IS ALL PRIVACY CREATED EQUAL?

Mary and Beth both reside in a state with very stringent abortion laws. The state also has a constitutional provision which recognizes human life from the moment of conception. Since Planned Parenthood v. Casey *was decided, the state has implemented the strictest abortion regulations in the country. Among some of the most onerous regulations are mandatory forty-eight hour waiting periods, "informed consent" laws, and comprehensive reporting requirements.*

Mary is a married woman and mother of three in her mid-thirties. She and her husband have decided to have no additional children. Mary went to her doctor to discuss various birth-control methods and decided on a low-dosage birth-control pill, sometimes referred to as the "mini-pill." The mini-pill is taken daily and works primarily to suppress ovulation. However, it has a "back-up" function so that if a woman does ovulate and the egg is fertilized, the hormones released by the mini-pill serve to break down the uterine lining. Without anything in which to implant, the two-week old fertilized egg is expelled, usually without the woman even knowing that she had conceived.

Beth is a married woman and mother of three in her mid-thirties. She and her husband have decided to have no additional children. Beth went to her doctor to discuss various birth-control methods and decided on the diaphragm. The diaphragm is a barrier method contraceptive device that prevents sperm from reaching the egg. After using the diaphragm as instructed for three years, Beth discovers that she is pregnant. When her period is three days late she confirms her suspicions with an in-home pregnancy test. She schedules an appointment with the local family planning clinic to discuss abortion options. Because she has conceived only weeks before, the abortion provider suggests terminating her pregnancy with RU-486. RU-486 acts by interfering with the body's production of progesterone. Without progesterone, the uterine lining breaks down, thereby defeating pregnancy. However, because RU-486 is classified as an abortifacient rather than a contraceptive, Beth must first comply with the abortion regulations of her state. She must wait two days before she can take the RU-486 pills. She must fill out a form that includes her name, address, and social security number. She must also attend an informed consent session with a doctor from the clinic. Because there are only

three part-time doctors available, she must wait ten days for an appointment. During the informed consent session Beth must watch a video which discusses adoption, social services provided by the state for dependent children, and which graphically depicts various types of abortion procedures, none of which she is to undergo.

INTRODUCTION

In 1965 the United States Supreme Court recognized a constitutionally protected right of privacy in *Griswold v. Connecticut*.[1] Although the legitimacy of recognizing unenumerated fundamental rights has been fervently debated, the right of privacy has become a widely accepted civil liberties precedent.[2] Regardless of which position one subscribes to in the right-of-privacy debate, it appears that the right of privacy recognized in *Griswold* is safely enshrined as "'a fixed star in our constitutional' firmament,"[3] that is, at least within the realm of contraception.

Griswold led to a controversial line of cases which culminated in 1973 with the Supreme Court's decision in *Roe v. Wade*.[4] However, *Roe* is not the definitive word on abortion rights. Since the Court handed down that landmark decision in 1973, it has decided many cases in which it has revisited, reworked, reanalyzed, and reaffirmed *Roe*.[5]

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

2. Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511 (1989).

3. *Id.* at 543 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 624 (1943)).

4. Roe v. Wade, 410 U.S. 113 (1973). The right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

5. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 190-92 (1973) (companion case to *Roe*) (offering broad definition of "maternal health" regarding third trimester abortions); Colautti v. Franklin, 439 U.S. 379, 382, 401 (1979) (invalidating a standard of care provision which required a physician to attempt to preserve the life of a fetus during an abortion if the fetus was deemed viable or if there was sufficient reason to believe the fetus might be viable); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 429 n.11, 434 (1983) (upholding trimester framework of *Roe* and holding that a state could not establish an abortion regulation which applied to the entire second trimester if it was evident that the regulation departed from accepted medical practices over a substantial portion of the trimester); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 482-86 (1983) (companion case to *Akron*) (relying upon its determination in *Roe* that the state had a compelling interest in potential life at viability, the Court upheld a statutory provision requiring the presence of a second physician at post-viability abortions to protect the viable fetus); Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (companion case to *Akron*) (upholding a state regulation requiring second trimester abortions to be performed in licensed clinics as a reasonable means of furthering the state's compelling interest in maternal health and stating that, unlike the hospitalization requirement challenged in *Akron*, the licensed clinic provision did not depart from accepted medical practice, and furthered the state's interest in ensuring that abortion procedures, like other medical procedures, were performed under conditions which would preserve patients' health); Thornburgh v. American College of

Although the right of privacy originated in a case concerning the right to use contraceptives, by eventually incorporating the right to choose an abortion into its privacy jurisprudence, the Court recognized abortion and contraception as related activities which share the common purpose of avoiding pregnancy and childbirth.[6] At the same time, however, the Court views the two activities as distinct, thereby justifying disparate standards of judicial review of state regulations of the various interests involved.[7] The Court's dissimilar application of the right to privacy vis-a-vis abortion and contraception has thus resulted in a divergent evolution of the privacy doctrine.

The disparities between the level of privacy afforded in abortion cases and contraception cases has been largely justified by the belief that abortion decisions implicate the state's interest in potential life (and maternal health) in ways that contraception decisions do not.[8] It has been said that "[w]ith contraception we are dealing with 'preventing the creation of a new and independent life,' . . . and with abortion, . . . 'voluntarily or involuntarily, . . . a new life has begun.'"[9] Furthermore, the logistics of contraception are viewed as significantly more private when compared to abortion.[10] In the words of Dean Joseph O'Meara: "There is nothing private about an in-hospital abortion."[11]

Obstetricians & Gynecologists, 476 U.S. 747 (1986); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Planned Parenthood v. Casey, 505 U.S. 833, 846, 873, 874 (1992) (reaffirming *Roe*'s central holding of protecting a woman's right to choose abortion before viability, while rejecting *Roe*'s trimester framework and replacing strict scrutiny with the "undue burden" test).

6. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). Contraceptives should be seen as part of the "constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Id.* at 688-89.

7. *Casey*, 505 U.S. at 852.

8. "Abortion presents a more difficult constitutional question than contraception because the state can assert a wholly plausible compelling governmental interest: protection of potential life from the moment of conception." Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat From* Roe v. Wade, 138 U. PA. L. REV. 83, 103 (1989).

9. Stephen M. Krason & William B. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted*, *in* ABORTION, MEDICINE, AND THE LAW 196, 216 (J. Douglas Butler & David F. Walbert eds., 1986) (citation omitted).

10. The Court recognized this in *Roe*:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned.

Roe, 410 U.S. at 159 (citation omitted).

