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### Recommended Citation

75 MD. L. Rev. 233 (2015)

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## PRIVACY AT 50: THE BEDROOM, THE COURTROOM, AND THE SPACES IN BETWEEN

JUDITH A. BAER\*

Fifty years have passed since the Supreme Court found a right of privacy in the Constitution. Whether *Griswold v. Connecticut*<sup>1</sup> recognized or invented this right is a question that resists resolution. *Griswold* was a ruling whose doctrine had more impact than its immediate result. The Connecticut law prohibiting the use of contraceptives was “uncommonly silly,” “obviously unenforceable,” and unique.<sup>2</sup> The only law in the United States anywhere near as restrictive was Massachusetts’s prohibition of the sale and distribution. Birth control was not a controversial issue—the Pill had been available for five years—which may be one reason why the ruling got little critical scrutiny. Within ten years, the right itself grew from a marital right to an individual right (there went the Massachusetts law) to a right to abortion.<sup>3</sup> The first ruling raised few, if any, eyebrows. The second provoked a firestorm that has raged ever since. The judicial response to this controversy has veered between retreat and advance.

*Bowers v. Hardwick*<sup>4</sup> found no privacy issue in a law criminalizing homosexual activity. Instead, the majority refused to recognize what it called “a fundamental right to engage in homosexual sodomy.”<sup>5</sup> *Lawrence v. Texas*<sup>6</sup> proclaimed *Bowers* “not correct when it was decided, [and] not correct today.”<sup>7</sup> No such reversal has occurred in the Justices’ approaches to abortion rights. The trend has been consistently negative, as successive Republican presidents have selected anti-choice Justices. The Court did not reverse *Roe v. Wade*,<sup>8</sup> as predicted, but *Planned Parenthood v. Casey*<sup>9</sup> demoted abortion from a right to a semi-right. Since 1992, restrictions on

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1. 381 U.S. 479 (1965).

2. *Id.* at 527 (Stewart, J., dissenting).

3. The Massachusetts case was *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The abortion case was *Roe v. Wade*, 410 U.S. 113 (1973).

4. 478 U.S. 186 (1986).

5. *Id.* at 191.

6. 539 U.S. 558 (2003).

7. *Id.* at 578; *see also* *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating the Defense of Marriage Act). Here, Justice Anthony Kennedy’s majority opinion stressed both individual rights and state powers.

8. 410 U.S. 113 (1973).

9. 505 U.S. 833 (1992).

abortion do not need compelling justification; they need only avoid imposing an “undue burden.”<sup>10</sup> Rulings since *Casey* have endorsed governmental powers to restrict access to abortion.<sup>11</sup>

In June 2015, *Obergefell v. Hodges*<sup>12</sup> ruled that same-sex marriage is legal and all existing same-sex marriages are valid throughout the United States. “[T]he right to marry,” Justice Anthony Kennedy wrote for the majority, “is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”<sup>13</sup>

This ruling, while less polarizing than *Roe*, is controversial both outside and within the Court; all four dissenters wrote opinions. Depending on the future composition of the Court, *Obergefell* may either reinforce the right of privacy or invite rulings that do to *Griswold* what *West Coast Hotel v. Parrish*<sup>14</sup> did to *Lochner v. New York*.<sup>15</sup>

I differ from most political scientists, and many legal scholars, in asserting that both *Griswold* and *Roe* were rightly decided. The flaws in the reasoning of both cases, which have been pointed out at too much length by too many authors to require repetition, do not vitiate the argument for inferring a constitutional right of privacy. (And why is it that students of constitutional law speak of *inferred* rights but *implied* powers?) As far as I am concerned, the legitimacy of the right to privacy is no longer an issue. This Paper has two purposes. First, I inquire what is distinctive and defensible about the privacy right established in *Griswold*, extended in *Roe*, and affirmed in *Lawrence*. Second, I explore the implications of this freedom for another core constitutional value: equality.

