the list of "others." The only player in the abortion drama left off the list is the Court itself. By relegating everyone else to the status of "others," the Justices once again demonstrate that the abortion decision truly concerning them is not the pregnant woman's, but their own.

Having established that abortion is an act with consequences, the Justices proceed: "Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances."²⁰⁸ Unless the Justices really view all conduct as presumptively subject to prohibition by the State, the Justices must believe that they have established a State interest that might be served by prohibiting abortion and are now going to weigh that interest against the burden on women's liberty. At this point in the opinion, however, the Justices have not yet demonstrated that the State has *any* interest in connection with abortion. Unusual as it is in other respects, the joint opinion falls into line with nearly every other abortion opinion in failing to explicate the State's interest with any specificity or clarity.²⁰⁹ The Justices as-

emotionally, underlies the whole notion, accepted uncritically by the courts, that the state can have and express some respect for potential life independent of a respect for the life of the pregnant woman.

208. *Casey*, 505 U.S. at 852. Ronald Dworkin claims that the joint opinion adopts his own argument that the right to choose abortion is or should be rooted in the First Amendment. RONALD DWORKIN, *FREEDOM'S LAW* 42 (1996). The Justices' assertion that abortion is conduct (thus, implicitly, subject to greater resolution than is speech) supports this claim, as does their earlier reference to saluting the flag. However, as Dworkin concedes, *id.*, the Justices never mention the First Amendment.

209. This failure occurs despite the fact that the Justices have quoted Justice Harlan to the effect "that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Casey*, 505 U.S. at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)). Justice Stevens points out that "the States rarely articulate [the nature of their interests in regulating abortion] with any precision." *See id.* at 914-15 (Stevens, J., concurring in part and dissenting in part). Nor does the Court often view the State's interest with any critical acuity. In *Roe* and cases striking down restrictive state abortion provisions, the State's interest is simply acknowledged as important (or legitimate), but not quite important enough; in cases upholding restrictions, the State's interest is simply assumed to be weighty; in neither case is the interest described in terms sufficient to enable a reasoned argument over its value to take place. This task is generally left to Justice Stevens. *See, e.g., id.*; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring); *Webster v. Reprod. Health Servs.*, 492 U.S. 490,

sert that they "appreciate the weight of the arguments made on behalf of the State in the cases before us" without ever saying what those arguments were;²¹⁰ later, it will be explained that the error in *Roe*, if *Roe* was in error, "would go only to the strength of the state interest in fetal protection."²¹¹ If the only questionable part of *Roe* from the point of view of the Court is the weight to be given the State's interest, one would expect an opinion reaffirming *Roe* to address that interest directly, but no such examination is undertaken.²¹²

Nonetheless, the Justices assume that they have identified a State interest that would be served by proscription of abortion. Abortion cannot be proscribed "in all instances," however, "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."²¹³ What can this mean? There is nothing unique about pregnancy or childbirth — the latter happens to everyone, and the former cannot be called unusual, much less unique. Pregnancy is unique in that each birth is a unique event, giving birth to unique individuals, but this does not set birth apart from other events. In this sense, each death is also unique, as is each robbery, installment purchase, and eighth-grade graduation. Pregnancy and childbirth may be among the least unique events experienced by the human race. However, the law does find pregnancy utterly unique — more accurately, unprecedented — and is at a loss as to how to understand it.

The authors of the joint opinion have little to go on in trying to imagine what abortion is about. So far as is known, none of these Justices has had an abortion. This should be no insurmountable obstacle to good judgment or coherent expression,

563-72 (1990) (Stevens, J., concurring in part and dissenting in part); see also *Casey*, 505 U.S. at 932 (Blackmun, J., concurring in part and dissenting in part) (quoting Justice Stevens's articulation of the State's interest).

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

211. *Id.* at 858.

212. The State's interest is ordinarily described as an interest in "potential life" or "the potentiality of human life." See, e.g., *Roe v. Wade*, 410 U.S. 113, 162 (1973) ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] still *another* important and legitimate interest in protecting the potentiality of human life."). The notion that the State can have and express respect for such an interest separate and independent from an interest in maternal health has been accepted essentially without examination since *Roe*. This idea is rooted in the imaginary separation of the life of the fetus from the life of the pregnant woman.

213. *Casey*, 505 U.S. at 852.

however; few judges have committed securities fraud either, but this lack of experience does not prevent them from explaining with precision the grounds for judgments in such cases. The resources of the law, however — its language, its history, its concepts, its notions of what it means to make a decision, what counts as a reason — are all perfectly suited to the task of sorting out securities fraud. Judges trying to sort out abortion, however, to explain how to make a decision, or even what counts as a reason, are on their own; the law cannot help them. The best the authors of the joint opinion can do is dust off the old pedestal and hoist the pregnant woman up onto it.

That these sacrifices [the anxieties, physical constraints and pain of pregnancy and childbirth] have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.²¹⁴

This effort produces a mixed blessing for women. More than in any other part of the joint opinion, the Justices acknowledge that the question is whether the State may force the pregnant woman to play her preordained role in society. They assert that history and culture alone are insufficient justifications for this coercion, but they do so in terms so luminous and vague it is not possible to be sure this is what they have said. And what does it mean that millennia of noble suffering “cannot *alone* be grounds for the State to insist she make the sacrifice”?²¹⁵ The Justices here appear to be weighing the suffering of mothers as a factor *in favor* of State coercion, although evidently not a dispositive one. The image of a proud woman ennobled by her suffering offers, at best, a doubtful model for ordinary women's liberty.

The joint opinion's examination of *Roe's* legal basis closes with another explicitly ambivalent expression of support: “The reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”²¹⁶ In the six pages preceding this doubtful conclusion the Justices undertook to lay the foundations for a jurisprudence of certainty by

214. *Id.*

215. *Id.*

216. *Id.* at 853.

affirming the soundness of *Roe's* doctrinal analysis. Instead, the Justices made it apparent that *Roe* was based on a doctrine supported more by stare decisis than by Constitutional text or inherent wisdom: that they are not entirely convinced that this doubtful doctrine supports women's liberty to choose abortion; that they find the exercise of this liberty offensive; and that they are unable to articulate a benefit this offensive act might offer any real woman. Yet in "an act of personal courage," one that exposes them to the ridicule of their colleagues, they reaffirm at least a part of *Roe*. Near the outset of their discussion, the Justices admit that they were tempted to adopt a simple rule that would "curb[] the discretion of federal judges."²¹⁷ Although it is possible that the Justices were hoping to rein in other federal judges, their focus in this opinion has been entirely on their own decisions, so it is far more likely they are again referring to themselves. The authors of the joint opinion, however, are conservative justices — they do not need to be restrained from giving in to the urge to "roam where unguided speculation might take them."²¹⁸ Instead, they longed for a rule that would *compel* them to reach a judgment that runs counter to their own deeply held beliefs. One must wonder why they put themselves in this position. If the Justices personally believe *Roe* was wrong, if they cannot articulate an argument that *Roe* was not wrong, if they find the arguments made on behalf of the State to be weighty, if their own most basic principles of morality are offended by abortion, and if they can find no convincing principle in the law requiring them to protect others' ability to commit this offensive act, they can simply vote with Justice Rehnquist — as Justice Kennedy did and Justice O'Connor nearly did in *Webster* — and let him write the opinion.

The Justices know that there is a real liberty at stake for the pregnant woman in *Roe*. It is not just a right to perform an act they find repugnant; it is, evidently, liberty of such a magnitude that it outweighs the lack of applicable rules compelling its protection and overrides the Justices' own antipathy. They can neither say what that liberty is nor account for the need to guarantee its extension to women because the law itself resists expressing these things. Built into the very foundation of American law is the notion that the person who exercises liberty

217. *Id.* at 847.

218. *Id.* at 850 (quoting *Poe v. Ullman*, 367 U.S. 498, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

is not only a man, but that he is the Man — a wealthy white man surrounded by women, workers, servants, and, if he wants them, slaves.²¹⁹ These subordinated persons make it physically possible for the Man to exercise his civil liberty by freeing him from the need to make his dinner, raise his children, run his shops, and till his fields. They also make it philosophically possible for the Man to justify his liberty by enabling him to define himself in opposition to these subordinates, who differ from the Man in gender, race, ethnicity, age, and class. The Man would never choose to be one of his own subordinates, nor would he last long were his subordinates free to choose to be the Man. The explicit legal restraints confining women, workers, servants, and slaves in their subordinate positions have vanished — slavery, indenture, and coverture have been abolished, we can all vote and demand a living wage — but truly freeing the people supporting the Man requires that the law rewrite its fundamental understanding of what it means to be a person. The law's solution to inequality is to declare everyone equal, but we cannot all be equal to the Man.

An unwilling pregnant woman seeking an abortion is asking to be allowed to choose whether and when she will carry out a task assigned her by the law — a task, moreover, that the Man could not do for himself even if he wanted to. The importance of this liberty is measured by the importance of motherhood itself in creating and maintaining the Man and his nation, but this is also the measure of the threat freeing Woman poses to the legal text. A far more fundamental revision of the law will have to take place before the Justices will find it easy to express women's liberty in the law's language.

