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Reimagining Potential Life: A Socialized Right to Reproductive Freedom

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**REIMAGINING POTENTIAL LIFE:
A SOCIALIZED RIGHT TO REPRODUCTIVE FREEDOM**

BY

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**SUBMITTED TO SCRIPPS COLLEGE IN PARTIAL FULFILLMENT OF THE
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Abstract:

A more conservative supreme court will likely have the chance to overrule *Roe v. Wade*. Many states have passed heartbeat laws that will probably be taken all the way to the supreme court, these cases will ask the supreme court to affirm fetal personhood, giving fetuses a constitutionally recognized right to due process and making abortion illegal. In this thesis, I will defend an expansion of protections for pregnant peoples through a socialized right to abortion.

Introduction

Approximately, half of the world's population is capable of giving birth. At some point in the lives of billions of individuals, they will be faced with a decision to procreate, whether that choice is preventative birth control, abstinence, abortion, or other methods of reproductive control.¹ In 1973, *Roe v. Wade* made abortion legal until the fetus was medically viable when the fetus could live outside the body of the pregnant person, with no interference on the part of the state. With modern medical improvements, the common understanding of the viability timeline has shrunk to about 22 weeks. There is substantial controversy about what is required to define viability, is viability a 100% chance of life if extracted from the womb or merely a 25% chance?² Before the Supreme Court decided *Roe*, most people with uteruses had little to no access to abortion. Those who did have access often had to pay large sums of money for an illegal abortion performed in dangerous conditions or were able to work with a doctor to get an abortion for the 'health of the mother,' a common exception to the anti-abortion laws around the United States. Although *Roe* allowed for people with uteruses to get abortions with few state restrictions pre-viability and with an increasing number of state restrictions post-viability, it did not guarantee access to doctors or clinics that would perform abortions. Accessibility is becoming a more significant issue as the anti-abortion movement sees successes in state governments to limit access to abortion.

¹ This thesis will use gender-neutral language throughout to ensure that the language is non-exclusionary to trans and intersex men and women along with gender fluid and non-binary individuals who are often left out of discussions of reproductive health. Many arguments exclude non-cisgendered people from discussions in abortion rights, as populations that are still affected by the regulation of uteruses, they should not be excluded through gendered language and omission in discussions on their rights and freedoms as individuals.

² The timeline for viability is under great discussion, for some discussions include Schneider and Vinovskis *The Law and Politics of Abortion*, Shaw and Doudera *Defining Human Life*, Roth *Making Women Pay*, and Schroedel *Is the Fetus a Person?*

Fetal personhood grew out of the anti-abortion movement. There are few if any prior cases in which the fetus was believed to be a person before exiting the womb. Historically, anti-abortion laws were non-existent in most parts of the world, including in the United States, and when they did exist, the purpose was to protect pregnant persons from the dangers of pregnancy (Schroedel, 2000; Roth, 2000; Levit, Verchock, 2006). These laws evolved into fetal personhood primarily due to the impact of the Christian religion which began to define the soul as entering the fetus at conception, ensoulment, this concept emerged in the enlightenment era but was still not commonly used to argue against abortion rights until more recently. For some religious persons, ensoulment is the point in which personhood begins; therefore, after conception, the fetus is a person, and to abort the fetus would be to commit murder, a cardinal sin.³ Although abortion was not an exact medical science, it was understood to be an appropriate method for women to manage reproduction among many communities.

Fetal personhood is the center of most anti-abortion argumentation. Anti-abortion arguments seek to reduce all access to abortion except when it is necessary to protect the health of the pregnant person. Even when exceptions are made for pregnancies resulting from rape or incest, fetal personhood gives the fetus claims to protection both under constitutional and state laws. The common sense response to fetal personhood is that the fetus's rights evolve as it moves from zygote to fetus to birth, increasing the rights of the fetus until it is viable. Many also demand to require pregnant people to ensure a specific quality of life for the fetus. This demand often lies on the shoulders of the pregnant person to give up 'dangerous' behavior. The most

³ Before the viability debate, quickening was the preferred time to judge the legality of abortion. Quickening is the common term for the first time a pregnant person feels the movement of the fetus. *Roe* mentions the common law precedent for abortion regulation. The common law generally affirmed that before quickening abortion was not a crime, but after quickening it became a crime lesser than homicide.

politically popular regulations from both pro- and anti-abortion advocates is the jailing and punishment of drug-using pregnant people. The bipartisan attacks on drug-using pregnant people are the beginning of the infringement on rights that fetal personhood threatens.

It is widely understood that the right to abortion is put at risk by the success of anti-abortion coalitions in electing to office “pro-life” politicians and the restrictive policies they enact. More fundamentally, I will argue, the absence of reproductive freedom is, in part, the reluctance of “pro-choice” advocates to support a more radical understanding of the right to abortion. Feminist and pro-abortion advocates continue to give up substantial and significant ground to fetal personhood advocates, such as the maltreatment and punishment of drug-addicted pregnant people. The accepting of ‘common sense’ regulation about fetuses threatens to allow for fetal personhood to take greater control of the legal system. To create clear advocacy that allows for the central focus on the pregnant person and their needs, I will present a socialized right to reproductive freedom. This right seeks to mitigate the effects of societal and economic harms on those who may become pregnant by analyzing the dangers and harms both the pregnant person and the fetus to ensure the quality of the potential life, without creating a more significant burden on those who may choose to carry life. This right to reproductive freedom draws on Marxist and feminist analysis on the conditions of society and pregnancy to create a list of required conditions to create reproductive freedom. Reproductive freedom includes, but is not limited to, access to food and nutrition, a stable job, access to salary including during pregnancy, a home, free healthcare, childcare resources and access to drug rehabilitation centers that specializes in working with pregnant persons.

