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Principles Governing Reproductive Freedom

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Abstract: *In the seventies, the US Supreme Court's decision in the path breaking case of Roe v/s. Wade guaranteed American women the right over their bodies and fertility. In this article, Racheal N. Pine and Sylvia A. Law enunciate the principles governing Reproductive Freedom. Though set in she American context, they universal relevance.*

Most cultures have systematically denied women an equal and autonomous voice on every issue from the election of public officials to the control of their own bodies and lives. When women have organized or spoken out, a degree of social change has followed. But these small steps forward to liberty and equality generate a powerful backlash. Indeed, it now appears that Roe's constitutional protection of the notion that women, like men, own their bodies, was only a brief historic interlude. For the foreseeable future, many women will again be denied reproductive choice and the effort to achieve an enduring guarantee of reproductive freedom will be prolonged, costly, and will demand painful compromises. It is therefore important to articulate our goals and to understand the nature of the opposition we will encounter before discussing and formulating strategies to be pursued.

A Feminist, Concept of Reproductive Freedom

A feminist concept of reproductive freedom has three components. The first is a formal recognition that the woman, rather than the state, has the right to make decisions that affect her reproduction (a principle of freedom from, state control). The second requires state even-handedness with respect to reproductive choices (a principle of government neutrality). The third and most expansive component demands a social context that affirmatively supports and enhances human freedom to make reproductive choices (a principle of reproductive liberty).

Each of these components of reproductive freedom can supported or undermined by the law Indeed, the, language of the U.S. Constitution's Bill of

Rights and subsequent amendments readily lends itself to judicial enforcement of the first two principles - non-interference, by the state in matters of individual liberty and government neutrality, to insure reproductive equality under law. However the third aspect of reproductive freedom-affirmative liberty extends beyond what (the American) Constitution traditionally has guaranteed.

Freedom from State Control

The least controversial component of reproductive freedom is the constraint on state interference with the individual's personal choice whether and when to bear a child. American culture and constitutional tradition place a special value on bodily freedom. The idea that "my body belongs to me," not to the state, expresses a fundamental value of self-determination: that people require autonomy in the decisions that affect their bodies and their persons in order to be able to participate fully in society.

To date, most courts have grounded women's reproductive autonomy on a constitutionally protected zone of personal privacy within which government may not coerce choice or restrain liberty. But the right to be free of governmental interference in the decision whether to bear a child has been defended by commentators and argued by advocates on a variety of other constitutional grounds.

For example, advocates of reproductive choice have argued that the right of bodily integrity is violated by laws that force unwanted pregnancy on women or that distort the informed consent dialogue between a woman and her physician. This argument is based on cases recognizing a constitutionally protected "liberty interest in refusing unwanted medical treatment" that in turn are based on the common law traditions that "every individual (has the right) to the possession and control of his own person" and the right to "bodily integrity...embodied in the requirement (of) informed consent....."

Other theorists have defended a woman's right to choose whether to bear a child as equality. When the state restricts, access to abortion, it is not the biological differences between men and women, but the state itself, that creates and perpetuates gender inequality. Such laws force, only women to bear the enormous burdens of unwanted pregnancy and to confront the significant risks of illegal abortion. State restrictions on abortion dramatically impair every fertile woman's capacity for self-determination and equal citizenship. In particular, such laws undermine women's ability to achieve and contribute in employment,

education and political life. Further, laws that allow abortion for certain physician-approved medical reasons reinforce the notion that motherhood is every physically fit woman's highest calling social duty, as well as the notion that women are not competent to make moral decisions. Laws restricting abortion thus provide both actual and symbolic reinforcement for traditional patterns of male dominance in society.

