Privacy or Equality?
Revisiting the Post-*Roe* Abortion Debates in a Post-*Roe* World

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The decision in *Dobbs v. Jackson Women's Health Organization* to overturn *Roe v. Wade* came as a devastating shock to supporters of abortion rights and reproductive justice, but not necessarily as a surprise. For decades, an increasingly conservative Supreme Court chipped away at the *Roe* decision in a long line of cases, while states eager to see the decision overturned imposed ever more draconian regulations and restrictions on abortion seekers and providers within their borders. Committed abortion rights advocates have repeatedly warned against the complacent assumption that past vindications of *Roe*, most notably *Planned Parenthood v. Casey* in 1992, fortified the decision to the point that no future Court would dare to overturn it. And now, as their worst fears have been vindicated, they can and have pointed to many villains: the mobilized and committed anti-abortion movement above all, with its decades-long strategy to place anti-*Roe* judges on the courts, but also Democratic politicians who could offer only mealy-mouthed, hedged defenses of abortion rights and largely preferred to avoid the issue entirely, and even many fellow abortion rights advocates who failed to place abortion rights within a broader reproductive justice framework, alienating potential supporters and providing an unnecessarily flimsy and narrow foundation for abortion rights that centered middle and upper-class white women.

Indeed, many abortion rights advocates have criticized the *Roe* decision itself along these lines. The byzantine trimester system, the recognition of a compelling state interest in "protecting potential life", the centering of the doctor rather than the pregnant woman in many parts of the decision, the ambiguous constitutional rationale: all have been subjected to harsh and compelling criticism by friends of the holding but not the analysis.[1] Above all, though, the grounding of abortion rights on a constitutional right to privacy became an immediate and persistent object of criticism and controversy. Feminist critics of the privacy rationale proffered an alternative grounding in equality as a superior rationale for legal, philosophical, and strategic political reasons.[2] The battle lines thus drawn, numerous scholars have weighed in on the privacy vs. equality debate. With the oft-prophesied death of *Roe* now a *fait accompli*, it is worth revisiting this debate to see what light it might shed on our post-*Roe* world, and on the movement to restore abortion rights on even sturdier ground this time.

I argue that defenders of the equality rationale make a very strong case that abortion rights are an essential component of gender equality, and that failing to recognize this leads to an impoverished defense of abortion rights. However, in contrast to many advocates of the equality framework, I do not see a strong equality-based defense of abortion rights as standing in opposition to privacy-based justifications, but rather as an essential ally and supplement. Privacy truly does get at something essential about the decision to seek an abortion. That is to say, both

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[1] I struggle throughout this paper with gendered usages referring to the pregnant person. At times I use the term "pregnant woman" and at other times I use the term "pregnant person". This is because many of the texts and thinkers I am engaging with explicitly assume the pregnant person is indeed a woman, and their arguments sometimes require that presumption. When I use the term pregnant woman, I do not mean to suggest that only women can be pregnant, but to accurately reflect the positions of the authors and activists that I am engaging with.

[2] Drucilla Cornell, "Abortion: Dismembered Selves and Wandering Wombs," in *The Imaginary Domain: Abortion, Pornography, and Sexual Harassment* (New York: Routledge, 1995), 31-94; Catherine Mackinnon, "Privacy v. Equality: Beyond *Roe v. Wade,*" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 93-102; Frances Olsen, "A Finger to the Devil: Abortion, Privacy, and Equality," in *Dissent* (Summer 1991): 377-382.

privacy and equality are key components of the defense of abortion rights and in fact illuminate each other. Furthermore, when operating in tandem, privacy and equality provide the best theoretical and practical foundation for a much more capacious vision of reproductive justice informed by an intersectional understanding of the reproductive burdens endured by those multiply marginalized by gender, race, and class.

In the course of making this argument, I also consider the place of liberty and/or autonomy in these debates.[3] Many of the defenders of the privacy rationale articulate the meaning of privacy in such a way that make it difficult to distinguish from liberty or autonomy. And while liberty and autonomy are very obviously also at stake in abortion rights, I argue that privacy entails more than just liberty, particularly with respect to what kind of standards it imposes on the state and other actors. When privacy is distinguished further in this way, we can see why many of the feminist critiques of *Roe*'s reliance on privacy are only partially on target. The trouble in *Roe* is that privacy is not sufficiently distinguished from liberty, and this permits a continual weakening of abortion rights in future cases that a stronger conception of privacy would not permit. Ultimately, then, we find that a robust defense of reproductive rights requires a theoretical foundation in privacy and equality, with privacy understood as protecting a certain subset of particularly personal and intimate liberties.

[3] I recognize that technical distinctions can be made between liberty and autonomy, with the former referring to the absence of direct impediments to individual action from outside parties, especially the government, and the latter referring to a state in which an individual's will is truly self-directed. On such a distinction, one requires liberty in order to have autonomy, but one may still lack autonomy even where one has liberty. This distinction, however, begins to collapse when critics of purely negative interpretations of liberty advocate for more substantive and positive accounts. In the abortion debates, "autonomy" and "liberty" are often used interchangeably, or at least too loosely to track the technical distinction. I generally use the term liberty simply because it appears directly in the due process clause of the Constitution, thus affording an explicit constitutional alternative to privacy. But I also use the term autonomy when it is used by another thinker with whom I am engaging.