This thesis will follow three stages to develop an argument for a socialized right to reproductive choices. It will start with a summary of the dangers of fetal personhood and the

current protections for people with uteruses, followed by an analysis of contemporary feminist legal theory on the right to abortion, and the dangers intrinsic to a privatized, neo-liberal right to abortion. Finally, I will develop my theory of a socialized right to abortion.

The Risks of Fetal Personhood

The most prominent and dangerous conservative critique of *Roe* affirms fetal personhood, giving the fetus rights protected by state and federal laws and the constitution. Although fetal personhood groups disagree with precisely when fetal rights begin, they usually define life at the point of conception. Some argue against birth control and spermicides but most focus on day-after pills and abortion, others allow for abortion in the case of rape, incest or for the health of the mother. At the center of these arguments is that life starts at conception and that fetal life should be protected by law. Anti-choice activists have gone to great lengths to not only limit the access to abortion through legislation but also through acts of terrorism on health clinics.⁴ Legally, the focus has been on affirming fetal personhood to create a constitutionally protected personhood status for the fetus.

If a fetus is given legally protected personhood, it is likely that abortion for any reason, except potentially when the life of the pregnant person is threatened, will become illegal. Those who provide or receive abortions could also be criminally liable for murder, homicide or manslaughter. Although this is concerning, there will likely be a more substantial impact on the daily lives of those who are, or may become, pregnant. If a fetus has rights that are protected by

⁴ Hillcrest Clinic fire in 1983, Christmas Day bombing in 1984, the attempted bombing of Alvarado Medical Center in 1987, the Feminist Health Center fire in 1989, the Blue Mountain Clinic fire in 1993, the acid attack in Miami in 1998, the fire in Concord New Hampshire in 2000, the Tacoma, Washington clinic bombing in 2001, the fire at Edgerton Women's Care Center in 2006 as well as many, many others.

the constitution, they receive rights separate from the pregnant person who carries the fetus and legally exist outside of the body of the pregnant person. The Constitution does offer protection for the conditions in which an individual lives their life. Fetal personhood could be used to argue for a right to quality of life for the fetus, creating cases for charging the parent with negligence, neglect, and potentially even murder in response to the choices made by the pregnant person. There will also likely be a resurgence of cases that seek to take over legal custody of the fetus from the parent to force medical care and restrictions on the pregnant person. The effect of fetal personhood on individual lives would be up to states. State laws govern murder, homicide, and negligence.

Not all fetal personhood arguments aim to make abortion illegal. Many believe that through affirming fetal personhood, the focus of the abortion debate can move to creating a stronger pro-abortion argument. A historically popular argument made by Judith Jarvis Thomas attempts to make abortion rights possible while affirming fetal personhood. Thomas asks the reader if it would be legal for a person to be locked up to life-support to a famous musician for nine months if it would save the musician's life. Although the person might choose to support the life of the musician, legally, they cannot be forced to, much like a pregnant person cannot be forced to carry a fetus. The most common response is that the distinction between the person forced to spend their life hooked up to the violinist is that the pregnant person engaged in the activity necessary to conceive the zygote/fetus, which ignores discussions over consent.

Arguments from theorists such as Charles H. Baron state that fetal personhood might offer better protection for both the fetus and the pregnant person from infringement on their collective rights. In *Harman v. Daniels*, a mother and their infant child attempted to sue a police officer for an alleged injury under the Civil Rights Act. The court ruled that the fetus could not

claim recognition under the Civil Rights Act because, as stated in *Roe*, the fetus did not constitute a person under the Fourteenth Amendment. Baron presents the hypothetical,

“[s]uppose a state program paid fees to mothers planning an abortion who agreed to allow experimentation on the fetus prior to and after the abortion – *but only if the fetus was non-white*” (Shaw, Doudera, 1983)

The hypothetical presents a compelling possible benefit to giving some personhood rights to fetuses. Baron argues that fetal personhood should be treated similarly to corporate personhood.⁵ Fetuses could be given partial personhood but would only receive certain rights that protect the fetus without infringing on the rights of the pregnant person. Giving the fetus rights under the constitution does not require abortion to be illegal, "a woman who poisons her five-year-old child does not violate the Fourteenth Amendment – although she is most likely to have violated the homicide laws of her state" (Baron, 1983) and it would provide protection for the fetus both in the hypothetical and the actual case above.

The power to define and regulate abortion returns entirely to the state, returning the nation to pre-*Roe* conditions. People with uteruses could again be forced to travel to other states, or countries, to receive abortions, which is impossible in large portions of the United States. Even with the current definition of the right to abortion without a right to access, this is slowly becoming true. Without the right to have access to reproductive freedom, for most, the right to abortion does not exist. It takes too long and is too expensive for many individuals to get a legal, let alone illegal, abortion. Even liberal arguments about expanding the right to abortion do not take into consideration the necessity of access not only to abortion but to the many services that

⁵ For other similar arguments, see “The Juridical Status of the Fetus: A Proposal for the Legal Protection of the Unborn” The Law and Politics of Abortion by Patricia King

would impact the choice to abort, keep or allow someone else to adopt a fetus genuinely free, unburdened socially and economically. This is at the center of a right to reproductive freedom.

Baron's solution for state infringement on the right to an abortion is the expansion of self-defense laws, but the protections offered by self-defense laws are state law. Florida's Stand Your Ground law is an excellent example of the differences between the power of self-defense laws between states. Baron supports some right to abortion but fails to understand the potential consequences to fetal personhood, favoring instead the potential benefits of fetal personhood which ignoring the consequences.

Fetal personhood offers a unique danger to the rights of pregnant people because it provides a potential for marginal reforms by feminists to protect some abortion rights. In the ideal world of Baron and Jarvis, personal protection laws would protect the pregnant person from severe infringements on individual liberty. Notably, the danger of the affirmation of fetal personhood on the national level is that potentially nothing would change at the beginning, and both self-defense laws and bodily autonomy protections might be able to win back pieces of abortion protections in state or federal courts of law. These protections only exist at the whims of the office or court though. At any moment they could be taken away. This is true, in theory, of all rights, but in practice, rights such as the right to abortion are substantially more at risk. The justification of the focus on individualized protection come from the perception of pregnancy as a private experience that exists only in the body of the pregnant person. It makes it difficult to argue for greater access to resources and equal conditions as an aspect of reproductive rights. Reproductive rights include the ability to decide to engage in sexual activity, the ability to make decisions about birth control and access to abortion.

Critical Legal Theory Background

Soon after *Roe*, feminist and legal theorist began reconstructing its roots and re-arguing the case with different interpretations and legal reasoning, attempting to recreate the protections missing from *Roe*. These interpretations largely reject the concept of 'privacy' as the basis for abortion rights and focus on equality, consent, and labor as a basis for political advocacy and abortion rights. Although at the time, the privacy doctrine had won significant access to birth control and prevailed in the *Roe* case, many believed that the reliance on the privacy would open itself up to slowly dissolving rights because the right to privacy was not explicitly written into the Constitution.⁶ The right to privacy has been heralded both before and after *Roe* as fundamental to personhood and existences, but the right to privacy faces degradation from both pro- and anti-abortion advocates. Anti-abortion advocates argue that to get an abortion is not a personal decision, whereas, pro-abortion advocates are more worried that because privacy is not a realm of political or personal freedom but instead a land of privilege and power dynamics being played out to the detriment of less powerful populations.

Many of these authors reject or re-evaluate the right to privacy but continue to defend, either actively or passively, some regulations on the right to abortion. These arguments highlight the dangers of restrictions on abortion during viability not as a way to remove any regulations, but instead as a response to the increasingly short definition of pre-viability. Many also worry about access to abortion through expanding access to clinics but do not take the demands for better reproductive choice beyond the right to abortion.

⁶ *Aborting Dignity: The Abortion Doctrine After Gonzales V. Carhart* by Victoria Baranetsky explores the impact of abortion rights being based on privacy rights, which were created during the protection of contract making and other economic rights that were later over-turned.

Neo-Liberal Support for Abortion

The central crux of many abortion arguments is the equity difference that arises as an impact of pregnancy. There are not only the physical and mental impacts of pregnancy but the economic harm that people with uteruses encounter even without becoming pregnant. For theorists worried about equality, two considerations center the arguments: equality of condition or equality of result. For those interested in creating equality of condition between those with and without uteruses, access to birth control and abortion are critical. Without control over reproduction, individuals suffer the impacts of pregnancy without making that choice. Pregnancy can lead to substantial economic damages and social shaming even if the child is put up for adoption. These effects are worse for the least advantaged populations that suffer from discrimination in the medical sphere, a lack of economic resources to provide nutrition and environmental stability and have difficulty accessing abortion and birth control due to geographic, monetary or social restraints.

Rachel Roth lays out a history of financial and medical abuses placed on potentially pregnant and pregnant people in the name of protecting their potential fetuses. Jobs that involve toxic chemicals excluded people with uteruses instead of created methods to protect all employees from toxic materials. She also chronicles the abuses layered on pregnant people in the name of fetal protection, such as medical decisions that go against the expressed wishes of the pregnant person.

"All women, therefore, live under the threat that doctors or state agents can wrest away control over what happens to their bodies and their lives." (Roth, 91). The potential to enact laws that criminalize behavior, or apply laws that already exist to fetuses, forces people with uteruses and those who might give abortions to adjust their lifestyle to protect themselves from legal repercussions. This is dangerous in two different ways: first, the force of the law acts as a threat

without due process; second, by forcing individuals to conform to moralizing beliefs of action without the visible force of the law, changes in action are attributed to a cultural shift instead of state infringement on individual rights. When the president argues that people who perform or receive abortions should face jail time, it creates fear. Then if a law is enacted that would allow for the prosecution of these individuals, whether or not the law is carried out, the reduction of abortions would reflect the number of reductions in who will perform abortions along with those who will get abortions from fear of prosecution.

A neo-liberal justification for abortion rights does not deny the underlying tenants of *Roe*. It makes an argument that the right to an abortion should exist because the denial of such a right will seriously compromise a person with a uterus's ability to interact in the economic sphere. The equality argument does not address the conflict between economic and private rights, nor ways to address the effects of inequality between people with uteruses and ignores the rampant abuses within the private sphere.

Radical Feminist Support for Abortion

For some, the concept of a private sphere that the government should not infringe upon forces them into a prison of abuse, rape, and mistreatment that is normalized by the patriarchal understanding of power dynamics and the family structure. These structures leave room for marital rape, emotional and physical abuse. Catharine MacKinnon is concerned with these conditions of abuse that permeate the 'private' sphere in cases of blatant abuse and where the societal expectations lead women into situations that they did not and cannot consent.⁷ The

⁷ MacKinnon is frequently criticized by queer theorists for her exclusion of non-cisgendered heteronormative people in her writing. Although MacKinnon tends to essentialize the conditions of some women to the conditions of all people with uteruses, her writing is still useful in understanding the ways in which language of consent has been destroyed through the abuses of

conditions leading up to pregnancy and abortion are particularly crucial to MacKinnon, the assumption of consent in conditions in which rape or coercion cannot be proven, like in the case of marital rape, make it impossible to regulate abortion based on 'consent' to sex that leads to pregnancy. Further, even if the sex was 'consensual' that does not require genuine consent because the conditions leading up to and involved in the act of sex are predetermined by the societal conditions that affect decisions made by people with uteruses. The language of consent is functionally bankrupt in common language because it is impossible to consent in a society that has been pre-determining one's answers since birth.

