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Roe's Effects on Family Law

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I. Introduction

Family law deals with the regulation of the most sensitive relationships in our lives—those between wives and husbands,

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between parents and children, and between people who share a household. Family law regulates entry into family status relationships, such as marriage, and the ways to get out of them, such as divorce. It regulates the ongoing nature of those relationships including duties, obligations, rights, and privileges vested in the members of a family by virtue of their relationships with one another.[1]

Generally, state domestic relations law balances two distinct and opposite ends of liberty interests, both of which are of paramount importance to the state: the preservation of family privacy and the protection of individual members of a family. The competition between these two positions has been highlighted in the wake of *Roe v. Wade*.[2] Family law has experienced some dramatic changes in the forty years since this landmark decision. The ease of obtaining a divorce has increased,[3] while the statutory requirements for entering into marriage are undergoing alteration,[4] and more individuals are opting out of marriage in favor of cohabitation.[5] Parenting rights and duties have changed,

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1. Other large aspects of family law include property distribution, spousal support, and child custody, but as those areas seem to have minimal interface with abortion, they are not discussed in this article.

2. *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973) (balancing the right to privacy in the familial context, which encompasses a woman's decision on "whether or not to terminate her pregnancy," against the legitimate state interest of protecting maternal health and protecting "potential" prenatal life). *Roe* has highlighted the competing interests of individual rights and family interests by sometimes potentially setting family members against one another. This Article seeks to set forth how *Roe* has possibly worked to increase conflicts between husbands and wives, and between parents and children, but also how those potential conflicts alter the interests of the family as a unit, drawing the state into those intimate family relationships.

3. *See* Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799, 799 (2004) (using forty years of census data to confirm that unilateral divorce regulations—involving laws that do not require explicit consent from both partners to obtain a divorce—significantly increase the incidence of divorce).

4. For a review of the changing nature of requirements for entering into marriage, from federal and state regulation to litigation, see generally Mark Strasser, Windsor*, Federalism, and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1, 23–28 (2013), http://harvardjlg.com/wp-content/uploads/2013/11/Strasser_Windsor_Federalism_and_the_Future_of_Marriage_Litigation.pdf.

5. *See* Lynne Marie Kohm, *Why Marriage Is Still the Best Default in Estate Planning Conflicts*, 117 PENN ST. L. REV. 1219, 1243 n.129 (2013)

and rights and privileges of children have been altered.[6] This article examines whether, how, and why any of those changes are related to *Roe*.

Roe's effects on these matters of family law warrant review. Part II begins with a discussion of changes to the parent–child relationship since *Roe v. Wade*. It investigates the regulation of parenting rights, duties, and choices, and the liberty interests of children to receive loving and valued parenting, using both statutory code and popular jurisprudence. Part III considers the changes in marriage since *Roe*. This Part examines marriage rights and privileges, focusing on how spousal roles are different than they were prior to *Roe*. Relationships between members within a household, sexuality regulation, and judicial decision-making in family law generally are the focus of Part IV. Finally, Part V offers some conclusions as to *Roe'*s effect on family law.

Forty years after *Roe,* alterations to family law include an expansion of the concept of increasing individuality and a contracting sense of community, and both are at least somewhat connected to abortion rights and regulations.[7] This Article seeks

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(discussing Census data indicating that a significant and growing percentage of the U.S. population comprises unmarried households).

6. *See generally* Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. AM. ACAD. MATRIMONIAL LAWS. 451 (2013) (citing Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J.L. FAM. STUD. 337 (2008)).

7. *See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN TRADITION: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987) (contrasting American individualism with the European emphasis on community to proffer that the legal tradition in the United States, since abortion jurisprudence (and divorce reform), has become more individualistic by incorporating the "right to be let alone" and viewing individuals as "lone rights bearers"). In Katherine Bartlett's review of Glendon's book, she characterizes Glendon's view of the intrafamily conflict that abortion laws have created between a mother and her child:

> Glendon focuses on the contrasting symbolism of the American and European approaches: while American abortion law reflects the triumph of women's liberty rights over a nonperson/fetus, abortion law in other Western nations communicates a message of active societal concern for fetal life along with compassion for the pregnant woman and a commitment to minimizing the impact of her "tragic choices."

Katherine T. Bartlett, *Story Telling*, 1987 DUKE L.J. 760, 761 (reviewing GLENDON, *supra* note 7) (citations omitted). These ideas are developed further in Part III of this Article.

to demonstrate that these alterations to family law and jurisprudence have generally affected the family as an institution. This expansion and contraction in family law as a whole has included seismic shifts in fundamental foundations of familial relations from what were previously understood, particularly between spouses, between parents and children, and between women and men.[8] While all those changes are not necessarily a direct result of *Roe,* the decision's influence is undeniable.

II. Roe*'s Effects on the Parent–Child Relationship*

Historic recognition of broad parental authority to raise children made the family the basic social, economic, and political unit.[9] Historically, parental rights were understood in property terms, and parents possessed virtually unlimited control over their offspring.[10] Parents were presumed to be protectors of their children's best interests.[11] The state had an interest in the

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8. Professor David Smolin has considered some of these shifts in human relationships brought on by abortion law in a jurisprudential context. *See* David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 980–83 (1992) (analyzing Supreme Court abortion and homosexuality jurisprudence and determining that a faction of the Court erred in creating "certain implicit constitutional understandings about the relationship between government and the family"). Smolin analyzes that jurisprudence in terms of the conflict between a woman and her fetus and the State, which may wish to protect either of them. *Id.* at 1015. He also looks at women's reproductive freedoms as compared to men's and the connection between abortion jurisprudence and parental rights, noting the "elevation of abortion to a virtually super-protected right and the simultaneous rejection of claims based on parental control over birth and education." *Id*. at 1015. These notions are also developed further throughout this Article.

9. *See* David Wagner, *The Family and American Constitutional Law*, 1 LIBERTY, LIFE & FAM. 145, 157–67 (1994) (discussing this historical basis in the context of the development of individualism through American constitutional case law); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 613–19 (1976) (discussing the history of and concerns with the parents' rights versus children's rights conundrum).

10. *See* HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 225 (3d ed. 1995) ("Historically, parental . . . power over offspring until the age of majority . . . was all but unlimited and unchecked.").

11. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J.L. & FAM. STUD. 337,

preservation of family strength and privacy.[12] When *Roe* legalized the right to abortion, these notions were changed, revising the parent–child relationship in completely new ways and removing parents from the equation when abortion was involved as a choice for a child.

New laws affecting the parent–child relationship were developed, at least somewhat, in response to *Roe*.[13] Pennsylvania's laws to protect the parent–child relationship when making a choice about abortion, among other laws regulating the abortion right, were challenged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[14] While upholding *Roe's* basic right to abortion, *Casey* found laws that restricted abortion, such as those requiring informed consent, minimum requirements for clinical facilities providing abortion, and parental notification for minors seeking abortions to be constitutional.[15] Based on the privacy and liberty interests founded in *Roe,* new notions, albeit of much more limited parental involvement in a child's abortion, became significant. Many state and federal restrictions on abortion in the United

345–52 (2008) (tracing the history of the best interest standard as related to parental rights).

12. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 493–94 (1983) (noting that the Supreme Court recognized the state's interest in formal marriage because of the importance society places on family).

13. *See* Steve Alumbaugh & C.K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 JUDICATURE 153, 157 (1990) (noting that "state legislatures have passed hundreds of laws designed to circumvent or limit the scope and breadth of" *Roe*, including a number of provisions that impact familial relationships, including spousal consent and parental consent laws). For a summary of state attempts to regulate abortion in the era following *Roe*, see ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 997–1006 (3d ed. 1995).

14. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (describing several Pennsylvania state laws, all of which were passed after *Roe* was decided).

15. *See id.* at 899 (upholding a law permitting minors to obtain an abortion only after receiving parental consent or, in special cases, court approval). The Court struck down a requirement for spousal notification. *See id.* at 895–98 (explaining why the state may not require a husband's approval for his wife to have an abortion). For a review of how *Casey* brought abortion liberty and regulation to a head, see generally Lynne Marie Kohm & Colleen Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?*, 6 WM. & MARY J. WOMEN & L. 381 (2000).

States were in place before *Roe*.[16] Because *Roe* was relatively silent as to a minor's abortion decision, an inference could be drawn that *Roe* permitted abortion on demand for a minor child without the protection that family involvement provides.[17] Pennsylvania's response was to establish a law designed to protect the best interests of a child through a parent's involvement in his or her child's abortion decision.[18] Montana

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16. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 72–80 (2005) (describing those restrictions in place prior to *Roe*); Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent? The Ex Parte Anonymous Cases (Alabama 2001)*, 34 CONN. L. REV. 1109, 1109 (2002) (describing how the Supreme Court refused to answer the question of parental involvement in *Roe*, effectively mandating that states fill the regulatory gap if they wanted parents involved in the abortion decisions of their children).

17. *Roe* seems to offer implicit approval for the availability of abortion on demand for a minor child (without mention of parental involvement). *See* Charles E. Rice, *Abortion: What Did the Supreme Court Do in* Roe v. Wade? 5–6, *in* LIFE & LEARNING IX, http://www.uffl.org/vol%209/rice9.pdf

> According to *Roe*, even after viability, when the state may regulate and even prohibit abortion, the state may not prohibit abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." The health of the mother includes her psychological as well as physical well-being. And "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the mother." This is equivalent to a sanction for permissive abortion at every stage of pregnancy.

(quoting Roe v. Wade, 410 U.S. 113 (1973)). These statements from *Roe* and *Doe*, analyzed here by Professor Rice, intimate that the age of the woman seeking the abortion is relevant to her wellbeing, permitting abortion on demand for a woman of any age if her wellbeing is at issue. *See also* Gary-Nw. Ind. Women's Srvcs., Inc. v. Bowen, 421 F. Supp. 734 (N.D. Ind. 1977) (where pre-*Roe* provisions of the Indiana Abortion Law requiring parental consent were held to be unconstitutional). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* at 736. The separate concurring statement of District Judge Allen Sharp draws the position of a minor's right to abortion on demand during the first trimester into better focus. "[O]ur highest Court has now vested in a mother, regardless of age or parental or marital consent, the absolute right to terminate human life in a clearly identifiable form during the first three months of its existence . . . ." *Id.*

18. *See* 18 PA. CONS. STAT. § 3206(a) (2013) (mandating parental involvement in a minor's abortion decision via an informed consent requirement). This law states:

passed legislation specifically noting that parental involvement serves a child's best interests.[19]

Other states have responded to the opportunity presented by *Casey* with regulatory schemes that fall into three categories: those protecting parental consent,[20] those requiring parental notification,[21] and those schemes that mandate both notification

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> Except in the case of a medical emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incapacitated person under 20 Pa.C.S. § 5511 (relating to petition and hearing; independent evaluation), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is an incapacitated person, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

Id.

19. MONT CODE ANN. § 50-20-502 (2013) (noting that "parents ordinarily possess information essential to . . . [support a] physician's best medical judgment," that parents can ensure that their children receive "adequate medical care" after an abortion, and that "parental consultation is usually desirable and in the best interests of the minor"). The Montana Legislature stated that the "purpose of this part is to further the important and compelling state interests of . . . protecting minors against their own immaturity" and "fostering family unity," as well as "preserving the family as a viable social unit." *Id.*

20. Parental consent laws can be found in ALA. CODE § 26-21-3 (2013); ARIZ. REV. STAT. ANN. § 36-2152 (2012); ARK. CODE ANN. § 20-16-803 (2013); IDAHO CODE ANN. § 18-609A (2013); IND. CODE § 16-34-2-4 (2010); KAN. STAT. ANN. § 65-6705 (2012); KY. REV. STAT. ANN. § 311.732 (LexisNexis 2013); LA. REV. STAT. ANN. § 40:1299.35.5 (2013); MASS. GEN. LAWS ch. 112, § 12S (2013); MICH. COMP. LAWS § 722.903(1) (2013); MISS. CODE ANN. § 41-41-53 (2013); MO. REV. STAT. § 188.028(1) (2013); MONT CODE ANN. § 50-20-504 (2013); NEB. REV. STAT. § 71-6902 (2012) (requiring written notarized consent); N.C. GEN. STAT. § 90-21.7(a) (2012); N.D. CENT. CODE § 14-02.1-03.1 (2013); OHIO REV. CODE ANN. § 2919.121 (LexisNexis 2013); 18 PA. CONS. STAT. § 3206(a) (2013); R.I. GEN. LAWS § 23-4.7-6 (2012); S.C. CODE ANN. § 44-41-31 (2012); TENN. CODE ANN. § 37-10-303 (2013); WIS. STAT. § 48.375 (2012).