The Privacy Justification and its Critics

In many ways, the privacy justification for abortion articulated in *Roe* was merely a matter of jurisprudential convenience. The concept of a constitutional right to privacy that specifically covers certain forms of decisional autonomy, rather than simply informational privacy or the protection against unreasonable searches and seizures afforded by the 4th amendment, had already emerged through an earlier set of cases, most importantly the well-known contraception cases, *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), often cited as precedents for *Roe*. In *Griswold*, the Court found that a Connecticut law barring the dissemination of information about and the use of contraceptives violated marital privacy. The decision rested heavily on the purported sanctity of the marital relationship: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraception? The very idea is repulsive to the notions of privacy surrounding the marital relationship."[4] *Eisenstadt* backed away from this concept of marital privacy, finding instead an individual right to privacy to strike down a Massachusetts law prohibiting the distribution of contraceptives to unmarried people. A key passage in *Eisenstadt* clearly lays the groundwork for a privacy rationale in *Roe* one year later:

> Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[5]

[4] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[5] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Roe necessarily inherited much of the ambiguity and confusion surrounding the constitutional basis for the privacy rights identified in *Griswold* and *Eisenstadt*. Where in the Constitution were these rights located? Was this a revival of the long-disavowed tradition of substantive due process, made notorious during the era of *Lochner v. New York*? Or did this right to privacy emerge from various emanations and penumbras of the Bill of Rights, as Justice Douglas suggested in his *Griswold* opinion? Or perhaps the Ninth Amendment's protection of unspecified unenumerated rights was sufficient to ground such a right, as suggested by Justice Goldberg in his *Griswold* concurrence? Our concern here is not primarily with the constitutional basis for a right to privacy, however, but with the substance of this right. What does a right to privacy actually entail, and how is this right distinct from the general idea of "liberty" explicitly named in the 14th amendment and serving as the foundation for most substantive due process decisions?

Justice Blackmun's majority decision in *Roe* offers surprisingly little guidance in this respect, and where he does elaborate on the concept of privacy, new concerns arise. He simply asserts that past decisions establishing a constitutional right to privacy indicate that this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[6] He notes various harms that may come to a woman who cannot make this decision, including physical and psychological harms. But he does not clarify why these harms specifically establish a privacy concern, rather than a more general liberty concern, or some other right altogether. Without further explication of the relationship between abortion and privacy, Justice Blackmun's account remains vulnerable to Justice Rehnquist's objection in his dissent that Blackmun has

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

essentially conflated privacy with liberty, and that the Court has never held liberty is in all cases inviolable:

> I have difficulty in concluding, as the Court does, that the right to 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of the word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment….
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> If the Court means by 'privacy' no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of 'liberty' protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty….But that liberty is not absolutely guaranteed against deprivation, only against deprivation without due process of law….[7]

In actuality, Blackmun plainly agrees with Rehnquist that the right at stake, whether characterized as liberty or privacy, is not inviolable. Instead, they disagree about where the line between constitutional and unconstitutional state regulations should be drawn. But Blackmun offers no substantive response at all to Rehnquist's objection that the alleged right to privacy at stake here is merely an alternative way to describe a general right to liberty.

Blackmun's own attempts to circumscribe the right to privacy he has just asserted, while nowhere near as dramatic as Rehnquist's, create additional concerns about the nature and meaning of the right. Blackmun lists several compelling state interests that justify regulations and even prohibitions of abortion at various stages during the pregnancy, including interests "in safeguarding health, in maintaining medical standards, and in protecting potential life."[8] Furthermore, the privacy right in *Roe* is unique, because "[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo, and, later, a fetus….The situation therefore is

[7] *Roe v. Wade* (Rehnquist J. dissenting).
[8] *Roe v. Wade*.

inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education…."[9] The presence of the embryo/fetus ultimately leads Blackmun to develop *Roe*'s trimester framework, later abandoned in *Casey*, which permitted no regulations whatsoever on abortions during the first trimester, regulations intended to secure a safe medical procedure during the second trimester, and regulations to express the State's interest in potential life during the third trimester, up to and including prohibitions on the procedure provided exceptions to protect the life and health of the mother.

Justice Blackmun's lack of precision in defining the relationship between abortion and privacy has enabled his many critics to hold the very concept of privacy itself accountable for the Court's subsequent weakening of abortion rights in a series of decisions. For example, Drucilla Cornell interprets the right to privacy defended in *Roe* as a "right to be left alone"—a direct quote from Samuel Warren and Louis Brandeis's classic 1890 article, "The Right to Privacy," analyzing the common law right to privacy and cited by many future lawyers and legal scholars investigating the nature of this right.[10] Such a right establishes only negative state obligations not to interfere, but no positive state obligations to enable or support. Indeed, such positive state actions can be read as their own form of interference in the private sphere. And, as Cornell notes, equal access to abortion sometimes requires precisely the form of interference that a "right to be left alone" either fails to secure or actively rules out: "The right to bodily integrity, dependent as it is on social and symbolic recognition, demands the establishment of conditions in which safe abortions are available to women of every race, class, and nationality."[11] It follows, as Catherine Mackinnon argues, that the privacy analysis in *Roe* "makes *Harris v. McRae*, in

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[9] *Roe v. Wade*.
[10] Cornell, *The Imaginary Domain*, 33; Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-220.
[11] Cornell, *The Imaginary Domain*, 33.

which public funding for abortions was held not to be required, appear consistent with the larger meaning of *Roe*."[12] For Mackinnon, any appeal to privacy necessarily replicates false, ideologically pernicious assumptions that the so-called private sphere, or the sphere free of government intervention, is a sphere of freedom for all, including women, and that freedom therefore requires the absence of government regulation. This ideology culminates in *Harris v. McRae*'s effective exclusion of poor women reliant on Medicaid from meaningful access to abortion.

