ABORTING DIGNITY: THE ABORTION DOCTRINE AFTER *GONZALES V. CARHART*

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Since its inception, the abortion doctrine has been stuck in a Catch-22: pro-choice lawyers have been pressured to use constitutional precedents, like privacy and dignity, gaining short-term wins at the cost of long-term stability. For example, in *Roe v. Wade*, pro-choice lawyers used privacy, successful in other due process cases, because it ensured a hook on which to establish the abortion right. But because privacy was not well-tailored to the particular goals of the abortion right, the doctrine's foundation contained holes guaranteed to surface later.[1] Today, a similar risk exists. In the wake of Justice Kennedy's majority opinion in *Gonzales v. Carhart*, academics and attorneys have suggested the term "dignity" be used because of its salience with the Court. However, instead of appealing to the Court's taxonomy, shouldn't litigators choose terms more specific to the right to access an abortion?

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[1] Although privacy accurately refers to the often-clandestine nature of the abortion procedure, the term in many ways undermines female autonomy in making decisions about the body, as discussed below.

Introduction

In 2007 the Supreme Court decided *Gonzales v. Carhart*,[2] which outlawed certain types of late-term abortions. The opinion, considered to be a far departure from previous case law and a further breakdown of the right to abortion,[3] drew considerable criticism.[4] Those opposed stated the language of abortion had been corrupted by the majority opinion. Pro-choice attorneys and academics immediately responded by suggesting new terms to support the right. Considering autonomy, dignity, and equality as possible candidates, these scholars turned to Supreme Court precedents, hopeful they might ground the precarious doctrine.[5] However, despite being canonical, these words are not tailored to the specific goals or unique moral difficulties of abortion.

Unfortunately, preferring terms from within the canon to more fashioned ones is a misstep that has plagued the abortion doctrine since its inception.[6] For example, in 1973, in the landmark case *Roe v. Wade*, litigants decided to use privacy because of its prevalence in Supreme Court cases at

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

[3] David Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 Sup. Ct. Rev. 1 (2007) (arguing that the case represented at least a symbolic break from its holding in *Stenberg v. Carhart*, 530 U.S. 19 (2000), which voided a Nebraska law banning "partial-birth" abortions).

[4] *Id.* at 1 (citing Charles Fried, "*The Supreme Court Phalanx": An Exchange*, N.Y. Review of Books, Dec 6, 2007, *available* at http://www.nybooks.com/articles/20877 (asserting that "Justice Kennedy's decision is incompatible not only with precedent but with his own strongly expressed profession of principle")).

[5] *See, e.g.*, Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 Yale L. J. 1694, 1763 (2008) (discussing the importance of dignity in Supreme Court abortion cases, particularly in regard to Justice Kennedy's opinions) [hereinafter Siegel, *Dignity and the Politics of Protection*].

[6] For example, as discussed below, in *Roe v. Wade,* 410 U.S. 133 (1973), feminists in the 1970's chose privacy over autonomy because of the former's recurrence in Supreme Court cases, despite privacy's logical setbacks.

that time. But the word privacy carried logical incoherencies[7] which were eventually what made the abortion doctrine come apart so easily in cases such as *Gonzales v. Carhart* nearly thirty years later. Therefore, engaging with words simply for their appearance in earlier case law should be done with caution. In this Article, I will point out unintended consequences of this strategy, critique the chosen words, and suggest a different approach and vocabulary for advocates today.

The current scramble for words that began in the wake of *Carhart*, in large part, was due to the highly-criticized reasoning provided by Justice Kennedy in his majority opinion. Writing for the Court, Justice Kennedy upheld the Partial-Birth Abortion Ban Act,[8] which outlawed late-term abortions referred to as "partial-birth" abortions.[9] The opinion created a wave of criticism within the pro-choice community. But rather than being upset by the outcome of banned procedures, it was Justice Kennedy's justification for limiting the right that created the most panic—and for good reason. Justice Kennedy stated that partial-birth abortions should be banned because of the "regret" women faced.[10] In other words, women were too weak to handle the difficult procedure, because they were susceptible to trauma.[11]

This reasoning ran as a direct affront to the initial justification for abortion first established in *Roe v. Wade*.[12] In the 1970s, feminists first established the right to abortion in order to empower women.[13] Giving women the

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[7] Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 718 (2010) ("It is not impossible to construct a theoretical account that ground a right to . . . have an abortion . . . in a right to privacy, but doing so invites the troublesome corollary that the justice underlying [this right] has anything at all to do with publicity, information-sharing, or discretion more generally.").

[8] Gonzales v. Carhart, 550 U.S. 124, 133 (2007).

[9] Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. 2005).

[10] *Carhart*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained . . . . Severe depression and loss of esteem can follow."). *See also* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1201 (2010) ("Given Justice Kennedy's blessing, abortion trauma now emerges as an antiabortion argument with legs.").

[11] *See, e.g.*, Suk, *supra* note 10, at 1196 ("To critics, the notion of abortion regret reflects images of women as emotionally unstable and lacking agency—old stereotypes . . . ."). Additionally, Justice Kennedy described the "fetus" as a "child" and "human," suggesting that therefore it too needed protection from the procedure. *See Carhart*, 550 U.S. at 134 ("Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development."); *see also id.* at 157 ("The Act expresses respect for the dignity of human life.").

[12] Roe v. Wade, 410 U.S. 113, 153 (1973) ("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.").

[13] *Id.* at 153 (explaining that feminists "argue that the woman's right is absolute" and thus derived from her own power over her body and her life). These "feminists" Justice Blackmun referred to included this discussion of power within their amicus briefs. *See, e.g.*, Brief for the American College of Obstetricians and Gynecologists, et al. as Amici Curiae Supporting Petitioner-Appellants, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-40), 1971 WL 126685, at *68 ("Those without knowledge, sophistication, funds, and political

right to make decisions about their health, their bodies, and their parental roles was meant to afford them control over their own lives and to free them from society's expectations of motherhood.[14] Thus, power was the driving principle.[15] In contrast, Justice Kennedy's rationale was based on the antiquated notion that women were too weak to endure an abortion. The latter rationale stood as a direct affront to the initial thrust of the right.[16] In an effort to restore a robust understanding of the right, feminist litigators looked

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power, are also largely without access to legal abortion."); Brief of Petitioner-Appellants, *Roe,* 410 U.S. 113 (No. 70-18), 1971 WL 128054, at *95 ("The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being is a Fundamental Personal Liberty . . . [T]he power of the public to *guard itself against imminent danger* depends in every case involving the control of one's body . . .") [hereinafter Roe Brief of Petitioner-Appellants]; Brief for Petitioner-Appellants, Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40), 1971 WL 134286, at *10 ("Under *Griswold* it is surely not the means of control, but the *power* to control which is significant."); Brief for New Women Lawyers, et al. Supporting Petitioner-Appellants, *Roe*, 410 U.S. 113 (Nos. 70–18, 70–40) 1971 WL 134283, at *14 ("Liberty means more than freedom from servitude and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use [her] powers of mind or body in any lawful calling.") (citing Smith v. Texas, 233 U.S. 630, 636 (1914)) [hereinafter Brief for New Women Lawyers]; Brief on Behalf of Organizations and Named Women as Amici Curiae Supporting Petitioner-Appellants, Roe v. Wade, 410 U.S. 959 (1972) (Nos. 70-18, 70-40), 1972 WL 126045, at *14 (arguing that the right to abortion is necessary because "[a] wife has no legal power to refuse to participate in the intimacies of married life," and without an abortion right, her only method of remaining free of pregnancy—abstinence—would leave her legally vulnerable).

[14] For discussions on the societal expectations of women being mothers, see, for example, MAXINE MARGOLIS, MOTHERS AND SUCH: VIEWS OF AMERICAN WOMEN AND WHY THEY CHANGED 13 (1984); MARY P. RYAN, THE EMPIRE OF THE MOTHER: AMERICAN WRITING ABOUT DOMESTICITY 1830-1860 (1982); BARBARA WELTER, DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY (1976).

Restrictions on abortion "conscript[ ] women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances provide years of maternal care. The state does not compensate women for their services . . . ." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (Blackmun, J., concurring) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); Craig v. Boren, 429 U.S. 190, 198–99 (1976)). In arguing for *Roe v. Wade*, as a sign of power, feminists directly aimed to dismantle the antiquated Victorian stereotype of women as the weaker sex. *Roe*, 410 U.S. at 148 ("It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct."). For example, litigators argued that the right to an abortion would show women to be rational, autonomous decision-makers rather than hysterical patients. However, eventually the attorneys boiled down this notion of *power* to *privacy* because of its salience with the Court.

[15] *See, e.g.*, Lucinda Cisler, *Unfinished Business: Birth Control and Women's Liberation*, *in* SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT 245, 276 (Robin Morgan ed., 1970) (framing the right to abortion around feminism and a woman's "right to limit her own reproduction"). "Sisterhood is Powerful" was a predominant slogan of the Women's Rights Movement canonized by the book of the same name. *Unfinished Business* was cited in an amicus brief submitted on behalf of Roe. *See* Brief for New Women Lawyers, *supra* note 13, at 55.

[16] *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 70 (Univ. of Cal. Press 1998) (discussing that the initial development of an abortion justification came from the idea that "the power to commence a pregnancy is one of the inalienable rights of the citizens . . . .").

for a term more in line with the original justification.[17] To do this, they first looked at how Justice Kennedy's rationale worked.

Justice Kennedy achieved his reasoning through a powerful syllogism. First, he stated that the fetus amounted to a "child"[18] in order to support his second argument that abortion was therefore "killing."[19] Having established abortion as infanticide,[20] he coupled it with the retrograde stereotype of women being naturally predisposed to motherhood[21] to indulge in the second stereotypical preconception—that mothers who lose their offspring are certain to experience trauma.[22] The "bond of love the mother has for her child" creates a "decision so fraught with emotional consequence" that she must be protected from having to make it.[23] In other words, a woman's natural role as mother makes her incapable of aborting her fetus. This picture of a woman not only stirred up Victorian notions of women as the weaker sex, but ran in direct juxtaposition to the initial notion of power, underlying the appellant's argument in *Roe v. Wade*.[24]

In response to the *Carhart* opinion, feminists fled to reestablish the right to women's power first expressed in *Roe v. Wade* and later hinted at in

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[17] Priscilla Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J. L. & Pol'y 97, 100 (2008) ("[W]e must emphasize that women's interest in abortion in a constitutional sense includes not only her interest in her choice *not* to be a mother (an aspect of her decisional autonomy), her interest in her personal dignity, her interest in her health and life (an aspect of her bodily integrity), and her interest in privacy of the information about her decision, but also includes her interest in motherhood itself . . . .").

[18] Gonzales v. Carhart, 550 U.S. 134, 157 (2007) (referring to the fetus as an "unborn child" and stating that the Act expresses "respect for the dignity of human life").

[19] *Id*. at 148 (referring to the procedure as "killing"); *id*. at 159 ("[W]omen come to regret their choice to abort the infant life.").

[20] Kennedy's characterization of abortion went against the long-established common law principle that abortion was not infanticide, but a misdemeanor. The Abortion Controversy: A Documentary History 6 (Eva R. Rubin ed., 1994) (citing William Hawkins, The Common Law: Treatise on the Pleas of the Crown 80 (1738) ("Book I. Of Murder. Sect. 16. And it was anciently holden, That the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: But at this Day, it is said to be a great Misprision [misdemeanor] only, and not Murder, unless the Child be born alive, and die thereof. . . .")) [hereinafter Rubin, Abortion Controversy].

[21] *Carhart*, 550 U.S. at 159 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well.").

[22] *See* Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375, 425–30 (1996) (discussing the stereotype of motherhood and assumptions of selflessness, particularly citing to the film *Sophie's Choice*).

[23] *Carhart*, 550 U.S. at 159 ("It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the state . . . It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.").

[24] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (referencing appellant's argument that the woman's right is absolute; in other words, ceding that feminists first established the right to abortion to enable women's self-empowering choices, however troubling).

Planned Parenthood v. Casey.[25] However, they grasped for constitutional hooks that had currency with the Court. For example, Professor Reva Siegel suggested the term "dignity" because of its resonance with the swing vote on the Court: Justice Kennedy.[26] Priscilla Smith, the pro-choice attorney who argued *Carhart*, suggested an "equality" analysis in relation to "motherhood" because of Justice Kennedy's discussion of motherhood in *Carhart*.[27] Other authors argued combining "equality" with "liberty,"[28] or even a return to a reinvigorated conception of "privacy."[29] These terms offered hope because of their previous success with the Court. Unfortunately, these words are also complicated because they are not tailored to the right of abortion, and therefore leave room to be used to undermine the right.[30] For example, as explained below, the term privacy, though beneficial to women in establishing the doctrine in *Roe v. Wade*, has also been used to undermine women's right to abortion.

This post-*Carhart* tactic—turning towards terms prominent in constitutional case law, yet possibly damaging to the pro-choice movement—is not

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[25] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (framing its decision around "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). *See also infra* Part II.C.

[26] Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1763 (2008) ("Why focus on the ways Justice Kennedy reasons about dignity in opinions written for the Court and on his own behalf? The abortion cases express core precepts in the language of dignity."). She specifically focuses on this term because of its particular resonance with the swing vote on the Court, Justice Kennedy: "Dignity is a value that bridges communities. It is a value to which opponents and proponents of the abortion right are committed, in politics and in law. It is a value that connects cases concerning abortion to other bodies of constitutional law . . . . [D]ignity figures so frequently and consequentially in the decisions of a Justice who is now playing a leading role in the development of American constitutional law." *Id.* at 1703.

[27] Smith, *supra* note 17, at 99. *See generally* Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 994 (2007) (arguing that women-protective abortion bans violate the equal protection clause) [hereinafter Siegel, *The New Politics of Abortion*].

[28] *See, e.g.*, Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 313–14 (2007) ("[W]e think that substantive due process under the Fourteenth Amendment requires that liberty be combined with equality.").

[29] Lisa M. Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL'Y & L. 87, 104 (2005) ("The right to physical integrity is supreme, as it ensures the basic privacy freedom of women, which is still a constitutional right.").

[30] *See generally* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (discussing how equality jurisprudence in the United States has not always benefited women). Similarly highlighting the inefficacy of abortion doctrine terminology, Jeannie Suk has recently pointed out that words like "trauma," that were once thought to serve the feminist abortion agenda, have now come to haunt them (as made clear by *Carhart*). *See generally* Suk, *supra* note 10. This vague quality highlights the point put forth most eloquently by Oliver Wendell Holmes, Jr.: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). In other words, although these words may have seemed appealing given their constitutional vigor, in the context of abortion and gender they may be used to undermine the right.

new. The compromise of opting for immediate function over long-term substance originated with the foundational word "privacy" in *Roe v. Wade*.[31] Based on its success in securing the right to contraception in *Griswold v. Connecticut*,[32] as well as other fundamental rights,[33] privacy seemed a natural choice to secure the further right of abortion in *Roe*. For example, the attorneys for *Roe* heavily relied on privacy in their brief, stating "privacy *and* autonomy" entitled constitutional protection for abortion.[34]

However, the "*and*" in this statement is key. The litigants seemed to know that the privacy right, by itself, did not adequately support the right of abortion. Something in this term was lacking; therefore "privacy *and autonomy*" were both necessary as justification.[35] Unfortunately, privacy became the precarious fulcrum on which the abortion doctrine rested, because of its key position in precedential cases like *Griswold*.[36]

Thirty years after *Roe*, feminists today threaten to make the same mistake.[37] For example, feminists after *Carhart* propose terms currently popular

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[31] 410 U.S. 113 (1973).

[32] 381 U.S. 479 (1965).

[33] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (recognizing a constitutionally protected right to privately choose to have offspring and a right not to); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding that state law requiring parents to send their school-aged children to public school unreasonably interferes with parents' liberty in violation of the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 400–03 (1923) (holding that state law prohibiting the teaching of any language other than English to a child who has not completed eighth grade violates teachers' liberties). *See also* Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.").

[34] Roe Brief of Petitioner-Appellants, *supra* note 13, at *94 (emphasis added).

[35] *Id*. Despite its inadequacies, the well-established right to privacy won feminists the subsequent right to abortion in *Roe v. Wade*. However, from the moment it was decided, the term has left the abortion doctrine in a state of disrepair. Almost immediately, commentators asked what privacy even meant. *See* Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 286 (Ferdinand David Schoeman ed., 1984) ("[N]obody seems to have any very clear idea what the right to privacy is."). *See also* JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 10 (2002) (responding to arguments that privacy is "an imprecise, arbitrary, or merely strategic way of establishing a right to sexual autonomy"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989) ("At the heart of the right to privacy, there has always been a conceptual vacuum.") [hereinafter Rubenfeld, *Right of Privacy*].

[36] Privacy therefore became the lynchpin term, despite the fact that technically *Roe* was founded under the liberty clause of the 14th Amendment—yet neither liberty nor autonomy, terms more related to power, were employed. *Roe*, 410 U.S. at 153 (finding the right of privacy to be "founded in the Fourteenth Amendment's concept of personal liberty"); *Id.* at 168 (Stewart, J., concurring) ("[T]he 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.").