21. Parental notification laws can be found in ALASKA STAT. § 18.16.020(a)(1) (2013); COLO. REV. STAT. § 12-37.5-104 (2013); DEL. CODE ANN. tit. 24, § 1783(1) (2013); FLA. STAT. § 390.01114 (2013); GA. CODE ANN. § 15-11-682 (2014); 750 ILL. COMP. STAT. 70/15 (2013); IOWA CODE § 135L.3 (2014); MD. CODE ANN., HEALTH-GEN. § 20-103 (LexisNexis 2013); MINN. STAT. § 144.343 (2013); N.H. REV. STAT. ANN. § 132:33 (2013); S.D. CODIFIED LAWS § 34-23A-7

and consent.[22] These laws largely protect a parent's intercession in his or her child's abortion decision, but challenges to these laws have continued since *Casey* because of *Roe*. For example, in July of 2013 the Illinois Supreme Court unanimously upheld the Illinois Parental Notification Act of 1995, following thirteen years of litigation over whether underage young women may gain the protection of notification of a parent before undergoing an abortion.[23] The court held that the "[s]tate has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."[24]

Family law in this area of parent–child relations has gone from unconstrained parental rights to the emergence of new rights for children against their parents (because of *Roe*) and parents against their children (in *Casey*). *Roe* has positioned children and parents against each other, breaking down this important family relationship, while also developing an entirely new area of family law.

Counter-balanced against parental rights restricted by *Roe* is the enlargement of the mature minor doctrine, which since *Roe* has expanded a child's privacy and liberty interests.[25] Generally

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(2013); W. VA. CODE § 16-2F-3 (2013).

22. State laws mandating both parental notification and parental consent include OKLA. STAT. tit. 63, §1-740.2 (2013); TEX. FAM. CODE ANN. § 33.002 (West 2013); UTAH CODE ANN. §§ 76-7-304, -304.5 (LexisNexis 2013); VA. CODE ANN. § 16.1-241 (2013); WYO. STAT. ANN. § 35-6-118 (2013).

23. *See* Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 769 (Ill. 2013) (holding that the law does not violate "state constitutional guarantees of due process and equal protection"); Naomi Nix, *Illinois Supreme Court Backs Parental Notification for Abortions,* CHI. TRIB. (July 13, 2012), http://articles. chicagotribune.com/2013-07-11/news/chi-abortion-parental-notification-201307 11_1_illinois-supreme-court-said-lorie-chaiten-parental-notifica tion (last visited Jan. 2, 2014) (reporting on the central holding of *Flores* and responses to the ruling by pro-life and pro-choice advocacy groups) (on file with the Washington and Lee Law Review).

24. *Flores*, 991 N.E.2d at 767 (quoting Hodgson v. Minnesota, 497 U.S. 417 (1990)).

25. *See* H.L. v. Matheson, 450 U.S. 398, 451–52 n.49 (1981) (Marshall, J., dissenting) ("The 'mature minor' doctrine permits a child to consent to medical treatment if he is capable of appreciating its nature and consequences."). In his dissent in *Matheson*, Justice Marshall discussed the two positions taken by the Justices after *Roe* on whether "mature" minors had a sufficient privacy interest in their abortion decisions to invalidate parental notification laws. *See id.*

within family law, states defer to parents who are the legal authority to make decisions regarding the medical treatment of their children.[26] However, many jurisdictions have carved out an area of law that permits minors to statutorily determine their own medical treatment if that minor is mature enough and individually competent, according to a judge's discretion, to understand the possible risks and benefits of the proposed medical procedure.[27] Much of this privacy jurisprudence was developed in case law prior to *Roe*.[28] Shortly after *Roe*, the United States Supreme Court determined that, as a matter of constitutional law, a mature minor must be permitted to make her own decision whether to terminate her pregnancy.[29] The

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(outlining Justice Powell's position that notification statutes were constitutional if they provided individualized determinations of the decision-making capacity of the mature minor, and Justice Steven's position that such judicial determinations unconstitutionally infringed on the mature minor's privacy).

26. *See* PETER N. SWISHER, LAWRENCE D. DIEHL & JAMES R. COTTRELL, FAMILY LAW: THEORY, PRACTICE AND FORMS § 5.5 (2013)

> The general rule with medical . . . care for children is that the parents ultimately decide whether medical care is to be provided for the child and what that care is to be. This general rule, however, is not absolute. The parents still owe their minor children the duty to provide adequate medical care, or the parents may be guilty of child abuse.

(providing that a failure to secure medical attention for an injured child is a Class 1 misdemeanor, with a Christian Science practitioner exception (citing VA. CODE ANN. § 18.2-314 (2013))).

27. *See* Lois A. Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions*, *in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85, 88 (Gary B. Melton ed., 1982) (enumerating the mature minor exception and giving examples of applicable standards for "maturity" from statutes and jurisprudence).

28. See Walter Wadlington, *Minors and Health Care: The Age of Medical Consent*, 11 OSGOOD HALL L.J. 115, 117–20 (1973) (summarizing the case law pertaining to consent to very basic medical care by a minor).

29. *See* Belotti v. Baird, 443 U.S. 622, 647 (1979) (concluding that every minor "must have the opportunity" for a court to determine whether they are mature enough to make an abortion decision on her own without requiring parental notification or consultation as a preliminary step); Planned Parenthood v. Danforth, 428 U.S. 52, 72, 75 (1976) (holding unconstitutional consent requirement for all unmarried minor abortions during the first twelve weeks of pregnancy because it infringed on the "weighty" right to privacy possessed by "competent minor[s] mature enough to have become pregnant"). Similarly, the Court held in *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), that minors cannot be denied access to contraceptives, both over the counter and medically prescribed. *Id.* at 681–82.

mature minor doctrine expanded rights for girls seeking an abortion, but it has not necessarily been applied to boys in their medical treatment decision-making.[30] Others suggest that equal protection of boys and girls with regard to mature minor laws cannot be applied similarly to boys and girls because pregnancy requires that an autonomous liberty interest be afforded to a girl (because her body carries the child),[31] which is unavailable to a boy by virtue of procreative differences.[32] Still others have argued that the unborn children who are being illegally aborted deserve the protection of counsel in the form of a court-appointed guardian *ad litem*.[33]

Roe changed the parent–child relationship; the development of the mature minor doctrine and parental notification and consent laws, a response to *Roe*, also changed the relationship between parent and child. These regulations brought about parenting limits that provide for a child to judicially bypass her parents to seek an abortion under certain circumstances.[34] The

30. *See, e.g.*, *'Abraham's Law' Clears Virginia Senate Panel*, 4 VA. MED. L. REP. 18, 18 (2007), http://valawyersweekly.com/wp-files/pdf/VMLRJan2007.pdf (discussing the origin of "Abraham's Law," the opposition to it, and the potential harm to all children). A judge ordered a 16-year-old boy, Starchild Abraham Cherrix, to take chemotherapy treatments to which he did not consent. *Id.* Although an agreement was eventually reached between social services and Abraham's attorneys to prevent this forced chemotherapy, Abraham would have been required to take the chemotherapy but for the agreement. *Id.*

31. *See, e.g.*, Catherine Grevers Schmidt, Note, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors,* 68 N.Y.U. L. REV. 597, 637–38 (1993) (noting the difficulty in applying traditional equal protection jurisprudence to laws that classify on the basis of biological differences).

32. For a comprehensive review of the case law, see generally Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002).

33. *See* Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Ad Litem Representation for Prenatal Children,* 19 WM. & MARY J. WOMEN & L. 511, 554 n.216, 555 (2013) (arguing that "hundreds, if not thousands" of illegal abortions could be prevented each year by the appointment of fetal guardians *ad litem* and listing state statutes pertaining to parental consent to an abortion for their minor child).

34. ALASKA STAT. § 18.16.020(a)(2) (2013); ARK. CODE ANN. § 20-16-804 (2013); DEL. CODE ANN. tit. 24, § 1783(2) (2013); GA. CODE ANN. § 15-11-682 (2014); IND. CODE § 16-34-2-4(d) (2013); KAN. STAT. ANN. § 65-6705(b) (2012); KY. REV. STAT. ANN. § 311.732(3) (LexisNexis 2013); LA. REV. STAT. ANN. § 40:1299.35.5 (2013); MASS. GEN. LAWS ch. 112, § 12S (2013); MICH. COMP. LAWS § 722.903(2) (2013); MINN. STAT. § 144.343(6) (2013); MISS. CODE ANN. § 41-41-53(3) (2013); MO. REV. STAT. § 188.028(2) (2013); NEB. REV. STAT. § 71-

lack of encouraging minors to consult with their own parents before undergoing an abortion procedure shows the disjointed nature of the parent–child relationship since *Roe*.[35]

The progression of the mature minor doctrine fostered competing interests between children and parents not fully contemplated before *Roe*. Professor Helen Alvaré suggests that parents "ought to be reinserted in decisions about whether their minor children will receive health care or even surgery in the forms of contraception and abortion."[36] She argues that the law "should stop indicating to minors that they are capable of gauging the full effects of premarital sexual involvement, parenting or abortion, without parental guidance."[37] By judicially removing the parent and his or her love and guidance from the child in certain circumstances, such as a stressful surgery like abortion, the child may be placed in a dangerous situation without needed support. Alvaré also argues that these new, additional laws affect a child's premarital sexual behavior, while also sending the message that adolescents are competent to "discern their own sexual values."[38] For example, judicial bypass laws allow a pregnant minor seeking an abortion to convince a judge, whom she is meeting for the first time, that she is mature enough to

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6903 (2012); N.C. GEN. STAT. § 90-21.7(b) (2012); N.D. CENT. CODE § 14-02.1-03.1(2) (2013); OHIO REV. CODE ANN. § 2919.121(C) (LexisNexis 2013); 18 PA. CONS. STAT. § 3206(c) (2013); R.I. GEN. LAWS § 23-4.7-6 (2012); S.C. CODE ANN. § 44-41-32 (2012); TENN. CODE ANN. § 37-10-304 (2013); W. VA. CODE § 16-2F-4 (2013); WIS. STAT. § 48.375 (2013); WYO. STAT. ANN. § 35-6-118(b) (2013). Two states provide for a physician waiver of the notice requirement: MD. CODE ANN., HEALTH-GEN. § 20-103 (LexisNexis 2013); and W. VA. CODE § 16-2F-3 (2013). Delaware, West Virginia, and Wisconsin allow a specified health professional to determine a waiver of parental consent or notice. *See State Policies in Brief: An Overview of Abortion Laws,* GUTTMACHER INST., Feb. 1, 2014, at 3, http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (providing an overview chart listing state policies).

35. For an overview of these laws by state, see *State Abortion Laws: A Survey*, MSU.EDU, https://www.msu.edu/user/schwenkl/abtrbng/stablw.htm (last visited Jan. 3, 2012) [hereinafter *MSU State Abortion Law Survey*] (on file with the Washington and Lee Law Review); *State Policies in Brief: An Overview of Abortion Laws*, *supra* note 34, at 2–3.

36. Helen M. Alvaré, *Saying "Yes" Before Saying "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle,* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 64 (2004).

37. *Id.*

38. *Id.* at 56.

make her own abortion assessment.[39] There is a large segment of society that perceives this to be an infringement on their ability to directly influence the upbringing of their children regarding premarital sexual decision-making.[40]

Roe has also affected the parent–child relationship in terms of child support. *Roe* introduced intent to become a parent as a factor in assigning child support obligations and thereby gave parents a rationale for avoiding responsibilities to their children.[41] *Roe* allows mothers to eliminate the obligation to support children they did not intend to conceive but does not extend the same ability to fathers.[42] In reaction to this disparity, fathers have advanced two main arguments rooted in the intent to parent rationale to likewise avoid child support obligations. The first type of argument draws from equal protection jurisprudence,[43] and the second relies on a fraud analysis.[44]

First, fathers posit a post-*Roe* dichotomy that, they argue, constitutes a violation of equal protection: while a mother can avoid all legal obligations of parenthood by having an abortion, a father cannot avoid the legal obligation of child support, even when the mother has the child against his wishes.[45] Courts have

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39. *See id*. (explaining how judicial bypass laws work and their prevalence).

40. *See id*. at 83 ("It is an understatement to conclude that parents likely perceive weakening social support for communicating and enforcing teachings on premarital sex to their children.").

41. *See generally* Laura W. Morgan, *Child Support Fifty Years Later,* 42 FAM. L.Q. 365 (2008) (discussing child support in the abortion context); Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?,* 66 MOD. L. REV. 175 (2003) (affording a rationale to exempt men from child support in the context of abortion).

42. *See* Marshall B. Kapp, *The Father's (Lack of) Right and Responsibilities in the Abortion Decision: An Examination of Legal–Ethical Implications*, 9 OHIO N.U. L. REV. 369, 381 (1982) (arguing that *Roe* "reduced the father of a fetus to the status of a helpless bystander," and, consequentially, he should not be held responsible for child support).

43. *Infra* notes 45–49 and accompanying text.

44. *Infra* notes 50–53 and accompanying text.

