IN A DIFFIDENT VOICE: RELATIONAL FEMINISM, ABORTION RIGHTS, AND THE FEMINIST LEGAL AGENDA

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Women’s lives are not autonomous, they are profoundly relational. This is at least the biological reflection, if not the biological cause, of virtually all aspects . . . of our “difference.” Women, and only women, and most women, transcend physically the differentiation or individuation of biological self from the rest of human life trumpeted as the norm by the entire Kantian tradition. When a woman is pregnant her biological life embraces the embryonic life of another. When she later nurtures children, her needs will embrace their needs. The experience of being human, for women, differentially from men, includes the counter-autonomous experience . . . of the emotional and psychological bond between mother and infant.1

Perhaps the central insight of feminist theory of the last decade has been that woman are [sic] “essentially connected,” not “essentially separate,” from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.2

Women are “profoundly relational”; men are not. That, according to relational feminist theory—one of the most prominent and widely accepted varieties of feminist and feminist legal thought—is the “essential” difference between them. This difference is “essential” not only in the sense that it purports to describe women generally,3 regardless of their

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2 Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 3 (1988) [hereinafter West, Jurisprudence and Gender].
3 In its most recent forms, in the hands of some of its proponents, relational feminism has
race, class, or sexual orientation, an enterprise many feminists attack,\textsuperscript{4} but also in the sense that it purports to speak of the fundamentals of human identity. According to relational feminism, it is from this basic difference that most “true” gender differences spring.


\textsuperscript{5} West, Jurisprudence and Gender, supra note 2, at 28.


\textsuperscript{7} See Mary Anne Glendon, The Probable Significance of the Bork Appointment for Issues of Particular Concern to Women, reprinted in Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court, 87 Nw. U. L. Rev. 859 (1993).
tional feminism's appeal, in fact, that at least one of its proponents in feminist legal theory claims that in its most general form it actually underwrites all the seemingly conflicting brands of nontraditional feminist legal thought. It is no stretch to state that relational feminism represents one of the most, if not the most, popular form of feminist legal theory.

We want to question this preeminence. Although we understand the appeal of relational feminism, we think it somewhat dangerous and misguided, particularly in its most prominent form. This is the view, most notably argued by Carol Gilligan in *In a Different Voice*, that women's relational qualities lead them to develop a moral perspective and moral identity different from men's. The problem with this view is not only that, as some others have noted, it may celebrate the terms of women's oppression and represent nothing more than a "slave morality," but, more importantly, that it stands in some tension with women's felt needs, particularly as expressed in the feminist legal agenda. We ex-

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8 Robin West claims that relational thought underlies not only cultural legal feminism but radical legal feminism as well. West, *Jurisprudence and Gender*, supra note 2, at 14 ("Underlying both radical and cultural feminism is a conception of women's existential state that is grounded in women's potential for physical, material connection to human life . . . "). By nontraditional feminist legal thought we refer to approaches other than liberal, "men-in-skirts," assimilationist feminism.


11 We realize, of course, that identifying reproductive rights, particularly abortion rights, with women's felt needs is not uncontroversial. Some, including some self-identified feminists, would challenge this connection. *See, e.g.*, infra pp. 880-82. To us, however, the connection is clear. We choose not to defend it in this piece for two reasons. First, many others have persuasively argued that abortion is a women's issue, *see, e.g.*, Catharine A. MacKinnon, *Abortion: On Public and Private, in Towards A Feminist Theory of the State* 184 (1989) [hereinafter MacKinnon, *Abortion*]; Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979), and we see little
explore this tension in the context of perhaps the most central plank of that agenda: reproductive rights. It is here, we believe, that relational feminism, "feminism's official story," fundamentally strains against many women's needs.

Part I lays out relational feminism by discussing its modern fountainhead: Carol Gilligan's *In a Different Voice*. Although this book diverges in some respects from other statements of relational feminism, it fairly presents the theory and is the most widely known account. We discuss Gilligan's powerful critique of existing theories of moral development and describe her concepts of the "different voice" and the "ethic of care." These twin concepts present an alternative to prevailing theories of moral identity, an alternative which is in many ways attractive and is largely associated with women.

Part II traces the implications of this alternative moral perspective in the abortion debate. By first exploring abortion theory, we show that the different voice speaks largely against abortion rights. Its communitarian underpinnings and tendency to impose moral responsibility in situations of need make defending abortion difficult. Compared to the traditional, masculinist autonomy regime, where individuals hold and assert rights, this brand of relational feminism is hostile to abortion. In this Part, we also show how the Supreme Court has invoked relational concerns in its abortion decisions. Not surprisingly, relatedness and connection appear as justifications for restricting reproductive freedom.

We then return to relational feminism's central text, Carol Gilligan's *In a Different Voice*, in order to explore its awareness of and response to this tension. We focus on the largest but most often ignored portion of the book: Gilligan's abortion studies. We show that in this context Carol Gilligan herself largely abandons relationalism or, to speak more precisely, elaborates it beyond recognition. This suggests to us that Gilligan not only senses the tension between women's "different voice" and their felt needs, but also, when pressed, recognizes the priority of women's experience over relational theory.

Point to repeating those arguments here. This paper is more concerned with the ethic of care than the ethics of abortion. Second, even if one believes that abortion is not a need of women in our society, the paper still stands as a descriptive account of the conflict between two normative positions—a particular ethical theory and a particular political goal—both considered by many to be centrally feminist. We encourage those who resist seeing abortion as a "felt need" of women to read this Article this second way. We continue to adopt the more controversial stance both to make our own normative commitments clear and to underline how much is at stake for the many women who share them.

12 Others have noted and explored this tension in other areas. See, e.g., Williams, *Deconstructing Gender*, supra note 6 (discussing employment discrimination).

13 Vest, *Jurisprudence and Gender*, supra note 2, at 15.

14 We use the terms "stands in some tension," "strains against," and similar terms later in this piece with care. Our claim is not that relational feminism makes defending abortion impossible, but just that it makes defending it more difficult and can justify it in fewer situations.
Part III addresses a question that emerges from a close examination of the implications of relational feminism for control over decisions about abortion: Are there ways of reconciling relational feminism to women’s needs? We conclude that proposed accommodations salvage relational feminism at the cost of making it incoherent.

Our overall aim is to question the prominence of relational feminism by showing its tension with many women’s felt needs. We choose abortion as the context for our inquiry for two reasons: first, it seems to us to lie near the center of nearly any conception of women’s needs and, second, it points out a cruel irony the theory may entail. If women’s relationalism results from their reproductive capacities, as the opening quotations suggest, then the theory cruelly constricts reproductive freedom in the name of those same capacities. Biology once again becomes destiny. We think it important to challenge relational feminism, especially in legal theory, because it can pose obstacles to responding to women’s needs.

Yet in challenging relational feminism, we do not mean to endorse its opposite. If nothing else, relational feminists and others have convinced us that traditional liberal rights-talk contains too many problems for women whole-heartedly and uncritically to adopt it. Instead, in our conclusion we argue that any feminist theory seeking to inform law should find its roots in and derive its insights from a feminist politics, in particular a politics that looks to women’s actual needs, experience, and history of oppression. Any notion of women’s psychology, morality, epistemology, or general ways of thinking that largely ignores the politics of social construction is, we believe, doomed to mistake difference for dominance and relation for subordination. As relational feminists argue, conversations about legal issues should include women’s voices (whether they are “different” or not) but these voices should be ones that reflect women’s own desires and needs, not the desires and needs embedded in the roles that men have given them.

I. THE ETHIC OF CARE

In the course of selecting women for a study of the relationship between moral judgment and action, Carol Gilligan began to see a gap in
existing theories of moral development. Although these theories described some moral decisionmaking well, they failed to explain at all other aspects of everyday moral decisionmaking. As Gilligan systematically explored these gaps, she found that existing models captured one moral viewpoint, while totally overlooking another. This blindness to alternative moral perspectives led to both descriptive and normative failures in the existing theories. To the extent existing theories failed to explain how people actually made moral decisions, they misdescribed much important human experience. More importantly, to the extent these theories devalued the approaches to identifying and solving moral problems that they overlooked—judging them as underdeveloped or otherwise inadequate, instead of seeing them as valid alternative moral perspectives—they may have prescribed for all moral decisionmaking a framework suitable for only a part, or imposed on every moral agent an approach with no more authority than others. To Gilligan, existing moral developmental theory represented a kind of ethical imperialism.

Gilligan’s unhappiness with these theories was sharpened by the gender implications their blindness entailed. Since the overlooked moral framework was characteristic of women, existing theories not only misrepresented women’s experience but also devalued it. In particular, existing theories, particularly those of Freud, Piaget, and Kohlberg, all placed women at a lower level of moral development than men. Under these existing theories, women were thought not to develop differently, but less well. To many of Gilligan’s readers, ethical imperialism was bad enough by itself, but what really angered them was that it both re-

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16 GILLIGAN, DIFFERENT VOICE, supra note 6, at 1; Carol Gilligan, Moral Orientation and Moral Development, in WOMEN AND MORAL THEORY 19 (Eva Feder Kittay & Diana T. Meyers eds., 1987) [hereinafter Gilligan, Moral Orientation].

17 GILLIGAN, DIFFERENT VOICE, supra note 6, at 5-23; Gilligan, Moral Orientation, supra note 16, at 20-21.

18 GILLIGAN, DIFFERENT VOICE, supra note 6, at 2; Gilligan, Moral Orientation, supra note 16, at 20-21.

19 Although Gilligan, unlike some of her followers, has never claimed that the different voice is a “woman’s voice,” GILLIGAN, DIFFERENT VOICE, supra note 6, at 2 (“The different voice I describe is characterized not by gender but by theme.”); see Joan C. Tronto, Beyond Gender Difference to a Theory of Care, 12 SIGNS 644, 644-45 (1987), she does claim that it is “associated” with women empirically. GILLIGAN, DIFFERENT VOICE, supra note 6, at 2; Gilligan, Moral Orientation, supra note 16, at 22. In her later work, Gilligan more fully describes what the empirical association consists of. See infra pp. 869-70.

20 GILLIGAN, DIFFERENT VOICE, supra note 6, at 6-7, 11 (discussing Freud); id. at 10 (discussing Piaget); id. at 18-22 (discussing Kohlberg).

21 As Gilligan notes: “The disparity between women’s experience and the representation of human development, noted throughout the psychological literature, has generally been seen to signify a problem in women’s development.” GILLIGAN, DIFFERENT VOICE, supra note 6, at 1-2.

22 GILLIGAN, DIFFERENT VOICE, supra note 6, at 7 (discussing how Freud explained “women’s developmental failure”); id. at 10 (noting Piaget’s finding that “the legal sense, which Piaget considers essential to moral development, ‘is far less developed in little girls than in boys’”); id. at 18 (“Prominent among those who . . . appear to be deficient in moral development when measured by
flected and arguably reinforced patriarchy. Moral developmental theory, it appeared, was just another manifestation and another tool of traditional (and oppressive) gender politics.

