

2009

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Recommended Citation

Shalleck, Ann. "Offspring and Bodies: Dependency and Vulnerability in the Constitutional Jurisprudence of Reproductive Rights." Response to "To Whom Do We Refer When We Speak of Obligations to 'Future Generations'?" by Sherry F. Colb. *George Washington Law Review* 77 (2009): 1620-30.

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Response

Offspring and Bodies: Dependency and Vulnerability in the Constitutional Jurisprudence of Reproductive Rights

Ann Shalleck*

Sherry Colb offers a new way to consider reproductive rights by delineating two distinct and not always overlapping interests at stake in giving meaning to and shaping the contours of the rights implicated in reproductive decisions.¹ Through differentiating interests in bodily integrity and offspring selection, Professor Colb disentangles underlying justifications for legal advocacy and judicial decisions and offers an interpretive frame through which to consider the reasons for providing protection to reproductive rights.² Additionally, in light of this symposium's focus on intergenerational justice, she demonstrates how each interest relates to each generation's obligations to the larger intergenerational community.³ In taking up Professor Colb's insightful approach, I suggest that both interests require us to recognize how reproductive decisions reveal both the vulnerability of human beings,

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¹ Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to "Future Generations"? Reproductive Rights and the Intergenerational Community*, 77 *GEO. WASH. L. REV.* 1582 (2009).

² *See id.* at 1583.

³ *See generally id.*

individually and collectively, as well as the inevitable dependency of human beings on each other, within as well as across generations, as each person, as well as each generation, faces the obligations entailed in the bearing and raising of children.

Martha Fineman, in her challenge to equality jurisprudence, has argued for making the experience of dependency and the vulnerability of each human foundational to legal and political thought.⁴ While she has primarily sought to expand and enrich our understanding of and approach to equality through vulnerability and dependency analysis, Professor Fineman's re-conceptualization of the political and legal subject as both dependent and vulnerable also profoundly challenges the current regime of legal thought regarding reproductive decision-making. Professor Colb's differentiation of two intertwined interests provides an opportunity to examine how each requires us in multiple contexts to confront the dependency and vulnerability central to an understanding of reproductive rights. This recognition can help move us beyond the rigid and distorting legal framework of competing maternal and fetal rights that dominates the jurisprudence of and argument surrounding abortion.

Offspring Selection and the Recognition of Dependency

Colb convincingly argues, from the perspective of intergenerational justice, that individuals have no obligation to produce offspring for the next generation⁵ and, correspondingly, potential people have no right to come into being.⁶ Reproductive decisions, whether to have children or not, rest with the individual. Further, exercising control over one's reproduction constitutes a component of the interest in offspring selection.⁷ By locating these principles in both Western tradition and modern law, Colb clarifies that the necessity of producing offspring for the intergenerational community does not take the form of an obligation, located in individuals, to reproduce nor of a right in a future being to come into existence. Society's need for future generations must be fulfilled in other ways. Intergenerational duties gain legal expression in the obligations of parents for the care of their chil-

⁴ See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008).

⁵ Colb, *supra* note 1, at 1583–94.

⁶ *Id.* at 1592–94.

⁷ *Id.* at 1583, 1588.

dren, obligations that result from the creation of those children.⁸ Society thus counts on individuals to care about future generations at least partly because they care about the future well-being of their children.⁹

These principles, while not explicitly delineated in constitutional law, all receive expression in the assumptions underlying the articulation of the mixture of constitutional rights related to constitutionally-protected reproductive decisionmaking. In prohibiting involuntary sterilization in *Skinner v. Oklahoma*,¹⁰ the Supreme Court recognized as fundamental an individual's right to procreate, which it framed as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."¹¹ In safeguarding the use of birth control, in *Griswold v. Connecticut*¹² for those who are married, and then in *Eisenstadt v. Baird*¹³ for those who are not, the Supreme Court protected the right *not* to procreate, which the Court described as "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁴ And, for whatever else they do, *Roe v. Wade*,¹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶ and *Gonzales v. Carhart*¹⁷ recognize an individual woman's interest in exercising control over decisions regarding termination of a pregnancy and thereby not creating offspring.

While these cases provide the constitutional structure for the right to conceive and bear children, as well as the right to decide not to conceive and bear children, they directly address only limited components of reproduction: conception and pregnancy. Reproduction, however, extends beyond pregnancy to child rearing. Decisions about reproducing implicate the obligations of parenthood. As the right to procreate rests in individuals, so too do the duties to the children who are born. Therefore, to understand the full implications of the decision to procreate, the constitutional framework governing the right to conceive and bear children must be seen within the broader perspective of the constitutional guarantees respecting parenthood. In *Pierce*

⁸ *Id.* at 1594.

⁹ *Id.*

¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹¹ *Id.* at 541.