C. *A Doubtful History*

The Justices do not acknowledge the scope of the problem they encounter in attempting to weave *Roe* into the text of the

219. "The Man" is a more appropriate term to use here than "Man." Despite its superficial parallel to "Woman," the general term "Man" usually connotes humankind as a species, distinguished from flora and other fauna, but with all internal distinctions of race, gender, ethnicity, and age obscured. "The Man," by contrast, has identifiable characteristics that distinguish him from the generality of Man. Descended from the slaveowning Master, he is white, male, adult, wealthy and in a position to exercise power over those who are not. In identifying "The Man," Black English makes visible a discrete privileged group that white Americans often find hard to see. "The Man" is used in this Article in an effort to indicate that the differences among women and workers and servants and slaves serve only to obscure our common differences from "The Man".

law, nor do they admit that they have not been entirely successful. Instead, in an implicit recognition of those difficulties, the Justices endow *stare decisis* with a wholly improbable force, sufficient to override tradition, public opposition, moral aversion, doctrinal weakness, and legal error, so as to save them from having to make again the decision in *Roe* for which they are now unable to account.²²⁰ The passion with which the Justices turn to *stare decisis* produces an unexpected commentary on their work in this case.

The Justices make three passes through the topic of *stare decisis*. First, applying a balancing test made up of factors drawn from earlier cases, they conclude that *Roe* should be reaffirmed "with whatever degree of personal reluctance any of us may have,"²²¹ because it has induced a kind of reliance,²²² has not

220. As described by the Chief Justice in his dissent: "The joint opinion of Justices O'Connor, Kennedy and Souter cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that 'the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.'" *Casey*, 505 U.S. at 953 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. *Id.* at 953-54. Justice Scalia, too, notes that "[t]he authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of 'reasoned judgment;' merely that it must be followed, because of *stare decisis*." *Id.* at 982 (Scalia, J., concurring in judgment in part and dissenting in part).

221. *Id.* at 861.

222. *Id.* at 854, 856. Chief Justice Rehnquist denies that "any traditional notion of reliance" can be applicable to *Roe* because "reproductive planning could take virtually immediate account of" *Roe*'s reversal. *Id.* at 956 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (quoting *id.* at 856). Another mark of the joint opinion's ambivalence is that the Chief Justice never actually formulates this argument in his opinion; instead, he is able to make the argument entirely by quoting the joint opinion's nervous anticipation of it. Of course, one would not expect *Roe* to induce "traditional notions" of reliance, any more than one would expect to find a specific, affirmative right to abortion recognized as "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 951 (citation omitted). The social, economic, and physical oppression of women is itself a Euro-American tradition, perhaps even "implicit in the concept of ordered liberty," *id.* at 951 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), and the denial of women's control over their own reproductive lives is the linchpin of that oppression. *But see* Cohen, *supra* note 25, at 216 (noting that it is a feature of the invisibility of women's lives and the politicization of history that the 19th-century availability of prequickenning abortion described in *Roe* has never been recognized as a principle rooted in our traditions). The joint opinion's recognition that women's greater participation in the national economy over the past 20 years can be attributed, at least in part, to *Roe*, *see Casey*, 505 U.S. at 856, is one of the more hopeful signals *Casey* sends to persons seeking an end to women's oppression. *Cf. id.* at 956-57 (Rehnquist, C.J., concurring in part and dissenting in part)

proved unworkable,²²³ has not been left so far behind by progress as to be "no more than a remnant of abandoned doctrine,"²²⁴ and has not been undermined by new views of its factual basis.²²⁵ After the noise and confusion of the preceding discussion of *Roe's* doctrinal foundations, this analysis passes by with the eerie calm of the eye of a hurricane. What follows, however, is almost as strange as what went before.

Having concluded their preliminary, and largely perfunctory, *stare decisis* analysis, the Justices begin the second pass through the doctrine with the observation that,

[i]n a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.²²⁶

The Justices then weave some fictions about the line of cases following *Lochner v. New York*²²⁷ which struck down State social welfare laws,²²⁸ and about *Plessy v. Ferguson*,²²⁹ which upheld State legislation mandating the segregation of the white and colored races. The *Lochner* cases were overruled,²³⁰ not because they were wrong or because the membership of the Court had changed or because President Roosevelt threatened to pack the Court with justices who agreed with him about the minimum wage, but because the nation's understanding of economic facts had changed in the interim.²³¹ Among the many problems with this view of history and economics²³² is the fact that the facts outside the Court had not changed so much that they prevented

(finding the link between *Roe* and women's economic and social progress "dubious").

223. *Casey*, 505 U.S. at 854-55.

224. *Id.* at 855, 857-59.

225. *Id.* at 855, 860.

226. *Id.*

227. 198 U.S. 45 (1905); see also *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

228. *Casey*, 505 U.S. at 861.

229. 163 U.S. 537, 548 (1896).

230. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

231. *Casey*, 505 U.S. at 863.

232. Most of these problems are helpfully brought to our attention by the Chief Justice. See *id.* at 960-62 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

Justice Sutherland from reprinting virtually his entire opinion for the Court in *Adkins* as a dissent when that case was overruled by *West Coast Hotel v. Parrish*.²³³ Although the story about the world (or, at least, the wealthy white world of which the Court was a part) having changed between *Plessy* and its demise in *Brown v. Board of Education*²³⁴ is marginally more plausible, the Court's opinion in *Brown* had nothing to add to the first Justice Harlan's dissent in *Plessy* but the packaging of social science.²³⁵

The greatest puzzle raised by the joint opinion's fiction about facts is why the Justices feel it is persuasive, in accounting for their decision *not* to overrule *Roe*, to turn to the two most prominent occasions on which the Court *did* reverse itself.²³⁶ The Justices' effort to portray *West Coast Hotel* and *Brown* as justified solely by changes in the underlying facts is so transparently unsuccessful that the effect is to highlight, rather than to obscure, the similarities between those cases and the one before the Court.²³⁷ If *Roe* was wrong, and these Justices cannot bring themselves to say it was correct, *West Coast Hotel* and *Brown* offer very little in the way of support for the conclusion that it should be reaffirmed anyway. However, for a justice who has lately changed his or her own mind about *Roe*, *West Coast Hotel* and *Brown* offer the comforting reassurance that sometimes in-

233. 300 U.S. 379 (1937). Compare *id.* (Sutherland, J. dissenting) with *Adkins v. Children's Hospital*, 261 U.S. 525, 539-562 (1923). See also *West Coast Hotel*, 300 U.S. at 391 (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

234. 347 U.S. 483 (1954).

235. In 1954, Justice Warren wrote for the Court, "To separate [Negro school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community The impact is greater when it has the sanction of the law." *Brown*, 347 U.S. at 494 (citations and internal quotation marks omitted). In 1896, Justice Harlan wrote, "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting). It certainly does not appear that any relevant facts known to the Court in 1954 had escaped the attention of Justice Harlan in 1896.

236. For this reason, Chief Justice Rehnquist also found the lines of cases selected for discussion in the joint opinion "very odd indeed." *Casey*, 505 U.S. at 959 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

237. This weakness in the joint opinion's argument did not escape the notice of the Chief Justice. See *id.* at 960-63 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

tegrity requires inconstancy.²³⁸ This section of the joint opinion thus operates neatly to shore up the Justices' weakly supported decision to reaffirm *Roe* while simultaneously validating their personal vacillations.

The Justices are still not finished with *stare decisis*. For their third pass through *stare decisis* the Justices ascend to a still higher level of generality. The joint opinion explains that:

[when] the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.²³⁹

In short, the Court's legitimacy depends on its refusal to repudiate its own decisions under pressure. The Court's legitimacy, moreover, is critical not only to its own character,²⁴⁰ but to that of the Nation as a whole;²⁴¹ "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals."²⁴²

In its opening line, the joint opinion announced the Justices' intention to create for themselves a refuge from the constant pressure to overrule the Court's decision on abortion. Here they tell us why that refuge is needed — because the Nation's definition of itself, and the beliefs central to its dignity, depend on the decisions made by the Court. It is therefore critical that the Court not succumb to the pressures exerted by state and federal governments ("five other cases in the last decade"²⁴³) and change its mind about abortion. Despite the difficulty of knowing

238. "[T]wo of the three [authors of the joint opinion], in order thus to remain steadfast, had to abandon previously stated positions." *Id.* at 997 (Scalia, J., concurring in judgment in part and dissenting in part).

239. *Id.* at 866-67.

240. *Id.* at 869.

241. *Id.* at 868.