[37] As if built with decaying bricks, each subsequent major case dealing with abortion has weakened the initial vigor of *Roe*. Since *Carhart*, scholars have expressed concern that the right to abortion is at risk of total decay, especially given the precarious nature of its theoretical underpinning. *See, e.g.*, Suk, *supra* note 10, at 1194 (citing Katha Pollitt, *Regrets Only*, THE NATION, May 14, 2007, at 9; *see also* Joanna Grossman & Linda McClain, Gonzales v. Carhart: *How the Supreme Court's Validation of the Federal Par-*

with the Court rather than terms that speak to initial reasoning driving the right to abortion—that is, that the right to have an abortion was initially about asserting women's power.[38] However, modern litigators are not considering ideas like power or even autonomy over one's body. Instead, terms like "dignity" have been chosen, perhaps in the hopes of attracting conservatives on the Court and reestablishing abortion rights.[39]

In moving forward with this argument, Part I of this paper will explain why feminists chose the word privacy to justify the right to an abortion and why that choice ultimately undermined the pro-choice movement. Part II will examine why present-day feminists are making a similar strategic error by suggesting a dignity justification within the abortion doctrine.[40] Finally, Part III will suggest a new term, "power," to be discussed in future work.

I. BEFORE *CARHART*: PRIVACY

In the decade preceding *Roe v. Wade*, feminist litigators recognized that the theory of privacy had helped to establish earlier sex cases[41] and could

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tial Birth Abortion Ban Affects Women's Constitutional Liberty and Equality, FINDLAW, (May 7, 2007), http://writ.news.findlaw.com/commentary/20070507_mcclain.html.); Jeffrey Toobin, *Five to Four*, THE NEW YORKER, Jun. 25, 2007, at 35.

[38] This is an especially salient point because it was the "reality" of abortion that Justice Kennedy exploited in the *Carhart* decision. His opinion reeked with contrived concern for those mothers who would "struggle with grief more anguished and sorrow more profound when she learns, only after the event" what the gruesome procedure looked like; Justice Ginsburg's dissent, on the other hand, recognized that choosing abortion can be a "painfully difficult" decision, but ultimately showed respect for the ability of women to make that decision on her own. *Compare Carhart*, 550 U.S. at 159–60 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision."), *with Carhart*, 550 U.S. at 183 n.7 (Ginsburg, J., dissenting) ("The Court is surely correct that, for most women, abortion is a painfully difficult decision . . . But 'neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have.'"). Justice Kennedy's opinion reads as paternalistic in comparison to Ginsburg's, hinting at an underlying assumption that women would be horrified by the procedure because they are weak.

[39] For a discussion of how privacy is being replaced by dignity, see, e.g., Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. JEFFERSON L. REV. 1, 20 (2007) ("Certainly, that we . . . had an abortion is not private. . . . [I]t is imperative that the Court steers its focus from privacy to . . . the right to *dignity*."). It is true that dignity has been a successful frame for conservative judges in other gender-related cases such as *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("[A]dults may choose to enter upon [an intimate] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

[40] *Cf.* Ruth Colker, *Feminist Litigation: An Oxymoron? A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137, 137 (1990) ("Feminists can and should do a better job of making radical arguments while engaging in constitutional litigation.") [hereinafter Colker, *Feminist Litigation*].

[41] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding the Connecticut law forbidding the use of contraceptives unconstitutionally intrudes upon the right to privacy).

potentially achieve the same success for the right to abortion.[42] The Supreme Court had affirmed that the privacy right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," seeming to open the doors to abortion.[43] However, from the moment the decision came down, *Roe* appeared to stand on questionable grounds.[44] Something about privacy seemed incongruous.

Opposition to the term began almost immediately. In 1981, a Justice Department memo written by a young attorney named John Roberts openly mocked the "so-called 'right to privacy'" as unfounded.[45] His criticism reverberated in the Justice Department's Guidelines on Constitutional Litigation,[46] in the halls of academia,[47] and in the High Court, in Justice Scalia's dissent in *Lawrence v. Texas*.[48] But complaints were not lodged only by those who opposed abortion; even those in support of the right questioned the "abstract" concept of "privacy."[49] Perhaps most illustrative was Justice Ruth Bader Ginsburg's criticism of the way privacy was used within *Roe* as

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[42] *See generally* GARROW, *supra* note 16, at 196–269 (explaining how the right to privacy was originally "created" in *Griswold*, and later served as the justification in *Roe*).

[43] Roe v. Wade, 420 U.S. 113, 153 (1973).

[44] *See* Kimberly S. Keller, Roe *on the Rocks? The Implications of the Federal Partial Birth Abortion Ban on the Ever-Diminishing Right to Privacy*, 26 WOMEN'S RTS. L. REP. 1 (2005) (discussing the problems with privacy as a foundational term); Jeffery L. Johnson, *Constitutional Privacy*, 13 LAW & PHIL. 161, 193 ("We were much too quick to accept the results of decisions like *Katz*, *Griswold*, and *Roe*, without supplying the theoretical underpinning to show that these decisions made political and constitutional sense, and were not simply exercises of judicial power during a rare liberal moment in our history."); Geoffrey Marshall, *The Right to Privacy: A Skeptical View*, 21 MCGILL L.J. 242, 245–46 (1975) (discussing the problems with a privacy rationale); Giles R. Scofield, *Rethinking* Roe, 8 TRENDS IN HEALTH CARE, L. & ETHICS 3, 18 (1993) ("Because the right to privacy seems to have come from nowhere, the notion that a woman has a right to have an abortion seems to be grounded in nothing.").

[45] Greene, *supra* note 7, at 739–40 (citing Memorandum from John Roberts to Att'y Gen. William French, Erwin Griswold Correspondence (Dec. 11, 1981) (on file with the National Archives & Records Administration)).

[46] *Id.* at 717 (citing Off. of Legal Pol'y, Dept. of Just. Guidelines on Constitutional Litigation 8 (1988)).

[47] Scholarly criticisms included comments by luminaries such as Ely and Epstein. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) ("A number of fairly standard criticisms can be made of *Roe* . . . ."); John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978) ("The Court has offered little assistance to one's understanding of what it is that makes [the privacy 'precedents'] a unit."); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 170 (1973) ("[I]t is difficult to see how the concept of privacy linked the cases cited by the Court, much less to explain the result in the abortion cases.").

[48] *See* Lawrence v. Texas, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting).

[49] *See generally* MACKINNON, *supra* note 30, at 97–101 (1987) (arguing that "abstract privacy protects abstract autonomy, without inquiring into whose freedom of action is being sanctioned at whose expense," such that the right to privacy serves to maintain "the imperatives of male supremacy"; therefore "the abortion choice must be legally available and must be women's but must not be based on privacy claims"); Robin West, *West, J. Concurring in the Judgment, in* WHAT ROE V. WADE SHOULD HAVE SAID 121 (Jack M. Balkin ed., 2005) (criticizing the constitutional right based on the right to privacy).

an "incomplete justification."[50] The assaults have not abated; scholars continue to characterize the constitutional right to privacy as a dead letter and have stated that if the right to privacy goes, with it goes the right to an abortion.[51]

The abundance of criticism over the use of privacy to justify abortion rights presents two overlapping questions. First, what is wrong with privacy? Why is the term under attack from both sides? Second, if privacy poses such a problem, why did feminist litigators still choose to use it as their primary justification for abortion rights? In Part A, I explain three major problems with the use of privacy in the context of the abortion doctrine. In Part B, I explain why, despite these problems, feminists still chose to use privacy. The conflict over privacy is in large part due to feminists' litigation strategies,[52] deciding to use terms that would likely privilege short-term wins over laying a foundation for long-term stability.[53]

A. The Problems with Privacy

Preceding *Roe* and even today, privacy has been heralded as one of the most "basic and coveted rights" in the Western world.[54] Just five years before *Roe*, in 1968, scholar Charles Fried deemed that without privacy, we lose "our very integrity as persons."[55] Today, scholars echo Fried on occasion and still speak of privacy as being fundamental to our very existence.[56]

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[50] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985) (arguing that *Roe v. Wade* "sparked public opposition and academic criticism" partly because the Court "presented an incomplete justification for its action").

[51] Greene, *supra* note 7, at 747 (noting that, to many liberals, "losing privacy would . . . endanger the right to an abortion"); *see also* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 105 (2008) (accounting for the "problem with privacy") [hereinafter Rubenfeld, *End of Privacy*].

[52] *See, e.g.*, Kristin B. Glen, *Abortion in the Courts: A Laywoman's Historical Guide to the New Disaster*, 4 FEMINIST STUD. 1 (1978) (discussing how feminists sacrificed long-term success for short-term wins in their litigation strategies by choosing to support abortion through the "right" to privacy); *see also* Colker, *Feminist Litigation*, *supra* note 40, at 155–58 (discussing the possibility of positive feminist litigation strategies); R. Colker, *Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207, 207 (1990) ("[T]he present privacy approach . . . does not centrally discuss women's well-being or acknowledge the importance of valuing fetal life."). However, it is important to remember that such counterfactual claims are easy to state, given that hindsight is always twenty-twenty. *See* Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976,* 8 COLUM. HUM. RTS L. REV. 373 (1976) (discussing the benefits and detriments of litigation).

[53] Greene, *supra* note 7, at 2 ("Privacy was never an apt moniker for the rights they have characteristically sought to protect.").

[54] ALICE FLEETWOOD BARTEE, PRIVACY RIGHTS: CASES LOST AND CASES WON BEFORE THE SUPREME COURT xiii (2006).

[55] Charles Fried, *Privacy,* 77 YALE L.J. 475, 477 (1968).

[56] *See, e.g.*, Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 300, 310 (Ferdinand David Schoeman ed., 1984) ("[P]rivacy is a condition of the original and continuing creation of 'selves' or 'persons.'"). For more recent examples, see, e.g., Jonathan Kahn, *Privacy as a Legal*

However, despite its supposed importance to our "very humanity,"[57] in the forty years since Fried's article, the idea of a constitutional right to privacy has been pilloried on a multiplicity of grounds.

Many have criticized privacy for being vague in scope and meaning.[58] However, given the copious amount of literature dedicated to this reproach, I will instead focus on three other criticisms of privacy that specifically address its relationship to the abortion doctrine. First, the privacy doctrine is a recent Constitutional invention, loosely underpinning the even more nascent right to abortion.[59] Second, the term reinforces stereotypical assumptions about women by ceding the decision to have an abortion to the hands of a physician. Third, a privacy justification frames the right to an abortion in negative rather than positive rights language.

1. *Privacy: A Recent Creation*

First, the fundamental right to privacy has been questioned because of its recent emergence in our constitutional order. Despite arguments by some academics, such as privacy scholar Jed Rubenfeld,[60] that the concept of "privacy" can be traced back to the most "venerable ancestor" cases, including *Marbury v. Madison*,[61] *Calder v. Bull*,[62] and *United States v. Carolene Products*,[63] even Rubenfeld admits the right to privacy is of "very recent origin."[64]

Principle of Identity Maintenance, 33 SETON HALL L. REV. 371, 373 (2003) ("Privacy, in short, provides principles for negotiating the legal management of personhood . . . .").

[57] Fried, *supra* note 55, at 475.

[58] *See, e.g.*, William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 255 (1966) ("[E]ven the most strenuous advocate of a right to privacy must confess that there are serious problems of defining the essence and scope of this right."); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001) ("Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."); Rubenfeld, *Right of Privacy*, *supra* note 35, at 737 ("Despite the importance of this doctrine and the attention that it has received, there is little agreement on the most basic questions of its scope and derivation."); Daniel J. Solove, *A Taxonomy of Privacy,* 154 U. PA. L. REV. 477–78 (2006) ("[P]rivacy suffers from an embarrassment of meanings. Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of privacy do not fare well when pitted against more concretely-stated countervailing interests."); Thomson, *supra* note 35, at 286 ("[N]obody seems to have any very clear idea what the right to privacy is.").

[59] *See, e.g.*, Sarah Weddington, *Reflections on the Twenty-Fifth Anniversary of* Roe v. Wade, 62 ALB. L. REV. 811, 824 (1999) ("The word 'privacy' does not appear in the Constitution.").

[60] Rubenfeld, *Right of Privacy*, *supra* note 35, at 740.

[61] 5 U.S. (1 Cranch) 137 (1803).

[62] 3 U.S. (3 Dall.) 386 (1798).

[63] 304 U.S. 144 (1938).

[64] Rubenfeld is the leading scholar on privacy. Rubenfeld, *Right of Privacy, supra* note 35, at 741–44. Rubenfeld also quotes *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

In fact, it was not until the famous Brandeis Brief that a conception of a privacy right was even considered.[65] In 1890, two Boston attorneys, Louis Brandeis and Samuel D. Warren, published an article now recognized as having "invented" the "right to privacy."[66] Roscoe Pound described the Brief as having done " 'nothing less than add a chapter to our law.' "[67] Before its publication, privacy had received little to no attention as a legal category.[68] Its failure to be recognized was in part due to the fact that the term fails to be enumerated within the text of the Constitution.[69] This invisibility, in large part, explains why the Court did not recognize a substantive right to privacy until its *Griswold* decision in 1964, nearly a century after the publication of the Brandeis Brief.[70] And despite the long line of privacy cases between *Griswold*[71] and *Roe*, all of which cite to privacy as their justification, a strong theory was never developed. The fact that this nascent theory supports the even more recent abortion right is troubling.

2. *Privacy: Poorly Tailored to the Goals of the Reproductive Rights Movement*

Second, in the wake of *Roe*, many scholars argued that privacy was poorly tailored to feminist goals.[72] Although privacy secured reproductive rights, its position in *Roe v. Wade* equally reinforced retrograde stereotypes about women. As explained below, privacy undermined the idea that women were rational actors; it supported male hierarchy through the public/private distinction; and it compromised the reproductive rights of socioeconomically disadvantaged women.

a. Privacy undermines the portrayal of women as rational actors

First, the use of privacy in *Roe* undermined the concept that women can be rational actors. In the years prior to *Roe*, feminist activists, academics,

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[65] Rubenfeld, *End of Privacy*, *supra* note 51, at 115–16 (2008) ("Brandeis and Warren published their now-famous article, and as the new century unfolded, a 'right to privacy' began to figure more prominently in search and seizure law.").

[66] *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890) (arguing that American law ought to recognize and protect a right to privacy). Warren and Brandeis are often credited with inventing the concept. *See* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979).

[67] Glancy, *supra* note 66, at 1.

[68] Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 173 (1979) (explaining that *Griswold* "elevates the right of privacy to independent constitutional significance" with no previous reference in the Constitution).

[69] U.S. CONST. art. I–IV.

[70] Rubenfeld, *Right of Privacy*, *supra* note 35, at 744.

[71] *See infra* Section I.B.

[72] *See, e.g.*, Ginsburg, *supra* note 50, at 383 (arguing that the right to an abortion concerns not just "state versus private control of a woman's body," but also "her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen"). *See also* West, *supra* note 49 (discussing why privacy is poorly tailored to feminist goals).

and litigators participating in the reproductive rights movement demanded that women's choices to abort their pregnancies[73] be treated as rational, autonomous, and self-determining[74] like other political choices recognized in the liberal tradition.[75] However, *Roe*'s use of privacy undermined this vision. In *Roe*, the Court framed the abortion right as one to be shared by doctor and patient but ultimately contingent on the treating physician's medical approval.[76] *Roe*'s emphasis on the "privacy" of the "doctor's office" vested the authority in the doctor, thereby hiding the woman's direct involvement with the procedure. In fact, some have argued that Justice Blackmun's opinion "delegated juridical authority to physicians,"[77] emphasizing the right of the doctor, rather than a woman's right to make the decision for herself. In essence, behind the white curtains, the doctor had to take responsibility for the "brutal"[78] procedure.

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[73] Many thanks to Evelyn Atkinson for this turn of phrase. Evelyn Atkinson, *Abnormal Persons or Embedded Individuals? Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J.L. & GENDER 617, 651 (2011).

[74] LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 203, 235 (2010) ("There is only one voice that needs to be heard on the question of the final decision as to whether a woman will or will not bear a child, and that is the voice of the woman herself.") (citing Betty Friedan, Founding President of the National Organization for Women, Abortion: A Woman's Civil Right, Speech Given at the First National Conference on Abortion Laws (Feb. 1969)).

[75] According to these early liberal theorists, autonomous rational individuals reasoned together to agree on the social contract, the idea upon which the origins of Western liberalism is founded upon. CAROLE PATEMAN, THE PROBLEM OF POLITICAL OBLIGATION: A CRITIQUE OF LIBERAL THEORY 164 (1985) (citing to John Locke's idea of "free and equal individuals, competing with each other in a market to protect and further their interests"); *see generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 168–69 (Thomas I. Cook ed., Hafner Press 1947) (1690) ("Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent."); THOMAS HOBBES, LEVIATHAN 87 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) ("[A] man be contented with so much liberty against other men, as he would allow other men against himself."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 24–25 (G.D.H. Cole trans. 1782) (1762) (describing the importance of "the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains voters . . . .").