45. *See* Kapp, *supra* note 42, at 378–79 ("Where a man is forced to discharge support obligations toward a child whom he did not anticipate or want and over whose birth or personhood he had no control or responsibility, he may justly claim discrimination."). Shortly after *Roe*, the Alabama Supreme Court rejected an equal protection claim against the paternity obligation of a man who had offered to pay for an(other) abortion for his pregnant girlfriend when she declined and later sued him for child support. *See* Harris v. State, 356 So. 2d

universally rejected this equal protection argument, resulting in this theory having no authority and little actual impact upon family law regulation.[46] It has, however, had some impact informally in court as demonstrated by the mere fact that courts have often been confronted with this argument.[47] Although the argument might make a modicum of sense logically, it would be a family law defeat to see fathers escape their obligations to their born children.[48] What are not certain are the effects on children and their relationship with their parent once this argument has been made in court and the child becomes aware of it. It would be detrimental in several ways to children everywhere were fathers relieved of their obligations to their children.[49]

623, 624 (Ala. 1978) (rejecting the father's equal protection argument to deny any liability for the child). Harris, the father, contended that Alabama's paternity determination proceeding statutes "deny the father of an illegitimate child equal protection of the laws." *Id.* He argued that because Mary, the mother, "did not consent to have an abortion when he requested her to do so," and because he agreed to pay for the abortion, he was "denied any decision as to the birth of the child," making him "not liable for the child's maintenance, care and education." *Id.* The court held that the "decision not to have an abortion was that of Mary Moore, and hers alone, and by not having one at the request of Harris, Harris cannot now shirk his obligations to the child as required by the statute." *Id.* (concluding, based on *Planned Parenthood v. Danforth*, that there were no "constitutional infirmities" in the paternity statutes and that a state cannot give a husband a "veto" over his wife's decision to have an abortion). The premise of whether intent (to become a parent) is relevant for child support obligations has come about because of *Roe.* This is because the law since *Roe* allows mothers to eliminate the obligation (child), while not allowing that same ability to fathers.

46. *See* Morgan, *supra* note 41, at 371 ("Courts have been unwilling to accept an argument that the constitutional rights that a woman enjoys to terminate a pregnancy also give men the right not to procreate.").

47. *See id.* at 371 n.30 (compiling cases from six states in which fathers attempted to argue equal protection claims based on a woman's refusal to have an abortion).

48. Some suggest that the law is logically unequal in this area. "[I]f women's partial responsibility for pregnancy does not obligate them to support a fetus, then men's partial responsibility for pregnancy does not obligate them to support a resulting child." Elizabeth Brake, *Fatherhood and Child Support: Do Men Have a Right to Choose?*, 22 J. APPLIED PHIL. 55, 56 (2005) (arguing that at most, men should be responsible for helping with the medical expenses and other costs of a pregnancy for which they are partly responsible).

49. *See* Sheldon, *supra* note 41, at 188 (suggesting that, as a consequence of relieving fathers of their obligations to their children, "[m]en would be encouraged to become less involved in their families; abortion of potentially wanted children would be encouraged; gendered [sic] disparities in wealth would

Second, a child's relationship with a father as expressed through child support has been directly affected by *Roe* and its progeny through the emergence of fraud and misrepresentation arguments that arise as an extension of the significance *Roe* implicitly attaches to the intent to become a parent. As described by Melanie McCulley:

> [P]utative fathers also have employed the claim or defense of fraud and misrepresentation in paternity proceedings to avoid their duty to pay support or to recover from the female damages for the amount of the support awarded. The putative father argues that the mother lied to him regarding her ability to conceive or her use of contraceptives. Thus, the putative father could not have agreed to become a father and should not be made to pay support or should be allowed to recover damages because his right to procreative choice or his right to privacy has been violated.[50]

Courts unanimously have held that such claims or defenses are against public policy.[51] Whether or not this is fairness, or equality, or good public policy is a matter of debate.[52] Moreover,

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be further entrenched; and child poverty would be exacerbated"). These points are made not to argue that fathers should have the unilateral decision for an abortion. Rather, they are made to draw out the concerns that are derived from *Roe* with regard to fatherhood. Indeed, children today are affected by fatherlessness. *See, e.g.*, DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25–48 (1995) (summarizing the impacts of fatherlessness, including its effect on youth violence, domestic violence against women, child sex abuse, child poverty, and economic insecurity). Whether the growing social problem of fatherlessness is connected to *Roe* is a worthwhile discussion, but beyond the scope of this Article.

50. Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 23 (1998).

51. *See* Jill E. Evans, *In Search of Paternal Equality: A Father's Right to Pursue a Claim of Paternal Misrepresentation*, 36 LOY. U. CHI. L.J. 1045, 1065–92 (2005) (compiling dozens of cases in support of the proposition that misrepresentation claims, made in any form, have been "singularly unsuccessful").

52. *Compare* Erika M. Hiester, *Child Support Statutes and the Father's Right Not to Procreate,* 2 AVE MARIA L. REV. 213, 241 (2004) (affording a statutory overview and concluding that "[i]t is inequitable and unjust to force responsibility on [a father] for the choices made by the mother of his child"), *and* McCulley, *supra* note 50, at 56 (maintaining that "courts have erred in systematically denying the putative father's rights and in focusing their analysis on the financial best interests of the child"), *with* Evans, *supra* note 51, at 1108–09 (claiming that *Griswold* and *Eisenstadt* create an individual right to

the desire by a father that his child be aborted is not harmless. Children are inevitably impacted by the knowledge that their parents did not want them.[53]

These instances reveal how the parent–child relationship is harmed by nonsupport of the child by the parent. The question of whether intent to become a parent is relevant for child support obligations has become salient because of *Roe*.[54] *Roe* granted mothers an opportunity to eliminate the obligation to support children they have conceived, and it prompted fathers to fight for a comparable opportunity. The parent–child relationship is thus harmed by nonsupport of the child by the parent. Whether the pro-life movement, as one response to *Roe*, has supported efforts to improve the collection of support payments from fathers as a way to combat abortion by alleviating the financial pressure upon women with unwanted pregnancies is a worthwhile question. Despite some recent changes, the various devices for collecting support payments are still woefully inadequate.[55]

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procreate and, as a corollary, a "nondelegable obligation to protect against unwanted procreation," which justifies courts in rejecting fraud and misrepresentation claims), *and* Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle,* 55 BROOK. L. REV. 1359, 1404 (1990) (emphasizing the autonomy differences between men and women in reproductive choice and concluding that these differences do not provide a "convincing basis for the creation of paternal rights that would operate to the exclusion of the right to an abortion").

53. *Cf.* Henry P. David, *Born Unwanted, 35 Years Later: the Prague Study*, REPROD. HEALTH MATTERS, May 2006, at 181, 187 (studying 350 mothers who did not want their children, noting that "in the aggregate, being born from an unwanted pregnancy entails an increased risk for negative psychosocial development and mental well-being (at least up to age 35, the end of the study)"). The author further noted that when tested against a control group, "the findings . . . lend at least partial support to the hypothesis that being born from an unwanted pregnancy has longer-term negative effects" because "[t]he unwanted pregnancy subjects became psychiatric patients (especially in-patients) more often than controls born from accepted pregnancies and also more often than their older siblings." *Id.*

54. Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 489, 492 (2012) ("Inherent within the definition of procreative liberty that embraces the freedom to have children or not [derived from *Roe*] is the concept of intent . . . .").

55. *See* Paula G. Roberts, *Child Support Orders: Problems With Enforcement,* 4 CHILD. & DIVORCE 101, 103 (1994) (discussing low child support collection).

Roe has also had an impact on the parent–child relationship with respect to adoption law. Increased abortion choices have naturally shrunk the pool of newborn children available for adoption.[56] In considering the impact of *Roe*, it is helpful to bear in mind not just what impact *Roe* has actually had but what impact it should have had in the area of adoption law. With fewer newborns needing an adoption placement, state services have generally not worked to simplify and lessen the expenses of adoption procedures.[57]

Another piece to this abortion–adoption puzzle has been the rise of Safe Haven (or safe harbor) laws,[58] in which states have

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56. *See* Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions,* 34 PERSP. ON SEXUALITY & REPROD. HEALTH 25, 25 (2002), *available at* http://www.guttmacher.org/pubs/journals/3402502.html (showing a sizable effect of abortion on the decline in adoption rates, particularly revealing that abortion legalization led to a reduction of "unwanted" children and of children available for adoption).

57. *See generally* Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327 (1997) (discussing the problem of adoption law complexity in several contexts).

58. Safe Haven laws are found in every state and in the District of Columbia. ALA. CODE §§ 26-25-1 to -5 (2013); ALASKA STAT. §§ 47.10.013, .990 (2013); ARIZ. REV. STAT. ANN. § 13-3623.01 (2013); ARK. CODE ANN. §§ 9-34-201, -202 (2013); CAL. HEALTH & SAFETY CODE § 1255.7 (West 2013); CAL. PENAL CODE § 271.5 (West 2013); COLO. REV. STAT. § 19-3-304.5 (2013); CONN. GEN. STAT. §§ 17a-57, -58 (2012); DEL. CODE. ANN. tit. 16, §§ 902, 907–08 (2013); D.C. CODE §§ 4-1451.01 to .08 (2013); FLA. STAT. § 383.50 (2013); GA. CODE ANN. §§ 19-10A-2 to -7 (2013); HAWAII REV. STAT. §§ 587D-1 to -7 (2013); IDAHO CODE ANN. §§ 39-8201 to -8207 (2013); 325 ILL. COMP. STAT. 2/10, 2/15, 2/20, 2/27 (2013); IND. CODE § 31-34-2.5-1 (2013); IOWA CODE §§ 233.1, .2 (2014); KAN. STAT. ANN. § 38-2282 (2012); KY. REV. STAT. ANN. §§ 216B.190, 405.075 (LexisNexis 2013); LA. CHILD. CODE ANN. arts. 1149–53 (2013); ME. REV. STAT. tits. 17-A, § 553, 22 § 4018 (2013); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (LexisNexis 2013); MASS. GEN. LAWS ch. 119, § 39 1/2 (2013); MICH. COMP. LAWS §§ 712.1, .2, .3, .5, .20 (2013); MINN. STAT. §§ 145.902, 260C.139, 609.3785 (2013); MISS. CODE ANN. §§ 43-15-201, -203, -207, -209 (2013); MO. REV. STAT. § 210.950 (2013); MONT. CODE ANN. §§ 40-6-402 to -405 (2013); NEB. REV. STAT. § 29-121 (2012); NEV. REV. STAT. §§ 432B.160, .630 (2013); N.H. REV. STAT. ANN. §§ 132-A:1 to :4 (2013); N.J. STAT. ANN. §§ 30:4C-15.6 to -15.10 (West 2013); N.M. STAT. ANN. §§ 24-22-1.1, -2, -3, -8 (2013); N.Y. PENAL LAW §§ 260.00, .10 (McKinney 2013); N.Y. SOC. SERV. LAW § 372-g (McKinney 2013); N.C. GEN. STAT. § 7B-500 (2012); N.D. CENT. CODE §§ 27-20-02, 50-25.1-15 (2013); OHIO REV. CODE ANN. §§ 2151.3515, .3516, .3523 (LexisNexis 2013); OKLA. STAT. tit. 10A, § 1-2-109 (2013); OR. REV. STAT. § 418.017 (2011); 23 PA. CONS. STAT. §§ 4306, 6502, 6504, 6507 (2013); R.I. GEN. LAWS §§ 23-13.1-2, -3 (2012); S.C. CODE ANN. § 63-7-40 (2012); S.D. CODIFIED LAWS §§ 25-5A-27, -31, -34 (2013); TENN. CODE ANN. §§ 36-

approved statutes that allow babies to be abandoned in specific locations if certain procedures are followed.[59] Safe Haven laws allow newborn babies to be abandoned at fire stations, doctors' offices, and hospitals, without charging the abandoning parent with any potential criminal liability for negligence or abuse.[60] Rather than encourage a parent to place his or her child up for adoption, Safe Haven laws provided a way for a parent to be released from responsibility for his or her child, while encouraging the protection of the child's safety.[61] Safe Haven laws were also used as a political tool to discourage abortion, given that they provided another option for women handling unwanted pregnancies.[62] Though not directly the reason for the

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1-142, 68-11-255 (2013); TEX. FAM. CODE ANN. §§ 262.301, .302 (West 2013); UTAH CODE ANN. §§ 62A-4a-801, -802 (LexisNexis 2013); VT. STAT. ANN. tit. 13, § 1303 (2013); VA. CODE ANN. §§ 8.01-226.5:2, 18.2-371.1, 40.1-103 (2013); WASH. REV. CODE § 13.34.360 (2013); W. VA. CODE § 49-6E-1 (2013); WIS. STAT. § 48.195 (2013); WYO. STAT. ANN. §§ 14-11-101, -102, -103, –108 (2013).

