Antioch Law Journal

Volume 2 | Issue 1 Article 8

12-30-1982

Reproductive and Sexual Freedom in the 1980s

Rhonda Copelon

REPRODUCTIVE AND SEXUAL FREEDOM IN THE 1980's

REMARKS OF RHONDA COPELON*/**

The inclusion of issues of reproductive and sexual freedom in this symposium is itself a sign of great progress. The civil liberties agenda which, until the last decade, was largely focused on first amendment issues, has grown substantially. This is because the movements of the last several decades—civil rights, black power, feminist, anti-war, Native American, lesbian and gay, anti-nuclear, and others—have broadened our understanding of the meaning of repression. In 1960, for example, there was only a hardy band of progressive civil libertarians working on the idea that a woman's right to contraception and abortion is fundamental to her liberty.[1] Today that right exists and is under serious attack. Today we discuss such matters at symposia on civil liberties.

Roe v. Wade is the cornerstone of reproductive rights.[2] Like the modern cornerstone of civil rights, *Brown v. Board of Education*,[3] which declared race-segregated schools unconstitutional, *Roe v. Wade* was a flawed, but revolutionary decision. Both broke, in different ways, with the ideology of separate spheres. *Brown* rejected the

---

* Staff Attorney, Center for Constitutional Rights, Adjunct Professor of Law, Brooklyn Law School, B.A. 1966, Bryn Mawr College, LL.B. 1970, Yale Law School. As of June 1, 1983, Ms. Copelon will be Associate Professor of Law, CUNY Law School, Queens College.

** The ideas in this piece are the product of the work of many feminists over the years. My deepest thanks go to Janet Gallagher, Judith Levin, Rosalind Petchesky, Nancy Stearns, Nadine Taub, and Sharon Thompson who have spent long and fruitful hours thinking them through with me. My thanks go as well to Jane Ransom and Claudette Furlonge, legal workers at the Center for Constitutional Rights, for their clerical and critical assistance, and to the editors of this journal for their care and patience.

[1] *See e.g.*, Poe v. Ullman, 367 U.S. 497, 500 (1961) (challenge to state ban on contraception dismissed for lack of showing of harm because there was no indication the statute would be enforced).

[2] Skinner v. Oklahoma, 316 U.S. 535 (1942), in which the Court refused to allow sterilization under a "habitual offender statute," first recognized the right to procreate as "one of the basic civil rights of man." In 1965, Griswold v. Connecticut, 381 U.S. 479 (1965), protected the married couple's right to use contraceptives and Eisenstadt v. Baird, 405 U.S. 438 (1972), protected access to contraception irrespective of marriage, under equal protection principles, articulating in *dicta* the right later recognized in Roe v. Wade, 410 U.S. 113 (1973), that an individual should "be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child." 405 U.S. 453.

[3] 347 U.S. 483 (1954).

contention that equality could be satisfied by dividing the public functions of society according to race, whereas *Roe v. Wade* undermined the notion that the functions of society should be divided between the private sphere, dictated to women, and the public sphere, dictated by men. The recognition in *Roe v. Wade* of the right of women to control their own bodies and lives challenged the ideology of biological determinism that has been one of the roots of women's separate and second-class place in society.[4]

To say that *Roe v. Wade* was a revolutionary decision does not mean, however, that it was a departure from constitutional tradition, but rather that, like *Brown*, it wrought great and long overdue change. For this reason alone, criticism is expectable, and criticism there has been. The Court is charged with judicial excess: the framers never envisioned a right to abortion; there is no right to privacy, or at least not one that embraces the abortion decision; the state and not women should have ultimate power over childbearing decisions; courts should leave controversial moral subjects to the legislature; the fetus should be treated as a person, thereby precluding the right to abortion. There are many flaws in this criticism that we do not have time to examine today.[5] What I want to emphasize here is that it reflects a failure, or more pointedly, a refusal to comprehend what the absence of reproductive control means to a woman.

Consider for a moment, the relation of some of our most fundamental constitutional principles to the issue of compulsory pregnancy and childrearing.