242. *Id.*

243. *Id.* at 844.

whether the original decision was correct, despite the fact that opposition may present "philosophic and social arguments of great weight,"²⁴⁴ "proceed[ing] from principles worthy of profound respect,"²⁴⁵ adherence to important decisions under pressure is essential to legitimacy. The pregnant woman has also made a decision about abortion, a choice the Justices believe may be "central to [her] personal dignity and autonomy."²⁴⁶ But while the Justices both recognize the damage to the Nation's character that might result were they to yield to the State's pressure, and suffer the doubt generated each time they are required to revisit the issue of abortion, they deny the pregnant woman the refuge from doubt they hope to create for themselves. On their own behalf the Justices are willing to rewrite history, pick and choose facts from the record, hand down pronouncements unconnected with economic or social reality, and then take refuge in their power to deny review and avoid having to think about abortion anymore.²⁴⁷ The pregnant woman turned away from the clinic is not so fortunate; she must go away and return again another day, face the opposition again, wrestle with her doubts again before she can claim refuge. The joint opinion itself demonstrates that the Justices have not been just to the pregnant woman.

V. CONCLUSION

Toni Morrison describes the role played by Africanist characters in white American literature as a goldfish bowl, "the structure that transparently (and invisibly) permits the ordered life it contains to exist in the larger world."²⁴⁸ Mothers and wives, like workers and servants and slaves, are a part of the fishbowl that permitted, and by and large still permits, the ordered life of the Man — the Founders and their Posterity — to exist in the world. The fishbowl is ordinarily invisible; the Man's subordinates have been kept too busy to write much law and our lives do not appear in the law books except where they cross the Man's paths and purposes. However, although our words do not appear in

244. *Id.* at 872 (describing arguments the State may force upon the pregnant woman).

245. *Id.* at 867 (describing arguments to which the Court must not yield).

246. *Id.* at 851.

247. The Court has denied review of every case requiring interpretation of *Roe* since *Casey* was handed down in 1992.

248. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 17 (1992).

the law, not a word of law could have been written without us. The Founders could not have gathered in Philadelphia without mothers to bear and raise them, wives, servants and slaves to feed and clothe them, and workers to generate their incomes for them while they brought forth their new nation.

In those portions of the joint opinion declining to overrule *Roe* and striking down the spousal notice provision, the Justices allow some women to refuse motherhood and grant some wives more liberty than their husbands are willing to give them. Trying to use the law to accomplish these tasks, the Justices are undertaking the difficult and dangerous project of removing a piece of the fishbowl from the inside. They cannot see what they are doing because the lives of women are largely invisible to the law. More importantly, they cannot succeed in their tasks without endangering the integrity of the law's existing order, plunging the fish — the outmoded Man whose life support system is written into the law — into a new and different world outside the fishbowl where he must either adapt or perish.

The benefits of our law were originally secured, in their entirety, to the Founders and their Posterity. Women and workers and servants and slaves have been given liberty over the years since the Constitution was written, but these benefits cannot effectively be extended to additional classes of people without reducing the shares or lessening the value of the benefits reserved to the original holders.²⁴⁹ The Founders and their Posterity have not relinquished liberties commensurate with the ones they purport to have given their former subordinates. Thus, the new liberties constantly conflict with the old. When the law must resolve these conflicts, the easy solution is always to reproduce the subordination of women and workers and servants and slaves. The portion of the joint opinion upholding the informed consent provision, by reading it as a mechanism for controlling women's decisions, proceeds smoothly because it does not violate the law's underlying logic, despite the fact that, as an effort

249. Oddly, this point is made in Justice Stevens's separate opinion in *Casey* in connection with his argument that the fetus is not and cannot be declared by the State to be a person qualifying for constitutional protection. "[A]ny power to increase the constitutional population . . . would be, in effect, a power to decrease rights the national Constitution grants to others." *Casey*, 505 U.S. at 914 (Stevens, J., concurring in part and dissenting in part) (quoting Dworkin, *supra* note 34, at 400-01). Dworkin does not seem to have considered that extending rights to women or any other originally subordinated group had to have the same effect on the rights of the Founders and their Posterity.

to tell a woman how she must decide whether she should be a mother, it is a moral absurdity. Difficult as it is to write a new liberty in the language of the law, it is even more difficult to apply the new liberty in a particular case. Extending liberty creates doubts of the sort this Article has identified throughout the joint opinion, particularly in those portions reaffirming *Roe* and striking down the spousal notice provision of the Act. The doubts will continue to disrupt the law until a new legal order has been written in which the benefits and burdens of liberty are equitably distributed. Unless these doubts are accepted in the law, indeed, unless they are sought out and welcomed, the liberty for which the Founders paid so dearly, and for which their workers, servants, and slaves fought and died, will remain the property of the privileged few.

Liberty for the rest of us finds its only refuge in a jurisprudence of doubt.