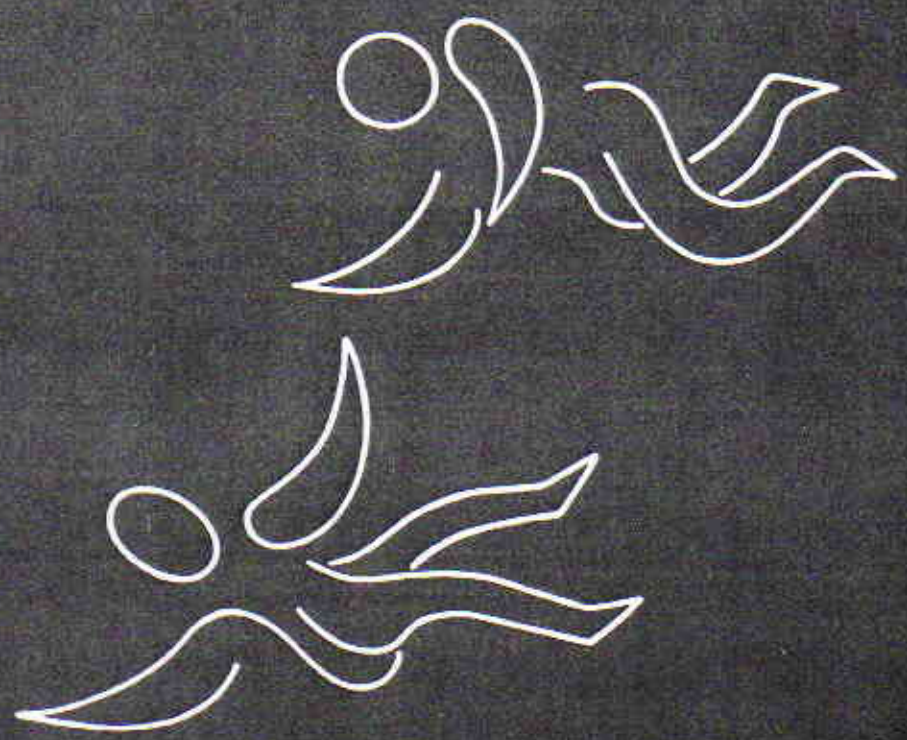


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BEYOND THE SOLITARY SELF:† VOICE, COMMUNITY, AND REPRODUCTIVE FREEDOM

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PROLOGUE: A PERSONAL PREDICATE TO THEORY

The body of this paper is an attempt to find hope in hope, even as we witness the moral bankruptcy and utter inefficacy of sole reliance on individual rights.¹ To halt our downward slide, we must reject the notion of the solitary self. We must recognize instead that we draw our meaning through our connection with others and that our communities in turn exist only through their synergistic relationship with us. In order to effect change in our communities, we must facilitate these dynamic, transformative relations by encouraging the interchange of diverse voices. First, however, the disempowered must be free to speak. While it is next to impossible to speak from a state of hopelessness, voice is fueled by hope. For most women, nothing provides more hope than regaining control over their own reproductive capabilities. By locating reproductive freedom in community, we can touch voice-enabling hope, amplify silenced voices, and

† Alexis de Tocqueville has warned that individualism may "throw [people back on themselves] alone. . . . shut up in the solitude of [their] own hearts[]." Alexis de Tocqueville, *Democracy in America*, Volume Two 508 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (1839).

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¹ Drucilla Cornell has similarly alleged that liberal society is in a state of moral disintegration. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. Pa. L. Rev. 291, 292-93 (1985).

About the Cover

The cover illustration was inspired by our desire to reflect cooperation, awareness, difference, and community that shape our purpose and process in creating the *Columbia Journal of Gender and Law*. It was drawn by Carol Quiete Mari Suzuki.

thus improve the functioning of communities.

To begin this essay at all, I first had to rekindle my own hope. Like many other advocates of reproductive freedom, I feel an almost overwhelming sense of frustration and despair.² Since 1980, when Ronald Reagan was elected President, the Department of Justice has continually intervened in litigation to ask the Supreme Court to overrule *Roe v. Wade*.³ The last Supreme Court decision that strongly affirmed *Roe* was in 1986,⁴ and with each subsequent decision, the Court has steadily chipped away at *Roe*'s foundations, all the while disingenuously pretending that it was leaving *Roe* intact.⁵

Soon after *Roe*, when the Supreme Court upheld restrictions on state and federally funded abortions, low-income women lost whatever right to reproductive freedom they once had.⁶ Then, as the Supreme Court upheld increasingly onerous parental notification provisions, young women gradually lost their ability to exercise their reproductive "rights."⁷ With the rights of the most marginalized women in society already stripped away, the

² I note that my sense of frustration undoubtedly cannot compare to that experienced by my more senior colleagues.