Gilligan's own work represents a direct response to the most recent in this long line of theories, that of Lawrence Kohlberg, a colleague of hers at Harvard. In Kohlberg's view, full human moral development proceeds through six well-defined stages. In the first two stages, people identify morality with their own private needs and wants. These two stages represent a "preconventional" phase of moral thinking in which people judge actions according to their own desires rather than according to any shared, social standards of appropriate moral behavior. In stages three and four, people come to recognize that social norms, not their own self-interests, define morality. These two stages represent a "conventional" phase of moral thinking in which individuals believe that prevailing social norms morally bind them. In the last two stages, on the other hand, people come to question and criticize these social norms and thus arrive at the highest level of moral development. People in this "postconventional" phase reason according to abstract notions of equality and universal right. To Kohlberg, postconventional moral thinking is the most fully developed because it provides a perspective from which to evaluate not only one's own desires but also prevailing social prac-

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Kohlberg's scale are women, whose judgments seem to exemplify the third stage of his six-stage sequence."

23 See, e.g., Sherry, Civic Virtue, supra note 6, at 581-82; West, Jurisprudence and Gender, supra note 2, at 1-4.


25 Gilligan sketches Kohlberg's theory in DIFFERENT VOICE, supra note 6, at 18-22. See supra note 24 for Kohlberg's own writings. We discuss Kohlberg as Gilligan describes him both because her description is largely accurate and because to a large extent her description—which accurate or not—defines the opposition. For our purposes, Kohlberg is less important than what, largely through Gilligan, he has come to represent.

26 GILLIGAN, DIFFERENT VOICE, supra note 6, at 72-73.

27 Id.

28 Id.
What troubled Gilligan most was not the particular path of moral development that Kohlberg described, but rather its gender implications. Under Kohlberg's scale, women tended to progress no further than stage three, only halfway through the six stages of full moral development. Men, on average, got further. In a strong sense, then, women were morally inferior to men.

Gilligan challenges Kohlberg's model in two ways. First, she questions Kohlberg's methodology. Like Freud and Piaget before him, Kohlberg generalized from purely male experience. In fact, Kohlberg was in one sense even worse than his predecessors. Although Freud and Piaget had viewed women's experience as secondary to men's, they had at least studied women. Kohlberg, however, completely excluded women from his studies. If there was any gender difference, Kohlberg's methodology was designed to overlook it.

More importantly, Gilligan challenges the substance of Kohlberg and his predecessors' theories. Her observation of an association between moral outlook and gender leads her to explore and describe an approach towards moral reasoning that they devalue. That approach articulates moral problems differently, but no less well, than the traditional voice. In terms of gender, then, Gilligan agrees—but only partially—with the judgment of her predecessors: women as a group do perform relatively poorly according to traditional models of moral development. But, she adds, that should be no surprise since these yardsticks measure only male ways of thinking. Since the prevailing models of moral devel-

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29 Id. at 73 ("[P]ostconventional judgment adopts a reflective perspective on societal values.").
30 Id. at 18.
31 As Gilligan describes it: "The penchant of developmental theorists to project a masculine image, and one that appears frightening to women, goes back at least to Freud, who built his theory of psychosexual development around the experiences of the male child that culminate in the Oedipus complex." Id. at 6.
32 Perhaps Piaget was most guilty of this bias since he deliberately overlooked the gender differences his research uncovered: Piaget's work on the moral judgment of the child illustrates these problems since he defined the evolution of children's consciousness and practice of rules on the basis of his study of boys playing marbles, and then undertook a study of girls to assess the generality of his findings. Observing a series of differences both in the structure of girls' games and "in the actual mentality of little girls," he deemed these differences not of interest because "it was not this contrast which we proposed to study." Girls, Piaget found, "rather complicated our interrogatory in relation to what we know about boys," since the changes in their conception of rules, although following the same sequence observed in boys, did not stand in the same relation to social experience. Nevertheless, he concluded that "in spite of these differences in the structure of the game and apparently in the players' mentality, we find the same process at work as in the evolution of the game of marbles."

33 GILLIGAN, DIFFERENT VOICE, supra note 6, at 18; Gilligan, Moral Orientation, supra note 16, at 22.
34 GILLIGAN, DIFFERENT VOICE, supra note 6, at 18; Gilligan, Moral Orientation, supra note 16, at 22.
35 But see Catherine G. Greeno & Eleanor E. Maccoby, How Different is the "Different Voice"?, 11 SIGNS 310 (1986) (discussing empirical research).
opment generalize human moral reasoning from male experience, it should be no news that women fare poorly by them.

Gilligan best describes the different voice in a study exploring differences in moral reasoning between girls and boys. In this study, Gilligan takes one of Kohlberg's hypotheticals and asks both boys and girls to describe and resolve the dilemma it presents. The hypothetical asks whether a man named Heinz, who cannot afford a drug his wife needs to live, should steal it from a druggist. Gilligan finds that boys and girls tend to approach the problem quite differently. In her book, she describes each sex's response by exploring in detail the responses of two children, Jake and Amy, whose approaches typify the two different ways of thinking.

Jake has no doubt that Heinz should steal from the druggist. To him, the hypothetical pits two protected rights, the right to life and the right to property, against one another. Jake ranks the two, finds that the right to life trumps, and uses that result to justify the decision to steal. He approaches the dilemma at a level of pure abstraction where, for example, whether Heinz loves his wife matters not at all. Jake, in fact, mentions that the moral problem is "sort of like a math problem with humans."

Amy approaches the problem quite differently. First, she is much more tentative and uncertain in her approach. When directly asked whether Heinz should steal the drug, she equivocates. She conceptualizes the situation more open-endedly and suggests alternatives to stealing, like borrowing money, making money, or just talking the druggist into a reasonable accommodation, all of which would pull the horns of the dilemma. Second, Amy's specific proposals attempt to resolve the conflict by harmonizing the concerns of all the parties. She proposes actions that would make the conflict more apparent than real. Third, Amy's initial identification of the problem is different from Jake's. Instead of seeing a conflict of irreconcilable rights, she sees a failure of human connection. To her, the moral problem lies primarily in the

36 Gilligan, Different Voice, supra note 6, at 25-39.
37 There are several gender-related aspects of the hypothetical to which no one, to our knowledge, has yet paid attention. First, notice that it gives the man, Heinz, a name, while it refers to the sick woman only as "his wife." Id. at 25. Second, notice that it places a man in the active role—caretaker responsible for his sick spouse—while relegating the woman to a completely passive status. The extent to which the two children identify with the character of the same gender could well distort their responses to the question. It would be interesting to present the hypothetical with different gender-related and power-related pairs and see if the same answers were given. For example, if "Heidi" had to save her sick husband, or her children, would Jake and Amy have reacted the same way?
38 Id. at 26.
39 Id.
40 Id. at 28 (characterizing response as "evasive and unsure").
41 Id.
42 Id.
druggist's failure to respond to human need.\textsuperscript{43}

According to Kohlberg's scale of moral development, Amy scores below Jake. Her blindness to the conflict of formal rights, not to mention her inability to determine the correct priority between them, places her a full stage lower than Jake in terms of moral development.\textsuperscript{44} Gilligan, however, redescribes Amy's response as reflecting a completely different type of moral insight, not a less developed one. To Gilligan, Amy's hesitancy and her focus on alternatives to stealing that would support and sustain relationships between people reveal her moral virtue, not any immaturity of judgment. Instead of simply ordering conflicting individual rights, as Jake does and a typical boy would, Amy, like many girls, struggles to harmonize competing personal responsibilities. She avoids describing the moral dilemma in the abstract and formal terms Jake uses, and instead explores the problem through narratives designed to respect and respond to the particular human context of the situation. Instead of applying impersonal rules derived ultimately from autonomy rights, Amy uses the characters' specific relationships with one another to guide her to a resolution. Her focus on responsibilities in relationships contrasts sharply with Jake's focus on rights and rules. In short, while Amy and many girls follow what Gilligan terms an "ethic of care," Jake and most boys pursue a "logic of justice."\textsuperscript{45} As Gilligan summarizes the difference: "[I]n Heinz's dilemma these two children see two very different moral problems—Jake a conflict between life and property that can be resolved by logical deduction, Amy a fracture of human relationship that must be mended with its own thread."\textsuperscript{46}

In another study, this one of college students, Gilligan aligns these differences in moral reasoning with different conceptions of the self. In this study, Gilligan analyzes violence in stories written by college students in response to seemingly neutral pictures.\textsuperscript{47} She discovers significant differences in the types of situations that lead men and women to report violence. For example, in response to a seemingly tranquil picture of a couple sitting on a bench next to a river, more than one in five men wrote stories containing some degree of violence, while none of the women did.\textsuperscript{48} One man, for instance, writes of walking across the ice on the river on a dare from his roommate. Part-way across, he breaks through the ice and starts to drown, all the while realizing that his roommate and his own fiancee, the couple on the bench, hate him and are watching him die. To make matters worse, he realizes that they will not only marry after his death but will probably finance the wedding out of his life insur-
Women's stories, by contrast, tend to turn violent in response to depictions of impersonal achievement and competition. In response to one picture showing two women in white coats working in a laboratory, one watching the other, a woman wrote of a "bitchy Miss Hegstead," a high school chemistry teacher, who was publicly praising Jane, the "model" student in her class, unaware that Jane was using the lab equipment at that very moment to make arsenic with which to poison her coffee.

To Gilligan, men's tendency to describe violence in situations of intimacy and women's tendency to describe violence in situations of achievement point to differences in how men and women conceive of personal identity. Women, she believes, define themselves through connection to others, while men define themselves by separation. Isolation and standing out thus threaten women because they represent the breaking of the ties that define them. Intimacy, on the other hand, represents the greatest threat to men because it destroys the autonomy through which they achieve self-definition. While women find identity in connecting with others, men find it in competing with and separating themselves from others. For women, identity springs from relationship and closeness; for men, from separateness and distance.

These differences in moral reasoning and in identity lead to two further differences. First, men and women see human society organized in different terms. Whereas women see individuals as constituted by a web of interconnection with others, as nodes defined by intersecting lines of relationship, men see the reverse. To men, the nodes come first. In other words, to men, the web of society has no meaning apart from the particular autonomous individuals who comprise it. Second, women experience social interaction in terms of care and connection; while men experience it in terms of violence, confrontation, and "explosive connection."