Even worse, assumptions about the private sphere as a sphere of freedom obscure the many ways in which women do not exercise meaningful control over their sexual and reproductive lives to begin with. It is not merely explicit state restrictions on women's sexual and reproductive choices, but a patriarchal structure permeating not only official state law and policy but also social and economic relations, that deprive women of meaningful sexual and reproductive autonomy. Privacy ultimately serves to protect this patriarchal structure by relegating it to an invisible realm screened off from state intervention: "It is probably not coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of what is covered by privacy doctrine."[13] On this account, the privacy rationale in *Roe* not only fails to secure meaningful abortion access for many pregnant women, but actively conspires in the subordination of women by shielding from state scrutiny and intervention the very social domains in which their subordination is secured.

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[12] Mackinnon, *Feminism Unmodified*, 93.
[13] Mackinnon, *Feminism Unmodified*, 101.

An additional critique of the privacy rationale in *Roe* is rooted more explicitly in the actual text and logic of the majority opinion. Justice Blackmun's account of the decision to have an abortion repeatedly invokes not only the pregnant woman but also her doctor, describing a right to privacy that encompasses and protects the woman, her doctor, and their relationship. Indeed, the lawsuit in *Roe* was brought not only by Jane Roe, the pregnant woman unable to obtain a legal abortion in Texas, but also by a doctor, James Hubert Hallford, who had been previously arrested for violating the state's abortion statutes and alleged that "they violated his own and his patients' right to privacy under the doctor-patient relationship and his own right to practice medicine…"[14] Accordingly, after listing the various harms that may come to a pregnant woman forced to carry the pregnancy to term against her will, Blackmun writes: "All these are factors the woman and her responsible physician necessarily will consider in consultation."[15] Later in the decision, Blackmun writes as if the decision to go forward with an abortion ultimately resides with the (presumed male) doctor and not the pregnant woman: "[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[16] For Reva Siegel, "Roe recognizes that a woman has a privacy right to make decisions about abortion, and describes this right in medical terms: it is a right to be exercised under the guidance of a physician."[17] Referring to Siegel's account of *Roe*'s medical framework for privacy, Deborah Nelson draws out the consequences for the woman's presumed autonomy:

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[14] *Roe v. Wade*.
[15] *Roe v. Wade*.
[16] *Roe v. Wade*.
[17] Reva Siegel, "Abortion as a Sex Equality Right: Its Basis in Feminist Theory," in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*, eds. Martha Fineman and Isabel Karpin (New York: Columbia University Press, 1995), 53.

> By introducing the doctor as the necessary partner in this 'private' decision, the Court transformed the right to privacy, often called 'the right to silence,' into one that entails confession, persuasion, and testimony. This reconstruction of the notion of autonomy when it regulated women suggests that the relationship between withdrawal into the private sphere and autonomy cannot be assumed. Moreover, insofar as bodies, especially women's bodies, are figured in spatial terms, the inherited language of privacy as a protected zone may be the very language that feminists need to interrogate and transform.[18]

In short, the privacy right as described in *Roe* compels the pregnant woman to share her decision, and her reasons for it, with a doctor, and it is the doctor's ultimate prerogative to determine if these reasons warrant the procedure.

Critics of *Roe*'s privacy rationale, including Mackinnon, Cornell, and Siegel, consistently offer equality as an alternative. Even former Supreme Court Justice Ruth Bader Ginsburg has recommended an equality alternative, pointing to its explicit constitutional basis in the Fourteenth Amendment equal protection clause and the Court's recent expansion of its equal protection standards of review to include an intermediate tier of scrutiny for sex-based classifications.[19] While this argument can be read as a purely strategic one about the likely resilience and persuasiveness of constitutional arguments, feminists (including Ginsburg) also provide compelling substantive arguments in favor of an equality rationale rooted in the gender role assumptions that have long underpinned social understandings of sex, reproduction, childbirth, and mothering. We turn to these arguments now.

The Equality Alternative to Privacy

[18] Deborah Nelson, "Beyond Privacy: Confessions Between a Woman and her Doctor," *Feminist Studies* 25.2 (1999): 282.
[19] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," *North Carolina Law Review* 63.2 (1985): 375-386.

Today, most of the public arguments against abortion equate the procedure with murder, claiming that the embryo/fetus, from the moment of conception, is a human life. This argument does not rely on any explicit assumptions about gender roles. The fact that the vast majority of pregnant people are women has no intrinsic bearing on the question of whether abortion is murder.[20] But as Reva Siegel explains, the "murder" argument was not always the sole or even predominant argument against abortion. Siegel explores the nineteenth-century movement to criminalize abortion, driven largely by doctors. She notes that, in addition to making physiological arguments about when life begins, anti-abortion doctors also emphasized "woman's duty to procreate" stemming from her possession of a uterus.[21] Doctors were responding to feminist attempts at the time to promote "voluntary motherhood" by demanding that women have the right to decline sex with their husbands, even though prominent nineteenth-feminists generally opposed abortion as well. The campaign for voluntary motherhood was not solely about the bodily autonomy of wives; it also sought to expand the opportunities for women to participate in the public sphere of work and politics by limiting their maternal and familial obligations. Thus, doctors saw the criminalization of abortion as one weapon in a broader battle "to preserve traditional gender roles in matters of sexuality and motherhood, education and work, and affairs of suffrage and state."[22] When the criminalization of abortion (and contraception) operates to maintain women's subordinate status in society, confined to the role of wife and mother in a patriarchal family, then feminists committed to gender equality must defend abortion rights.