Constitutional prohibitions against involuntary servitude provide another ground for attacking state abortion restrictions. For example, it has been argued that forced pregnancy and childbirth, by compelling a woman to serve her foetus, creates "that control by which the personal service of one (person)...is disposed of or coerced for another's benefits which is the essence of involuntary servitude. Forcing women to be mothers or "giving foetuses a legal right to the continued use of their mothers' bodies (is)precisely (the sort of involuntary servitude that) the Thirteenth Amendment forbids".

Finally, commentators have argued that laws codifying a single view of when life begins violate the wall of separation between church and state required by constitutional prohibitions against the establishment of a state religion. In *Webster*, for example, Justice Stevens, in his dissent, concluded that a law restricting abortion and asserting that life begins at conception represented "an unequivocal endorsement of a religious tenet of some, but by no means all, Christian faiths (and) serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause...." Further, by preempting personal decisions of conscience, it has been argued that laws restricting violate the constitutional rights of some women to free exercise of religion.

Government of Neutrality on Matters Affecting Reproductive Choice

The recognition that individual women, rather than the state, possess the right to choose whether to bear a child is a necessary but insufficient step forward achieving the feminist conception of reproductive freedom. True reproductive freedom also demands that government programs and policies conform with equality norms that are distinct from those prohibiting state created or state promoted gender inequality discussed above. These equality norms prohibit any government action that burdens or coerces the exercise of a constitutionally protected choice or liberty. They require strict government neutrality not only when government acts to control reproductive choice directly, as through the criminal law, but also when it seeks to influence reproductive choices indirectly,

as through the distribution of benefits. Government evenhandedness in matters affecting reproductive choice is the hallmark of this component of reproductive liberty.

Consider a recent example. The First Amendment protects individuals' right to free speech. Suppose that the federal government were to conclude: "Because we want to protect foetal life and to stop abortions, doctors who intend to advise pregnant women about all their options including legal abortions are barred from working in health programs that receive federal funds." Under the view that the First Amendment, protects freedom of speech solely from direct state control, government has not banned speech because doctors remain free to advise patients about abortion outside the funded health program and because all women are free, in theory, to seek health care from an unrestricted Park Avenue doctor. But singling out speech about abortion for special censorship in this way violates equality norms even though the state has deprived doctors of a benefit (i.e. the opportunity to practice in a facility receiving federal funds) rather than imposed a special burden such as a criminal sanction.

The equality norms discussed here create an independent requirement of even handed treatment by government, independent, that is, from the equality-based restrictions on government interference described in the preceding section. Under these norms, government must act with neutrality in the distribution of benefits or burdens that affect the exercise of important liberties such as free speech and reproductive choice. In the above example, the requirement of government neutrality would permit doctors in subsidized family planning clinics to speak freely and equally about abortion and childbirth. It would also protect those who do so from adverse consequences.

The requirement of government neutrality on matters affecting fundamental liberties is most important in two contexts. First, it has supplied an alternative ground for invalidating government action where the claimed right of freedom from direct government control is ambiguous or unclear to the court. In such cases, the principle of neutrality requires the state to face the political consequences of failing to treat all similarly situated people equality.

Second, the principle of neutrality is vital in assuring the fairness of laws that distribute benefits as in the example discussed above. Although such a discriminatory system of subsidized speech may not violate a right to free expression where the right is conceptualized solely as a freedom from direct state

control, it surely violates norms assuring even handed treatment by government as to the content of speech.

These equality norms have been invoked by the Supreme Court where the state imposes unequal burdens on reproductive liberty, as well as where the state denies benefits to people exercising fundamental rights other than reproductive choice. But the Court has refused to invalidate discriminatory benefit programs affecting women's reproductive liberty. For example, the Court has rejected equality based challenges to laws restricting women's access to government benefits for abortion, pregnancy or abortion information, and specifically has sanctioned government bias against the exercise of the right to abortion, so long as it is implemented indirectly.