## I. PRIVACY, AUTONOMY, AND ASSOCIATION

The easiest criticism to make about *Griswold* and *Roe* is that they are just as bad as *Lochner*: they limit legislative power by entrenching a right not specified in the Constitution.<sup>16</sup> The easiest refutation of that criticism points out the differences between those who benefitted from *Lochner* and those who benefitted from *Griswold*. In 1905, the real victors were em-

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10. *Id.* at 874; *see also* *Craig v. Boren*, 429 U.S. 190 (1976).

11. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007). Restrictions that have been sustained include waiting periods, reporting requirements, mandatory counseling, and limitations on where and by whom abortions may be performed.

12. 135 S. Ct. 2584 (2015).

13. *Id.* at 2604.

14. 300 U.S. 379 (1937).

15. 198 U.S. 45 (1905).

16. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

ployers who could set employees' working hours without government interference. In 1965, the victors were women who could not afford private medical care; they got freedom that everyone else in Connecticut already had.<sup>17</sup> But the similarities between the decisions are greater than twenty-first-century liberals might like to admit. In neither case does the majority opinion pertain to the actual controversy. Justice Rufus Peckham waxed eloquent about the right of "grown and intelligent men" to "labor to earn their living," but *Lochner* protected the power of an employer to set working hours.<sup>18</sup> Justice William O. Douglas's rhetorical question—"Would we permit the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives?"—accompanied a ruling that upheld the right of the Planned Parenthood Association to establish a clinic and dispense contraceptives.<sup>19</sup>

Analysis of the *Griswold* opinion reveals yet another similarity with *Lochner*. Douglas cited several constitutional provisions to support his conclusion that a "penumbra" surrounding the Bill of Rights established a right of privacy.<sup>20</sup> These included "[t]he right of association contained in the penumbra of the First Amendment," the Third Amendment's prohibition of quartering soldiers in homes in peacetime, the Search and Seizures Clause of the Fourth Amendment, the Self-Incrimination Clause of the Fifth Amendment, and the Ninth Amendment's reference to unenumerated rights.<sup>21</sup> The use of the Ninth Amendment by Justice Douglas and Justice Arthur Goldberg was exciting, but it went nowhere. The two dissenters, Justice Hugo Black and Justice Potter Stewart, insisted that its purpose was to reserve power to the people within the states.<sup>22</sup> They continued the tradition established in *Barron v. Baltimore*<sup>23</sup> of reading rights phrased in the passive voice as limiting only the federal government. Justice Goldberg did not stay on the Court long enough to continue making the argument.<sup>24</sup> Justice Douglas's opinion does little more than list the remaining rights. Aside from his concept of "penumbra," he does not attempt to integrate them into a whole, to ask, "What may these rights, read together, mean?"

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17. Mark A. Graber makes a similar argument about *Roe*: that legalization made abortion available for women who could not previously afford it. But even for the affluent, getting an illegal abortion was difficult and expensive. MARK A GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* (1996).

18. *Lochner*, 198 U.S. at 61.

19. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

20. *Id.* at 484.

21. *Id.*

22. Respectively, *id.* at 518–20 (Black, J., dissenting); *id.* at 529–30 (Stewart, J., dissenting).

23. 32 U.S. 243 (1833).

24. *Griswold*, 381 U.S. at 487–91 (Goldberg, J., dissenting). Goldberg resigned from the Court in the summer of 1965 to become ambassador to the United Nations.

The differences among the rights are as obvious as the similarities. The Third and Fourth Amendment provisions are rights to seclusion: the immunity from self-incrimination, a right to secrecy. The privacy rights differ in kind from both of these. *Griswold* protected a right of association (within marriage). *Roe*, *Casey*, and *Lawrence* endorsed rights to autonomy. *Griswold* was not the first occasion that the Court had protected such a right. The decision's doctrinal ancestors, cited therein, were *NAACP v. Alabama*,<sup>25</sup> which invalidated on First Amendment grounds a requirement that organizations turn their membership lists over to the state on request, and two decisions<sup>26</sup> from the 1920s written by, of all people, Justice James McReynolds.<sup>27</sup>

Calling *NAACP v. Alabama* a privacy case is more confusing than enlightening; the right involved was a right of public association. *Meyer v. Nebraska* struck down restrictions on the teaching in, and of, foreign languages in public schools.<sup>28</sup> *Pierce v. Society of Sisters* negated an initiative making public school attendance compulsory, on the grounds that it violated the "liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>29</sup> (The concrete result of this decision was, in fact, to protect the Sisters of the Holy Names of Jesus and Mary from state interference with their school system). The Court decided these cases on substantive due process grounds. *Lochner* lived.