[20] Indeed, given the ideological commitments of most anti-abortion activists, one can safely assume most of them believe that *all* pregnant people are "really" women.
[21] Siegel, "Abortion as a Sex Equality Right," 48.
[22] Siegel, "Abortion as a Sex Equality Right," 52.

One might respond that the archaic arguments of nineteenth-century doctors no longer have any bearing on contemporary abortion politics. But this is to greatly overestimate the extent to which a commitment to a patriarchal social structure has become anachronistic. Indeed, explicitly antifeminist movements have flourished among the various reactionary forces animating the MAGA movement.[23] Not only men's groups like the Proud Boys demand a return to traditional gender roles, but so too do self-proclaimed "tradwives" who proudly and publicly seek to embody these roles, often via idyllic scenes of motherhood on their Instagram feeds.[24] Unsurprisingly, these groups and activists denounce abortion in the harshest terms. And, as Siegel notes, even those who avoid explicit gender role claims often smuggle gendered assumptions into the "abortion is murder" claim under cover of a purely physiological analysis.[25] Accordingly, feminist arguments for abortion as a matter of gender equality remain crucial.

But the equality argument goes beyond a direct response to the remnants of a separate spheres ideology driving antiabortion activists. It also responds to the existing social and material conditions that underpin sex, reproduction, and parenthood. Socialist feminists have been especially adept at placing a broad spectrum of reproductive rights, including abortion rights, in this perspective. Rosalind Petchesky provides a comprehensive list of the kind of conditions that constrain reproductive possibilities regardless of state laws on abortion:

> A woman does not simply "get pregnant" and "give birth" like the flowing of tides and seasons. She does so under definite material conditions that set limits on "natural" reproductive processes—for example, existing birth control methods and technology and access to them; class divisions and the distribution/financing of health care; nutrition; employment, particularly of women; and the state of the economy generally. And she does so within a specific network of social relations and social arrangements involving herself, her sexual partner(s), her children and

[23] Casey Ryan Kelly, *Apocalypse Man: The Death Drive and the Rhetoric of White Masculine Victimhood* (Columbus: Ohio State University Press, 2020).
[24] Nancy Love, "Shield Maidens, Fashy Femmes, and TradWives: Feminism, Patriarchy, and Right-Wing Populism," in *Frontiers in Sociology* 5 (2020): doi: 10.3389/fsoc.2020.619572.
[25] Siegel, "Abortion as a Sex Equality Right," 55-56.

> kin, neighbors, doctors, family planners, birth control providers and manufacturers, employers, the church, and the state.[26]

Instead of pitting equality against privacy, Petchesky's point is that the "pro-choice" framework of the mainstream abortion rights movement obscures all of this by zeroing in exclusively on the immediate decision whether or not to see an abortion provider and erasing the past and future circumstances that influence, or even determine, this decision. Hence, a poor woman may genuinely want to have children, but may feel that her present financial circumstances make it impossible for her to provide for a child. A more generous social welfare policy could enable her to have a child after all, but in the absence of such a policy, access to abortion becomes especially crucial. Nonetheless, it is difficult to say the woman really "chose" abortion given her economic circumstances.

Overall, then, socialist feminists reveal how "the critical issue for feminists is not so much the content of woman's choices, or even the 'right to choose,' as it is the social and economic conditions under which choices are made."[27] Whereas our above example concerns a woman compelled to "choose" an abortion due to lack of economic resources to raise a child, we can also reverse the scenario and consider the plight of a woman who cannot afford an abortion. As we have already seen, critics of the privacy rationale in *Roe* charge that this rationale enabled the Court to rule in later cases such as *Harris v. McRae* and *Maher v. Roe* that the government has no affirmative obligation to assist women who wish to terminate their pregnancies but lack the resources to do so. An equality rationale for abortion could change this analysis, insofar as it provides a perspective not only on gender inequalities between men and women, but also on

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[26] Rosland Petchesky, "Reproductive Freedom: Beyond 'A Woman's Right to Choose'," in *Signs* 5.4 (1980): 672.
[27] Petchesky, "Reproductive Freedom," 674.

inequalities of race, class, immigration status, and other such identity attributes that differently impact the ability of different women to terminate their pregnancies when they desire to do so. That is to say, the equality rationale for abortion rights creates an affirmative duty on the state to guarantee that pregnant people of all backgrounds can meaningfully exercise the right.

In sum, equality arguments for abortion are compelling for two reasons. First, because they simultaneously reveal and rebut the antifeminist assumptions underlying campaigns to criminalize abortion: specifically, that women have a duty to become mothers and shirking this duty is an offense against womanhood. And second, because they take account of the material and social conditions that constrain reproductive options even when the state does not explicitly prohibit abortion. By refusing to ameliorate these constraints, and in the case of the Hyde Amendment, by essentially endorsing them, the state reinforces existing inequalities between all people capable of becoming pregnant along the familiar lines of race and class.