All these differences lead men and women not only to reason through and resolve moral dilemmas differently, but to identify and conceptualize the dilemmas differently in the first place. Since men's sense

49 Id.
50 Id. at 41.
51 Id. at 41-42.
52 Id. at 42-43.
53 Id. at 42 ("[T]he danger women portray in their tales of achievement is a danger of isolation, a fear that in standing out or being set apart by success, they will be left alone.")
54 Id. at 43-44 ("[T]he prevalence of violence in men's stories, its odd location in the context of intimate relationships, and its association with betrayal and deceit [indicate] a problem with connection that leads relationships to become dangerous and safety to appear in separation.")
55 Id. at 35.
56 Gilligan, Moral Orientation, supra note 16, at 25 ("[T]he two cross-cutting perspectives . . . focus attention on different dimensions of the situation, creating a sense of ambiguity around the question of what is the problem to be solved.")
of identity leads them to fear, above all else, losing their autonomy to others, while women's sense of identity leads them primarily to fear losing their connections to others, men are likely to find moral problems in situations of oppression and women in situations of abandonment. Thus each perspective foregrounds different aspects of a particular situation.\[^{57}\]

Gilligan’s own characterization of these differences, especially in her later writings, is not quite so blunt. She never claims, for example, that all women focus on care and all men on justice. Although she sees an

\[^{57}\] Other scholars have challenged many of Gilligan’s individual findings as well as her overall theory. First, many have questioned the integrity of her methodology. As one feminist critic has described it:

[The book] draws conclusions about women in general based, first, on an analysis of two eleven-year-olds and a study of a small sample of Harvard students—neither group representative of society at large—and, second, a study of women making abortion decisions, for which there is clearly no adequate control group.


Second, others have accused Gilligan of confusing the relevant categories. Peter Lifton argues that there may be a relationship between the different voice and gender, but not between the different voice and sex, as he believes Gilligan claims. Peter D. Lifton, *Individual Differences in Moral Development: The Relation of Sex, Gender, and Personality to Morality*, 53 J. PERSONALITY 306, 329-30 (1985). Joan Tronto, *supra* note 19, at 650-51, and Carol B. Stack, *The Culture of Gender: Women and Men of Color*, 11 Signs 321, 322-24 (1986), both question whether Gilligan’s insights might apply to subordinated classes generally—whether they be racial, economic, or sexual—not just to women. If Gilligan’s insights do apply more generally, then there is reason to question identifying the different voice with women.

Third, many critics accuse Gilligan of essentializing women and defining gender difference in a masculinist way. In this view, Gilligan practically defines women by their different voice. The ethic of care represents the authentic path of all women’s moral development. Schroeder, *supra* at 1137-47; Williams, *Dangerous Supplement*, *supra* at 69 (describing Gilligan’s *In a Different Voice*, along with other works of difference feminism as “essentialist formulations”). As John Broughton notes, this essentialism reiterates some of the very same qualities Gilligan describes as masculinist:

Gilligan’s separation and sharp contrast of “male” and “female” normative ethics and metaethics seems, in her own terms, extremely “masculine” in its emphasis on difference and boundary, its abstraction of the mind from life, and its tendency to essentialize gender, removing it from the context of relationships, discourse, culture, societal structure, and processes of historical formation. She subscribes to the very decontextualized binary logic that elsewhere she eschews as the false consciousness of a mystifying male moiety.


Gilligan implicitly admitted the force of some of these charges in the design of her follow-up studies. Remarks of Carol Gilligan, in Isabel Marcus et al., *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 76-78 (1985) [hereinafter Mitchell Lecture] (outlining study of inner-city subjects). Gilligan’s description in her later writings of the distribution of the different voice between men and women, see infra pp. 869-70, may also reflect some sensitivity to these particular criticisms.
“association” between moral orientation and gender, it is not one so tight. Instead, Gilligan suggests that one-third of men and women combine both moral perspectives in their thinking while two-thirds of each sex focus exclusively on one. The great difference between men and women lies in the direction and uniformity of their moral focus. The two-thirds of men who focus, focus exclusively on the justice perspective. The two-thirds of women who focus, on the other hand, focus in equal numbers on justice and on care. In other words, although an equal proportion of women focus on justice as focus on care, the care focus is completely absent from men. Thus, the ethic of care is “associated” with women not because it characterizes all women’s or even most women’s reasoning—it does not—but because the people whose reasoning it does characterize are all women. In one sense, then, the ethic of care is no more a women’s perspective than is the logic of justice since equal numbers of women focus on each. But the ethic of care does represent a woman’s perspective in the sense that no men possess it.

The upshot of these observations for our purposes lies in the competing moral (and, ultimately, political) visions that they signify. On the one hand, women tend to experience the world as connected by a web of lateral relationships and thus see themselves as inseparable parts of a community. On the other, men tend to experience the world as ordered by hierarchy and to see themselves as autonomous, unconnected individuals. To women, the community constitutes the individual; to men, the reverse. The different voice calls for a communitarian, nonhierarchal, responsibility-driven social order. The masculine voice yearns for Kant. Much of contemporary feminist legal thought claims that the present legal order privileges the perspective of these Kant “wanna-bes” and silences the discrete perspective represented by women’s different voice.

II. TALK ABOUT ABORTION

Much of the legal scholarship that has used Gilligan’s work points to her discussion of the hypothetical moral dilemma of Heinz and the druggist to illustrate a central contrast between male and female forms of moral reasoning. Virtually none of the legal scholarship, however, has dealt with the actual moral question that occupies a far longer section of In a Different Voice: accounts of various women’s struggles with the

59 Id.
60 Id.
61 The masculine voice is neo-Kantian insofar as it values formalism, equality, universalizability, and autonomy. See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (H. Patton trans., 1964). Kohlberg, in fact, expressly states that the highest stage of moral development in his theory is Kantian. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT, supra note 24, at 337.
question whether to have an abortion.\textsuperscript{62}

Gilligan is concerned with how women, in an environment in which early abortion is a constitutional right,\textsuperscript{63} make the personal, moral decision whether to end a pregnancy. She shows how women's distinctive moral reasoning—which focuses on connections with and responsibility to others—is particularly engaged by the abortion decision, because abortion necessarily involves the termination of a paradigmatic "attachment."\textsuperscript{64} But as Gilligan herself recognizes, women's moral reasoning does not take place in a vacuum: it is powerfully shaped by, among other things, the message conveyed by the legal culture and women's felt needs. The existence of a constitutional right to abortion likely influences women's understanding of themselves and of their moral responsibilities. Indeed, in \textit{Casey}, the Court recognized precisely this sort of reliance on the \textit{Roe} regime: "[F]or two decades of economic and social development, people have organized intimate relationships and made choices that define their view of themselves and their places in society, in reliance on the availability of abortion."\textsuperscript{65}

Our basic conclusion is that "different voice" feminism is peculiarly ill-equipped to offer a defense of freedom of choice.\textsuperscript{66} We begin by showing how both moral and legal justifications for abortion rights have centered on the importance of bodily and decisional autonomy. Next, we show how both moral and legal justifications for stripping women of decisional freedom have often rested on precisely the celebrations of connectedness, responsibility, and community that drive "different voice" moral reasoning. We conclude by examining how Gilligan confronts this dissonance.


\textsuperscript{63} The legal backdrop against which \textit{In a Different Voice} was researched and published was set out in \textit{Roe v. Wade}, 410 U.S. 113 (1973), which had held that prior to viability, the decision whether to have an abortion rested with the woman and her doctor (although, in the second trimester, the states were permitted to regulate abortion to protect the health of the woman). Although that regime was modified somewhat in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 112 S. Ct. 2791 (1992), see infra pp. 884-85, \textit{Casey} concluded that "the essential holding of \textit{Roe v. Wade} should be retained and once again reaffirmed." 112 S. Ct. at 2804.


\textsuperscript{64} Gilligan, \textit{Different Voice}, supra note 6, at 59. See also Mitchell Lecture, supra note 57, at 38.

\textsuperscript{65} 112 S. Ct. at 2809.

\textsuperscript{66} "Ill-equipped" does not mean that the different voice can never defend abortion but only that it must often strain to do so and cannot offer as general and adequate a defense as can autonomy. Our claim is only that the moral framework the different voice brings to the abortion debate makes defending abortion more difficult, not impossible.
A. Abortion and the Autonomous Voice

The central legal question in the abortion debate is who controls the decision to terminate a pregnancy. There are obviously a variety of conceivable answers, but most of those that have actually been advanced focus on three potential classes of decisionmakers: the pregnant woman alone; the pregnant woman in consultation with (and perhaps with the consent of) some other defined persons (such as her doctor or her family); and finally, the community through the enactment of categorical rules. With regard to this last category, the rules enunciated by different communities might well vary—from rules that actually enhance individual control over the abortion decision, through statutes that permit certain abortions but not others, to some recently enacted statutes that criminalize virtually all abortions unless they are performed to save the life of the mother.

Approaches that place control over the determination to end a pregnancy in each individual woman virtually always rest on arguments from

67 A community might subsidize abortions in order to enable a woman who otherwise could not afford one to obtain it. New York City, for example, allocates city funds to pay for abortions that cannot otherwise be funded under state law. See Susan Chira, On Issues for Women, It’s a Matter of Nuances, N.Y. TIMES, Aug. 26, 1989, at A25, col. 5, A28, col. 2. In New York, state law restricts public funding to those women seeking medically necessary abortions who are eligible for Medicaid. New York City fills the resulting gap by funding elective abortions, even for those women who earn above the Medicaid limit. Id.


States' refusals to facilitate early abortions take many forms. The use of public facilities is often prohibited, see, e.g., KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1990); Mo. Ann. Stat. § 188.215 (Vernon Supp. 1991), as is the use of public funding for legal assistance relating to abortion rights, see, e.g., N.C. GEN. STAT. § 7A-474.3(c)(1) (1989); 18 PA. CONS. STAT. ANN. § 3215(i) (1991). Cf 45 C.F.R. § 1610.1(i) (1990) (prohibiting affiliates of the Legal Services Corporation from providing legal assistance relating to abortion rights, regardless of the source of such funding).

69 See, e.g., Act of Mar. 19, 1990, Guam Pub. L. No. 20-134 (to be codified at 9 GUAM CODE ANN. §§ 31.21 and 31.22); LA. REV. STAT. ANN. § 14:87 (West 1992). In Louisiana, an exception is made in cases where the physician terminates a pregnancy which is the result of rape or incest, providing the woman has filed a timely report to law enforcement officials and submitted to a physical examination. Id.

Indeed, one can imagine, albeit not in the contemporary United States, a regime in which the community, rather than the woman, had the authority to force the termination of a pregnancy. See Tr. of Oral Arg. at 21-22, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (discussing whether the substantive due process protection afforded a woman would prevent the state from combating overpopulation by requiring her to have an abortion); cf. Julie Jimmerson, Note, Female Infanticide in China: An Examination of Cultural and Legal Norms, 8 UCLA PAC. BASIN L.J. 47, 71-75 (1990) (describing Chinese forced abortion policies).
principles of autonomy,\textsuperscript{70} expressed both in decisional and spatial terms.\textsuperscript{71} In this section, we first delineate the essentially philosophical arguments based on autonomy that have justified the \textit{morality} of women's decisions to end pregnancy. We then turn to how those arguments recur throughout the Supreme Court's case law upholding the woman's right to decide.

1. \textit{Violinists, Samaritans, and Intruders}.—Perhaps the most celebrated justification of a woman's moral right to abortion appears in Judith Thomson's \textit{A Defense of Abortion}.\textsuperscript{72} Thomson's article represents

\textsuperscript{70} We are aware of only two attempts to defend abortion in relational terms. \textit{See Richard Goldstein, Mother-Love and Abortion} (1988); Robin West, \textit{The Supreme Court 1989 Term—Forward: Taking Freedom Seriously}, 104 Harv. L. Rev. 43 (1990). Goldstein argues that the pregnant woman and the fetus should be viewed as a single relational whole, a "dyad," to which the state should grant autonomy. In practical terms, this means recognizing the woman as the "appropriate and exclusive representative of the dyad with the decisional capacity and power to determine its future." \textit{Goldstein, supra}, at 62-63. In other words, Goldstein would give half the dyad the sole power to decide to sever the relationship and end the existence of the other half. To a relationalist who doubted that everyone else actually behaved relationally, however, this trust would appear tremendously naive. One might fear that recognizing the woman as the sole representative would in many cases undercut relationalism because it would invite self-dealing in a world where individual autonomy and self-interest have some play. That we aspire for fiduciaries to behave selflessly does not mean that they do so, especially in the absence of legal control and reinforcement. Aspirational relationalists might well argue that the only way to protect the dyadic relationship in a world where relationalism often comes under pressure is to regulate abortion.

\textsuperscript{71} \textit{See Bowers v. Hardwick}, 478 U.S. 186, 203-04 (1986) (Blackmun, J., dissenting) (explaining the right to privacy as involving "two somewhat distinct, albeit complementary lines"—"a privacy interest with reference to certain \textit{decisions} that are properly for the individual to make" and "a privacy interest with reference to certain \textit{places} without regard for the particular activities in which the individuals who occupy them are engaged") (emphasis added).

\textsuperscript{72} Judith Thomson, \textit{A Defense of Abortion}, 1 Phil. & Pub. Aff. 47 (1971). Donald Regan makes a very similar argument in Regan, \textit{supra} note 11.
a particularly pure form of autonomy-talk because, unlike other defenders of women’s autonomy—who counterpose the woman’s interests against the interests of a not-yet-human fetus—Thomson is willing to assume that the fetus is every bit as human as the pregnant woman. Nonetheless, Thomson argues that the pregnant woman should retain the right to end her pregnancy.

Thomson’s argument centers on a powerful analogy. Imagine, she suggests, waking up in a hospital and finding yourself attached to a famous violinist who must share your kidneys or die. Are you morally obligated to continue to provide life support for him? Thomson suggests that the answer is clearly “no.” To remain hooked into another person—for even one hour, let alone nine months—requires one to “make large sacrifices to sustain the life of another who has no right to demand them.” The only basis for morally requiring this degree of self-sacrifice, Thomson contends, is that the person undertaking such a “special responsibility” has voluntarily “assumed it, explicitly or implicitly.” In short, in Thomson’s world, moral obligation is the product of autonomous individual choice.

Moreover, Thomson is careful to limit the causal links that will render life-sustaining obligation as voluntarily undertaken. She rejects the idea that the decision to engage in consensual sexual intercourse constitutes a voluntary commitment to preserve the life of any fetus conceived as a result of that intercourse. She attacks this idea with a reductio ad absurdum:

If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, “Ah, now he can stay, she’s given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle.”

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73 Thomson, supra note 72, at 48.
74 At the end of her article, Thomson notes one consequence of her position: although the woman should possess the right to end her pregnancy, she does not enjoy a similar right to cause the death of the fetus. Id. at 66; see also Regan, supra note 11, at 1573-75.
75 Thomson, supra note 72, at 49. Regan, supra note 11, at 1585-86, shows that there is clearly no legal obligation to provide physically invasive life-support, even when the needy recipient is in fact a family member. Id. at 1585 n.21. Family members are one of the few classes of persons with regard to whom the law is sometimes willing to impose obligations without respect to voluntariness. See infra p. 875.
76 Thomson, supra note 72, at 59-60.
77 Id. at 49.
78 Id. at 64. For a catalogue of the “large sacrifices” demanded during pregnancy and childbirth, see Regan, supra note 11, at 1579-83.
79 Thomson, supra note 72, at 65.
80 Id. at 57-59.
It would be still more absurd to say this if I had had bars installed outside my windows, precisely to prevent burglars from getting in, and a burglar got in only because of a defect in the bars.\footnote{Id. at 58-59.}

There are two things going on in this analogy. First, of course, is the contention that voluntarily performing a discrete action (in the example, opening the window to get air; in the context of abortion, engaging in sexual intercourse) cannot be equated with consenting to all potential consequences of that action, particularly when the actor has taken reasonable steps to avoid the consequences (such as putting bars on the windows or using contraceptives). But just as important is the implicit argument that the equation is unjustified because of the extraordinary costs it would impose on actors' autonomy. Telling people that opening the window to get a breath of fresh air obligates them to welcome as permanent guests any intruders who make it in through the window is likely to dissuade people from breathing fresh air, surely an everyday part and pleasure of life. So, too, telling women that they must make the "large sacrifices" of carrying a pregnancy to term as the (ultimately unavoidable) price of sexual activity is likely to burden their choice whether to engage in such activity. The consequences are simply too large for the voluntary act to bear. "You have," Thomson tells us, "your own life to lead,"\footnote{Id. at 64.} and if "you simply cannot see giving up so much of your life to the sustaining of" another person's,\footnote{Id.} there is nothing immoral in refusing to continue to aid him.

Put simply, Thomson's hypothesis is that prohibiting abortion requires of women that they act involuntarily as Good Samaritans for a class of persons: unwanted fetuses.\footnote{See id. at 62-64.} Nothing in mainstream moral reasoning, she argues, requires such an undertaking: "Indeed, with one rather striking class of exceptions, no one in any country in the world is legally required to do anywhere near as much as this for anyone else."\footnote{Id. at 63.}

And as Donald Regan explains, even within that "obvious" class of exceptions—presumably parents—there is a far greater degree of volition with regard to the actual burdens imposed, since all of them can be avoided by relinquishing responsibility over the child to other parties who will provide the necessary care.\footnote{See Regan, \textit{supra} note 11, at 1597-98.} No one, in short, is required, either by law or by morality, to remain involuntarily for long periods of time in a samaritan relationship. Rather, individuals retain their essential separation from others as a central aspect of their control over their own personhood.
Thomson’s argument, moreover, implicitly uncovers a rhetorical confusion within the abortion debate. As traditionally understood, the moral issue of abortion pits the fetus’s right to life against the right of the woman to control her life-choices. The moral interests of one autonomous being appear to weigh against those of another. In Gilligan’s terms, this traditional framework of analysis expresses a masculinist, autonomist construction of the abortion issue. Some feminists have attacked the public abortion debate on exactly this ground. Thomson argues implicitly, however, that this framework does not reflect autonomy concerns at all. Rather, by exposing the right to life as actually a right to support from and connection to another person, who may not wish to provide support or connection—a right, in other words, not to life but to have a Good Samaritan on hand—Thomson reveals that the traditional construction of the abortion debate is deeply relational. The rhetoric of a “right to life” may sound in autonomy but the reality—a right to support, nourishment, and connection—is exactly the opposite. Thus, the traditional pro-life stance is not masculinist, as many of its critics claim, but “caring” instead.

2. The Rhetoric of Self-Definition in the Supreme Court.—These essential aspects of the debate over the morality of abortion—the large sacrifices imposed by compulsory pregnancy, the interference with self-definition, and the importance of choice and control over oneself—echo throughout the Supreme Court’s abortion jurisprudence, particularly as a justification for striking down restrictions on women’s ability to determine for themselves whether to end their pregnancies. The language of autonomy has provided the central rationale for protecting individual women’s control over the abortion decision.

In Roe v. Wade, the Court located within the Fourteenth Amendment’s “concept of personal liberty” a right to privacy “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” In identifying this right, the Court stressed the infringements on a woman’s liberty that an unwanted pregnancy would entail:

Specific and direct harm medically diagnosable even in early pregnancy may force upon the

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90 See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 98 (1987). Other self-identified feminists go further and actually oppose abortion because they claim it operates primarily to expand men’s freedom to ignore their responsibilities to their female partners. See, e.g., Susan Maronek, The ERA and Clarifying Language, in PRO-LIFE FEMINISM 41, 41 (Gail Grenier Sweet ed., 1985); see also infra pp. 880-82 (discussing “pro-life feminism”).
91 See, e.g., Thomson, supra note 72, at 55.
92 410 U.S. 113 (1973).
93 Id. at 153.
woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.\footnote{Id.}

Just as significant (at least for the ultimate implications of different voice theory), the Court’s limitation on the scope of the woman’s autonomy\footnote{See id. at 154 (“[I]t is not clear to us that the claim . . . that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions.”).} stemmed from its recognition that “[t]he pregnant woman cannot be isolated in her privacy.”\footnote{Id. at 159.} At viability, the fetus “has the capability of meaningful life outside the mother’s womb”\footnote{Id. at 163.};\footnote{See id. at 164 (“[T]he abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”).} that is, the fetus and the mother can exist as separate persons. Accordingly, the Court held, the state at this point can forbid the woman from ending her pregnancy except to save her life or health. Notice that the point at which the state’s ability to protect an individual attaches is the point at which the individual is capable of separation, that is, capable of some form (however limited that is for a newborn baby) of autonomous action.

\textit{Roe} itself, however, was as much a case about \textit{physician} autonomy as about \textit{women’s} autonomy. The majority sometimes treated the issue as one involving medical judgments rather than choices about life direction.\footnote{Justice Douglas’s concurrence did rest directly on autonomy concerns. In particular, he identified three facets of the Fourteenth Amendment’s liberty interest implicated in control over abortion: (1) “the autonomous control over the development of one’s intellect, interests, tastes, and personality,” \textit{id.} at 211; (2) “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children,” \textit{id.}; and (3) “the freedom to care for one’s health and person, freedom from bodily restraint or compulsion,” \textit{id.} at 213.} Thus, although \textit{Roe} recognized the costs of pregnancy as relevant to the question whether women ought to be forced to undergo it, the Court addressed only indirectly the issue of the importance of control over the decisionmaking process to women’s sense of control over their own lives.\footnote{428 U.S. 52 (1976).}

In the later cases, the rhetoric of women’s control is far more pointed. The Court’s next major abortion decision, \textit{Planned Parenthood of Central Missouri v. Danforth},\footnote{428 U.S. 52 (1976).} represented the beginnings of an abortion jurisprudence dependent in an essential way on the distinction between women and the relational web in which they are located. In \textit{Danforth}, the Court struck down a Missouri statute that required that married women obtain their husbands’ consent, and that minors obtain
their parents' before an abortion could be performed. The state defended the spousal consent provision on the ground that "any major change in family status is a decision to be made jointly by the marriage partners." Similarly, the lower court upheld the parental consent provision on the basis of the state's compelling interest "in safeguarding the authority of the family relationship." Although the Court recognized the importance of the "marital relationship" and the "family unit," as well as the desirability of communication and joint decisionmaking, it held that the woman's right to end her pregnancy could not be vetoed by her husband or her parents. The right to privacy is "the right of the individual, married or single, to be free from unwarranted governmental intrusion," and from familial intrusion as well, "into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Thus, the right to privacy requires carving out a sphere in which women can act independently of either governmental or familial control; the woman's decision is freed from her preexisting relationship to either the polity or other individuals. The Court's most forceful pro-choice decision, Thornburgh v. American College of Obstetricians & Gynecologists, focused even more sharply on the decisional aspects of the right to choose:

[T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.

To grant the decisionmaking authority to the community, as Justice Stevens explained in his concurrence, would flout "the concept of privacy [which] embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" In short, self-definition and control over the course of one's life lie at the heart of the individual woman's right to decide for herself whether to seek an abortion.

The Court's most recent opinion illustrates the centrality of autonomy-talk to the standard legal defense of abortion rights. In Planned Parenthood of Southeastern Pennsylvania v. Casey, the parts of the

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101 Id. at 68.
102 Id. at 73.
103 Id. at 69.
104 Id. at 75.
105 Id. at 70 n.11 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
106 See also, e.g., City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 428 n.10 (1983) ("[t]he right of privacy includes 'independence in making certain kinds of important decisions' ") (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).
108 Id. at 772.
109 Id. at 777 n.5 (quoting Charles Fried, Correspondence, 6 Phil. & Pub. Aff. 288-89 (1977)).
Court's opinion reaffirming Roe and striking down Pennsylvania's spousal-notification requirement (the only part of the state scheme which the Court was willing to invalidate) rested expressly on values of autonomy, independence, and voluntary action. The decision whether to have a child, the Court concluded, involved "choices central to personal dignity and autonomy.... At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." And the Court located the practical consequences of this choice as much in women's participation in the public world as in any private, traditionally female sphere. With respect to the spousal-notification privilege, the Court's analysis went beyond Danforth to reject expressly the common-law notion that "a woman had no legal existence separate from her husband," and thus to insist on the adult woman's independence and separation from others as an essential attribute of her personhood.

This is not to say, by any means, that the Court's autonomy language necessarily guarantees the full measure of abortion rights which pro-choice feminists claim. Indeed, autonomy/individualism rhetoric may account for a line of decisions decried by pro-choice feminists: the abortion funding cases. The Court has consistently upheld the power of Congress and the states to deny poor women funding for abortions and abortion-related services even when other, analogous medical procedures are covered. The Court's reconciliation of these cases with the underlying Roe right rests on its treatment of the decision to have an abortion as purely an individual right, to be exercised by a woman using only her own resources. In short, it is a private decision in a dual sense: the state cannot interfere and the woman cannot invoke state aid.

But, although the Court's autonomy language does not lead to the fullest possible constitutional right or entitlement to abortion, it is clear that without reliance on the value of autonomy embodied in the Four-

\footnotesize{111 Id. at 2807 (emphasis added); see also id. at 2816 (opinion of O'Connor, Kennedy, & Souter, JJ.) (relying on both decisional and spatial aspects of privacy in recognizing "the urgent claims of the woman to retain ultimate control over her destiny and her body").
112 See, e.g., id. at 2809 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"); id. at 2812 ("An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society . . . .").
113 Id. at 2830 (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873)).
114 See id. (refusing to adopt "assumptions about adult women" that "parallel" those used to justify parent-notification statutes for minors).
teenth Amendment's liberty interest, it is virtually impossible to derive a constitutional limit on the states' power to regulate the abortion decision.116 Any theory of the constitutional right to an abortion will necessarily involve either some understanding of the unacceptability of forcing women to involuntarily bear the burdens of pregnancy and childbirth, or some conclusions about the importance of giving decisionmaking authority over such central aspects of self-definition to the individual most affected, or some notion of private spheres, or some combination of these factors.

B. *Abortion and the Communal Voice*

To agree with Thomson that a moral framework based on autonomy leads to abortion rights does not answer an analytically prior question: Should moral obligations be imposed only on persons who willingly agree to them? Pro-life feminists, such as Sidney Callahan,117 attack not the logic but the premises of Thomson’s position. They argue that feminist ideals, “loosely defined as a responsible commitment to the loving nurture of specific human beings as they actually exist in socially embedded interpersonal contexts,” are “very different from the abstract, competitive, isolated, and principled rigidity so characteristic of patriarchy” and the autonomy-driven moral reasoning it embodies.118 In short, they

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116 Donald Regan professes to identify an Equal Protection Clause-driven right. Regan, *supra* note 11, at 1630-39. He argues that it is unfair to impose on pregnant women a Good Samaritan obligation that is not imposed on any analogous class. But at bottom, the explanation for why we do not find such Good Samaritan obligations is surely driven by Thomson’s argument: it would constrain our individual freedom too much to place such burdens on unwilling individuals. This notion of freedom is, of course, the notion that the liberty aspect of substantive due process embraces.

117 Sidney Callahan, *Abortion and the Sexual Agenda*, *Commonweal*, Apr. 25, 1986, at 232. For a sociological examination of pro-life feminism, see, e.g., Faye Ginsburg, *Contested Lives: The Abortion Debate in an American Community* 9, 47-48, 83, 125-27, 214-15 (1989). For some representative pro-life accounts, see, e.g., Elizabeth Fox-Genovese, *Feminism Without Illusions* 81-86 (1991); *Pro-Life Feminism* (Gail Grenier Sweet ed., 1985); *Sisterlife* (Summer 1989) (the quarterly newsletter of the Feminists for Life of America); *The Seamless Web Philosophy*, *Utne Reader*, Mar./Apr. 1991, at 61. As Ginsburg explains, there are a number of distinct strands in the pro-life movement. Some pro-life activists view their campaign against abortion as part of a profoundly conservative social movement. Ginsburg, *supra* at 47-48; see also Luker, *supra* note 88, at 159-75. Others, including some Roman Catholic pro-life activists, are involved in a variety of progressive causes, such as the peace movement or the campaign against capital punishment. See Kathleen McDonnell, *Not an Easy Choice* (1984). Still others, like Callahan herself, support a broad range of nearly universally held feminist positions, such as a demand for greater governmental child-care support and strong nondiscrimination policies.


118 Callahan, *supra* note 117, at 233; see Cecilia Voss Koch, *Reflecting as FFL Celebrates Its Tenth Birthday*, in *Pro-Life Feminism*, *supra* note 117, at 17, 22 (also rejecting the autonomy-driven reasoning underlying abortion rights).
reject the importance of autonomy as the starting point in analyzing the morality of abortion.

In its place, pro-life feminists advance an “expanded and refocused" feminist vision,\textsuperscript{119} based on an ethic of care. As Callahan views it, Thomson’s celebration of autonomy reflects a “distorted idea of morality” that “overemphasizes individual autonomy and active choice.”\textsuperscript{120} For Callahan, “morality also consists of the good and worthy acceptance of the unexpected events that life presents. Responsiveness and responsibility to things unchosen are also instances of the highest human moral capacity.”\textsuperscript{121} Thus, the fact that a woman did not choose to become pregnant is entirely beside the point. The fetus’s claim to her support arises precisely from its extreme dependence.

Moreover, precisely because moral behavior cannot be logically deduced from “abstract . . . principled rigidity,” but must be discerned in the context of actually existing beings,\textsuperscript{122} Thomson’s “[s]trained philosophical analogies fail to apply: having a baby is not like . . . being hooked up to a famous violinist’s artificial life-support system.”\textsuperscript{123} For one thing, there is nothing \textit{artificial} about pregnancy; for another, the very fact that Thomson must pick an analogy so divorced from the real world damn's her argument.

If, as different voice theorists claim, moral reasoning is contextual and relational, then the obligations to others that arise out of context and relationship—specifically those that come from being “embedded in a family, a neighborhood, a social system”\textsuperscript{124}—are every bit as binding as those that are freely chosen by the individual. Thomson recognized that the law sometimes imposes obligations on family members that it does not place on others, but she viewed those obligations as a “class of exceptions.”\textsuperscript{125} To different voice theorists, that conclusion is fatally flawed. By identifying moral obligations stemming from the family as the exception rather than the rule, theorists like Thomson privilege the traditional masculine-individualist perspective and so invert the moral order.

Following Gilligan’s lead, Callahan expands the communitarian perspective to cover all of life. As she puts it:

Parent-child relationships are one instance of implicit moral obligations arising by virtue of our being part of the interdependent human commu-

\textsuperscript{119} Callahan, supra note 117, at 234.
\textsuperscript{120} Id. at 235.
\textsuperscript{121} Id.; see also Mary Meehan, Abortion: The Left Has Betrayed the Sanctity of Life, in PRo-LIFE FEMINISM, supra note 117, at 60, 65 (“Unborn children don’t cause women to become pregnant, but parents cause their children to be in the womb, and as a result, they need parental care. As a general principle, if we are the cause of another’s need for care, . . . we acquire an obligation to that person as a result.”) (quoting a pro-life activist).
\textsuperscript{122} Callahan, supra note 117, at 233.
\textsuperscript{123} Id. at 234.
\textsuperscript{124} Id. at 235.
\textsuperscript{125} Thomson, supra note 72, at 63.
nity. . . . [T]he fetus possesses rights arising from its extreme need and the interdependency and unity of humankind. The woman's moral obligation arises both from her status as a human being embedded in the interdependent human community and her unique lifegiving female reproductive power. To follow the pro-choice feminist ideology of insistent individualistic autonomy and control is to betray a fundamental basis of the moral life.\textsuperscript{126} And, she could add, it betrays a self-identified feminist "basis of the moral life" at that. Far from the fetus's dependency providing an argument for denying its claims to support (because it lacks the central autonomy that makes us human), its dependency in fact marks it as human, for the central nature of human existence is its dependency on the care of others. Dependency makes the fetus a member of the community.

Thomson argued, at bottom, that the fetus, like the violinist, was a stranger to whom one owed no special obligations. For Callahan, the fetus is no stranger; it is, in a fundamental way, a member of the family (the human family as well as the nuclear one), and thus someone to whom we owe a duty of care regardless of our consent. In this way, the different voice speaks against abortion.

\textbf{C. Others' Voices in the Supreme Court}

It would represent, we think, a ludicrous overreading to suggest that the Supreme Court's recent restrictions on abortion rights stem from a conscious adoption of relational theory. If anything, some of its conclusions reflect precisely the kind of abstract, out-of-this-world, principled rigidity that relational theorists squarely condemn. Only a Court completely out of touch with the realities of poor women's lives, for example, could conclude with a set of straight faces that paying for maternity services but not for abortions would have no coercive effect on women's decisionmaking about whether to have an abortion.\textsuperscript{127} But much of the rhetoric in the Court's recent opinions sounds disturbingly similar to the language that a Court convinced by different voice moral reasoning might use to justify denying women sole, autonomous control over the abortion decision. In this section, we examine the language in two recent cases that involved the claims of literally "different voices" to a say in the abortion decision, namely, the state-sponsored claims of minors' parents, to show the danger that embedded, relational reasoning can pose to women's control over their reproductive fates. We also show how relational concerns have been used to delimit the outer boundaries of freedom of choice.

