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INTRODUCTION

With the growing use of assisted reproductive technology ("ART"), courts have to reconcile competing rights to seek and avoid procreation.[1] Often, in imagining the boundaries of these rights, judges turn to abortion jurisprudence for guidance.[2]

This move sparks controversy. On the one hand, abortion case law may provide the strongest constitutional foundation for scholars and advocates seeking rights to access ART or avoid unwanted parenthood.[3] On the other hand, abortion jurisprudence

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1. For scholarly discussion of the issues raised by these disputes, see, for example, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233 (2013); Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378 (2013); Tracey S. Pachman, *Disputes over Frozen Preembryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128 (2003).

2. *See, e.g.*, Szafranski v. Dunston, 993 N.E.2d 502, 516–17 (Ill. App. Ct. 2013); J.B. v. M.B., 783 A.2d 707, 711–18 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 595, 601–02 (Tenn. 1992).

3. For an argument in this vein, see generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE]. *See* John A. Robertson, *A Secular Regard for Human Liberty Means Allowing Reproductive Technologies*, *in* REPRODUCTIVE TECHNOLOGIES 87–90, 92 (Clay Farris Naff ed., 2007) [hereinafter Robertson, *A Secular Regard*]; John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 914 (1996). For a discussion of the intersection between reproductive rights, constitutional equality, and ART, see, for example, Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 463–69 (1999); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460–62 (2008). *Cf.* Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 190 (2013) (arguing that ART can advance reproductive justice, rather than re-

carries normative and political baggage: a privacy framework that disadvantages poor women and a history of intense polarization.[4]

This article uses the legal history of struggle over spousal consent abortion restrictions as a new way into the debate about the relationship between ART and existing reproductive rights. Such laws would require women to notify or obtain consent from their husbands before a doctor can perform an abortion.[5] Scholars use spousal-consultation laws to illustrate the sex stereotypes supposedly underlying all abortion restrictions.[6] This article tells a far more complex story. When feminists and pro-lifers battled about spousal consent in the 1970s, they wrestled with many of the questions motivating current battles about ART: Do women enjoy a unique role in child-rearing and childbearing? Does gestation, caretaking, or a genetic connection explain the decision-making power conferred on women in the context of reproduction? How could feminists reconcile demands that men perform a greater share of child-rearing with arguments that women should have the final decision on reproductive matters? By reexamining the history of the consent wars, we can gain valuable perspective on what can go right—and wrong—when we forge a jurisprudence based on the relationship between genetic, gestational, and functional parenthood.

The consent wars helped drive a wedge between feminist sex-equality arguments—which challenged sex stereotypes and re-

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productive rights, and suggesting that a justice framework best justifies the regulation of ART).

4. For a sample of these criticisms of abortion rights, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dicotomy [sic] that is at the heart of the structures that perpetuate the powerlessness of women."); NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 98 (2010) (discussing the polarization of contemporary abortion politics); *see also* Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52–53 (Jay L. Garfield & Patricia Hennessey eds., 1984).

5. For examples of such restrictions, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887–89 (1992) (plurality opinion); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 58 (1976).

6. *See, e.g.*, Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 308 (2013); Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After* Gonzales v. Carhart, 36 HARV. J.L. & GENDER 123, 143–44 (2013).

productive rights law—which partly relied on similar generalizations about sex roles. Throughout the 1960s and 1970s, legal feminists pushed new laws on publicly funded child care and pregnancy discrimination in a quest to assign more caretaking responsibility to men and to the State.[7] Feminists believed that separating women's gestational and functional parenthood would help root out damaging sex stereotypes and dramatically expand women's role in the political, economic, and social spheres.[8]

The consent wars flipped this project on its head: for both strategic and ideological reasons, feminists assumed a more traditional vision of the roles, rights, and responsibilities of both mothers and fathers. Feminists argued that women had a unique role not only in the context of gestation but also in the context of child-rearing.[9] While these contentions strengthened the constitutional case against spousal consent laws, they were unnecessary. Without contradicting their support for equal parenting responsibilities, feminists could have stressed that the law did not treat the fetus as a child. Consequently, a man's interest in equal parenting might have looked quite different before, rather than after, viability. Moreover, conflating gestational and functional parenthood had damaging, unintended consequences, entrenching sex stereotypes about gender roles at the heart of abortion jurisprudence.[10]

In chronicling the consent wars, we can gain a better understanding of the proper relationship between ART and the existing constitutional framework governing reproduction. As feminists recognized in the 1960s and 1970s, pregnancy—not the burdens of caretaking or genetic parenthood—puts women in a unique biological and social position. In the 1970s, by reading a broader understanding of women's disproportionate share of parenting into *Roe v. Wade*, feminists inadvertently created an opening for courts to fall back on deeply rooted stereotypes about women's

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7. I follow Serena Mayeri in my definition of legal feminists: activists who turned to the law to advance equal citizenship for women. *See* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 758 (2004).

8. Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 472 (2013).

9. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1984–1985).

10. *See infra* Part III.E.

role in the home.[11] To avoid this trap in ART cases, we should read abortion jurisprudence as standing for the connection between sex equality and women's gestational role. The consent wars powerfully demonstrate the costs feminists can face when they fail to unbundle women's genetic, gestational, and functional parenthood.

Conversely, ART jurisprudence spotlights the path not taken by feminists during the consent wars. Separating the strands of parental rights allows us to define women's equal citizenship concerns in abortion with greater precision. Because only women can carry pregnancies to term, abortion bans necessarily implicate women's interest in equal treatment, regardless of who takes on caretaking responsibilities after childbirth. Equally important, the injuries associated with unwanted pregnancy itself—to bodily integrity, dignity, and autonomy—can justify a woman's right to abortion regardless of who assumes caretaking responsibilities later in life.

This article proceeds in four parts. What is the best way to understand the relationship between abortion and ART jurisprudence? Parts I and II evaluate this question by studying the history of battles in the 1970s to balance men and women's competing procreative rights. Part I begins this inquiry by telling the story of anti-abortion efforts to pass spousal consent laws in the aftermath of *Roe v. Wade*. While members of the anti-abortion movement of the 1970s held a variety of political views, prominent movement leaders sometimes privileged the traditional family. After *Roe*, the spousal consent battle encouraged prominent abortion opponents to define parenting responsibilities in radically different ways.[12] These anti-abortion activists insisted that unintended pregnancy, childbirth, and child-rearing produced the same emotional investment and psychiatric trauma in men and women. Abortion opponents also contended that men should (and would) undertake an equal share of caretaking responsibilities. According to these activists, men deserved equal parenting rights

11. *See infra* Part II.A.

12. *See* Roe v. Wade, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting); *see also* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095, 1109–10 & nn.70–74 (2009).

because they were similarly situated to women in their willingness and ability to care for children.[13]

As Part II argues, the consent wars also reshaped feminist reasoning about parenting responsibility, at least in the abortion context. In the late 1960s and early 1970s, members of a fragmented women's movement prioritized both abortion rights and laws guaranteeing child care access for women.[14] These dual priorities reflected a belief that women's liberation meant nothing unless employers, politicians, and family members no longer believed that a woman's biology dictated her destiny.

Because of shifting strategic priorities, feminists in the consent wars argued for an image of motherhood that stood in fundamental tension with the equal parenting project of the 1960s and 1970s. In compelling women to bear a child, feminists contended, men forced on women a virtual lifetime of child-rearing duties.

Feminists' sex-equality arguments offered a persuasive justification for women's right to fertility control. At the same time, by assuming without explanation that women raised children, feminists inadvertently played into deeply rooted ideas about the uniqueness of pregnancy and motherhood—the very ideas that made discrimination against mothers and pregnant women so difficult to overcome.[15] Although Supreme Court decisions in the 1970s did not explicitly draw on feminists' arguments about motherhood, they resurfaced in later abortion cases, particularly in *Planned Parenthood v. Casey*.[16]

Part III draws from the history of the consent wars to reconsider the relationship between abortion rights and ART. This section uses embryo disposition cases as a lens through which to view the relationship between abortion law and emerging rules governing ART. Often, ART jurisprudence uses abortion jurisprudence to flesh out the competing rights governing procreation. Part III sets out three lessons courts have drawn from abortion jurisprudence: (1) given differences in women's social and biological roles, women should have the final say over childbearing and child-rearing, whether in vivo or in vitro fertilization is at issue; (2) the right

13. *See infra* Part I.B.
14. *See infra* notes 106–10 and accompanying text.
15. *See infra* Part II.B.
16. 505 U.S. 833, 895–98 (1992) (plurality opinion).

not to become a genetic parent trumps any countervailing interest in procreation; (3) the Constitution recognizes rights to both seek and avoid parenthood that must be weighed on a case-by-case basis.

However, the history of the consent wars counsels against a broad reading of the right not to parent in abortion case law. In justifying women's abortion rights, courts have assumed that women bear and raise children.[17] Without a clear explanation of why women take on so disproportionate a share of caretaking work, courts too easily draw on well-established stereotypes concerning motherhood and fatherhood.[18] Properly understood, the right to abortion assigns women decision-making authority because only women face the burdens of pregnancy and gestation. A broader understanding of the right not to parent fails to capture the different positions men and women face with respect to pregnancy, genetic parenthood, or caretaking work.

Second, by drawing on the historical materials assembled in this article, Part III uses ART jurisprudence as an opportunity to clarify the sex-equality arguments for abortion rights. Abortion case law can fall prey to gender-role stereotypes partly because the courts conflate women's gestational role with other aspects of parenthood.[19] Reconceiving abortion as a right to avoid unwanted pregnancy or gestation, rather than a right to avoid unwanted parenthood, will help to undercut the power of the sex stereotypes at work in both *Casey* and *Gonzales v. Carhart*.[20]

I. THE ANTI-ABORTION MOVEMENT AND THE NEW FATHERHOOD

In 1973, in the immediate aftermath of *Roe v. Wade*, the nation's leading anti-abortion activists gathered to discuss how best to respond to the Supreme Court decision.[21] As one advocate put it, pro-lifers focused on "[s]pell[ing] out at the local level as to

17. *See* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 6, 12–13 (1990) ("The Supreme Court, then, far from giving men and women strictly equal treatment, has left room for giving women special consideration as mothers.").

18. Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1053–54 (2005).

19. *See id.* at 1056–57 (citing *Casey*, 505 U.S. at 852).

20. 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting); *see also* Siegel & Siegel, *supra* note 12.

21. *See* Minutes, NRLC Ad Hoc Meeting (Feb. 11, 1973), in The American Citizens Concerned for Life Papers, Box 4, Gerald Ford Memorial Library, University of Michigan.

what the intention of the Supreme Court was as to ou[r] state laws."[22]

Laws requiring spousal notification and consent promised to limit women's access to abortion.[23] For prominent abortion opponents, however, spousal-consultation laws raised deeper questions about the meaning of parenthood. Conventionally, we identify anti-abortion politics with traditionalist ideas about gender. However, the spousal-consultation battle pushed those on either side of the abortion debate to offer new ideas about the definition of legal motherhood and fatherhood. Drawing on the Thirteenth and Fourteenth Amendment, abortion opponents framed parenthood as a fundamental right.[24] By virtue of the Reconstruction Amendments, the right to have and raise children within a nuclear family, so often denied to male slaves, belonged to every man and woman. Giving women the power to make unilateral decisions about abortion constituted slavery for men.

This section begins by evaluating pro-life arguments in the 1960s and 1970s for the supremacy of the marital family. It shows that movement leaders argued that the Constitution guaranteed men (and women) the right to form and participate in nuclear families. Anti-abortion activists described men as protectors, qualified to make decisions on behalf of other less competent or independent family members.

Next, this section studies why, in court and the legislative arena, anti-abortion activists began to define the rights and responsibilities of fathers in transformative ways. First, anti-abortion activists demanded rights for those in non-marital and even non-committed sexual relationships. More importantly, abortion opponents envisioned fathers who would assume equal or even exclusive caretaking responsibilities. While failing to address the fact that only women could become pregnant, abortion opponents stressed the changing roles of men in marriage and child-rearing. Pro-lifers argued that men and women were similarly situated with respect to functional parenthood—an assertion that abortion

22. *Id.* at 5.

23. *See* Kate Sheppard, *Next on the Anti-Abortion Agenda: Spousal Consent?*, MOTHER JONES (Oct. 17, 2012), http://www.motherjones.com/mojo/2012/10/next-anti-abortion-agenda-spousal-consent.

24. *See, e.g.*, Brief for Concerned Alaska Parents, Inc. as Amicus Curiae at 5–6, State v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001) (No. S-8580), 1998 WL 35168184.

opponents used to demand greater say for men in decision-making about abortion. Under the Equal Protection Clause pro-lifers argued, the law could no longer discriminate against men who wanted to raise children.[25] In working to undermine reproductive rights, some abortion opponents tried to disconnect parents' social and biological roles.

Pro-lifers entered into a debate that closely parallels the one governing ART today: what relationship should the law recognize between gestational, functional, and genetic parenthood? For strategic reasons, abortion opponents presented women's gestational role as almost totally disconnected from any other form of parenting. Ultimately, legal feminists responded by conflating crucial aspects of gestational, functional, and genetic parenthood—a move that would prove as costly then as it would in the context of ART today.