In Defense of Privacy

When we recognize these virtues of the equality rationale, do we necessarily need to reject the privacy rationale? Must one choose between them, rather than recognizing that equality and privacy are both at stake in abortion law? While Mackinnon and Cornell do offer equality as an alternative to privacy, it is notable that neither Siegel nor Petchesky recommend an equality rationale *alone*. Quite the contrary, Siegel concludes her examination of abortion as a sex-equality right by suggesting that "developing equality arguments for the abortion right can in fact reinvigorate privacy discourse."[28] Petchesky goes even further, arguing that an equality

[28] Siegel, "Abortion as a Sex Equality Right," 69.

rationale alone would be dangerously inadequate, as it implies the possibility of a future society in which transformed social and material conditions removed the right to seek an abortion from pregnant women themselves:

> A materialist (and, I would argue, feminist) view looks forward to an eventual transcendence of the existing social relations of reproduction, so that gender is not ultimately determinant of responsibility. This implies that, should existing social arrangements change—should society be transformed so that men, or society itself, bear an equal responsibility for nurturance and child care—then the basis of the needs would have changed and control over reproduction might not belong primarily to women.[29]

Petchesky concludes that reproductive freedom can only be secured by combining socialist and liberal perspectives, despite the tensions between them. From the socialist perspective we derive the equality framework. From the liberal perspective, Petchesky offers an autonomy framework with a specific focus on the idea of a person's right to make decisions about their own body, which she variously identifies as bodily autonomy and bodily integrity. She only briefly mentions privacy, but folds it into this tradition:

> While privacy, like property, has a distinctly negative connotation which is exclusionary and asocial when applied to persons as persons—in their concrete, physical being—it also has a positive sense that roughly coincides with the notion of 'individual self-determination'. In other words, control over one's own body is an essential part of being an individual with needs and rights, a concept which is, in turn, the most powerful legacy of the liberal political tradition.[30]

While this is a powerful rejoinder to Mackinnon and Cornell, it suffers from the same potential flaw that opened Blackmun's majority decision in *Roe* to Rehnquist's dissent: privacy appears to become just another word for liberty/autonomy.

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[29] Petchesky, "Reproductive Freedom," 677.
[30] Petchesky, "Reproductive Freedom," 664-665.

In fairness, Petchesky is not seeking to offer a comprehensive theory of privacy or even a defense of its specific applicability to abortion and other reproductive freedoms. Instead, she is merely demonstrating how the line of holdings reliant on a constitutional right to privacy in *Griswold*, *Eisenstadt*, and *Roe* fit in with a broader liberal tradition of bodily autonomy. Jean Cohen, instead, does aim to provide a systematic defense of the concept of privacy, intended as a rebuttal to feminist and communitarian critics of the doctrine. Not only does she effectively answer these critics, but she also begins to provide a much-needed distinction between privacy and liberty based on the evolution of abortion jurisprudence from *Roe* to *Planned Parenthood v. Casey*. In further explaining this distinction, we can see more clearly why privacy remains such an important part of the defense of abortion rights in a post-*Roe* world, and why it functions so effectively in tandem with an equality-based defense. Specifically, I argue below that a modified version of Cohen's account of privacy supports contemporary reproductive justice frameworks that attend to the intersectional nature of the various constraints on a whole array of reproductive freedoms, of which prohibitions on abortion are just one.

According to Cohen, feminist critics of privacy conflate a particular flawed conception of privacy with the overall concept.[31] The flawed conception, which they criticize persuasively, is the liberal model of privacy in which "all that is nonstate is construed as the private sphere—the realm of freedom—in an undifferentiated manner."[32] Cohen concurs that such a model of the private sphere erases from view many forms of power and hierarchy that subordinate women in their personal lives, while also buttressing a false and mythical essentialism that the boundaries between private and public derive from nature rather than being socially and politically

[31] Jean Cohen, "Is privacy a legal duty? Reconsidering private right and public virtue in the domain of intimacy," in *Public and Private: Legal, political, and philosophical perspectives*, eds. Maurizio Passerin d'Entrèves and Ursula Vogel (New York: Routledge, 2000), 125.
[32] Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton: Princeton University Press, 2002), 29.

constructed to begin with. Instead, via a constructivist framework, she defends the constitutional right to privacy "on new grounds, free of anachronistic presuppositions regarding a prepolitical private sphere or natural liberty."[33] **[more will be filled in in final version here about Cohen's constructivism]**

But what is the actual substance of the constitutional right to privacy? Cohen repeatedly describes it as a matter of "[i]ndividual decisional autonomy in [the] domain of intimacy."[34] By itself, the term "decisional autonomy" seems to repeat the conflation of privacy and liberty, merely adding "in the domain of intimacy" to specify that privacy refers to a particular subset of liberties. But Cohen elaborates further on decisional autonomy in a way that shows it can be distinguished from other liberties not only by its reference to intimate concerns, but also by the kind of protections it affords. She accuses feminist critics of missing "the moral importance of rights guaranteeing decisional autonomy and ascribing ethical competence and a sense of control over one's identity needs in the domain of intimacy to socialized, solidary, individuals—a complex of rights for which *privacy* has increasingly become the umbrella term."[35] The ascription of ethical competence and a sense of control over one's identity require more of the state and of other individuals than simply not preventing the individual from acting upon their final decision in intimate matters. Let us take these one at a time.