“In private, consent tends to be presumed. It is true that showing of coercion voids this presumption. But the problem is getting anything private to be perceived as coercive... The private is the public for those whom the personal is political... *Roe vs Wade* presumes that the government nonintervention into the private sphere promotes a woman's freedom of choice... So women got abortion as a private privilege, not as a public right” (MacKinnon, 100).

Marital rape was not a crime in all 50 states until 1993, this type of rape is incredibly difficult to argue in court, consent to sexual acts is often presumed from clothing choices, attending events, consuming alcohol, comments made to friends, and previous consent. To many, marriage is consent to sex for the rest of married life. Some claim headaches, fatigue, and illness to escape sex with their partners that will not, or may not, accept that their partner wishes not to have sex. There is no protection inside the home so long as there is no violence reported, and even when individuals report violence, many are still left unprotected in the name of privacy. These laws only seek to entrench the violence further making consensual choices impossible.

the patriarchy. Patricia Cain offers a critique of MacKinnon's centering of non-queer experiences in their piece "Feminist Jurisprudence: Grounding the Theories".

The necessity to center the discussion of sex and the private sphere is similar to the necessity of centering work and the economic sphere to Marxists. MacKinnon laments the conditions of sex saying, “Sex is to Feminists what Work is to Marxists.” By relegating discussions about the poor treatment of people with uteruses into the private sphere, the prerogative is forced into the hands of the abused to protect themselves. The private sphere hides the amount of abuse and coercion that exists in the lives and relationships of people with uteruses.

MacKinnon worries though that access to abortion in the private sphere only further forces heterosexuality and sexual accessibility on women. To have the right to abortion lowers the perceived consequences of sexual violence to those who enact that violence, even more so it opens up more bodies to their violence. MacKinnon doesn't argue that abortion should be illegal, MacKinnon sees abortion as a necessary right for people with uteruses, but this right arrives not from the conditions of pregnancy themselves, but instead from the conditions before pregnancy that lead to it. The societal conditions that lead sex to be non-consensual create the necessity of abortion, even if that choice is affected by coercion. So long as only women with privilege have the ability to receive abortions, that there is no true right to abortion, only a privilege.⁸

Marxist Analysis: Pregnancy as Labor

The problem of privilege in deciding who gets to receive reproductive care, including abortions, is particularly applicable Marxist theory once pregnancy and giving birth are understood as labor. Texts such as “Wages Against House Work” have created a framework in

⁸ In MacKinnon critiques the availability of abortions to only to those who have access to the doctor and the financial resources to abortion as exclusionary to large portions of the population, meaning that there is no right to abortion. “The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect.” (MacKinnon, 101). There is not a true right to abortion until it is protected as a right outside of privacy and it is covered and accessible to all people if the choose to receive one.

which to see the unpaid labor that occurs inside the household, or in this case inside the body of the pregnant person as economically important labor.⁹ The type of labor that occurs in the household is generally called reproductive labor because of its importance in keeping the laborer able to return to work. The language used to discuss pregnancy and birth mirrors the language that Marxists use. People with uteruses produce the next generation of workers, filling the factory floor. Much like in “Wages Against Housework,” the person with a uterus provides life-giving care, such as feeding and providing shelter for, the fetus. Federici demands access to wages for housework as a way to then enable homeworkers to reject the position put upon women and to unionize for better working conditions and fair wage. The analysis of a non-traditional understanding of work allows for the historical labor of women as homemakers, caretakers, and child-birthers to have a greater prevalence.

Although this framework is not generally accepted in public discourse, it does allow for interesting Marxists legal interpretations. Rubinfeld’s legal analysis sits on the back of work from second wave feminist Marxists but does not go nearly as far. Jed Rubinfeld describes pregnancy as “a specific, long term, life occupying course of conduct,” and he uses this analysis of pregnancy to compare *Bailey v. Alabama* (1911) to the conditions faced by pregnant people when abortion is illegal. Under Rubinfeld’s framework, forced pregnancy is indentured servitude in which the pregnant person is forced to raise the child, at their own expense and without, necessarily, their consent to the work.

When pregnant people lack the option to have an abortion, they forced into labor by the government. If pregnancy constitutes labor under the criteria that Rubinfeld gives, then the right to abortion through *Bailey* (1911) that decided indentured servitude was unconstitutional. A right

⁹ Sylvia Federici “Wages Against Housework”

to abortion under Rubenfeld's analysis is an economic right, a right that ensures that an individual has a right to choose their own profession. The right to choose one's own profession guarantees the government does not determine the options available to pursue economic activity. If Rubenfeld is able to frame pregnancy as a profession, then it also creates avenues for pregnant people to argue for better, fairer, working conditions through the multitude of worker's rights cases that have been decided by the Supreme Court.

Rubenfeld expands his analysis into a weighing system for arguments about the rights of fetuses and the moral arguments against abortion. He addresses these in a few separate ways; primarily he focuses on the evolution of fetuses in the womb from a zygote to a fetus to a child through the gestation period, then he critiques claims that the State has the ability to make a moral judgment on when life begins.