Why, then, do I defend constitutional privacy rights? Despite *Griswold's* failure, they can be based on a holistic and integrated interpretation of the Bill of Rights, the Due Process Clauses, or both—even without the Ninth Amendment.<sup>30</sup> The distance between listing "zones of privacy" and identifying a "zone of privacy created by several fundamental constitutional guarantees" is a logical step, not a leap, a vault, or, in John Hart Ely's metaphor, a slalom.<sup>31</sup> Seclusion, secrecy, and association combine to endorse private autonomy. This combination could not cover *Roe*, since abortion, at that time, did not take place in private. But strong arguments have since

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25. 357 U.S. 449 (1958).

26. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

27. James Clark McReynolds, appointed by Woodrow Wilson, served from 1914 to 1941. He consistently voted for business interests and against progressive legislation. Along with Willis Van Devanter, George Sutherland, and Pierce Butler, he was one of the "Four Horseman" whose hostility to New Deal programs provoked Franklin Roosevelt's plan to increase the size of the Court.

28. 262 U.S. at 400.

29. 268 U.S. at 534–35.

30. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

31. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 66 (1980).

been made for locating this privacy right in the Thirteenth<sup>32</sup> or Fourteenth<sup>33</sup> Amendment. None of these arguments will satisfy those who agree with Robert Bork that constitutional rights must be construed narrowly,<sup>34</sup> but the judicial tradition of construing powers broadly militates against defending that position.

*Roe v. Wade* exposed the defects of *Griswold*. The majority opinion and separate concurrences suggest that at least some Justices found the step from birth control to abortion easy.<sup>35</sup> The fact that seven male jurists assumed without argument in 1973 that the right of men and women to make decisions about conception entailed the right of women to make decisions about pregnancy was encouraging, but a nuanced, comprehensive discussion of why the similarities between birth control and abortion were more important than the differences would have made the ruling less vulnerable. Instead, the core of Justice Harry Blackmun's majority opinion consisted of a list, a proclamation, and a *non sequitur*. Justice Blackmun added some post-1965 rulings, notably *Eisenstadt v. Baird* and *Loving v. Virginia*, to Justice Douglas's provisions and precedents.<sup>36</sup> "This right of privacy," Justice Blackmun continued, "is broad enough to include a woman's decision whether or not to terminate her pregnancy."<sup>37</sup> Why? Because unwanted pregnancy harms pregnant women and their families. Generations of undergraduates in my courses in civil liberties and women and the law have easily grasped the difficulty with the argument: law can force people to do or not to do many things that can cause harm. Few legal scholars defended *Roe*.<sup>38</sup> Courts retreated, handling privacy cases timidly.

Would it have made any difference if the privacy cases had been better reasoned? Certainly not to the anti-choice lobby, or to the editors, authors, and subsidizers responsible for the conservative, religious journal, *First Things*. I doubt that Justice Byron White, whose dissent accused the majority of favoring "the convenience, whim, or caprice of the putative mother"

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32. See Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, in PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY 226–44 (Alexander Tsesis ed., 2010).

33. Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160 (2013).

34. Robert Bork, Tradition and Morality in Constitutional Law, 1984 Francis Boyer Lecture at AEI Annual Dinner (Dec. 6, 1984), <https://www.aei.org/publication/tradition-and-morality-in-constitutional-law/>.

35. JUDITH A. BAER, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE 125–28 (1999).

36. Respectively, 405 U.S. 438 (1972); 388 U.S. 1 (1967).

37. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

38. For an exception, see LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

over “the life or potential life of the fetus,” would have been impressed.<sup>39</sup> The former dean of the law school of Notre Dame wrote, “Mr. Justice Blackmun seems unconscious of the fact that women want children.”<sup>40</sup> A critic who misread so badly—the majority opinion referred consistently to *unwanted* pregnancy—may have based his opposition to the ruling on his opposition to the result. Some critics of *Roe* should have known better.

But there were judges like Justice William Rehnquist, whose dissent in *Roe* emphasized not (preferred) result but (due) process.<sup>41</sup> And scholars like Ely, professor of law at Yale and Harvard and later law school dean at Stanford, who labeled *Roe* “a very bad decision . . . because it is bad constitutional law, or rather because it is *not* constitutional law and gives no sense of an obligation to try to be.”<sup>42</sup> Judges read legal scholarship; professors teach future judges; and they all meet at conferences. Suppose solid arguments for privacy rights had influenced the bench, bar, and academy in the generation since *Roe*. Would the pool of anti-choice candidates now available for judgeships exist? Would those members of the attentive public who oppose legalized abortion but who consider other issues more important have put abortion on the back burner?

A popular argument against *Roe* (though inapplicable to *Griswold* or *Eisenstadt*) asserts that it usurped a decision that belonged to the democratic process. My students never make this argument without my teasing it out of them, but legal experts and political scientists often do. Justice Ruth Bader Ginsberg has taken this position repeatedly. “My criticism of *Roe*,” she said in 2013, “is that it seems to have stopped momentum on the side of change.”<sup>43</sup> She would have preferred “that abortion rights be secured more gradually, in a process that included state legislatures.”<sup>44</sup> Lawrence Tribe has argued that few if any states were poised to follow New York’s and Hawaii’s lead in legalizing abortion before *Roe*; no momentum existed.<sup>45</sup> Moreover, the “democratic process” is an abstraction; weighed against the concrete reality of reluctant pregnancy, it must yield. I agree with Tribe that *Roe* effectively assigned the abortion decision to pregnant women themselves. This action fits easily within David Easton’s definition of politics as the authoritative allocation of values for society as a whole. We

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39. *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

40. Joseph O’Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337, 343 (1974).

41. *Roe*, 410 U.S. at 172–78 (Rehnquist, J., dissenting).

42. Ely, *supra* note 16, at 947.

43. Meredith Heagney, *Justice Ruth Bader Ginsberg Offers Critique of Roe v. Wade During a Law School Visit*, UNIVERSITY OF CHICAGO LAW SCHOOL OFFICE OF COMMUNICATIONS (May 15, 2013), [www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offer-critique-roe-v-wade-during-law-school-visit](http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offer-critique-roe-v-wade-during-law-school-visit).

44. *Id.*

45. Tribe, *supra* note 38, at 45–51.

know that courts make political decisions, even if they avoid political questions. *Roe v. Wade* may have been bad politics. In the long run, it may do more harm to abortion rights than good. But it is not wrong.

## II. PRIVACY AND EQUALITY: CONFLICT? COOPERATION? BOTH?

The relationship and apparent contradiction between privacy and equality has been exhaustively treated in constitutional jurisprudence. Much of this discourse, to which I have contributed, involves questions of gender.<sup>46</sup> The connection between public and private is equally present and powerful in the relationship between privacy and gender equality. Justice Ginsburg, who successfully argued several significant women's rights cases before the Court, is "troubled that the focus on *Roe* was on a right to privacy, rather than women's rights."<sup>47</sup> But in 1973, a decision based on the Equal Protection Clause would have been a dramatic departure from precedent. Feminism was alive and well in the 1970s, but feminist equal protection doctrine was in its early stages.