Ethical competence specifically "means that one cannot be obliged either to reveal one's personal motives for one's choices or to accept, as one's own, any particular group's reasons or evaluations."[36] So privacy protects more than the ultimate decision a person makes. It also shields from scrutiny the entirety of their decision-making process, based on the presumption of

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[33] Cohen, *Regulating Intimacy*, 12.
[34] Cohen, *Regulating Intimacy*, 22.
[35] Cohen, *Regulating Intimacy*, 26.
[36] Cohen, *Regulating Intimacy*, 55.

their ethical competence.[37] This does not mean we presume them to be a philosopher in their sitting room pondering the decision in isolation from all other human beings, but only that they alone may determine whom they wish to consult, if anyone, about the decision. Liberty alone does not guarantee what Debra Morris usefully describes as a "reprieve from scrutiny and public judgment" but only bars public judgment from wielding the powers of physical coercion.[38] Privacy, therefore, offers stronger protections than mere liberty. And these stronger protections are warranted precisely in the kind of decisions, often intimate in nature, where one's sense of self is most at stake and the intrusion of unwarranted outside parties into the decision making process, even if one's ultimate decision prevails, is experienced as an affront to the boundaries we require around our own process of identity construction.

Cohen, drawing on the work of Linda McClain, illustrates precisely this point in her analysis of *Casey*. In *Casey*, the Court reaffirmed "the essential holding" of *Roe* but "reduced the concept of privacy to the narrow dimension of decisional autonomy or liberty in order to permit the state and third parties to try to influence the pregnant woman's reasoning process and ultimately her decision, by exposing it to public pressure and scrutiny while leaving her the liberty to make the ultimate decision."[39] Specifically, the Court upheld provisions of a Pennsylvania abortion law requiring that women give their "informed consent" to the abortion procedure and wait 24 hours before receiving the abortion. These provisions, the Court ruled, do not place an "undue burden" on the woman's choice to seek an abortion, because she can still choose to undergo the procedure a mere 24 hours after hearing the required information about the nature of the procedure, its potential health risks, and the fetal development process. From a

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[37] See also Linda McClain, "The Poverty of Privacy?" in *Columbia Journal of Gender and Law* 3 (1992): 119-174.
[38] Debra Morris, "Privacy, Privation, Perversity: Toward New Representations of the Personal," *Signs* 25.2 (2000): 330.
[39] Cohen, *Regulating Intimacy*, 63.

privacy perspective, however, these provisions clearly impute a lack of ethical competence to the woman, as they presume she may choose abortion "out of ignorance or without due attention to arguments against abortion," and permit the state to try to sway her decision based on its own assessment of the most relevant facts.[40] Notably, Justice Blackmun, who authored the original *Roe* decision and its privacy rationale, dissented in *Casey* with respect to these provisions of the law.

Cohen's ascription of ethical competence departs from Blackmun's privacy rationale in an important way, however. Recall that privacy for Blackmun shielded the doctor-patient relationship, and he often described the doctor as the party wielding ultimate decisional authority. Privacy as Cohen describes it clearly undermines this logic. Certainly, pregnant people may wish to consult their doctors about what the abortion procedure might mean for them, but neither the consultation nor following their doctor's advice can be compelled when privacy is understood as decisional autonomy in Cohen's sense. So privacy as Cohen describes it can be usefully distinguished from liberty while also protecting the pregnant person from coercive forums of consultation with their doctor or any other outside parties.

The second component of Cohen's elaboration of privacy, beyond ethical competence, is the ascription of "a sense of control over one's identity needs in the domain of intimacy." Our sense of identity, she explains, is necessarily always under development and fragile, such that circumstances that threaten to disrupt our chosen identities or impose unwanted identities upon us can have wrenching effects on the self. Bodily integrity has unique importance here, as "our bodies, our symbolic interpretation of our bodies, and our sense of control over our bodies are central to our most basic sense of self, to our identity and our personal dignity."[41] It follows

[40] McClain, "The Poverty of Privacy?," 142.
[41] Cohen, *Regulating Intimacy*, 60.

logically that unwanted pregnancies pose especially grave threats to our identity. Importantly, it does not matter whether the pregnancy is unwanted because the state prohibits abortions or because the pregnant woman does not have the material means to access one. The same "very powerful form of embodiment….in which she risks losing control over her bodily functions and her sense of self" pertains in both cases.[42] Hence, I would argue that Cohen's expanded account of privacy severs the link between *Roe*'s privacy rationale and the Court's decisions in *Harris v. McRae* and *Maher v. Roe* to permit the state to deny abortion funding via Medicaid (or any other public health care plans). Once again, we find that Justice Blackmun dissented in these cases.

I would, however, offer one slight addendum or modification to Cohen's account. Her concept of decisional autonomy as ethical competence may plausibly be interpreted as having strong rationalist implications. That is to say, when Cohen defends the principle of decisional autonomy by describing the pregnant woman as a "strong evaluator capable of affirming, devising, and even revising (if desired) her own conception of the good," she strongly implies a certain form of conscious and deliberate reasoning used to make protected decisions in the intimate domain, including the decision to seek an abortion. The woman's privacy, it seems, depends on her capacity to engage in a particular kind of deliberative process. This interpretation makes sense in light of Cohen's general Habermasian framework, through which she offers a reflexive paradigm of law as an alternative to natural rights theory.[43] Certainly, we should reject gendered assumptions that women are less capable of such reasoning than men, and to the extent that such assumptions underlie a broader skepticism about privacy as decisional autonomy for pregnant women, Cohen's insistence on the woman's deliberative capabilities is certainly useful. However, part of the reason we may wish to shield pregnant women from

[42] Cohen, *Regulating Intimacy*, 61.
[43] Cohen, *Regulating Intimacy*, 52-53.

scrutiny of their decision-making process is because we should not expect them to have perfectly formulated, rationally articulable reasons for wanting to end or continue their pregnancies. Feelings about our bodies and about motherhood may be inscrutable even to us, and powerful affective reactions to the experiences of pregnancy or the prospect of motherhood may not be communicable in words to begin with, even to ourselves. In fact, the right to privacy is likely especially important for precisely those decisions for which we find it most difficult to articulate our decisions in rational language.