59. Texas was the first state with such a law, named the "Baby Moses Law," in 1998; by 2008 all fifty states had some sort of safe haven type of law. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., INFANT SAFE HAVEN LAW 1–2 (2013), https://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.pdf (outlining the widespread adoption of safe haven laws by all fifty states).

60. *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 753 (2006) (laying out how these laws relate to pro-life political objectives).

61. *See* Susan Ayres, *Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth*, 15 WM. & MARY J. WOMEN & L. 227, 227, 249, 278–79, 281 (2008) (noting that states passed these laws "in an effort to stem the problem of neonaticide and illegal abandonment," which could number into the hundreds each year).

62. *See* Sanger, *supra* note 60, at 753 (arguing that, by enacting Safe Haven laws, states are working to promote a "culture of life" that seeks the ultimate reversal of *Roe v. Wade*, 410 U.S. 113 (1973)). From the indications given in some commentary and based on some state experiences with the law, Safe Haven laws arose to stem the rising tide of infanticide. *See id*. at 774–75 (describing the string of infanticides that were used to advance legislation in various states); *see also* Lynne Marie Kohm & Thomas Scott Liverman, *Prom Mom Killers: The Impact of Blame Shift and Distorted Statistics on Punishment for Neonaticide*, 9 WM. & MARY J. WOMEN & L. 43, 56, 70–71 (2002) (citing evidence indicating that "child homicide and infanticide rates continue to rise in the United States," and asserting that states have responded to this trend by passing Safe Haven laws). Consider, for example, the experience in Nebraska, where lawmakers neglected at first to insert into the law an age limit for the surrendered child and found their state becoming a haven for troubled parents to drop off their teen children. *See* Ed Lavandera, *Nebraska Fears Rush to Drop*

development of Safe Haven laws, *Roe's* jurisprudence may have heightened the urgency of the underlying rationale that states were worried about mothers killing newborn babies, as indicated by the introduction of similar laws in France.[63]

Individuals from all political and legal views seem to agree that Safe Haven laws are at least partly supported by political ideology flowing from *Roe v. Wade*.[64] These views fall into three main areas. First, some think that Safe Haven laws are a result of the "culture of life" movement that erupted after *Roe*.[65] This view proposes that *Roe v. Wade* has created a society that is dismissive of the importance of life and asserts that Safe Haven laws are considered part of the general "culture of life" movement as an effort to guard children who may otherwise be dismissively disposed of because of this culture.[66] Second, some think that

Off Kids Before Haven Law Change, CNN (Nov. 8, 2008, 11:38 AM), http://www.cnn.com/2008/US/11/14/nebraska.safe.haven/ (last visited Jan. 6, 2014) ("Safe haven laws were meant to protect infants . . . . Safe haven laws allow distraught parents, who fear that their children are in imminent danger, to drop them off at hospitals without being charged with abandonment.") (on file with the Washington and Lee Law Review). The connection between this rationale and *Roe* may be tenuous, but it could be argued that *Roe* has devalued the worth of a child, making a child more vulnerable to maltreatment, leading to the initial conception of Safe Haven-type laws. This view is worth further development but is essentially beyond the scope of this Article and its focus on family law.

63. See Nadine Lefaucheur, *The French "Tradition" of Anonymous Birth: The Lines of Argument*, 18 INT'L J.L. POL'Y & FAM. 319, 321, 329–30 (2004) (explaining the French perception of their form of anonymous abandonment laws as "saving children," as these laws were designed to give women another option besides abortion for unwanted pregnancies). *But cf.* Susan Ayres, *Not a Story to Pass On: Constructing Mothers Who Kill*, 15 HASTINGS WOMEN'S L.J. 39 (2004) (considering whether legalized abandonment solves the problem of neonaticide and newborn abandonment). It should be noted that the fact that France acted to pass laws to limit infanticide because of concerns about abortion does not necessarily mean, however, that American states did the same.

64. *See* Sanger, *supra* note 60, at 759 (noting that Safe Haven laws are supported by the political rhetoric surrounding the abortion debate with broad "coalitions of unusual bedfellows").

65. *See id.* at 753 (arguing that Safe Haven laws are properly understood within a larger political "culture of life" organized around "the protection of unborn life," and that Safe Haven laws ultimately work to promote the reversal of *Roe* by "connecting infant life to unborn life and infanticide to abortion").

66. *See id.* at 808 ("Safe Haven legislation serves as one more connecting dot in a larger enterprise that seeks to blur the boundaries between prenatal and postnatal life, contributing powerfully to the pro-life project by keeping what is characterized as the murderousness of abortion in the public eye.").

these laws are an extension of the idea of reproductive rights for women and hail Safe Haven laws as an additional way for mothers to maintain privacy a result of *Roe*.[67] This means that rather than adopting the view that Safe Haven laws' primary rhetorical impact is reversing *Roe v. Wade*, they are "providing women with another choice in their continuum of decision-making for unwanted pregnancies."[68] Third, some argue in an interesting and distinct way that *Roe* has created a pro-women's rights atmosphere in Safe Haven laws that is too expansive, cutting biological fathers out of the equation after birth; arguing that Safe Haven laws disrespect paternal rights in a way *Roe* never intended:

> The rationale in *Roe* suggests that what happens to a child once born cannot be subject to exclusive maternal control. While potential fathers cannot participate much in decisions on prenatal care, nor on pregnancy termination, a father can fully participate in childrearing once a child is born. In fact, under prevailing public policies, a father typically merits an equal opportunity to rear children, such that unilateral decision making by a mother cannot be tolerated.[69]

More saliently, Safe Haven laws are advanced with the political rhetoric of *Roe* in the context of parents being relieved of obligations to their children, something that traditionally occurs in the context of adoption placement. As part of a domestic

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67. *See* Brittany Neal, *Reforming the Safe Haven in Ohio: Protecting the Rights of Mothers Through Anonymity*, 25 J.L. & HEALTH 347, 370 (2012) ("Much like *Roe* protects the right to have an abortion, a woman's right to safely surrender her baby to medical experts, without another individual interfering with her decision, is crucial in a woman maintaining her due process right to privacy.").

68. Ayres, *supra* note 61, at 278.

69. Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?* 36 CAP. U. L. REV. 207, 235–236 (2007); *see also* Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Havens*, 24 QUINNIPIAC L. REV. 335, 347 (2006)

> Yet, notwithstanding their pre-birth abortion rights under *Roe v. Wade*, women have never generally possessed veto powers over the childrearing interests of genetic fathers of children born alive, at least where the women are unwed genetic mothers whose pregnancies resulted from consensual sexual intercourse. Such maternal powers are "foreign to our legal tradition."

(citation omitted).

relations regulatory system, *Roe* has assisted in the addition of new laws that have affected the parent–child relationship.

Roe's influence has also stretched into other laws that negatively impact the parent–child relationship. The value of a child, not from an economic standpoint but from an intrinsic standpoint, is reflected in a proliferation of litigation over the tort of wrongful birth. Consider "medical malpractice claim[s] brought when a physician's negligent care leads to the birth of a child with a congenital illness or abnormality that the parents would have chosen to abort had they been given appropriate prenatal counseling and information earlier in the pregnancy."[70] Because the "result of genetic testing may lead a woman to terminate her pregnancy," these tests open "a flood of moral and philosophical issues."[71] To prevail in a wrongful birth claim, parents must establish that they have been harmed by the birth of their child, an element which is "likely the most controversial and philosophically difficult aspect of the wrongful birth action."[72] Rare before *Roe,* abortion protection has led indirectly to a proliferation of this litigation.[73]

The wrongful birth tort action is lauded by pro-choice advocates on the basis that it "ensures that doctors will exercise due care in prenatal counseling and provide parents with the information necessary to make informed procreative decisions," particularly toward abortion.[74] Some states, however, notably those that have gravitated toward increased abortion regulation

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70. Julie Gantz, *State Statutory Preclusion of Wrongful Birth Relief: A Troubling Re-Writing of a Woman's Right to Choose and the Doctor–Patient Relationship*, 4 VA. J. SOC. POL'Y & L. 795, 796 (1997) (discussing the circumstances of residents of Pennsylvania, "one of six states whose legislature has determined that women have no cause of action against their doctors if, but for the lack of correct genetic information, they would have chosen abortion rather than continue the pregnancy").

71. *Id.* at 808.

72. *Id.* at 815 ("There are two views on what constitutes harm: 1. the absence of choice in reproductive decisions; and 2. the birth of an impaired child.").

73. *See* Amy Lynn Sorrel, *Judging Genetic Risks: Physicians Often Caught Between What Patients Want and What Science Offers,* AM. MED. NEWS (Nov. 10, 2008), http://www.amednews.com/article/20081110/profession/311109973/4 (last visited Jan. 6, 2014) (noting that "case law in about 25 states recognizes wrongful birth claims") (on file with the Washington and Lee Law Review).

74. Gantz, *supra* note 70, at 806.

and greater protection for fetal life, have passed legislation to prohibit wrongful birth actions.[75] Other states have protected fetal life in their case law, as in *Hamilton v. Scott*,[76] in which the Supreme Court of Alabama reaffirmed "that the lives of unborn children are protected by Alabama's wrongful-death statue, regardless of viability."[77] It makes sense that support for the wrongful birth tort tracks with support for abortion, for the action adopts a pro-choice or pro-abortion view of the unborn child, dependent on recognition that a mother's autonomy absolutely overrides any rights of the child regardless of its moral status.[78] Of course, as a legal remedy, the wrongful birth action not only depends on a pro-choice rationale but it is also impacted by *Roe's* holding, as without abortion as a legal and justifiable option, the tort would be impossible. Wrongful birth has led to depreciation of the parent–child relationship and of children.[79]

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75. *See* Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risk*, 29 HOUS. L. REV. 149, 159–60 (1992) (noting that these states banned the cause of action because they were persuaded that prenatal diagnosis of genetic conditions "encourages abortion"); Gantz, *supra* note 70, at 818–19 (noting that wrongful birth actions are explicitly barred by statute in several states—Idaho, Minnesota, Missouri, Pennsylvania, South Dakota, and Utah—and implicitly barred in North Carolina by a conscience clause that the state supreme court has interpreted to preclude the legal theory of wrongful birth).

76. 97 So. 3d 728 (Ala. 2012) (maintaining a wrongful death action for the death of an unborn child who died before he was viable).

77. *Id.* at 737 (Parker, J., concurring specially). Justice Thomas Parker's special concurrence in this case set forth why *Roe v. Wade* did not bar the result the court reached as *Roe* is not controlling authority beyond abortion law, emphasizing "the diminishing influence of *Roe's* viability standard." *Id.*

78. *See* Gantz, *supra* note 70, at 808–09 (stating that a "wrongful birth action recognizes a woman's right to choose abortion and compensates her when that liberty is denied by the act or omission of a doctor failing to meet the standard of care" (citation omitted)). Gantz argues that "[w]rongful birth liability protects women from pro-life doctors imposing their own moral views on their patients." *Id.* Gantz also offers some interesting comments on how *Roe* has affected other areas of society, to the point of suggesting that pro-life OB/GYNs are in the wrong profession. *See id.* at 810 (noting that such doctors are "quite possibly in the wrong specialty"). Freedom of conscience for the medical professional is nearly nonexistent in that "[w]ith the wrongful birth action available, the pro-life obstetrician has no legal choice but to put aside his personal views and provide his patients with the information they need to decide whether to undergo genetic screening." *Id.* at 811.

79. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 176 (2005) (focusing on

In great contrast to the tort of wrongful birth is the development in criminal law of fetal homicide laws. Laws criminalizing intentional or negligent harm to fetal life have continued to develop post-*Roe*.[80] Legislation designed to punish violence against pregnant women, protect unborn life, and to punish its taking was stimulated, at least somewhat, by the lack of protection for unborn life brought about under *Roe*.[81] *Roe* created an obstacle that barred the states from protecting fetal life, as states would have done (and indeed did do) without *Roe*.[82] Fetal homicide laws became an avenue of state protection of unborn life as a consequence of *Roe*.[83]

Finally, consider what message a government sends to its citizens about the value of a child when it endorses, as a fundamental right, a parent's choice to kill a child, albeit unborn. The very person a child is most dependent upon prior to birth and for a good many of the first years of life is also the one by which he or she can be placed in the most jeopardy. The Supreme Court in 1973, even if unwittingly, severely devalued children generally, and by their closest relatives specifically, with its ruling in *Roe*.

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how the tort devalues disabilities and the unborn children that are challenged with them).

80. *See* Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 140 (2006) (offering that, in the aftermath of *Roe*, "a majority of jurisdictions, both state and federal, have now successfully enacted and sustained fetal homicide laws"). *See generally* Mark S. Kende, *Michigan's Proposed Prenatal Protection Act: Undermining a Woman's Right to an Abortion,* 5 AM. U. J. GENDER & L. 247 (1996) (examining Michigan's Senate Bill 515, which criminalizes "virtually any injury to a fetus" without regard to intent but which provides a "medical exception" designed to comport with *Roe* and *Casey*, as an attempt to limit abortion rights).