¹² *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

¹³ *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).

¹⁴ *Id.* at 453.

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁷ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

v. Society of Sisters,¹⁸ *Meyer v. Nebraska*,¹⁹ *Stanley v. Illinois*,²⁰ and *Santosky v. Kramer*,²¹ the Supreme Court delineated the fundamental right to the care and custody of children, which carries with it corresponding individual obligations.

Revisiting this constitutional framework through its expression of the interest in protecting decisions about the creation of offspring, we can see more clearly the centrality of dependency to an understanding of reproductive rights. In making decisions about birth control, about whether to conceive, individuals carry the weight of creating a child who will be dependent upon them for many years and for whose care they will be almost solely responsible. Whatever state subsidies exist to support the care of children—such as tax policies, education funding, or social welfare programs—are limited and contingent, distributed unequally, matters of politics and policy, not rights. Whatever legal requirements are placed upon markets to support the care of children (such as leave from work for care of dependents) and whatever accommodations the market itself makes (such as flexible work schedules), these, too, operate at the margins of caregiving responsibilities, each one the result of often intense political and social struggle.

The U.S. Constitution, reflecting and reinforcing social practice, legal rules regulating the family, political arrangements, and economic status, locates the family as the site for fulfilling the obligations of parenthood. Although since *Griswold* the Supreme Court has framed the right to decide upon contraception as rooted in a right to privacy,²² decisions about becoming pregnant and bearing children implicate the rights of parenthood, rights originally articulated in *Pierce* and *Meyer*, which are firmly grounded in a vision of parents as the authority responsible for making decisions regarding children.²³ With each decision about whether to conceive, then, individuals face the monumental responsibilities of parenthood that accompany the rights of care and custody. Parents not only take on the obligation of providing care for dependent children, but, to the extent that caregiving circumscribes the ability to participate in the economy and society, individual family members who provide care become derivatively de-

¹⁸ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

¹⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁰ *Stanley v. Illinois*, 405 U.S. 645, 651, 658 (1972).

²¹ *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

²² See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

²³ See *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

pendent on others for support of that work.²⁴ Shielded in the family from both the market and the state, caregiving performed within the family remains unreimbursed, subject to the economy of the family.²⁵ And the structural gender inequalities in the distribution of obligations within the family, which contribute to the allocation of caregiving work primarily to women,²⁶ permeate each individual decision about whether to conceive.

Privacy, then, in the context of deciding whether to conceive, protects from governmental intrusion decisions about the creation of offspring, that is, the formation of family. Our constitutional framework leaves this determination to individuals. In constructing the rights of parenthood as situated in the family, however, the Constitution assumes that the obligations regarding offspring created through conception remain within the family, too. Thus, individuals considering whether to use birth control, exercising one reproductive right, must contemplate their responsibility for the care and nurture of those members of the future generation they decide to bring into being. The assumption that individuals act responsibly in taking on obligations for offspring underlies the fundamental premise that the family can best assure the care of children. In *Prince v. Massachusetts*,²⁷ the Court, citing *Pierce*, made explicit this assumption:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters*, *supra*. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.²⁸

Thus, our constitutional framework presupposes and enshrines children's dependency upon parents, a dependency that produces derivative dependency in caretakers. Without protection of the right not to conceive, individuals have no way to exercise their responsibility in deciding whether to assume the obligations of parenthood. Therefore,

²⁴ See FINEMAN, THE AUTONOMY MYTH, *supra* note 4, at 34–37 (discussing the “derivative dependency” of caregivers).

²⁵ See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (discussing how the view of the family and the market as distinct spheres has hampered reforms aimed at equalizing treatment of women in the marketplace).

²⁶ See FINEMAN, THE AUTONOMY MYTH, *supra* note 4, at 161.

²⁷ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

²⁸ *Id.* at 166.

in *Griswold* and *Eisenstadt*, the protection for individual privacy attaches to decisions about “whether to bear or beget a child.”²⁹

Parental obligations for the care of children—the next generation—which constitute part of the interest in the creation of offspring, are reflected in the articulation of the constitutional right to terminate a pregnancy. In *Roe*, the Supreme Court directly acknowledged the looming responsibility for a dependent child that a pregnant woman faces. In explaining the importance of the right to terminate a pregnancy, the Court invoked “the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it”³⁰ as well as “the additional difficulties and continuing stigma of unwed motherhood.”³¹ While *Roe* situated the decisions in the woman carrying the pregnancy in relationship with “her responsible physician,”³² the Court recognized that a woman decides to terminate a pregnancy with the obligations of parenthood in the forefront of her mind. Protecting a woman’s right to assess her own ability to fulfill the responsibilities of caring for a dependent shaped the Court’s understanding of the right to terminate a pregnancy.