[76] Roe v. Wade, 410 U.S. 113, 163 (1973) (emphasizing the importance of the "medical judgment" of the attending physician).

[77] Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147, 194 (2006). *See also* Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J.L. & MED. 315, 320 (1987) (characterizing *Roe* as reflecting "Justice Blackmun's early proclivity to trust too fully in the goodness of doctors").

[78] Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

b. Privacy undermines female authority by foreclosing openness in decisions of sex

Second, privacy was poorly tailored to feminist goals of liberating women from male control in the home.[79] In 1959, Dr. Mary Steichen Calderon, the medical director of Planned Parenthood from 1953–1954, said that female inferiority persisted as a result of privacy reinforcing "hush-hush" and "closed" social treatment of these procedures—locking women behind the closed doors of the male-dominated home.[80] "Privacy," some feminists argued, reinforced "male domination" by burying public discussions around abortion, thereby making it difficult for women to break out of male tutelage at home.[81] Their argument continued that although "[t]he law claims to be absent [from the private sphere] the state selectively chooses when to interject and that selection often preferences immunity in order to protect male domination."[82] In other words, privacy enabled a "hands off" policy, which in practice allowed male-control to persist in the household—making women's decisions often corrupted. For example, Justice O'Connor specifically spoke to this concern in *Planned Parenthood v. Casey*. Writing for the Court, Justice O'Connor stated that despite the "husband's interest in the life of the child," it does not permit the State to empower him with the "troubling degree of authority over his wife"[83] that would require spousal notification laws.

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[79] *See, e.g.*, Cathy Harris, *Outing Privacy Litigation: Toward a Contextual Strategy For Lesbian And Gay Rights*, 65 GEO. WASH. L. REV. 248, 257 (1997) (noting that the idea that privacy "implies something that should be kept secret" undermines the feminist slogan that "the personal is political"). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965). Additionally, cases like *Griswold v. Connecticut* reflected an effort to overturn retrograde legislation like the Comstock laws, which banned contraception and the distribution of information on abortion, in order to free women from male control over sex.

[80] GREENHOUSE AND SIEGEL, *supra* note 74, at 23–25 (citing Mary Steichen Calderon, *Illegal Abortion as a Public Health Problem*, 50 AM. J. OF PUB. HEALTH 948, 948–54 (July 1960) ("a symptom of a disease of our whole social body, the frightening hush-hush, the cold shoulders, the closed doors, the social ostracism and punitive attitude toward those who are greatly in need of concrete help . . . .")).

[81] MACKINNON, *supra* note 30, at 101 (arguing that the right to privacy serves to maintain "the imperatives of male supremacy," and so the abortion choice must be legally available and must be women's, but must not be based on privacy claims). *Casey* tried to correct this rationale by reinforcing that a wife need not receive consent from her husband in order to obtain an abortion. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–98 (1992) (finding spousal consent was unconstitutional).

[82] *See* Elizabeth M. Schneider, *The Violence of Privacy,* 23 CONN. L. REV. 973, 977 (1991) ("Thus, in the so-called private sphere of domestic and family life, which is purportedly immune from law, there is always the selective application of law. Significantly, this selective application of law invokes 'privacy' as a rationale for immunity in order to protect male domination.") The author argues that this selectivity has justified domestic violence and the exploitation of women. *Id.*

[83] *Casey*, 505 U.S. at 898. O'Connor specifically spoke to the actual coercion of domestic violence, noting that "approximately two million women are the victims of severe assaults by their male partners." *Id.* at 891.

c. Privacy furthers socio-economic concerns

Third, a clear goal from the beginning of the abortion movement was to make abortions more accessible to those in lower economic brackets who could not otherwise obtain them.[84] For example, in 1959 Dr. Calderon expressed her concern about the economic "*inequity* of application of [the] medical procedure . . . ."[85] In essence, she condemned the fact that a safe abortion was a procedure reserved for the rich.

However, the more abortion was associated with privacy, the less those in lower income brackets were able to obtain it. A hidden or private choice is often the one that is more shameful, the one that is not supposed to be openly aired and therefore is often more difficult to choose. The more abortion was viewed as something worth concealing, the less accessible it became. For women already facing financial obstacles, the difficulty of obtaining an abortion was therefore compounded. As Khiara Bridges has recently explained, although "privacy" protected women in lower socioeconomic classes from government intrusion, it also failed to empower these women in their choices or ensure that they even have access to a choice.[86]

3. *Privacy Reframes the Abortion Right as a Negative Rather Than Positive Right*

The third problem with privacy is that by converting abortion from a positive right (*freedom to* abort a fetus) into a negative principle (*freedom from* the state), privacy undermines the proactive notion of the right. Privacy instead transforms the right into a discussion about delimiting the state, instead of empowering a woman.

However, women at the forefront of the liberation movement, such as those in the radical group Redstockings, argued abortion was not about delimiting the state—but about regaining power for women "from male domi-

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[84] GREENHOUSE & SIEGEL, *supra* note 74, at 205 ("Medically safe abortions have always been available to the wealthy, to those who could afford the high costs of physicians and trips abroad; but the poor woman has been forced to risk her life and health with folk remedies and disreputable practitioners.") (citing THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE (1972)); GREENHOUSE & SIEGEL, *supra* note 74, at 8–11 (detailing the complicated and expensive procedure for obtaining an abortion in Japan, effectively keeping such options out of reach for women outside of the wealthy class).

[85] GREENHOUSE & SIEGEL, *supra* note 74, at 23 ("Remember the woman with $300 who knows the right person and is successful in getting herself legally aborted on the private service of a voluntary hospital, in contrast to her poorer, less influential sister on the ward service of the same hospital or in a public hospital in the same city, a woman in exactly the same physical and mental state as the first one –whose application is turned down?") (citing Mary Steichen Calderon, *Illegal Abortion as a Public Health Problem*, 50 AM. J. OF PUB. HEALTH 948 (July 1960)).

[86] Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 155–57 (2011).

nated society."[87] Having popularized the slogan "sisterhood is powerful," the group tried to inspire women to liberate themselves through consciousness-raising,[88] particularly on the key issue of abortion.[89] In 1969, the group stormed a New York legislative hearing on abortion where a nun was the only woman testifying among 14 other male "experts."[90] When a male audience member asked about the father's right, a Redstocking responded, "Women have the ultimate control over their own bodies."[91] Despite the oversimplification and inappropriate dismissal of this response, it demonstrates that the notion of power was key.[92] The Redstockings were not alone in their view. In 1969, Betty Friedan delivered a speech, "Abortion: A Woman's Civil Right," through which "the right to abortion emerged front and center for the women's movement."[93] In her speech, Friedan argued that without abortion rights there would be "no freedom . . . until we assert and demand the control over our own bodies."[94]

These initial protests, which commenced the abortion rights movement in America, display that feminists' intention behind securing the right was to recognize women as powerful: as able decision-makers capable of determining their own lives, bodies, health, and futures. Similarly, it is no surprise that when presented with the opportunity to frame the abortion right, many feminist organizations filed amicus briefs with notions of power littered in their justifications.[95] However, Justice Blackmun explicitly denied such a powerful conception of abortion, stating that this interpretation of the right was too extreme because "some state regulation . . . is appropriate."[96] Instead, he framed the right in privacy's negative terms. Therefore, *Roe* certainly gave constitutional status to abortion rights, but at the cost of casting

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[87] Redstockings, *Redstocking Manifesto,* (July 7, 1969), *available at* http://www.redstockings.org/index.php?option=com_content&view=article&id=76&Itemid=59 ("call[ing] on all our sisters to unite with us in the struggle" against "[m]en [who] have controlled all political, economic and cultural institutions and backed up this control with physical force. They have used their power to keep women in an inferior position.").

[88] REDSTOCKINGS, FEMINIST REVOLUTION 124 (abr. ed. 1978) (describing how the movement helped one woman "get back in touch with what I really want") [hereinafter REDSTOCKINGS, FEMINIST REVOLUTION].

[89] *Id.* at 20–22, 138–40 (discussing consciousness raising about abortion as a key point in their movement).

[90] GREENHOUSE & SIEGEL, *supra* note 74, at 128–30 (citing Susan Brownmiller, *Everywoman's Abortion: "The Oppressor Is Man*," VILLAGE VOICE, Mar. 27, 1969, at 1).

[91] *Id.* at 130.

[92] REDSTOCKINGS, FEMINIST REVOLUTION, *supra* note 88, at 60 ("The truth and unity [the truth] brings about constitute the main source of the power the oppressed can bring to bear against the oppressor's established apparatus and power.").

[93] GREENHOUSE & SIEGEL, *supra* note 74, at 38–39 (citing Betty Friedan, Founding President of the National Organization for Women, Abortion: A Woman's Civil Right, Speech Given at the First National Conference on Abortion Laws (Feb. 1969)).

[94] *Id.*

[95] Roe v. Wade, 410 U.S. 113, 153 (1973) (referring to the assertion that a woman ought to be able to obtain an abortion "at whatever time, in whatever way, and for whatever reason she alone chooses").

[96] *Id.*

the right as what the government *couldn't* do rather than what a woman *could do*.[97] In the long-term, this negative construction of the right disinherited women from the right to *enact* an abortion. Had the justification been something else, such as women's power, the right might not have been so easily chipped away at.

B. Why Did Feminists Use Privacy?

Given these criticisms of privacy, the question remains: why did feminists still choose to use it? Did feminist litigators just not understand the problems privacy might create? This seems unlikely since many scholars have shown feminists knew from the start of litigation that privacy was a complicated justification.[98] Rather, litigators chose the term because of its near guarantee of success in the courts. Privacy had won a long line of cases preceding *Roe*. In the pivotal book on the *Roe v. Wade* litigation, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade, David J. Garrow shows how the term percolated into abortion-litigation strategy because of its success in then-contemporaneous case law.[99] His argument shows that developing a tailored argument for the abortion doctrine was only an afterthought. Privacy was the going currency—and therefore the obvious choice for the *Roe v. Wade* litigation.

In *Liberty and Sexuality*, Garrow provides an account of the 1968 Hot Springs Association for the Study of Abortion (ASA) and explains how abortion litigators arrived at privacy as an almost foregone conclusion. The ASA conference was the key site for participants strategizing how to win a right to abortion.[100] Participants, including John D. Rockefeller III, ultimately advocated for a strategy that would include litigation, given that the High Court would inevitably also rule on any legislation that was passed.[101] Therefore, with the courts, rather than the legislature, announced as the preferred method, feminists turned to already existing Constitutional precedents that could be used to support the right.[102] A surfeit of sexuality cases had already won under a theory of privacy.[103] So litigators thought, why not abortion?

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[97] *Cf.* Posner, *supra* note 68, at 193 ("Both seclusion and contraception are means to enhance liberty, but they can be distinguished on the basis of the difference between 'freedom from' and 'freedom to,' or between negative and positive liberties.").

[98] Bartee introduces a somewhat optimistic account by stating, "We only win by losing." In her account, Bartee explains how pro-choice groups banded together around "privacy" despite recognizing its problems. BARTEE, *supra* note 54, at 82.

[99] GARROW, *supra* note 16, at 560–70 (discussing the influence of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), on the decision made in *Roe*).

[100] *Id.* at 357.

[101] *Id.* at 358 ("Zad Leavy . . . comment[ed], 'I believe we are going to see recognition in the courts before we see it in the legislatures.'").

[102] *Id.* at 364–65.

[103] Rubenfeld, *Right of Privacy*, *supra* note 35, at 744.

In the years between 1965 and 1973, considering its notoriously slow pace, the Supreme Court affirmed a dizzying number of cases based on privacy.[104] The first was the 1965 case *Griswold v. Connecticut*,[105] which held that contraception was legal in the privacy of the bedroom. There, the Court wrote that the right to privacy could be discerned in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments.[106]

Griswold set the precedent that, under privacy, retrograde laws based on morals were no longer going to be easily upheld. Echoes of *Griswold* could be heard just two years later, in *Loving v. Virginia,* where the Court struck down a statute that criminalized interracial marriage.[107] Following *Loving*, the Court recognized a right for married couples to divorce in *Boddie v. Connecticut*.[108] The subsequent year, in 1972, the Court expanded *Griswold* in *Eisenstadt v. Baird* to allow the sale of contraceptives to unmarried as well as married people.[109] "[I]f the right to privacy means anything," the Court stated, "it is the right of the individual, married or single, [to decide] whether to bear or beget a child."[110]

With this backdrop of cases, abortion-rights activists across the country began to see the possibility of privacy. Two such individuals were Zad Leavy, a twenty-nine-year-old Los Angeles County assistant district attorney, and Herma Hill Kay, a young professor at Berkeley, both now famous for authoring the *Shively* brief.[111] Originally written for the 1966 California case *Shively v. Stewart*,[112] the brief laid out the groundbreaking privacy framework[113] eventually used in *Roe*. Written on behalf of several doctors in San Francisco who had been threatened with losing their medical licenses

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[104] In reflection, scholars have been somewhat baffled by the growth in such cases. Rubenfeld, *Right of Privacy*, *supra* note 35, at 744 ("[T]he great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality . . . Nothing in the privacy cases says that the doctrine must gravitate around sexuality. Nevertheless, it has.")

[105] 381 U.S. 479, 485 (1965).

[106] *Id.* at 484.

[107] Loving v. Virginia, 388 US. 1, 12 (1967) ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights . . . .").

[108] 401 U.S. 371, 374–75 (1971).

[109] 405 U.S. 438, 453 (1972).

[110] *Id.* at 438.

[111] *See generally* Brief for Doctors Gail V. Anderson, et al. as Amici Curiae Supporting Petitioner, Shively v. Stewart, 421 P.2d 65 (Ca. Sup. Ct. 1966) (No. 7756) (arguing that anti-abortion legislation is an arbitrary invasion of the right of privacy) [hereinafter Brief for Doctors Gail V. Anderson]. The thirty-nine page amicus brief defending the doctors was signed by more than 200 physicians across the nation, including 128 deans of medical schools and every medical school dean in the state of California. Additionally, prominent doctors such as Alan Guttmacher, Bob Hall, and Lee Buxton signed the brief. The brief also strongly relied on Zad Leavy and Jerome Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123 (1962).

[112] *See* Shively v. Stewart, 421 P. 2d 65 (Cal. 1968) (granting physicians' motions for discovery without reference to merits).

[113] *See* Brief for Doctors Gail V. Anderson, *supra* note 111, at 17.

for performing abortions,[114] the brief cited to *Griswold* and its lineage of cases to establish a privacy-right for doctors to perform abortions.[115] Subsequently, Leavy and Kay, recognizing the success of the privacy justification used in earlier sex cases, developed this theory into an abortion case for the Supreme Court.[116]

With privacy becoming a well-established theory, and with a positive scorecard in the Court's recent decisions, feminists decided a case was ripe for litigation. Linda Coffee and Sarah Weddington would become the infamous team to take the landmark case all the way to the Supreme Court. In March 1970, Weddington and Coffee filed suit against Wade, the Dallas district attorney, on behalf of Jane Roe. In their brief, the attorneys placed privacy front and center in the debate, squarely stating that the right to abortion dealt with the privacy between a woman and her physician.[117]

However, under this framework, the right to abortion was framed primarily as a physician's right to execute his job. "Privacy," they wrote, was the "right of a physician to practice medicine according to the highest professional standards."[118] Almost as an afterthought, the brief mentioned the woman's fundamental right to privacy and tacked on "*and* autonomy in control of reproduction."[119] The inclusion of the additional justification of "privacy *and* autonomy"[120] appears to be almost an admission of privacy's weakness as a stand-alone justification. In Coffee and Weddington's rendition, privacy was less about a *woman's* right and more about a *physician*'s

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[114] HADLEY DYNACK ET AL., HONORING SAN FRANCISCO'S ABORTION PIONEERS: A CELEBRATION OF PAST AND PRESENT MEDICAL AND PUBLIC HEALTH LEADERSHIP 12 (2003) *available at* http://bixbycenter.ucsf.edu/publications/files/Monograph_HonoringSFsAbortionPioneers.pdf (describing the growth of physician involvement in abortion-rights litigation throughout the 20th century).

[115] Leavy and Kay argued that "the Bill of Rights and particularly the right to privacy 'reserves to the individual control of the procreative function free from unreasonable restriction by the state.'" GARROW *supra* note 16, at 365 (citing Griswold v. Connecticut, 381 U.S. 479, 365 (1965)). *See also* GARROW, *supra* note 16, at 309 ("[T]he Leavy brief represented the first judicial filing to expressly argue that the privacy holding of *Griswold* could and should be applied to abortion.") (citing Brief for Doctors Gail V. Anderson, *supra* note 111). The privacy argument Leavy and Kay developed was ultimately used in *California v. Belous*, the 1967 California Supreme Court case that declared "for the first time, a constitutional right to choose an abortion." Rubin, ABORTION CONTROVERSY, *supra* note 20, at 89.