The Court decided *Roe* a year and a month after it rejected the old rule that sex was a valid basis for classification, in a case where then future-Justice Ginsburg co-authored the brief.<sup>48</sup> She wrote the American Civil Liberties Union's amicus brief in *Frontiero v. Richardson*,<sup>49</sup> decided a few months after *Roe*, in which the Court came within one vote of declaring sex a suspect classification, like race. But three years later, the Court, apparently reluctant to render the proposed Equal Rights Amendment ("ERA") superfluous, compromised in *Craig v. Boren*.<sup>50</sup> This "intermediate scrutiny" has been the standard for equal protection cases involving gender since then, long after the ERA was defeated. The Court has not moved from this position for almost forty years. Despite Justice Ginsburg's efforts in *United States v. Virginia*,<sup>51</sup> there is little or no indication that it will demand strict scrutiny in gender-based equal protection.

*Casey* is perfectly symmetrical to *Craig*. The 1992 case does to abortion what *Craig* does to gender-based classifications. Both types of claims are relegated to a status somewhere between an ordinary interest and a first-tier right or immunity. Compelling justification is no longer required for restricting access to abortion, any more than it is for sex discrimination.

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46. See BAER, *supra* note 35, at ch. 3, 6.

47. Heagney, *supra* note 43.

48. *Reed v. Reed*, 404 U.S. 71 (1971); see Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 216–40 (Earl M. Maltz ed., 2003).

49. 411 U.S. 677 (1973).

50. 429 U.S. 190 (1976).

51. 518 U.S. 515 (1996).

For all its brave talk about women's freedom, the *Casey* plurality opinion invites legislatures to limit legal abortion.

Could an argument for legal abortions be based on women's rights without declaring gender a suspect classification? A future Supreme Court majority could begin with the recognition that this particular privacy claim is unique in the sense that it belongs only to women. An opinion could go on to argue that equality between the sexes entails the right to abortion.<sup>52</sup> This hope is not realistic at present, but this scenario is plausible in the long run.

The most durable critiques of privacy doctrine came from radical feminists like Catharine MacKinnon and Andrea Dworkin. Whereas Justice Douglas referred in *Griswold* to "the sacred precincts of marital bedrooms,"<sup>53</sup> MacKinnon wrote, "The right of privacy is a right of men to be let alone to oppress one woman at a time."<sup>54</sup> She insisted, "Reproduction is sexual, men control sexuality, and the state supports the rights of men as a group. *Roe* does not contradict this."<sup>55</sup>

I have assigned *Roe v. Wade* and MacKinnon's critique of it in my courses since they became available. By now, most students are ho-hum about *Roe*. Some women's studies majors—oops, women's and gender studies—enrolled because of my association with the local Planned Parenthood Clinic, but it was forced to close in 2013. Once in a while, a woman student declares that abortion is against God's law (no male student has done this so far). If she says this in class, we can talk about freedom of and from religion and the difference between opinion and policy, thus raising her grade and my evaluation scores. If she waits for the final, she's toast.

A former colleague reports that his students love MacKinnon's work, but he taught at the University of Hawaii. In south central Texas, the land of personal responsibility and positive attitudes, only a rare few students have that reaction. Some students laugh out loud. Some roll their eyes. An occasional male student indignantly denies that he oppresses women or even that he masturbates while reading *Playboy*.<sup>56</sup> These students need to learn one general and one specific lesson. First, they need not agree with an argument in order to understand it. Second, MacKinnon is not writing about them, or about other people, any more than Karl Marx did. She is writing about a situation: not class struggle, but male dominance.<sup>57</sup> Those

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52. See Siegel & Siegel, *supra* note 33.

53. 381 U.S. 479, 485 (1965).

54. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 93–102 (1987).

55. *Id.* at 97.

56. *Id.* at 209.

57. See BAER, *supra* note 35, at 40–67.

who are quiet sometimes indicate receptivity to radical feminist ideas in written assignments.

The majority Justices in *Griswold*, *Eisenstadt*, *Roe*, and *Casey* also wrote about a situation. Although some of them might deny it, they held a liberal view of the world.<sup>58</sup> “Marriage,” Justice Douglas wrote, “is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred,” an “association for as noble a purpose as any involved in our prior decisions.”<sup>59</sup> Justice William Brennan endorsed “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>60</sup> The difficulty here is that the decision to bear or beget usually entails a partner. The protected autonomy is both personal and associational. In *Roe*, the male partner disappears, replaced by a doctor (always “he”). As we have seen, the assumption of equality between the parties is uncertain. The plurality opinion in *Casey* returns to the *Eisenstadt* theme: “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.”<sup>61</sup>

These judges knew, as lawyers must, that not all relationships fit this model: one partner may dominate; unwanted sex may occur. Marriage may be more nearly equal when people choose their own spouses than when marriages are arranged, and when wife and husband are approximately the same age rather than the Aristotelian ideal of a thirty-seven-year-old husband and an eighteen-year-old wife.<sup>62</sup> The relationship is presumed to involve equal partners exercising free will: consenting adults. Theories need not account for all relevant facts.

MacKinnon rejects the premise of free will, the idea that sexual partners are equals, and the assumption that sex is consensual. She bases her conclusions on her premises, just as the opinion authors did. She knows as well as they do—she graduated from law school, too—that not all relationships fit her model. Neither the judges nor the radical feminists care whether their premise holds for a majority or minority of instances. A partial test of any theory is what we can learn by suspending disbelief and proceeding as if it were correct.

The liberal assumptions can be and have been carried to extremes. With respect to abusive relationships, for example, the question “Why doesn’t she leave?” has often dominated reactions, leading to the conclusion

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58. See *supra* note 3 and accompanying text.

59. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

60. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

61. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

62. ARISTOTLE, *THE POLITICS* bk. VII, at 293 (Betty Radice ed., *The Penguin Classics*, 1962) (c. 350 B.C.E.).

that the abuse is consensual. It is not even a century since the domestic relations courts in Canada were praised for an “attitude of *Rex pro the accused*, and not *Rex vs. the accused*.”<sup>63</sup> The marital family is a unit, composed of equals. What the privacy doctrine accomplishes is to remove the possibility of an official veto on personal decisions about sex and reproduction.

Yet the radicals are on to something:

Women who agree on little else share a perception of sex as men’s assertion of power over them. An activist in Operation Rescue says, ‘The idea [of abortion] is that a man can use a woman, vacuum her out, and she’s ready to be used again.’ A NOW chapter advises feminists, ‘If your husband or lover is anti-choice and thinks the government has a right to control women’s bodies, then control his access to your body. ‘Just Say No’ to more sex until all women are free to control their own lives and bodies. . . . The fact that women can speak this way to one another, and be understood, supports MacKinnon’s thesis.’<sup>64</sup>

(When I told this story at a conference, one woman commented, “Most women who said no to sex would get the shit beaten out of them.”)

No, the right to privacy does not destroy male dominance. But what MacKinnon has shown is the inadequacy of the privacy doctrine as a support for gender equality, not that privacy and equality are mutually exclusive. The one line the Supreme Court has consistently drawn is against mandatory spousal consent or notification.<sup>65</sup> A prospective father who is not married to his unborn child’s mother has no say at all. He cannot legally veto her abortion, though several have tried. A woman can get an abortion or birth control without getting permission. Privacy rights do not help a woman who wants to have a baby or does not want to have reprox. To this extent, MacKinnon is right.

Two recurring themes in the abortion controversy provide a link to still another privacy issue, that of family autonomy. In *Roe v. Wade* the Court refused to choose between “a woman’s decision whether or not to terminate her pregnancy” and “the pregnant woman’s attending physician.”<sup>66</sup> And consider the assumption of some anti-abortion activists that, other things being equal, the woman would choose to have the baby—despite the number of pregnancies a woman can undergo during her fertile years.<sup>67</sup> The

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63. AMANDA GLASBEEK, *FEMINIZED JUSTICE: THE TORONTO WOMEN’S COURT, 1913–1934*, at 41 (2009).

64. See BAER, *supra* note 35, at 57.

65. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976); *Casey*, 505 U.S. at 887–98.

66. 410 U.S. 113, 153, 164 (1973).

67. See BAER, *supra* note 35, at 138.

same hegemony of experts and commitment to life under any circumstances pervade this discourse, too.

The claims recognized in *Meyer* and *Pierce* exist within the nuclear family, which is both a private association and a public institution. Parents have rights to make decisions for their children. *Wisconsin v. Yoder*,<sup>68</sup> which upheld the rights of Amish parents to withdraw their children from school early, relied on the Free Exercise Clause, but the majority cited *Pierce* several times. Only Justice Douglas questioned the assumption that the interests of parents and children were identical.<sup>69</sup>

Parental autonomy has limits, but a gap exists between law and custom. Two well-publicized cases in the 1980s involved children with cancer whose parents refused conventional treatment for them.<sup>70</sup> The parents of a boy with Hodgkin's Disease won. The parents of a boy with leukemia lost, but defied the court order to take their son back for treatment. Both boys died.<sup>71</sup> The chance that either would have survived with alternative treatments was remote, but their chances of dying with conventional treatment were substantial. Outcomes like these may have influenced current law, which does not permit parents to withhold lifesaving treatment for their children.<sup>72</sup> But parents do. A web search produced headlines like, "Christian Kids Dying Because Their Parents Refuse Medical Treatment," "Amish Girl with Leukemia, Family Flees U.S. to Avoid Chemotherapy," and "Second Child of Philadelphia Faith-Healing Couple Dies."<sup>73</sup> Parents have more autonomy than law gives them. Privacy doctrine does not restructure family power any more than it ends male supremacy.

The extent of parental autonomy became clear in the recent controversy over MMR immunization. Personal anecdotes and bad science spread the belief that this vaccine causes autism when given to infants and toddlers. So many parents have refused to get their children immunized that herd immunity no longer exists for measles, which can disable or kill children too young for the vaccine. Most states allow some exemptions from immunization requirements. Where the injections are required for admission to school, parents may homeschool, often with little supervision. Public health yields to private ignorance and illogic. Is this autonomy run riot? In May 2015, the California legislature revisited the issue.

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68. 406 U.S. 205 (1972).

69. *Id.* at 243–46.

70. Respectively, *Matter of Hofbauer*, 393 N.E.2d 1009 (N.Y. 1979); *Custody of a Minor Child*, 393 N.E.2d 836 (Mass. 1979).

71. See JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 168–72 (1983).

72. Charles Patrick Davis, *Patient Rights* EMEDICINEHEALTH, [www.emedicinehealth.com/patient\\_rights/article\\_em.htm](http://www.emedicinehealth.com/patient_rights/article_em.htm) (last visited Sept. 8, 2015).

73. Search for Parents Refusing Medical Treatment for Children, GOOGLE WEB SEARCH, <https://www.google.com> (last visited Feb. 20, 2015).

I am not arguing here that *Griswold*, *Yoder*, or any other decision caused these developments. I suspect that the relationship between doctrine and practice is as tenuous as that between obscenity law and the availability of explicit material. But suppose we follow Justice Douglas in *Yoder* and entertain the possibility that parents and children may disagree. What if a minor who was old enough to have an informed opinion wanted to be immunized? Or what if a gravely ill child did not want treatment, or preferred orthodox medical treatment to whatever alternatives the parents had chosen? In either case, a hospital, a health care professional, or another adult might seek temporary guardianship, but how would the minor find such a next friend? The child who wants to forgo treatment against parental wishes is out of luck. The child who wants treatment might seek legal emancipation or, where available, “mature minor” status, but then who would take care of her during and after treatment? These situations are hypotheticals, but a real case in 2015 had parent and child on the same side.

Cassandra C., a seventeen-year-old with Hodgkin’s lymphoma, rejected chemotherapy. “This is my life and my body,” she wrote. “I am a human—I should be able to decide if I do or don’t want chemotherapy. . . . I care about the quality of my life, not just the quantity.” Her mother, Jackie Fortin, supported her decision.<sup>74</sup> The Connecticut Department of Children and Family Services (“DCF”) intervened. Cassandra became a ward of the state, undergoing forced treatment. The state supreme court upheld DCF.<sup>75</sup> Adults have the right to refuse treatment. Cassandra gained this right when she turned eighteen in September 2015. Parents are empowered to make medical decisions for minor children, with partial exceptions for life-threatening conditions, abortion, and treatment for sexually transmitted diseases. But, at least in Connecticut, the exception for life-threatening conditions is total. The medical establishment wins even when opposed by both parent and child. Parental autonomy rules, except when it doesn’t. The possibility of recovery trumps the risk of death.

Cassandra wrote, “My mom and I wanted to make sure my diagnosis was correct, so we agreed to seek a second opinion. We wanted to be 100 percent sure I had cancer. Apparently, going for the second opinion and questioning doctors was considered ‘wasting time’ and ‘not necessary.’”<sup>76</sup> The DCF took the experts’ point of view, accepting the medical reports at face value. Its lawyer told the court that Cassandra and her mother indulged in “some magical thinking that, ‘If I closed my eyes to the fact I have this

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74. Cassandra C., *Op-Ed: Cassandra’s Chemo Fight: ‘This Is My Life and My Body’*, HARTFORD COURANT (Jan. 8, 2015), <http://www.courant.com/opinion/op-ed/hc-op-cassandra-my-body-my-life-0109-20150108-story.html>. Cassandra was released from custody on April 27.

75. Elizabeth A. Harris, *Connecticut Teenager Loses Fight to Refuse Chemotherapy*, N.Y. TIMES, Jan. 9, 2015.

76. *See supra* note 74.

serious illness, then my cancer doesn't exist.”<sup>77</sup> The question that preoccupied the court was whether Cassandra was mature enough to make the decision, but legally she didn't make it; her mother did. In conflicts between parents and children, parents win. In conflicts between professionals and clients, professionals win.

Hodgkin's lymphoma is curable—usually, but not always. Some people die of it. No one knows, immediately after diagnosis, who will recover and who will not. The surgeon-author Atul Gawande describes how “the logic and momentum of medical solutions take over”<sup>78</sup> the treatment of serious illness. Many clinicians pursue cures long after treatment has any effect but to make the patient worse. Many patients demand this commitment, but, as Cassandra's case shows, not all. No one involved in her case seems to have taken what Gawande calls an “interpretive” approach, helping her and her mother “determine what they want.”<sup>79</sup> Even a remote chance of life is preferred to probable death.

### III. WHITHER PRIVACY?

Even with these contradictions, equality and privacy are a potent combination. That is how the Supreme Court decriminalized homosexuality, and how the highest courts of the U.S. and Massachusetts legalized same-sex marriage.<sup>80</sup> The *Casey* plurality wrote that *Roe v. Wade* and *Brown v. Board of Education*<sup>81</sup> “call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”<sup>82</sup> *Obergefell* did the same, for the third time in the lives of senior scholars. Such a ruling is unlikely to engender the national opposition that *Roe* did, but it may provoke the regional opposition that *Brown* did. The right to abortion, however, hangs by a thread. While claiming to preserve it, *Casey* allowed states to gut it. The right's survival depends, as it has since the Reagan administration, on which of the two major parties prevails in the next election.

The space between the bedroom and the courtroom is filled with individuals, relationships, and the balance of power. Michel Foucault wrote that sexuality was “an extremely dense transfer point for relations of power: between men and women, young people and old people, parents and off-

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77. Josh Kovner, *Connecticut Supreme Court Upholds Ruling That State Can Force Chemotherapy on Teen*, Hartford Courant (Jan. 8, 2015) <http://www.courant.com/news/connecticut/hc-teen-battles-chemo-order-0103-20150102-story.html>.

78. ATUL GAWANDE, *BEING MORTAL: MEDICINE AND WHAT MATTERS IN THE END* 213 (2014).

79. *Id.* at 178, 161.

80. Respectively, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Goodridge et al. v. Commissioner of Public Health*, 798 N.E. 2d 941 (2003).

81. 347 U.S. 483 (1954).

82. 505 U.S. 833, 867 (1992).

spring, teachers and students, priests and laity, an administration and a population.”<sup>83</sup> Law controls only the last pair, and that not completely. Government lacks the power to deliver freedom to a whole society.

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83. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, 103 (Robert Hurley trans., 1978).