In Professor Colb’s framework, offspring selection involves the evaluation of one’s capacity as well as the conditions necessary to fulfill one’s obligations to the resulting offspring. As Fineman’s work further clarifies, in taking on the care of a dependent child, one becomes derivatively dependent in fulfilling obligations to the next generation.³³ The care and nurture of the child, situated within the family, remains, according to *DeShaney v. Winnebago County Department of Social Services*,³⁴ insulated from any obligation of the state to provide care or protection.³⁵ Therefore, in deciding whether to conceive and bear a child, a woman must consider her own possible dependency on those who will provide for her as she fulfills her obligations to care for the dependent child. Derivative dependency makes her vulnerable both materially to others within the family who must provide financial support and, as recognized by the Court in *Casey*, physically to potential violence.³⁶

²⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

³⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³¹ *Id.*

³² *Id.*

³³ *See supra* note 24 and accompanying text.

³⁴ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

³⁵ *See id.* at 201–02.

³⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 891, 897–98 (1992).

Colb's separation of the two interests in reproductive decision-making recognizes a woman's evaluations of the responsibility for the inevitable dependency of a child upon her that results from producing offspring and of her own derivative dependency that follows from assuming the obligation to care for dependent offspring as part of the interest in offspring selection protected within reproductive rights. This strand of the right to terminate a pregnancy protected in *Roe*, and then reaffirmed in later abortion cases, can be interpreted not as placing a woman's interest in opposition to the fetus, but as reflecting her need to decide whether she can fulfill her obligations to a dependent offspring for whom she will be responsible.³⁷

Bodily Integrity and the Recognition of Vulnerability

Colb's disentangling of the interest in bodily integrity from the interest in offspring selection also helps differentiate, within reproduction, between concerns about vulnerability and dependency: dependency, which is always part of creating offspring, may result from or produce vulnerability; the vulnerability that accompanies the bodily instantiation of reproductive capacity can arise independent of dependency. Separating out the interest in bodily integrity that falls within constitutional decisions about reproductive rights clarifies that each strand generates different aspects of the scope and import of protections for reproductive decisionmaking. The protection of decision-making regarding the bodily aspects of reproduction also reveals some aspects of the vulnerability attendant upon the reproductive process.

The right to procreate, the first right that is part of the cluster of reproductive rights, implicates not just the obvious interest in producing offspring, but also concerns about bodily integrity. Bodily integrity arises most clearly in the right not to be subjected to a medical procedure or other medical intervention that alters the fundamental bodily function of reproduction. The procedures themselves may be physically intrusive or have consequences for the health of the person. Even if minimally invasive or with little impact on health, sterilization requires bodily invasion and changes how the body works. In addition, by eliminating or interfering with a person's reproductive capacity, sterilization reconfigures the body in ways that may profoundly

³⁷ As the Supreme Court recognized in *Santosky v. Kramer*, 455 U.S. 745 (1982), in our constitutional scheme of rights regarding bearing and raising children, the state cannot assume, even in a proceeding to terminate parental rights, that the interests of offspring are in conflict with the interests of those who have both the rights and obligations of parenthood. *Id.* at 760 (“[T]he State cannot presume that a child and his parents are adversaries.”).

affect participation in the world, whether or not one wants to or decides to have children. Infertility may have far-reaching physical, psychological, and social consequences, some of which may produce severe vulnerability. As the Supreme Court stated in *Skinner*, “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.”³⁸ Thus protecting the right to procreate involves leaving to individuals decisions not just about having children, but also about retaining the bodily capacity to reproduce, with its attendant psychic and social meanings.

Similarly, the decision to use contraception, which implicates the right to choose not to have children, also involves consideration of the bodily aspects of seeking to conceive—concerns that implicate the nature of sexuality and the bodily consequences of pregnancy and childbirth. Both *Griswold* and *Eisenstadt* cloaked the interests at stake in the use of contraceptives within the concept of privacy.³⁹ Because the opinion of the Court addressed neither decisions about having children nor decisions about the bodily consequences of pregnancy and childbirth, *Griswold* made decisions about contraception almost mystical: as part of marriage, decisions about contraception are “intimate to the degree of being sacred,” part of “a way of life.”⁴⁰ Untethered to decisions about having children or to decisions about avoiding pregnancy and childbirth, the right to use contraception encompasses *all* intimate aspects of life connected to the use of birth control. When in *Eisenstadt*, based upon equal protection, the Court extended the right to contraception to all individuals, “each with a separate intellectual and emotional makeup,”⁴¹ whatever their marital status, it protected for all the broad interests at stake in decisions about preventing pregnancy. Thus, the breadth of the Court’s understanding of privacy protected individuals’ decisions about the bodily ramifications of reproduction.