A. *Pro-Lifers Embrace the Traditional Family*

Although heavily shaped by the Roman Catholic Church, the anti-abortion movement of the late 1960s and early 1970s drew on a diverse group of supporters with widely differing views on the family and gender issues.[26] Just the same, many leaders of the early anti-abortion movement framed their cause as a defense of the traditional family and conventional sexual mores, particularly for women.[27] As Kristin Luker has shown, many pro-lifers identified strongly with conventional understandings of the roles that mothers and father should assume.[28] By the late 1960s and early 1970s, however, defense of the traditional family also served im-

25. For a more recent Equal Protection argument for related fathers' rights, see generally Illya D. Lichtenberg & Jack Baldwin LeClair, *Advocating Equal Protection for Men in Reproductive Rights and Responsibilities*, 38 S.U. L. REV. 53 (2010).

26. For a discussion of the diversity of the anti-abortion movement, see, for example, ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 23–26 (2008); Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 138–39 (Donald T. Critchlow ed., 1996). *See also* SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA (2011) (examining the evolution of social, legal, and political attitudes toward the fetus from the late nineteenth to the early twenty-first century).

27. *See generally* CHARLES RICE, THE VANISHING RIGHT TO LIFE: AN APPEAL FOR A RENEWED REVERENCE FOR LIFE (1969).

28. *See generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

portant strategic purposes. In 1969, for example, leading pro-life attorney Charles Rice urged a defense of the right to life as part of a broader quest to stamp out sexual promiscuity. Rice's concept of the right to live involved a battle against "the abandonment of self-control over sexual urges."[29]

Like Rice, other opponents of abortion reform insisted that liberalized laws would "occasion sexual promiscuity and a change in sexual *mores*."[30] Promiscuity arguments took on so much importance that supporters of abortion rights almost universally offered counterarguments to them in pre-1974 abortion litigation. For example, an abortion-rights amicus brief in *United States v. Vuitch*, a challenge to a Washington, D.C. abortion ban, contended: "Not only is there no evidence that a prohibition on abortion deters this kind of behavior, the existence of a prohibition unlimited to these circumstances sweeps too broadly, prohibiting as it does abortion for an unwanted pregnancy occurring in wedlock as well as that resulting from an illicit relationship."[31]

In *Roe*, a brief submitted on behalf of a group of feminist organizations similarly asserted that most laws designed to deter promiscuity swept "too broadly, prohibiting abortion for unwanted pregnancy occurring in marriage, or without criminal sexual conduct."[32]

Before 1973, the politics of "promiscuity" encouraged those on either side of the abortion debate to defend the supremacy of the marital family. Pointing to shifting sexual mores, abortion opponents argued that abortion removed the one remaining deterrent to illicit sex.[33] Supporters of abortion rights responded that liberalized laws would have no impact on the regulation of extramarital sex. For example, amicus curiae briefs in *Roe* stressed not that

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29. RICE, *supra* note 27, at 125.

30. John M. Finnis, *Three Schemes of Regulation*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 211 (John Noonan ed., 1970).

31. Motion for Leave to File Brief Amicus Curiae in Support of Appellee and Brief Amicus Curiae at 24, United States v. Vuitch, 402 U.S. 71 (1971) (No. 84).

32. Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 29, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40, 1972 WL 126045, at *29) [hereinafter Motion for Leave to File Brief Amici Curiae].

33. *See, e.g.*, Robert Drinan, *The Inviolability of the Right to Be Born*, 17 CASE W. RES. L. REV. 465, 476 (1965); Frank Ayd, Jr., *Liberal Abortion Laws*, AMERICA, Feb. 1, 1969, at 304 (discussing the possibility that liberalizing abortion laws would "encourage promiscuity").

the State had no interest in "deterring fornication and adultery" but rather that "a ban on abortions by married couples in no way reinforces the state's ban on other sexual relationships."[34]

Leading reformer Larry Lader called the idea that abortion helped "single girls escap[e] the penalty of promiscuity" a "myth," since married women sought out most abortions.[35] If anything, he suggested, legal abortion would strengthen the supremacy of the traditional family.[36] Lader shared stories of marriages threatened by too many children. "Some simply say, 'I need help desperately,'" he reported.[37] "Others are more detailed. A man whose wife had had five children said that she had become mentally ill after the last two children, and he was unable to work."[38] As Lader described it, unwanted children destroyed women's mental health and prevented them from undertaking their traditional responsibilities.[39] Men, in turn, could no longer play the part of provider when forced to care for their children.

Prior to 1973, activists on opposing sides battled to present their position as most in line with the legal defense of marriage and the traditional family, but the Supreme Court's decision in *Roe v. Wade* transformed the debate. In *Roe*, the Court saved for another day the question of a father or spouse's rights.[40] In the wake of the Court's decision, anti-abortion activists introduced spousal-consultation laws, assuming their potential constitutionality under *Roe*.[41] In part, from the standpoint of anti-abortion activists, spousal-consultation laws would reduce the total number of abortions.[42]

More importantly, however, consultation laws forced anti-abortion activists to flesh out the supposed connections between

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34. Motion for Leave to File Brief Amici Curiae *supra* note 32, at 17.

35. *See* Lawrence Lader, *The Scandal of Abortion—Laws*, N.Y. TIMES, Apr. 25, 1965, at SM32.

36. *Cf. id.*

37. Martin Tolchin, *Defiance Pledged on Abortion Law*, N.Y. TIMES, Mar. 12, 1964, at 81; *see, e.g.*, Cassidy, *supra* note 26, at 139–43.

38. *Id.*

39. *See id.*

40. *See* 410 U.S. 113, 165 n.67 (1973).

41. *See, e.g.*, SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 58, 195 n.3 (1991).

42. *See, e.g.*, JAMES R. BOWERS, PRO-CHOICE AND ANTI-ABORTION: CONSTITUTIONAL THEORY AND PUBLIC POLICY 3 (1994) (describing spousal consultation laws as part of "a political strategy designed to greatly reduce access to abortion and related services").

Roe v. Wade and family law.[43] In part, the members of pro-life groups like the National Right to Life Committee ("NRLC") and Americans United for Life ("AUL") appealed to anxieties about the decline of traditional marriage.[44] At the same time, these activists played with new ideas about the evolution of parental responsibilities and gender roles.[45] In defending the supposed rights of fathers, anti-abortion activists challenged conventional distinctions between marital and non-marital families—and between maternal and paternal roles.

These new ideas debuted during the battle for a fetal-protective amendment to the Constitution.[46] Beginning in 1973, many anti-abortion leaders prioritized a constitutional amendment that would undo *Roe*, recognizing fetal personhood and banning all abortions.[47]

Often, in defending a personhood amendment, NRLC and AUL members positioned themselves as defenders of the traditional family. For example, Dennis Horan, a prominent pro-life attorney, stressed that *Roe v. Wade* undermined conventional family roles: "*Roe v. Wade* . . . has provided one more wedge to separate, undermine and ultimately destroy the nuclear family."[48] The father, as Horan reasoned, had "been reduced to [an] onlooker."[49] Abortion opponent Carol Mansmann similarly concluded that *Roe* would render the family a group of "fully autonomous individuals who have no binding relationship to each other."[50] In liberating a woman from her family and her husband, *Roe* destroyed the commitments supporting the traditional family.

Family law, in this view, depended on a set of fixed commitments between men, women, and children. To truly count as a

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43. *See infra* notes 48–64 and accompanying text.

44. *See infra* notes 48–49 and accompanying text.

45. *See infra* notes 69–72 and accompanying text.

46. For a discussion on the fetal life amendment campaign, see, for example, Cassidy, *supra* note 26, at 138–42; DUBOW, *supra* note 26, at 100.

47. *See infra* notes 48–64 and accompanying text.

48. *Abortion Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 258 (1975) [hereinafter *Abortion Part IV Hearing*] (statement of Dennis Horan).

49. *Id.*

50. *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Judiciary Comm.*, 94th Cong. 248–49 (1976) [hereinafter *Proposed Constitutional Amendments Hearing*] (statement of J. Jerome Mansmann).

family, a group of individuals had to reach consensus instead of pursuing a set of independent or conflicting goals. By conferring the abortion decision on women alone, the courts undermined the commitments and collective decision-making that defined the nuclear family. As abortion opponent John Noonan argued: "The proponents of abortion have not been able to rest with their victory in *Roe* and *Doe*. They have been led to challenge the structure of the family itself . . . . The person seeking an abortion has become by federal fiat an anonymous, rootless individual without spouse, parents, or family."[51]

B. *Pro-Lifers Offer New Ideas of Fatherhood*

As Horan and others recognized, however, the pro-life movement wanted the courts to recognize an affirmative right for fathers. Targeting the supposed damage to the family caused by women's liberation might create sympathy in some circles for men, but pro-life leaders had to go further to make a constitutional case for fathers' abortion rights. Influential academic Joseph Witherspoon, a leading member of the NRLC, tried to do so first by relying on a vision of fatherhood rooted in the Thirteenth Amendment.[52] In Witherspoon's view, the Thirteenth Amendment "not only aimed at the destruction of the status of slavery and involuntary servitude . . . but also aimed at the elimination of the situation in which one class of human beings was placed in practical subjection to another."[53]

Witherspoon argued that the Framers of the Thirteenth Amendment expressed particular concern about fathers' ability to protect their wives and children. "The rights to conceive and to raise one's children have been deemed 'essential . . . basic civil rights of man,'" Witherspoon testified.[54] "Both the mother and father of an unborn child have the constitutionally protected right to protect the life of that child."[55] In outlawing slavery, the Thirteenth Amendment stopped any state or private actor from reinstituting slavery, which had "[d]estroyed the sanctity of marriage,

51. *Id.* at 70 (statement of John Noonan).
52. *See id.* at 24 (statement of Joseph Witherspoon).
53. *Id.*
54. *Id.* at 26.
55. *Id.*

and sundered and broken the domestic ties [that] bound men, women, and children."[56]

In part, Witherspoon popularized a vision of the father as a responsible and benevolent patriarch, charged with "bring[ing] the protection of marriage and family law to his family."[57] Denying a slave father the right to "claim his child as his own" stripped the slave of his manhood and his freedom.[58] Insofar as the law gave women alone the power to make abortion decisions, the State would once again be complicit in slavery.[59]

Witherspoon and his colleagues appealed to traditional views of masculinity, control, and family. As men, fathers had implicit power to make decisions about a child's welfare, to claim a child, and to protect that child. Allowing a woman to make a unilateral decision about abortion emasculated fathers.[60] "It seems perfectly clear," Witherspoon argued, "that to subject the father of an unborn child to the uncontrolled discretion of its mother with respect to having an abortion is to convert that father into a partial slave."[61]

At the same time, Witherspoon, like other pro-lifers, also emphasized sex equality claims—equality arguments that pushed Witherspoon and the broader anti-abortion movement to reason in new ways about family responsibilities. In analyzing sex discrimination, anti-abortion activists insisted that fathers and mothers had equal rights and responsibilities.[62] In so doing, abortion opponents both drew on and challenged sex stereotypes governing motherhood. While insisting that marriage gave men a measure of control over their wives' reproductive lives, anti-abortion activists also challenged stereotypes about the unique caretaking capacity of mothers and the unique psychological consequences of motherhood for women. In 1975, for example, Horan spoke favorably of the Equal Rights Amendment ("ERA"), arguing that it would impact fathers' rights "rather profoundly."[63] Horan

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56. *Id.* at 25.
57. *Id.*
58. *Id.*
59. *See id.* at 26.
60. *See id.*
61. *Id.*
62. *See id.*
63. *Abortion Part IV Hearing, supra* note 48, at 258–59 (statement of Dennis Horan). Later in the 1970s, pro-lifers more uniformly opposed the ERA, after New Right operatives

claimed that the ERA would likely "place the husband on an equal footing with the wife in the abortion decision."[64] Horan's argument assumed that men and women were similarly situated with respect to both procreation and child-rearing.

Co-founded by Dennis Horan, the litigation arm of the AUL elaborated on this contention: "Either or both marriage partners may suffer the legal, economic, social or psychological 'detriments' which, as this Court has observed, may result from pregnancy and subsequent parenthood; either or both may suffer social, economic, legal or psychological detriments as the result of an abortion."[65] Far from a protective patriarch, the father described by the AUL shared women's supposed emotional fragility and psychological investment. Like unwed mothers, men incurred financial liabilities and social stigma if they had children outside of wedlock. And like women, men suffered psychiatric distress as a result of pregnancy, childbirth, child-rearing and abortion.

This equal-trauma argument subverted sex stereotypes long advanced by both sides in the abortion debate. Assuming that women enjoyed a unique bond with a fetus, abortion opponents had asserted since the 1960s that pregnancy termination destroyed a woman's psyche.[66] In the consent wars, by contrast, prolifers described this trauma as sex-neutral.[67] In the spousal consent context, the AUL instead asserted that women and men enjoyed exactly the same bond with an unborn child and suffered the same consequences after either abortion or childbirth.[68]

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effectively argued that the Amendment would expand abortion rights. *See, e.g.*, Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 248–51 (2013); Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade, *1973–1980*, 87 CHI.-KENT L. REV. 571, 588 (2012).

64. *Abortion Part IV Hearing*, *supra* note 48, at 258–59 (statement of Dennis Horan).

65. Motion and Brief Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419), 1976 WL 178721, at *104 [hereinafter Brief of Dr. Eugene Diamond and Americans United for Life, Inc.].

66. *See, e.g.*, John G. Herbert, *Is Legalized Abortion the Solution to Criminal Abortion?*, 37 U. COLO. L. REV. 283, 291 (1965); Dennis M. Mahoney, Comment, *Therapeutic Abortion—The Psychiatric Indication—A Double-Edged Sword?*, 72 DICK. L. REV. 270, 288 (1968).

67. *See* Brief of Dr. Eugene Diamond and Americans United for Life, Inc., *supra* note 65, at *104–05.

68. *Id.* at *102–03.

These abortion opponents also assumed (perhaps inaccurately) that men and women would assume a roughly equal share of caretaking responsibilities. The AUL described parenthood as a sex-neutral right involving "the birth and raising of children."[69] The anti-abortion movement championed the causes of men theoretically willing to assume major or even exclusive responsibility for child-rearing.[70] Describing child-rearing as a woman's fate—as had the *Roe* Court[71]—entrenched a stereotype about men and women's proper roles. By contrast, abortion opponents argued that the Equal Protection Clause required rights for fathers both before and after birth. Establishing such rights meant "[d]isestablishing a sexual stereotype."[72]

The consent wars also encouraged some pro-lifers to downplay bias against the non-marital family. For much of the 1960s, the anti-abortion movement had led a charge against extramarital sexuality.[73] In the consent wars, by contrast, leading anti-abortion activists articulated rights for both putative fathers and divorced fathers. In particular, pro-lifers relied on Fourteenth-Amendment cases, including *Stanley v. Illinois* and its progeny,[74] that recognized some rights for unwed fathers.[75] According to the AUL, *Stanley* removed any gender stereotypes from constitutional parental rights, leaving in place a sex-neutral "right to conceive and raise a family."[76] The United States Catholic Conference similarly argued that *Stanley* meant that "a man has a legally cognizable interest in his progeny . . . at least as fundamental as the woman's."[77]

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69. *Id.* at *102.

70. For examples of these cases, see Doe v. Doe, 314 N.E.2d 128, 137–39 (Mass. 1974) (Reardon, J., dissenting) ("The modern trend is for fathers to take a more active role in the pregnancy . . . ."); Timothy Harper, *Woman Has Abortion Despite Court Order*, THE REPORTER (Wisconsin), Sept. 22, 1977, at 6.

71. 410 U.S. 113, 153 (1973).

72. Brief of Dr. Eugene Diamond and Americans United for Life, Inc., *supra* note 65, at *109.

73. *See supra* note 33 and accompanying text; *see also* Pam Chamberlain & Jean Hardisty, *Reproducing Patriarchy: Reproductive Rights Under Siege*, 9 PUB. EYE 1, 3 (2000) *available at* http://www.publiceye.org/magazine/v14n1/PE_V14_N1.pdf (discussing the Catholic Church's "reassertion of its long-standing condemnation of . . . extramarital sex" in the 1960s).

74. 405 U.S. 645, 649 (1972).

75. *See, e.g.*, Brief of Dr. Eugene Diamond and Americans United for Life, Inc., *supra* note 65, at *110.

76. *Id.* at *120.

77. Brief of Amicus Curiae for United States Catholic Conference, Planned

Championing consent laws also encouraged anti-abortion activists to envision different models of decision-making in the family. Rather than assigning most authority to a benevolent patriarch, abortion opponents often assumed a companionate marriage in which both spouses had equal responsibility. Allowing a woman to make a unilateral decision, the AUL argued, could not "be reconciled with the modern principle of equality of marital partners."[78] Prominent anti-abortion academic Robert Byrn likewise drew on the "bilateral" nature of companionate marriage in criticizing a regime in which women alone had decision-making power about abortion.[79]

In practice, anti-abortion sex equality arguments ignored the biological differences between men and women concerning pregnancy itself. If men asked for an equal share of the burdens of child-rearing, men could not ever assume part of the responsibility for pregnancy and childbirth. As Jan Liebman of the National Organization for Women (NOW) explained in the mid-1970s: "The woman is the one who carries the fetus, and gives birth to it, so she should be the only one to decide whether to carry it to term."[80] Spousal-consultation laws passed in most states also failed to establish or explain any clear connection between marital status and paternity.[81] Nor did abortion opponents address the legal difference between a father's interests in a child before and after birth.[82] If, as *Roe* held, the fetus did not count as a legal person,[83] a court could strike down a spousal-consultation law without assuming that mothers took greater responsibility for a child than fathers.

Just the same, in promoting consultation laws, pro-lifers challenged prevailing stereotypes about the control men exercised in

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Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74-1151, 74-1419), 1975 WL 171454, at *37.

78. Brief of Dr. Eugene Diamond and Americans United for Life, Inc., *supra* note 65, at *104.

79. Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 812 (1973), *reprinted in Abortion Part IV Hearing*, *supra* note 48, at 130 (statement of Robert Byrn).

80. Linda Mathews, *High Court to Rule on Spouse's Rights*, ANNISTON STAR (Alabama), Mar. 17, 1974, at 10E.

81. *See, e.g.*, Poe v. Gerstein, 517 F.2d 787, 795–96 (5th Cir. 1975).

82. *See, e.g., id.*

83. Roe v. Wade, 410 U.S. 113, 162 (1973) ("[T]he unborn have never been recognized in the law as persons in the whole sense.").

the family, the roles played by men and women in child-rearing, and the psychological attachment of either sex to a child. As prominent pro-life scholar Joseph O'Meara argued in 1974: "If the mother, whether married or unmarried, has a constitutional right to an abortion, and the father, whether married or unmarried, is denied the right to veto the abortion, it seems to me that he is denied the equal protection of the law."[84]

C. *Representing Fatherhood in the Courts*

Anti-abortion attorneys also advanced their own vision of sex equality in the courts. Some litigation, as Part III explores, involved the defense of multi-restriction laws requiring spousal consent. In other instances, anti-abortion attorneys represented a variety of men seeking to enjoin the abortion of what they believed to be their children. Consider the example of John Doe, a truck driver from Massachusetts. John, age twenty-seven, had a stormy marriage with his wife.[85] The couple had lost a child in August 1973.[86] The following November, the couple welcomed the news that Jane was pregnant again.[87] By January, however, the couple had split up, and John insisted that he would neither support the child financially nor allow his name to be put on the birth certificate.[88] Jane replied that she did not actually want a second child and would prefer to terminate the pregnancy.[89] John then reversed his position, offering to support the child and raise it himself.[90]

Suits like John Doe's required anti-abortion attorneys to construct a new idea of both fatherhood and masculinity. In making woman-protective arguments, abortion opponents drew on longstanding stereotypes about the uniqueness of motherhood.[91] In fathers' rights cases, by contrast, abortion opponents described

84. Joseph O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337, 348 (1974).

85. *See* Doe v. Doe, 314 N.E.2d 128, 129 (Mass. 1974).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. For a discussion on woman protective arguments, see, for example, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991, 1020 (2007).

distinctions between mothers and fathers as artificial and easy to overcome. For example, in *Jones v. Smith*, a 1973 decision, a putative father seeking to block an abortion highlighted his "desire to marry the appellee and to assume all the obligations financial and otherwise for the care and support of the unborn child."[92] A dissenting judge in *Doe* picked up on a similar pro-life narrative of fatherhood: "The husband stood ready to assume at birth the responsibility for the care and raising of his child. He furthermore was willing to defray all the medical expenses of the pregnancy and the delivery. The wife's association with and responsibility for the child could have ended at birth."[93]

Clients like John Doe reframed the connection between childbirth and child-rearing as a temporary and largely irrelevant inconvenience rather than a woman's destiny. Although the fathers in *Jones* and *Doe* both failed in court, their claims offered a different perspective on equal parenting. Men demanded and claimed a right to fulfill what had appeared to be women's natural or inevitable caretaking role. As parents, mothers and fathers stood on equal ground.

D. *The Consent Wars and the Path Not Taken*

Feminists appeared to have a strong legal position in the consent wars. At common law, even when most states banned abortion, men fared poorly when seeking tort recovery in abortion cases.[94] Courts tended to describe men's interest in childbirth and child-rearing as too shallow and contingent to warrant legal protection.[95]

Consider as an example a prominent New Jersey wrongful birth lawsuit, *Gleitman v. Cosgrove*.[96] The Gleitmans sued after their son, Jeffrey, was born with severe birth defects.[97] The couple argued that their physician had failed to warn them of the possible impact of Sandra Gleitman's German measles on the preg-

92. Jones v. Smith, 278 So.2d 339, 340 (Fla. Dist. Ct. App. 1973).

93. *Doe*, 314 N.E.2d at 138 (Reardon, J., dissenting). The court in *Doe* ultimately held that the father had no right to block the abortion. *See id.* at 134.

94. *Cf.* Note, *The Expectant Father Protected: Tort Action Allowed Against Abortionist*, 14 STAN. L. REV. 901–02 nn.1–2 (1962).

95. *Id.* at 906.

96. Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967).

97. *Id.* at 690.

nancy.[98] The court assumed—and the Gleitmans argued—that Sandra would care for the child, while her husband would take on only financial responsibilities: "Mrs. Gleitman can say that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects; and Mr. Gleitman can assert that it would have been less expensive for him to abort rather than raise the child."[99]

Courts imagined fathers' interests in unborn children to be minimal, speculative, and predominantly financial. Against this legal background, feminists would have an easy time undercutting arguments for spousal rights in the abortion context.

Equally important, *Roe v. Wade* had concluded that the fetus was not a person, at least for the purpose of the Fourteenth Amendment.[100] Without questioning the equal responsibility of fathers, feminists could contend that no parental rights applied before childbirth.

However, in spousal consent cases, feminists forged sex-equality arguments that at least partly assumed the irresponsibility and indifference of fathers. Moreover, in battles about spousal consent, legal feminists often glossed over the differences between gestational, genetic, and functional parenthood. Their tactical decisions shed light on the dilemma facing contemporary scholars and attorneys forging a legal framework for ART. While advancing important substantial goals, legal feminists blurred the distinction between gestation and parenthood in a way that would prove equally costly today.

II. BIOLOGY, DESTINY, AND THE CONSENT WARS

In the late 1960s and early 1970s, a variety of feminist reformers tied the legal right to abortion to demands for the reform of laws governing child care and pregnancy discrimination. In both campaigns, feminists used the law to make both childbirth and child-rearing a choice rather than an obligation.[101] Separating

98. *Id.* at 691.

99. *Id.* at 692–93.

100. 410 U.S. 113, 162 (1973).

101. *See* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 457–58, 464 (2011); Sarah D. Murphy, *Labor Pains in Feminist Jurisprudence: An Examination of Birthing Rights*, 8 AVE

women's biological and social roles would afford women more time, money, and freedom to pursue any life course they chose. Equally important, making motherhood a choice allowed feminists to challenge the sex stereotypes at the root of much of the sex discrimination in the workplace and in the larger society. If women had to shoulder less of the burden of child care, as feminists argued, men should more often identify as caretakers. Equal parenting figured in a broader feminist project to undermine the belief that women's biology and destiny were the same.[102]

As a result of the consent wars, feminists reworked the relationship between abortion rights and family law. In the most salient case, *Planned Parenthood of Central Missouri v. Danforth*, influential abortion opponents had not presented consent laws as necessary for the equal treatment of mothers and fathers but rather as valuable to the defense of traditional marriage.[103] Framed in this way, consent laws triggered feminists' anger about the subordination women experienced as a result of coverture and its vestiges. Far from discussing equal parenting, feminists instead presented consent laws as an effort by men to reassert sexual and social control over women.[104]

More importantly, in challenging consent laws, feminists tended to assume without explanation that women both bore *and* raised children; by forcing women to bear children, husbands forced on their wives a lifetime of caretaking responsibility.[105] Because of the demands of the consent wars, feminists inadvertently helped to weave a sex stereotype into reproductive rights jurisprudence.

This section begins by chronicling feminists' efforts to use law to separate women's caretaking and gestational role. Next, by focusing on the history of *Danforth*, the section explores how the consent wars distorted some feminists' advocacy. Finally, the section studies how these distortions contributed to the rise of woman-protective stereotypes in *Casey* and *Carhart*.

MARIA L. REV. 443, 450–53 (2010); *see also* ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 6–7.

102. *See, e.g.*, *infra* note 128 and accompanying text.

103. 428 U.S. 52, 68 (1976).

104. *See infra* notes 168, 172, 174–76 and accompanying text.

105. *See infra* notes 178–80 and accompanying text.

The history of legal feminists' efforts to navigate the consent wars provides a useful case study for advocates charged with answering similar questions in the context of ART: what is the relationship between women's gestational role and other constitutional parental rights? Neglecting the differences between women's gestational role and parental rights allowed feminists to draw a more compelling connection between sex equality and abortion. At the same time, this strategy had serious unintended consequences that might confront reproductive rights activists adopting a similar approach today.

A. *Abortion, Child Care, and the Right Not to Mother*

In 1970, the *New York Times* informed its readers of the common demands of an otherwise divided women's movement.[106] "Control of her own body is women's liberation's most broadly based tenet," the *Times* argued.[107] Laws transforming the provision of child-rearing support came a close second.[108] Many feminists saw a common theme in calls for "'free and legal abortions and child care centers for all who need them.'"[109] Until women had true freedom to choose a life apart from motherhood, other protections against sex discrimination lost meaning. As feminist Ti-Grace Atkinson argued in 1968: "[I]t's just not honest to talk about freedom for women unless you get the childrearing off their backs."[110]

Legally, demands for reforms to abortion and child care laws advanced a single agenda: freeing up time and energy women needed to pursue new opportunities while undercutting stereotypes that blocked women's progress in the workplace, education, and politics.[111] For example, NOW connected the repeal of abortion restrictions to the creation of a "nationwide network of child-care centers."[112] As early as 1967, the organization imagined reshaping women's social role by calling for "'the right of every

106. Marylin Bender, *The Women Who'd Trade in Their Pedestal for Total Equality*, N.Y. TIMES, Feb. 4, 1970, at 30.

107. *Id.*

108. *See id.*

109. *Id.*

110. Martha Weinman Lear, *The Second Feminist Wave*, N.Y. TIMES, Mar. 10, 1968, at SM24.

111. *See* Bender, *supra* note 106, at 30; Lear, *supra* note 110, at SM24.

112. Lear, *supra* note 110, at SM24.

woman to control her own reproductive life'" and "[f]ederally sponsored child care facilities for citizens of all income levels."[113]

Feminists in urban centers across the United States similarly saw the transformation of women's caretaking responsibilities as a natural extension of the abortion struggle. At the 1970 Conference to Unite Women, for example, five hundred feminists endorsed a right to twenty-four-hour daycare centers, as well as proposals to encourage men to take on a greater share of child care.[114] Fertility control allowed women to become pregnant only by choice.[115] Laws requiring fathers or the State to shoulder more responsibility for child-rearing allowed women greater control over what it meant to raise children.

As the 1970 Conference suggested, some feminists endorsed legal and social strategies to encourage men to take a more equal share of caretaking responsibilities. As feminist Susan Brownmiller reported in 1970: "Much of the energy of young mothers in the [women's] movement has gone into . . . day-care collectives that are staffed on an equal basis by mothers and fathers."[116] Encouraging men to act as caretakers would help to undermine the sex stereotypes governing men and women's roles. As New York feminist Rosalyn Baxandall explained: "Some [. . .] men have actually come to understand that sharing equally in child care is a political responsibility."[117]

Legal proposals for equal parental responsibility took on radically different forms: 1) the replacement of marriage as a status with a pure contract; 2) the reform of laws on pregnancy disability; and 3) the introduction of universal, federally funded daycare. Feminist Alice Rossi explained NOW's philosophy on the family as follows:

> The basic ideological goal of NOW is a society in which men and woman have an equitable balance in the time and interest with which they participate in work, family and community. NOW should seek and advocate personal and institutional measures which would reduce the disproportionate involvement of men in work at the ex-

113. Marylin Bender, *The Feminists Are On the March Once More*, N.Y. TIMES, Dec. 14, 1967, at 78.

114. Susan Brownmiller, *'Sisterhood Is Powerful': A Member of the Women's Liberation Movement Explains What It's All About*, N.Y. TIMES, Mar. 15, 1970, at 230.

115. *See* Bender, *supra* note 106, at 30.

116. Brownmiller, *supra* note 114, at 230.

117. *Id.*

> pense of meaningful participation in family and community, and the disproportionate involvement of women in family at the expense of participation in work and community.[118]

NOW pursued this agenda, as the leader of its Task Force on Marriage, Divorce, and Family Relations explained, by focusing on laws guaranteeing the "[p]rotection of a woman's rights to return to her job after childbirth" and requiring an "[e]qual sharing of child support and child rearing responsibilities by both parents."[119] NOW members like Rossi pushed for laws prohibiting pregnancy discrimination and guaranteeing access to child care, but in the mid-1970s the organization also promoted a "Marriage Equality Act" that would expand men's child-rearing rights and responsibilities.[120]

As early as 1970, the organization passed a resolution redefining marriage as "an equal economic and household responsibility and shared partnership with . . . shared care of children."[121] The marriage-equality laws formulated in the mid-1970s transformed this idea into a concrete proposal for legal reform.[122] NOW leaders assumed that current marriage laws treated marriage as a status under which "the man [was] the 'head of the household'" and the "woman render[ed] services."[123] A marriage equality law would replace the common law presumption with rules providing that "[t]he partners share the responsibility of providing for and 'heading' the household."[124] Under the law, the parties would have to draft a "statement of intention" addressing childbirth and child-rearing.[125] More importantly, judges would assume that

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118. Memorandum from Alice Rossi to NOW Task Force on the Family (on file with Schlesinger Library, Harvard University).

119. Press Release, NOW Task Force on Marriage, Divorce & Family Relations, Elizabeth Spaulding, Nat'l Coordinator (on file with Schlesinger Library, Harvard University).

120. NOW Proposed Resolution on the Marriage Contract (on file with Schlesinger Library, Harvard University).

121. DOROTHY MCBRIDE-STETSON, WOMEN'S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES 193 (3d ed. 2004). For later proposals from NOW on the remaking of marriage, see Letter from Nan Wood, Project Director, to NOW Chapter Presidents et al. (Aug. 12, 1973) (on file with Schlesinger Library, Harvard University) [hereinafter Letter from Nan Wood].

122. For additional discussion of these reforms, see, for example, Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 555 (2007).

123. NOW Proposed Resolution on the Marriage Contract, *supra* note 120.

124. *Id.*

125. *Id.*

"[d]omestic and child-rearing services [should be] shared equitably."[126]

The marriage equality proposal suggested that NOW members viewed equal parenting responsibilities as a central part of women's legal liberation. As Nan Wood, a champion of the marriage contract law, explained: "Until women have equality in the home there is no equality, and until children have a chance to observe the equality of the sexes from their earliest experience we cannot hope any gains [the women's movement] make[s] to be lasting gains."[127]

Feminist efforts to revolutionize marriage reflected a profound belief in the destructiveness of stereotypes about women's caretaking role. If men never took on a more equal share of child-rearing responsibilities, women would not have the time to pursue other interests. Moreover, from childhood onward, Americans would learn that women naturally belonged in the home and men did not. Equal parenting would uproot overbroad generalizations about men's proper role while freeing women to explore new identities and opportunities.

Efforts to redefine marriage and fatherhood figured centrally in a larger effort to dislodge the sex stereotypes that limited women's opportunities in education and the workplace. When testifying in favor of the proposed Equal Rights Amendment to the Constitution, for example, NOW President Wilma Scott Heide focused on the perniciousness of stereotypes about a woman's role as caretaker: "My ability to [give birth to] two children," she insisted, "does not confer on me the unique ability, based on my sex, to care for and raise these children."[128] As Serena Mayeri has shown, challenges to sex stereotypes played a crucial role in feminist efforts to transform equal-protection jurisprudence in the 1970s.[129]

The quest to undermine similar sex stereotypes also led feminists to campaign for protections against pregnancy discrimination. In 1974, in *Geduldig v. Aiello*, the Supreme Court upheld a

126. *Id.*

127. Letter from Nan Wood, *supra* note 121.

128. Eileen Shanahan, *Women's Leader Says U.S. Suffers Because Sexes Have Separate Roles*, N.Y. TIMES, Sept. 16, 1970, at 9.

129. SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

state disability policy that excluded pregnancy from coverage,[130] and in 1976, in *General Electric v. Gilbert*, the Court rejected a similar challenge under Title VII of the Civil Rights Act of 1964.[131] Like the laws they upheld, *Geduldig* and *Gilbert* fell into what Katherine Bartlett called "the uniqueness trap"—"an ill-defined perception that pregnancy is profoundly different from all other disabling conditions that plague or bless humankind."[132]

The idea of uniqueness underlying *Geduldig* and *Gilbert*, as Bartlett explained, suggested a "familiar set of stereotypes—that women belong in the home raising children; that once women leave work to have babies, they do not return to the labor force."[133] Influential feminists from Letty Cottin Pogrebin to Ruth Bader Ginsburg agreed that pregnancy discrimination reflected and reinforced some of the most entrenched forms of sex subordination.[134] Writing with feminist Susan Deller Ross, Ginsburg argued: "Women's child-bearing function has always played a central role in supporting sex discrimination."[135] Similarly, when feminists began promoting the federal Pregnancy Discrimination Act, witnesses stressed the deep harms to women caused by pregnancy-based stereotypes. Feminist Wendy Williams testified in this vein: "[I]t is fair to say that most of the disadvantages imposed on women, in the workforce and elsewhere, derive from this central reality of the capacity of women to become pregnant and the real and supposed implications of this reality."[136]

As feminists understood it, pregnancy discrimination forced women to suffer the consequences of old ideas about men and women's roles in the family.[137] Employers made assumptions about women workers' lack of commitment and deeper interest in

130. Geduldig v. Aiello, 417 U.S. 484, 494, 496–97 & n.20 (1974).

131. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138–40, 146 (1976).

132. Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1563 (1974).

133. *Id.*

134. *See* Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. TIMES, Jan. 25, 1977, at 33; Letty Cottin Pogrebin, *Anatomy Isn't Destiny*, N.Y. TIMES, May 6, 1977, at 21.

135. Ginsburg & Ross, *supra* note 134, at 33.

136. *Legislation to Prohibit Discrimination on the Basis of Pregnancy: H.R. Subcomm. on Emp. Opportunities of the Comm. on Educ. and Labor*, 95th Cong. 5 (1977) (statement of Wendy Williams).

137. *See, e.g., Comprehensive Child Development Act of 1971: Hearings Before the H. Select Subcomm. on Educ. and Labor*, 92d Cong. 64 (1971) [hereinafter *Child Development Act Hearing*] (statement of Rep. Bella Abzing).

child-rearing.[138] By extension, pregnancy discrimination assumed that men had little interest in child care and could father without putting any less effort into work. As the battle for equal parenting in marriage had assumed, feminists in the pregnancy discrimination struggle saw generalizations about caretaking at the heart of sex subordination. As Susan Deller Ross testified: "discrimination against women workers cannot be eradicated unless the root discrimination, based on pregnancy and childbirth, is also eliminated."[139]

The battle for federally funded, universal child care advanced the same agenda: challenging stereotypes about sex and caretaking and broadening women's opportunities outside the home. In 1971, when Congress proposed the Comprehensive Child Development Act of 1971 (CCDA), the federal government already involved itself in early childhood education and child care for low income families.[140] By contrast, the CCDA framed universal child care as a right.[141] With over two billion dollars in authorized funding, the CCDA would have made child care services available at no cost to low income families and charged a sliding-scale fee to families earning higher incomes.[142] Representatives Bella Abzug (D-NY) and Shirley Chisholm (D-NY) proposed legislation that would make the law more responsive to the needs of women.[143] In Abzug's view, child care counted as a woman's issue. "Isn't it clear yet," she asked, "that if a woman must stay home to mind the kids she won't be able to go to school, take a job, or work harder for a promotion. Isn't it clear that she will be doomed to hold low-paying, low-prestige jobs that no man would hold still for?"[144]

NOW members similarly viewed child care legislation as another tool in the war against sex stereotypes and unequal child-

138. *Id.*

139. *Discrimination on the Basis of Pregnancy 1977: Hearings Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 151 (1977) (statement of Susan D. Ross).

140. *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 461 (2011); *see also* Kimberly J. Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. POL'Y HIST. 215, 221 (2001).

141. *See* Dinner, *supra* note 140, at 461.

142. *See id.*

143. *See id.*

144. *Child Development Act Hearing*, *supra* note 137, at 64.

rearing duties. NOW members endorsed Abzug and Chisholm's proposal and child care reform at large, reasoning:

> A basic cause of the second class status of women in America and the world for thousands of years has been the notion that woman's anatomy is her destiny . . . that because women bear children, it is primarily their responsibility to care for them and even that this ought to be the chief function of a mother's existence. Women will never have full opportunities to participate in our economic, political, cultural life as long as they bear this responsibility almost entirely alone . . . .[145]

Ensuring that women have access to quality, low-cost child care services would, as NOW member Florence Dickler reasoned, make it possible for all women "to develop and utilize their talents, and skills."[146] "Immediate expansion of facilities is imperative in order to permit women to take a more responsible position in all facets of American life," Dickler concluded.[147]

The consent wars offered feminists an opportunity to bridge the gap between the law of childbearing—particularly in the case of abortion—and the law of child-rearing. Given NOW's commitment to equal parenting responsibilities, feminists might have been sympathetic to fathers' interests in child-rearing.[148] Without contradicting their support for equal parenting responsibilities, feminists could have stressed that the law did not treat the fetus as a child. Consequently, a man's interest in equal parenting might have looked quite different before, rather than after, viability. Moreover, feminists could have focused on the flaws in spousal consent laws, which rarely required that a husband father the child at issue.[149] Even if fathers did have rights, poorly drafted spousal consent laws might have done little to vindicate them. The law afforded a number of paths for feminists committed to both abortion rights and the principle of equal parenting.

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145. Press Release, NOW Task Force on Child Care, Tery Zimmerman, Nat'l Coordinator (Nov. 1973) (on file with Schlesinger Library, Harvard University).

146. Letter from Florence F. Dickler, Nat'l Coordinator of Child Day Care, to All Chapters of the National Organization for Women (on file with Schlesinger Library, Harvard University).

147. *Id.*

148. *See supra* note 118 and accompanying text.

149. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 68–69 (1976).

Why did feminists' legal response to the consent wars take so different a course in the 1970s? This section takes up this question next.

B. Danforth, *Spousal Consent, and the Defense of Traditional Marriage*

The consent wars escalated in 1975, after the United States District Court for the Eastern District of Missouri upheld a spousal consent law.[150] As we shall see, *Planned Parenthood of Central Missouri v. Danforth* re-framed the rationale for spousal consent, presenting it as a prerequisite for the preservation of traditional marriage.[151] Far from reflecting new ideas about fathering, as some feminists suggested, consent laws seemed to entrench outmoded ideas about a husband's authority over his wife. With traditional marriage in the spotlight, feminists had strategic reasons to present consent laws as the product of sex stereotypes concerning men's control over women.

Danforth allowed feminists to bring together women's interests in autonomy, equality, and bodily integrity. Relying on sex stereotypes, as feminists argued, men used women's bodies for their own purposes and later forced on their wives a life of unwanted child-rearing.[152] "To give men the unreviewable power to sentence women to childbearing and childraising against their will," feminists contended in *Danforth*, "is to delegate a sweeping and unaccountable authority over the lives of others."[153]

The assumption that women assumed both childbearing and child-rearing duties remained under the surface in the Supreme Court's *Danforth* opinion,[154] but feminists reinforced a strand of reasoning that began in *Roe* and carried forward in the Court's decisions in *Planned Parenthood v. Casey* and *Gonzales v. Car-*

150. Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1369 (E.D. Mo. 1975), *aff'd in part and rev'd in part*, 428 U.S. 52 (1976).

151. *Id.* at 1369–70.

152. Brief Amicus Curiae on Behalf of the Center for Constitutional Rights and the Women's Law Project at 5–6, 9–10, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (Nos. 74-1151, 74-1419) [hereinafter Brief for Constitutional Rights and Women's Law].

153. *Id.* at 53.

154. *See, e.g.*, 428 U.S. at 71 (stating that the wife is necessarily "more directly and immediately affected by the pregnancy" than the husband).

hart.[155] The child-rearing assumption made for a more compelling equal citizenship argument, since unintended pregnancy seemed to limit a woman's opportunities long after the birth of any child. Just the same, the consent wars helped to incorporate into reproductive rights jurisprudence a stereotype about parenting roles that was fundamentally at odds with feminist efforts to separate a woman's biological and social roles.

C. *Abortion, Divorce, and Unhappy Husbands: The Missouri Law*

Missouri's spousal consent law and others like it transformed public understandings of fathers' abortion rights. For example, State Senator Charles Dougherty, the chief sponsor of a spousal consent bill in Pennsylvania, explained the rationale for his proposal as follows: "a husband who has total responsibility for a child up to 18 years old should have some say before the child is born. 'We're talking about the concept of family here.'"[156] The total responsibility to which Dougherty referred involved not caretaking work but the traditional financial obligation a man assumed.[157] Rather than challenging stereotypes about the roles men assumed, Dougherty relied on generalizations about "the concept of family."[158]

Later, Missouri Attorney General (and future Senator) John Danforth elaborated on Dougherty's argument connecting spousal consent and the defense of traditional marriage. "Historically," Danforth contended, "this Court has viewed the institution of marriage as more than the cohabitation of two atomistic individuals, each pursuing his or her separate rights."[159] By demanding her reproductive liberty, a married woman acted in a way antithetical to the purpose and regulation of traditional marriage.

Danforth insisted that marriage required both parties to waive freedom over their bodies and important life decisions.[160] The

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155. *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 120 (1973).

156. *State Senate Passes Abortion Restriction*, EVENING STANDARD (Pennsylvania), Mar. 20, 1974, at 19.

157. *Id.*

158. *Id.*

159. Brief of John C. Danforth, Attorney General of Missouri, Planned Parenthood of Cent. Mo. v. Danforth, 452 U.S. 52 (Nos. 74-1151, 74-1419), 1976 WL 178720, at *35.

160. *Id.* at *34.

State could criminalize adultery, even if the same sexual acts would be permissible for unmarried persons.[161] The State had a similar authority to guarantee that "important decisions changing the structure or status of the marriage relationship be made by both parties."[162] In a world transformed by no-fault divorce and shifting gender roles, the State acted not to protect a man or woman from sex discrimination but rather identified a "means of preserving and strengthening the institution of marriage."[163]

The defense of marriage Danforth imagined appeared too little too late, given the freedom with which men and women could exit marriage. As a measure of last resort, however, consent laws would at least force parties to preserve traditional roles as long as they remained married. "So long as people choose to remain married," Danforth explained, "they must accept certain obligations and responsibilities believed by their elected representatives to be in the best interests of society and the institution of marriage."[164]

At first, members of the abortion-rights movement did not challenge Danforth's goal so much as argue that consent laws would do little to achieve it. "If a woman's going to disregard her husband's feelings, and gets an abortion anyway," argued Jan Liebman of NOW in 1974, "that's not an intact marriage any longer . . . . That's a war."[165] Liebman's arguments drew on ideas advanced by abortion reformers for the better part of a decade about the way in which abortion strengthened and healed the traditional family.[166] In the mid-1970s, some abortion-rights supporters echoed similar ideas. In Ohio, for example, abortion-rights activists contended that a spousal consent law would destroy rather than save traditional marriage, creating "a severe strain on marital relations, neglect or rejection of the new child, [and] threats to the stability of the family."[167]

Later, feminists and other abortion-rights activists used spousal consent laws to challenge both the privileged position of marriage and the dominant privacy rationale for abortion rights. In a

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161. *Id.* at *35.
162. *Id.* at *36.
163. *Id.* at *37.
164. *Id.* at *40–41.
165. Mathews, *supra* note 80, at 10E.
166. *See id.*
167. *See* Jolene Limbacher, *NOW Supports Legal Abortion as a Woman's Right*, DAILY REP. (Ohio), May 29, 1975, at A3.

brief submitted by Nancy Stearns and Rhonda Copelon of the Center for Constitutional Rights, feminists painted a far darker picture of traditional marriage, arguing that a consent requirement "necessitates and transcends even the limits of the husband's control over the wife as embodied in the common law of 'coverture' and its vestiges."[168]

Stearns and Copelon had reshaped abortion jurisprudence for several decades, from the time that Stearns litigated crucial pre-*Roe* cases to the pair's partnership in challenging the constitutionality of the Hyde Amendment, and the consent wars proved to be no exception.[169] Before the mid-1970s, activists on both sides of the abortion debate had celebrated marital harmony. Copelon and Stearns instead asserted that marital unity had long disguised "the common law subjugation of the married woman to her husband's will."[170]

For the better part of a decade, prominent abortion-rights leaders had assumed the superiority of marriage, insisting that legal abortion would not increase sexual promiscuity.[171] Copelon and Stearns used *Danforth* to turn this presumption on its head. Even if reforms had chipped away at coverture, laws in the 1970s still guaranteed men sexual access to their wives and treated a woman's care of her husband as a personal obligation.[172] Far from an ideal, the court's concern with the integrity of marriage provided "a thinly-veiled rationalization for assigning ultimate sway over . . . planning and harmony to men."[173]

By putting into question the presumption of marital supremacy, the consent wars also created an opening for feminists seeking to inject sex-equality arguments into the Court's abortion jurisprudence. Stearns and Copelon first argued that consent laws—and perhaps abortion regulations at large—relied on stereotypes

168. Brief for Constitutional Rights and Women's Law, *supra* note 152, at *6.

169. On Copelon and Stearns' involvement in the Hyde litigation, see, for example, Rhonda Copelon & Sylvia A. Law, *"Nearly Allied to Her Right to Be"—Medicaid Funding for Abortion: The Story of* Harris v. McRae, *in* WOMEN AND THE LAW STORIES 207, 216–23 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011). On Stearns' involvement in pre-*Roe* litigation, see, for example, Amy Kesselman, *Women versus Connecticut: Conducting a Statewide Hearing on Abortion*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE 1950–2000, at 42, 43, 52 (Rickie Solinger ed., 1998).

170. Brief for Constitutional Rights and Women's Law, *supra* note 152, at *19.

171. *See supra* notes 34–35 and accompanying text.

172. Brief for Constitutional Rights and Women's Law, *supra* note 152, at *3, *25, *27.

173. *Id.* at *48.

about women's role as a bearer of and caretaker for children.[174] "To enforce the husband's will," as they contended, "would repudiate not only the right to abortion but this Court's rejection, under the Equal Protection Clause, of sex-discriminatory statues [sic] and stereotypes."[175] Equally important, given the unique consequences and nature of pregnancy, a husband's veto of an abortion decision would undercut a woman's equal citizenship, imposing on women both unwanted childbirth and child-rearing. Stearns and Copelon asserted: "For this Court to sustain the spousal consent provision would be . . . a repudiation of the important steps taken in its recent decisions to foster the emancipation and equality of women."[176]

However, the feminists' *Danforth* brief made clear that arguments about the consequences of pregnancy stood in some tension with sex-stereotype conventions.[177] Requiring spousal consent for abortion reflected archaic ideas about a husband's role as protector and "head of household"—beliefs that a married man had the right to control his wife's sexual and reproductive decision-making.[178] At the same time, in outlining the consequences of unintended pregnancy, feminists drew on assumptions that a woman who bore a child almost necessarily raised it. For example, Stearns and Copelon asserted: "Missouri has here stated that a husband can force a woman against her will to endure nine months of pregnancy . . . *and be responsible for the rearing of a child for nearly two decades.*"[179] Prominent constitutional scholar Laurence Tribe built a similar assumption into his argument that spousal consent laws represented a form of involuntary servitude for women:

> [G]ranting a man the power to force someone to carry and care for his child despite her unwillingness to use her body and life for that purpose would raise the specter of the legally enforced physical and psychological domination of one group in society by another. A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, *to the pains and anxieties of carrying, delivering, and nurturing a child* she did not wish to conceive or *does not want to bear and*

174. *Id.* at *6.
175. *Id.*
176. *Id.* at *49.
177. *Id.* at *6.
178. *See id.* at *39–40, *48–52.
179. *Id.* at *9–10 (emphasis added).

> *raise.* is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude.[180]

The *Danforth* Court struck down the spousal consent law.[181] Indeed, over the course of the next several decades, the Supreme Court proved consistently hostile to any spousal-consultation provision.[182] Just the same, feminists' success in the consent wars figured in a much more complex story about the law of equal parenting. In promoting a principle of equal parenting responsibility in the law of marriage, pregnancy disability, and child care, feminists had worked to undermine the belief that a woman's biology necessarily led to a life of child-rearing. Indeed, as leaders of NOW and other feminist organizations recognized, equating a woman's procreative capacity and social roles facilitated much of the worst sex discrimination, both in employment and family law.[183] During the consent wars, however, feminists and other abortion-rights supporters borrowed from the same assumptions.

Strategically and ideologically, these assumptions played a critical role in advancing equal citizenship arguments. From a tactical standpoint, equality arguments appeared more compelling when a woman not only had to undergo an unwanted pregnancy but also had to submit to at least two decades of child-rearing responsibility. Ideologically, in a political climate in which abortion opponents lauded traditional motherhood and condemned promiscuity, feminists had reason for skepticism when abortion opponents endorsed equal responsibility in parenting.

Just the same, generalizing about women's caretaking role had deep risks for feminists committed to challenging the connection between biology and destiny. Assuming that women raised children could set the stage for broader and more troubling generalizations about women's behavior and preferences, particularly if neither advocates nor the courts explained why women took on a disproportionate share of child-rearing responsibilities.

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180. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 40 (1973) (emphasis added).

181. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976).

182. *See* OVERVIEW ON SUPREME COURT DECISIONS ON ABORTION AND THE RIGHT TO PRIVACY, CTR. FOR REPRODUCTIVE RIGHTS (2009), *available at* http://reproductiverights.org/en/document/overview-of-supreme-court-decisions-on-abortion-and-the-right-to-privacy.

183. *See supra* Part II.A.

The contradictory role played by the childbearing assumption came fully to the surface in *Planned Parenthood v. Casey*.[184] As a wide variety of scholars have noted, *Casey* articulated a clearer relationship between abortion and sex equality than had the Court's earlier decisions.[185] As had been the case since the decision of *Roe*, however, that connection rested partly on the supposed consequences of an unintended pregnancy:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[186]

Casey suggested that abortion regulations rested partly on the State's decision to enforce "its own vision of the woman's role."[187] Not only did sex stereotypes animate some abortion restrictions; the impact of unintended pregnancy—the "sacrifices" and "suffering" a woman endured—also justified a woman's right to define "her place in society."[188]

Just the same, *Casey* blurred the distinction between a woman's childbearing and child-rearing roles. Although limiting its discussion to the pregnancy itself, the *Casey* majority described a woman as a mother and highlighted the fact that a woman supposedly gave "to the infant a bond of love" after childbirth.[189]

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

185. *See, e.g.*, Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 334–35 (2010); Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 24–25 (2012); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1779–80 (2008); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833–35 (2007).

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

187. *Id.*

188. *Id.*

189. *Id.*

Echoing feminist arguments about coverture and spousal consent dating back to *Danforth*, the *Casey* Court identified sex stereotypes at work in the spousal-notification law challenged in *Casey*. As the majority explained: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children."[190]

By contrast, the Court appeared blind to stereotypes about the mother-child bond. In upholding the State's informed consent law, the majority assumed that an abortion decision would traumatize a sizeable group of women.[191] "[M]ost women considering an abortion," the Court explained, "would deem the impact on the fetus relevant, if not dispositive, to the [abortion] decision."[192]

Of course, an abortion's "impact on the fetus" would be obvious to most Americans, male or female. The *Casey* majority did not view women as inherently incompetent to make a decision about abortion, as its spousal-notification analysis made plain.[193] Because the majority assumed the existence of a powerful mother-child bond, however, it seemed more reasonable to assume that women did not know what they were doing than to conclude that most women choosing abortion knowingly killed their unborn children. "In attempting to ensure that a woman apprehend the full consequences of her decision," the Court further reasoned, "the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[194] Gender-role assumptions justified both the Court's understanding of the need for informed consent and its prediction concerning the regret and trauma women suffered after an abortion.

Sex-role stereotypes play a similarly prominent role in the Court's analysis of the federal Partial Birth Abortion Act ("PBA") in *Gonzales v. Carhart*.[195] Under *Casey*, an abortion law violates the Constitution if it has the purpose or effect of creating an un-

190. *Id.* at 898.
191. *See id.* at 882.
192. *Id.*
193. *Id.* at 896–98.
194. *Id.* at 882.
195. *See* 550 U.S. 124, 183–85 (2007) (Ginsburg, J., dissenting).

due burden on the woman's right to choose abortion.[196] *Carhart* required the Court to clarify what counted as a legitimate purpose under the undue burden framework.[197] In identifying two legitimate purposes behind the PBA, *Carhart* stressed "the bond of love the mother has for her child."[198] Recognizing the supposed uniqueness of motherhood allowed the government to advance a legitimate interest in "[r]espect for human life."[199]

The mother-child bond also tied into the government's interest in preventing post-abortion regret:

> 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 . . . ."[200]

Given the strength of the mother-child bond and the supposed probability of regret, *Carhart* concluded that the "State [had] an interest in ensuring so grave a choice is well informed."[201]

If feminists and sympathetic justices had assumed that women raised the children they bore, the stereotypes about mothering at work in *Casey* and *Carhart* should come as no surprise. As feminists had long recognized, deeply entrenched stereotypes about women's social roles had obstructed important reforms of child care and pregnancy disability laws. The courts had long assumed that women enjoyed a special role in raising children, much as they played a special part in gestation.[202] Left without an explanation of why women would shoulder the responsibility of child-rearing, courts logically fell back on longstanding cultural and legal assumptions about women's traditional parenting role.

The questions legal feminists confronted during the consent wars have resurfaced, this time in the context of efforts to explain the relationship between ART and existing constitutional reproductive rights, including abortion. Overlooking the differences between gestational, genetic, and functional parenthood might ad-

196. *Casey*, 505 U.S. at 878.
197. *See* 550 U.S. at 145–46.
198. *Id.* at 156–57, 159, 161, 166–67.
199. *Id.* at 159.
200. *Id.* at 159–60.
201. *Id.* at 159.
202. *See* Mason, *supra* note 17, at 1, 6, 12–13.

vance important interests at work in ART, allowing greater access to reproductive technologies or protecting individuals' interests in avoiding unwanted parenthood. Existing constitutional doctrine may provide the soundest foundation for new rights in the ART context.[203] However, the history of past efforts to explain the relationship between gestation and parental rights offers a cautionary tale for those who would use abortion doctrine as the basis for new rights governing ART. By assuming that women raised children and offering no explanation for this asymmetry, feminists and other abortion-rights supporters made it easy for courts to fall into the "uniqueness trap" identified by Katherine Bartlett.[204] Part III argues that if we ignore the distinction between gestation and parenthood in the ART context, we could fall back into that trap again.

III. REVISITING THE RELATIONSHIP BETWEEN ABORTION JURISPRUDENCE AND ART

Courts often look to the constitutional framework already governing reproductive decisions in determining which rights, if any, govern ART disputes.[205] Legal history can offer equally important insights about how (and how well) the law has resolved the countervailing parental rights of men and women. This section examines leading understandings of the relationship between ART and abortion jurisprudence. This article argues abortion jurisprudence should not provide guidance for courts interested in the existence of a right to seek or avoid procreation in the ART context. Using *Roe* and its progeny as a source of rights to seek or avoid parenthood conflates analytically and normatively distinct interests in genetic parenthood, gestational parenthood, and functional parenthood. The history of the consent wars makes plain the

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203. *See, e.g.*, Andrew B. Coan, *Is There a Constitutional Right to Select the Genes of One's Offspring?*, 63 HASTINGS L.J. 233, 294–95 (2011) (stating that existing constitutional analysis is the best approach for analyzing reproductive freedom); Jean Macchiaroli Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 647 (1991); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1038 (1984) ("[P]rivacy doctrine is richly developed in relation to reproductive freedom, and a shift to sex equality analysis in these cases seems, to many, unlikely.").

204. Bartlett, *supra* note 132, at 1563.

205. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (checking the applicability of privacy and bodily integrity concerns before proceeding with a dispositional authority analysis).

risks inherent in failing to unbundle the rights and responsibilities linked to parenthood.

To avoid entrenching stereotypes about gender roles and parenting, we should understand abortion rights as reflecting the unique concerns about bodily integrity, dignity, and equality surrounding pregnancy and gestation alone. Conversely, ART jurisprudence offers a way to reconcile the competing goals endorsed by feminists in the post-*Roe* era: the recognition of abortion rights and the battle to disestablish stereotypes surrounding pregnancy and motherhood. By separating the strands of parental rights and responsibilities, we can define an abortion right unrelated to generalizations about women's caretaking role.

Consider as an example the doctrine governing procreative rights in the context of embryo disposition. By some estimates, nearly 400,000 cryopreserved pre-embryos exist in the United States today.[206]

First, this section surveys the leading approaches in embryo disposition cases. The courts follow one of several approaches in these matters: (1) enforcing prior consent forms or other agreements addressing disposition;[207](2) leaving in place the status quo until the parties can reach a mutual contemporaneous agreement;[208] and (3) balancing the parties' respective interests.[209]

Next, the section maps a different set of legal approaches in embryo disposition jurisprudence, involving the relationship between ART and abortion law. Drawing on the history developed in Parts I and II, the section concludes by arguing that the courts should not rely on abortion law in reasoning about the rights governing genetic or functional parenthood.

A. *Prior and Contemporaneous Consent*

Some courts seek to avoid any constitutional issue by relying on either a prior or contemporaneous agreement between the par-

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206. Anne Drapkin Lyerly et al., *Factors That Affect Infertility Patients' Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623, 1623 (2006).

207. *See Kass*, 696 N.E.2d at 179 n.4; *In re* Marriage of Dahl, 194 P.3d 834, 842 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40, 43, 55 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261, 262, 264, 271 (Wash. 2002).

208. *See In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).

209. *See* J.B. v. M.B., 783 A.2d 707, 719–20 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

ties addressing embryo disposition.[210] Abortion jurisprudence, however, haunts even approaches relying on prior or contemporaneous consent. Prior-consent cases first imply that abortion jurisprudence recognizes a right to make decisions about procreation. In *Kass v. Kass*, the New York Court of Appeals concluded that prior contracts governing embryo disposition should be presumed valid, because "[e]xplicit agreements" had particular value in matters of reproductive choice, "where the intangible costs of any litigation are simply incalculable."[211]

The prior-consent approach does offer an interpretation of reproductive liberty. It values contracts because they "maximize procreative liberty" and reserve "to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."[212] Understood in this way, both abortion cases and the whole of privacy jurisprudence recognize a right to make important decisions, such as those concerning procreation, gestation, and genetic parenthood. A prior-consent approach does not vindicate the decisions of those who have changed their minds after the making of an earlier agreement. Just the same, courts adopting such an approach assume that an individual enjoys more decisional autonomy when the law enforces only agreements made by the parties, rather than allowing the State or the courts to make their own judgments.

Would *Kass* have come out differently if the court had unbundled interests in genetic, gestational, and functional parenthood? The court only briefly discussed constitutional procreative autonomy in reaching its decision,[213] so refining the lessons drawn from abortion jurisprudence may not substantially impact prior-consent jurisdictions. At the same time, however, the history of the consent wars calls into question the broad understanding of constitutional procreative liberty on which *Kass* relies.

The court suggests that constitutional procreative liberty primarily involves individuals' ability to make crucial decisions without interference from the State.[214] Indeed, *Kass* seems to read *Roe* and its progeny as recognizing the importance of freedom

210. *See supra* notes 207–08 and accompanying text.
211. *Kass*, 696 N.E.2d at 180.
212. *Id.*
213. *Id.* at 178.
214. *Id.* at 179.

from state meddling in reproductive decision-making in any context.[215] As the consent wars make apparent, however, we should interpret the abortion decisions as honoring women's interest in avoiding gestational parenthood rather than any broad interest in avoiding genetic or functional responsibilities. *Kass* may reach the right result, but prior-consent jurisprudence is undertheorized, based partly on a flawed understanding of the procreative liberty supposedly recognized by the existing doctrine. To explain the merits of the prior-consent approach, courts will have to look elsewhere.

B. *Contemporaneous Consent and the Abortion-Regret Analogy*

Iowa has adopted a second avoidance strategy, the contemporaneous consent approach, under which embryos remain in storage unless or until the parties can reach a mutual agreement about their disposition.[216] The contemporaneous consent approach relies on an independent understanding of constitutional procreative liberty and its relationship to abortion jurisprudence. In *In re Witten*, the Iowa Supreme Court described procreative liberty as including a broad right to avoid or choose parenthood:

> When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast, imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies. For some people, the mandatory destruction of an embryo can have equally profound consequences, particularly for those who believe that embryos are persons. If forced destruction is experienced as the loss of a child, it can lead to life-altering feelings of mourning, guilt, and regret.[217]

Witten envisages parenthood decisions as the site of a different kind of autonomy, involving self-expression and self-definition.[218] Becoming a parent confers either a wanted or unwanted identity. By extension, much like abortion, both parenthood and nonparenthood represent a source of potential emotional trauma.[219]

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215. *See id.* at 179–80.

216. *See In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).

217. *Id.* at 778 (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 97 (1999)).

218. *Id.* (quoting Coleman, *supra* note 217, at 96–97).

219. *Id.*

If the court properly unbundled interests in genetic, gestational, and functional parenthood, judges might find independent reasons to support a mutual contemporaneous consent approach, particularly since an analogy to abortion cases plays only a peripheral role in the reasoning of *Witten*.[220] Again, however, *Witten*'s notion of procreative autonomy is distinguishable from the gestational parenthood at work in abortion cases.[221]

If anything, *Witten*'s idea of the trauma produced by unwanted genetic parenthood uncomfortably resembles ideas about post-childbirth regret deployed in *Roe* and during the consent wars.[222] Certainly, as feminists argued during the consent battle, some women do experience psychiatric distress and a different life course as the result of unwanted pregnancy.[223] Similarly, as *Witten* recognized, some men and women would likely suffer trauma as the result of unwanted genetic parenthood.[224] Just the same, the *Witten* Court premised its support for a mutual contemporaneous consent approach partly on a notion of parental regret that borrows too much from *Casey*, *Carhart*, and even *Roe*—an understanding of regret that ignores important differences between genetic, gestational, and functional parenthood.[225] If genetic parenthood serves as an important source of psychological distress, the courts will have to find better evidence of it. Abortion cases themselves offer little support.

While some states reject either the prior-consent or contemporaneous-consent approach, courts applying either one may struggle to determine whether the parties intended a consent form to act as a binding agreement; in other cases, no written agreement exists.[226] In such cases, courts have to weigh the parties' interests in seeking or avoiding procreation.[227] In doing so, courts have re-

220. *See Witten*, 672 N.W.2d at 774 (discussing a right to bear children and the fetal personhood debate rather than the abortion cases).