81. *See* Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process,* 87 B.U. L. REV. 1177, 1188–92 (2007) (discussing the juxtaposition that *Roe* created, the inquiries prompted by fetal-homicide laws, and a mother's exemption from them).

82. *See* GREENHOUSE, *supra* note 16, at 78 (describing the laws struck down by the Court in *Roe*).

83. *See* Michael Holzapfel, *The Right to Live, The Right to Choose, and the Unborn Victims of Violence Act,* 18 J. CONTEMP. HEALTH L. & POL'Y 431, 439 (2002) ("According to Planned Parenthood, the Unborn Victims of Violence Act is designed solely with the intent of eroding the very foundation of *Roe v. Wade*."). *But see* Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws,* 67 OHIO ST. L.J. 721, 723–24 (2006) (supporting the notion that fetal homicide laws have passed as a result of *Roe*, but that those "laws are not uniformly hostile to the landmark decision").

These areas of the mature minor doctrine,[84] child support disputes,[85] safe haven laws,[86] wrongful birth tort actions,[87] and fetal homicide laws all work to reveal a landscape of laws that owe their development to *Roe*. These areas of legislation have affected and harmed the parent–child relationship and the value of the child in the four decades since the decision.

III. Roe*'s Effects on Marriage and the Spousal Relationship*

Roe disallowed many state and federal restrictions on abortion throughout the United States.[88] Its holding was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which became the source of invalidating spousal notification requirements.[89] States like Pennsylvania began to work post-*Roe* to protect the welfare of citizens in light of the legality of abortion by developing various statutory parameters for the exercise of that right within the *Roe* framework.[90] The Justices in *Casey* were tasked with reviewing the constitutionality of Pennsylvania's regulations on abortion;[91] they determined that the only unconstitutional portion in the law was that of spousal involvement in a woman's right to an abortion.[92]

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84. *Supra* notes 25–40 and accompanying text.

85. *Supra* notes 41–55 and accompanying text.

86. *Supra* notes 56–69 and accompanying text.

87. *Supra* notes 70–79 and accompanying text.

88. *See* William Mears & Bob Franken, *30 Years After Ruling, Ambiguity, Anxiety Surround Abortion Debate*, CNN (Jan. 22, 2003, 2:53 PM), http://www.cnn.com/2003/LAW/01/21/roevwade.overview/ (last visited Jan. 14, 2014) (reporting that *Roe* and its companion case "impacted laws in 46 states") (on file with the Washington and Lee Law Review).

89. *See* 505 U.S. 833, 895 (1992) (saying Pennsylvania's spousal notification was "an undue burden, and therefore invalid").

90. *See id.* at 946–50 (Rehnquist, C.J., dissenting) (describing various state regulations implemented after *Roe*).

91. *See id.* at 844 (plurality opinion) (describing the provisions of the Pennsylvania law at issue).

92. *See id.* at 880, 895 (concluding, respectively, that Pennsylvania's definition of medical emergency did not violate *Roe*, and that the spousal notification requirement constituted an unconstitutional undue burden). *See generally* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 77–83 (1995) (describing *Casey*'s path to the Court, its holdings, and public reaction to

The marital relationship was altered when the Court ruled that there could be no requirement of spousal notification of abortion.[93] Rather than promoting marital harmony, the Court pushed a wedge between the husband and the wife. The Court raised the issue of disharmony in the marital relationship as justification for seeking an abortion, as a reason a woman would be unable to discuss the matter with her husband, but also effectively thwarted any right of the husband to communicate with his wife on the matter of the unborn child or of the marriage.[94] The autonomy set out in *Roe* served as spousal distancing in *Casey*.

Marital communication has historically been important to the Supreme Court of the United States.[95] It rendered the common law doctrine of marital privilege regarding confidential communications between spouses constitutional.[96] Reflecting the significance traditionally ascribed to marital communications, even in the years since *Roe* when spousal notification requirements were outlawed,[97] ten states still carry on their books unenforceable laws requiring spousal consent or notice.[98]

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it).

93. *See Casey*, 505 U.S. at 895 (ruling that Pennsylvania's spousal notification law was an undue burden).

94. *See id.* at 892 (discussing studies that found "marital difficulties" to be "the primary reason women do not notify their husbands" when the husband is the father). The Court noted that a strong marriage would not need a spousal notification law, as spouses would certainly discuss important decisions such as that of abortion. *Id.* at 892–93. Rather, the Court focused on the need for freedom from spousal notice or consent in marriages characterized by abuse or cruelty. *Id.* at 893.

95. *See, e.g.*, Wolfle v. United States, 291 U.S. 7, 14 (1934) (recognizing that confidential communications between spouses are privileged for evidentiary purposes); Stein v. Bowman, 38 U.S. 209, 222–23 (1839) (outlining the doctrine of the marital communications privilege).

96. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (recognizing the existence of a federal evidentiary privilege for confidential communications between spouses).

97. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (striking down Pennsylvania's spousal notification law).

98. *See MSU State Abortion Law Survey*, *supra* note 35 (listing Colorado, Florida, Illinois, Kentucky, Louisiana, North Dakota, Pennsylvania, Rhode Island, South Carolina, and Utah as retaining spousal notification laws).

Lack of communication is often cited as a primary source of marital breakdown and subsequent dissolution.[99] What role *Roe* has had in the proliferation of divorce is a more complex matter. Divorce prior to the late 1960s was generally available for causes of action based on fault by one of the parties.[100] The fault of the perpetrating spouse was considered a breach of the marital promise or agreement, and thus victim spouses could sue for divorce based on the damage caused by the other spouse's fault.[101] Many states also had bilateral no-fault divorce laws based on the married parties' consent to living separate and apart for a lengthy period of time.[102] In the early 1970s, however, divorce laws in many states began to change with a nation-wide sweep toward no-fault divorce, a phenomenon that is commonly called the divorce revolution.[103] The proliferation of no-fault divorce laws provided for unilateral action and occurred largely after 1972, correlating chronologically with the *Roe* decision.[104] The

99. *See* Ailsa Burns, *Perceived Causes of Marriage Breakdown and Conditions of Life*, 46 J. MARRIAGE & FAM. 551, 553 (1984) (finding that lack of communication was the second most frequently reported reason for marital breakdown).

100. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 83 (identifying pre-1969 divorce grounds on the basis of fault).

101. *See id.* at 86 (discussing the idea of fault as "breach of marital trust").

102. *See* William E. McCurdy, *Divorce—A Suggested Approach*, 9 VAND. L. REV. 685, 701 (1956) (describing the state of divorce laws from the nineteenth century through the 1950s).

103. *See, e.g.*, LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 20–51 (1985) (describing the trend toward no-fault divorce in the 1970s).

104. *See* Wardle, *supra* note 100, at 97, 137 n.220 (citing to the research of Doris Jonas Freed and her many articles on the development of divorce grounds in the fifty states). In 1969, eight states had no-fault grounds for divorce. *Id.* at 138. That number rose to thirty-three in 1973 and forty-three in 1977. *Id.* By 1987, all fifty states and the District of Columbia had adopted some form of no-fault divorce. *Id.* For an overview of each state's code on divorce, including no-fault grounds, see *Grounds for Divorce and Residency Requirements*, 46 FAMILY L.Q. 530, 530–533 fig.4 (2013), http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol46/4win13_chart4_divorce.authcheckdam.pdf (providing that all fifty states, including the District of Columbia, have adopted some form of no-fault divorce). *See also generally* Denese Ashbaugh Vlosly & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States,* Families and the Law, 51 FAM. REL. 317, 317–24, *available at* http://www.jstor.org/stable/3700329.

increase in divorce rates among the American population also correlates chronologically with *Roe*, but is generally thought to be more connected to the no-fault divorce revolution when the American divorce rate more than doubled.[105] A reasonable inference could be made that disagreements between husbands and wives as to whether accessing the right to an abortion could be either a part or a whole reason for some divorces, but a causal connection cannot be clearly established.

Comparisons between abortion rights and divorce opportunities, however, are instructive here. Professor Mary Ann Glendon's comparative law work in abortion regulation and divorce law observes that abortion has been less regulated in the United States than anywhere in the western world, while at the same time divorce laws among the states have been "less diligent . . . to mitigate the economic casualties of divorce" to family members comparatively than have other western nations.[106] She seems to attribute these connections to special American traits, or factors that might have facilitated a uniquely American approach to divorce and abortion.[107] Professor Glendon summarizes her assertions in that "political and legal ideas have played no small part in forming the distinctively American way of imagining the individual in his or her relationships to others in the family and larger communities."[108] Similarly, Professor Helen Alvaré discusses the notion of a more egocentric, adult-centered approach to marriage that "view[s] marriage as more of a self-seeking than a self-giving institution, and thus steer[s] marriage and families in a direction precisely opposite that which is needed

105. *See* Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 165 (2006) (offering an empirical look at the impact of no-fault divorce laws on marriage and divorce in America). *See generally* Gruber, *supra* note 3.

106. *See* GLENDON, *supra* note 7, at 2, ch. 2 (discussing these phenomena and the restrictions placed on divorce in other western nations).

107. *See id*. at ch. 3 (discussing an individual rights approach that dominates American legal thinking with marital breakdown potentially working to disadvantage the family unit left impoverished by divorce). Professor Catharine MacKinnon also analyzes the privacy basis of abortion as an individual right in American jurisprudence. *See* CATHARINE A. MACKINNON, *Privacy vs. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 102 (1987). Professor MacKinnon's analysis is most relevant to and discussed further *infra* Part IV.

108. GLENDON, *supra* note 7, at 7.

to reconnect these institutions to children and to the larger society."[109] Considering the resulting effects of this individual focus on marriage with the insight that Professors Glendon and Alvaré offer is significant. The movement toward individualism can be perceived in the embargo of spousal notice in abortion through the way it affects marital oneness and communication. Though abortion availability without spousal notice may not be a direct cause of increased divorce rates, an argument can be made regarding the individual liberty interests common to both opportunities of abortion and divorce.[110] The autonomy fostered by abortion rights in privacy and choice to one marriage partner unilaterally creates a wedge in the notion of marital oneness.[111] That separation serves to weaken the marital bond. *Roe* opened up options that altered how couples deal with the choice to become a parent. They do not have to face abortion together; parental choice to abort a child rests with one individual, a fact

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109. Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors,* 16 STAN. L. & POL'Y REV. 135, 136 (2005). Professor Alvaré makes this point even more clearly in the larger context of family law:

> [M]arriage is not a tool for adults to feel better about being different, but an important element to express state interests in the well-being of children. Parents' interests are not unimportant; marital happiness is a terribly important component of adult happiness. Yet in the eyes and on the scales of the law, the state is more vigorously protective of children's interests and looks to strong marital unions as the way of assuring these. This is why the state can interfere with parents in cases of child abuse, why divorcing parties may never have the last word about child support or custody, why adoption procedures attend so much more closely to the interests of the child than even the deepest longings of would-be parents, and why recent federal and state lawmaking efforts about marriage, divorce, and welfare all have children as their rallying cry.

Id. at 187.

110. Others have connected abortion and divorce before with liberty jurisprudence and family outcomes. *See generally, e.g.*, JENNIFER E. SPRENG, ABORTION AND DIVORCE LAW IN IRELAND (2004) (examining the history of both laws in Ireland and their connections to community and family dynamics).

111. Professor Bruce C. Hafen examines the dynamics of abortion (and contraception) in the context of marriage in his article, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 527–38 (1983) (discussing the competing interests of each in family law).

that is not conducive to marital unity.[112] This works to expand the wedge into marital oneness. Combined with the unilateral choice to dissolve marriage, the unilateral nature of abortion has the potential to severely weaken the moral fiber of marriage, which might thereby increase the possibility of divorce.[113]

Marriage has also been altered by the concept of privacy as developed through case law, including *Roe*. Efforts toward expanding marriage's definition and the type of unions afforded state recognition have been altered in that rather than recognizing conjugal[114] marriage alone, several states have moved to expand marriage toward non-conjugal variations.[115] The most

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112. On the other hand, some might suggest that an abortion could promote marriage, as was the case with one high-profile couple. While not wishing to promote abortion, a joint decision for abortion between cohabitants led to marriage for NBA player Udonis Haslem and Faith Rein. *See* Linda Marx, *Taking Their Very Sweet Time*, N.Y. TIMES (Aug. 30, 2013), http://www.nytimes.com/2013/09/01/fashion/weddings/taking-their-very-sweet-time.html (last visited Jan. 14, 2014) (describing Rein's decision to get an abortion as a positive turning point in their relationship) (on file with the Washington and Lee Law Review). But compare that to NBA star J.J. Redick, who contracted with his girlfriend for an abortion. *See* Barry Petchesky, *How J.J. Redick's Abortion Contract Was Conceived*, DEADSPIN (Jul. 25, 2013, 4:20 PM), http://deadspin.com/how-j-j-redicks-abortion-contract-was-conceived-9127 27291 (last visited Jan. 14, 2014) (detailing an agreement between Redick and his girlfriend that was premised on her getting an abortion) (on file with the Washington and Lee Law Review).