Drucilla Cornell's idea of an "imaginary domain" through which we perpetually re-imagine "who one is and who one seeks to become" speaks powerfully to the non-rationalist (though not necessarily irrational) nature of the self and its relationship to the body.[44] She notes that the shared need of all humans "to project a self-image of bodily integrity" necessitates "the protection of some control over the divide between what is inside the body and out, and over what is to be publicly exposed, in order that even the most primordial sense of self may be retained."[45] Curiously, although this account of women's imaginary domain makes a powerful argument for a privacy rationale for abortion rooted in the necessity of control over one's imaginary domain, free from the scrutiny of others, Cornell nonetheless rejects the privacy rationale for abortion and advocates the equality rationale as an alternative. On my reading, however, though, we can join Cohen and Cornell into a powerful defense of privacy as decisional autonomy, in which the ultimate decision to have an abortion need not be understood as a process of rational deliberation (though it may certainly entail this, too) but instead as a process of self-imagining that one has no obligation to share with others, in part because it may not be share-able through ordinary language anyway.

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[44] Cornell, *The Imaginary Domain*, 5.
[45] Cornell, *The Imaginary Domain*, 65.

Privacy and Equality

Up to this point, we have seen how both a privacy rationale and an equality rationale can usefully illuminate certain elements of why abortion rights matter and should be defended. But my argument goes beyond a both/and approach. The stronger claim is that the two rationales buttress and strengthen each other. In other words, when we consider the argument for privacy we have just made, it illuminates one of the crucial ways in which gender subordination works: via a denial of privacy to women, and an instrumentalization of their bodies and their reproductive capacities for public purposes. The feminist movement has successfully fought to shrink the scope of this instrumentalization and expand the ambit of privacy for women, thus moving us towards a more equal society along gender lines, but its successes have not been complete and, most importantly, have not been equally distributed. Poor women and women of color have always suffered the greatest deprivations of privacy in the intimate domain, and the greatest affronts against their decisional autonomy regarding sex, reproduction, family formation, and motherhood. Dorothy Roberts explains this violation of privacy itself constitutes a serious affront to equality: "A basic premise of equality doctrine is that certain fundamental aspects of the human personality, including decisional autonomy, must be respected in all persons."[46] For this reason, an account of abortion rights that weds privacy to equality best captures the intersectional vision of the contemporary reproductive justice movement, a movement that usefully pushes us beyond a narrow focus on "choice" and abortion to a more comprehensive emphasis on reproductive freedom for all. In the wake of *Dobbs*, as the

[46] Dorothy Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," in *Harvard Law Review* 104.8 (1991): 1450.

abortion rights movement struggles to find its footing and fight back against reproductive revanchism, it is essential that defenders of abortion place it in this broader reproductive justice framework.

The reproductive justice movement was born at a pro-choice conference in 1994, spearheaded by twelve black women.[47] It criticized the pro-choice framework adopted by mainstream organizations and activists as excessively narrow and especially inadequate to address the reproductive health needs of poor women and women of color. It advocated for a health care system that would defend three sets of interconnected rights: "(1) the right to have a child under the conditions of one's choosing; (2) the right not to have a child using birth control, abortion, or abstinence; and (3) the right to parent children in safe and healthy environments free from violence by individuals or the state."[48] The inclusion of the first and third rights, as well as the expansion of the second right beyond just abortion, highlighted the kind of assaults on reproductive justice to which women of color, poor women, and especially poor women of color have been vulnerable. These assaults all too often receive short shrift or no attention in the mainstream pro-choice movement.

Examples of such assaults include past and present policies and practices of forced family separation, from the sale of enslaved black women's children to contemporary child welfare policies that remove children from their mothers because of poverty rather than genuine abuse or neglect.[49] Shatema Threadcraft has described eloquently how, in the aftermath of emancipation,

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[47] Kimala Price, "What is Reproductive Justice? How Women of Color Activists are Redefining the Pro-Choice Paradigm," in *Meridians* 19 (2020): 340-362; Dorothy Roberts, "Reproductive Justice, Not Just Rights," in *Dissent* 62.4 (2015): 79-82; Loretta Ross, "Reproductive Justice as Intersectional Feminist Activism," in *Souls* 19.3 (2017): 286-314.

[48] Ross, "Reproductive Justice as Intersectional Feminist Activism," 290.

[49] **On** the latter, see Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* (Basic Books, 2022).