11. Krason & Hollberg, *supra* note 9.

As this Note will discuss, recent advances in reproductive technologies have erased many of the distinguishing characteristics between abortion and contraception, thereby removing or diminishing much of the support they provide to justify maintaining dual levels of privacy protection. A presumption that contraception prevents pregnancy, while abortion defeats pregnancy, is not always factually sound. Some methods of contraception—such as the IUD and some forms of "the Pill"—actually allow conception to occur, but prevent pregnancy by altering the uterine environment and defeating its ability to sustain pregnancy. In effect, these methods induce abortion in the earliest stages of pregnancy.[12]

Similarly, the assumption that abortion necessitates a surgical procedure, while contraception is practiced in the privacy of one's home, no longer holds true since the advent of reproductive technologies like RU-486.[13] In many regards, the gap which has sustained the distinctions between abortion and contraception (whether the result of a void of technology or of personal knowledge) has been bridged. Advances in reproductive technology have also provided women with relatively inexpensive, safe, self-administered home-test kits to confirm both pregnancy and ovulation, enabling women to know if they are pregnant virtually from the moment of conception.

Under the trimester framework established in *Roe v. Wade*, state regulation of abortion in early pregnancy was essentially a non-issue since the state's interests (in maternal health and potential life) did not rise to the level of compelling until after the thirteenth week.[14] Since the Court dispensed with the trimester framework in *Planned Parenthood v. Casey*, however, the state's interest in potential life is now recognized from the "earliest stages of pregnancy."[15]

Early in-home pregnancy tests, together with abortifacients[16] like RU-486, effectively move the state's ability to regulate abortion steadily closer to the moment of conception, as women can now know if they are

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12. *See infra* notes 115-20 and accompanying text.

13. *See* E. E. Baulieu, *On the Mechanism of Action of RU 486*, *in* FEMALE CONTRACEPTION AND MALE FERTILITY REGULATION 197 (B. Runnebaum et al. eds., 1991) (explaining the clinical and technical functioning of RU-486).

14. *Roe*, 410 U.S. at 163.

15. *Casey*, 505 U.S. at 872. "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ." *Id.*

16. Abortifacients are procedures which act after implantation of a fertilized egg, though generally too early to confirm whether or not one has conceived. JAMES W. KNIGHT & JOAN C. CALLAHAN, PREVENTING BIRTH: CONTEMPORARY METHODS AND RELATED MORAL CONTROVERSIES 103 (1989).

pregnant—and take action to end the pregnancy—almost immediately from the moment of conception.[17] Recognition of the state's interest in potential life in early pregnancy has resulted in the passage of legislation imposing burdensome regulations on women seeking abortions,[18] which will affect abortifacients like RU-486.

Unfortunately, discussion of the distinctions and similarities between contraception and abortion is often muddled by inconsistent use of the terminology that mark the boundaries among the various medical mechanisms and biological events involved. Such terms include pregnancy, viability, conception, and contraception.

Part I of this Note will examine the evolution of the privacy doctrine from *Griswold v. Connecticut* through *Planned Parenthood v. Casey* and will focus on the inconsistencies encompassed in the current constitutional analysis of reproductive rights.[19]

Part II will examine the relevant vocabulary and will focus on disparities among the legal, medical, and popular understanding of these words.[20] Part II finds that as they are currently used—and often misused—these words offer little help in looking clearly at the actual differences between contraception and abortion, as these concepts are currently understood. Part II will then suggest that the conceptual distinction between contraception and abortion, which provides a constitutional basis for state restrictions on abortion, cannot survive the advent of RU-486 as a non-surgical abortion method. The discussion will focus on the functional similarities between some types of contraceptives and RU-486, and how such similarities are often concealed by imposing legal definitions on medical procedures which defy formulaic categorizations. This discussion will illustrate how the disparity in the level of privacy afforded contraceptive decisions and abortion decisions results in similarly situated women being treated in grossly dissimilar manners.

Part III will discuss new ways of thinking about the factual events encompassed within these conceptual categories toward developing a coherent and principled application of the right to privacy as it relates to

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17. With a postcoital contraceptive (PCC) (also known as the "morning after pill") a woman can take action to prevent a pregnancy if she fears she may have conceived, but before confirmation of that fact. This raises the question of whether such medical devices fall into the category of contraception or abortion. *Infra* notes 120-25. Further confusion results from the fact that the Pill—a common form of contraception—is an effective PCC method when used in slightly different dosages. *See infra* note 164 and accompanying text.

18. *See infra* note 65.

19. *See infra* notes 23-92 and accompanying text.

20. *See infra* notes 93-153 and accompanying text.

each category.[21] The Note concludes by recommending that as technological advancements reduce the practical disparities between contraception and abortion, the Court must acknowledge the inequities resulting from the disparities in its privacy jurisprudence, and re-evaluate how it will draw such lines in the future.

This conclusion endorses a reaffirmation of the principle the Court recognized over half a century ago: A "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[22]

I. THE EVOLUTION OF THE PRIVACY DOCTRINE

In 1965, the Supreme Court recognized a constitutional right of privacy in the landmark case of *Griswold v. Connecticut*.[23] The right of privacy asserted in *Griswold* was seen as a "peripheral" right derived from various enunciated rights contained within the United States Constitution.[24] Justice Douglas specifically noted the First Amendment's protection of the freedom to associate and a correlative right of privacy in those associations invoked in such cases as *NAACP v. Alabama*,[25] as well as the implicit concept of privacy contained in the Third, Fourth, Fifth, and Ninth Amendments.[26] Essentially, Justice Douglas maintained that legitimate, peripheral rights of privacy exist (alternately referred to as "zones," "emanations," and "penumbras") which warranted formal recognition by the Court.[27]

Justice Black, in his dissent in *Griswold*, expressed considerable frustration with the majority's creation of the right of privacy.[28] He believed that finding a right of privacy in the penumbras and emanations of enunciated constitutional rights was a ruse to avoid the condemned

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21. *See infra* notes 154-67 and accompanying text.

22. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

23. Griswold v. Connecticut, 381 U.S. 479 (1965). *Griswold* was a test case brought by a physician at the Yale Medical School and the head of the Connecticut Planned Parenthood Association to challenge a Connecticut statute which made illegal the use of "any drug, medicinal article or instrument for the purpose of preventing conception." Bloom, *supra* note 2, at 511 n.4. Plaintiffs succeeded in getting themselves charged as aiders and abettors by distributing contraceptives to married couples. *Id.* at 512. The Court held that married couples had the right to obtain and use contraceptives in their home free from state interference. *Griswold*, 381 U.S. at 485-86.