113. For a clinical look at the effect of abortion on troubled marriages, see generally J. Mattison, *The Effects of Abortion on Marriage*, *in* ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS, CIBA FOUNDATION SYMPOSIUM 115 (1985) (examining clinical aspects of an abortion's effects on the marriage partners and on their marriage in the context of couples turning to therapy who find they may not have understood at the time of the abortion the effects it would have on them and their marriage later).

114. "Conjugal" defines those rights shared specifically by a wife and a husband, and include the enjoyment of each other's society, intimacy, comfort, and affections, also generally referring to sexual intimacy between a married man and woman. *See* BLACK'S LAW DICTIONARY 276 (9th ed. 2009) ("Of or relating to the married state, often with an implied emphasis on sexual relations between spouses . . . ."). The term is used as a primary indicator of marriage by Girgis, Anderson, and George to describe a marriage of a man and a woman as contrasted to a same-sex marriage. *See* SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 1–2, 9, 23, 37 (2012) (describing the conjugal view of marriage "as an emotional and spiritual bond, distinguished thus by its comprehensiveness . . . " and comparing "conjugal" male–female marriage to "revisionist" same-sex marriage throughout).

115. *See Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL (July

recent Supreme Court opinion on spousal relationships discussed only same-sex marriage.[116] The movement toward marriage expansion and away from the conjugal definition of marriage has been largely based on notions of privacy and autonomy, jurisprudential rationales introduced into family law and well-developed in *Roe*.[117] The constitutional foundation for privacy was established in *Griswold v. Connecticut*,[118] a case protecting marital privacy for contraceptive use as a liberty interest of the married couple.[119] The marital context was abandoned, however, in affording that same privacy interest to unmarried persons in *Eisenstadt v. Baird.*[120] That ruling served to distance marriage from sexual intimacy, and that privacy rationale became the foundation for *Roe*.[121] This creates some correlation between *Roe* and the separation of sexual intimacy from marriage.

The effects of *Roe* on marriage have worked to help turn marriage into an institution that reflects more individualism

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15, 2010) (last updated Dec. 19, 2013), http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships (last visited Jan. 14, 2014) (listing the states in various categories of same-sex marriage status) (on file with the Washington and Lee Law Review). Same-sex marriage has been legalized in sixteen states—California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington—as well as the District of Columbia. *Id.* Same-sex civil unions have become legislatively equivalent to marriage in four additional states: Colorado, Illinois, Nevada, and Oregon. *Id.*

116. *See* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (determining that animus was the major factor in limiting marriage to opposite sex couples and that the limitation was therefore unconstitutional as a federal definition of marriage).

117. *See* Elizabeth Oklevitch & Lynne Marie Kohm, *Federalism or Extreme Makeover of State Domestic Relations Power: The Rules and Rhetoric of* Windsor *and* Perry, 6 ELON L. REV. (forthcoming 2014).

118. 381 U.S. 479 (1965).

119. *See id.* at 485–86 (invalidating the Connecticut law banning the use of contraceptives).

120. 405 U.S. 438 (1972). In *Eisenstadt*, the Court held that the Massachusetts law under consideration, "by providing dissimilar treatment for married and unmarried persons who are similarly situated . . . violate[ed] the Equal Protection Clause. *Id.* at 454–455. Also, see Lynne Marie Kohm, *From* Eisenstadt *to Plan B: A Discussion of Conscientious Objections to Emergency Contraception*, 33 WM. MITCHELL L. REV. 787 (2007), for further discussion of the marital privacy implications of *Eisenstadt*.

121. See *infra* Part III for further discussion on this jurisprudence.

than unity of two people into a new community. For many centuries marriage was about bridging families, but "[t]oday, we see marriage as a commitment between two individuals."[122] Western culture has become "individualistic, prizing independence and self-fulfillment in almost all areas. We emphasize rights over duties and choice over obligation. This extends especially to marriage."[123]

The availability of abortion since *Roe* has also led to other trends in marriage, cohabitation, and divorce. The link between premarital sex and divorce has been highlighted by the availability of abortion.[124] Although there are signs that some abstinence programs are increasingly tying marital happiness to premarital sexual behaviors,[125] the availability of abortion as a contraceptive option has made premarital sex casual and easy, making cohabitation preferable to marriage,[126] simultaneously

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122. MEG JAY, THE DEFINING DECADE: WHY YOUR TWENTIES MATTER—AND HOW TO MAKE THE MOST OF THEM NOW 87 (2012).

123. *Id.* Dr. Jay continues:

> With some notable exceptions, there has never been more freedom to decide whether, when, and how to partner, and with whom. There is no question that this has led to countless happy unions, as well as the experience of owning one of the most important decisions of our lives. At the same time, the foregrounding of the individual in the relationships has caused us to forget about one of our greatest twentysomething opportunities: picking and creating our families.

Id. at 87–88.

124. *See* Alvaré, *supra* note 36, at 31 (discussing the connection between abortion availability and premarital sex, and suggesting it is a piece of the divorce puzzle). Further empirical research in this area could inform the argument of whether abortion leads to divorce.

125. *Id.* at 53. "The influential Abstinence Clearinghouse directs its many members and visitors to its sophisticated website with a resource entitled 'Saving Sex for Marriage Reduces the Risk of Divorce.'" *Id.*

126. *See* JAY, *supra* note 122, at 89–91 (discussing the "cohabitation effect"). One woman said about cohabitation: "I felt like I was on this multiyear, never-ending audition to be his wife. That made me really insecure. There was a lot of game-playing and arguing." *Id.* at 94. Jay's research found a unique set of circumstances surrounding cohabitation.

> Cohabitation in the United States has increased more than 1,500 percent in the past fifty years. . . . This shift has largely been attributed to the sexual revolution and the availability of birth control, and certainly the economics of young adulthood play a role. But when you talk to twentysomethings themselves, you hear about something else: cohabitation as prophylaxis.

weakening the moral fiber of marriage, and robbing women of the marriage preference. "In gaining the option of abortion, many women have lost the option of marriage."[127] *Roe* has had some significant effects on the spousal relationship, altering marriage, divorce, and marital relationships generally in ways that will likely become more apparent in the future.

IV. Roe*'s Effects on Sexuality, Romance, and the Family Generally*

Roe has also brought dramatic changes to relationships between men and women. Sexuality and privacy notions in family law have been expanded and modified in many ways because of the constitutional privacy that was developed in *Roe*.[128] When *Roe* came to the Court in 1973, the previous decisions of *Griswold* and *Eisenstadt* provided easy application of privacy, combined with jurisprudence on autonomy, to make the way for a woman's decision regarding pregnancy termination, though essentially derived from the penumbra of the Constitution.[129] The Court's ruling on sex between consenting partners in *Bowers v. Hardwick*[130] was overruled as unconstitutional jurisprudence in *Lawrence v. Texas* based on *Roe*-like privacy notions.[131] The privacy basis of *Roe* formed the foundation for new law on consensual sex between adults brought to bear in *Lawrence*.[132]

Id. at 91.

127. Richard Stith, *Her Choice, Her Problem*, FIRST THINGS, http://www.firstthings.com/article/2009/07/her-choice-her-problem (last visited Mar. 2, 2014) (on file with the Washington and Lee Law Review). Stith completes the thought: "Liberal abortion laws have thus considerably increased the number of families headed by a single mother, resulting in what some economists call the 'feminization of poverty.'" *Id.*

128. *Supra* Part III.

129. *See* Roe v. Wade, 410 U.S. 113, *passim* (1973) (citing *Griswold* and *Eisenstadt* throughout the opinion).

130. 478 U.S. 186 (1986). In *Lawrence*, the Court stated that the "petitioners are entitled to respect for their private lives. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government" and "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

131. 539 U.S. 558 (2003).

132. *See id.* at 565–66 (discussing *Roe*'s place in the development of privacy jurisprudence).

Combined with state decisions to protect unmarried partners,[133] family law became permanently expanded to include relationships between unmarried members.[134]

Somewhat surprisingly, some gender disparity in sexual freedom has arisen as a result of this jurisprudential progression of privacy. Some men have advocated for a paternal rights exception to the abortion right.[135] Because abortion gives women more power to decide whether to procreate, some argue that men should possess some rights in balance of that choice; for example, a father might be afforded the right to decide previability to avoid parenthood, or agree to solely parent the child if the woman gives birth.[136] A man could be continually promiscuous and neglect birth control because of abortion availability; this entails less cultural pressure for a man to show commitment to a woman following sex when the man can rightly say that she can readily terminate any resulting pregnancy. Some have argued that "emotional and psychological harm results in the infringement of the father's constitutional right to privacy in procreative matters."[137] This passive and expressive gender inequality has come about because of *Roe*. Gender equality could be restored post-*Roe* by holding a man financially responsible for a child if it is presumed that he intended to father the child, such as when the child was conceived within a formal or common law marriage, or pursuant to a written contract.[138]

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133. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122–23 (Cal. 1976) (finding in *quantum meruit* an equitable remedy for dissolution of unmarried partnerships).

134. *See* BRIAN BIX, FAMILY LAW 52 (2013) (discussing claims of unmarried partners based on cohabitation relationships). Although *Marvin*'s rationale was not based on family law regulations, its contract basis has become part of family law for the dissolution of relationships between unmarried partners. *Id.*

135. *See* Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 197 (1994) (proposing multiple approaches for men asserting paternal rights in the abortion decision).

136. *Id*. at 147 (noting that the legal system has not yet recognized that a man's constitutional right to decide whether to beget a child should extend to procreative decisions made during pregnancy).

137. Christopher Bruno, *A Right to Decide Not to Be a Legal Father:* Gonzales v. Carhart *and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141, 142 (2008).

138. *See* Totz, *supra* note 135, at 153 (proposing standards for a man's

Courts have repeatedly ruled that if a child is born to an unmarried woman, the parents cannot contract to waive the man's child support obligation, as such agreements are against public policy and void.[139] Nevertheless, while denying men the right to act between the time of conception and viability to avoid the responsibilities accompanying procreation, courts have consistently upheld the right on behalf of women, ruling that a woman's constitutional right to abort her child prior to viability is one she may exercise unilaterally, even if she is married.[140] An argument can be made that these legal decisions infringe the man's fundamental rights.[141] "[T]he government's requirement that a man pay mandatory child support for children he did not choose to beget, while only requiring a woman to financially support those children she actually decides to bear, . . . plac[es] an unequal statutory burden upon a man who desired not to procreate."[142] This argument would seem to make sense in light of contemporary thought tending to eliminate the complementary nature of gender.[143] If gender is no longer binary, it would seem

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financial responsibility for a child). Conversely, "a man should not be fiscally responsible to provide child support if he was single and the conception was unintended or the result of a birth control mishap—one of the main rationales for a woman's abortion right." *Id.*

139. *See id.* at 158 (noting that this situation occurs more often when state social service agencies sue for child support on behalf of a child) (citing Okla. Dep't of Human Servs. v. T.D.G., 861 P.2d 990, 994 (Okla. 1993)).

140. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (invalidating Pennsylvania's spousal notification law).

141. *See* Totz, *supra* note 135, at 158 (arguing that voiding agreements to waive child support and spousal notification laws amounts to an intrusion on "the man's fundamental rights").

142. *Id*. at 173–74.

> One proposed method of protecting a man's right to avoid procreation is for the state to require a pregnant single woman who will be seeking child support to, sometime prior to viability, notify the putative father of her intent to carry the pregnancy to full-term. Upon notice, the father could decide whether or not he also wishes to beget the child.

Id. at 177.

143. *See, e.g.*, KATHERINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 871 (1993) (explaining that gender is a social construct dependent upon subjective individual perspective). For a discussion of that theory in a different context of gender equality see Lynne Marie Kohm, *A Christian Perspective on Gender Equality,* 15 DUKE J. GENDER L. & POL'Y 339, 341 (2008).

that the unequal treatment of two people similarly situated as parents promotes a violation of equal protection.[144]

Placing *Roe* in a broader social framework illuminates the individual rights perspectives of sexual relationships that find themselves governed by family law. Some scholars examine "the *Roe* decision and its progeny from an individual rights perspective of both sexes," specifically challenging *Roe* "in an [e]qual [p]rotection context."[145] There are several proposed solutions to the current inequities in reproductive rights, responsibilities, and decision-making between the sexes.[146] One proposed solution is a "symbolic abortion" by men: "The father-to-be would reserve the right to refuse support for the child. The father-to-be could simply abort himself from the situation by stating that he has no interest in the child-to-be, for whatever reason, and thus will not support the child."[147] Evident once more are the (un)fairness arguments that men are legally powerless in the abortion decision but financially responsible for unwanted children.[148] The growing concerns of unwed and unintentional fathers are taken up in father's rights advocacy.[149]

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144. *See* Totz, *supra* note 135, at 182–83 (arguing that the man "should have an equal say as to whether or not fetal development will continue").