221. *Id.* at 778.

222. *Compare id.*, *with* Roe v. Wade, 410 U.S. 113, 153 (1973).

223. *See Roe*, 410 U.S. at 153.

224. *Witten*, 672 N.W.2d at 778 (quoting Coleman, *supra* note 217, at 97).

225. *Id.* (quoting Coleman, *supra* note 217, at 97, 110).

226. For an example of courts' skepticism about the extent to which consent forms constitute a binding agreement, see A.Z. v. B.Z., 725 N.E.2d 1051, 1056–57 (Mass. 2000). For scholarly concerns in the same vein, see Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIMONIAL L. 57, 66–67 (2011). For an example of a case in which the parties had no written agreement, see Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

227. *See Davis*, 842 S.W.2d at 590–91, 603; *cf.* J.B. v. M.B., 783 A.2d 707, 719 (N.J.

lied on abortion jurisprudence in drawing the boundaries of procreative liberty.[228] The next sections identify three distinct lessons courts draw from *Roe* and its progeny.

C. *Abortion and the Uniqueness of Motherhood*

One approach draws from abortion jurisprudence the principle that "until such time as the fetus reaches a stage of development sufficient to trigger the State's interest in its life the fetus' fate rests with the mother to the exclusion of all others."[229] Consider, for example, the (ultimately overruled) New York Supreme Court's decision in *Kass*, where the parties pursued in vitro fertilization ("IVF") after they failed to conceive.[230] Following their divorce, the wife wanted to have the remaining pre-embryos implanted.[231] The husband insisted the pre-embryos be given to a hospital for research.[232] In resolving the parties' respective rights, the court explored abortion jurisprudence in order to determine "whether there is a conceptual or propositional difference between the product of an *in vitro* fertilization and the product of an *in vivo* fertilization."[233]

In the context of in vivo procreation, the court viewed the right to seek or avoid procreation as inherently gendered: "It cannot seriously be argued," the court explained, "that a husband has a right to procreate or avoid procreation following an *in vivo* fertilization. He cannot force conception [or abortion]."[234] A woman's right to procreate flowed from "the nature of the zygote not the stage of its development or its location."[235] In either instance, men's rights to procreate ended once they consented to either IVF or to sex.[236] After the point of consent, "the rights of the

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2001).

228. *See Davis*, 842 S.W.2d at 601. *See generally* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 955 & nn.50–51 (1986).

229. Kass v. Kass, 1995 WL 110368, at *2 (N.Y. Sup. Ct. 1995), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998). For a supporting scholarly argument, see, Daar, *supra* note 3, at 476–77.

230. *Kass*, 1995 WL 110368, at * 1.

231. *Id.*

232. *Id.*

233. *Id.* at *2.

234. *Id.*

235. *Id.* at *3.

236. *Id.*

wife must be considered paramount and her wishes with respect to disposition must prevail."[237]

The New York Supreme Court decision in *Kass* read into *Roe* and its progeny the existence of a gender-specific right to control the disposition of pre-viable fetuses.[238] Some language in *Roe*, *Casey*, and *Carhart* supports this idea. When explaining the importance of fertility control for women, *Roe* mentions the "stigma of unwed motherhood" and the challenges of child-rearing, suggesting that women's authority over children extends beyond childbirth.[239] *Casey* and *Carhart* hint at the existence of a unique and constitutionally significant "bond of love" between mothers and children, whether born or unborn.[240] Dicta of this kind suggest that the right to abortion reflects broad differences between men and women's interest in, capacity for, and tendency to take on parental duties. If abortion rights rest on a deep difference between mothers and fathers, women may well enjoy a unilateral decision-making authority in the context of IVF.

As a majority of courts have recognized, however, assigning women authority in the IVF context ignores the importance of bodily integrity and gestational parenthood in abortion jurisprudence.[241] The history of the consent wars spotlights the importance of this conclusion.[242] While women may, in contemporary society, carry a disproportionate share of caretaking responsibility, there is nothing inevitable about the burden women have assumed.

More importantly, assigning women reproductive decision-making on the basis of a temporary social reality has profound costs. First, the division of child-rearing in the United States may change. Tying reproductive authority to a fluid social reality will make ART jurisprudence unpredictable, introducing added uncer-

237. *Id.*

238. *See supra* notes 234–37 and accompanying text.

239. 410 U.S. 113, 153 (1973).

240. Gonzales v. Carhart, 550 U.S. 124, 159 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

241. *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 108 ("The constitutionality of laws that prevent the discard or destruction of IVF embryos is independent of the right to abortion established in *Roe v. Wade* and upheld in *Planned Parenthood v. Casey*. *Roe* and *Casey* protect a woman's interest in not having embryos placed in her body and in terminating implantation (pregnancy) that has occurred.").

242. *See supra* Part II.

tainty to an already amorphous body of law. Second, giving women decision-making power would further strengthen the stereotypes about women's roles as functional parents that have so long plagued abortion law. It is bad enough that sex-role stereotypes serve to limit women's reproductive autonomy in the abortion context. Courts should not import a similarly flawed analysis into ART jurisprudence.

D. *Abortion Jurisprudence and the Right Not to Procreate*

Most courts, including the Supreme Court of Tennessee in *Davis*, correctly refuse to read a gender-specific decision-making authority into ART cases, recognizing that "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions" apply to IVF.[243]

A variety of courts instead draw on *Roe* and its progeny to describe a broad, gender-neutral right to avoid procreation—a right that usually trumps any competing reproductive liberty interests.[244] In *Davis*, Mary Sue Davis wanted to donate several preembryos to another couple for implantation, while her former husband, Junior, opposed her decision.[245] The *Davis* court declined to decide the case on contract grounds, and instead proceeded to balance the parties' interests.[246]

In so doing, the court first unbundled parental rights, describing independent interests in "child-bearing and child-rearing aspects of parenthood," "gestational parenthood," and "genetic parenthood."[247] *Davis* found embryo disposition cases to be fundamentally distinguishable from abortion cases, which "dealt with gestational parenthood" rather than genetic parenthood.[248]

Nonetheless, the *Davis* court explained the importance of genetic parenthood by borrowing from the trauma reasoning set forth in *Roe*: "Sperm donors may regret not having contact with their biological children. . . . Even more so, women who have sur-

243. Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

244. *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) (ceding that "ordinarily the party choosing not to become a biological parent will prevail").

245. *Davis*, 842 S.W.2d at 590.

246. *Id.* at 598, 603.

247. *Id.* at 602–03.

248. *Id.* at 603.

rendered children for adoption may be haunted by concern about the child."[249] Much as unintended gestation and childbirth can cause psychiatric distress, unwanted genetic parenthood can produce trauma, particularly for those who do not take care of their offspring.[250] And much as the trauma following unwanted pregnancy and childbirth help justify women's abortion rights, the mental distress accompanying unwanted genetic parenthood dictates that the party seeking to avoid procreation should usually prevail.[251]

Similarly, under *Davis*, the consequences of procreation require that gamete providers alone enjoy decisional autonomy in the IVF process, much as the consequences of procreation require that women enjoy abortion rights under *Roe*. "[N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process," the court explained, "because no one else bears the consequences of these decisions in the way that the gamete-providers do."[252] Similarly, the *Roe* Court found a right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" partly by stressing "[t]he detriment that the State would impose upon the pregnant woman by denying this choice."[253] Like *Davis*, *Roe* highlighted the specific psychological harms produced by unwanted parenthood: the "distressful life and future," "[p]sychological harm," and threats to "[m]ental and physical health" produced by unwanted parenthood.[254]

Trauma arguments played a similar role in the Supreme Court of New Jersey's decision in *J.B. v. M.B.* In *J.B.*, the plaintiff sought the destruction of several fertilized pre-embryos, while her former husband wanted to preserve them, either for implantation in a future partner or for donation to another infertile couple.[255] Like *Davis*, *J.B.* drew on abortion and privacy jurisprudence as "a framework within which disputes over the disposition of pre-

249. *Id.* at 603 n.28.

250. *See id.* at 604.

251. *See id.*

252. *Id.* at 602.

253. Roe v. Wade, 410 U.S. 113, 53 (1973).

254. *Id.* Citing the fact that the wife did not want the embryos implanted and had no compelling constitutional right to procreation, the court in *Davis* favored the husband's position. *Davis*, 842 S.W.2d at 604.

255. J.B. v. M.B., 783 A.2d 707, 709–10 (N.J. 2001).

embryos can be resolved," and both *Davis* and *J.B.* concluded that "[o]rdinarily, the party wishing to avoid procreation should prevail."[256]

Ultimately favoring the wife's interest in avoiding procreation, the *J.B.* court downplayed the weight of the husband's interest in procreation because he already had genetic children and would, at least in theory, have future opportunities to become a genetic parent.[257] By contrast, as the *J.B.* court explained, violating an interest in avoiding procreation would produce lasting emotional trauma.[258] As the court explained, "the birth of [a] biological child . . . could have life-long emotional and psychological repercussions."[259] Ambivalence or even regret arising from the parent-child bond makes unwanted genetic parenthood a potent source of trauma, much like trauma accompanies unwanted childbirth or abortion.[260]

If the courts had focused more clearly on the distinctions between gestational, genetic, and functional parenthood, would *Davis* or *J.B.* have come out any differently? In both cases, the courts already recognized that embryo disposition cases involved a different dimension of parenthood than did *Roe* and other abortion cases.[261] At the same time, in elaborating on the stakes of genetic parenthood, *Davis* and *J.B.* present it as strikingly similar to the gestational parenthood described in abortion jurisprudence.

The gender-specific trauma set out in *Roe* figures centrally in *Davis* and *J.B.*, helping to explain the greater value assigned to rights to avoid (rather than seek) procreation.[262] As the history of the consent wars instructs, however, assumptions about the psychiatric distress defining parenthood are neither necessary to the resolution of reproductive disputes nor helpful in understanding why the Constitution may protect reproductive liberty. The ideas of post-childbirth trauma and responsibility *Davis* and *J.B.* set forth draw heavily on sex-role stereotypes about trauma and re-

256. *Id.* at 716 (quoting *Davis*, 842 S.W.2d at 604).
257. *Id.* at 717.
258. *Id.*
259. *Id.*
260. *See id.*
261. *See supra* notes 247–48, 257.
262. *See supra* notes 249–50, 258–59.

gret that cost feminists during the consent wars. These stereotypes detract from ART jurisprudence, introducing inaccurate and self-reinforcing generalizations into reproductive law and politics.

Independently of the reasons highlighted in *Davis* and *J.B.*, courts may have good reason to privilege interests in avoiding unwanted parenthood. The history of the consent wars militates in favor of a more nuanced, fact-intensive weighing of the parties' interests rather than a generalized assessment of the importance of dodging unwanted genetic parenthood. The abortion cases do not—and should not—support a conclusion that rights to avoid parenthood have greater value than countervailing interests in procreation.

E. *Abortion Jurisprudence and the Right to Seek or Avoid Procreation*

Although *Davis* and *J.B.* recognize a right to procreate that may prevail in certain factual circumstances, the trauma and regret linked to unwanted genetic parenthood mean that the right not to procreate usually trumps any countervailing procreative interest.[263] Again drawing on abortion jurisprudence, other courts applying a balancing test describe a more robust interest in seeking genetic parenthood. In *Reber v. Reiss*, for example, the wife sought implantation of fertilized embryos created using her husband's sperm.[264] Rendered infertile by treatment for breast cancer, she claimed that the pre-embryos represented her last chance at biological parenthood.[265] Seeking to avoid genetic parenthood, the husband wanted the pre-embryos to be destroyed.[266]

In balancing the parties' interests, the *Reber* court implied the existence of a broader and more constitutionally significant right to procreate at work in the Supreme Court's abortion and privacy jurisprudence.[267] *Reber* distinguished interests in legal parenthood or caretaking from a woman's constitutional rights involving genetic parenthood and pregnancy: "Adoption is a laudable, won-

263. *See supra* notes 244, 256 and accompanying text.
264. *See* Reber v. Reiss, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012).
265. *See id.* at 1138.
266. *Id.* at 1133.
267. *Cf. id.* at 1138–39.

derful, and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child."[268]

Read in harmony with *Reber*, *Roe* and its progeny would recognize the unique costs and benefits tied to gestation or pregnancy. The opportunity to act as a gestational or genetic parent has a unique value for which neither adoption nor foster parenting could substitute. A party's interest in procreation draws on ideas in abortion jurisprudence about the uniqueness of pregnancy and the bond between a woman and her genetic child.

In *Szafranski v. Dunston*, an Illinois court similarly drew from abortion jurisprudence a series of constitutionally significant interests in procreation and the avoidance of procreation.[269] In *Szafranski*, a man sought to prevent the use of embryos created using his sperm and a former girlfriend's ova.[270] The former boyfriend drew on abortion jurisprudence in describing his right to avoid parenthood:

> [U]nlike in the abortion context, in the context of cryopreserved pre-embryos the man and woman are in equal positions. And with this equality of positions comes the equality of the respective constitutional rights of a woman and man to control the use of the pre-embryos. As a result, the constitutional right not to be a parent means the consent of both the woman and the man is required for any use of the pre-embryos.[271]

In effect, the former boyfriend interpreted abortion jurisprudence as creating a right to avoid procreation. Under *Roe* and its progeny women's interests prevailed only because women alone could become pregnant. When IVF came into play, men and women both enjoyed a paramount right to avoid parenthood.