In \textit{Hodgson v. Minnesota},\textsuperscript{128} the Court addressed the constitutional-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{126} Callahan, \textit{supra} note 117, at 235.
\item \textsuperscript{127} \textit{See}, e.g., Harris v. McRae, 448 U.S. 297, 315-18, 328 (White, J., concurring) (1980); Poelker v. Doe, 432 U.S. 519, 521 (1977); Maher v. Roe, 432 U.S. 464, 474 (1977).
\item \textsuperscript{128} 110 S. Ct. 2926 (1990).
\end{enumerate}
\end{footnotesize}
ity of a Minnesota statute that required a minor to notify both parents at least forty-eight hours prior to her undergoing an abortion unless she fell within a limited class of exceptions. A deeply fragmented Court struck down the requirement (by a five-to-four vote with former Justices Brennan and Marshall providing two of the five votes). Justice Stevens, writing for himself and Justice O'Connor, believed that parents had some form of constitutionally cognizable interest in participating in their daughters’ abortion decisions which would have justified a forty-eight hour delay after one parent had been notified. Nonetheless, they disapproved of the Minnesota statute because its requirement that both parents be notified represented inappropriate state interference in family autonomy. In short, for Justices Stevens and O'Connor it was the state's interference with the family's decisional power, not its interference with the minor's autonomy, that rendered the statute constitutionally invalid.

In dissent, the other four Justices were more explicit in their privileging of relational values. They argued that the two-parent notification statute represented an attempt “to foster and preserve the parent-child relation[ship] by giving all parents the opportunity to participate in the care and nurture of their children.” Even in families where the parents no longer have an ongoing relationship, “many absent parents maintain significant ties with their children, and seek to participate in their lives, to guide, to teach, and to care for them” and “both parents [may] share responsibilities and duties with respect to the child.” The dissent’s defense of the Minnesota statute is laden with terms central to different voice theorists: “nurture,” “care,” “responsibilities,” “duties,” “ties,” and “relationship.” The opinion identified in the statute the state’s desire to foster “communication” and to prevent “estrangement or alienation” among family members—in short, to break down the barriers individuals erect around themselves. The dissent thus represents a privileging of relational values over autonomy concerns. Moreover, by suggesting that parental participation is critical to a minor’s reaching the right decision, the dissent ultimately rejects the idea that autonomy and self-control are essential liberty interests.

Justice Kennedy’s dissenting view was expressed even more forcefully in a plurality opinion he issued the same day. In Ohio v. Akron Center for Reproductive Health, after upholding the state’s judicial-
bypass provision, Justice Kennedy stated:

A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that . . . the beginnings of that understanding will be within the family, society's most intimate association.137

In the plurality's view, the pregnant woman's connections with others radiate both inward (toward the human life that lies within the developing embryo) and outward (to the family within which she is situated). One's destiny and dignity are ultimately shaped by one's relationships with and responsibilities toward others. And although the plurality opinion in Akron addressed only the decisionmaking of pregnant minors,138 there was nothing in its reasoning that would necessarily have restricted its elevation of joint familial decisionmaking solely to young girls. A mature woman is no less linked to the embryo within her. Nor is her family any less an intimate association; indeed, to the extent that she, unlike a child, has chosen the adult (her husband) with whom she is intimately affiliated, the family is in some ways an even stronger bond, created, as it were, by both culture and autonomous choice. Indeed, the dissenters in Casey relied on precisely this kind of reasoning to defend Pennsylvania's spousal-notification statute.139

Similarly, in Casey, relational reasoning underlay the joint opinion's approach. Although the Court ultimately recognized a core liberty interest in a woman's control over her body and the decisionmaking process,140 it acknowledged the relational context in which such decisions are made:

[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem

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137 Id. at 2983-84 (plurality opinion).
138 See id. at 2984.
139 See Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2871 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (recognizing the legitimacy of "promoting the integrity of the marital relationship") (internal quotation marks omitted); id. (noting the importance of "encourage[ing] collaborative decisionmaking"). Moreover, the dissenters criticized Justices Kennedy and O'Connor for abandoning the apparent implications of Akron in their joint opinion in Casey. See id. at 2877 n.4 (Scalia, J., concurring in judgment in part and dissenting in part).
140 See supra pp. 878-80.
nothing short of an act of violence against innocent human life that is aborted.\textsuperscript{141}

The joint opinion carried this relational perspective forward into its enunciation of a new, more deferential test for reviewing state abortion regulations. Instead of the strict scrutiny approach adopted in \textit{Roe} and applied most stringently in \textit{Thornburgh v. American College of Obstetricians & Gynecologists}, the joint opinion adopted an "undue burden" standard, under which regulations were to be permitted unless they placed a substantial burden in the path of a woman determined to have an abortion. The joint opinion seems to seek a compromise between autonomy and relational concerns and thus defines the abortion right in terms of both: "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."\textsuperscript{142} Thus, a state can properly adopt measures designed to "ensur[e] that a woman's choice contemplates the consequences for the fetus,"\textsuperscript{143} or that structure the physician-patient dialogue.\textsuperscript{144}

Of course, notification and informed-consent statutes are not just about communication and connection. The states that enact them normally implant them within regulatory schemes that are clearly intended to dissuade women from choosing abortion.\textsuperscript{145} But the fact that an emphasis on communication and connection can so easily be employed to limit a woman's freedom to choose for herself whether to have an abortion, as well as how and to what extent to engage in communication with others about that decision, should give us pause before we inject provisions based on relationships and responsibilities into our legal policy.\textsuperscript{146}

Indeed, as we explain in the next section, even champions of different voice moral reasoning recognize the dangers it poses for women faced with the decision whether to have an abortion.

\textbf{D. The Dialectics of Care}

Of all her studies, Gilligan's abortion study plays the largest and most interesting role in her book.\textsuperscript{147} To Gilligan, the decision whether to

\textsuperscript{141} \textit{Casey}, 112 S. Ct. at 2807.
\textsuperscript{142} \textit{Id.} at 2821 (opinion of O'Connor, Kennedy, & Souter, JJ.).
\textsuperscript{143} \textit{Id.} at 2818.
\textsuperscript{144} See \textit{id.} at 2822-26.
\textsuperscript{145} Missouri's notification provisions, for example, have been contained in statutes that also limited the performance of second- and third-trimester abortions to hospitals, see Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 478 & n.1 (1983), and that restricted the kinds of abortions that could be performed, see Planned Parenthood v. Danforth, 428 U.S. 52, 58-59 (1976), while Akron, Ohio city ordinances required physicians to inform women of the quality of the "human lives" inside them, see City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 423 & n.5 (1983).
\textsuperscript{146} See Williams, \textit{Deconstructing Gender}, supra note 6, at 816 n.77 (stating that "[t]he fact that stereotypes drawn from relational feminism can so successfully be used against women suggests, to me, their inherent limitations").
\textsuperscript{147} Although commentators have often overlooked the abortion studies in favor of the other stud-
have an abortion represents a particularly fruitful context in which to study women's moral decisionmaking. Abortion not only concerns an issue particularly important to women's lives, but also, since Roe, it represents a situation "where women have the power to choose and thus are willing to speak in their own voice." Gilligan warns us, however, not to read her report as generally descriptive of women's abortion decisionmaking. Because her subjects were referred by abortion counselors, they generally had more difficulty reaching a decision than do most women. Gilligan does, however, view her study as representative in another sense: "[T]he findings pertain to the different ways in which women think about dilemmas in their lives . . . ." In other words, Gilligan takes the study to illuminate women's decisionmaking generally.

Our interest in Gilligan's abortion study lies not in how the ethic of care affects the abortion decision, but in the reverse: how Gilligan's consideration of abortion affects her description of the ethic of care. Gilligan's description of the ethic of care at work in the abortion context is very different from her earlier depiction. The simple contrast between care and justice presented in the Jake and Amy study is replaced by a complex dynamic of care. Gilligan's redescription of care reflects the inability of her original ethic to respond satisfactorily to woman's felt needs. Abortion renders Gilligan's original formulation unworkable. When she replaces it with a dialectical process, it loses its distinctive characteristics. In fact, abortion so undermines the original description that care comes close, uncomfortably close, to justice.

In the earlier parts of her book, Gilligan depicts the ethic of care through a series of contrasts to the traditional logic of justice. Whereas the logic of justice celebrates qualities like autonomy, equality, universalizability, and rights, the ethic of care celebrates the somewhat opposite qualities of connectedness, responsiveness to need, contextualization, and duty. In her abortion study, however, Gilligan presents a highly dynamic account of care which attempts to draw together the pre-

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148 Id. at 70.
149 Id. at 72. ("Since the study focused on the relation between judgment and action rather than on the issue of abortion per se, no effort was made to select a sample that would be representative of women considering, seeking, or having abortions.").
150 Id.
151 Id. ("[T]here is reason to believe that the women interviewed were in greater than usual conflict over the decision.").
152 Id.
153 Since there is no reason to believe that the women selected were any more representative of women generally than of women considering abortion, this appears to be an equally suspect assumption.
154 See supra pp. 862-70.
viously divergent concerns of care and justice into a unified outlook. The structure of her new dynamic, in fact, reveals the extent and direction of her redescription of care. Her abortion study traces three stages of development in women's moral decisionmaking which look surprisingly like a compact version of Kohlberg's six stages of justice-thinking. Just as the boys in Kohlberg's studies ideally progress from "preconventional" to "conventional" and on to "postconventional" understandings of morality, so too do the women in Gilligan's dynamic model of care.\footnote{GILLIGAN, DIFFERENT VOICE, supra note 6, at 73.}

In Gilligan's preconventional stage, women, much like men, identify morality with their own individual desires. In the next stage, the conventional stage, women criticize the selfishness of the preconventional stage and, again like men, see morality as a matter of social consensus. But because society has traditionally held quite different norms for women's and men's behavior, the conventional women's ethical perspective is quite different from men's. In particular, the conventional stage, for women, embodies a notion of self-sacrifice.\footnote{Id. at 73-74.} Thus, the development in women's moral thinking from the first stage to the second traces a movement from selfishness to self-sacrifice, or, as Gilligan puts it, from selfishness to "goodness,"\footnote{Id. at 87.} where the good is "equated with caring for others."\footnote{Id. at 82.}

Gilligan's final, postconventional stage is the most interesting. Women come to question second-stage conventional morality when their self-sacrifice "gives rise to problems in relationships, creating a disequilibrium" between the self and others.\footnote{Id. at 74.} In confronting decisions like whether to obtain an abortion, a woman realizes that sacrificing her own interests to the interests of others leads to an "illogic of . . . inequality between other and self."\footnote{Id.} At this point, many women come to understand that they cannot truly care for others unless they first care for themselves. This stage represents the culmination of care because women direct care not only to others, but to the self as well.\footnote{Id.} Gilligan describes this final transition as one from goodness, defined as goodness to others, to "truth"\footnote{As Gilligan describes the final transition: Examining the assumptions underlying the conventions of female self-abnegation and moral self-sacrifice, [the woman] rejects these conventions as immoral in their power to hurt. By elevating nonviolence, the injunction against hurting, to a principle governing all moral judgment and action, she is able to assert a moral equality between self and other and to include both in the compass of care. Id. at 90.} because one finally acknowledges and respects

\footnote{155} Gilligan, Different Voice, supra note 6, at 73.  
\footnote{156} Id. at 73-74.  
\footnote{157} Id. at 87.  
\footnote{158} Id. at 82.  
\footnote{159} Id. at 82.  
\footnote{160} Id. at 74.  
\footnote{161} Id.  
\footnote{162} Id.  
\footnote{163} Id. at 82-83, 84.
one's own human needs. Thus, Gilligan sketches a trajectory in women's moral development from selfishness to goodness to truth, at whose final stage "the disparity between selfishness and responsibility dissolves."\(^{164}\) In fine Hegelian fashion, her synthesis of opposites overcomes all contradiction.

Comparing Gilligan's first and third stages best reveals the change the ethic of care has undergone. On the surface, her first and third stages look vaguely similar. Both take account of the needs of the self. Their difference can be seen in Gilligan's discussion of Sandra, a twenty-nine-year-old Catholic nurse considering an abortion. At the time of her interview Sandra finds herself questioning the "conventional" morality of feminine selflessness that she previously believed should govern the decision. Witnessing the moral complexities of euthanasia while nursing several patients has led her to the verge of viewing abortion as more than simply a choice between respecting the fetus's life or her own desires. The morality of selflessness, which had previously guided her, becomes open to criticism and revision as "she questions not only the justification for hurting others in [the] name of morality but also the 'rightness' of hurting herself."\(^{165}\) But Sandra ultimately fails to make the transition to the third stage because "to sustain such criticism in the face of conventions that equate goodness with self-sacrifice, [she] must verify her capacity for independent judgment and the legitimacy of her own point of view."\(^{166}\) This she cannot do. Because she lacks an adequate "self-concept,"\(^{167}\) she is unable to grow into the final stage of development and instead falls back into the first. As Gilligan describes her:

When uncertainty about her own worth prevents a woman from claiming equality, self-assertion falls prey to the old criticism of selfishness. Then the morality that condones self-destruction in the name of responsible care is not repudiated as inadequate but is rather abandoned in the face of its threat to survival. Moral obligation, rather than expanding to include the self, is rejected completely when the failure of response leaves the woman unwilling any longer to protect others at what is now seen to be her own expense. In the absence of morality, survival, however "selfish" or "immoral," returns as the paramount concern.\(^{168}\)

To Gilligan, then, the difference between the first and third stages of care development hinges upon the woman's self-concept, that is the belief in the legitimacy of her own point of view. When a woman recognizes her own worth, and thereby sees equality between herself and others, she can overcome the ethic of selflessness and direct care both to others and to herself. Without this sense of equality, however, a woman cannot see

\(^{164}\) Id. at 94.  
\(^{165}\) Id. at 87.  
\(^{166}\) Id.  
\(^{167}\) Id.  
\(^{168}\) Id.
self-assertion as different from selfishness, and instead of overcoming self-sacrifice, she abandons moral development altogether.

Simply put, the difference between stage three and stage one is not having to say you're sorry. Gilligan admits how close these two stages can be when she writes "[a]lthough from one point of view, paying attention to one's own needs [in stage three] is selfish," and thus identical to stage one, "from a different perspective it is not only honest but fair." Since acknowledging one's own interests, whether in stage one or three, is always "honest," what distinguishes Gilligan's third stage is the fairness of admitting one's own needs. In other words, the culmination of care arises from the belief that one's own needs deserve to be acknowledged if only because they are one's own. Fairness represents the healthiness of self-assertion.

Gilligan's pivotal notion is equality, for it is what allows one to respect oneself when directing care inward. As Gilligan describes the transition from the second stage of care-thinking to the third, the ideal of selflessness is "called into question by the concept of rights, by the assumption underlying the idea of justice that self and other are equal." Or as she later writes:

In women's development, the absolute of care, defined initially as not hurting others, becomes complicated through a recognition of the need for personal integrity. This recognition gives rise to the claim for equality embodied in the concept of rights, which changes the understanding of relationships and transforms the definition of care.

It is equality that makes possible the final transition.

Such a large role for equality, however, creates problems for Gilligan, because it is equality that animates the logic of justice, the alternative to her original ethic of care. In particular, equality represents the culminating value of Kohlberg's six stages of moral development. It is equality that allows one to criticize the consensus of conventional morality and to move towards universal principles of justice in the postconventional stage. It is odd, to say the least, that it is the logic of justice that fulfills the ethic of care.

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169 Id. at 85.
170 Id. at 149.
171 Id. at 166.
172 Gilligan herself notes that equality underpins and largely defines the traditional view of morality: "The morality of rights is predicated on equality ... [and] the ethic of rights is a manifestation of equal respect ..." Id. at 164. See also id. at 149 ("The essential notion of rights [is] that the interests of the self can be considered legitimate."). In her later writing, Gilligan maintains this awareness: "From a justice perspective, the self as moral agent stands as the figure against a ground of social relationships, judging the conflicting claims of self and others against a standard of equality or equal respect ..." Gilligan, Moral Orientation, supra note 16, at 23. She also speaks of "the logic of reciprocity or equal respect" as one of the two "basic assumptions of a justice framework." Id. at 24.
173 E.g., Kohlberg, Moral Stages and Moralization, supra note 24, at 35.
The question, of course, is how much the fulfillment of care differs from the logic of justice. Gilligan, to be sure, sees an important difference: "While the ethic of rights is a manifestation of equal respect, balancing the claims of others and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care."\(^\text{174}\) The difference, then, finally boils down to the distinction between "balancing the claims of others and self" and needing to care for both others and self. But does this distinction make a real difference, especially in a world where equal respect has been used to generate affirmative moral responsibilities towards others?\(^\text{175}\)

We think not and, perhaps more importantly, we think that Gilligan herself thinks not. It is significant that of the two characterizations of the ethic of care in her book, the more complex and full-blown is largely ignored by her commentators and by Gilligan herself in her subsequent work. For the most part, Gilligan's critics attack her early portrayal of care\(^\text{176}\) while her champions extend it to other realms of individual and social experience.\(^\text{177}\) Most provocatively, in her latest essay reviewing and extending her original findings, Gilligan herself describes only the early version of her morality.\(^\text{178}\) This reception—indeed self-reception—suggests that Gilligan's readership and Gilligan herself find the later, dialectical description of the ethic of care unsatisfying or unconvincing, perhaps because of its close resemblance to the logic of justice.

Our interest lies in the pressures that lead Gilligan to redescribe care in the troubling terms that she does. It is no accident, we think, that her redescription grows out of an abortion study. Simply put, Gilligan's need to redescribe care in the context of abortion reveals the inadequacy of her original description. Jake, not Amy, has the better voice to articulate at least this particular need of women. When pressed by women's experience, webs give way to hierarchies and the ethic of care unravels to resemble the logic of justice. As flattering as Gilligan's ethic of care may be to women, it remains inadequate in some crucial respects to enable them honestly and truthfully to live their lives.

### III. Rescuing Relational Feminism

Can we rearticulate relational feminism so as to accommodate a pro-choice legal regime? Three strategies are available in attempting

\(^\text{174}\) Gilligan, Different Voice, supra note 6, at 164-65.

\(^\text{175}\) The best example may be the Judeo-Christian injunction that "thou shalt love thy neighbor as thyself," *Leviticus* 19:18; *Matthew* 22:39, on which together with the command that "[l]l turn love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind," *Matthew* 22:37, "hang[s] all the law and the prophets." *Matthew* 22:40.

\(^\text{176}\) See supra note 10.

\(^\text{177}\) See, e.g., Menkel-Meadow, supra note 6; Sherry, Civic Virtue, supra note 6, at 580-91.

such a reconciliation. First, one could argue that although relational feminism makes ethical demands, it makes no legal ones. This strategy simply denies relational feminism any legal consequences: its ethics is purely a private one. In abortion, for example, this view simply asks women to weigh the fetus's dependence in their private decisionmaking. Second, one could exploit relational feminism's insistence on approaching problems contextually to argue against imposing any general legal prohibitions. Unlike the first approach, which simply declares that relational feminism articulates no legal positions, the second argues that, since decisions must be made in context, the legal rule should give each individual woman the power to decide. It denies relational morality any legal consequences not by fiat, but by elevating its method above its substance. By insisting that context come before care, this view fore-

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179 We reject the argument that relational feminism can support abortion rights by viewing the relationship between the woman and the fetus as inconsequential. While relationalism does not itself say how much particular relationships count, Tronto, supra note 19, at 659-60, it cannot coherently devalue the existence of the fetus. Thus, most relational feminists who discuss the woman-fetus relationship emphasize its importance. GILLIGAN, DIFFERENT VOICE, supra note 6, at 59; West, Jurisprudence and Gender, supra note 2, at 2-3; see Williams, Deconstructing Gender, supra note 6, at 800-01 & n.11 (discussing some relational views of pregnancy as connection). If pregnancy does not involve connection, dependency, and need, what does? Simply declaring that the fetal connection does not count if the woman does not wish it to, moreover, makes autonomy the master of relationalism.

180 See, e.g., The Seamless Web Philosophy, supra note 117, at 62:

While we hold our beliefs passionately, we do not seek to have them realized through legislative means. We recognize that abortion is a political, social, and religious issue, but also an extremely personal issue, and that the law is inadequate for this problem. Moreover, we are extremely skeptical that any policies of the U.S. government, which guards its power with more potential violence than any other nation on earth, could really have the good of women at heart. Laws about women's reproductive rights . . . usually reflect the interests of male elites. This is equally true whether abortion is legal or illegal; and so, in a sense, the law is beside the point, and the fierce debate over the law may obscure deeper questions of how women's liberation can be realized and in what kind of society.

181 Interestingly, some of the relational feminists most insistent on contextual problem-solving resist this implication. Suzanna Sherry, in fact, claims the opposite:

A feminine society . . . makes decisions based on what is right under the circumstances, not on who has rights in the abstract. One important consequence of this rejection of abstractions is that such a society will have to decide what is right, to make value choices and choose among competing visions of the good life. Defining virtue can no longer be done at the individual level: a feminine society is a virtuous society in the sense that it cannot be pluralist.

Sherry, The Gender of Judges, supra note 6, at 164 (second emphasis added).

182 Although Gilligan and other prominent relational feminists see sensitivity to context and the ethic of care as part of a single package, see, e.g., NODDINGS, supra note 6; RUDDICK, supra note 6, these two concerns are, as some have noted, quite independent. Williams, Deconstructing Gender, supra note 6, at 799-800 (discussing "Gilligan's description of 'women's voice' . . . [as] an attempt to attribute to women two influential critiques of contemporary Western culture[] . . . the critique of traditional Western epistemology [and] . . . the critique of possessive individualism"). Williams's discussion makes clear how independent these two critiques are. Much feminist writing considers one or the other of these two concerns independently of the other. See Seyla Benhabib, The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory, in WOMEN AND MORAL THEORY, supra note 15, at 154 (discussing the implications of Gilligan's focus on contextuality); Tronto, supra note 19 (discussing primarily connectedness and care); Walker, supra note 15
closes nearly all legal regulation of private behavior, including those pre-
scriptions that seek to promote relational values. Third, one could argue
that no matter what relational feminism's imperatives, contemporary re-
alities often compel women to choose abortion.

All three strategies, however, ultimately prove unsuccessful. The
first two salvage relational feminism by privatizing it. In their view,
although relational feminism calls on us to recognize our connectedness
to others, it has no public implications. It asks us to value intercon-
nectedness, responsibility, and care, but only as private virtues. Parado-
xically, by privatizing relational feminism, these two strategies actually
reinforce and reentrench the central value relational feminism rejects:
Autonomy. When push comes to shove, both these strategies call on us
to defer to individual choice. Both strategies, moreover, ultimately reca-
pitulate what many feminists, especially relational ones, see as the central
problem of Kohlberg's model and of other traditional ethical systems:
The exclusion of women's experience and ways of thinking from the cen-
tral arenas of culture. They reinscribe an oppressive form of the pub-
lic/private distinction that relegates women's experience to a secondary
sphere.

Second, insofar as relational feminism speaks only privately, its
message may well fail. To make ourselves care we must coerce, if only
because "masculine" values so dominate private and public affairs.
Without forcing care in an area where discourse is overwhelming
"masculine," as Gilligan herself claims is the case in the abortion de-
bate, the relational ethic may remain the exception. Privatizing it will
largely cede public discourses of particular concern to women. In this
sense at least, the private surely is the political.

Third, privatizing relational feminism would not only deny it much
transformative power, but, more dangerously, reentrench the old, now
largely discredited notion of separate spheres. This notion holds that
women and men are equal in their mastery of their different dominions.
For women, this dominion consists of the family and the home, in short,

(discussing the implications of Gilligan's focus on contextuality). We, of course, focus on the care
side of relational feminism.

183 There may, of course, be other, now unimagined ways of articulating relational feminism so as
to align it more successfully with women's needs. We do not ourselves, however, see even how to
begin such a project. Any theory generating moral obligation from connectedness and need would
seem to us necessarily to succumb to the type of difficulties we describe.

184 Benhabib, supra note 182, at 158, 162, 171; Tronto, supra note 19, at 653-54.

185 Tronto, supra note 19, at 654-55.

186 Sherry, The Gender of Judges, supra note 6, at 168 ("Is it possible for a society to be caring
without being coercive?").


(discussing how Gilligan's ethic of care resembles separate spheres ideology); Williams, Deconstruct-
ing Gender, supra note 6, at 806-09 (discussing Gilligan's ethic of care in terms of nineteenth-century
ideology of domesticity).
the private world. For men, it consists of work and politics, in short, the public world. In this view, the traditional feminine virtues of selflessness, kindness, and care are valued, but only within the home and family. In the public world, individualism and self-interest, the masculine virtues, hold sway. Making relational feminism a private ethic thus runs the danger of reinscribing this oppressive ideology deep within feminist theory. In effect, relationalism would represent a family virtue. The ethic of care would become an ethic of domesticity.\textsuperscript{189}

The third strategy, arguing that contemporary realities override relational imperatives, suffers from different problems. Unlike the first two, it does not seek to confine relational feminism to a delimited sphere of human activity. Rather, it finds other concerns trumping relational feminism. In one view, for example, abortion has to remain available to women because pregnancy and motherhood are often used by men to oppress women.\textsuperscript{190} This particular approach, however, aligns relational feminism with women's felt needs by subordinating relational insights to a dominance paradigm of feminist politics. In this view, analysis of women's oppression deserves priority over women's ethics. While this may be right, it seriously undercuts the claims of relationalism. These claims compel only when they are consistent with radical feminist politics. Once again, relational feminism enjoys only secondary status.

Another version of the third strategy would attempt to reconcile relational feminism with the feminist legal agenda by making instrumental arguments of various kinds. In this view, for example, although relational feminism may argue against abortion, it does so in the context of a world where people more generally recognize relational responsibilities. Thus, a relational feminist could argue that abortion is immoral but so long as society does not recognize its relational responsibilities to women, by providing affordable childcare and means of family support, individual women should not disproportionally bear the burden of raising children. While more consistent with relational aims, we wonder how well this view actually reflects women's feelings on abortion. To be sure, many women do see the question whether to have an abortion as resting on their ability to raise and support a child. To others, however, the issue rests on other concerns, including their own sense of personal identity. These women do not want to raise a child even if they have the means and social support to nurture it, because the experience of pregnancy or of being a parent so deeply contradicts their self-definition, aims, and overall ambitions. To the extent our intuitions about some


\textsuperscript{190} Some feminists who believe that abortion is immoral, for example, would not legally proscribe it for this very reason. See supra note 180.
women's response to pregnancy are correct, the instrumental strategy cannot fully reconcile relational feminism and the feminist legal agenda.

IV. CONCLUSION

Despite the tension between the logical implications of relational feminism and the needs expressed by many women, feminist theory should not rush to embrace its opposite. Although autonomy-talk may better suit many of women's aims, there is simply too much to both the relational and radical feminist critiques of autonomy to adopt it wholesale. Instead, a true feminist ethics must go beyond the simple ethical dichotomies and oversimplified moral psychology that the debate between relationalism and autonomy now presents us.

The real problem with the prevailing ethical debate is its assumption of two disjunctive pairings: relationalism and care (or responsibility) on the one hand and autonomy and justice (or rights) on the other. A true feminist ethics must break down these barriers in order to understand the ways in which an ethic of responsibility can promote autonomous choice, and the ways in which a relational focus can serve justice. We hope our discussion of abortion has suggested some of the contours of such new understandings. For example, in a society that refuses to take collective responsibility for the welfare of mothers and their already-born children, it makes no sense to tell women that they are somehow insensitive to their responsibilities if they choose to have abortions. Society cannot impose a relational ethical perspective on women while treating them as completely self-sustaining individuals. The dissonance between responsibilities and resources is simply too great, and cruelly disserves millions of women.

The way in which the conversation about abortion cuts across the logic/ethic, justice/care lines should counsel us to recognize that a feminist ethics worthy of its name must spring from an understanding of how women really live. A politically innocent "feminist" ethics may just more deeply entrench the ideology of patriarchy, especially within women themselves.

Ironically, the deep resonance relational feminism has for many women may itself show the necessity of taking real world politics into account in constructing feminist ethics. Anecdotes abound about the many women who see themselves in Gilligan's Amy and how uplifted they feel after reading Gilligan's vindication of Amy's perspective. Even femi-

191 For the relational critique, see supra pp. 862-70; for an example of the radical critique, see MacKinnon, Abortion, supra note 11.
192 Cf. Hantzis, supra note 10, at 703 ("[A] sensible theory for social change should not devalue concerns about justice and individual rights as outmoded 'male' values.").
193 See, e.g., Greeno & Maccoby, supra note 35, at 314-15 ("Many women readers find that the comments by women quoted in Gilligan's book resonate so thoroughly with their own experience that they do not need any further demonstration of the truth of what is being said."); Mitchell
nists who criticize Gilligan admit the resonance of her description and the great dignity it bestows on those women who believe it describes them.\textsuperscript{194} The irony springs from the explanation of the resonance: does the different voice resonate because it reflects women's authentic nature or because it reflects the domesticated nature men have led women to adopt?

We are wary of the first explanation, the one offered by many relational feminists,\textsuperscript{195} because it assumes that women's voices are largely untouched by the subordination they experience. It is of critical importance, we believe, to interpret the different voice's resonance against the background of women's history and experience. When viewed in this context, it may well be, as Joan Williams puts it, that "[t]he 'conventional feminine voice' [Gilligan] describes reflects how society tells women to behave and how they internalize those mandates when describing their decisions."\textsuperscript{196} Or, as Catharine MacKinnon more forcefully describes it, "women care because men value women by the care they have given them."\textsuperscript{197}

Under this political interpretation, the different voice resonates not because it reflects woman's "true" nature, but because it reflects the material and ideological conditions under which women live, many of which have been defined by men. The resonance, in other words, bespeaks not "truth," but accommodation to the sometimes oppressive realities and expectations that define women's lives.\textsuperscript{198} This possibility suggests that the different voice may pose two great dangers to women. First, women who celebrate the terms of their own oppression will be unlikely to challenge it.\textsuperscript{199} The most secure form of slavery is that in which the slave mistakes the master's interest as her own. Second, when coupled with the essentialism common to relationalism,\textsuperscript{200} relational ideology threatens to become imperial. Just like Kohlberg's model, relational feminism devalues experience that differs from its measure. And, also like Kohlberg's model, it squelches those who dissent from the identity it

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\textsuperscript{194} See Kerber, supra note 188, at 306; MacKinnon, Difference and Dominance, supra note 10, at 38; Williams, Dangerous Supplement, supra note 57, at 70.

\textsuperscript{195} MacKinnon, Difference and Dominance, supra note 10, at 38-39; see Mitchell Lecture, supra note 57, at 75 (remarks of Carol Gilligan); \textit{id.} at 57 (Menkel-Meadow stating that "the differences reflect reality").

\textsuperscript{196} Williams, Dangerous Supplement, supra note 57, at 71.

\textsuperscript{197} MacKinnon, Difference and Dominance, supra note 10, at 39.

\textsuperscript{198} Hantzis, supra note 10, at 699-704; Williams, Dangerous Supplement, supra note 57, at 70-71.

\textsuperscript{199} Cf. Williams, Dangerous Supplement, supra note 57, at 76:

To the extent that Gilligan encourages women to feel comfortable again with the conventional language of femininity, she helps diffuse a potentially creative conflict between women's conviction that they have the same right to self-development as do men and their continued commitment to life patterns and values associated with femininity.

\textsuperscript{200} See supra pp. 858-59.
would impose. The danger here, of course, is that the dissenters are women. It is obnoxious enough when the big, bad voice of patriarchy silences women, but when a feminism itself silences women’s voices, we should really worry, especially when, as here, the voices are often those of women who have struggled most against the ethic of domestication.201

The fact that the rhetoric of a pure relational feminism can so easily be co-opted by partisans of traditional roles for women suggests the dangers of an apolitical espousal of its insights. Rather than building a feminist ethics atop a few anecdotal stories, we should take into account the wider behavior of the great masses of women. Ethics should reflect experience—who we are and what we wish to be. To us, this means listening sympathetically to women’s voices but in full awareness of the historical and cultural contexts in which women’s needs, desires, and self-image have been allowed to find expression. Too often those contexts have been created by and for men. The extent to which they have stifled the voices women have been able to construct for themselves is the key to hearing what women are really saying.

201 See Luker, supra note 88, at 175-77, 194-97 (describing the more nontraditional educational and social characteristics of women involved in the pro-choice movement).