We all hold as sacred the physical privacy of the home. If we guard our physical environment and possessions from intrusion by the

---

[4] *See* Bradwell v. The State of Illinois, 83 U.S. (16 Wall) 130 (1872); Muller v. Oregon, 208 U.S. 412 (1908); Hoyt v. Florida, 368 U.S. 57 (1961). Since 1971, the separate-sphere ideology has also been questioned in a series of Supreme Court decisions rejecting gender stereotypes. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), but this has been severely limited by the Court's refusal to recognize pregnancy-based discrimination as gender discrimination. Geduldig v. Aiello, 417 U.S. 484 (1974). *See also*, Rostker v. Goldberg, 453 U.S. 57 (1981) (sustaining exclusion of women from draft registration); Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (sustaining male-only penalty for statutory rape). For a useful discussion of separate-sphere ideology *see* Taub and Schneider, PERSPECTIVES ON WOMEN'S SUBORDINATION AND THE ROLE OF LAW, IN THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982).

[5] Much of the criticism of, as well as the support for, Roe v. Wade has been compiled in the records of the Congressional hearings on proposals to overturn it. *See* "Constitutional Amendments Relating to Abortion," Vols. I and II, *Hearings Before Subcommittee on the Constitution, Senate Judiciary Committee on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110*, 97th Cong., 1st Sess. (1983); "Abortion," *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on S.J. Res. 119 and S.J. Res. 130*, 93rd Cong., 2nd Sess. (1974).

state, how can we accord lesser status to dominion and control over the physical self? Indeed, the right of bodily integrity is one of the foundations of the right to privacy.[6] We insist on the right to informed consent to medical treatment; we recognize each individual's right to refuse to donate organs to save the life of another person;[7] we consider the forcible extraction of the contents of a suspect's stomach to be conduct that "shocks the conscience."[8] And yet, those who criticize *Roe v. Wade* show little concern for the massive invasion of physical integrity and privacy that forced pregnancy entails.[9]

The constitutional right of association embraces the right to form a family, to choose our most intimate associates and guide the raising of children. This is an aspect of privacy protected by both due process and the First Amendment. The state cannot fix marriages nor force an unwilling parent to care for a child. It is not for the state to mandate intimate association; and yet the power to block abortion denies to women an aspect of this right accorded to others.[10]

The First Amendment protects our thoughts and beliefs, and our verbal, as well as symbolic, expression. We can be neither restrained in our speech, nor forced to break silence. The Constitution protects these rights, not only because of a utilitarian view that a marketplace of ideas serves the public good, but also because of the importance of freedom of expression in the development of individual identity and the fulfillment of human aspirations. Is not sexuality a most intimate and important form of expression,[11] albeit one that has been tradition-

---

[6] In Union Pacific Railway Co. v. Botsford, the Court wrote: "No right is held more sacred, or is more carefully guarded, by the common law that the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . " 141 U.S. 250, 251 (1891). For an extremely useful discussion of the origins and implications of the right of bodily self-determination, *See*, Petchesky, *Reproductive Freedom: Beyond A Woman's Right to Choose*, 5 SIGNS 661, 663-71 (1980) (hereinafter *Reproductive Freedom*).

[7] *See:* Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47 (1971); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); McFall v. Shimp (unpublished, Ct. 51 Common Pleas, Allegheny County, Pa., Civil Division, July 26, 1978).

[8] Rochin v. California, 342 U.S. 165, 172 (1952).

[9] "There is no way a pregnant woman can passively let the fetus live; she must create and nurture it with her own body, a symbiosis that is often difficult, sometimes dangerous, uniquely intimate. However gratifying pregnancy may be to a woman who desires it, for the unwilling it is literally an invasion—the closest analogy is to the difference between lovemaking and rape . . . Clearly, abortion is by normal standards an act of self-defense." E. WILLIS, BEGINNING TO SEE THE LIGHT, 208 (1981).

[10] Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 640-41 (1980).

[11] *See, e.g.*, Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 1001-1006 (1979) (hereinafter "Richards").

ally denied to women by the sexual double standard and the realistic fear of pregnancy?[12] Or consider the commitment to bring a child into the world and to raise it through daily love, nurture, and teaching. Is this not an awesome form of expression, as well as a reflection of one's beliefs, thoughts, identity, and notion of what is meaningful? Men and women speak with their bodies on the picketline and in demonstrations; we also "speak" in sexual encounters, just as women do in childbearing.

