

Privacy v. Equality: Beyond Roe v. Wade (1983)

In a society where women entered sexual intercourse willingly, where adequate contraception was a genuine social priority, there would be no "abortion issue" . . . Abortion is violence . . . It is the offspring, and will continue to be the accuser of a more pervasive and prevalent violence, the violence of rapism.

Adrienne Rich, *Of Woman Born* (1976)

Roe v. Wade¹ guaranteed the right to choose abortion, subject to some countervailing considerations, by conceiving it as a private choice, included in the constitutional right to privacy. In this critique of that decision, I first situate abortion and the abortion right in the experience of women. The argument is that abortion is inextricable from sexuality, assuming that the feminist analysis of sexuality is our analysis of gender inequality. I then criticize the doctrinal choice to pursue the abortion right under the law of privacy. The argument is that privacy doctrine reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split. The political and ideological meaning of privacy as a legal doctrine is connected with the concrete consequences of the public/private split for the lives of women. This analysis makes *Harris v. McRae*,² in which public funding for abortions was held not to be required, appear consistent with the larger meaning of *Roe*.

I will neglect two important explorations, which I bracket now. The first is: what are babies to men? On one level, men respond to women's rights to abort as if confronting the possibility of their own potential nonexistence—at *women's* hands, no less. On another level, men's issues of potency, of continuity as a compensation for mortality, of the thrust to embody themselves or their own image in the world, underlie their relation to babies (as well as to most else). To overlook

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these meanings of abortion to men as men is to overlook political and strategic as well as fundamental theoretical issues and to misassess where much of the opposition to abortion is coming from. The second issue I bracket is one that, unlike the first, has been discussed extensively in the abortion debate: the moral rightness of abortion itself. My stance is that the abortion choice must be legally available and must be *women's*, but not because the fetus is not a form of life. In the usual argument, the abortion decision is made contingent on whether the fetus is a form of life. I cannot follow that. Why should women not make life or death decisions? This returns us to the first bracketed issue.

The issues I will explore have largely not been discussed in the terms I will use. Instead, I think, women's embattled need to survive in a world hostile to our survival has precluded our exploring these issues as I am about to. That is, the perspective from which we have addressed abortion has been shaped and constrained by the very situation that the abortion issue puts us in and requires us to address. We have not been able to risk thinking about these issues on our own terms because the terms have not been ours. The attempt to grasp women's situation on our own terms, from our own point of view, defines the feminist impulse. If doing that is risky, our situation also makes it risky not to. So, first feminism, then law.

Most women who seek abortions became pregnant while having sexual intercourse with men. Most did not mean or wish to conceive. In contrast to this fact of women's experience, which converges sexuality with reproduction with gender, the abortion debate has centered on separating control over sexuality from control over reproduction, and on separating both from gender and the life options of the sexes. Liberals have supported the availability of the abortion choice as if the woman just happened on the fetus.³ The political right, imagining that the intercourse preceding conception is usually voluntary, urges abstinence, as if sex were up to women, while defending male authority, specifically including a wife's duty to submit to sex. Continuing with this logic, many opponents of state funding of abortions, such as supporters of some versions of the Hyde Amendment, would permit funding of abortions when pregnancy results from rape or incest.⁴ They make *exceptions* for those special occasions during which they presume women did *not* control sex. From all this I deduce that abortion's proponents and opponents share a tacit assumption that women significantly do control sex.

Feminist investigations suggest otherwise. Sexual intercourse, still

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the most common cause of pregnancy, cannot simply be presumed coequally determined. Feminism has found that women feel compelled to preserve the appearance—which, acted upon, becomes the reality—of male direction of sexual expression, as if male initiative itself were what we want, as if it were that which turns us on. Men enforce this. It is much of what men want in a woman. It is what pornography eroticizes and prostitutes provide. Rape—that is, intercourse with force that is recognized as force—is adjudicated not according to the power or force that the man wields, but according to indices of intimacy between the parties. The more intimate you are with your accused rapist, the less likely a court is to find that what happened to you was rape. Often indices of intimacy include intercourse itself. If “no” can be taken as “yes,” how free can “yes” be?