24. Bloom, *supra* note 2, at 515.

25. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

26. Bloom, *supra* note 2, at 516.

27. *Id.*

28. *Id.* at 516-17.

substantive due process rationale of the Lochner era.[29] Although the validity of recognizing a right of privacy was challenged by the dissent in *Griswold,* it has since been vindicated by even the most stalwart strict-constructionists within the context of contraceptive use.[30]

The right of privacy engendered by the *Griswold* decision involved two discrete aspects of privacy: "decisional" privacy, the right to make important decisions regarding whether to bear or beget a child, and "place-oriented" privacy, the right to make such decisions in the privacy of one's home, free from state interference.[31]

While the contraceptive right of privacy in *Griswold* applied specifically to married couples, the Court extended the right to unmarried individuals on equal protection grounds seven years later in *Eisenstadt v. Baird.*[32] Writing for the majority, Justice Brennan concluded that "[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[33] This statement has come to embody "the principle of *Griswold* with respect to contraception."[34]

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29. *Id.* The Lochner era refers to a line of cases stemming from a substantive due process right to contract established in Lochner v. New York, 198 U.S. 45 (1905). ROBERT H. BORK, THE TEMPTING OF AMERICA 44-46 (1990). The Lochner era is condemned for its judicially imposed, value-oriented style of substantive due process interpretation, whereby the applicable law was often ignored by the Court in favor of the personal values of the individual justices. *Id.*

30. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989). In *Michael H.*, Justice Scalia (one of the most devout strict-constructionists on the Supreme Court today) condoned the privacy right to free access to and use of contraceptives by citing *Griswold* as a case reflecting the Court's "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . . ." *Id.* at 122-23 (quoting *Griswold*, 381 U.S. at 501) (Harlan, J., concurring in judgment).

31. Bloom, *supra* note 2, at 533.

> During the oral argument in *Griswold* itself . . . the Court anticipated the potential application of appellant's theory to abortion. The Court specifically asked Professor Emerson whether his theory would not invalidate state regulation of abortion. He replied that it would not since, unlike the contraception decision at issue in *Griswold*, abortion is [both] less likely to take place within the sanctity of the home, and a life . . . apart from the married couple is affected.

Id. at 533 n.201 (citing Transcript of Oral Argument following recess, at 23-24, Griswold v. Connecticut).

32. Eisenstadt v. Baird, 405 U.S. 438 (1972).

33. *Id.* at 453 (emphasis in original).

34. Bloom, *supra* note 2, at 533.

In 1973, one year after *Eisenstadt*, the Court issued its opinion in *Roe v. Wade*.[35] In the opinion, authored by Justice Blackmun, the Court held that the constitutional right of privacy manifested in the *Griswold* decision "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[36] This protection of decisional privacy in the abortion context is now considered "*Roe*'s essential holding."[37] In balancing the competing interests at stake—a woman's privacy interests, the state's interest in preserving the health of the woman undergoing the abortion, and the state's interest in preserving the life of potential citizens—the Court in *Roe* based its reasoning on the trimester framework.[38] Dividing pregnancy into three, thirteen-week periods (i.e., trimesters) is a medical convention co-opted by the Court in *Roe* to mark the point at which the respective interests become compelling, and therefore subject to state regulation.[39]

According to *Roe*, in the first trimester (approximately 0-13 weeks) a woman's right to privacy predominates because the state's interest in maternal health and potential life has not yet reached the point of compelling, thereby precluding regulation.[40] During the first trimester an

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35. Roe v. Wade, 410 U.S. 113 (1973). Plaintiff brought an action claiming that Texas' criminal abortion laws, which proscribed all abortions except to save the life of the mother, were unconstitutional. *Id.* at 120. The statute, in pertinent part, proscribed any activity by any person that was designed to "administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any . . . means whatever externally or internally applied, and thereby procure an abortion." *Id.* at 117 n.1. Abortion was defined as "the life of the fetus or embryo . . . destroyed in the woman's womb or that a premature birth thereof be caused." *Id.*

36. *Id.* at 153.

37. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

38. *Roe*, 410 U.S. at 162-66.

39. *Id.*

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. . . .
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> . . . .
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> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. . . .
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> This holding, we feel, is consistent with the relative weights of the respective interests involved, [and] with the lessons and examples of medical and legal history . . . .

Id. at 163-65.

40. *Id.* at 163.

> This means . . . that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without

"important and legitimate" state interest exists in protecting the potential life of the fetus and the health of the mother, but it is only when the interest reaches the compelling point that a state is justified in imposing any regulations on abortion.[41] In other words, during the first trimester the state may not take action to promote its interests in protecting maternal health, or preserving potential life.

State regulations during the second trimester (approximately 13-27 weeks) are permitted "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[42] The Court reasoned, based on medical evidence, that the state's interest in *maternal health* becomes compelling at this point because of the comparative risk of abortion to childbirth, which therefore justifies state regulation relating to maternal health.[43]

The state's interest in protecting the *potential life of the fetus*, while important and legitimate during the first two trimesters, does not reach the point of compelling until viability.[44] A fetus attains viability "usually . . . at about seven months" thus roughly corresponding with the beginning of the third trimester (approximately 27-40 weeks).[45]

Viability is defined as the point at which the fetus "presumably has the capability of meaningful life outside the mother's womb" with or without artificial aid.[46] It is important to note that the Court recognized that viability is usually reached by twenty-eight weeks, although it may occur sooner in some cases.[47] The fact that the point of viability is imprecise and contingent on available technology later proved significant to the Court in *Casey* when it rejected the trimester framework as "unworkable" yet retained the concept of viability as a valid legal dividing line between competing interests.[48] At all times, however, the state's

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> regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Id.

41. *Id.* at 162-63.

42. *Id.* at 163.

43. *Id.* The Court concluded: "[U]ntil the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure . . . [for] the preservation and protection of maternal health." *Id.*

44. *Id.* at 164-65.

45. *Id.* at 160.

46. *Id.* at 160, 163.

47. *Id.* at 160.

48. *Casey*, 505 U.S. at 872-73.

> We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was

compelling interest in fetal life remains subordinate to that of the mother's rights when abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[49]

Four years after the *Roe* decision the Court reaffirmed the right of privacy in the context of reproductive decisions in *Carey v. Population Services International*.[50] The Court in *Carey* held that access to contraceptives is a fundamental right, and as such, any state action affecting the exercise of that right is subject to strict judicial scrutiny.[51] The Court also recognized that the right of privacy afforded to contraceptive matters is conceptually related to the privacy right afforded to the abortion decision.[52]

Subsequent anti-abortion efforts have focused on legislation directed toward regulating the time, place, and method of second and third trimester abortions, with special emphasis placed on the state's interest in viable fetal life. Such attempts were invalidated by the Court under *Roe* in *City of Akron v. Akron Center for Reproductive Health*[53] and *Thornburgh v. American College of Obstetricians & Gynecologists*.[54]

> true in 1973, . . . and advances in neonatal care have advanced viability to a point somewhat earlier. . . . But these facts go only to the scheme of time limits on the realization of competing interests . . . .

Id. at 860 (citations omitted).

49. *Roe*, 410 U.S. at 165.

50. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

51. *Id.* at 690. The Court held that states may not ban mail-order companies from distributing contraceptives. States must demonstrate a compelling state interest when seeking to regulate distribution of contraceptives and may not constitutionally proscribe advertising of contraceptives. *Id.* at 690-700.

52. *Id.* at 688-89. The right to obtain and use contraceptives should not be seen as constitutionally distinct from, but as a part of, the constitutionally protected right of privacy involving personal judgment and decisions in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Eisenstadt*, and *Roe*. *Id.*

53. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983). A 6-3 majority struck down five provisions of an ordinance regulating abortion. The regulations required, *inter alia*, that all second or third trimester abortions be performed in a hospital, 24-hour waiting periods after signing consent forms, and "truly informed" consent provisions requiring physicians to inform patients of physical and emotional complications that may result from an abortion. *Id.* at 422-24. The informed consent provision was struck down as an attempt "not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* at 444.

54. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986). Applying a strict scrutiny standard of review the Court invalidated the Pennsylvania Abortion Control Act of 1982. *Id.* at 772. Among the invalidated statute's provisions were requirements that a physician report the basis for his determination that a second and third trimester fetus is not viable and use the abortion technique providing the best opportunity for the fetus to be aborted alive unless doing so poses a "significantly greater medical risk" to the woman's life or health. *Id.* at 769. "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Id.* at 759.

Justice Stevens, concurring in *Thornburgh*, reminded the Court that the post-*Griswold* decisions regarding reproductive privacy put the *Griswold* holding in its proper perspective, and reaffirmed the point that, at a basic conceptual level, contraception and abortion share a common right of decisional privacy.[55]

Although many of the early attacks against the right to choose abortion were defeated, later challenges proved more successful. Initially the abortion right secured in *Roe* and affirmed in *Carey*, *Thornburgh*, and *Akron* was attacked piecemeal. Three arguments in particular led the way for what became a wholesale campaign against the right secured in *Roe*. This anti-abortion offensive involved limiting the definition of "medically necessary" within the context of Medicaid funding for abortion, pressing for parental and spousal notification, and expanding the boundaries of the so-called informed consent provisions. This assault on *Roe* culminated in a significant erosion of the fundamentality of a woman's right to choose abortion.

First, Medicaid benefits that were initially afforded for medically necessary abortions under the provisions outlined in *Doe v. Bolton*[56] were later reduced as the definition of medically necessary was narrowed under the Hyde Amendment.[57] Under the Hyde Amendment, medically necessary abortions were defined as only those performed to save the life of the mother, to prevent serious and long-lasting injury to the mother's health by carrying the pregnancy to term as determined by the physician, and in cases of rape and incest if the incident had been "promptly reported."[58] This effectively discounts a physician's medical judgment regarding any social, economic, and psychological pressures affecting a patient's well-being and her ability to sustain a pregnancy.

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55. *Id.* at 775 (Stevens, J., concurring). "*Griswold* may no longer be read as holding only that a state may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* (quoting *Carey*, 431 U.S. at 687) (White, J., concurring).

56. Doe v. Bolton, 410 U.S. 179, 191 (1973). The Court held that physicians may broadly interpret the meaning of medically necessary abortion. *Id.* In deciding whether a patient needs an abortion, the physician may take into account all factors relevant to the patient's well-being, including age and familial circumstances as well as physical and psychological conditions. *Id.* at 192.

57. Pub. L. No. 94-439 § 209, 90 Stat. 1418 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."). The Hyde Amendment, proposed by Illinois Republican Representative Henry Hyde, amended the Department of Health, Education and Welfare's Appropriations Act, limiting abortions covered under Medicaid to those necessary to save the life of the woman, or in instances of rape or incest. *Id.* at 302.

58. Harris v. McRae, 448 U.S. 297 (1980).

Second, in 1976 the issue of third-party consent (spouses and parents) came before the Court in *Planned Parenthood of Central Missouri v. Danforth*.[59] The Court invalidated Missouri statutes giving a husband veto power over his pregnant wife's decision to terminate her pregnancy, and parents absolute veto power over their minor, unwed daughter's decision to terminate her pregnancy.[60] However, the Court left unresolved the issues of whether a state could require a physician to notify a husband or a parent about a wife's or a daughter's decision to terminate her pregnancy, and whether a state could require more than parental notification in the case of minors who are unable to give informed consent.[61] Ultimately, legislation was enacted and upheld limiting the rights of minor women to choose to terminate their pregnancies.[62]

Third, although abortion providers are not currently obligated by law to instruct patients as to any state defined "moral status" of the fetus (i.e., whether abortion is immoral, whether abortion contravenes religious precepts, or whether the fetus has a "soul," etc.),[63] numerous states have

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59. Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976).

60. *Id.* at 74. The Court reasoned that neither a father's nor a grandparent's interest in the abortion decision of the mother was sufficient to override the woman's right to make her own decision. *Id.*

61. LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY 168 (1994).

62. *See* Bellotti v. Baird, 443 U.S. 622 (1979) (upholding parental consent statutes provided that the state provides an alternative procedure, such as judicial consent). *See also* H.L. v. Matheson, 450 U.S. 398 (1981) (upholding statutes that require parental notification for a minor, dependant woman who is too immature to decide the matter for herself, as long as the state provides a judicial bypass option). "As of November 1992, 18 states had mandatory parental consent or notification laws in effect for a minor to obtain an abortion, and 12 additional states had considered bills during the 1992 legislative session that were intended to limit access to abortion through these statutes." Council on Scientific Affairs, American Medical Association, *Induced Termination of Pregnancy Before and After* Roe v. Wade; *Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231, 3237 (1992). Similar success, however, has not been achieved with regard to spousal notification and consent, as it is generally acknowledged that adult women are able to give informed consent, and that a husband's input is not needed to do this. KAPLAN & TONG, *supra* note 61, at 170; *Casey*, 505 U.S. at 893-94 (invalidating Pennsylvania's spousal notification provision as unduly burdensome).

63. KAPLAN & TONG, *supra* note 61, at 170.

> Although informed consent is assuredly in the best interests of any patient, many courts came to the conclusion that the intent of so-called Akron Ordinances was not so much to provide women with factual information about fetal development and abortion as to interpret for women the significance of this information in order to convince them that abortion is murder. The obligation of physicians is to inform their pregnant patients about the major physical and psychological risks of carrying a fetus to term, on the one hand, and aborting a fetus, on the other. It is not also the obligation of physicians to convince their pregnant patients that fetuses are persons.

Id.

considered or passed comprehensive and oppressive[64] mandatory informed consent legislation.[65]

The retreat from *Roe* began in earnest, however, with the Court's decision in *Webster v. Reproductive Health Services*.[66] In *Webster*, the Court upheld a Missouri statute imposing significant restrictions on the right to choose abortion accorded under *Roe*.[67] The statute at issue included a preamble which defined conception as the point at which life begins.[68] However, the Court refused to rule on the constitutionality of the statute's preamble, stating that the recognition of fetuses as Missouri

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64. *See, e.g.*, Council on Scientific Affairs, American Medical Association, *supra* note 62.

> In recent years, the introduction of mandatory waiting periods and parental consent and notification statutes, a reduction in the number and geographic availability of abortion providers, and a reduction in the number of physicians who are trained and willing to perform first- and second-trimester abortions have the potential to threaten the safety of induced abortion. *Each* of these factors increases the gestational age at which the induced pregnancy termination occurs, thereby also increasing the risk associated with the procedure.

Id. at 3237 (emphasis added).

65. The legislatures of Arizona, Minnesota, Montana, and Washington have considered bills containing "informed consent" provisions which require women seeking abortions to delay 24 hours after receiving state-mandated information. REPRODUCTIVE FREEDOM NEWS, Vol. IV, No. 3, Feb. 10, 1995, at 4-7. Soon after *Casey* was decided, a counseling provision, similar to the one upheld in Pennsylvania, was allowed to go into effect in Mississippi, when the United States Court of Appeals for the Fifth Circuit lifted a previously imposed injunction. Janet Benshoof, Planned Parenthood v. Casey*: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2253 (1993). After *Casey* was decided, biased counseling requirements (encouraging childbirth over abortion) were considered by Alaska, Connecticut, Georgia, Michigan, Missouri, Kansas, Rhode Island, South Carolina, Tennessee, and Vermont. *Id.* at 2255. Biased counseling bills have been passed in Utah and South Dakota. *Id.*

66. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

67. *See Webster*, 492 U.S. at 499-501; MO. REV. STAT. §§ 1.205, 188.205, 188.210, 188.215, 188.029 (Supp. 1996).

68. MO. REV. STAT. § 1.205.

> Life begins at conception—unborn child, defined . . .
>
> 1. The general assembly of this state finds that:
>
> (1) The life of each human being begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
>
> 3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

Id.

citizens from the moment of conception was not intended to have any regulatory effect limiting abortion, but merely expressed a "value judgement."[69]

The Court upheld the three statutory provisions at issue which (1) prohibited any employee or facility that received state funding from assisting in or performing abortions not necessary to save the mother's life, (2) prohibited public funding of abortion counseling, and (3) required physicians to perform viability tests for any fetus believed to be at least twenty weeks old.[70] Although twenty-three and one-half to twenty-four weeks gestation is the earliest point at which viability is possible with current technology,[71] the Court found that there may be a four-week error in estimating gestational age.[72] It was in recognition of this margin of error that the Court upheld the second trimester—i.e., twenty-week—viability testing provision.[73] In upholding the provision, the Court implicitly discarded *Roe's* prohibition of second trimester regulations designed to advance the state's interest in potential life. This prohibition was later explicitly discarded by the Court in *Casey* when the trimester framework was rejected, thus allowing viability—at whatever point it may

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69. *Webster*, 492 U.S. at 504-06. The United States Supreme Court may have been accurate in its determination that the preamble to Section 1.205 would not have any regulatory effect limiting abortion, but its opinion that it expressed a mere "value judgment" was not shared by the Missouri Supreme Court. Missouri v. Knapp, 843 S.W.2d 345 (Mo. 1992). The Missouri Supreme Court held that the § 1.205 definition of "person" was clearly intended to apply to other statutes and further held that it did apply "at least to the involuntary manslaughter statute." *Id.* at 347-48.

70. MO. ANN. STAT. §§ 188.205, 188.210, 188.029 (Vernon 1983 & Supp. 1996).

> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Id. § 188.205.

> It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a . . . public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

Id. § 188.210.

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable . . . [T]he physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of gestational age, . . . and shall enter such findings and determination of viability in the medical record of the mother.

Id. § 188.029.

71. Darcy Frey, *Does Anyone Here Think This Baby Can Live?*, N.Y. TIMES, July 9, 1995, § 6 (Magazine), at 22.

72. *Webster*, 492 U.S. at 515-16.

73. *Id.*

be achieved—to stand alone as the point at which a state may regulate abortion to advance its interest in potential life.[74]

A more significant aspect of the *Webster* decision was the Court's departure from recognizing abortion as a fundamental right.[75] As a fundamental right, any state action affecting abortion is afforded the strictest judicial scrutiny.[76] In *Webster*, however, the Court "seized the occasion to suggest that the abortion right [was] no longer fundamental."[77]

In 1992, the Court retreated further from its *Roe* decision in *Planned Parenthood v. Casey*.[78] Although a majority of the Court voted to preserve *Roe*'s central holding,[79] the Court still redefined the right of

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74. *See infra* note 82.

75. *Webster*, 492 U.S. at 507-08. The Court upheld a state created presumption of viability at 20 weeks—seven weeks before the beginning of the third trimester. *Id.* at 513-17. This regulation was upheld because it "permissibly further[ed] the State's interest in protecting potential human life." *Id.* at 519-20. Because the state's interest in protecting fetal life is not compelling in the second trimester, but only legitimate, and "permissibly furthers" is not the argot of strict scrutiny, but rather, rational basis, the fundamentality of the abortion choice was implicitly undermined.

76. Strict scrutiny has been applicable to abridgements of fundamental rights since Loving v. Virginia, 388 U.S. 1 (1967). Strict scrutiny requires that the government meet a heavy burden of justification. The government must prove that (1) the policy's goal is compelling, (2) the means chosen will substantially affect that goal, and (3) there is no alternative less restrictive of constitutional rights that will affect the stated compelling goal. *Roe*, 410 U.S. at 155; Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1963); NAACP v. Alabama, 377 U.S. 288, 307 (1963).

77. Dellinger & Sperling, *supra* note 8, at 84.

> The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, as the Court described in *Akron* a "limited fundamental constitutional right," as Justice Blackmun's dissent today treats *Roe* as having established, . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.

Id. (citing *Webster*, 492 U.S. at 519).

78. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

79. *Id.* at 864-67. In articulating why it preserved the essential holding of *Roe* as sound legal precedent, the plurality expressed its concern for both the institutional integrity and the public perception of the Supreme Court, as opposed to any deep conviction in the right to abortion per se.

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. at 864 (citations omitted). The Court again emphasized its commitment to stare decisis later in the opinion: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." *Id.* at 867. *But see* Benshoof, *supra* note 65, at 2250-53. It was significant that the Court agreed to review, in 1992, most of the same provisions it had ruled unconstitutional in *Thornburgh* in 1986. *Id.* at 2250. From 1986 to 1992, three new justices had been appointed to the Court. *Id.* "Despite its claimed reverence for stare decisis, the joint opinion in *Casey* explicitly overruled *Akron* and *Thornburgh*." *Id.* at 2253.

privacy in the abortion context, while declaring the right to obtain and use contraceptives as even more explicitly sacrosanct.[80] The Supreme Court upheld four of the five restrictive statutory provisions and approved of the statute's narrow definition of "medical emergency,"[81] dismantled *Roe*'s trimester framework,[82] and replaced strict scrutiny with the less stringent "undue burden" standard.[83]

The Court defined undue burden as a regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[84] Since the undue burden standard provides only vague guidelines, many women under this standard could effectively be deprived of the right to exercise their choice if the Court maintained a restrictive view of how burdensome state regulations must be before they constitute an infringement of the liberty interest.[85] And, as Justice O'Connor argued in *Akron* and *Thornburgh*, many restrictions on abortion may not unduly burden a woman's choice sufficiently to trigger serious constitutional scrutiny.[86]

By dismantling the trimester framework established in *Roe*, the Court recognized the state's legitimate interests in fetal life and maternal health, which exist from the "earliest stages of pregnancy," as sufficient justification for regulating abortion.[87] The *legitimacy* of these state interests had been recognized in the past.[88] However, under *Roe* such interests supersede a woman's privacy interest only when the state's

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80. *Casey*, 505 U.S. at 852-53.

81. *Id.* at 878-80. "The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion . . . ." *Id.* at 879. The provisions which were upheld include: (1) a narrow definition of "medical emergency" limited to conditions "which, on the basis of the physician's good faith clinical judgment, so complicate[] the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"; (2) informed consent requirements; (3) 24-hour waiting period; (4) parental consent provision for minor women; and (5) reporting and recordkeeping requirements. *Id.* at 879-87, 899-900.

82. *Id.* at 873. "[W]e abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life." *Id.*

83. *Id.* at 874.

84. *Id.* at 877.

85. *See* Benshoof, *supra* note 65, at 2253. Since the Court has refused to hear cases toward establishing a definition of undue burden, any statute resembling the Pennsylvania statute is facially presumed constitutional. *Id.* Plaintiffs have not been permitted to show how it would pose an undue burden. *Id.* Essentially "women would actually have to suffer an undue burden before the law could be found unconstitutional." *Id.*

86. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (citing *Akron*, 462 U.S. at 464).

87. *Casey*, 505 U.S. at 871-72.

88. *See supra* note 41 and accompanying text.

interest is compelling under *Roe* as required under strict scrutiny analysis.[89] The state's interest is compelling when the mortality rate of abortion increases or when the fetus reaches viability, which corresponds, more or less, with pregnancy's trimesters.[90]

Recognizing that abortion and contraception share a common ancestor in *Griswold's* decisional privacy, the Court nonetheless maintains a dual standard of review depending on the type of decision being infringed upon by the state.[91] The Court continues to apply strict judicial scrutiny to those cases involving state interference of contraceptive choice. State regulation of abortion before the point of viability is now examined only to determine whether the regulations are rationally related to a state interest and do not impose an undue burden on the exercise of the right.[92]

II. CONTRACEPTION V. ABORTION: SEPARATING FACT FROM FICTION

The Supreme Court appears to accept the idea that contraception and abortion are logically and legally separate,[93] distinguished by a clear line of demarcation at the moment of conception.[94] Nonetheless, the Court's analytical distinction between contraception and abortion, which provides a constitutional basis for state restrictions on abortion, cannot survive the introduction to this country of abortifacients like RU-486.[95]

The Court has drawn lines based on such tacit assumptions as: contraception takes place in the privacy of one's home while abortion takes place in hospitals and clinics; contraception is self-administered, while abortion requires surgical procedures; and most importantly, contraception prevents the creation of new life, while abortion destroys new life once it has begun. These assumptions, however, are flawed and confounded by the development of new reproductive technologies.

The legal and medical definitions of the events involved in both contraception and abortion are confusing and often inconsistent. More importantly, when relied upon as the basis for distinguishing between the

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89. *See supra* note 76.

90. *See supra* notes 38-49 and accompanying text.

91. *Casey*, 505 U.S. at 852. "It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions." *Id.*

92. *Id.* at 874.

93. *Id.* at 862 ("Abortion is a unique act.").

94. *Id.* at 859. "*Roe's* scope is confined by the fact of its concern with postconception potential life . . . ." *Id. See also* Krason & Hollberg, *supra* note 9, at 196, 216.

95. *See infra* notes 118-22.

level of constitutional protection afforded to each category, such inconsistent or inaccurate usage results in arbitrary line drawing.

A. Definitions, Distinctions, and Popular Notions

Contraception, an abbreviation of "contra-conception,"[96] is legally defined as "[a]ny device or substance which prevents fertilization of the female ovum."[97] Abortion is legally defined as the "artificially induced expulsion of an embryo or fetus."[98]

The commencement of pregnancy is medically defined, however, as the successful implantation of a fertilized egg.[99] Implantation occurs approximately seven days after fertilization, and is a process which itself takes place over several days.[100] In other words, conception and the onset of pregnancy (i.e., implantation of the product of conception) are medically not the same event. It is unclear whether the Court has adopted the medical definition of pregnancy as beginning with implantation, or defines pregnancy as beginning with conception. In any event, the Court is aware that such a window of time creates a gray area of sorts that lies legally somewhere between contraception and abortion.[101]

Abortion opponents, like the National Right to Life Committee, maintain that the union of the sperm and the egg is the beginning of life.[102] This position ignores the medically established lines which separate the discrete events that set the stage for the beginning of life.

In 1991, the Louisiana legislature passed a restrictive abortion statute.[103] Under this statute abortion was defined as the termination of a pregnancy after "contact" between egg and sperm, effectively including in its definition of abortion any form of contraception that interferes with implantation instead of preventing fertilization.[104] The statute was challenged in 1992 and invalidated as unconstitutional under *Roe* and

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96. Etienne-Emile Baulieu, *RU-486 as an Antiprogesterone Steroid: From Receptor to Contragestion and Beyond*, 262 JAMA 1808, 1813 (1989).

97. BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

98. *Id.* at 7. An embryo is a fertilized egg which has successfully implanted in the uterine wall. KAPLAN & TONG, *supra* note 61, at 51.

99. KNIGHT & CALLAHAN, *supra* note 16, at 104.

100. *Id.* at 100-05. *See also* Baulieu, *supra* note 96, at 1813.

101. *See infra* note 111.

102. Sandra G. Boodman, *Emergency Contraception; "Morning After" Pill Has Long Been Available but Many Women Don't Know About it*, WASH. POST, Apr. 4, 1995, at 7.

103. LA. REV. STAT. ANN. § 14:87(D)(4) (West 1991 & Supp. 1995).

104. *Id.*

Griswold.[105] While *Sojourner* was pending in the Fifth Circuit the Supreme Court decided *Casey*.[106] The Fifth Circuit based much of its decision in *Sojourner* on the reasoning in *Casey*, affirming the lower court's invalidation of the statute.[107] The Fifth Circuit, however, refused to address the issue of whether the statute criminalized the use of certain contraceptives.[108] The Supreme Court declined to hear the case.[109] In the 1995 appendix to the Louisiana Statutes Annotated there is a reference to the decision that states: "The term 'pregnancy' is not defined in this section but is given its customary meaning. The term does not apply to the prescription, administration and use of the oral contraceptive pill, the intrauterine device (IUD) and the morning-after pill."[110] While the Supreme Court has never explicitly defined the "customary meaning" of pregnancy, it could be argued that *Casey* implicitly defines pregnancy as beginning with implantation.[111]

Further complicating matters is that of the various types of contraceptive methods, only "natural" methods (*e.g.*, abstinence, coitus interruptus, and rhythm methods), barriers (*e.g.*, condoms and diaphragms), and spermicides function solely to prevent fertilization.[112] Many popular forms of contraception routinely allow conception to occur, and defeat pregnancy—usually via a "back-up" function—by destroying the uterine lining before or soon after implantation, generally before a woman knows she has conceived.[113] In fact, applying the term contraceptive to a drug or device that prevents or interrupts implantation of a fertilized egg

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105. Sojourner T. v. Edwards, 974 F.2d 27, 29 (5th Cir. 1992), *cert. denied sub nom.* Connick v. Sojourner T., 113 S. Ct. 1414 (1993).

106. *Id.* at 30.

107. *Id.*

108. *Id.*

109. Connick v. Sojourner T., 113 S. Ct. 1414 (1993).

110. LA. REV. STAT. ANN. § 14:87 (citing Op. Atty. Gen. 91-419 (Aug. 7, 1991)).

111. *Casey*, 505 U.S. at 859. "In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases." *Id.* *See also* Webster v. Reproductive Health Servs., 492 U.S. 490, 563, 563 n.7 (1989) (Stevens, J., concurring in part and dissenting in part). The Court acknowledged that as the Missouri statute defines fetal life as beginning with "fertilization," it therefore affects contraceptive devices which prevent implantation such as the IUD, the morning-after pill, some high-dose birth control pills, and potentially RU-486, "the so called abortion pill." *Id.*

112. KNIGHT & CALLAHAN, *supra* note 16, at 103.

113. *Id.*

is a misnomer, since it is not only fertilization, but sometimes implantation as well, that is thwarted by such a drug or device.[114]

Common forms of "contraceptives" such as the Pill and IUDs may prevent fertilization (and are designed primarily to do so), but sometimes fertilization occurs anyway.[115] Pregnancy is thwarted in such instances by a "secondary" function which defeats implantation.[116] In either case, a woman would only know that her menstrual cycle recurred when expected, not which mode of action—prevention or interruption—was responsible.[117]

Abortifacients,[118] like RU-486[119] and postcoital contraceptives

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114. *Id.*

115. *Id.* at 105. "[O]ral contraceptives generally prevent ovulation, but occasionally 'breakthrough' ovulation may occur and fertilization may result." *Id.* Pregnancy may fail, in this case, as a result of environmental disturbances in the reproductive tract caused by the hormones released by the oral contraceptive. *Id.* IUDs cause the uterus to produce a large number of destructive white blood cells, thereby maintaining the uterine lining in a chronic low-grade inflammation. *Id.* at 152. This makes the uterus a very inhospitable location for sperm or newly fertilized ovum. *Id.*

116. *Id.* at 105.

117. *Id.*

118. Baulieu, *supra* note 96, at 1813. A third category of birth control—"contragestion" (i.e., against gestation)—has been suggested by Dr. Baulieu, the French researcher and creator of RU-486. *Id.* Dr. Baulieu believes that characterizing RU-486 as a "contragestive" is more accurate because its function is to prevent the gestational environment from developing. *Id.*

119. KAPLAN & TONG, *supra* note 61, at 78. RU-486's generic name is mifepristone. Baulieu, *supra* note 13. It is an antiprogestational steroid hormone that, depending on the point in time and amount administered, can suppress ovulation, or induce menstruation. Michael Klitsch, *RU-486: The Science and the Politics*, *in* THE NATIONAL WOMEN'S HEALTH NETWORK INFORMATION PACKET 1, 6-7 (1989). While it is most notably used for voluntary interruption of pregnancy in the first nine weeks of pregnancy, it also has proven effective as a contraceptive, a labor inducer, and in treating viral infections, hypertension, ulcers, breast cancer, meningioma, endometriosis, Cushing's disease, and AIDS. Rudy M. Baum, *RU-486: Abortion Controversy in U.S. Clouds Future of Promising Drug*, CHEMICAL AND ENGINEERING NEWS, March 11, 1991, at 7, 12-13.