The First Amendment also protects the right to follow religious and conscientious convictions. It demands that the state respect diverse beliefs and practices that involve worship, ritual, and decisions about everyday life.[13] We recognize as religious, matters of ultimate concern which include issues of life and death and the meaning thereof.[14] The decision whether to bear a child, like conscientious objection to military service, is one of conscientious dimension.[15] The religions and the people of this country are deeply divided over the propriety and, indeed, necessity of abortion. For some, even the consideration of abortion is a grave evil. Others hold that a pregnant woman has a religious and moral obligation to make a decision whether to continue a pregnancy and to consider abortion where the alternative is to sacrifice her health or well-being, that of her family, or of the incipient life.[16] Thus, the right to abortion is rooted in the recognition that women too make conscientious decisions.

Few would dispute that the Constitution recognizes the right to work as a fundamental liberty. And although we have failed properly to implement that right by providing jobs for millions of unemployed people, we deem fundamental the principle enshrined in the Thirteenth Amendment, that no person should be forced into involuntary servitude as a result either of private conspiracy or public law. Does this right not extend to a woman, entitling her to say "no" to the

---

[12] Though opposition to abortion is justified in terms of concern for fetal life, at root it seeks to prevent the separation of sex and reproduction. Most abortion foes either oppose contraception or disregard the consequences of its inadequacies. So long as sex can be maintained as legitimate only when combined with an intent, or at least willingness, to procreate, sexual autonomy and expression are denied to women—heterosexual intercourse is inhibited by the fear of pregnancy, and homosexuality is, by definition, illegitimate. See E. WILLIS, BEGINNING TO SEE THE LIGHT, *supra* at 208-209 (1981).

[13] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[14] United States v. Seeger, 380 U.S. 163, 180-83 (1965).

[15] *See, e.g.*, United States v. Seeger, *supra;* Welsh v. United States, 398 U.S. 333 (1970). McRae v. Califano, 491 F. Supp. 630, 741-42 (1980), *rev'd on other grounds*, Harris v. McRae, 448 U.S. 297, 320-21 (1980) (plaintiffs lacked standing to raise free exercise issue).

[16] For a description of different religious positions, *see* McRae v. Califano, *supra*, 491 F. Supp. at 690-702, 741-42.

unparalleled labor demanded by pregnancy, childbirth and childrearing, and to the expropriation of her body and service for the sake of another? If we strip away the sentimentalism that has rendered invisible the work of childbearing and rearing,[17] forced pregnancy must surely be recognized as a form of involuntary servitude.[18]

And what of the equality of women? Not to apply the foregoing constitutional principles to the question of the liberty to choose abortion is to deny to women equal personhood and dignity in the most fundamental sense. At the same time, to deny the right to abortion ensures that women will be excluded from full participation in society. Without the ability to decide whether and when to bear children, women lack essential control over their lives. Unexpected pregnancy and involuntary motherhood can preclude education, shatter work patterns and aspirations, and make organizational and political involvement impossible. A woman is no more required to remain pregnant than a cardiac patient is to die of a heart condition that is treatable. Pregnancy is not "natural" or necessary. Rather, it is ideologically and legally imposed by denying access to safe technology, which, in myriad other spheres, we applaud as enhancing the possibility for human freedom and endeavor.[19]

In sum, the criticism of *Roe v. Wade* has less to do with judicial excess than with a view of woman as less than a whole person under the Constitution; as someone whose being and aspirations can and should be legally subordinated to the service of others. The criticism, as well as certain aspects of the decision itself,[20] reflect a failure to

---

[17] As the Court said in Frontiero v. Richardson: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973).

[18] In Bailey v. Alabama, Justice Hughes summarized the purpose of the Thirteenth Amendment: "The plain intention [of the Thirteenth Amendment] was to abolish slavery of whatever name and form . . . ; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." 219 U.S. 241 (1911).

[19] Petchesky, *Reproductive Freedom*, *supra*, n.6 at 632.

[20] Because Roe v. Wade is not grounded in the principle that pregnant women are entitled to equal treatment, the decision itself has significant flaws. Although, the decisional right is the woman's. *Id.* at 153; *see also*, Whalen v. Roe, 429 U.S. 589, 599 n.23 (1977), Roe v. Wade makes the doctor a necessary co-partner in the decision. *Id.* at 163-64; *see also*, Doe v. Bolton, 410 U.S. 179 (1973), and draws a shakey line at viability. Roe v. Wade, *supra*, 410 U.S. at 163. Most significantly, by treating the right to abortion as one of privacy, rather than one involving fundamental liberty, autonomy, expression and equality, abortion becomes, in the Court's hands a negative right, something which the state need only tolerate. Some of the implications of this are discussed in the text following note 24, *infra*. It is important to note, however, that privacy need not be understood as simply a negative inhibition on state power, but also as an affirmative right rooted in autonomy. *See, e.g.*, Richards, *supra*, n.11 at 1001; Petchesky, *Reproductive Freedom*, *supra*, n.6, at 663-70.