In the abortion decisions, the right to bodily integrity as intrinsic to reproductive rights gains prominence; for *Colb*, the interest in bodily integrity is the dominant concern.⁴² In *Roe*, the Court pointed to the dangers of pregnancy and childbirth as basic concerns driving a woman’s decision regarding abortion.⁴³ In *Casey*, the Court recog-

³⁸ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

³⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

⁴⁰ *Griswold*, 381 U.S. at 486.

⁴¹ *Eisenstadt*, 405 U.S. at 453.

⁴² See *Colb*, *supra* note 1, at 1606.

⁴³ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

nized as fundamental to its reaffirmation of a woman's right to terminate a pregnancy the bodily impact of and meaning of pregnancy in her life:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.⁴⁴

Her body, along with her decision about having a child, is at stake in the decision about abortion.

Thus, the protected interest in deciding whether to create offspring exists alongside the woman's interest in the bodily meaning of that decision for her, a meaning that the Court, in affirming the holding of *Roe*, recognized as necessarily including "anxieties," "physical constraints," "pain," and "suffering." In going through pregnancy and childbirth, a woman must make "sacrifices" that the state cannot compel. Later in *Casey*, in striking down the spousal notification requirement in the Pennsylvania statute, the Court drew upon the same rationale regarding the burdens that pregnancy and birth place upon a woman:

It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.⁴⁵

⁴⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

⁴⁵ *Id.* at 896 (internal quotation marks and citations omitted).

The urge to protect a woman's bodily integrity separates this statutory burden and renders it "undue," unlike the other burdens that the Court upholds.⁴⁶

The attitude toward bodily integrity reveals differences between the Court's concern with the dependency and vulnerability that reproduction entails. In *Casey*, the Court highlighted the vulnerability created by a woman's bodily relationship to reproduction. Dependency does not create vulnerability. Vulnerability appears as "an inescapable biological fact."⁴⁷ Concomitantly, for the Court, vulnerability has no role in the creation of dependency.

Conclusion

Distinguishing between interests in creating offspring and in bodily integrity, both of which inform the Supreme Court's reproductive rights decisions, and then mapping those interests onto the dependency and vulnerability attendant upon reproduction perhaps yield some routes to new kinds of dialogue about abortion. The debate now recursively recreates the confrontation between the rights of a pregnant woman and the status of a fetus. The terms of the legal debate, while of enormous political import, often diverge from the experiences of reproductive decisionmaking. Yet, this abstract confrontation dominates discourse far removed from the legal realm. Profound yet everyday questions about reproduction get channeled into the confines of this legal discourse.

Colb's delineation of distinct but overlapping interests and the concurrent identification of the relationship of those interests to experiences of vulnerability and dependency reveal at least two important inquiries. First, this exploration of reproductive rights from the perspective of intergenerational justice clarifies that in our society individuals have no obligation to produce offspring for future generations and future offspring have no right to exist. With this understanding, we can better address the realities of intergenerational rights and obligations, especially the dependency that inevitably results from bearing and having children. In our constitutional framework governing reproduction, these rights and obligations inhere in individuals and are situated within the family. Perhaps constitutional debate and adjudication can move toward recognizing the import of

⁴⁶ *Id.* at 895. The other provisions upheld by the Court were a twenty-four hour waiting period, a requirement that certain materials be given to the woman, parental consent, and record-keeping and reporting requirements. *Id.* at 879–87.

⁴⁷ *Id.* at 896.

dependency for women who make decisions about reproduction. Also, as Fineman urges, we must address how as a society we are to deal with this dependency, now situated within the family, without ignoring the enormous obligations that those who care for dependents assume.⁴⁸

Second, Colb argues forcefully that both pro- and anti-abortion advocates share a commitment to the interest in bodily integrity underlying reproductive jurisprudence and, therefore, disputes about abortion need not be trapped in debates about when the fetus becomes a person entitled to rights that must be balanced against those of the mother. Whatever the status of the fetus, the shared concern for a woman's bodily integrity, in Colb's view, can generate greater understanding of how an unwanted pregnancy creates a threat justifying abortion.⁴⁹ Whether Colb's framework can generate this consensus, or at least recognition of shared concerns among advocates, the identification of distinct underlying interests animating the Supreme Court's reproductive rights jurisprudence reveals areas of commonality. That commonality may yield a different debate or an altered constitutional framework, however, only if the interest in bodily integrity incorporates the vulnerability of body and self that inhere in pregnancy and reproduction. While bodily vulnerability may be inevitable, how we understand and respond to that vulnerability and its threats matters in the creation of constitutional protections for reproductive decisions.

⁴⁸ See *supra* notes 24–26, 33 and accompanying text.

⁴⁹ See Colb, *supra* note 1, at 1610–11.