[116] GARROW, *supra* note 16, at 307 ("Zad Leavy told one legal colleague that Griswold 'gave us the beginning of an answer if the legislature cannot find it.'"). In late September, the Southern California ACLU announced its conclusion that a woman's decision regarding abortion represented a 'fundamental right' and not a legislative policy choice. The ACLU said, "Under the right of privacy guarantees of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution, it is for each individual to determine when and whether to produce offspring.") *Id.* With a clear eye on the Court it is no question why Leavy chose to focus on the successful sexuality cases that had appeared before the Court.

[117] *See, e.g.*, Roe Brief of Petitioner-Appellants, *supra* note 13, at 95.

[118] *Id.* at 94–95.

[119] *Id.* at 94.

[120] *Id.*

right,[121] a far cry from what the right was initially conceived of by feminists such as Friedan and the Redstockings: a notion of female empowerment.

And although the two felt compelled to include a justification of female autonomy, the major thrust of the opinion was wrapped up in an impoverished image of women.[122] In their use of privacy, their argument reflected old stereotypes of women as an incapable class whose choices were irrational[123] and needed the guidance of their doctor.[124] Women were now painted as enfeebled patients. In some sense, privacy diagnosed women with the imagined Victorian disease of hysteria.[125] Unfortunately, co-counsel for *Roe* firmly situated this vision of women as controlling within the doctrine, operating under the guise of privacy.

Privacy was therefore a significant departure from the women's movement's initial goals, which had discussed abortion as a locus for empowerment. Instead, the abortion doctrine now carried the very same antiquated perceptions of women that the movement had initially intended to undo. Riddled with logical inconsistencies, the abortion doctrine began to crumble in on itself. Over the next thirty years, the Supreme Court in a myriad of cases chipped away at the right to abortion.[126] In response, feminists joined pro-life activists in attacking the privacy rationale.[127] Soon after, the term became not only fiercely contested but almost entirely defunct.[128]

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[121] Hunter, *supra* note 77, at 148 ("[C]onventional wisdom has become that Justice Blackmun . . . wrote *Roe* to center on the best interests of physicians.").

[122] Roe v. Wade, 410 U.S. 113, 159 (1973) (discussing abortion not as an empowering right but simply about "the health of the mother").

[123] *See* Suk, *supra* note 10, at 1201–07 (discussing the connection between hysteria and the decision of abortion); *see also* PHYLLIS CHESLER, WOMEN AND MADNESS 82 (Palgrave Macmillan rev. ed. 2005) ("Women are trained to be those creatures who are supposed to get so carried away emotionally that they cannot think clearly, if at all."); ELAINE SHOWALTER, THE FEMALE MALADY: WOMEN, MADNESS AND ENGLISH CULTURE, 1830–1980 7 (1987) (discussing famous portrayals of women that "established female sexuality and feminine nature as the source of" female insanity); JANE M. USSHER, WOMEN'S MADNESS: MISOGYNY OR MENTAL ILLNESS? 7 (1991) ("[M]isogyny makes women mad through either naming us as the 'Other,' . . . through depriving women of power, privilege and independence.").

[124] *See supra* Section I.A.1.a.

[125] *See, e.g.*, Suk, *supra* note 10, at 1201.

[126] *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

[127] *See* Susan Baker, *Risking Difference: Reconceptualizing the Boundaries between the Public and Private Spheres*, *in* WOMEN AND PUBLIC POLICY: THE SHIFTING BETWEEN BOUNDARIES BETWEEN PUBLIC AND PRIVATE SPHERES 3 (Susan Baker et al. eds.,1999) (arguing that the public-private dichotomy has marginalized women); LEONORE DAVIDOFF, *Some 'Old Husbands' Tales': Public and Private in Feminist History*, *in* FEMINISM, THE PUBLIC AND THE PRIVATE, 165 (Joan B. Landes ed., 1998); Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999) (responding to feminist critiques of privacy); SHERRY B. ORTNER, *Is Female to Male as Nature is to Culture?*, *in* FEMINISM, THE PUBLIC AND THE PRIVATE 40 (Joan B. Landes ed., 1998).

[128] Miller, *supra* note 39, at 1 ("It would be a good thing if privacy could be protected, but the war and the way of technology and the needs of security have de facto made the right to privacy a dead letter.").

C. Privacy's Lasting Effects on Abortion

That said, although privacy became somewhat of a dead letter after *Roe*, its vision of women would persist in the underbelly of the abortion doctrine and come to haunt feminists when reawakened nearly thirty years later in *Gonzales v. Carhart*. Though privacy was never explicitly used within *Roe* to enfeeble women, as discussed above, its implications laid the groundwork for Justice Kennedy's opinion in *Carhart* which portrayed women as weak and irrational.[129] However, an intermittent case, *Planned Parenthood v. Casey*, reemployed some of the visions of female power first expressed during the Women's Liberation Movement.

In 1992, nearly two decades after *Roe*, the Court revisited the abortion doctrine in *Planned Parenthood v. Casey*.[130] In striking down a statute requiring spousal consent before an abortion, the Court briefly replaced the term privacy with a rubric of liberty.[131] "The controlling word in the cases before us is 'liberty,'" wrote the Court in support of the abortion right.[132] Writing for the Court, Justice Sandra Day O'Connor emphasized the importance of female autonomy in her opposition to the disputed spousal notification requirement.

In language that departed radically from the passive imagery and cautious rationale used in *Roe*, Justice O'Connor's opinion required that women have the ability to circumvent their husbands' approval in order to actively obtain an abortion and fight back in situations of domestic abuse.[133] It is true that other aspects of the opinion, which upheld mandated waiting periods, informed consent laws, and parental notification for minors, did not reflect that empowering language. But O'Connor's forceful language in this section, refusing to allow the state to coerce women into the role of mother,[134] created, however fleetingly, a space to redefine the abortion doctrine around a woman's liberty, autonomy, and power.

Unfortunately, despite *Casey*'s more fortified concept of women, *Roe* had rather firmly grounded this initial vision of women as passive agents, allowing courts to easily reinstate this view, buttressed by long-standing stereotypes. Moreover, *Casey*'s more liberating depiction, expressed in distinct passages of the plurality opinion, was not difficult to overcome, given that overall the opinion was far from a salvo for women's rights; in many passages *Casey* still carried on the rhetorical problems of privacy, particu-

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[129] *See* Gonzales v. Carhart, 550 U.S. 124 (2006).

[130] 505 U.S. 833 (1992).

[131] *Id.* at 853. *See also* Bridges, *supra* note 86, at 143 ("The *Casey* plurality declined to use the language of privacy when describing the source of the abortion right, instead opting to use the language of liberty.").

[132] *Casey*, 505 U.S. at 846.

[133] *Id.* at 890–96.

[134] *Id.* at 852 ("[A woman's] 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 culture.").

larly in its section on parental consent.[135] By 2007, *Roe*'s stubborn notion of women was finally exposed in the case *Gonzales v. Carhart*.[136]

Writing for the Court in *Carhart*, Justice Kennedy revived *Roe*'s vision of women by invoking the stereotype of a mother incapable of aggressive self-protection, resigned to being the victim.[137] The reader is presented not just with a pregnant woman, but a pregnant "mother" plagued with the "fraught" decision[138] whether to act with violence and kill "a newborn infant."[139] Kennedy didn't spare the reader any detail. He described Congressional testimony of one abortion in which "[t]he baby's little fingers were clasping and unclasping"[140] before the doctor used "forceps" to crush the fetus's skull" and "suck[ ] the baby's brains out"[141] causing it to go "completely limp."[142] Nothing was left to the imagination. But more importantly, no room was left for interpretation. In Kennedy's description, the procedure was described as trauma inflicted on the mother and her baby, rather than as a rational empowering decision.

However, describing the procedure of abortion as a gory execution was the least offensive part of Justice Kenney's opinion. Rather, the way that he positioned the woman as a bereaved mother[143] and an emotionally unstable patient was the true transgression. "[I]t is important to remember that some feminists have long argued that emphasis on trauma unwittingly reestablishes stereotypes of irrationality and thereby undermines agency."[144] By depicting the woman as a victim, Kennedy's discussion admitted something previously gone underappreciated in Supreme Court jurisprudence—the try-

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[135] *See infra* Section II for a discussion of those problems.

[136] 550 U.S. 124 (2007). *See also* Suk, *The Trajectory of Trauma*, *supra* note 10, at 1220 ("Notwithstanding the liberatory meaning *Roe* has had for many women, the concern emphasized was not women's reproductive autonomy. Rather, it was the need to *protect* women from harm to their health, which from the outset included mental health.").

[137] Adrienne Rich is most commonly recognized for disentangling this stereotype of mothers as docile beings—brought to light by the fact that whenever women behave violently, their actions are psychologized. *See, e.g.*, ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 263 (1995) ("Instead of recognizing the institutional violence of patriarchal motherhood, society labels those women who finally erupt in violence as psychopathological.").

[138] *Carhart,* 550 U.S. at 159; *see also* Suk*, supra* note 10 (arguing that *Carhart's* recognition of post abortion trauma and regret is a continuation of the feminist legal discourse on trauma around women's bodies and sexuality).

[139] *Carhart,* 550 U.S. at 158.

[140] *Id*. at 139.

[141] *Id*.

[142] *Id*.

[143] *Id.* at 159–60 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming human forms.").

[144] Suk, *supra* note 10, at 1199, 1236 ("*Carhart* suggested that details unknown at the time of the abortion can cause psychological harm as their emotional meanings become known after the event.").

ing nature of the procedure[145]—but it simultaneously failed to recognize that the difficulty associated with undergoing an abortion was not beyond a woman's power, as recognized by other Supreme Court justices in some previous opinions.[146] Moreover, this image distanced women even further from the image of an independent rational actor that feminists had initially envisaged when establishing the right.[147] In this way, *Carhart* endorsed *Roe*'s image of a woman as incapable of making decisions about her bodily health without the guidance of others, and as easily traumatized by the reality of medical procedures, ignoring the more formidable language O'Connor had used in parts of the *Casey* decision.[148] In reaching the end of Justice Kennedy's opinion, one thing was clear: power was dead.

Pro-choice activists were not the only ones to recognize that the *Carhart* decision relied on outmoded, traditional stereotypes of women. The week after the Supreme Court announced its decision in *Carhart,* Richard Land of the Southern Baptist Convention (known for their conservative image of women) hailed, "Thank God for President Bush, and thank God for

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[145] *Carhart*, 550 U.S. at 159 (discussing potentially traumatic effects on mothers). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future . . . ." Thornburgh, Governor of Pa. v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S., 747, 781 (1986).

[146] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 916 (1991) (Stevens, J., concurring in part and dissenting in part) ("The authority to make such traumatic and yet empowering decisions is an element of basic human dignity.").

[147] There is a long tradition of feminist discussion on women's trauma distancing women from rational decision-making. *See, e.g.*, Leigh Goodmark*, When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 120 (2008) (finding the implied "belief that battered women cannot make rational choices at times of crisis and that professionals' judgment should be substituted for the women's own good"); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 255 (2009) ("*Carhart* assumes that female patients (in particular pregnant women) lack equal capacity to make judgments about their own well-being."); Ronald Turner, Gonzales v. Carhart *and the Court's 'Women's Regret' Rationale*, 43 WAKE FOREST L. REV. 1, 4–5 (2008) (characterizing the *Carhart* decision's as based on a "women's regret" rationale).

[148] *See, e.g.*, *Casey*, 550 U.S. at 833; *see also* Dahlia Lithwick, *Father Knows Best: Dr. Kennedy's Magic Prescription for Indecisive Women*, SLATE, (Apr. 18, 2007, 7:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/father_knows_best.html ("In Kennedy's view, if pregnant women only knew how abhorrent the procedure was, they'd always opt to avoid it. But as Justice Ruth Bader Ginsburg points out in dissent, Kennedy doesn't propose giving women more information about partial-birth abortion procedures. He says it's up to the Congress and the courts to substitute their judgment and ban the procedures altogether."). *See also* Joanna Grossman & Linda McClain, Gonzales v. Carhart*: How the Supreme Court's Validation of the Federal Partial-Birth Abortion Ban Act Affects Women's Constitutional Liberty and Equality*, FINDLAW (May 7, 2007), http://writ.news.findlaw.com/commentary/20070507_mcclain.html ("*Carhart* infringes women's equality both by curtailing the abortion right itself, and also by relying on archaic and stereotypical assumptions in its analysis. Justice Kennedy's casual, essentialist assumptions about how women regard their fetuses, and how they react to the decision to abort, hearken back to routine assumptions animating the discriminatory and protectionist legislation of earlier centuries.").

Chief Justice John Roberts and Associate Justice Samuel Alito."[149] Right-wing conservatives who protested the right to abortion considered *Carhart* a major victory.[150] The opinion simultaneously revived more aggressive tactics by right wing conservatives.[151] But most importantly, the decision marked the fact that the pro-life movement's long-fought battle over the rhetoric of abortion was won. Depicting the procedure as a bloody execution was finally included in a Supreme Court opinion.[152]

On the opposite end, pro-choice organizers began to truly consider the possibility of *Roe* being overruled.[153] In the past few years, this reality has become even starker, as bills that proposed cutting back on abortion were introduced in the House of Representatives;[154] states all over the country have tried to pass laws repealing the right;[155] and key anti-choice politicians

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[149] Christine Stansell, *Partial Law: A Lost History of Abortion*, THE NEW REPUBLIC 12 (May 21, 2007).

[150] *Id.; see also* Rev. Frank Pavone and Rev. Paul T. Stallsworth, *Considering* Gonzales v. Carhart*: Its Importance, The Future,* LIFEWATCH, Sept. 1, 2007 *available at* www.biblicalwitness.org/overturning_roe_v_wade.htm; Richard S. Myers, *The Supreme Court and Abortion: The Implications of* Gonzales v. Carhart *2007, in* LIFE AND LEARNING XVII: THE PROCEEDINGS OF THE SEVENTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 103, 125 (J. Koterski ed., 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093614 ("*Gonzales v. Carhart*, it seems clear . . . provides reason for optimism about the ultimate success of the pro-life movement.").

[151] *See, e.g.*, Robin Toner, *Abortion Foes See Validation for New Tactic*, N.Y. TIMES, May 22, 2007, at A1, *available at* http://www.nytimes.com/2007/05/22/washington/22abortion.html?pagewanted=all.

[152] *See* Toobin, *supra* note 37 ("[T]he Court all but abandoned the reasoning of *Roe v. Wade* (and its reaffirmation in the 1992 *Casey* decision) and adopted instead the assumptions and the rhetoric of the anti-abortion movement."); *see also* Carole Joffe, *The Abortion Procedure Bar: Bush's Gift to His Base,* DISSENT (Fall 2007), *available at* http://www.dissentmagazine.org/article/the-abortion-procedure-ban-bushs-gift-to-his-base (subscription required) ("In its statement of the need to 'protect the medical community's reputation' from the practices of abortion providers, the Court revealed its willingness to join the antiabortion movement in demonizing these professionals.").

[153] *See* Stansell, *supra* note 149, at 12.

[154] *See, e.g.*, *Abortion Votes in the House*, N.Y. TIMES (Aug. 22, 2012), *available at* http://www.nytimes.com/interactive/2012/08/22/us/politics/Abortion-Votes-in-the-House.html.

[155] *See, e.g.*, 2000 S.D. Sess. Laws 257–59 (requiring that aborted fetuses be issued death and burial certificates); 2011 Tex. Gen. Laws 342–47 (requiring that women seeking an abortion receive an ultrasound and listen to a description of the fetus's physical development prior to receiving an abortion). *See also* Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 1, 14 (2012). *See generally* Monica Davey, *South Dakota to Revisit Restrictions on Abortion*, N.Y. TIMES, Apr. 26, 2008, at A14, *available at* http://www.nytimes.com/2008/04/26/us/26abort.html?_r=0 ("Voters in South Dakota this fall will once again be asked to consider a sweeping limit on abortion."); Alex Hannaford, *As State Abortion Fights Intensify, Texas Moves to Adopt Sonogram Bill,* THE ATLANTIC (Mar. 11, 2011), http://www.theatlantic.com/politics/archive/2011/03/as-state-abortion-fights-intensify-texas-moves-to-adopt-sonogram-bill/72349/ (discussing a "sonogram bill" proposed in the Texas House of Representatives); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) (describing how several state legislatures now require that before a woman may consent to an abortion, she must first undergo an ultrasound and be offered the image of her fetus).

have made abortion their pet issue.[156] In the years since 2007, *Carhart* has become the lodestar for reinstating antiquated views of women as the second sex.[157] For example, this was aptly demonstrated by Todd Akin's arguments on abortion and "legitimate rape."[158] Just as in *Carhart*, the Congressman's comments are underpinned by the notion that women's default position should be their natural role as mother.[159]

Despite the circular logic, Akin was one of many representatives to hold this position, as the Culture Wars seem to have come back to life through political movements such as the Tea Party.[160] For example, Richard Mourdock, the Tea Party-backed Republican Senate candidate in Indiana, declared during a debate that "he was against abortion even in the event of rape," a comment that "came on the heels of the Tea Party-backed Republican Representative Joe Walsh of Illinois saying after a recent debate that he opposed abortion even in cases where the life of the mother is in danger."[161] And both of these comments were made around the same time that the House sought to remove funding from Planned Parenthood.[162]

But perhaps the most interesting ramification of *Carhart* is not the subsequent political movements but the legal strategies pursued in its aftermath, illustrating that old mistakes die hard. In the five years since *Carhart*, litigators and academics have refused to suggest terms that admit the difficulty and gore of abortion. In doing so, they refuse to choose words that recognize women as rational actors who can withstand making harrowing choices. In other words, by not engaging with "power," feminists deny the difficulty of abortion—in part to distance themselves from the pro-life/*Carhart* narrative that abortion is *traumatizing*, but also because of the intimidating features of

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[156] *See, e.g.*, Amy Gardner, *Palin Pushes abortion foes to form 'conservative, feminist identity'*, WASH. POST, May 15, 2010, at A16, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/15/AR2010051500002.html ("Former Alaska Governor Sarah Palin told a group of women who oppose abortion rights that they are responsible for an 'emerging, conservative, feminist identity' and have the power to shape politics and elections around the issue."); Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES, August 21, 2012, at A13, *available at* http://www.nytimes.com/2012/08/21/us/politics/rep-todd-akin-legitimate-rape-statement-and-reaction.html (discussing Representative Akin's views on abortion); Jessica Valenti, *The Fake Feminism of Sarah Palin*, WASH. POST, May 30, 2010, at B01 (discussing Sarah Palin's use of the word "feminism" to explain her pro-life views).