understand the gravity with which women view the responsibility of childrearing, and the violence of forced pregnancy to human dignity.[21] As Judge Dooling concluded in *McRae v. Califano*, a woman's right to abortion is "nearly allied to her right to be."[22]

It is because the right to abortion is so deeply connected to the autonomy, freedom and equality of women that it has drawn such intense political opposition. The opposition comes largely from the intensely patriarchal religions and the political New Right, which, through reification of the fetus, seek to enforce the evil of women's sexuality and the necessity of women's domesticity.[23] This religio-political mobilization aims to consolidate broad state power to regulate, among other things, morality, sexuality, childbearing, and gender roles.

The defense of *Roe v. Wade* in this decade is, therefore, part of a broader struggle to establish reproductive and sexual freedom for women generally, and, in particular for lesbians and gay men, poor women and women of color. The attack on the abortion right takes a variety of forms, all of which illustrate the tactics of the right wing's wider program to undo the Constitution.

To date, the most pernicious and successful attack on abortion rights is the denial to poor women of publicly funded abortions under the federal and state medicaid programs. The Supreme Court's decisions in *Maher v. Roe*[24] and *Harris v. McRae*,[25] reflect the confluence of the political opposition to abortion, the weakness of privacy rights under the constitution as it is presently construed, and the hostility of the Court to the rights of the poor. By permitting medicaid to deny abortion while reimbursing for childbirth, the Court rejected the principle of state neutrality with regard to the exercise of this funda-

---

[21] C. GILLIGAN, IN A DIFFERENT VOICE (1982).

[22] 491 F. Supp. at 742.

[23] Roe v. Wade recognizes the distinctively sectarian character of the controversy over abortion. 410 U.S. at 116, 160-61. Prior to Roe v. Wade, the Catholic and other religious hierarchies played the major role in blocking liberalization of abortion laws. *See, e.g.*, L. LADER, ABORTION II: MAKING THE REVOLUTION, (1973); Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L.R. 18-22 (1973). Until 1978, the anti-abortion movement was built primarily through the hierarchy of the Roman Catholic Church. *See*, McRae v. Califano, *supra*, 491 F. Supp. at 690-727. Subsequently, the abortion issue has been taken up by the fundamentalists of the new right. For a discussion of the relation between abortion and right-wing ideology see, R. PETCHESKY, ABORTION AND WOMEN'S CHOICE: THE STATE, SEXUALITY AND THE CONDITIONS OF REPRODUCTIVE FREEDOM (to be published in 1983).

[24] 432 U.S. 464 (1977). *See also*, Beal v. Doe, 432 U.S. 438 (1977) elective abortion not required to be reimbursed under the federal Medicaid program); Poelker v. Doe, 432 U.S. 519 (1977) (public hospitals may refuse to provide publicly financed elective abortions to poor women).

[25] 448 U.S. 297 (1980).

mental right,[26] and sanctioned, for the first time, a state funding scheme which is explicitly justified as an effort to deter such exercise.[27] That abortion may be inaccessible to the poor is constitutionally irrelevant because it is due to poverty, rather than a state-created barrier. Poverty then, is treated as the fault of the poor, rather than the responsibility of government.[28] The right to abortion is thereby reduced to a matter of privilege.[29]

The implications of this legitimation of state power to manipulate childbearing decisions through discriminatory funding schemes are far-reaching. Already a number of federal agencies are barred from providing abortion under their health plans,[30] although the continuing effort to expand this restriction to all federal employees has been defeated so far.[31] Omnibus funding bills are pending that would deny funds to any hospital or facility that provides or refers for abortion, as well as prohibit funds for training in the medical tech-

---

[26] The Court distinguishes First Amendment cases where the obligation of state neutrality is recognized. Maher v. Roe, *supra*, 432 U.S. at 474, n.8. But the obligation of neutrality had been recognized in other contexts as well. In Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court invalidated the denial of benefits to new residents in part because it might deter—directly or indirectly—exercise of the right to travel. Maher ignores this aspect of these cases. 432 U.S. at 474, n.8.

[27] Prior decisions of the Court have countenanced the denial of fundamental rights to the poor, but never so blatantly and directly. For example, in Dandridge v. Williams, 397 U.S. 471 (1970), the Court ignored the contention that a ceiling on welfare benefits after the fifth child deterred the right to procreate and sustained the regulation on an independent, albeit absurd, rationalization. *Id.* at 480-82. In Wyman v. James, 400 U.S. 309 (1971), the Court permitted social workers to enter the homes of welfare recipients without observing Fourth Amendment standards by rationalizing this intrusion as a beneficent one, designed to benefit the recipient. *Id.* at 318-20. By contrast, Maher sanctioned the explicit purpose of deterring the abortion choice, and McRae upheld this even in the face of demonstrable and avoidable harm.

[28] Maher v. Roe, *supra*, 432 U.S. at 476; Harris v. McRae, *supra*, 448 U.S. at 314. Compare the earlier recognition by the court that welfare benefits are entitlements "more like 'property' than a 'gratuity'. Goldberg v. Kelly, 397 U.S. 254, 261, n.8 (1970) and that "forces not within the control of the poor contribute to their poverty." *Id.* at 265, citing Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

[29] Contrast the approach in Maher and McRae to that of the European Court on Human Rights. In the Airey case, the Court held that the right to privacy in family matters entitled Mrs. Airey to have a state-provided attorney to pursue her claim for judicial separation. The premise of the decision was not, as in Boddie v. Connecticut, 401 U.S. 371 (1971) that the state monopoly created an obligation to make the forum for divorce available, but rather that a right is not meaningful without the wherewithal to exercise it. Airey v. Ireland, 2 E.H.R.R. 305 (1979).

[30] *See*, for example, Department of Defense Appropriation Act of 1982, P.L. 97-114 sec. 757; Foreign Assistance and Related Programs Appropriations Act of 1982, P.L. 97-121. *See also*, District of Columbia Appropriations Act of 1982, P.L. 97-91, sec. 118. By regulation the Indian Health Service is restricted from providing abortion. 47 Fed. Register 4016 (January 27, 1982).

[31] *See:* American Federation of Government Employees, AFL-CIO, 525 F. Supp. 250 (D.D.C. 1981). Subsequently, in the 97th Congress, the Senate defeated by a vote of 49-45 the Ashbrook Amendment to the extension of the continuing resolution for fiscal 1983.

niques of abortion and for fetal experimentation.[32] While many of these proposals can be challenged constitutionally, these bills would, if passed, severely cut back the availability and increase the cost of safe, legal abortion.

The power to manipulate funding decisions also threatens the right of the poor to procreate. In an ominous footnote in *Maher*, Justice Powell suggests that demographic concerns "could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth."[33] The right to procreate is thus inextricably intertwined with the right of procreative control legally as well as practically. At the same time as we must oppose restrictions on women's ability to refuse unwanted childbearing, we must also work to preserve the right to bear children.

The economics of federal funding of reproductive health care together with cutbacks in support for basic services provide a powerful incentive to states to encourage sterilization. Abortion is not reimbursed, childbirth is reimbursed according to the state's medicaid formula, and for sterilization the federal government returns 90% of the cost to the states.[34] Sterilization abuse—i.e., sterilizations performed under coercive conditions or based on false, misleading or inadequate information—has surfaced as major concern during the last decade.[35] A recent survey of New York City women revealed, for example, that 38.5% did not know that sterilization is permanent, and that, among women already sterilized, the rate of misunderstanding was over 50%.[36] While sterilization abuse—in the sense of inade-

---

[32] In the 97th Congress, *see* H.R. 900 reintroduced as H.R. 3225 (Hyde); S.158 reintroduced as S. 2148 (Helms) which was proposed as amendment 2038 to the Debt Ceiling Limit Bill of 1982 and tabled in the Senate by a vote of 47 to 46 (September 15, 1982); S. 2372 (Hatfield), reintroduced as S.2806 (deleting medical training and referral limits). In the 98th Congress these bills have been reintroduced as H.R. 618 (Hyde), S. 26 (Helms).

[33] Maher v. Roe, *supra*, 432 U.S. at 478 note 11. Compare Dandridge v. Williams, *supra*, 397 U.S. 471 where the Court eschewed this question with Cohen v. Chesterfield County School Board, 414 U.S. 632 at 652-3, (1974) (Powell, J. concurring) where Justice Powell first announced the legitimacy of this purpose. In Buck v. Bell, 274 U.S. 200 (1927) the Court cavalierly sustained eugenics laws permitting the forcible sterilization of an alleged "imbecile".

[34] 42 U.S.C. 1396e *et seq.*

[35] *See, e.g.*, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974) reversed on grounds of mootness, 565 F.2d 722 (D.D.C. 1977); discussion accompanying federal sterilization regulations, 43 Fed. Reg. 52146 (November 8, 1978); Committee for Abortion Rights and Against Sterilization Abuse (CARASA), Women Under Attack: Abortion, Sterilization Abuse, and Reproductive Freedom (CARASA 1979) (hereinafter cited as "CARASA").

[36] Carlson and Vickers, Voluntary Sterilization and Informed Consent: Are Guidelines Needed?, pp. 21-22 (unpublished, available from Center for Constitutional Rights, New York City).

quate information and birth control alternatives—affects women of all classes, deliberate abuse has been overwhelmingly directed against Black, Native American, Puerto Rican, and Chicana women, as well as prisoners and women who are physically or mentally disabled.[37]

In response to significant pressure from feminist, black, third world, welfare rights, health, and civil liberties advocates, federal regulations governing all federally funded sterilizations and designed to safeguard a woman's informed and voluntary consent, were promulgated by the Department of Health and Human Services in 1979.[38] These regulations, which come up for review in 1982,[39] provide crucial protection against these abusive practices. They cannot, however, protect against the coercion visited upon poor women by their economic circumstances together with the absence of funded abortions under the medicaid program.

Although there is, as yet, no hard evidence, the absence of funded abortions is likely to lead poor women to concede to sterilization rather than risk a future unwanted pregnancy. The pressure to be sterilized will be aggravated in the 80's, given the Reagan Administration's dedication to intensifying the plight of the poor. The fight to guarantee entitlements to the basic necessities of life—including food, shelter, education and health care, as well as to establish such hitherto unrecognized necessities such as day care, is, therefore, an integral part of the reproductive rights agenda for the 80's.

The abortion funding decisions have also encouraged sweeping proposals to condition entitlement to federal funds on adherence to state-endorsed morality. The Family Protection Act (FPA)[40]—which

---

[37] See generally, CARASA, *supra*, note 36; *See also, Reproductive Freedom*, *supra*, note 6, at 667-68.

[38] 43 Fed. Reg. 52146 (November 8, 1978), 42 C.F.R. 50 and 441; 45 C.F.R. 1392.

[39] *Id.* The regulations were published for comment at 47 Fed. Reg. 17582 (April 23, 1982). As of March 1983, no disposition has been announced.

[40] The Family Protection Act (S.1808) was first introduced in the United States Senate in September, 1979 by Senator Paul Laxalt (R-Nevada). Co-sponsors of the bill were three other "right wing" Republicans, Jake Garn of Utah, Thad Cochran of Mississippi, and Jesse Helms of North Carolina. A similar proposal was introduced in 1981 in the House of Representatives as H.R. 311 by Cong. George Hansen (R-Idaho).

A new version of the Family Protection Act was introduced by Republican Senator Roger Jepsen of Iowa on June 17, 1981. This bill (S. 1378) has been restructured and rephrased in ways that will probably make it more politically passable; but its basic message for public education remains the same as the original Laxalt bill. The current bill has six titles: Family Preservation, Taxation, Education, Voluntary Prayer and Religious Meditation, Rights of Religious Institutions and Educational Affiliates and Miscellaneous.

combines the agenda of the new right and the religious fundamentalists—would use the power of the public purse to sanction their opponents and reward their adherents. The FPA favors the traditional, religious, white, middle-class, heterosexual, husband-supported, wife-dependent family with tax exemptions and seeks to suppress competing relational arrangements and ideas. It would, for example, lay the foundation for a vicious new McCarthyism by prohibiting federal funding for educational materials which "would tend to denigrate, diminish or deny the role of differences between the sexes,"[41] or to any person or entity that "presents homosexuality, male or female, as an acceptable alternative life-style"[42]. Legal services would be barred from cases involving abortion, desegregation, divorce, selective service violations or gay rights.[43] The premise of the FPA is that the funding power of the government should be beyond constitutional control. In the name of "the Family," it would intrude into the most intimate aspects of people's lives and, at the same time, undermine present legal and constitutional protections for such public matters as discrimination, the separation of church and state, labor organizing, academic freedom, etc.

Defeating the FPA and its progeny,[44] as well as affirmatively guaranteeing the rights of those the FPA seeks to punish, is also a major issue on the civil liberties agenda of the 80's.

In addition to funding schemes to deny reproductive and sexual freedom, there are direct assaults on the legal foundation of those rights and the constitutional role of the federal courts in protecting them. The major target of these attacks is *Roe v. Wade*.

---

[41] H.R. 311, sec. 440B(3).

[42] H.R. 311, sec. 507.

[43] H.R. 311, sec. 506(8)(12).

[44] The Reagan Administration has attempted to implement various aspects of the FPA without legislation. For example, a central aspect of the FPA is a scheme to ensure tax-exempt status to white Christian schools. H.R. 311, sec. 104(a). The Administration sought to implement this by "reinterpreting" IRS regulations and, when that effort failed, supported the constitutionality of tax-exempt status for racially discriminatory religious schools in Goldsboro Christian Schools, Inc. v. United States, 456 U.S. 922 (1982) (granting leave to Solicitor General of the United States to file a brief *amicus curiae* and to divide the argument). The FPA also would impose parental notification when contraceptives are provided to minors. (H.R. 311 sec. 504. The Administration sought to do precisely the same thing in promulgating the "squeal rule," 48 Fed. Reg. 3600 (Jan. 26, 1983), 42 C.F.R. part 59, which has been invalidated by several district courts. People of the State of New York v. Schweiker, 83 Civ. 0726 and Medical and Health Research Association of New York City v. Schweiker, 83 Civ. 0727 (S.D.N.Y., Feb. 14 and Mar. 27, 1983); Planned Parenthood Federation of America v. Schweiker, Civ. Action No. 83-0037 (D.D.C., Feb. 18 and Mar. 2, 1983).

The "Human Life" Bill, proposed by Jesse Helms would declare that the fetus is a person under the Constitution by a mere majority vote, and strip the lower federal courts of power to invalidate abortion restrictions.[45] The effort to pass this bill is primarily political as its constitutional shortcomings are quite clear.[46] This does not, however, diminish its potential as a vehicle for intimidating the Supreme Court into backing off from its decision in *Roe v. Wade*. Contending that the bill reflects a national consensus that the fetus is a person, its proponents would urge the Supreme Court to retract its view that the question of when life begins is unanswerable by civil authority,[47] and thereby, to permit severe restrictions on abortion throughout pregnancy.[48]

Additionally, there are a number of proposals to amend the Fourteenth Amendment to include the fetus as a person.[49] Fetal personhood would permit and perhaps require severe criminalization of abortion. It could be used to justify pregnancy surveillance and indeed surveillance of all women's health care. In Victorian times women were confined during pregnancy. If the fetus were made a person, women's right to work while pregnant would be in question, as would our right to engage in strenuous activity.[50] The question of how to prevent a desperate woman from self-aborting would remain a vexing one, however. Some proponents of fetal personhood have advocated that an embryo be removed from her womb and transferred to that of a willing surrogate. Thus, by a simple declaration of fetal personhood, women would be reduced to the status of carriers, not persons.

It is not necessary, however, to declare that the fetus is a person to eliminate the right to abortion. Amendments that would overrule *Roe v. Wade* and empower states and/or the federal government to

---

[45] The "Human Life" Bill, known by opponents as the Abortion Prohibition Bill, was introduced in the 97th Congress as S.158 and reported out of committee as S.2148. The bill failed to pass the Senate. *See*, note 32, *supra*.

[46] *See The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1982).*

[47] Roe v. Wade, *supra*, 410 U.S. at 159-62.

[48] A slightly different version of the bill, S.2372, proposed by Senator Hatfield in 1982 makes this strategy explicit.

[49] Some of the major proposals, previously introduced and renewed in the 98th Congress are S.J. Res. 4, 8, 9 which are variations of the fetal personhood amendment.