Under these conditions, women often do not use birth control because of its social meaning, a meaning we did not create. Using contraception means acknowledging and planning the possibility of intercourse, accepting one's sexual availability, and appearing non-spontaneous. It means appearing available to male incursions. A good user of contraception can be presumed sexually available and, among other consequences, raped with relative impunity. (If you think this isn't true, you should consider rape cases in which the fact that a woman had a diaphragm in is taken as an indication that what happened to her was intercourse, not rape. “Why did you have your diaphragm in?”) From studies of abortion clinics, women who repeatedly seek abortions (and now I'm looking at the repeat offenders high on the list of the right's villains, their best case for opposing abortion as female irresponsibility), when asked why, say something like, “The sex just happened.” Like every night for two and a half years. I wonder if a woman can be presumed to control access to her sexuality if she feels unable to interrupt intercourse to insert a diaphragm; or worse, cannot even want to, aware that she risks a pregnancy she knows she does not want. Do you think she would stop the man for any other reason, such as, for instance, the real taboo—lack of desire? If she would not, how is sex, hence its consequences, meaningfully voluntary for women? Norms of sexual rhythm and romance that are felt interrupted by women's needs are constructed against women's interests. Sex doesn't look a whole lot like freedom when it appears normatively less costly for women to risk an undesired, often painful, traumatic, dangerous, sometimes illegal, and potentially life-threatening procedure than to protect themselves in advance. Yet abortion policy has never been explicitly approached in

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the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality; that is, as an issue of forced sex.

Now, law. In 1973 *Roe v. Wade* found that a statute that made criminal all abortions except those to save the life of the mother violated the constitutional right to privacy.⁶ The privacy right had been previously created as a constitutional principle in a case that decriminalized the prescription and use of contraceptives.⁷ Note that courts use the privacy rubric to connect contraception with abortion through privacy in the same way that I just did through sexuality. In *Roe* that right to privacy was found "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In 1977 three justices observed, "In the abortion context, we have held that the right to privacy shields the woman from undue state intrusion in and external scrutiny of her very personal choice."⁸

In 1981 the Supreme Court in *Harris v. McRae* decided that this right to privacy did not mean that federal Medicaid programs had to fund medically necessary abortions. Privacy, the Court had said, was guaranteed for "a woman's decision whether or not to terminate her pregnancy." The Court then permitted the government to support one decision and not another: to fund continuing conceptions and not to fund discontinuing them. Asserting that decisional privacy was nevertheless constitutionally intact, the Court stated that "although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."⁹ It is apparently a very short step from that which the government has a duty *not* to intervene in to that which it has *no* duty to intervene in.

The idea of privacy, if regarded as the outer edge of the limitations on government, embodies, I think, a tension between the preclusion of public exposure or governmental intrusion, on the one hand, and autonomy in the sense of protecting personal self-action on the other. This is a tension, not just two facets of one whole right. In the liberal state this tension is resolved by demarking the threshold of the state at its permissible extent of penetration into a domain that is considered free by definition: the private sphere. It is by this move that the state secures to individuals what has been termed "an inviolable personality" by ensuring what has been called "autonomy or control over the intimacies of personal identity."¹⁰ The state does this by centering its self-restraint on body and home, especially bedroom. By staying out of marriage and the family, prominently meaning sexual

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ity—that is to say, heterosexuality—from contraception through pornography to the abortion decision—the law of privacy proposes to guarantee individual bodily integrity, personal exercise of moral intelligence, and freedom of intimacy.¹¹ But if one asks whether women's rights to these values have been guaranteed, it appears that the law of privacy works to translate traditional social values into the rhetoric of individual rights as a means of subordinating those rights to specific social imperatives.¹² In feminist terms, I am arguing that the logic of *Roe* consummated in *Harris* translates the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy.

This is my retrospective on *Roe v. Wade*. Reproduction is sexual, men control sexuality, and the state supports the interest of men as a group. *Roe* does not contradict this. So why was abortion legalized? Why were women even imagined to have such a right as privacy? It is not an accusation of bad faith to answer that the interests of men as a social group converged with the definition of justice embodied in law in what I call the male point of view. The way the male point of view constructs a social event or legal need will be the way that social event or legal need is framed by state policy. For example, to the extent that possession is the point of sex, illegal rape will be sex with a woman who is not yours unless the act makes her yours. If part of the kick of pornography involves eroticizing the putatively prohibited, illegal pornography—obscenity—will be prohibited enough to keep pornography desirable without ever making it truly illegitimate or unavailable. If, from the male standpoint, male is the implicit definition of human, maleness will be the implicit standard by which sex equality is measured in discrimination law. In parallel terms, abortion's availability frames, and is framed by, the conditions men work out among themselves to grant legitimacy to women to control the reproductive consequences of intercourse.

Since Freud, the social problem posed by sexuality has been perceived as the problem of the innate desire for sexual pleasure being repressed by the constraints of civilization. In this context, the inequality of the sexes arises as an issue only in women's repressive socialization to passivity and coolness (so-called frigidity), in women's so-called desexualization, and in the disparate consequences of biology, that is, pregnancy. Who defines what is sexual, what sexuality therefore is, to whom what stimuli are erotic and why, and who defines the conditions under which sexuality is expressed—these is-

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sues are not even available to be considered. "Civilization's" answer to these questions fuses women's reproductivity with our attributed sexuality in its definition of what a woman is. We are defined as women by the uses to which men put us. In this context it becomes clear why the struggle for reproductive freedom has never included a woman's right to refuse sex. In this notion of sexual liberation, the equality issue has been framed as a struggle for women to have sex with men on the same terms as men: "without consequences." In this sense the abortion right has been sought as freedom from the reproductive consequences of sexual expression, with sexuality defined as centered on heterosexual genital intercourse. It is as if biological organisms, rather than social relations, reproduced the species. But if your concern is not how more people can get more sex, but who defines sexuality—pleasure and violation both—then the abortion right is situated within a very different problematic: the social and political problematic of the inequality of the sexes. As Susan Sontag said, "Sex itself is not liberating for women. Neither is more sex . . . The question is, what sexuality shall women be liberated to enjoy?"¹³ To address this requires reformulating the problem of sexuality from the repression of drives by civilization to the oppression of women by men.

Arguments for abortion under the rubric of feminism have rested upon the right to control one's own body—gender neutral. I think that argument has been appealing for the same reasons it is inadequate: socially, women's bodies have not been ours; we have not controlled their meanings and destinies. Feminists tried to assert that control without risking pursuit of the idea that something more might be at stake than our bodies, something closer to a net of relations in which we are (at present unescapably) gendered.¹⁴ Some feminists have noticed that our right to decide has become merged with the right of an overwhelmingly male profession's right not to have its professional judgment second-guessed by the government.¹⁵ But most abortion advocates argue in rigidly and rigorously gender-neutral terms.

Thus, for instance, Judith Jarvis Thomson's argument that an abducted woman had no obligation to be a celebrated violinist's life support system meant that women have no obligation to support a fetus.¹⁶ The parallel seems misframed. No woman who needs an abortion—no woman, period—is valued, no potential a woman's life might hold is cherished, like a gender-neutral famous violinist's unencumbered possibilities. The problems of gender are thus under-

lined here rather than solved, or even addressed. Too, the underlying recognition in the parallel of the origin of the problem in rape—the origin in force, in abduction, that gives the hypothetical much of its moral weight—would confine abortions to instances in which force is recognized as force, like rape or incest. The applicability of this to the normal case of abortion is neither embraced nor disavowed, although the parallel was meant to apply to the normal case, as is abortion policy, usually. This parable is constructed precisely to begin the debate after sex occurred, yet even it requires discussion of intercourse in relation to rape in relation to conception, in order to make sense. Because this issue has been studiously avoided in the abortion context, the unequal basis on which woman's personhood is being constructed is obscured.

In the context of a sexual critique of gender inequality, abortion promises to women sex with men on the same reproductive terms as men have sex with women. So long as women do not control access to our sexuality, abortion facilitates women's heterosexual availability. In other words, under conditions of gender inequality, sexual liberation in this sense does not free women; it frees male sexual aggression. The availability of abortion removes the one remaining legitimized reason that women have had for refusing sex besides the headache. As Andrea Dworkin put it, analyzing male ideology on abortion, "Getting laid was at stake."¹⁷ The Playboy Foundation has supported abortion rights from day one; it continues to, even with shrinking disposable funds, on a level of priority comparable to that of its opposition to censorship.