³ 410 U.S. 113 (1973), modified by Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). See Brief of the United States Department of Justice, Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *aff'd* in part, *rev'd* in part, 112 S. Ct. 2791 (1992); Brief of the United States Department of Justice, Hodgson v. Minnesota, 111 S. Ct. 2926 (1990); Brief of the United States Department of Justice, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

⁴ Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down various roadblocks to legal abortion, including mandatory anti-abortion information and reporting requirements).

⁵ See *infra* notes 7-22 and accompanying text.

⁶ See Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding Hyde Amendment, prohibiting Medicaid funding for abortions, and finding that states have no obligation to pay for those medically necessary abortions for which the Hyde Amendment prohibits funding). Poelker v. Doe, 432 U.S. 519, 521 (1977) (holding that cities need not provide publicly financed hospital services for nontherapeutic abortions, even when they do provide publicly funded services for childbirth); Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding state denial of funding for nontherapeutic abortions, even when the state does fund childbirth); Beal v. Doe, 432 U.S. 438, 446, 447 (1977) (holding that states are not required to provide nontherapeutic abortion services under federal Medicaid statute).

⁷ See Hodgson, 111 S. Ct. at 2944 (upholding 48-hour waiting period and notification of at least one parent before a minor may obtain an abortion); Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972, 2983-84 (1990) (finding constitutional a statute making it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age); Bellotti v. Baird, 443 U.S. 622, 647-49 (1979) (conditioning a minor's access to abortion on the consent of either both of her parents or of a judge).

Court began attacking all women. In 1989, the Court upheld state-mandated viability testing requirements and a prohibition on nontherapeutic abortions in public facilities.⁸ And in 1991, the Court sanctioned federal restrictions on the abortion-related speech and activities of federally funded physicians.⁹

The most recent word from the Supreme Court was the most devastating—with the possible exception of the abortion-funding cases¹⁰—in recent years. After waxing eloquent about the importance of reproductive freedom in women's lives,¹¹ the plurality in *Planned Parenthood v. Casey*¹² proceeded to gut *Roe*. Explicitly overruling two of its earlier abortion decisions,¹³ the Court in *Casey* ruled that the state has an interest in fetal life throughout pregnancy.¹⁴ After viability, the state's latitude in advancing this interest is nearly boundless.¹⁵ Before viability, state abortion restrictions are subject only to the proviso that they not "unduly interfere" with women's right to choose abortion.¹⁶

⁸ Webster v. Reproductive Health Servs., 492 U.S. 490, 511, 519-20 (1989).

⁹ Rust v. Sullivan, 111 S. Ct. 1759, 1777 (1991). See also Planned Parenthood v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991); Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (en banc), vacated and remanded for further consideration in light of *Rust*, 111 S. Ct. 2252 (1991).

¹⁰ Webster, 492 U.S. 490; Rust, 111 S. Ct. 1759.

¹¹ For the first time, the Court recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992) (citing Rosalind Pollack Petchesky, *Abortion and Woman's Choice* 109, 133 n.7 (rev. ed. 1990)).

¹² 112 S. Ct. 2791 (1992).

¹³ *Id.* at 2816 (overruling "those parts of *Thornburgh* [v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986)] and *Akron* [Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983)] which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn").

¹⁴ *Id.* at 2816, 2820.

¹⁵ Even before viability, states may impose "[l]egislations designed to foster the health of a woman seeking an abortion . . . if they do not constitute an undue burden." *Id.* at 2821.

¹⁶ *Id.* at 2820. What exactly constitutes an "undue burden" is unclear. The plurality in *Casey* explained only that "an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (emphasis added). In applying this standard to the Pennsylvania law at issue, however, the Court examined only the purported effect of each provision, not the purpose. *Id.* at 2823 (finding that requiring the physician to provide the woman with materials describing the consequences of abortion to the fetus may promote the state's interest in childbirth over abortion but "cannot be considered a substantial obstacle to obtaining

Under this new analysis, *Roe's* trimester framework is history. No longer are women's interests ever necessarily superior to those of the fetus. No longer is reproductive freedom at any time a "fundamental right" subject to the strictest judicial scrutiny.¹⁷ Because the trimester framework and the pre-viability application of a strict scrutiny test were central to *Roe*, the case now survives only as "a storefront on a Western movie set, . . . a mere facade to give the illusion of reality."¹⁸ The fact that the Court has not yet uttered the magic word "overruled" does not mean that *Roe* is not lost.