[50] The implications of a fetal personhood amendment are discussed in U.S. Commission on Civil Rights: Constitutional Aspects of the Right to Limit Childbearing (1975); Goodman and Price, *Abortion and the Constitution: An Examination of the Proposed Anti-Abortion Amendments*, 7 RUT. CAM L. J. 671 (1976); Pilpel, *The Collateral Legal Consequences of Adopting a Constitutional Amendment on Abortion*, 5 FAM. PLANNING/POP. REP. 44 (June 1976); Copelon, *Danger: A Human Life Amendment is on the Way*, Ms. (February 1981).

restrict abortion could severely curtail access to safe, legal abortion.[51] Moreover, all these efforts in Congress and legislatures around the country are ultimately designed to pressure the Court to further water-down *Roe v. Wade*.[52]

Massive opposition to these statutes and amendments is crucial. At the same time, it is important that we recognize that the "rights" of the fetus are already being advanced to deny basic rights to women in the funding context and others. For example, rather than clean up toxic workplaces that threaten the health and reproductive capacity of all workers, some employers are instituting policies excluding women of childbearing age unless they agree to be sterilized.[53] Doctors and courts are wrongfully treating the viability of the fetus as equivalent to personhood, and attempting to exercise greater control over the childbirth process. New technologies for *in utero* surgery threaten the right of the woman to consent to a medical invasion of her body.

---

[51] In the 98th Congress S.J. Res. 3, the "federalism" amendment, proposed by Senator Orin Hatch would give both Congress and the states power to restrict abortion. The implications of this amendment are explored in *Constitutional Amendments Relating to Abortion: Hearings Before the Subcommittee on the Constitution, Senate Judiciary Committee on S.J. Res. 17; S.J. Res. 18; S.J. Res. 19; and S.J. Res. 110, 97th Congress, 1st Session (1983).* As approved by the Senate Subcommittee on the Constitution, S.J. Res. 3 provides: "A right to abortion is not secured by the Constitution," which is designed to reempower the states to restrict abortion.

[52] The decisions in Maher and McRae are a product of these pressures, as are the courts' decisions restricting the autonomy of minors with respect to abortion. *See, e.g.*, Baird v. Bellotti (II), 443 U.S. 622 (1979) (parental consent with judicial by-pass would be acceptable); H.L. v. Matheson, 450 U.S. 398 (1981) (parental notification statute approved for cases involving immature, unemancipated minors where it would not harm their best interest).

In addition, in the 1982 term, the Court will decide three abortion cases which could have a major impact on the standard of review in abortion cases. Simopoulos v. Virginia, No. 81-185; City of Akron v. Akron Center for Reproductive Health, Inc., No. 81-746, and Akron Center for Reproductive Health v. City of Akron, No. 81-1172; Planned Parenthood of Kansas City, Mo. v. Ashcroft, No. 81-1255 and Ashcroft v. Planned Parenthood of Kansas City, Mo., No. 81-1623. The parties defending abortion-restrictive statutes are contending that judicial review is not triggered unless a restriction is "unduly burdensome," an obviously sieve-like test. Despite the absence of a federal interest in abortion restrictions, the Solicitor General of the United States has filed an amicus curiae brief which urges abandonment of strict scrutiny in abortion and other fundamental rights cases. Brief for the United States in Nos. 81-746 and 81-1623. The administration contends that legislatures and not courts should determine the parameters of and protection accorded to basic constitutional rights. Justice Blackmun pointedly suggested at the argument that if the Solicitor was not seeking to reverse Roe v. Wade, it was Marbury v. Madison, 5 U.S. [1 Cranch] 137 (1803)—i.e., the most basic principle of judicial protection of constitutional rights—that he was after. 51 U.S.L.W. 3435 (December 7, 1982).

[53] In response to such a "fetal protection" policy, five women employed by American Cyanamid, got themselves sterilized to save jobs that were later terminated. This is a growing problem. See, e.g., Williams, *Firing the Women to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 GEO. L. J. 641 (1981).

These are only some of the most immediate attacks on reproductive and sexual rights that we can expect in the 80's. The present day threats demand not only a defense, but also an offense. The fight against cut-backs on the limited nature of the rights we have won is an integral part of expanding the meaning and reality of reproductive and sexual freedom. In this effort, it is essential to establish the principle that basic human rights are illusory without guaranteeing the economic means necessary to their exercise.

Finally, we must remember that none of these rights came into being because of the brilliance of legal arguments, but primarily because of the strength of the movements for which we work. We won *Roe v. Wade* because there was a powerful movement behind it; we are losing ground because we underestimated the potential of the present movement to suppress the rights of women and deny reproductive and sexual freedom. We can win back that ground, however, if, as we are doing here today, we commit ourselves to this work, develop a comprehensive vision of human rights and social justice, and make connections between the various assaults on the rights of the people. The potential for a broad coalition is here. As lawyers, it is our job first to understand the suffering and demands of people, second to help to translate these into legal theory and strategy, and, finally, to do this in a way which builds our collective strength.