Black women in the South were effectively denied the right to devote themselves to family, motherhood, and home, and coerced instead into a hyper-exploitative labor market in the fields or in the homes of white families, all the while separate spheres ideology revered those white women who did stay home to tend to their families.[50] Women have also experienced rape, sexual assault, and pressure for sex under coercive circumstances unequally along race and class lines. Forced and coerced sterilization or use of long-term birth control methods have long deprived poor women of color of the right to have a child under conditions of their own choosing (or the right to have a child at all, in too many circumstances). Incarceration, disproportionately experienced yet again by poor women and women of color, represents a near total assault on incarcerated people's reproductive autonomy, denying them access to decent reproductive health care, exposing them to the constant threat of sexual assault from prison guards, making abortion exceptionally difficult to access (even before *Dobbs*), forcing them to give birth in shackles, separating them from their newborns, and often making it impossible even after release for them to be reunited with their children.[51] These are particularly dramatic examples, but more mundane realities such as welfare reform, lack of public transportation, subpar wages, and unsafe neighborhoods all represent threats to reproductive justice most often experienced by poor women of color.

Certainly, this list is not comprehensive. But it is more than sufficient to illustrate how privacy and equality together best capture the reproductive injustices that poor women of color confront. Collectively, the above examples show that poor women of color, and especially Black women, have consistently been depicted as undeserving and incapable mothers, as compared to

[50] Threadcraft, *Intimate Justice*, ch. 3.
[51] Crystal Hayes et al., "Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression," in *American Journal of Public Health* 110.51 (2020): 521-524.

wealthier white women.[52] To the extent that their reproductive and caretaking capacities have been recognized, it has been to serve the economic or emotional needs of white families, including and sometimes especially white mothers. As a result, their desires to have children of their own, and to care for these children are routinely thwarted, in more and less violent ways, but always in coercive ways. Thwarting a person's desire for motherhood clearly represents a denial of privacy as decisional autonomy in the most basic sense, but more recently, it also manifests routinely as a violation of the kind of informational privacy that even critics of the privacy rationale in *Roe* recognize as an "authentic" form of privacy. That is to say, poor women of color who choose to have children are subject to various forms of surveillance and coerced confession of personal information that other pregnant women and mothers rarely experience.

For example, consider Khiara Bridges' examination of the compulsory interviews that Medicaid recipients in New York's Prenatal Care Assistance Program (PCAP) must undergo.[53] The interviews force pregnant women to share details of their sex lives, relationships with intimate partners and family members, financial circumstances, immigration status, and nutritional habits, all in order to establish potential "risk factors" to their ability to parent effectively. Furthermore, nurses routinely visit the women before and after childbirth to give them "information" about contraception that includes recommending long-term and potentially more dangerous forms of birth control, such as Depo-Provera. The effect of these interviews is that "poor women's private lives are made available for state surveillance and problematization, and they are exposed to the possibility of punitive state responses."[54] Privacy rights, Bridges concludes, are *especially* important "for the marginalized, indigent women who must turn to the

[52] Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," 1436-1444.
[53] Khiara Bridges, "Privacy Rights and Public Families," in *Harvard Journal of Law and Gender* 34 (2011): 113-174.
[54] Bridges, "Privacy Rights and Public Families," 131.

state for assistance if they are to achiever healthy pregnancies and infants[.]"[55] If we drop privacy from our framework for reproductive justice, we fail to see the historically evolving but nonetheless continuous forms of aggressive surveillance of poor women of color's intimate lives that stem from and contribute to the unequal assessment of their worth as mothers, caretakers, and intimate partners.

What is striking about this example is how it denies exactly the kind of ethical competence described by Jean Cohen as fundamental to privacy rights. The interviews begin from a position of suspicion toward women on Medicaid, presuming they cannot and should not be trusted to make decisions about sex, contraception, childbirth, or parenthood on their own. Thus it is not just the forced confession of personal and possibly painful details of one's own life that constitutes a wrong, though it certainly does. It is also the very clear implicit message that poverty indicates ethical incompetence, and therefore the dissolution of any right to maintain a sense of control over one's own identity needs. Even worse, given that the State clearly refuses numerous policies that would improve the material condition of poor children, we cannot even presume that these interviews stem from a kind of paternalistic concern about the well-being of future children. Instead, Bridges contends, such interviews are a vehicle through which "the state exacts punishment on the woman for allowing her poverty to intersect with her pregnancy."[56] Hence, the poor woman is denied privacy as decisional autonomy and then punished for the very ethical incompetence that the state has unjustly attributed to her. Denials of privacy to pregnant women on Medicaid clearly reinforce unequal social hierarchies of class, race, and gender.

[55] Bridges, "Privacy Rights and Public Families," 122.
[56] Bridges, "Privacy Rights and Public Families," 168.

One might respond here that denial of the right to an abortion actually stands in tension with the kind of race- and class-based deprivations of reproductive privacy described above. After all, these deprivations stem from the disparagement rather than the encouragement of motherhood for poor women of color. Denying or restricting abortion rights, on the other hand, seeks to compel the motherhood of women who do not wish to become mothers, at least not in the immediate future. But it is precisely by drawing together these seemingly opposed forms of state interference in reproductive decisions that a more representative, diverse, and effective reproductive justice movement can be forged. When we recognize how reproductive privacy and equality require not only access to legal abortion but also "a living wage, universal health care, and the abolition of prisons," we enable precisely the kind of broad, coalitional politics that pioneers of intersectional feminism such as the Combahee River Collective and Kimberlé Crenshaw originally advocated.[57] And this is exactly the kind of political movement that our post-*Roe* present demands.

[57] Combahee River Collective, "The Combahee River Collective Statement," 1977; https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/; Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," in *Stanford Law Review* 43.6 (1991): 1241-1299.