Privacy doctrine is an ideal vehicle for this process. The liberal ideal of the private—and privacy as an ideal has been formulated in liberal terms—holds that, so long as the public does not interfere, autonomous individuals interact freely and equally. Conceptually, this private is hermetic. It means that which is inaccessible to, unaccountable to, unconstructed by anything beyond itself. By definition, it is not part of or conditioned by anything systematic or outside of it. It is personal, intimate, autonomous, particular, individual, the original source and final outpost of the self, gender neutral. It is, in short, defined by everything that feminism reveals women have never been allowed to be or to have, and everything that women have been equated with and defined in terms of *men's* ability to have. To complain in public of inequality within it contradicts the liberal definition of the private. In this view, no act of the state contributes to—hence should properly participate in—shaping the internal alignments of

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the private or distributing its internal forces. Its inviolability by the state, framed as an individual right, presupposes that the private is not already an arm of the state. In this scheme, intimacy is implicitly thought to guarantee symmetry of power. Injuries arise in violating the private sphere, not within and by and because of it.

In private, consent tends to be presumed. It is true that a showing of coercion voids this presumption. But the problem is getting anything private to be perceived as coercive. Why one would allow force in private—the “why doesn’t she leave” question asked of battered women—is a question given its urgency by the social meaning of the private as a sphere of choice. But for women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is the public for those for whom the personal is the political. In this sense, there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. We are not inviolable. Our sexuality is not only violable, it is—hence, we are—seen *in and as* our violation. To confront the fact that we have no privacy is to confront the intimate degradation of women as the public order.

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In this light, a right to privacy looks like an injury got up as a gift. Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered. For example, if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change. It is not even thought to require any social preconditions, other than nonintervention by the public. The point of this for the abortion cases is not that indigency—which was the specific barrier to effective choice in *Harris*—is well within the public power to remedy, nor that the state is exempt in issues of the distribution of wealth. The point is rather that *Roe v. Wade* presumes that government nonintervention into the private sphere promotes a woman’s freedom of choice. When the alternative is jail, there is much to be said for this argument. But the *Harris* result sustains the ultimate meaning of privacy in *Roe*: women are guaranteed by the public no more than what we can get in private—that is, what we can extract through our intimate associations with men. Women with privileges get rights.

So women got abortion as a private privilege, not as a public right. We got control over reproduction that is controlled by “a man or The Man,” an individual man or the doctors or the government. Abortion

was not decriminalized; it was legalized. In *Roe* the government set the stage for the conditions under which women gain access to this right. Virtually every ounce of control that women won out of this legalization has gone directly into the hands of men—husbands, doctors, or fathers—or is now in the process of attempts to reclaim it through regulation.¹⁸ This, surely, must be what is meant by reform.

It is not inconsistent, then, that framed as a privacy right, a woman's decision to abort would have no claim on public support and would genuinely not be seen as burdened by that deprivation. Privacy conceived as a right against public intervention and disclosure is the opposite of the relief that *Harris* sought for welfare women. State intervention would have provided a choice women did *not* have in private. The women in *Harris*, women whose sexual refusal has counted for particularly little, needed something to make their privacy effective.¹⁹ The logic of the Court's response resembles the logic by which women are supposed to consent to sex. Preclude the alternatives, then call the sole remaining option "her choice." The point is that the alternatives are precluded *prior* to the reach of the chosen legal doctrine. They are precluded by conditions of sex, race, and class—the very conditions the privacy frame not only leaves tacit but exists to *guarantee*.

When the law of privacy restricts intrusions into intimacy, it bars change in control over that intimacy. The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect. It is probably not coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor, has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition, and has protected the primary activity through which male supremacy is expressed and enforced. Just as pornography is legally protected as individual freedom of expression—without questioning whose freedom and whose expression and at whose expense—abstract privacy protects abstract autonomy, without inquiring into whose freedom of action is being sanctioned at whose expense.

To fail to recognize the meaning of the private in the ideology and reality of women's subordination by seeking protection behind a right

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to that privacy is to cut women off from collective verification and state support in the same act. I think this has a lot to do with why we can't organize women on the abortion issue. When women are segregated in private, separated from each other, one at a time, a right to that privacy isolates us at once from each other and from public recourse. This right to privacy is a right of men "to be let alone"²⁰ to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood. This is an instance of liberalism called feminism, liberalism applied to women as if we *are* persons, gender neutral. It reinforces the division between public and private that is *not* gender neutral. It is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it. It keeps some men out of the bedrooms of other men.²¹