[157] Moore, *supra* note 156.

[158] *Id*.

[159] Akin seemed to believe that in cases of "legitimate rape" women would not become pregnant and therefore, those women who did become impregnated should keep the child since they had not been raped.

[160] Luisita Lopez Torregrosa, *Abortion Returns to Center Stage*, INT'L HERALD TRIBUNE (April 19, 2011), *available at* http://www.nytimes.com/2011/04/20/us/20iht-letter20.html.

[161] Thomas Friedman, *Why I Am Pro-Life*, N.Y. TIMES (October 27, 2012), *available at* http://www.nytimes.com/2012/10/28/opinion/sunday/friedman-why-i-am-pro-life.html.

[162] Jennifer Steinhauer, *House Republicans Seek to Remove Federal Funding for Planned Parenthood*, N.Y. TIMES (April 11, 2011), http://thecaucus.blogs.nytimes.com/2011/04/11/house-republicans-seek-to-remove-federal-funding-for-planned-parenthood/.

power—which would mean engaging with the uncomfortable ideas of abortion as violence. However, by doing so, they fail to seize the opportunity to recognize women's ability to make difficult moral choices, in self-preservation, often reserved for the opposite gender. Instead, feminists turned to two other constitutional stalwarts—dignity and equality—to appeal to the Court, once again putting abortion at a similar risk as privacy had three decades prior.

However, should we not consider that abortion may be difficult? Perhaps that is the one truth in Kennedy's decision: abortion can be difficult. It affects others as well as the mother and may bear some resemblance to violence. But admitting this does not have to be disempowering. Kennedy's opinion in *Carhart* seemed to be premised on the notion that for a mother to engage in a violent act is necessarily a traumatic and damaging experience. However, the dichotomy between docile motherhood versus a violent act—abortion—is false.

The experience of motherhood is, in and of itself, violent and an expression of power over another. In *Casey*, the Court spoke to the inherent violence of motherhood, recognizing that "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear," and that a mother's "suffering is too intimate and personal for the state to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture."[163] The bloody and painful act of childbirth is violence on a woman's body; mothers have long resorted to corporal punishment of their children throughout history; and some women even kill their children.[164] Moreover, motherhood is inherently a domination over children, in many ways.

Adrienne Rich illuminated this idea in her authoritative book on the subject, *Of Woman Born: Motherhood as Experience and Institution*. Rich therein argues that women who engage in the "violence" of motherhood may be empowered.[165] In a discussion of a thirty-eight year old mother of eight who murdered her two youngest children, Rich calls on society to "recogniz[e] the institutional violence of patriarchal motherhood," rather than labeling women who commit violent acts as "psychopathological."[166] The *Casey* court recognized that mothers have endured the violence of motherhood—the suffering, the pain, and the anxiety—"since the beginning of the human race."[167]

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[163] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

[164] RICH, *supra* note 137, at 263. The phenomenon goes back to the very roots of our culture. *Medea* is the story of a woman, intelligent but oppressed, who acts in hostility by killing her children, as an extreme measure of liberating herself from her subordinate role in Greek society. P. VELACOTT, EURIPIDES' MEDEA AND OTHER PLAYS (Penguin, 1971). The violence of Medea can be compared with the violence of abortion described in *Carhart*, 550 U.S. at 159–60.

[165] RICH, *supra* note 137, at 258.

[166] *Id.* at 263.

[167] *Id.*

Whether a pregnant woman chooses abortion or motherhood, her choice will involve power and some nodes of violence. This false dichotomy between motherhood or violence must be undone. Abortion can be violent, and it certainly is power over others, including the fetus, the father, and even the State, but that in itself does not make abortion morally wrong. And since women are the ones who will experience some form of discomfort and power in either choice, they must have the right to decide what they will endure. The 2005 documentary film, *Speak Out: I Had an Abortion*, interviewed a range of women, each with different abortion experiences, including some who came to regret the decision.[168] Some women do. But "[t]he destiny of the woman must be shaped to a large extent on her own conception of her . . . place in society."[169] The right to choose abortion, regardless of the violence inherent in the act, or maybe because of it, must come from a woman's *power* to enact a choice *for* herself *on* herself despite any outside pressures from society, her partner and even the fetus.[170]

II. After *Carhart*: Dignity

Still, after *Carhart*, feminist academics and litigators chose to explore the use of dignity as a justification for the doctrine of abortion because of its constitutional legacy.[171] Pro-choice activists hoped dignity, like privacy, would work based on the Court's commitment to stare decisis;[172] however, like privacy, dignity does not adequately express the motives first envisioned behind protecting the right to abortion, nor the complicated reality of the procedure. Moreover, dignity fails to adequately repair the harm caused by the privacy rubric, and poses to possibly make it worse. The following section will dissect dignity, examine why feminists have suggested this term for litigation, and forewarn that a dignity strategy that compromises the abortion doctrine for short-term wins may backfire as it did with privacy.

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[168] *See* Speak Out: I Had an Abortion (SpeakOut Prod. 2005). This film features 10 women—including famed feminist Gloria Steinem—who candidly describe their abortion experiences spanning seven decades, from the years before *Roe v. Wade* to the present day. Several of the women, many who had their abortions pre-*Roe*, explain that their choice was in no way difficult to make, and they feel no feelings of remorse of regret, especially considering their then-present economic and social situations. However, given that some women in the post-*Roe* era find abortions traumatic, it is important to be able to justify abortion, even while accepting the procedure as traumatic.

[169] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

[170] Victoria Baranetsky, *The Positive Face of Power: Abortion and Guns* (October 27, 2012) (unpublished manuscript) (on file with author) (arguing that *power* is the intersection of liberty and equality).

[171] *See, e.g.*, Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1703–04 (describing Justice Kennedy's commitment to dignity in several cases).

[172] *Id.*

A. The Problems with Dignity

Since Immanuel Kant first hailed *dignity* as "unassailable," the term has been used as a powerful legal justification.[173] Set on the proverbial mantle next to freedom and truth, dignity has had a sweeping influence around the globe; the term often invites judicial creativity, as judges use it to justify important case law.[174] For example, Erin Daly writes that "in Latin America, tribunals charged with interpreting their country's constitution are increasingly asserting themselves and inserting themselves into public controversies, from abortion to same sex marriage to the rights of political association" under the rubric of dignity.[175]

Recent scholars have tried to persuade certain United States judges[176] to keep up with international trends and include dignity in their own opinions.[177] This trend has also taken hold of abortion scholars. In the wake of

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[173] IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 421 (Lewis White Beck trans., MacMillan 1990) (1784). Dignity has been embraced in the human rights law and other international orders. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]. *See generally* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15 (2004) ("Human dignity has become an important part of constitutionalism and human rights."); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* 1–2 (Univ. of Oxford Faculty of Law, Working Paper No. 24/2008, 2008), *available at* http://ssrn.com/abstract=1162024 ("[T]he concept of 'human dignity' now plays a central role in human rights discourse.").

[174] *See, e.g.*, Erin Daly, *Dignity in the Service of Democracy* 1–2 (Widener Law School Legal Studies Research Paper Series No. 11-07, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743773 (discussing the use of dignity by tribunals in various South American countries in cases involving abortion, gay marriage, and other rights) [hereinafter Daly, *Dignity in the Service of Democracy*]; Nghia Hoang, *Human Dignity and Fundamental Freedoms—Global Values of Human Rights: A Response to Cultural Relativism* (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314288 (discussing the ways dignity is used in human rights law around the world).

[175] Daly, *Dignity in the Service of Democracy*, *supra* note 180, at 2. Daly finds this especially problematic given "human dignity can be understood (1) as autonomy or the possibility of designing a life plan and self-determination according to his or her own desires; (2) as entailing certain concrete material conditions of life; and (3) as the intangible value of physical and moral integrity." *Id.*

[176] Most notably, many academics have taken scholarly notice of Justice Kennedy's responsiveness to dignity, especially because he currently sits as the swing vote on the Court. *See, e.g.*, Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, THE NEW REPUBLIC, June 18, 2007, at 16, 19, *available at* http://www.tnr.com/article/politics/supreme-leader-the-arrogance-anthony-kennedy. *See also* Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1739–40 (discussing Justice Kennedy's use of dignity in "his prominent decisions regarding sexual autonomy").

[177] *See, e.g.*, Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right* 1-3 (Widener Law School Legal Studies Research Paper Series no. 10-39), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1703073 ("[T]he theory that justifies recognition of state dignity could also give form to the constitutional right to human dignity.") [hereinafter Daly, *Human Dignity in the Roberts Court*]; Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1261–62

Carhart, many scholars believed that a resurrection of the doctrine could stand on the shoulders of dignity.[178] Most notably, Professors Reva Siegel,[179] Erin Daly,[180] and Carol Sanger[181] have hinted at, if not explicitly advocated for, using dignity in the context of abortion. Unfortunately, the term is only a recent and sporadic addition to United States constitutional law.[182] Additionally, it is not well-suited to justify the right to abortion because it poses two specific problems: first, it is merely a placeholder for privacy, and second, its split definitions reinforce stereotypical notions about women.[183] Therefore, once again we must ask: why have feminists chosen this term? I argue that feminists are reaching for dignity to appeal to the Courts, as was also the case with privacy.

1. *Dignity: A Placeholder for Privacy*

Dignity acts as little more than a placeholder for privacy, importing many of its predecessor's delinquencies. After being nearly dismissed[184] as an illegitimate constitutional right following *Roe v. Wade*, privacy altogether

(1999) (advocating replacement of privacy rhetoric in the family law context with rhetoric emphasizing dignity, arguing that "[m]ost struggling mothers would trade a right to be left alone, which does little to help them survive, for the right to be treated in a respectful manner, even as one accepts government assistance"). For a thorough exploration of how dignity can be used to protect abortion rights, see, for example, the discussion of *Casey* in Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1763–66.

[178] *See, e.g.*, Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1738. (arguing that the *Casey* variance of dignity must be restored to protect the right to choice).

[179] *Id.*

[180] *See* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 49–50 ("I have argued in this article that human dignity may be an important constitutional value in America if it is conceived of as protection against surrendering control to another.").

[181] Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 499 (2009).

[182] *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202 (2007-2008) ("[T]he Supreme Court has . . . invoked the concept of human dignity . . . tentatively.").

[183] As Professor Daly has noted, this term, used broadly in diverse topics ranging from abortion to same sex marriage to the rights of political association, is unlikely to have a uniform meaning. *See* Daly, *Dignity in the Service of Democracy*, *supra* note 174, at 2. *See also* Jan M. Smits, *Human Dignity and Uniform Law: An Unhappy Relationship* 6–9 (Tilburg Inst. of Comparative and Transnational Law, Working Paper No. 2008/2, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132684 (explaining the different uses of dignity in international law and whether the term can therefore even be useful).

[184] Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1311 (1991) (criticizing the right to privacy as a foundation for reproductive rights and arguing that it obfuscates the violence and disenfranchisement that makes motherhood a status to be avoided for many women); Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2158 (1996) (documenting how "privacy talk was deployed in the domestic violence context to enforce and preserve authority relations between man and wife"). Siegel noted similar discourses of privacy in interspousal tort immunity laws and in the controversy surrounding the civil remedies available under the Violence Against Women Act. *Id.* at 2161–70, 2200–05.

disappeared from the abortion cases.[185] In most cases pertaining to sex and the family, the Court, on the suggestion of activists, advocates, and academics, substituted the word privacy in the abortion cases with the concept of dignity.[186] For example, notwithstanding the positive and empowering language discussed above, *Casey* affirmed the "essential holding" of *Roe* that the state has legitimate interests in protecting the health of the woman and the life of the fetus.[187] That holding contained the implicit notion that abortion existed as a right for women who acted within the bounds of privacy in the doctor's office.[188] However, *Casey* was primarily framed around dignity, not privacy; the Court replaced one with the other.[189] Similarly, falling in line with this decision, the holding of *Lawrence v. Texas*, arguably the most controversial gender-related case following *Casey*, was also established on the grounds of dignity.[190]

However, despite the linguistic conversion, it is important to note that the two words predictably shared similar mishaps. First, like privacy, dignity is not a part of our constitutional framework. Although used in the writings of some early thinkers that influenced the Founding Fathers,[191] dignity was not included within our own legal canon. Like privacy, dignity is altogether missing from the founding documents. However, its absence is not a consequence of simple oversight. There is evidence that dignity was especially avoided by the framers. Previously used in the English Bill of Rights and other British documents,[192] the term connotes a meaning of royal and aristo-

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[185] Privacy is mentioned only twice in *Casey* and not at all in *Carhart*. *See also* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 31 ("What is new in *Casey* is the turn in the language from privacy to dignity.").

[186] *Compare* Roe v. Wade, 410 U.S. 113, 152–53 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."), *and* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) ("We deal with a right of privacy older than the Bill of Rights."), *with* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."), *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

[187] *Casey,* 505 U.S. at 833.

[188] *See infra* Part II.A.2.c.

[189] Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 31.

[190] *Lawrence*, 539 U.S. at 572 (referring to the liberty established in *Casey*, which is intricately tied to dignity).

[191] *See, e.g.*, Cicero, De Officiis, I, 30; DECLARATION OF THE RIGHTS OF THE MAN AND OF THE CITIZEN August 26, 1789, art. 6 (Fr.) ("All citizens, being equal in [the eyes of the law], are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and their talents."); THOMAS PAINE, RIGHTS OF MAN 46 (E.P. Dutton & Co., Inc. ed., 1951) (1791) ("[W]hen I contemplate the natural dignity of man . . . I become irritated at the attempt to govern mankind by force and fraud.").

[192] *See, e.g.*, The Bill of Rights (Act), 1689, 5 W. & M., c. 2 (Eng.); The Act of Settlement, 1701, 7 Will. 3, c. 1 (Eng.).

cratic hierarchy.[193] Therefore, the concept was antithetical to the republican ideals of the New World.[194] Dignity, a word based on aristocratic status, worked in direct opposition to the republican idea of equality among yeoman farmers.[195] Therefore not only is dignity without a foundational textual underpinning, but perhaps was purposely excluded from the Constitution altogether.

Second, like privacy, the scope and meaning of dignity is confused. Since the early 19th century, dignity has been criticized by the likes of Schopenhauer and Nietzsche as a hollow and amorphous term.[196] Criticizing Kant in 1837, Arthur Schopenhauer wrote that dignity was the "shibboleth of all perplexed and empty-headed moralists" because it lacked any "intelligible meaning."[197] Karl Marx criticized the use of dignity as a "refuge from history in morality."[198] Similarly, in 1872, Friedrich Nietzsche castigated the idea of the "dignity of man."[199] Today, dignity similarly seems to cause con-

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[193] *See* Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley* 43, 43 (N.Y. U. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 09-50, 2009) (referencing dignity's "quintessentially aristocratic virtue") [hereinafter Waldron, *Dignity, Rank and Rights*]. *See also* The Federalist No. 19 (Alexander Hamilton and James Madison) ("Charlemagne and his immediate descendants possessed the reality, as well as the ensigns and dignity of imperial power."); Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities,* 43 Ariz. St. L. J. 1177, 1178–79 (2011) ("There is a self-mastery implicit in, yet essential to an entitlement to the dignity, rank and expectation of respect that were formerly accorded only to nobility.").

[194] Franke, *supra* note 193, at 1179 (asking how, if modernity has flattened hierarchy, "can rank that does no meaningful sorting (since it is 'rank' among equals) retain the 'special something' that inheres in dignity").

[195] Founding Fathers such as Thomas Jefferson believed that the republican ideal that "almost every man is a freeholder" engendered a culture of political equality, unknown elsewhere in the world. Gordon S. Wood, The Creation of the American Republic 1776–1787 (Univ. of N.C. Press 1969) (discussing the vision of Thomas Jefferson of an agricultural society). If dignity is inherently aristocratic, as Waldron argues above, then it was necessarily contrary to a vision of a world characterized by political equality. *See* Waldron, *Dignity, Rank and Rights*, *supra* note 193.