“The judgement is a moral one, and, generally speaking, states are free to arrive at their own conclusion on moral matters... but a state's prerogative to legislate morality is not unlimited. The prerogative ends when legislated morality would deprive an individual of a constitutional right.” (Balkin, 115)

After defending the right to abortion as protected through the constitution from the *Bailey* case, he must respond to the argument that a State can regulate abortion due to their moral beliefs in when life begins. Even without a consensus agreement between doctors, philosophers or clergy about the moment in which life begins, each state has the ability to make decisions about what constitutes life and how this will interplay with their laws, this is not true when the law infringes on rights, like the right to abortion, established by the *Bailey* case. States such as Texas have made it state policy that life beings at conception, but this has no legal effect on abortion rights at the current time.

Criticizing the State's Interest in Potential Life

If life begins at conception, Texas, and many other heartbeat states, fail to protect both the carriers of that life and the potential life itself from the most basic harms. Poverty, malnutrition, unsafe working conditions, and abusive households all directly risk the lives of individuals both already born and fetal. A state that claims to be concerned with the conditions of life of a fetus should, in theory, be at least equally as concerned with the lives of those who have already been born. The interest of the state to bring life into the world seems to be inappropriately applied, and generally unnecessary in legal terms.

Within an analysis of the actual conditions of abortion procedures and in place legal restrictions it becomes clear that states already have a robust ability to regulate the medical profession and provide support to individuals to decrease the numbers of abortion necessary. Instead, the focus on restricting abortions ignores the causes of abortions: lack of resources, birth defects due to environmental harms, lack of access to birth control, rape and assault, large number of children up for adoption, coercion, economic disadvantages to pregnancy and childbirth, and lack of sex education to name a few. These problems could be solved and addressed by states, dramatically reducing the number of both socially and medically necessary abortions. Instead, the focus on protecting potential life is through infringing on the rights of people with uteruses.

For the Health of the Mother

There are many other ways for the state to protect the health of the pregnant person throughout the abortion procedure without infringing on individuals rights. The right of the state to regulate the medical profession is clear. There must be oversight on doctors, nurses and hospitals to ensure that they refrain from malpractice and abuse of patients, especially when

those patients cannot advocate for themselves. Oversight is generally managed by the Federal Drug Administration, legislation passed on the conditions of hospitals and clinics, and guidelines for medical professions. These rules and regulations apply to all medical treatment and consideration. Additionally, doctors sign an oath not to endanger the lives of patients either through a lack of service or through the administration of risky or life-threatening procedures unless in the case of an emergency or if the risk/outcome without the procedure or medication is worse than the risk undertaken through medical intervention. Consent is also mandatory throughout the treatment, if the patient decides, while in a sound state of mind to not undergo treatment, even if that decision might risk the life of the individual, they are allowed to withdraw from treatment or request a different course of action. Furthermore, decisions that risk the safety of an individual in favor of assisting another, such as a kidney transplant, exist if both parties consent to the treatment. No individual can be forced into medical treatment against their own will in cases where their decision endangers their own life, or in the case of a potential kidney transplant or even blood donation or the life of another. These central tenants of medical care are the basis for Judith Jarvis Thompson's Violist argument.

The health of the mother was used by states in the past to limit the right to abortion. It was considered a medical intervention because of its associated high mortality rate. It is still used as one of the compelling state interests in *Roe*. The question then remains, is the procedure still dangerous enough that there needs to be a unique intervention on behalf of the patient because the danger is too great? Medically, the several abortion procedures, throughout the trimesters, have become much safer. In the first several weeks, a prescription can be written, and pills can be taken at home to cause a chemical abortion, later medical procedures are often preformed in clinics and outpatient facilities.

Abortions that require invasive medical procedures are last choice options, these do increase the risk to an individual, and state regulation of these abortion procedures makes sense, this regulation easily fits under the current regulatory standards. For the majority of people with uteruses, abortion is sought as soon as possible. Only about 1.3% of abortions are in the third trimester.¹⁰ For that 1.3%, the choice to get an abortion is likely because of physical or mental danger to the pregnant person or the fetus. There is also the potential that this person either lacked the knowledge that they were pregnant or were unable to utilize abortion resources earlier because of abuse or family intrusion into the decision. For those whose physical or mental health is at stake, the right to an abortion is currently legal. The procedure is used to mitigate the danger to the pregnant person, much like other potentially dangerous medical procedures. For those who have faced abuse, intrusion into the decision or did not know they were pregnant, the decision to choose to get an abortion can be made like all other medical decisions, through an examination of the risk involved. Doctors will not agree to perform a procedure that unnecessarily risks the health of life or the patient. It would be against their oath and open the doctor up to medical malpractice lawsuits. The pregnant person will also not attempt a risky procedure unless there is no better option. The current protections under law provide a more than sufficient framework to reduce the risk to the health of the pregnant person. The state's compelling interest in the 'health of the mother' would have to be shown to be unique in some way over the current medical considerations, outside of an argument for the protection of the fetus or moral concerns about the rational decision-making ability of pregnant persons.

The decisions made in the name of medical good conduct should not differ in the case of abortion than in the case of other medical procedures. If a doctor decides that the abortion is of

¹⁰ Center for Disease Control and Prevention

reasonable safety, in comparison to the condition of the pregnant person and the risks of childbirth, then they should be allowed to continue with the abortion. The opinion of another doctor, or two, should not be necessary, much like in other medical decisions. A second opinion can be a valuable tool both to doctors and patients, but the patient decides to allow for the sharing of their medical records or concerns with each doctor that they consent to treat them. Furthermore, if the doctor sees no reason to request a second opinion, and the patient does not desire one, there is no reason for the state to demand a second opinion. The state could require a second opinion for doctors for specific types of medical decisions, but they would have to make clear what makes these procedures uniquely require the opinion of more than one doctor. The procedures that are associated with abortion are less dangerous than many other common procedures provided in hospitals and outpatient clinics. In the past, the state has never seen it necessary to have more than one opinion about a procedure, but those involved could seek a second opinion. This follows with a state's demand for specific information to be shared with the person seeking an abortion that is outside of the demands of medical due-diligence. If the sharing of information is necessary to make an informed opinion about the medical procedure, then it already must be given to the patient.

The medical dangers of pregnancy are not purely in the abortion. Both the time spent being pregnant and giving birth are dangerous and draining processes. Without access to resources that protect the health of both the mother and fetus, there can be major health impacts to one or both parties. This can lead to miscarriages, short lifespans of the fetus, and the death of the pregnant person. Medical, environmental and social harms all increase the likelihood that the fetus or the pregnant person will face complications. These threats to 'potential life' and the life

of the pregnant person are consistently ignored, in favor of curtailing the pregnant person's right to bodily autonomy.

Abuses Allowed in the State's Interest in Potential Right

In Rachel Roth's book *Making Women Pay*, they underline how even potential pregnancy was used to curtail the rights of people with uteruses in economic, social and medical spheres. Those who may become pregnant were forced out of jobs that could cause congenital disabilities and were forced into medical treatments that they objected to in favor of the 'fetal interests. Fetal personhood gives "the fetus and independent relationship with the state that bypasses the pregnant women" (Roth, 3). When the pregnant person becomes at odds with the fetus that they are supporting, a doctor for the fetus can impose regulations and restrictions on the pregnant person, and a lawyer for the fetus even has the potential to sue the pregnant person on behalf of the fetus. The requirements that are now placed on pregnant people not only give the fetus a right to life, but a right to a specific quality of life, Margery Shaw advocated for requiring pregnant people to go through currently optional genetic testing and follow through with ablest and eugenic policies that require the pregnant person to undergo medical intrusions into their pregnancy despite the beliefs or wishes of the pregnant person lest they be sued on behalf of the fetus if the fetus is then born with a preventable condition. before *Roe* fetal rights could be used to justify even life-threatening procedures against the wishes of the pregnant person. One example is the *Mollholland* 1987 case, that Roth cites, where a pregnant person who had terminal cancer instructed their doctors to attempt to resuscitate them before trying to say the fetus if they went into cardiac arrest. Although the state ruled in favor of the pregnant person finally, there were several doctors and state officials that were willing to force the pregnant person into a life-threatening procedure against their wishes to retrieve a 6-month developed

fetus.¹¹ The dangers to the lives of people with uteruses are not only at the points in their lives in which they are pregnant but begin from birth and continue until they are no longer able to reproduce.

A current infringement in the rights of pregnant people even without abortion restrictions are the ongoing attacks on pregnant people who use drugs during their pregnancy. Even though most rehabilitation facilities do not accept pregnant people, due to the different treatments needs to assist in the recovery in pregnant people, many courts prosecute pregnant drug addicts with child abuse and negligence. (Schroedel, 2000) In the past, nurses and doctors would test the blood of pregnant people and their newly born children to test for drugs and used these, now illegal, blood tests to prosecute the parent with child abuse. With an expansion of fetal rights, blood tests like these could become legal again, and they could be expanded to legal activities, limiting people with uteruses ability to drink alcohol or smoke cigarettes, which is legal but could harm fetal development. It can take weeks to discover a pregnancy, so the rights of people with uteruses to consume alcohol, medication, illegal drugs, or smoke would be significantly curtailed in favor of the ‘potential right to life.’ Many commonplace medications are dangerous to fetal development but are necessary or useful in treating illness, which could place normal, everyday access to the standard of care for certain illnesses or diseases at risk in favor of the health of a potential fetus.

Socializing the Interest in ‘Potential Human Life’: Reproductive Freedom

If arguments for fetal personhood, with legally recognized personhood at conception, are won in court is it likely to be the end of abortion rights as a whole. At the present moment, the

¹¹ This fetus would be very premature and likely not survive outside of the womb at 6-months.

court has refused to decide if ‘personhood’ starts at conception or afterwards, in favor of defining an ‘interest’ in potential life, that becomes compelling at the point of viability. The court rejects the theory of fetal personhood in *Roe*.

“the word ‘person’, as used in the Fourteenth Amendment, does not include the unborn... The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus... [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or of the potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.” (Blackmun, 159)

Instead of supporting fetal personhood the court opts for the language of ‘potential human life’. The court may not give all rights held by the pregnant person over to the fetus, but if *Roe*’s analysis on a compelling interest in potential life appears in front of a conservative court, it opens itself up to easy criticism and dismissal based on the contradictions on the rights of fetuses in Justice Blackmun’s decision. For the fetus to have the ability to infringe on the rights of the pregnant person, it must have a claim to a right or principle that can be used to weigh against the rights of the pregnant person or another involved party. Robert Alexy presents a theory of constitutional rights that takes into consideration the balancing required to optimize each individual’s right. Using Alexy’s framework for constitutional right optimization, the right to bodily autonomy would be both a principle and a rule, a person’s right to an abortion would function as a principle. “A principle can be overridden when the counter principle has more force in the instant case.” (Möller, 2007) For the ‘potential life’ to override the right to abortion, it would have to carry more force.¹² Reproductive freedom and access to abortion is a critical aspect of bodily autonomy for anyone who has the ability to become pregnant.