Demonstrating the toothlessness of the new "undue burden" test, the Court in *Casey* used it to uphold a panoply of pre-viability abortion restrictions, including the following: "informed parental consent" requiring a parent's in-person visit to a doctor's office;¹⁹ state-mandated counseling for all patients designed to discourage women from having abortions;²⁰ a twenty-four-hour waiting period;²¹ and clinic reporting requirements.²² As of this writing, numerous cases are pending across the country that demand an application and interpretation of the "undue burden" standard. Each of these cases will give the Court yet another opportunity to further

an abortion", at 2825 (finding 24-hour waiting period "a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden"), and at 2832 (finding that reporting requirements relate to the state's interest in "health" and do not pose "a substantial obstacle to a woman's choice").

Note that the "undue burden" test embraced in *Casey* is different from the one earlier proposed by Justice O'Connor. See *Akron I*, 462 U.S. at 453, 461-63 (O'Connor, J., dissenting) (finding an undue burden in abortion cases in "situations involving absolute obstacles or severe limitations on the abortion decision"); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (following the formulation set out in *Akron I*). Therefore, the *Casey* test should not be confused with the earlier formulations, which would have applied a strict scrutiny test where a burden is found to be "undue." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting).

¹⁷ This standard is directly contrary to *Roe*. See *Roe v. Wade*, 410 U.S. 113, 152-53, 155 (1973).

¹⁸ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in part, dissenting in part).

¹⁹ *Casey*, 112 S. Ct. at 2832.

²⁰ *Id.* at 2823.

²¹ *Id.* at 2825.

²² *Id.* at 2832. The only provision of the Pennsylvania law the Court did not uphold was a spousal notification provision. *Id.* at 2831. The Court in *Casey* remanded the case for a decision consistent with its findings. *Id.* at 2833. As of this writing, the plaintiffs are moving for new fact finding, arguing that they had not presented all of the evidence that is necessary for a complete examination under the new "undue burden" test.

whittle away whatever guarantee of reproductive freedom remains.²³

This collapse of *Roe* has led me to reassess individual rights as a tool for social change. It seems apparent that an overemphasis on individual rights contributed to the demise of *Roe*. Granted, the conservative political climate, combined with the enhanced politicization of the federal judiciary,²⁴ ensured *Roe's* ruin. But it was *Roe's* reliance on individual rights that made the opinion so vulnerable in the first place. The plurality in *Casey* gave lip service to the importance of reproductive freedom for enabling women to chart their own roles in society.²⁵ Why, then, did they fail to follow through with their observations? Perhaps because an individual rights analysis provides neither the proper tools for fully recognizing the centrality of reproductive freedom, nor an adequate means by which to ensure its survival.

The ultimate focus on the individual reflects an impoverished and imaginary vision of self—the solitary self. No theory based upon such a distorted view of society can withstand the test of time, at least not without great sacrifice, particularly the stunting of both individual and communal development. This Article is an attempt to develop a stronger grounding for reproductive freedom and other besieged "rights" by rejecting the solitary self.

In the first section of the Article, "The Present," I briefly review the

²³ The laws at issue in the pending cases can be classified into two categories: abortion bans and "roadblock laws" (laws making it more difficult to obtain abortions, but not banning them outright). The leading abortion-ban cases are: *Guam Society of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (invalidating statute under which abortions banned, except for ectopic pregnancies and abortions in cases where two independently practicing physicians determine that the pregnancy will endanger the life of the woman or "gravely impair" her health, no exceptions for rape, incest, or fetal defects), withdrawn, 1992 LEXIS 7599 (9th Cir. 1992), amended, 1992 LEXIS 13490 (9th Cir. 1992), cert. denied, 61 U.S.L.W. 3399 (1992); *Jane L. v. Bangerter*, 794 F. Supp. 1528 (D. Utah 1992) (dismissing with prejudice claims that Utah law banning abortions except to prevent "grave" damage to a woman's health or prevent "grave" fetal defects and in limited cases of rape and incest violates Utah constitution), summary judgment granted in part, claim dismissed, 794 F. Supp. 1537 (D. Utah 1992).

Leading "roadblock" cases include *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1991) (finding facially constitutional Mississippi Informed Consent to Abortion Act, mandating 24-hour waiting period and counseling on the benefits of childbirth and the risks of abortion), cert. denied, 61 U.S.L.W. 3418 (1992).

²⁴ See Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189, 191-94 (1988) (examining President Reagan's "enduring institutional legacy").

²⁵ *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807, 2809 (1992) ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . .").