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Webster and Women's Equality

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The National Abortion Rights Action League (NARAL) and the Women's Legal Defense Fund (WLDF) co-authored an *amicus curiae* brief submitted to the United States Supreme Court in *Webster v. Reproductive Health Services*.[1] The brief was authored on behalf of seventy-seven organizations committed to women's equality. The brief argued that continued constitutional protection of a woman's fundamental right to choose abortion is guaranteed by the liberty-based right to privacy. Further, we argued that this right is essential to women's ability to achieve sexual equality. In order to participate in society as equals, women must be afforded the opportunity to make decisions concerning childbearing. Women's unique reproductive capabilities have long served as a principal justification for their unequal and disadvantageous treatment by the state. Restrictive abortion laws continue "our Nation['s] . . . long and unfortunate history of sex discrimination"[2] by depriving women of the freedom to control the course of their lives.

The brief described ways in which foreclosing the abortion option severely restricts women's ability to participate in society equally with men. The brief also detailed the profound negative impact on women's lives that would result if the Court found a compelling state interest in protecting potential life prior to viability. We argued that such a holding would permit states to curtail the freedom of pregnant women drastically, and would thereby vitiate the constitutional right to liberty for all women. The following is an overview of the principal legal arguments set forth in the NARAL/WLDF brief.

If the United States Supreme Court were to uphold abortion restrictions that force pregnant women to bear children, it would render empty the constitutional promise of liberty for women by profoundly structuring their lives. Moreover, it would do so for women alone; men

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† This is a summary of the "Brief of Seventy-Seven Organizations Committed to Women's Equality as *Amici Curiae* in Support of Appellees." This brief may be found at Congressional Information Service Microfiche, United States Supreme Court Records and Briefs, *Webster v. Reproductive Health Services*, Card No. 35.

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[1] 109 S. Ct. 3040 (1989).

[2] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

are not required to endure comparable burdens in the service of the state's abstract interest in promoting life. To ensure that the constitutional guarantee of liberty "extends to women as well as to men," the Supreme Court must secure women's right to choose abortion lest it "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."[3]

State interference with abortion violates the principle of bodily integrity that underlies much of the fourteenth amendment's promise of liberty. The process of bearing a child involves the most intimate and strenuous exercises of the female body and psyche; forced continued pregnancy entails a tangible violation of physical liberty by subjecting women to a host of physical burdens and risks that range from prolonged discomfort and pain during pregnancy and delivery, to a substantial risk of specific medical complications, and even death. State abortion restrictions thus require women — and women only — to endure physical intrusions and risks that are greater than those previously found by the Supreme Court to violate the constitutional principle of bodily integrity. The principles underlying the Supreme Court's treatment of state-mandated bodily intrusions demonstrate that forced childbearing visits unacceptable violations upon women's bodily integrity.

For example, in *Winston v. Lee*,[4] the Court held that, in part because of "the extent of [its] intrusion upon the individual's dignitary interest in personal privacy and bodily integrity,"[5] a state could not, consistent with the fourth amendment, compel a criminal defendant to submit to an invasive surgical operation in order to retrieve a bullet necessary for the state's prosecution. The Court found that the criminal defendant's right to bodily integrity would be violated by the state's imposition of the risks inherent in a surgical procedure consisting of a small incision in his skin and retrieval of the bullet. By comparison, one in four pregnant women delivers by cesarean section, which requires a much larger incision in the woman's abdomen, and is accompanied by all the risks, pain and permanent disfigurement associated with invasive surgery.

In *Rochin v. California*,[6] the Supreme Court overturned a conviction based on evidence obtained from a "shocking" bodily invasion consisting of the forced stomach pumping of a criminal suspect.[7] The pain and discomfort associated with having one's stomach pumped is comparable to the physical effects of pregnancy, including morning sick-

[3] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

[4] 470 U.S. 753 (1985).

[5] *Id.* at 761.

[6] 342 U.S. 165 (1952).

[7] *Id.* at 172.

ness, which is experienced by many pregnant women on a recurring basis. Given that isolated aspects of pregnancy involve risks and burdens comparable to or worse than those found unacceptable when imposed upon criminal defendants, forced pregnancy and childbirth certainly constitute an intolerable bodily intrusion when imposed by the state on unwilling pregnant women.