Reproductive Freedom as Affirmative Liberty

The feminist concept of reproductive freedom goes beyond both freedom from state control and the mandate of government neutrality to seek a society in which all people can make decisions regarding their reproductive lives and futures. Affirmative reproductive liberty asserts that government has the obligation to insure that people can make reproductive decisions freely. It requires subsidies for those who cannot afford the means of exercising choice, protection from the hostile acts of private parties seeking to interfere with choice, and educational, medical and social services to facilitate true choice. Affirmative liberty also contemplates insuring reproductive choice within and not outside the socio-economic context in which real choices are made. It addresses not only the right to abortion, contraception and prenatal care, but also the constraints and coercion imposed on choice by employment, financial, housing and familial circumstances, by cultural norms, biases and traditions, and by the, psychological and emotional dynamics of human relationships.

While the first two elements of reproductive freedom can and should be articulated and enforced under our Constitution, affirmative liberty demands comprehensive changes in cultural, economic and social arrangements. Specifically, affirmative reproductive liberty requires universal access to responsive, high quality health care. Millions of American women have neither public nor private health insurance to pay for contraception, abortion, prenatal care or delivery services. Even if they have money or insurance, many women live in communities that lack medical services and, particularly, abortion services. Other women have access only to medical services that subvert, rather than support, reproductive choice, whether by promoting sterilization,

discouraging abortion or placing a higher value on foetal life than on the woman's judgement.

In addition to medical services, affirmative reproductive liberty would require social and economic arrangements that make it possible to combine a satisfying work life with a commitment to parenthood. Affirmative reproductive liberty rejects the notion that parenthood is a privilege reserved to people who are married, heterosexual, physically and mentally unchallenged, and biologically fertile. It also rejects the notion that no woman is complete without motherhood. It seeks acceptance and promotion of a healthy, responsible sexuality, free of sexual coercion. It would insure that children are provided with even-handed and informative family planning and sex education.

Finally, affirmative liberty seeks pervasive change in current economic arrangements. People who cannot find work lucrative enough to meet their economic needs are not free to choose parenthood or to provide their children with the kind of nurturance every child deserves.

Opposition to Reproductive Liberty

"Abortion is the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood, and young women's sexuality are contested." The feminist claim to reproductive freedom thus provokes powerful opposition from those who adhere to the traditional view of women's sole function as mother and wife.

Historically, opposition to women's reproductive choice centered not on a concern with foetal life, but on the desire to keep women in their biologically defined and subordinate place, and on a moralistic condemnation of all non-procreative sexual activity. Today, these goals are no longer constitutionally or culturally legitimate and a professed concern with protecting foetal life dominates the debate. While some anti-choice activists sincerely believe in the personhood of the foetus, the movement's systematic hostility to the welfare of born children strongly suggests that something else is at work. Protection of unborn life has become a surrogate for other social objectives.

Nevertheless, abortion opponents persistently invoke the image of the foetus, and the image now permeates contemporary abortion discourse, due partly to the development of medical diagnostic imaging technology. Foetal imagery, even

when accurate, distorts human pregnancy by wrenching it out of its biological, historical and social context. Barbara Katz Rothman observes that "the foetus in uteri has become a metaphor for 'man' in space, floating free, attached only by the umbilical cord to the spaceship", while the pregnant woman "has become empty space." The foetal image thus serves a political function. It becomes the most potent symbol of helplessness demanding paternal protection. In its loss is condensed the multiple losses of family, economic security, national strength, motherhood that, patriarchal power under the likes of Reagan or Bush promise to revive again. "Saying the foetus" and "Saving America" go together, and they both require a strong male leader.

But beneath the rhetoric of foetal life persists the view that women are morally inferior to men or, at least, that they are "victims" of the moral treachery of "abortionists." Laws banning abortion outright or those requiring twenty four hour waiting periods, forcing doctors to make misleading and paternalistic speeches to encourage childbirth and requiring women to notify their husbands, all reflect a belief that women have neither the moral strength nor integrity to make independent moral choices with the support of those they trust.

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