[196] *See, e.g.*, Arthur Schopenhauer, The Basis of Morality 101 (Arthur Brodrick Bullock trans., 1915) ("[T]his expression 'Human Dignity,' once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a 'dignity' that they would be quite satisfied."); *see also* Friedrich Nietzsche, *The Greek State*, *in* Nietzsche: On the Genealogy of Morality 176, 185 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) ("[E]very man . . . is only dignified to the extent that he is a tool of genius, consciously or unconsciously; whereupon we immediately deduce the ethical conclusion that 'man as such', absolute man, possesses neither dignity, nor rights, nor duties: only as a completely determined being, serving unconscious purposes, can man excuse his existence.").

[197] Schopenhauer, *supra* note 196, at 101.

[198] McCrudden, *supra* note 173, at 8 (citing Marx, 'Moralising Criticism and Critical Morality, a Contribution to German Cultural History Contra Karl Heinzen', Deutsche-Brüsseler-Zeitung Nos 86, 87, 90, 92, and 94, Oct. 28 and 31, Nov. 11, 18, and 25, 1847).

[199] Nietzsche, *supra* note 196.

fusion, if not disdain, among scholars.[200] The main criticism is that the term has a multiplicity of definitions.[201] As with privacy, the uncertainty surrounding the definition of dignity causes concern as to the recent increase in incidence of dignity within sex cases: if no one knows what it means, how can it be an effective rationale? For these reasons, using dignity in many ways just repeats problems first encountered with privacy.

2. *Dignity: Split Meanings*

Dignity's second problem arises from its dyadic quality. Dignity has two radically different meanings: feminine *social obligation* and masculine *autonomy*.[202] Even though these definitions may seem to support a woman's right to abort her pregnancy, both of them undermine it.[203] Opponents of abortion have therefore employed both definitions of dignity to limit the right to abortion—just as they did with privacy, following *Roe*.[204] In the sections below, I will explain both definitions and how their interaction within the doctrine undermines the right to abortion.

a. Dignity: feminine social obligation

In the two centuries since the Victorian era, dignity has carried a social definition, limiting women to particular choices within the family. This definition is reinforced by the well-documented separate spheres doctrine, whereby women and men have authority over distinct realms but men remain dominant in both private and public spheres.[205] A woman was considered to be dignified when she remained discretely in her sphere, as wife and

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[200] *Cf.* Libby Adler, *Dignity and Degradation: Transnational Lessons from the Constitutional Protection of Sex* 1 (bepress Legal Series, Working Paper 1873, 2006), *available at* http://law.bepress.com/expresso/eps/1873) ("[Dignity] is still very much alive, if sometimes difficult to discern.").

[201] *See id.* at 2.

[202] McCrudden, *supra* note 173, at 1 ("The meaning of dignity is therefore context specific, varying significantly . . . . Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion."). Other scholars have identified even more than two definitions. *See generally* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 44 (contrasting dignity of the institution with dignity of the individual).

[203] These split definitions (discussed below) are counterproductive because they obfuscate the realities of an abortion, as a procedure that is sometimes a gruesome and difficult choice. This is a precarious tactic because it leaves pro-life advocates with the still powerful rhetoric of murder, without any opposition to it. However, it is important to point out that many abortions are not as gruesome as defined by the *Carhart* decision. And furthermore, the choice to abort a pregnancy is also often not a traumatic or difficult choice for a woman to make. *See* SPEAK OUT: I HAD AN ABORTION (SpeakOut Productions 2005).

[204] *See supra* Part I (discussing how the passive elements of privacy came to haunt the abortion doctrine in *Carhart*, despite the term's split success in *Roe*).

[205] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 601 (George Lawrence, trans., T.P. Mayer, ed., Harper Harper Perennial 1988) (1840) ("In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the

mother. Occupying these roles, she was required to act in a traditional "dignified" manner: subserviently, docilely, and placidly.[206] However, she was able to make decisions within her sphere.

As an example, the Catholic Church has been one of the fiercest advocates of this conception of dignity and promoting the separate spheres doctrine.[207] For example, in denouncing contraception, the Pope declared that the Church was saving the "dignity" of women through the sacrament of marriage.[208] According to this definition, dignity required women to conform to roles of wives and mothers. Women who surrendered to these roles could make *choices concerning the family*, but no farther.

b. Dignity: masculine autonomy

In contrast, while dignity's second definition as *autonomy* also stems from 19th century ideals, it is gendered male. Enlightenment thinkers envisioned this notion of dignity as the bulwark of citizenship,[209] which was restricted to the then-citizens—white, landowning, males—and therefore was gendered male. In the foundational document of the French Revolution, *The Declaration of the Rights of Man and of the Citizen*, as well Thomas Paine's *Rights of Man*,[210] dignity was used to characterize citizens who were ra-

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two sexes and to make them keep pace one with the other, but in two pathways that are always different.").

[206] *See, e.g.*, Pope Pius XI, Casti Connubii ¶ 29 (Dec. 30, 1930) (citing Pope Leo XIII, Encyclical on Christian Marriage (1880)) ("The man is the ruler of the family, and the head of the woman; but because she is flesh of his flesh and bone of his bone, let her be subject and obedient to the man . . . .").

[207] Feminists have long tried to undo the harms of the separate spheres argument. *See generally* ROSALIND ROSENBERG, BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM (1982) (investigating ideas developed by women in their study of sex differences). There is a clear distinction in Papal writings between masculine dignity and feminine dignity. *Compare* Pope Pius XI, *supra* note 206, at ¶ 12 ("How great a boon of God this is, and how great a blessing of matrimony is clear from a consideration of man's dignity and of his sublime end. For man surpasses all other visible creatures by the superiority of his rational nature alone."), *with* Pope Pius XI, *supra* note 206 at ¶ 12 (citing Ephesians 5:22–24) (" 'Let women be subject to their husbands as to the Lord.' . . . This subjection, however, does not deny or take away the liberty which fully belongs to the woman both in view of her dignity as a human person, and in view of her most noble office as wife and mother and companion.").

[208] In retort to the feminist claim that contraception emancipated women, the Church declared, "This . . . is not the true emancipation of woman, nor that rational and exalted liberty which belongs to the noble office of a Christian woman and wife; it is rather the debasing of the womanly character and the dignity of motherhood . . . More than this, this false liberty and unnatural equality with the husband is to the detriment of the woman herself." Pope Pius XI, *supra* note 206, at ¶ 75. The "dignity and position of women in civil and domestic society," he wrote, "is shamefully lowered." *Id.*

[209] David C. Yamada, *Human Dignity and American Employment Law*, U. RICH. L. REV. 523, 540 (2009) ("This early understanding of dignity was shaped by three overarching precepts. First, dignity is grounded in an inherent right to be free of harm to one's person or property. Second, the government can be both a violator and protector of individual dignity. Third, unchecked power can lead to abuses of power.").

[210] DECLARATION OF THE RIGHTS OF MAN, *supra* note 191.

tional, independent, and assertive.[211] However, this type of dignity was historically reserved for the elite in society, the citizenry.[212] Only men could make political choices some of which determined life or death, and still be dignified. For example, entering into a battle or a duel was a dignified choice reserved for men.[213] Conversely, women were precluded from making similar choices.[214] Therefore, in some sense reserving dignity for males meant that autonomy was also exclusive to men.

Although missing from foundational American texts, this male version of dignity was imported from international texts. "[D]ignity itself began [to enter] our political and social policy discourse [in the 1950s] with the formation of the United Nations" and international human rights law.[215] For example, this enumeration of dignity was included in the Universal Declaration of Human Rights, written in response to the human rights abuses of World War II.[216] Despite starting optimistically that "*[a]ll human beings* are born free and equal in dignity and rights," the Declaration quickly explained that "Everyone" actually meant every "man," "he," and "him."[217] This might seem like a superficial distinction, but real effects of women's invisibility from this legal definition of dignity have been well recorded.[218] Unfortunately, this rhetoric was soon infused into the context of abortion.

c. Dignity in the doctrine

Over the past half-century, politicians have incorporated these two visions of dignity into the abortion doctrine in place of privacy. Juxtaposed against one another, the two definitions work hand in hand to undermine the authority of a woman to make choices about her own life, in a manner analogous to privacy.[219] Although initially divorced from the abortion debate,[220]

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[211] *Id.* ("All citizens being equal in its eyes, are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and their talents.").

[212] *See* ROBERT W. FULLER, SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK 153 (2003) (discussing the damaging effects of a hierarchical society and advocating a "rank-based strategy aimed at equalizing dignity").

[213] CARL SCHMITT, THE NOMOS OF THE EARTH: IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 163 (G. L. Ulman trans. & ann., Telos Press 2003) (explaining the distinction between the "friend and enemy" in the international realm and that dueling was initially a right reserved for "equals" or full-fledged citizens in society).

[214] Yamada, *supra* note 209, at 543.

[215] *Id.* at 544.

[216] *Id.*

[217] Universal Declaration of Human Rights, *supra* note 173, at 74–76. In fact, the entire document failed to mention any "she" or "her" rights. *See generally* CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (1999) (criticizing how "human dignity" in the order of international law, especially with respect to the Universal Declaration left out women transpiring in sex discrimination and even worse, violence against women).

[218] *Id.* ("The omissions in the Universal Declaration are not merely semantic.").

[219] GREENHOUSE & SIEGEL, *supra* note 74, at 257 (showing how abortion "was beginning to find a life in national party politics as well" as a way of recruiting Catholics). The strategy of making abortion a Catholic political issue played directly off Catholic

the two gendered versions of dignity became key players between 1975 and 1980 via the burgeoning national debate around abortion and traditional family values.[221] In this five-year period, Republican Party strategists, intent on realigning the Catholic demographic at the polls with their party, incorporated the feminine definition of dignity involving social obligation into their campaign platforms.[222] For example, during the 1972 presidential election, in an effort to cast Democratic presidential nominee George McGovern as the amoral candidate, Nixon's campaign successfully labeled McGovern as the "triple-A" contender—in support of "amnesty," "acid," and "abortion."[223] "The objection to abortion was not that abortion was murder, but that abortion rights . . . validated a breakdown of traditional roles . . . ."[224] In other words, McGovern's support of abortion rights threatened a women's social dignity in her roles as wife and mother.[225] Republicans' use of the word

values and gender norms, *see* GREENHOUSE & SIEGEL, *supra* note 74, at 260, which I have shown are tied to the separate male- and female-gendered notions of dignity.

[220] Linda Greenhouse, *Democracy and the Courts: The Case of Abortion*, 61 HASTINGS L.J. 1333, 1336–37 (citing George Gallup, *Abortion Seen up to Woman, Doctor*, WASH. POST, Aug. 25, 1972, at A2, *as reprinted in* Greenhouse and Siegel, *supra* note 74, at 201, 208–09). A Gallup poll showed that sixty-three percent of men believed that "the decision to have an abortion should be made solely by a woman and her physician." *Id.* at 209. Sixty-five percent of Protestants and fifty-six percent of Catholics agreed. *Id.* Fifty-nine percent of Democrats and sixty-eight percent of Republicans agreed. *Id.* Therefore, before abortion was made a nationwide political issue, not only did the seven justices in *Roe*'s majority agree with the procedure, but a majority of the country did also. *Id.*

[221] For example, Justice O'Connor's position on abortion was a central decision in her nomination. *See Transcript of GOP debate at Reagan Library*, CNNPOLITICS.COM (June 30, 2008), http://edition.cnn.com/2008/POLITICS/01/30/GOPdebate.transcript/ ("On July 6, 1981 . . . Ronald Reagan wrote in his diary . . . Already the flak is starting and from my own supporters. Right-to-life people say she's pro-abortion."). In contrast, Justice John Paul Stevens's 1975 Senate confirmation hearing, three years after *Roe*, did not include a single question about abortion. *See* Greenhouse, *supra* note 220, at 1344.

[222] GREENHOUSE & SIEGEL, *supra* note 74, at 257.

[223] *Id.*

[224] *Id.* An interesting double standard existed in the triple-A campaign. Men were being criticized for passivity—in other words, they were acting undignified because they were not being violent by refusing to serve as soldiers in the war. And women were criticized for their aggression—in other words they were acting undignified because in electing to have an abortion they were being too violent.

[225] *See generally* Sidney Callahan, *Feminist as Anti-Abortionist*, NATIONAL CATHOLIC REPORTER, April 7, 1972, *reprinted in* BEFORE ROE V. WADE 46, 47 (Linda Greenhouse & Reva Siegel eds., 2010) ("Males have always searched, destroyed, cut, burned, and aggressively attacked anything in the way without regard to context, consequences and natural interrelationships. Women have been committed to creative nonviolent alternatives which seek more lasting solutions. Feminist values are highly attuned to conservation and the achievement of social and ecological health. What irony that a society confronted with a plastic basin filled with. . . fetal 'wastage,' could worry more about the problem of recycling the plastic. So where have all the flowers gone?"); *see also* Phyllis Schlafly, *Women's Libbers Do NOT Speak for Us*, THE PHYLLIS SCHLAFLY REPORT, Feb. 1972, *reprinted in* BEFORE ROE V. WADE 218–220 (Linda Greenhouse & Reva Siegal eds., 2010). "Phyllis Schlafly's attack on abortion never mentioned murder; she condemned abortion by associating it with the Equal Rights Amendment (ERA) and child care." GREENHOUSE & SIEGEL, *supra* note 74, at 257. As Schlafly said, her distaste for abortion stemmed from her concern for "marriage and motherhood." Schlafly, *supra*, at 220.

"dignity" delimited the abortion rights to the extent that it disturbed women's obligations in their separate sphere.

In response to Republicans, Democrats, unwilling to lose the Catholic demographic, also incorporated this definition of dignity into the abortion doctrine.[226] This concession influenced the vocabulary around abortion in the legislation and litigation leading up to *Planned Parenthood v. Casey*,[227] which had the ultimate effect of restricting abortion to those women who had already accepted their roles as wives and mothers. Therefore the *Casey* Court really did re-affirm *Roe*'s "essential [privacy] holding."[228] In essence, the Court replaced privacy with dignity, by maintaining the status quo of women's place in the family unit.[229]

In *Roe v. Wade* the Court powerfully affirmed the doctrine of separate spheres. Although *Roe* never explicitly used the word dignity, it cited to a myriad of cases that legally circumscribed a woman's choice to familial decisions: marriage,[230] procreation,[231] contraception,[232] family relationships,[233] child rearing, and education.[234] A woman who adhered to feminine dignity was guaranteed certain authority over this realm. In citing to these cases, *Roe* continued that tradition with privacy, implying that the abortion right would only be vested in women who made private family-based decisions and thus matched traditional norms of womanhood: wives and mothers. Abortions conducted within the context of family-planning are considered justified because decisions concerning families are inherently informed and private. Because the notion of feminine dignity as social obligation was limited to certain socio-economic classes, women who were impoverished often lacked the privilege of maintaining this dignified role as solely wives

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[226] Democrats agreed that a woman's dignity depended on her remaining predominantly a wife and mother within the family unit. For example, in the 1980 Democratic Party platform, politicians acknowledged the importance of female dignity. DEMOCRATIC PLATFORM OF 1980 (1980), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29607&st=dignity&st1=abortion#ixzz1GmATjtBo ("Reproductive Rights—We fully recognize the religious and ethical concerns which many Americans have about abortion. We also recognize the belief of many Americans that a woman has a right to choose whether and when to have a child.").

[227] *See generally* GREENHOUSE & SIEGEL, *supra* note 74 (discussing how political concessions by the Democratic party influenced the vocabulary around *Casey*).

[228] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1991).

[229] *See id.* at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . ."). *See also* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 31 ("What is new in *Casey* is the turn in the language from privacy to dignity.").

[230] Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)) (finding a personal right in marriage).

[231] *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942)) (finding the Court had recognized a right in procreation).

[232] *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972)) (contraception).

[233] *Id.* at 153 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (family relationships).

[234] *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, (1923)) (child-rearing and contraception).

and mothers, and have thus been denied the right to choose abortions.[235] In many ways, it was as if society was willing to allow mothers the indiscretion of choosing an abortion, so long as they still maintained their feminine dignity in other realms.

Parts of the *Casey* decision continued in this vein. For example, the statute at issue in *Casey* required married women to receive consent from their husbands and single minors to receive consent from their parents.[236] Assessing the statute, the Court held that only married women were entitled to a fully robust right to an abortion because they had fulfilled their "social" obligation.[237] There, the Court found that a *wife* need not inform her husband of her choice to abort because that choice involved was "central to *personal dignity*."[238] The Court stressed that "wives"[239] and "mothers"[240] were enti-

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[235] Later decisions relying on *Roe* similarly distinguished between women of means (dignified women), who could afford abortions, and poor women—granting abortion rights to the dignified woman, but not her poorer sister. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (holding that the government's funding of indigent women's childbirth-related expenses, but refusal to fund indigent women's abortion-related expenses, did not force poor women to surrender their abortion rights in exchange for a welfare benefit and was, therefore, not an unconstitutional condition); Bridges, *supra* note 86, at 173–74 ("When one considers that the right to privacy for non-poor women enables their access to abortion services, while the 'right' to privacy for poor women dismally fails to accomplish the same feat, can we still argue that non-poor women and poor women possess the same right?"); Kris Palencia, *Harris v. McRae: Indigent Women Must Bear the Consequences of the Hyde Amendment*, 12 Loy. U. Chi. L.J. 255, 256–60 (1980) (discussing how indigent women should be afforded the same right guaranteed to women who could afford the procedure).

[236] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1991).

[237] Ironically, *Carhart* reveals the paternalism of *Casey*'s definition of dignity. By securing the right, *Casey* initially appears to liberate women by allowing women to have abortions without notifying their husbands. However, *Carhart*'s extension of *Casey* reveals that the principle within *Casey*, when taken to its logical conclusion, is, in fact, paternalistic. In other words, comparing *Casey*'s variance of dignity to *Carhart*'s variance of dignity reveals that the version used in *Casey* was limited—reserved only for women who took on the obligation of wife- and mother-hood, which would not include women who could violently murder their babies. *Casey* permitted women discretion over family planning decisions, but as *Carhart* showed, this was only when they maintained their feminine dignified roles. This is in contrast to the use of masculine dignity in *Carhart*, which imbues the fetus with dignity closer to the Kantian conception of political autonomy discussed above.

[238] *Casey*, 505 U.S. at 851.

[239] This proposition is additionally evidenced by the way in which the Court ruled on the statute in *Casey*. In *Casey*, there were five provisions of the Pennsylvania Abortion Control Act of 1982 at issue, but only one of the prongs was struck down. *Casey*, 505 U.S. at 879–901. Section 3209, the prong struck down in *Casey*, required wives to obtain written consent for abortions from their husbands. The Court reasoned that this prong must be abolished because it put a woman at risk of being abused by her spouse. *Id.* at 893. In other words, the Court saw that for a wife to remain dignified she must have control over her decisions within the family. In contrast, the Court in *Casey* preserved the prong that forced minors to obtain parental consent even if they were at risk of being abused. In other words, the Court decided that women who assumed a traditional role as a wife could make a decision about "family planning"; however, an unwed minor needed her parents' approval. Therefore, only by succumbing to stereotypical roles within the family can a woman achieve dignity and earn the right to opt for an abortion.

[240] *Casey*, 505 U.S. at 852.

tled to the "right to make family decisions."[241] However, single minor women or poor women, who disturbed the natural order of separate spheres by not adhering to the pre-ordained concepts of feminine dignity, could be required by the State to carry their pregnancies to term[242] and to assume maternal roles, which would place them in their proper sphere.[243] Dignity therefore underscored that a woman's central role was in the family.[244] These notions had been firmly lodged in the doctrine from *Roe* to *Casey*.

Further reinforcing this construction of delimiting women's choice to the doctrine of separate spheres was the alternate definition of male dignity. Used in juxtaposition to this social obligation definition, it too undermined the abortion right, by reinforcing the boundary between spheres. By 1972, the Church, deeply steeped in the issue of abortion and working hard to mobilize the non-Catholic community,[245] turned to "the language of international human rights," including "the dignity of the child."[246] Under the clerical definition of male dignity, the fetus was the "ruler of the family, and the head of the woman" that made her "obedient . . . so that nothing be lacking of honor or of dignity in the obedience which she pays."[247] This echoed the general zeitgeist of the nation, "America discovered the child as the leading figure in the family, if not in history itself."[248] Women were beholden to their children above all other responsibilities. The Court used this idea of dignity[249] not in reference to the father but as to the fetus, later referred to as the child.[250] In *Carhart*, the fetus is depicted as a man with a right to auton-

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[241] *Id.* at 884.

[242] *See, e.g.*, *Casey*, 505 U.S. at 895 (contrasting the Court's position toward married women and unmarried minors).

[243] The Court stated that women of lower socioeconomic statuses were not affected by having to wait after a consultation with a doctor, since it was the right to make family decisions that was protected. *Id.* at 886. Although the waiting period has the effect of "increasing the cost and risk of delay of abortions," the Court found it did not "amount to [a] substantial obstacle[]." *Id.*

[244] The Court emphasized that a woman is not "isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus." *Casey*, 505 U.S. at 848. "The right is protected 'under the rubric of . . . family privacy.'" *Id.* at 839.

[245] Greenhouse, *supra* note 220, at 1341 (discussing the role of the Catholic Church in framing the abortion debate in the 1970s).

[246] *Id*. This terminology was coupled with the "wide circulation of photographs of the developing fetus as well as by disturbing images of fetuses dismembered by abortion," in other words invoking the *dignity* of the child. *Id.*

[247] Pope Pius XI, *supra* note 206, at ¶ 29.

[248] MARGOLIS, *supra* note 13, at 44.

[249] *See* Pope Pius XI, *supra* note 206, at ¶ 27–29. Starting with Pope Pius IX's 1931 Encyclical, the Church was committed to the idea that man's dignity included the maxim, "man is the ruler of the family, and the head of the woman; . . . subject and obedient to the man, so that nothing be lacking of honor or of dignity in the obedience which she pays." *Id.* In 1967, the Church perpetuated this definition of dignity in language that echoed its pro-life stance: "Every man is born to seek self-fulfillment, for every human life is called to some task by God." Pope Paul VI, Populorum Progressio ¶ 15 (March 26, 1967).

[250] Pope Paul VI, *supra* note 249, at ¶ 15 ("At birth a human being possesses certain aptitudes and abilities in germinal form, and these qualities are to be cultivated so that they may bear fruit.").

omy and liberty whose own social dignity outweighs a mother's right, grounded merely in feminine social dignity, to choose abortion. Instead of replacing it, *Carhart* reveals the limitations of *Casey*'s definition of dignity, which limits a woman's dignity to the weaker, feminine definition.

From the early 1980's, politicians took advantage of this rhetoric.[251] Starting with the Reagan Administration, presidential speeches focused on the life of the fetus, thereby undermining the authority of the woman's choice.[252] In a Proclamation observing "National Sanctity of Human Life Day," President Reagan stated that "since 1973 . . . more than 15 million unborn children have died in legalized abortions . . . ."[253] This political rhetoric of the fetus's dignity continued throughout the Reagan Administration and into the Bush Administration of the late 1990s.[254]

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[251] *See* Christine Stansell, *supra* note 149, at 14. Stansell writes that "the Catholic Church was the first to attack abortion." *Id.* Even before *Roe*, the Church hierarchy "coordinated a parish-by-parish effort to stop any sort of reform bill, including those for therapeutic abortions. The predominantly Catholic movement didn't broaden into the more ecumenical one we know until the late '70s and early '80s, when Protestant evangelicals first joined in." *Id.*

[252] While the Nixon campaign was responsible for invoking the dignity of the woman, the Reagan campaign was responsible for animating the dignity of the fetus. *See* Ronald Reagan, Remarks and a Question-and-Answer Session with Women Leaders of Christian Religious Organizations (Oct. 13, 1993), http://www.presidency.ucsb.edu/ws/index.php?pid=40630&st=dignity&st1=abortion#ixzz1GnGdBsGe ("Our administration has tried to make sure the handicapped receive the respect of the law for the dignity of their lives. And the same holds true, I believe deeply, for the unborn. . . . [U]ntil and unless it can be proven that the unborn child is not a living human being—and I don't think it can be proven—then we must protect the right of the unborn to life, liberty, and the pursuit of happiness."); *see also* National Sanctity of Human Life Day, 1991, Proclamation No. 6241, 56 Fed. Reg. 1,559 (Jan. 11, 1991) ("Abortion robs America of a portion of its future and denies preborn children the chance to grow, to contribute, and to enjoy a full life with all its challenges and opportunities."); National Sanctity of Human Life Day, 1987, Proclamation No. 5599, 52 Fed. Reg. 2,213 (Jan. 16, 1987) ("Abortion kills unborn babies and denies them forever their rights to 'Life, Liberty and the pursuit of Happiness.' "); National Sanctity of Human Life Day, 1986, Proclamation No. 5430, 51 Fed. Reg. 2,469 (Jan. 15, 1986) ("[T]he child in the womb is simply what each of us once was: a very young, very small, dependent, vulnerable member of the human family."); National Sanctity of Human Life Day, 1985, Proclamation No. 5292, 50 Fed. Reg. 2536 (Jan. 14, 1985) ("By permitting the destruction of unborn children throughout the term of pregnancy, our laws have brought about an inestimable loss of human life and potential."); President George Bush, Remarks to Participants in the March for Life Rally (Jan. 23, 1989), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16617 ("We are concerned about abortion because it deals with the lives of two human beings, mother and child."); President Ronald Reagan, Remarks to Participants in the March for Life Rally (Jan. 22, 1987), *available at* http://www.presidency.ucsb.edu/ws/?pid=34286 ("Today you remind all of us that abortion is not a harmless medical procedure but the taking of the life of a living human being.").

[253] President Ronald Reagan, National Sanctity of Human Life Day, 1984, Proclamation No. 5147, 49 Fed. Reg. 1,975 (Jan. 13, 1984).

[254] *See* President Ronald Reagan, National Sanctity of Human Life Day, 1985, Proclamation 5292 (Jan. 14, 1985) (using the word dignity to denounce the right to abortion). For more examples of the use of the word dignity to denounce abortion, see President Ronald Reagan, Proclamation 5430 (Jan. 15, 1986); President Ronald Reagan, National Sanctity of Human Life Day, 1987, Proclamation 5599 (Jan. 16, 1987); Ronald Reagan, Remarks to Participants in the March for Life Rally (Jan. 22, 1987); President George

By the early 2000s, Republicans and moral conservatives had achieved success with this rhetoric by playing both definitions of dignity off one another within the abortion doctrine. This tactic was used to advance fetal personhood, a new anti-abortion strategy that sought to give a fetus the same rights as a person, in two ways.[255] First, advocates of fetal rights invoked the rights of the fetus (masculine autonomous dignity) against maternal rights (feminine social dignity) to emphasize that the woman and the fetus "have [such] an intimate connection" that it delimits a woman's ability to act in severing that bond.[256] Furthermore, conservatives were able to use dignity to emphasize the traumatic effects of abortion on the mother. As Professor Jeannie Suk has written, "Recent years have seen growing alarm about a rising antiabortion discourse of women's psychological pain."[257] In essence, the vernacular went like this: dignified women do not kill their fetuses, and if they do, it traumatizes them.[258] This rhetorical use of dignity invoked

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Bush, Remarks to Participants in the March for Life Rally (Jan. 23, 1989); President George Bush, National Sanctity of Human Life Day, 1991, Proclamation 6241 (Jan. 11, 1991), *available at* http://www.presidency.ucsb.edu/.

[255] Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after* Planned Parenthood v. Casey, 22 FEMINIST FORMATIONS 101, 110 (2010) (examining the pro-life movement's efforts to advance the legal, moral, and political arguments for fetal personhood in the period following the Supreme Court's decision in *Casey)*.

[256] *Id.* at 109 ("[P]ro-life groups integrate the language of duty, morality and women's traditional (and religious) role as mother more thoroughly into their pleas for public support . . . . All of the rhetoric of this early period seemed aimed at presenting the fetus as a distinct and separate human being, and at characterizing the pregnant woman who would destroy that life as irresponsible, careless, self-interested or (even worse) feminist."); *see also* Stansell, *supra* note 149, at 14 ("By the late '90s, some right-to-life strategists began to search for a softer, more 'woman-friendly' message. They mixed the old rhetoric of protecting fetuses with new claims to defending women: from the pressures of loutish male partners too selfish to consider fatherhood, from domineering feminists, and from the depression and 'post-abortion syndrome' that supposedly ensues.").

[257] Suk, *supra* note 10, at 1195.

[258] *See generally* Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6 (Magazine), at 41, *available at* http://www.nytimes.com/2007/01/21/magazine/21abortion.t.html?pagewanted=all&_r=0; Francis J. Beckwith, *Taking Abortion Seriously: A Philosophical Critique of the New Anti-Abortion Rhetorical Shift*, 17 ETHICS & MED. 155 (2001) (arguing against new rhetorical strategy that stresses harm to women rather than fetal humanity because it implies that moral wrong of abortion depends on whether women suffer). *See also* Eileen Fegan, *Reclaiming Women's Agency: Exposing the Mental Health Effects of "Post-Abortion Syndrome" Propaganda*, *in* WOMEN, MADNESS, AND THE LAW 169, 187 (Wendy Chan et al. eds., 2005) ("In cultures, particularly North American, where women have fought and used their reproductive freedom to gain control over their lives—publicly exercising their agency in choosing legal abortion—PAS [post-abortion syndrome] has evolved as the anti-choice weapon to reverse the tide."); Ellie Lee, *Reinventing Abortion as a Social Problem: 'Postabortion Syndrome' in the United States and Britain*, *in* HOW CLAIMS SPREAD: CROSS- NATIONAL DIFFUSION OF SOCIAL PROBLEMS 39, 41 (Joel Best ed., 2001) ("Throughout the 1980s, U.S. antiabortionists argued that abortion can lead to PAS. By the decade's end, this claim generated a high-profile debate in the United States involving politicians of major stature, and provoked substantial media discussion of PAS."); Siegel, *The New Politics of Abortion*, *supra* note 27, at 1014 (describing the emergence of "[g]ender-based arguments against abortion [that] embed claims about protecting the unborn in an elaborate set of arguments about protecting women"); Reva Siegel & Sarah Blustain, *Mommy Dearest?*,

harmful traditional stereotypes of women as *solely* mothers and traumatized victims—creating a disempowered vision of woman—just as privacy did.

Politicians all across the country have picked up on the discourse.[259] Sarah Palin endorsed the dignity of motherhood, denouncing abortion no matter what the cost.[260] Legislative efforts in the House and Senate also echoed the dignity of mother and child in hopes of passing anti-abortion legislation.[261] But this message was articulated no clearer than in South Dakota, where the Republican legislature sponsored a religious taskforce to write a policy brief on abortion.[262] The report led to the draconian South Dakota law that made performing any abortion, except to save the life of the mother, a felony for physicians.[263] The law was based on the "rallying cry" of the anti-abortion movement "that abortion hurts women and that women are coerced into abortion."[264] This legislation replicated both the models of dignity. Eventually all of Washington began to inculcate the rationale.[265] In 2007, the Court decided to do the same.[266] In *Carhart*, "[t]he Court . . . [was said to have] adopted . . . the rhetoric of the anti-abortion movement."[267] Although voters overturned the South Dakota law, the logic behind it survived to inform Kennedy's opinion in *Gonzales v. Carhart*.[268]

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17 AM. PROSPECT 10, Oct. 1, 2006, at 22, *available at* http://prospect.org/article/mommy-dearest.

[259] Halva-Neubauer, *supra* note 255, at 117.

[260] Kate Philips, *Palin on Abortion and Gays*, N.Y. TIMES (September 30, 2008), http://thecaucus.blogs.nytimes.com/2008/09/30/palin-on-abortion-gays/.

[261] Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument,* 57 DUKE L. J., 1641, 1642–45 (2008) (discussing the development of the South Dakota law making abortion a felony) [hereinafter Siegel, *The Right's Reasons*].

[262] *Id.*; *see also* Siegel, *The New Politics of Abortion*, *supra* note 27, at 1009–11.

[263] Siegel, *The Right's Reasons*, *supra* note 261, at 1642–45; *see also* Siegel & Blustain, *supra* note 258, at 22.

[264] Siegel, *The Right's Reasons*, *supra* note 261, at 1646–47.

[265] *Id.*

[266] *Id.* at 1643–44 ("In fact, the South Dakota Task Force to Study Abortion, which recommended that the state ban abortion in 2005, heavily relied on the same Operation Outcry affidavits that Justice Kennedy cited in *Carhart*.").

[267] Toobin, *supra* note 37.

[268] *See* Siegel, *The Right's Reasons*, *supra* note 261, at 1643 (stating that the brief filed in *Carhart* draws this link). *See also* Gonzales v. Carhart, 550 U.S. 124, 159 (2006) (citing Brief for Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner at 22–24, Gonzales v. Carhart, 550 U.S. 124 (2006) (No. 05-380), 2006 WL 1436684 [hereinafter Brief for Sandra Cano]). One hundred and eighty "post-abortive" women joined Sandra Cano's brief, which offers ninety-six pages of excerpts from affidavits testifying to "their real life experiences" of how "abortion in practice hurts women's health." Brief for Sandra Cano at 2. The brief informs the Court that the affidavits provided were merely a sampling from "approximately 2,000 on file with The Justice Foundation." *Id.* at app. 11. The South Dakota Task Force Report repeatedly relies on the affidavits. See S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY 21–22, 33, 38–39 (2005).