At some time in their lives, most women willingly choose to bear and raise children. Few events, however, can more dramatically constrain a woman's opportunities in life than an unplanned child. The bearing and raising of children often places severe constraints on women's employment opportunities and therefore threatens their ability to support themselves and their families. Moreover, teenagers' inability to postpone motherhood until they have completed a basic education and are psychologically and financially equipped to care for children largely predetermines the paths their lives will take before they have even developed their own identities and aspirations. Teenage mothers, for example, receive lower hourly wages and earn less annually for the rest of their lives than women who postpone childbearing.[8]

Even for many women who become pregnant after their teens, opportunities in the public world are severely constrained. Many women lose their employment during pregnancy because employers unlawfully discriminate against them or do not adapt their jobs either to fetal hazards or to the perceived physical constraints of pregnancy; many other women lose their jobs or suffer significant financial hardships because employers do not provide or do not pay for job-protected leave for childbearing or infant care. Some women must either accept part-time work with significantly less pay, and few if any job benefits, or move to less skilled positions so that they can work a regular schedule.

If the Supreme Court were to overrule *Roe v. Wade*,[9] thereby depriving women of the right to control the frequency and timing of their pregnancies, it would deny women the ability to plan and shape their futures and assume their place in the public world.

Missouri and the Solicitor General of the United States have asked the Supreme Court to relabel the state's interest in protecting potential life as compelling, prior to viability, so as to override a woman's right to choose abortion at all times. This extraordinary request is based solely on the assertion that viability provides an unworkable dividing line. Current medical evidence reveals that this critique is unfounded. But even were the critique acceptable, the conclusion that the state's interest is always compelling would not logically follow; the unworkability of

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[8] RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 130 (C. Hayes ed. 1987).

[9] 410 U.S. 113 (1973).

viability as a dividing line would equally support the opposite conclusion: that the state's interest in protecting potential life is *never* sufficiently compelling to outweigh a woman's fundamental right to choose abortion. Hence, the critique of viability merely begs the central question of how to evaluate the state's asserted interest in the context of abortion restrictions.

The Supreme Court has never accepted as compelling an asserted interest so broad that it would eliminate virtually all constitutional protection afforded a fundamental right. Were the Supreme Court to accept Missouri's blanket contention that its interest in potential life outweighs women's fundamental right to procreative autonomy at all stages of pregnancy, states would be free to criminalize abortion in virtually all circumstances, to investigate all abortions to determine whether they were spontaneous or intentionally induced, and then to prosecute for murder women who intentionally ended their pregnancies.

Missouri's reasoning would allow states to criminalize the use of any contraceptive devices, such as intrauterine devices and some oral contraceptives, that prevent implantation of a fertilized ovum after conception. More fundamentally, because the "potentiality" of life exists equally before sperm-ovum fusion as after, states could invoke the same "compelling" interest proffered here to justify laws prohibiting the use or sale of *all* contraceptives. At bottom, embracing the position advocated by Missouri would not only require the reversal of *Roe*, but would call into question *Griswold v. Connecticut* [10] and *Eisenstadt v. Baird* [11] as well.

Moreover, embracing Missouri's position would provide states with an open-ended invitation to force pregnant women to act in whatever ways the state determined were optimal for the fetus, thereby reducing pregnant women to no more than fetal containers. A frightening preview of the potential intrusions is found in Missouri Revised Statute section 1.205 itself (part of which is at issue here), which states that "[t]he life of each human being begins at conception" and "[u]nborn children have protectable interests in life, health and well-being."[12] A Missouri court relied on section 1.205 in ordering a pregnant woman to submit to a cesarean section against her wishes, finding that "the life, health, and well-being" of her fetus "may be jeopardized" by her decision.[13]

If the Supreme Court accepts a compelling state interest in the fe-

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[10] 381 U.S. 479 (1965).

[11] 405 U.S. 438 (1972).

[12] Mo. Rev. Stat. § 188.205 (1988).

[13] Deaconess Hosp. v. McRoberts, No. 874-00172 (St. Louis, Mo., Cir. Ct. May 21, 1987).

tus from conception, laws like section 1.205 could be used to force women to submit not only to cesarean sections, but also to other types of surgery and medical treatment deemed to be in the interest of the fetus they carry, including *in utero* fetal surgery. Pregnant women could be denied medical care needed to protect their own health, such as radiation or chemotherapy to treat cancer, or the use of prescription or nonprescription drugs. A wide range of common conditions and conduct arguably posing some threat to fetal health could provoke state intervention, criminal prosecution or civil liability, including: being overweight, being underweight, exercising, not exercising, failing to eat "well," failing to "stay off of her feet," smoking, drinking alcohol, ingesting caffeine and suffering physical harm. In short, acceptance of Missouri's assertion of a broad compelling interest in protecting potential life would do far more than eviscerate the fundamental right to abortion. It would also provide the constitutional foundation for a frontal assault on other fundamental liberties.

Missouri's decision to advance its interest through pre-viability abortion restrictions must also be rejected because it entails the resurrection of "archaic and overbroad generalizations" about women's proper role in society.[14] For many years the Supreme Court accepted detrimental treatment as the "natural" consequence of women's reproductive capacities and as furthering important state interests, such as "preserv[ing] the strength and vigor of the race."[15] The Court has now soundly rejected the outmoded view that "the female [is] destined solely for the home and the rearing of the family,"[16] and it has invalidated legislation that perpetuates women's image as the " 'weaker sex' or . . . child rearers."[17] Despite the likely absence of malicious intentions and the widespread acceptance (even among women) of unequal treatment, the Court has recognized that the Constitution prohibits the state from disadvantaging any individual woman on the basis of stereotypes. Abortion restrictions reflect and reinforce the same stereotypes of women that the Court has found illegitimate. By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, state laws manifest the stereotype that it is women's "natural role" to bear children.

Although Missouri asserts an interest in compelling unwilling women to sacrifice their bodies, health and well-being for nine months to protect *potential* life, Missouri and other states never impose comparable duties on men to protect *actual* life. The value that our law attaches

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[14] Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[15] Muller v. Oregon, 208 U.S. 412, 421 (1908).

[16] Stanton v. Stanton, 421 U.S. 7, 14 (1975).

[17] *Califano*, 430 U.S. at 317.

to the individual right to liberty is so great that people are generally not required to reach out to aid another person, even when it is possible to save another from grave injury or certain death at little or no risk to oneself. Particularly instructive is *McFall v. Shimp*,[18] in which a court refused to order a man to donate bone marrow, a procedure far less risky than many aspects of pregnancy and childbirth, even though the donation was necessary to save the life of his cousin. According to the court:

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid to take action to save that human being or to rescue. . . . For our law to *compel* the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, . . . and one could not imagine where the line would be drawn.[19]

To permit the state's interest in potential life to prevail over women's fundamental rights would have the perverse effect of elevating fetuses to "superhuman" status by giving fetuses protections that states do not give to persons. This provides further evidence that this legislative "trade-off" rests upon an illegitimate stereotype that women are essentially, and "naturally," childbearers, and that women are therefore appropriate targets for a subordination of bodily freedom and autonomy that never has been and never would be placed in comparable fashion upon men.

The Supreme Court is asked to view the state's interest in protecting potential life as so compelling that it eviscerates women's fundamental right to reproductive choice throughout pregnancy. The Court in *Roe* understood and discharged its responsibility to protect fundamental rights from undue government interference by allowing women's right and the state's interest to supersede each other at different temporal states of pregnancy. Retreating today from this commitment to the safeguarding of fundamental rights would cede complete control over women's (and only women's) reproductive autonomy (and hence a core aspect of their social, economic and political freedom) to a political process that frequently has failed to treat women fairly; particularly given the highly-charged emotional environment in which legislative "balances" necessarily would be struck, legislatures can be expected again to undervalue both the importance of protecting women's autonomy and the burdens of state-imposed continued pregnancy and childbirth. Allowing state legislatures to dictate women's most intimate and

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[18] 10 Pa. D. & C.3d 90 (Allegheny County 1978) (per curiam).

[19] *Id.* at 91 (emphasis in original).