> One of the inherent paradoxes of a woman's right to terminate her pregnancy, is that in protecting the individual privacy of a woman from government intrusion, and by allowing her to make the ultimate decision of whether or not to bear a child, the Supreme Court has effectively intruded into the man's fundamental right to decide whether or not he will beget a child.

Id. (citation omitted).

145. Illya D. Lichtenberg & Jack Baldwin LeClair, *Advocating Equal Protection for Men in Reproductive Rights and Responsibilities*, 38 S.U. L. REV. 53, 53–54 (2010).

146. *See id.* at 73–74 (discussing the disparate rights and responsibilities of men and women when it comes to reproduction, and proposing solutions).

147. *Id*. at 75.

148. *See id*. at 63–67 (noting that although there is now no cultural stigma of unwed motherhood, there is still the strong stigma of a "dead beat dad").

149. *See* Bryn Anne Poland, *He Said, She Said: Diverging Views in the Emerging Field of Fathers' Rights*, 46 WASHBURN L.J. 163, 163–64 (2006) (noting the growth of fathers' rights advocacy groups). Unwed fathers are using these historic cases to argue for more parental rights prior to the birth of a child. Potential fathers are aligning themselves on both sides of the debate; some attempt to use *Roe v. Wade* to terminate their parental responsibilities, while others attempt to use their status as a potential parent under the Fourteenth

Some unwed fathers have attempted to sue the women they have impregnated for fraud,[150] the theory being that "[a]lthough a suit for fraud against a mother would not terminate a father's parental responsibilities, men who successfully pursued tort claims for fraud could theoretically use the money damages from the claim to meet those parental responsibilities."[151] These cases do not provide a consistent approach and the fraud claims typically have been unsuccessful,[152] but they nonetheless reveal the alteration to gender relations and gender roles that has occurred since and as a consequence of *Roe*. On the other hand, some potential fathers have sought a permanent injunction prohibiting the mother from receiving an abortion.[153] So far, autonomy and privacy have trumped this approach based on the fact that a child is conceived and grows inside a woman's body.

Men have also argued for their rights using the tort of conversion as a way to provide compensation for the loss of a child when a mother receives an abortion against the wishes of the potential father.[154] Almost as if to revive the old doctrines of parental ownership of a child as his or her property, some men argue that although a fetus is not considered a person with constitutional rights until months after conception, a father retains a property interest in the fetus from the moment of conception.[155] By aborting a fetus, the mother has converted the potential father's property interest, and he should be allowed to

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Amendment to prohibit a pregnant woman from terminating her pregnancy. *Id.* at 164.

150. *Id.* at 170 (citing *In re* Inez M. v. Nathan G., 451 N.Y.S.2d 607, 608 (N.Y. Fam. Ct. 1982)). Poland adopts a definition of fraud as "an intentional, knowing misrepresentation, reliance upon which causes another person injury." *Id.* (citation omitted). She asserts that the fraud claim would be "based on the 'injury' of the father being forced into paying child support." *Id.*

151. *Id.*

152. *Id.*; *see also* Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5th 301 (1992) (focusing on tort claims of fraud and misrepresentation).

153. Poland, *supra* note 149, at 170–71.

154. *See* Totz, *supra* note 135, at 225–26 (outlining the theory behind a conversion action).

155. *See id.* (relying on rationale from in-vitro fertilization cases to assert that the fetus is the parents' property).

pursue monetary damages against the mother.[156] Cultural conflict in the areas of sexuality are observable broadly in culture[157] and are inevitably reflected in relationships between men and women; these conflicts are in greater and more direct divergence because of *Roe* and the abortion option, and the major dynamics of sexuality that have been altered as a result.

Women's rights, though thought by many to be dependent on reproductive choice,[158] have been limited by *Roe.* That fact has been argued by feminist scholar Catharine MacKinnon in her critique of *Roe*'s extension of the privacy right to abortion.[159] She posits that abortion does not afford women more authority over sexual activity or reproductive choice, but rather that "[a]bortion facilitates women's heterosexual availability."[160] "Assuming that the feminist analysis of sexuality is [an] analysis of gender inequality," MacKinnon argues that "abortion is inextricable from sexuality."[161] Reasoning that the arguments of both pro-choice and pro-life positions assume that women control sex, MacKinnon asserts that feminist investigations prove otherwise, and that

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156. *See id.* at 226 (describing the potential father's property interest as a future interest).

157. *See generally* STEVEN SEIDMAN, EMBATTLED EROS: SEXUAL POLITICS AND ETHICS IN CONTEMPORARY AMERICA (1992). This author presents a sophisticated analysis of the major dynamics and patterns of the contemporary debate on sexuality as two sexual ideologies: the libertarian—where sex has no moral connection—and the romanticist—where sex is about romance and morality, including abortion. *Id.* at 5–7. He suggests a pragmatic sexual ethic of sexual and social responsibility as a bridge between libertarians and romanticists, arguing that mutual consent cannot provide the only basis for limiting sexual expression, but that a sexual ethic should take account of the qualitative aspects of sexual and social change. *Id.* at 206–07. He notes that in the 1990s Americans were divided on virtually every issue surrounding sexuality; now, however, though the sexual sphere is so entangled that it defies both description and analysis, he seems able to clarify some of the major dynamics, conflicts, and patterns of contemporary American intimate culture. *Id*. at 211–14.

158. *See* Lynne Marie Kohm, *The Challenges of Teaching Gender Equality in an Age of Gendercide*, 6 REGENT J.L. PUB. POL'Y 1, 20–23 (2013) (discussing the notion promoted in nearly all of legal education and feminist jurisprudence that women's rights rest on the abortion foundation) (manuscript on file with the author).

159. *See generally* MacKinnon, *supra* note 107, at 102 (asserting that "[w]hen women are segregated in private separated from each other, . . . a right to privacy isolates us at once from each other and from public recourse").

160. *Id*. at 99.

161. *Id*. at 93.

women do not control sex.[162] While contraception would be a better choice for a woman who wants to avert an abortion, "[n]orms of sexual rhythm and romance that are felt interrupted by women's needs are constructed against women's interests."[163] MacKinnon notes that courts use the privacy rubric to connect contraception and abortion to promote an increasing freedom for women from government intrusion,[164] but under current conditions of gender inequality, however, sexual liberation does not free women. Rather "[t]he availability of abortion removes the one remaining legitimized reason that women have had for refusing sex besides the headache."[165]

In this way abortion alters a woman's bargaining power in romance and sexuality. "Legalized abortion was supposed to grant enormous freedom to women, but it has had the perverse result of freeing men and trapping women."[166] Because "[e]asy access to abortion has increased the expectation and frequency of sexual intercourse . . . among young people, it is more difficult for a woman to deny herself to a man without losing him,"[167] as the "presence in the sexual marketplace of women willing to have an abortion reduces an individual woman's bargaining power."[168]

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162. *See id*. at 94–95 ("Feminism has found that women feel compelled to preserve the appearance—which acted upon, becomes the reality—of male direction of sexual expression . . . .")

163. *Id*. at 95 (discussing a woman's need to interrupt a romantic interlude to prepare for protected sex that would help to avoid an abortion in the context of the pressures not to do so because she does not control the sex).

164. *See id*. at 96 (citing *Roe*, and *Harris v. McRae,* 448 U.S. 297 (1980), as two Supreme Court cases delineating the limits on the government's duties not to intervene and to intervene in a woman's decision whether to terminate her pregnancy).

165. *Id*. at 99.

166. Stith, *supra* note 127. Stith credits radical feminist Catherine MacKinnon's prescience on the effects of *Roe* as a decision that would largely benefit men, stating the "'men control sexuality' and '*Roe* does not contradict this.'" *Id*. Stith writes,

> Perhaps that is why, she observed, "the Playboy Foundation has supported abortion rights from day one." In the end, MacKinnon pronounced, *Roe*'s "right to privacy looks like an injury got up as a gift," for "virtually every ounce of control that women won" from legalized abortion "has gone directly into the hands of men."

Id.

167. *Id.*

168. *Id*. Stith notes that an economic environment that "employs mainly

Therefore, the availability of abortion has led to a casual sexual culture, as abortion as a method of birth control has eliminated a potential natural consequence of premarital sex. Abortion, then, makes possible casual sexual attitudes characterized in a hookup culture.

This casual sexual culture has become the focus of some interesting research. In her book *Sex and the Soul*[169] on the intersection of faith and sexual experiences of college students, Donna Freitas discusses the problems created by casual sexual values. "The problem was that the hookup culture promoted reckless, unthinking attitudes and expectations about sex, divorcing it from their larger value commitments—religious, spiritual, or otherwise."[170] Although Freitas never explicitly considers abortion, her research deals in particularity with the casual sexual culture college students are faced with today. She reports that the students she interviewed were weary and fatigued by their sexual experiences. "After a few years of living in this environment they felt exhausted, spent, emptied by the pressure to participate in encounters that left them unfulfilled."[171] This pressure Freitas refers to, though experienced by both male and female students in her study,[172] seems to provide an example of the lack of power MacKinnon observes in the notion that women are unable to control sex.[173] Freitas was surprised by her findings, particularly of disempowerment.

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men, leaving women dependent on economic handouts," creates an environment in which "women will be much less likely to resist male pressures to make use of abortion. Wherever men make women's decisions for them, the option of abortion will be a man's choice, regardless of how the law may label it." *Id.* at 8.

169. DONNA FREITAS, SEX AND THE SOUL: JUGGLING SEXUALITY, SPIRITUALITY, ROMANCE, AND RELIGION ON CAMPUS xv (Oxford U. Press 2008).

170. *Id.* at xv. Some of those value commitments were expressed through child-bearing secured by marriage (although it should be noted that Freitas characterizes her students' attitudes toward a procreation-only view of sex and marriage as "outdated" and "unrealistic," *id*. at 196). *See* Stith, *supra* note 127 (discussing the duty a man understood in offering marriage to a woman in the event of pregnancy prior to *Roe*).

171. FREITAS, *supra* note 169, at xv.

172. Freitas' study used a sample of twenty women and one man; it also touches on hookup remorse from male students as well. *Id*. at 153.

173. *See* MacKinnon, *supra* note 107, at 93–99 (describing the further gender disempowerment that abortion promotes and arguing that "women do not control access to [their] sexuality").

> At first, I was taken aback by students' stories about the party scene and the degrading experiences that many of them, especially the women, endured regularly. We are ostensibly living in the era of feminism and post-sexual revolution. Weren't my students supposed to be beneficiaries of these movements, empowered and in control of their sexuality? I was even more surprised to learn exactly how powerless they felt to change this culture that made them so unhappy—at least before they realized that the person next to them (and the person next to *that* person) wished she or he could change things, too.[174]

Because women have the right to an abortion, sexual intercourse and the choice to abort in the event of pregnancy can be often presumed. Clark Forsythe, Senior Counsel for Americans United for Life, argues that *Roe* has not solved the problems it was supposed to solve for women.[175] He argues that the availability of abortion has not reduced spousal abuse[176] or poverty for women,[177] nor provided better job opportunities necessarily.[178] Rather, the paradigm of liberty and control has essentially magnified the power of uncommitted men, "leverag[ing] male influence over women and damag[ing] male–female relationships."[179] Furthermore, abortion has provided a way, unwittingly, for women to annihilate the future of their own gender in rampant gendercide occurring in nations around the world.[180] Family law is largely designed to provide for the

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174. FREITAS, *supra* note 169, at xviii.

175. CLARK FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 310–11 (2013).

176. *See id.* at 323 ("Whatever the risk of spousal abuse in 1973, the risk for women has been replaced by increasing rates of *domestic* abuse of women—by uncommitted men."). "Numerous incidents have been publicized where men assault women for not having an abortion; and data suggest that these incidents are not rare." *Id.* at 323–24.

177. *See id.* at 316 (comparing poverty rates in families with married couples to poverty rates in "female-headed families with children").

178. *See id.* at 316–18 (discussing employment opportunity for women since *Roe*).

179. *Id.* at 321. Forsythe has also argued that the pro-life community bears the burden of civility in the abortion debate. For a review of that work, see Lynne Marie Kohm, *Restoring the Lost Virtue of Prudential Justice to the Life Debate,* 22 REGENT U. L. REV. 191 (2009).

180. *See* Kohm, *supra* note 117 (noting the gender imbalances in major world nations revealing the vast annihilation of baby girls by reproductive

protection of vulnerable family members; those members are most often women and children. Some of these effects might not technically be characterized as impacts upon family law, but their effects are nonetheless detrimental to women, which has an indirect effect on the strength of family law regulations designed to protect women.