The *Szafranski* court offered a radically different reading of *Roe* and its progeny: abortion jurisprudence actually required a balancing of interests in procreation, fetal life, and the avoidance of procreation.[272] "[T]he right to terminate a pregnancy," the court

268. *Id.* at 1138.
269. *See* Szafranski v. Dunston, 993 N.E.2d 502, 516 (Ill. App. Ct. 2013).
270. *Id.* at 503.
271. *Id.* at 516.
272. *See id.*

explained, "is subject to a balancing of the interests involved."[273] On this reading, *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court's spousal consent decision, balanced a husband's interest in procreation and a wife's interest in avoiding it.[274] *Planned Parenthood v. Casey*, in turn, weighed "the right of the woman to choose to have an abortion" and the legitimate interests of the State "from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[275] Abortion jurisprudence instructed that the rights to seek and avoid procreation had significant and sometimes equal value.

Reber and *Szafranski* come closest to a satisfactory analysis of the relationship between ART and the abortion cases, recognizing the myriad ways in which the abortion right—based on concerns about dignity and bodily integrity—does not resemble interests in achieving or avoiding genetic parenthood that are often at stake in the context of ART. As *Reber* recognizes, pregnancy differs in fundamental ways from functional parenthood.[276] And as *Szafranski* acknowledges, abortion jurisprudence does not offer any clear answers as to the relative value of rights to seek and avoid procreation once a woman's bodily integrity is no longer on the line.[277]

Ultimately, courts should develop ART jurisprudence largely outside the shadow cast by abortion law. Relying on unworkable analogies impoverishes ART analysis and reinforces a troubling understanding of the abortion cases that overlooks important differences between gestational, genetic, and functional parenthood. Drawing together abortion jurisprudence and ART might saddle the latter with the controversy and backlash that defined post-*Roe* politics. More importantly, as the consent wars make clear, abortion cases touch on an independent and unique set of constitutional concerns surrounding unwanted pregnancy—not undesired parenthood. Ignoring this distinction will introduce the mistakes made in abortion litigation into the framework ART scholars and jurists have just begun to develop.

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273. *Id.*

274. *See id.* (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976)).

275. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

276. *See supra* text accompanying notes 267–68.

277. *See supra* text accompanying note 271.

F. *Childbearing, Gestation, Functional Parenthood, and Genetic Parenthood*

What justifications remain for relying on the child-rearing assumption in abortion law? First, we might argue that, as a matter of fact, women still assume a disproportionate share of caretaking responsibility.[278] Generalizations about child-rearing simply reflect sociological fact.

Even if we assume the truth of this proposition, the child-rearing assumption plays a problematic role in abortion jurisprudence. First, justifying a constitutional right in reference to a disputed and changeable sociological assertion is risky business. As Reva Siegel has chronicled, massive resistance to *Brown v. Board of Education*[279] partly reflected a belief that "assertions about sociological facts were indeterminate and partial, and hence an illegitimate ground for a decision that claimed the authority of constitutional law."[280] Sociological arguments appear particularly vulnerable to attacks on judicial legitimacy. If judges cannot competently evaluate sociological evidence, such assertions easily come under fire for being arbitrary, political, and result-oriented.[281]

Contested sociological assertions also remain an unstable foundation for constitutional rights. As June Carbone has shown, wealthier couples now divide caretaking responsibilities more evenly than do those in other socioeconomic groups.[282] In the larger society, men perform a larger share of caretaking work than

278. *See, e.g.*, Danielle Kurtzleben, *Vive La Difference? Gender Divides Remain in Housework, Child Care*, U.S. NEWS & WORLD REP. (June 22, 2012), http://www.usnews.com/news/articles/2012/06/22/vive-la-difference-gender-divides-remain-in-housework-child-care; Kim Parker & Wendy Wang, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family*, PEW RES. (Mar. 14, 2013), http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/.

279. 347 U.S. 483 (1954).

280. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1488 (2004).

281. In *Casey* itself, Justice Scalia took particular aim at the plurality's descriptive assertions, arguing that the opinion's "error-filled history book" rendered the opinion illegitimate. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996–99 (1992) (Scalia, J., concurring in part and dissenting in part).

282. *See* June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 867, 878 (2011).

they did several decades ago.[283] If wealthy women generally face a less onerous child-rearing responsibility, should they have correspondingly narrower abortion rights? In the future, if the State or men undertake a greater share of caretaking responsibility, should women lose abortion rights altogether? By grounding abortion rights in uncertain generalizations about women and caretaking, we invite this kind of challenge.

Perhaps the child-rearing assumption still makes sense because it strengthens the sex equality case for abortion rights. Pregnancy lasts only nine months and, as such, represents a temporary interference with women's bodily integrity and equal opportunity. By contrast, if we assume that women bear a disproportionate share of caretaking responsibility, the consequences of an unintended pregnancy seem much graver.

However, the history of the consent wars suggests that the child-rearing assumption is both unnecessary and counterproductive. The assumption becomes counterproductive because it creates an uncomfortable contradiction between feminist sex equality arguments—which seek to root out stereotypes based on pregnancy, uniqueness, and child-rearing—and feminist abortion arguments—which at times rely on similar generalizations. The assumption becomes unnecessary because pregnancy and gestation represent grave enough burdens to explain the relationship between fertility control and women's equal citizenship. As Khiara Bridges has shown, statutory law, common law, and constitutional law already provide some support for the proposition that "unwanted pregnancies . . . literally, harm women."[284] Childbirth represents an "intensely traumatic physical event."[285] Pregnancy transforms a woman's body and imposes health risks.[286] Finally, unintended pregnancy can change a woman's identity and understanding of herself in ways that may be emotionally or psychologically traumatic.[287] By emphasizing the limited time span of pregnancy, we fail to take seriously women's experiences of unwanted pregnancy. Additionally, sex equality arguments for abortion leverage historical evidence that sex stereotypes animate both wom-

283. *See* Parker & Wang, *supra* note 278.

284. Khiara M. Bridges, *When Pregnancy Is An Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 459–60 (2013).

285. *Id.* at 485.

286. *See id.* at 485–87.

287. *See id.* at 488–89.

an-protective and fetal-protective laws.[288] If we no longer rely on the child-rearing assumption, these other sex equality arguments remain just as convincing.

If we construe abortion rights as involving unwanted pregnancy or gestation, what does abortion jurisprudence teach us about broader rights to avoid or seek procreation? Reconceived as recognizing a right to avoid only unwanted pregnancy or gestation, *Roe* and its progeny offer no answer as to whether the Constitution recognizes broad interests in seeking or avoiding procreation. Abortion laws implicate sex equality concerns because only women become pregnant and because generalizations about sex roles fuel some anti-abortion legislation. While abortion rights may fall in the same general category of liberty interest as a right to seek or avoid procreation, *Roe* and its progeny recognize a right to abortion, not a right to avoid procreation in all contexts.

Nor should we force such an interpretation on abortion jurisprudence. Reading *Roe* or *Casey* as cases about the right to avoid parenthood conflates women's biological/gestational roles with burdens related to functional or genetic parenthood. As ART cases teach us, not all gestational parents face the responsibility of child-rearing or the trauma that might accompany unwanted genetic parenthood. And as feminists recognized in the 1970s, women's biological role as gestational parents does not necessarily lead to a life of caretaking.[289]

Conversely, ART offers a roadmap for rethinking abortion rights. Unraveling the different strands of legal parenthood makes clear that genetic, gestational, and functional parenthood raise distinct legal questions. We should not ask whether there is a right to seek or avoid parenthood in the abstract, for the reasons to recognize such a right in the context of genetic, gestational, or functional parenthood will be quite different. In abortion jurisprudence, we have often lost sight of these crucial differences. The injury produced by an unplanned pregnancy often appears to be a form of "compulsory motherhood," understood as an unde-

288. *See, e.g.*, Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 414–15 (2013); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263–66 (1992) (analyzing abortion-restrictive regulation in an equal protection framework based on historical perspectives of women's role in society).

289. *See supra* note 113 and accompanying text.

sired genetic, gestational, and (perhaps lifelong) caretaking relationship.

In ignoring the different aspects of parental rights, abortion jurisprudence fails to track important changes in the way Americans achieve and think of parenthood. Additionally, focusing on "compulsory motherhood" gives new life to the kind of sex stereotypes drawn on by the *Casey* Court.[290] Abortion law needs a better account of what it does and does not mean to be pregnant. The burdens of caretaking do not always follow the injuries tied to an unintended pregnancy.

Recognizing this distinction takes away some of the force of *Casey*'s generalizations about post-abortion regret and the mother-child bond.[291] At present, abortion law generally assumes without explanation that women raise the children they bear. In a climate in which stereotypes about women's caretaking role remain very much alive, the Supreme Court has turned (unsurprisingly) to generalizations about the mother-child bond in reasoning about why women raise children or regret abortion.[292] If we reimagine abortion as a right to avoid only gestation and pregnancy, these generalizations will make less sense in the broader context of reproductive rights jurisprudence. None of this is to say that a change in the rationale for abortion rights would necessarily stop the Court from invoking sex stereotypes in reasoning about abortion. Nonetheless, those on the side of reproductive rights should make arguments that chip away at sex stereotypes rather than reinforce them.

CONCLUSION

As disputes about the disposition of pre-embryos and IVF reach the courts, the law once again has to address competing visions of procreative liberty. In so doing, judges often fall back on the constitutional framework used in abortion and privacy cases. At a minimum, abortion cases seem to bear a compelling resemblance to ART disputes. For scholars and advocates seeking constitutional support for new procreative rights in the ART context, abortion law might provide the best available constitutional

290. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992).
291. *Id.*
292. *Id.*

foundation.[293] Moreover, abortion law (like privacy jurisprudence, broadly speaking) highlights important constitutional concerns applicable in the ART context, such as bodily integrity, autonomy, and sex equality.[294]

We can identify equally compelling reasons, of course, for separating (or limiting the applicability of) abortion and ART jurisprudence. Abortion law comes saddled with significant limitations: the denial of a right to state support, a clear and seemingly growing interest in fetal life, and an apparent blindness to issues of race and class discrimination.[295] Politically, an ART/abortion analogy may introduce into ART disputes the bitterness and dysfunction that define abortion politics.[296] With powerful policy arguments on either side, we may have no clear way to decide whether or not to draw on abortion case law in reasoning about ART.

As this article shows, the legal history of struggles over abortion and spousal consent provides a new way into the debate about the relationship between ART and abortion jurisprudence. In the 1970s, feminists worked to deconstruct dominant legal and popular ideas about parental rights, separating women's biological ability to become pregnant from any subsequent caretaking right or duty. As originally and properly understood, abortion rights figured centrally in this project. A right to choose abortion allowed women who became pregnant to avoid pregnancy and childbirth. By embracing abortion rights, the law sent a message to the state that pregnancy in no way required a life of caretaking.

Just the same, feminists conceived of abortion rights as allowing women to avoid unwanted pregnancy and gestation alone. Feminists certainly pursued reforms that would allow women to avoid unwanted child-rearing responsibilities, but viewed those

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293. *See generally* ROBERTSON, CHILDREN OF CHOICE, *supra* note 3 (analyzing the legal, ethical, and social controversies surrounding ART); Robertson, *A Secular Regard*, *supra* note 3, at 87.

294. For discussion of the intersection between reproductive rights, constitutional equality, and ART, see, for example, Daar, *supra* note 3, at 463–69; Rao, *supra* note 3, at 1460–62.

295. For a sample of these criticisms of abortion rights, see Law, *supra* note 4, at 1020; MacKinnon, *supra* note 4, at 52–53.

296. On the polarization of contemporary abortion politics, see, for example, CAHN & CARBONE, *supra* note 4, at 98; MUNSON, *supra* note 26, at 89.

responsibilities as normatively and politically distinct from the harms produced by pregnancy.

The consent wars helped to transform (and tame) feminists' ambitions. To incorporate sex equality into abortion law, feminists made a strategic decision to use the same kind of generalization about women's caretaking roles that the movement had otherwise sought to challenge. In this way, the history of the consent wars highlights the dangers of conflating gestational and functional parenthood. By not adequately emphasizing this distinction, feminists inadvertently opened the way for courts to rely on the deeply rooted sex stereotypes the women's movement had worked so hard to attack.

Understood in its historical context, abortion jurisprudence should not provide guidance for courts balancing rights to seek or avoid procreation in ART cases. Abortion rights advance equal citizenship because only women experience the dignitary, physical, and emotional harms of unwanted pregnancy and gestation. Courts reasoning about the rights and burdens connected to genetic or functional parenthood have to resolve fundamentally different questions. If anything, we should stress the distinctions between genetic, gestational, and functional parenthood. Doing so provides the best chance of forging a reproductive rights jurisprudence no longer haunted by the consent wars.

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