In *Carhart* the Court suggested that a woman's dignity depended on maintaining the dignity of her fetus.[269] This invocation reaffirmed both concepts. First, the woman's social dignity, her place in society, limited her choices with respect to abortion by assuming that, as a mother, she would be devastated by abortion.[270] Second, Kennedy juxtaposed this social dignity[271] against the fetus's masculine dignity, the "dignity of human life."[272] By invoking the fetus as a human life, he further undermined abortion rights.[273] Prior to *Carhart*, the mother's dignity had been contrasted with and weighed against the State's interest, resulting in a standard that allowed the state to regulate abortion without creating an undue burden on the mother.[274] By introducing the concept of the fetus's dignity, the decision was now weighed against the life of the child which reframed the choice in a way that no dignified woman could possibly opt for an abortion. Painting the fetus as a human life transformed the woman's choice into a mortal one[275] about life or death[276] instead of family planning. In doing so, the Court placed the abortion choice outside the realm of *social dignity*,[277] structurally, no longer within the woman's sphere. For Justice Kennedy, the dignity of the fetus therefore easily trumped the woman's dignity to make a familial choice.

Academics have duly noted that the law does not "understand" women who make choices of violence, even when acting in self-defense. Instead, it

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[269] The *Carhart* Court juxtaposed the fetus's dignity against *Casey*'s variance of the mother's dignity to find that the mother's dignity was inferior. *Compare Carhart*, 550 U.S. at 157 ("The Act expresses respect for the dignity of human life."), *with Carhart*, 550 U.S. at 170 (Ginsburg, J., dissenting) (referencing "a woman's 'dignity and autonomy'"). *Cf.* Siegel, *The Right's Reasons*, *supra* note 261, at 1763 (observing that *Casey* at times focused on women's autonomy to choose to abort their fetuses). *But see* Atkinson, *supra* note 73, at 620 (2011) (arguing that justice is administered on a two-track basis, with the first track favoring rational, autonomous actors and the second track—which is applied to women—used for less respected people in society). Applying Atkinson's framework, the fact that a woman can even be put on the second track (reflecting the *Casey* feminine social obligation version of dignity) immediately disqualifies the woman from the (male) autonomy concept of dignity.

[270] *See Carhart*, 550 U.S. at 159.

[271] *Id.* at 170.

[272] *Id.* at 157.

[273] *Id.*

[274] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1991) (plurality opinion) (upholding a woman's right to an abortion and creating the undue burden standard to protect that right).

[275] *See supra* Part II.A.

[276] Alongside the Court's descriptions of the fetus as a "baby" and an "unborn child," the gore of a partial birth abortion suggested murder. *See, e.g.*, *Carhart,* 550 U.S at 134, 139–40, 151, 160. For a discussion of how the "law has always more readily 'understood' male violence whereas women who enact violence are treated with 'suspicion'," see Graeme Coss, *Provocation, Law Reform and the Medea Syndrome*, 28 CRIMINAL L. J, 133, 135–40 (2004). Even in cases of self-defense such as where a battered wife decided to end her suffering by smashing her husband's head in, "she was not perceived as a worthy recipient of the generosity of the defence," unlike male equivalents who are heralded. *Id.*

[277] *See supra* Part II.A. (discussing the idea of social dignity, used in the abortion doctrine, undermining the empowerment of women).

rewards the violent male with more "leniency."[278] In other words, the law penalizes a violent woman, for transgressing her social role, whereas it turns a blind-eye to a man defending his honor. Unlike familial choices dealing with contraception, education, or health, abortion became a violent act under the rubric of dignity. *Carhart* therefore rejected the right to abortion according to stereotypes about what choices make a woman dignified.[279] In this way, dignity undermined a right to an abortion in a manner similar to the way that privacy had before, embracing outdated notions of women as passive docile creatures rather than actors capable of acting in their own self-defense.

B. Dignity: Why Are Feminists Charmed?

If dignity does not provide full protection for abortion, but limits its protection to certain socio-economic demographics of the nation, then why do feminists continue to return to the word? In the section below, this Article will explain why legal scholars have recently advocated for the use of "dignity" to defend abortion revealing that the reasons are similar to those of feminists in the *Roe* era who advocated for "privacy." First, scholars have been motivated by the Court's recent trend to appeal to dignity within the context of international law. Second, the allure of dignity is especially strong because of Justice Kennedy's particular respect for the term.

1. *Dignity in International Law*

Although dignity is nowhere to be found in our own constitutional texts, the term is immediately visible and has been increasingly used in the international context.[280] International law has mostly developed in the past

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[278] Coss, *supra* note 276, at 5–6 ("And yet the courts have done just that, or worse, historically shown greater leniency to the jealous male. The criminal law has always more readily understood male violence.") This is integral to the case at hand, which would force a woman who would otherwise be deemed violent, engaging in the brutal killing of the unborn, to carry a child to term.

[279] *See supra* Part II. Justice Ginsburg stated, "There was a time, not so long ago, when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." *Carhart,* 550 U.S at 171 (Ginsburg, J., dissenting) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)). "This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." *Id.* at 185. *See also* Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. REV. OF BOOKS (May 31, 2007), *available at* http://www.nybooks.com/articles/20215 ("Kennedy's paternalism flatly contradicts the principle that provided the rationale of the three-justice opinion in *Casey*: that people must be left free to make decisions that, drawing on their fundamental ethical values, define their own conception of life.").

[280] The concept of 'human dignity' now plays a central role in human rights discourse. *See generally* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002) (discussing dignity from theological, philosophical, historical, classical, and legal perspectives).

century, following the atrocities of World War II.[281] Among the international texts that include the term dignity are the Universal Declaration of Human Rights,[282] the Rome Statute of the International Criminal Court,[283] and the articles of the Geneva Convention.[284] Initially international attorneys employed dignity to express the harrowing victimization experienced by the Holocaust survivors, in order to impose retribution against the Nazi regime. This pattern was later replicated in other international contexts dealing with similar forms of victimhood.[285] For example, dignity became a popular trope with interest groups such as feminists[286] and human rights advocates[287] who used the language in prosecutions dealing with violence against women.[288] Dignity was especially useful in war crimes cases in Bosnia and Rwanda where women were raped as a mechanism of war.[289]

The recent abundance of successful dignity jurisprudence within international law has encouraged scholars to employ it in the domestic realm, hoping for the same results.[290] For example scholars such as Maxine Good-

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[281] *See* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 1–2 ("Since the end of World War II[,] [when] courts around the world [began] to recognize 'the dignity and worth of the human person' and one constitution after another made the right to human dignity fundamental, even some American justices began to recognize how the value of human dignity underlies other constitutional rights.").

[282] Universal Declaration of Human Rights, *supra* note 173, at Preamble (highlighting "the dignity and worth of the human person").

[283] Rome Statute of the International Criminal Court, art. 8(2)(c), July 17, 1988, U.N.T.S. 90, (stating that "committing outrages upon personal dignity, in particular humiliating and degrading treatment" is prohibited).

[284] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949 6 U.S.T. 3516, 75 U.N.T.S. 287, (proscribing "outrages upon personal dignity, in particular humiliating and degrading treatment").

[285] Rao, *supra* note 182, at 209–10 (discussing the relationship between victimhood and the term dignity).

[286] *See, e.g.*, Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 804 (2005) (discussing how dignity was used in the criminal rape prosecutions in the Balkans). For further discussion of feminist approaches to international human rights issues, see, for example, Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L. J. 427 (2005), and Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 365–66 (2006).

[287] *See, e.g.*, Rao, *supra* note 182, at 204 (arguing that "acceptance of the modern, largely European conception of human dignity would weaken American constitutional protections for individual rights").

[288] *See generally* Halley et al., *supra* note 286 (critical observations on feminist litigations in the international context as inappropriate activism sometimes yielding unwanted consequences).

[289] *See, e.g.*, Prosecutor v. Kunarac, Kovac, & Vokovic, Case No. IT-96-23 & IT-96-23/1, Judgment, ¶ 161 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (citing to dignity in a prosecution for rape); Prosecutor v. Musema, Case No. ICTR 96-13-A, Judgment and Sentence, ¶ 285 (Jan. 27, 2000) (citing to dignity in a prosecution for rape).

[290] *See* Rao, *supra* note 182, at 214 ("Most scholars writing in this area advocate a progressive view of 'human dignity.' They seek to expand the use of the term within American constitutional jurisprudence and consider it helpful to import modern, interna-

man, Gerald Neuman, and Louis Henkin have all advocated for the notion of human dignity within international law to be incorporated into our national legal order.[291] The abortion doctrine has been no stranger to this trend.[292] In addition to the vagueness of such language,[293] however, feminists should hesitate in transplanting dignity from international law for several reasons. First, dignity has no stronghold in our constitutional order.[294] Although some scholars have tried to make analogies to the Fourth, Fifth, and Eighth Amendments, with particular attention to American torture jurisprudence,[295] this theory has little justification.[296] Dignity just doesn't translate into the American context.[297] But most damning, when dignity is gendered, this term carries with it traces of victimhood, such as the kind used by Justice Kennedy to unravel the right to abortion in *Gonzales v. Carhart*.

2. *Dignity in the Supreme Court*

Feminists have recommended the use of the word "dignity" not only because of its success in the international realm but also because of its recent

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tional, and European notions of human dignity into United States constitutional law."). *See also* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOWARD L.J. 145, 184–88 (1984) ("In the contemporary setting, human rights law provides a rich set of general criteria and content for supplementation of past trends in Supreme Court decisions about human dignity."); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 87–88 (Sujit Choudry ed., 2007).

[291] *Rao*, *supra* note 182, at 213–14 (discussing how these academics suggest widening the use of dignity within American law).

[292] Miller, *supra* note 39, at 39–42.

[293] For example, President G.W. Bush said in 2006 that dignity is "very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation . . . . " George W. Bush, PRESS CONFERENCE BY THE PRESIDENT (Sept. 15, 2006), *available at* http://www.pbs.org/newshour/bb/politics/july-dec06/bush_09-15.html.

[294] *Cf.* Gerald L. Neuman, *Human Dignity in United States Constitutional Law, in* ZURE AOTONOMMIE DES INDIVIDUUMS 271 (Dieter Simon & Manfred Weiss eds., 2000) ("Even originalists should recognize that belief in human dignity is inherent in the constitutional structure . . . *as corrected by* the Fourteenth Amendment.") (emphasis added).

[295] Jeremy Waldron suggests that cruel and unusual treatment upon personal dignity is cruel, unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Jeremy Waldron, *Cruel, Inhuman and Degrading Treatment: The Words Themselves* 5 (N.Y. Univ. School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 08-36, 2008) [hereinafter Waldron, *Cruel, Inhuman and Degrading Treatment*].

[296] *See id.* at 43 ("Given the massive moral differences that exist between peoples and cultures, how can the provisions we have been studying possibly be read as credible invocations of a common positive morality? We have to be careful how we understand the impact of cultural relativity on the operation of these provisions.").

[297] The term dignity is not used within our constitution; however, some scholars, like Ronald Dworkin, would likely support its use. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977) ("He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.").

and increasing resonance with the Supreme Court in general, and with Justice Kennedy in particular.[298] Even though it is not tethered to any constitutional text, the Court has referred to dignity almost 1000 times in its 200-plus year history.[299] In fact, the Justices have read dignity into the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments as well as the concepts of sovereign immunity and federalism.[300] The word appears in some of our most influential cases[301] and doctrines, including those of speech, capital punishment, and federalism.[302]

But scholars are most interested in the special appeal the word "dignity" has for the current swing vote, Justice Kennedy. Justice Kennedy is a well-known proponent of utilizing the dignity language found in international law.[303] Most notably in *Lawrence v. Texas* and *Gonzales v. Carhart*, he has shown a special proclivity for dignity justifications.[304] And although some judges, like Justice Scalia, strongly oppose the use of international law, they do not sit in the same swing seat as Justice Kennedy.[305] Therefore, just as the litigators for *Roe v. Wade* had a specific eye towards Justice Blackmun because of his previous work with the medical profession, today litigators focus on dignity with an eye towards Justice Kennedy's vote.[306]

Feminists should question the decision to fit abortion rights within a "dignity" framework. Even though winning a case at a given time seems like the preferred strategy, something is lacking in this tactic. This is not the first time a criticism has been lodged against this litigation-driven strategy.

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[298] *See* Siegel, *Dignity and the Politics of Protection*, *supra* note 5, at 1739–40 (discussing Justice Kennedy's use of dignity in "his prominent decisions regarding sexual autonomy").

[299] Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 1.

[300] *Id.* at 2.

[301] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Furman v. Georgia, 408 U.S. 238, 270–71 (1972) (Brennan, J., concurring) ("A punishment is 'cruel and unusual' therefore, if it does not comport with human dignity. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.").

[302] *See* Daly, *Human Dignity in the Roberts Court*, *supra* note 177, at 30–43.

[303] For examples of influential cases authored by Justice Kennedy in relation to this doctrine, see, for example, Roper v. Simmons, 43 U.S. 551, 560 (2005) (arguing that "[t]he opinion of the world community . . . does provide respected and significant conformation for our own conclusions" that execution of minors is a violation of human dignity); *Lawrence,* 539 U.S. at 576 (citing the European Court of Human Rights, which struck down an anti-sodomy law, as an example of foreign jurisdictions respecting the dignity of homosexuals).

[304] *See* Gonzales v. Carhart, 550 U.S. 124, 157 (2006); *Lawrence*, 539 U.S. at 567 (2003).

[305] *See, e.g.*, *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta."); Foster v. Florida, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of cert.); Roper v. Simmons, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting).

[306] Siegel, *Dignity and the Politics of Protection*, *supra* note 5.

For example, as Reva Siegel has noted elsewhere, "[a] generation ago, progressives responded to violent backlash against *Brown v. Board of Education* by attempting to develop principles of constitutional theory they hoped would justify controversial decisions."[307] In other words, winning *Brown v. Board* did not establish the formidable right of equality that litigants had hoped for.[308] Siegel continues, "[t]oday, there are many progressives who have lost confidence in this project" of developing strong principles—such as a theory of power—that "might provoke populist resentments."[309] Instead, they suggest focusing away from litigation altogether.

Siegel suggests, however, a measured revisit to this strategy may prove successful. The notion here, being that perhaps the words used in litigation should carry some connection to the right they are trying to secure. My argument is that although dignity as a term does not have altogether deplorable connotations, it does seem divorced from the notions of empowerment initially envisioned with the right. Moreover it seems especially distant from allowing a procedure described as "brutal."[310] After all, "dignified" women would not engage in acts as brutal as abortion.

This is where it makes sense to say that abortion instead seems to be more about something such as power. Of course, the struggle is that the law has never been comfortable with recognizing women's violent power[311]—in fact, when the author suggested this term to an attorney who had participated in Supreme Court litigation on abortion, the attorney replied, "Yeah, but that's scary." But before cowering away, perhaps feminists should take heed of the negative effects the use of "dignity" in *Casey* and *Carhart* had on the doctrine[312] and take the challenge to look elsewhere.

Conclusion

In conclusion, this article hopes to engage with the recent influx of articles published since *Gonzales v. Carhart* that have offered new terms to bolster the abortion right. This paper shows that the strategy of these articles lies in the perilous path of hindsight. As was the case with privacy in *Roe v. Wade*, "dignity" has been chosen for its constitutional salience rather than its logical connection to the specific goals or unique moral difficulties of abortion. Like the term "privacy," this term fails to capture the essence of what it means for a woman to have an abortion, and although its popularity

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[307] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. 373, 374 (2007).

[308] *See generally* Martha Minow, In Brown's Wake: Legacies of America's Educational Landmark (2010) (discussing the legacy of *Brown v. Board of Educ.*).

[309] *Id.*

[310] Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

[311] Coss, *supra* note 276, at 135–40.

[312] *See supra* Part II.A.

with Justice Kennedy may gain it short term success, this comes at the cost of casting women in a disempowered light and rooting women's fundamental rights in the Victorian stereotype of what it means to be feminine.

Feminists have focused on constitutional compatibility rather than the initial impetus driving the right: *women's power to terminate a pregnancy*. I therefore further propose that it is *this* rationale, rather than a recourse to what seems popular with the Court at a given time, that feminists should turn to. As Professor Charles Fried has recently written, our cases should be somewhat keen on "[t]he frank embrace of moral principle lurking in our constitutional tradition."[313] Such a principle is "what makes . . . decisions so strong and, I venture to predict, permanent."[314] Although permanence is not always the ultimate goal, a term such as power, embraced frankly and honestly, could offer a more lasting and reasoned foundation. And despite the use of power having been criticized,[315] there is some suggestion that such words provide legitimacy.[316] So future feminists may consider embracing a word that calls the abortion right what it is: a struggle for *power*.[317]

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[313] Charles Fried, *On Judgment*, 15 Lewis & Clark L. Rev. 1025, 1044 (2012).

[314] *Id.*

[315] *See* Raymond Geuss, Philosophy and Real Politics 7–9 (2008) (considering whether ethics can be separate from words and arguing that the language of politics will always be imbued with power). Geuss proposes a realist approach to political life, recognizing politics is not about principles but power-relations. *Id.*

[316] *See* Bernard Williams, In the Beginning Was The Deed: Realism and Moralism in Political Argument 1–3 (2005) (claiming this standard is presented as basic within political orders, and is the best way to underwrite fundamental liberal principles particular to the modern state, including basic human rights).

[317] For further discussion of this topic, see Baranetsky, *supra* note 170.