Roe has also been a factor in the breakdown of romance. The availability of abortion created a disconnect between sexual intercourse and procreation, removing or causing to disappear a level of sexual caution that dating relationships generally benefit from in terms of emotional protection.[181] While not addressing abortion, Dr. Meg Jay speaks candidly and caringly to young men and women on their choices in dating, cohabitation, marriage, and becoming parents, particularly describing the problems presented by managing sexuality and fertility.[182] Jay posits that young women and men have been made more vulnerable in a variety of ways due to the many options for sexual intimacy now available to them.[183] Romance is sometimes lost in a culture of sexual expectations, [184] which may sometimes leave the parties emotionally harmed.[185] Those expectations of immediate intimacy

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technology and choice).

181. *See* FREITAS, *supra* note 169, at 93–97 (discussing the benefits of romance and emotional closeness in sexual encounters).

182. *See* JAY, *supra* note 122, at 69–79 (describing the experiences and problems of numerous twenty-something men and women). Jay quotes feminist theorist Germaine Greer: "The management of fertility is one of the most important functions of adulthood." *Id.* at 175.

183. *See id.* at 75–79 (noting that men and women cohabitate for many reasons, some of which include economy, convenience, and sexual intimacy). However, "[l]iving with someone may have benefits, but approximating marriage is not necessarily one of them," as many cohabitants do so for fun, rather than for added responsibility. *Id.* at 89–95.

184. *See, e.g.*, Jeremy Nicholson, *Unrealistic Relationship Expectations: Learning from Don Jon*, PSYCHOL. TODAY (Sept. 29, 2013), http://www.psychologytoday.com/blog/the-attraction-doctor/201309/unrealistic-relationship-expectations-learning-don-jon (last visited Jan. 15, 2014) (discussing sexual expectations in the context of media portrayals) (on file with the Washington and Lee Law Review).

185. Elizabeth Armstrong, Laura Hamilton & Paula England, *Is Hooking Up Bad for Women?*, CONTEXTS (Aug. 2010), http://contexts.org/articles/summer-2010/is-hooking-up-bad-for-young-women/ (last visited Feb. 11, 2014) (discussing the empirical evidence of the dangers and benefits of casual sex for women) (on file with the Washington and Lee Law Review). While the authors note that "[t]he most commonly encountered disadvantage of hookups . . . is that

are made more possible by the availability and opportunity to remove an unwanted pregnancy.[186] The result is that rather than enjoying reproductive freedom, women have been disadvantaged by the negative effect of *Roe* on what used to be romantic attachments, thereby placing women at a disadvantage in terms of relational issues.[187] Sexual liberty, postmodern sexual freedom, and the hookup culture have not necessarily supported women or their exercise of their rights as women.[188] *Roe* allowed abortion to become a backstop for failed contraception, which had the unintended consequence of facilitating the sexual exploitation of women and resulting in increased rates of unintended pregnancy and abortion.[189]

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sex in relationships is far better for women" the authors also list a number of advantages of casual sex that some women have reported: that boyfriends tend to get in the way of their studies and the fact that they do not have to expend emotional energy that might otherwise be required for a relationship. *Id.*

186. *See, e.g.*, Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior,* 32 J. OF LEGAL STUD. 407, 430–32 (2003) (examining how easy access to abortion increased the expectation and frequency of sexual intercourse, as well as increased pregnancies and sexually transmitted infections).

187. Stith points this out in the context of marital expectations in a relationship:

> Prior to the legalization of abortion in the United States, it was commonly understood that a man should offer a woman marriage in case of pregnancy, and many did so. But with the legalization of abortion, men started to feel that they were not responsible for the birth of children and consequently not under any obligation to marry. In gaining the option of abortion, many women have lost the option of marriage.

Stith, *supra* note 127, at 9.

188. Stith strongly asserts that abortion availability leaves the woman as the only responsible party, as "the father and the doctor and the health-insurance actuary can point a finger at her as the person" responsible for "an inconvenient human being;" and that abortion availability "makes women's claims for better working conditions lose a measure of legitimacy." *Id.* at 10. Jay is subtler in her approach to empowerment, discussing dating, cohabitation, "dating down," and the timing of choosing a marriage partner in a culture of casual intimacy. *See* JAY, *supra* note 122, at 93.

189. *See* E-mail from Dorinda Bordlee, Vice President & Chief Counsel of the Bioethics Def. Fund, to author (Jun. 17, 2013, 3:46 PM) (noting that "*Roe* and *Casey* embodied a flawed radical feminist philosophy that made abortion a backstop for failed contraception—which had the unintended consequence of facilitating the sexual exploitation of women and resulting in increased rates of unintended pregnancy and abortion.") (on file with author). This idea originated with Dorinda Bordlee. Though it was not possible for her to participate in this

Women are also compromised in their relationships with men by their own acquiescence to arguments made by a lover based on the availability of abortion.[190] Because a woman can get an abortion, it can be assumed by a lover that she will do so to keep the relationship free of responsibility. "Children were the tangible proof of romance; evidence of the success, even moral correctness, of romantic love. But abortion breaks the age old connections between love, sex, marriage, and procreation; it does so, both actually and in the stories we tell."[191] Romantic relationships have, as a direct result of abortion availability, become more sexually focused in culture generally.[192] Abortion "throws new narrative twists into our stories of love, exposing uncertainties that have been in our most intimate relationships all along" [193]—but now those uncertainties highlight sexual intimacy without consequence (other than possible physical evidence and emotional sting).[194] The realities of life post-*Roe* impact women negatively and can be factors that might keep a woman from pursuing legal action against a man that has fathered her child.[195] *Roe*'s effects on sexuality and intimate partner

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Symposium, Bordlee's initial work focused more generally upon *Roe*'s harmful impact upon women. *But cf.* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Arguments*, 57 DUKE L.J. 1641, 1688–90 (2008) (objecting to arguments and policies that claim abortion harms women, and labeling them as "gender-paternalist").

190. *See* Stith, *supra* note 127, at 8 ("To the degree that a culture is built on machismo, for example, the legalization of abortion will make women relatively worse off by giving men another tool to manipulate women as sex objects.").

191. CARA J. MARIANNA, ABORTION: A COLLECTIVE STORY 53 (2002).

192. *See* Stith, *supra* note 127, at 7 ("Easy access to abortion has increased the expectation and frequency of sexual intercourse (including unprotected intercourse) among young people, making it more difficult for a woman to deny herself to a man without losing him, thus increasing pregnancies and sexually transmitted infections." (citing Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence from Sexually Transmitted Diseases*, 32 J. LEGAL STUD. 407 (2003))).

193. MARIANNA, *supra* note 191, at 53.

194. *See id.* at 52–53 (discussing the story of one woman who states that she fell in love three times and each time got pregnant as proof of the love affair, so to speak, yet obtained an abortion because the relationships did not last).

195. *See* Serrin M. Foster, *What If Her Partner, Friends, or Family Have Abandoned Her? Or What If She Is Poor?*, HUMAN LIFE OF WASH., http://www.humanlife.net/view_qnr.htm?qid= 16 (last visited Jan. 15, 2014) ("Lack of support often coerces women into abortion.") (on file with the Washington and Lee Law Review); Stith, *supra* note 127, at 8 (discussing how

jurisprudence have affected and potentially injured relational aspects between men and women.[196] Sexuality and privacy notions in family law have been expanded and modified because of the foundation for constitutional privacy that was developed in *Roe* and is widely applied to male–female relationships generally.

Changes to family law generally brought about by *Roe* have also affected the family as an institution. The combination of legal changes from *Roe* in the parent–child relationship, the spousal relationship, and sexual relationships between men and women in law and culture have led to a more individual-focused legal environment in a family context. "Our American culture is experiencing later marriages, historically low birthrates, high abortion rates, 400,000 'frozen embryos' in storage, and record creation of more or less temporary sexual unions resulting in high numbers of children at risk for the difficulties that arise in one-parent homes."[197] *Roe*'s effect on laws concerning contraception and abortion, and particularly regarding minors' access to contraception and abortion, has clearly sent messages about the role of sex in the lives of adolescents[198] and adults, and has assisted in moving family law toward a set of protections of individual interests, rather than a code that protects and strengthens families. That has had an impact on family strength, weakening the unit generally.

Roe has led to a host of incidental effects on the family. It has served to increase government involvement in the family, as abortion funding is now a routine part of federal family

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refusing to have an abortion may leave a woman all alone with the burden of a child, and society supposing she has no one to blame but herself for not making the abortion decision).

196. *See, e.g.*, Feminists for Life America, Print Advertisement (2003) (saying "If SHE's in trouble, HE's in trouble, too" to inform women about child support laws) (on file with the Washington and Lee Law Review); Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232 (2013) (discussing different positions on abortion held by pro-life feminists in an effort to identify areas of agreement with pro-choice feminists).

197. Alvaré, *supra* note 109, at 18. Professor Alvaré continues: "There is also the fact of endless media images celebrating unbridled adult sexual choices. In sum, it is a culture in which human sexuality appears to be viewed through the lens of adult desires, with the unwanted consequences of disease and pregnancy spoken of in the same breath." *Id*.

198. *Id*. at 47.

assistance.[199] Recent Health and Human Services (HHS) regulations for the Affordable Care Act mandate that contraception, sterilization, Plan B, Mifropristone, and other nonsurgical pharmaceutical abortion medication be available and paid for by employers,[200] often regardless of an employer's pro-family faith perspectives.[201] *Roe* has also propagated a method of limiting families that has revealed its racial disparity.[202] It has also changed how family law is taught in legal education.[203] Families and individuals can reconsider their family planning strategy because of the possibility of abortion used as selective pregnancy reduction in assisted reproduction techniques.[204] It could be argued that the value of a child individually and to his or

199. *See* Nat'l Network of Abortion Funds, *Can Medicaid Cover My Abortion?*, FUND ABORTION NOW, http://www.fundabortionnow.org/get-help/Medicaid (last visited Jan. 15, 2014) (listing fifteen states as providing abortion funding through Medicaid: Alaska, California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and West Virginia) (on file with the Washington and Lee Law Review).

200. *See Preventive Services Covered Under the Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Sept. 23, 2010), http://www.hhs.gov/healthcare/facts/factsheets/2010/07/preventive-services-list.html (last visited Jan. 15, 2014) (listing contraception among the preventive services offered for adult women) (on file with the Washington and Lee Law Review); Kelly Cleland et al., *Family Planning as a Cost-Saving Preventive Health Service*, 364 NEW ENG. J. MED. e37(1), (2)–(3) (2011) (discussing new provisions of the Affordable Care Act).

201. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (remanding for consideration of a preliminary injunction for a secular corporation challenging the Affordable Care Act's contraception mandate).

202. *See* Mary Ann Engel, *Abortion Rate Down but Racial Disparity Up*, L.A. TIMES (Sept. 23, 2008), http://articles.latimes.com/2008/sep/23/science/sci-abortion23 (last visited Jan. 15, 2014) (citing a Guttmacher Report demonstrating that black abortions occur five times more frequently than white abortions, and Hispanic abortions occur three times more frequently than white abortions) (on file with the Washington and Lee Law Review).

203. *See* Lynne Marie Kohm & Lynn D. Wardle, *The "Echo-Chamber Effect" in Legal Education: Considering Family Law Casebooks*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 104, 105 (2011) (arguing that "there is a profound 'echo effect' in law school teaching about abortion issues in family law").

204. *See generally* E.V. Gemmette, *Selective Pregnancy Reduction: Medical Attitudes, Legal Implications, and a Viable Alternative*, 16 J. HEALTH POL. POL'Y & L. 383 (1991) (discussing how routine the practice of selective pregnancy reduction—in which a doctor reduces a multiple pregnancy—has become, and offering a medical and ethical solution to minimize it).

her family has been permanently altered.[205] Families have been forever changed by *Roe*.

V. Conclusion

Roe has had a profound effect on family law. It has altered the parent–child relationship and the spousal relationship. Its ideology is connected or correlated to devalued marriage, increased divorce, increased cohabitation, and a culture of casual sexuality. It has changed relationships between men and women, perhaps permanently, and led to unique harms to women and to men.

Alterations to family law brought about by *Roe* comprise a pattern of increasing individuality and a decreasing sense of community, even between family members related by blood or consanguinity. Forty years of some of the most profound changes to family law have occurred since *Roe v. Wade*. While all those changes may not necessarily be a direct result of that decision, a significant amount of these changes are manifestly effects of *Roe*.

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205. *See, e.g.*, Stephen Adams, *Killing Babies No Different from Abortion, Experts Say*, TELEGRAPH (Feb. 29, 2012), http://www.telegraph.co.uk/health/healthnews/9113394/Killing-babies-no-different-from-abortion-experts-say.html (last visited Jan. 15, 2014) (quoting medical ethicists from Oxford as arguing that it is "not possible to damage a newborn by preventing her from . . . becom[ing] a person in the morally relevant sense" and that "what we call 'after-birth abortion' (killing a newborn) should be permissible in all the cases where abortion is") (on file with the Washington and Lee Law Review).