¹² Alexy gives three main conditions to reach an optimal balance between the two principles: suitability, necessity and proportionality in the narrow sense. Suitability means that the limiting

A Right to Reproductive Freedom

To redefine and understand a right to reproductive freedom, it is necessary to rethink the relationship between the pregnant person and the fetus as not in conflict. Instead, the fetus is a part of the pregnant person, their interests are the same, even if that interest is not to keep the fetus. Medically, the fetus cannot have an opinion, and the pregnant person speaks for the best interests of their body, which the fetus is a part of. The needs of the fetus are directly dependent on the needs of the pregnant person. Care and protection for the fetus is dependent on the decisions and resources of the pregnant person.

The ‘compelling interest’ in potential life is only applied in contexts that remove rights from people with uteruses, creating conflict between the fetus and the pregnant person. The state only has an interest in ‘potential life’ when the protection of that life requires nothing from the government. There is almost no governmental support for pregnant people. Many pro-abortion activists focus on the burdens of parenthood that is placed primarily on the person who was pregnant, generally women. This burden includes providing for nearly 24-hour care for the infant for the first several months followed by 16+ hour care after the first few months, which often requires the caretaker to take off work, damages promotion opportunities and is seen by employers as a reason to not hire or promote the potential caretaker. There is also a financial burden to support this child for 18 years, with little more than a tax break for the expenses. Social judgements are also placed on parents, specifically the parent that birthed the child, such as their quality of parenting and the resources and time they can spend with the child.

of one principle must help to advance the other. Necessity requires the least intrusion into the principle that is being limited. Proportionality means that each right must be weight for their importance in the specific case. (summarized from *Balancing and the Structure of Constitutional Rights*, Kai Möller)

Benefits to a Socialized Right to Reproductive Freedom

If the state truly believed in a compelling interest in potential life there would be substantially more resources to support pregnant people, as well as protection from the environmental and socioeconomic conditions that could negatively impact the fetus for pregnant people that want to give birth. The increasingly dramatic effects of climate change put pregnant people, fetuses and young children at the greatest risk of damage due to “lack of food and safe drinking water, poor sanitation, population migration, changing disease patterns and morbidity, more frequent extreme weather events, and lack of shelter.” (Rylander). These conditions affect low- and middle-income women with the greatest prevalence, for the state to give their claim legitimacy, they must start with an effort to minimize the effects of climate change and pollutants on pregnant people, which cause adverse health impacts that the pregnant person has no control over.¹³ The State should offer greater prenatal care, medical resources both during and before pregnancy, and after-birth financial support.

In Alexy’s study of balancing rights, to infringe on a principle, it must be a necessity to infringe on an individual’s rights. It would be possible for the State to mitigate the dangers to potential life to the same degree that allowing infringement on the rights of people with uteruses by intervening in any of these issues.¹⁴ These protections need to exist for people with either

¹³ The effects of pollution on fetuses is even greater than the impact of climate change, to impose restrictions on corporations, who’s polluting activities can in no way be construed as a constitutional right, would be a necessary start in proving a State’s interest in protecting fetal rights.

¹⁴ Several of the interventions above would increase the quality of life of potential life that is wanted, they would also decrease the chance of birth defects, stillborn or miscarriages. Providing more monetary support for pregnant people and for parents who raise children would make it substantially easier to keep and raise children in all stages of pregnancy.

reproductive organ, as the impacts of chemicals that can affect the viability of eggs in a uterus can also affect the sperm causing congenital disabilities in the fetus or forcing sterility. These are all concerns that should be faced and considered by a State before they claim that their compelling interest in potential life is strong enough to over-rule an individual's constitutional rights.¹⁵ There is no legal imperative for the government to intervene on behalf of fetuses, but if they choose to do so, the intervention should occur without infringement on the rights of one group.

These rights do not stem purely out of a State's interest in protecting fetal rights, but instead should be framed as one piece of the right to choose to conceive a child or not. In making that choice, there should be the assumption that the State will protect the choice to conceive the child. It is in the State's interest to protect the rights of its citizens both to have healthy children, through protections of conditions before, during and after pregnancy, along with their rights to participate fully in economic and political spheres. It is a current failing of the government that it does not ensure a right to even small amounts of social inclusion. This is a failure both in the government's role to protect the people, and also creates an inefficient society. Robin West argues that the pregnant person, and then later the primary care parent, are excluded from the benefits of citizenship. The work that is required to be pregnant, and then to be the primary

¹⁵ That *Roe* did not make further effort to clarify where the State's compelling interest in protecting fetal life comes from and how that is consistent in the laws supported by the State outside of just access to abortion was, in my opinion, a major misstep in the case. This contradiction was mentioned in the footnotes of the decision by Blackmun where he calls out the contradiction in the Texas penal code "if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command? ... the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257" although Blackmun uses this contradiction to question the claim for fetal personhood not the state's interest in protecting potential life. The same method should be used to question the existence of a compelling interest.

caregiver for a child for the first several years, let alone the 18 required of a parent, makes it difficult, if not impossible, for the parent or pregnant person to use their citizenship.

“But if it is true that citizenship is inconsistent with motherhood, and if it is also true that it is indeed unconstitutional to arrange society so that citizens by definition are not mothers and mothers by definition are not citizens, then it is an undertaking that Congress should commence pronto, no matter how arduous the task might prove to be” (West, 145)¹⁶

There is also a compelling interest that the state has in protecting fetal health, pregnant people’s health, and the general health of the population. To understand an interest in the economic, medical and social well-being of those in society who may become pregnant in the context of a protection of future generations allows for the understanding that there needs to be a burden placed on the State to regulate pollution, to reverse climate change, to protect those most vulnerable from attack, but that does not privilege the fetus above the pregnant person, nor give the fetus rights outside of the right of the pregnant person. A pregnant person should have the right to give birth to a healthy child if they so desire, they do not have an obligation to give birth, or to have medical testing, or to receive medical treatment that might ensure a healthy child, but if they wish to have any of those things or many more, they have a right to that.

Conclusion

After reviewing and examining the current arguments both for and against abortion rights, there seems to be no reason to limit a pregnant person’s ability to receive an abortion. The arguments for fetal personhood, both the pro- and anti-abortion arguments, rely on an argument centered around morality claims, that life begins at conception and must be protected. Although fetal personhood, pro-abortion arguments tend to limit the reach of fetal personhood rights, they

¹⁶ Balkin, Jack M., Siegel, Reva B. (2009) *The Constitution in 2020*. New York, NY: Oxford University Press.

still allow for the rights of the fetus to be equal to the rights of the pregnant person in specific cases. The critical legal theory arguments presented in this paper, social equality, radical feminist consent, and Marxist labor analysis, all create the basis for my argument for a socialized right to abortion. This right would allow for the decrease in abortions without having to infringe on the right to bodily autonomy of people with uteruses.

The socialized right to reproductive freedom understands and treats the causes of abortion. To limit the ability for individuals to receive abortions would just recreate the black market of medical care that existed pre-*Roe* where groups like Jane trained individuals to perform abortions in their home and doctors exploited desperate persons to pay large sums of cash for dangerous procedures that often lead to sterilization and long-term medical problems. A socialized right to reproductive freedom offers housing for families, free medical care both before and after pregnancy, food for the pregnant person and their family, sex education starting at an early age that does not shame people who choose to be sexually active, attempting to mitigate the effects of pollution and climate change on all peoples, and understanding people with uteruses as capable of making their own decisions. An attempt to quell the desire for abortion without addressing what creates the need for abortion is an act of futility, abortion access will always be a necessity, but the need can be lowered by adopting a socialized right to reproductive freedom.

Bibliography

Balkin, Jack M., Siegel, Reva B. (2009) *The Constitution in 2020*. New York, NY: Oxford University Press.

Baranetsky, Victoria. (2013) Aborting Dignity: The Abortion Doctrine After *Gonzales V. Carhart*. *Harvard Journal of Law & Gender*, 36, 123-170.

Bartlett, Katharine T. (2012) Feminist Legal Scholarship: A History Through the Lens of the “California Law Review”. *California Law Review*, 100(2), 381-429. Retrieved from <https://www.jstor.org/stable/23239883>

Cain, Patricia A. (1989) Feminist Jurisprudence: Grounding the Theories. *Berkeley Journal of Gender, Law & Justice*, 4(2), 191-214

Center for Disease Control and Prevention. (2018) *CDCs Abortion Surveillance System FAQs*. Reproductive Health. https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

Fellmeth, Robert C. (2002) *Child Rights and Remedies: How the U.S. Legal System Affects Children*. Atlanta, GA: Clarity Press.

Goldstein, Leslie Friedman. (1994) *Contemporary Cases in Women’s Rights*. Madison, WI: University of Wisconsin Press.

Goldstein, Leslie Friedman. (1992) *Feminist Jurisprudence: The Difference Debate*. Lanham, MD: Rowman & Littlefield Publishers.

Law, Sylvia A. (2016) “Rethinking Sex and the Constitution” *University of Pennsylvania Law Review*, 132(5), 955-1040

Levit, Nancy., Verchock, Robert R. M. (2006) *Feminist Legal Theory: A Primer*. New York, NY: New York University.

MacKinnon, Catherine A. (1987) *Feminism Unmodified*. Cambridge, MA: Harvard University Press.

Nussbaum, Martha C. (2008) Robin West, *Jurisprudence and Gender: Defending a Radical Liberalism*. *The University of Chicago Law Review*, 75(3), 985-996

Pollitt, Katha. (2014) *Pro: Reclaiming Abortion Rights*. New York, NY: Picador.

Roth, Rachel. (2000) *Making Women Pay: The Hidden Costs of Fetal Rights*. Ithaca, NY: Cornell University.

Rylander, Charlotta, Odland, Jon Ø., & Sandanger, Torkjel M. Climate Change and the Potential Effects on Maternal and Pregnancy Outcomes: An Assessment of the Most Vulnerable – the Mother, Fetus and Newborn Child. *Global Health Action*.

Rysavy, Matthew A., Li, Lei, Bell, Edward F., Das, Abhik et al. (2015) Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants. *The New England Journal of Medicine*. 372, 1801-1811

Schneider, Carl E., Vinovskis, Maris A. (1980) *The Law and Politics of Abortion*. Kexington, MA: Lexington Books.

Schroedel, Jean Ruth. (2000) *Is the Fetus a Person?* Ithaca, NY: Cornell University Press.

Shaw, Margery M., Doudera, A. Eduward. (1983) *Defining Human Life: Medical, Legal and Ethical Implications*. Ann Arbor, MI: AUPHA Press.

Siegel, Reva B. (1995) Abortion as a Sex Equality Right: Its Basis in Feminist Theory. *Mothers in Law: Feminist Theory and the Regulation of Motherhood*. 43-72. New York, NY: Columbia University Press.

Weeks, Kathi. (2011) *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries*. Durham, NC: Duke University Press

West, Robin. (1994) *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment*. Durham, NC: Duke University Press.