Currently, as a method of birth control RU-486 is generally considered an abortifacient. KAPLAN & TONG, *supra* note 61, at 78. It suppresses the production of progesterone, a hormone required for proper development of the uterine lining necessary to sustain a developing fetus. Baum, *supra*, at 9. Without progesterone, the uterine lining breaks down and is expelled. *Id.* A fertilized egg, without the proper environment in which to implant and grow, would be expelled as well. RU-486, when taken in conjunction with an oral prostaglandin, successfully terminates pregnancies approximately 96% of the time. *Id.*

The protocol followed in France regarding the administration of RU-486 involves a four-step process. KAPLAN & TONG, *supra* note 61, at 78-80. First, the woman goes to an authorized clinic for a pregnancy test and counseling. *Id.* If the test confirms that she is within eight weeks of conception and she wishes to terminate the pregnancy, she must wait a week before receiving the RU-486. *Id.* When she returns to the clinic she is given three pills containing 600 mg. of RU-486. *Id.* Two days later she returns for a dose of prostaglandin, ordinarily administered by injection, which induces contractions. *Id.*

The woman typically waits at the clinic for the embryo to be expelled, which occurs approximately four hours after taking the prostaglandin. *Id.* If the embryo is not expelled after a reasonable amount of time, however, a woman may return home to wait for the expulsion there. *Id.* Expulsion occurs while at the clinic for approximately half of the women, and for the rest usually

(PCCs),[120] are medical procedures (as opposed to surgical procedures) which act to sabotage implantation of a fertilized egg. Abortifacients, like contraceptives, are used at the earliest stages to prevent pregnancy. But abortifacients are typically administered after a woman has had sexual intercourse and believes, or knows, that she may have conceived. Contraceptives, on the other hand, are used by a woman on an ongoing basis to prevent pregnancy, whether by preventing fertilization or implantation should fertilization occur.

Confirmation of pregnancy, however, is not a prerequisite for the use of PCCs. For over fifteen years employees at university health clinics, rape-relief centers, and emergency rooms that treat sex-assault victims have administered PCCs to women who have had recent (usually within seventy-two hours) unprotected intercourse.[121] And a New York gynecologist, Dr. Richard Hausknecht, has successfully used a combination of two drugs approved for other uses to perform early first trimester abortions—before eight weeks—without surgery.[122]

The essential difference between abortifacients and contraceptives that interrupt implantation after fertilization is the point in time at which a woman avails herself of the treatment, and perhaps, her knowledge of what is accomplished by the chosen treatment.[123] Since the Pill and IUDs are contraceptive devices,[124] they are not subject to mandatory informed

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shortly after returning home. *Id.*

A new variation on the method administers the prostaglandin orally, potentially enabling women to self-administer the entire process. *Id.* Oral prostaglandin also increases the percentage of expulsions within four hours to 61%. *Id.* One week later the woman returns to the clinic for a follow-up examination to ensure that the procedure was complete. In 4% of the cases expulsion is not complete, and a surgical abortion is advised. *Id.*

120. Postcoital methods are procedures performed after intercourse up to the time of the expected onset of the menstrual period. David A. Edleman & Gary S. Berger, *Menstrual Regulation*, *in* ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 209 (Jane Hodgson ed., 1981). *See also* KNIGHT & CALLAHAN, *supra* note 16, at 164.

121. Jan Hoffman, *The Morning-After Pill: A Well-Kept Secret*, N.Y. TIMES, Jan. 10, 1993, § 6 (Magazine), at 12. *See also* Carol M. Ostrom, *Morning-After Pill Little Used*, CALGARY HERALD, July 9, 1993, at B9.

122. John Tierney, *A Lone Doctor Adapts Drugs For Abortions*, N.Y. TIMES, Oct. 10, 1994, at A1. In a two-stage process the woman first receives an injection of methotrexate, a drug that inhibits tissue growth and has been used for decades to treat cancer tumors and other conditions. *Id.* at A1, B2. Four days later the woman receives tablets of misoprostol—a drug approved for preventing stomach ulcers—which she inserts into her vagina. *Id.* at B2. The woman returns home where the uterine lining is expelled along with the embryo within three days. *Id.* The drugs are available by prescription and cost less than $10. *Id.* Dr. Hausknecht charges $500 for the procedure, which covers the cost of laboratory tests, an ultrasound exam, and three office visits. *Id.* The cost of a surgical abortion by comparison ranges from $300 in clinics to $1,000 in some doctor's offices. *Id.*

123. KNIGHT & CALLAHAN, *supra* note 16, at 153.

124. *Id.* at 106, 153.

consent provisions included in some abortion laws. Furthermore, doctors commonly fail to inform women of how these contraceptive methods work.[125]

As noted above, the Court is aware of the functional similarities between some forms of contraceptives and abortifacients. The question then is how can the Court recognize the state's interest in potential life from the earliest stages of pregnancy to justify onerous regulations of abortion and simultaneously ignore the same interest in the contraceptive context?[126] Moreover, even if the Court is willing to define pregnancy as beginning with implantation to distinguish post-fertilization contraception from abortion, can it continue to do so in light of new abortion devices such as RU-486 and PCCs?

Until recently, contraception and abortion were separated by a practical and logistical divide. For example, before medical abortifacients, abortions were exclusively surgical procedures performed in hospitals by trained professionals. Contraception, on the other hand, was used at the discretion of the individual, in the privacy of one's home, and often without needing a prescription. The introduction of new technology has bridged this gap, resulting in confusion and contradictions in the Court's rulings.

Initially, *Roe*'s trimester framework prohibited any state regulation of abortion in the first trimester.[127] This effectively afforded early abortions the same level of protection from state interference as contraception by requiring strict judicial scrutiny of any state action which affected such decisions.[128] However, when the Court renounced the trimester framework and replaced strict scrutiny with an undue burden standard, it created disparate levels of protection within its privacy jurisprudence.[129]

Given the functional similarities between some forms of contraception and new abortion technologies such as RU-486, there no longer exists a valid distinction upon which the disparate standards of privacy can be logically sustained.[130] If the Court insists on maintaining the divide in privacy doctrine as it currently exists, the question then remains, upon what facts would such a distinction rest?

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125. *Id.* at 223.

126. *See Casey*, 505 U.S. at 873.

127. Roe v. Wade, 410 U.S. 113, 163 (1973).

128. *Id.*

129. *See supra* notes 82-90 and accompanying text.

130. *See generally* Elizabeth A. Silverberg, Note, *Looking Beyond Judicial Deference to Agency Discretion: A Fundamental Right of Access to RU 486?*, 59 BROOK. L. REV. 1551 (1993).

B. Legal Distinctions

The decisional and place-oriented aspects of privacy derived from *Griswold* now apply equally to both contraception and abortion. With both, the decision is to prevent childbirth.[131] Today, some forms of contraception (*e.g.*, the Pill and IUDs) require a physician's prescription or insertion,[132] while some forms of abortion (*e.g.*, PCCs and RU-486) can be self-administered[133] without surgery. More importantly perhaps, the state's interest in potential life is implicated equally in both contexts, since some forms of contraception (*e.g.*, the Pill and IUDs) act to defeat pregnancy at the same point in time—developmentally—as newer methods of abortion (*e.g.*, PCCs and RU-486).

The Court noted in *Casey*, "[e]ven in the *earliest stages* of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."[134] Does the phrase "earliest stages" mean from the point of fertilization? One could argue that the Court meant the phrase "earliest stages of pregnancy" to incorporate the medical definition of pregnancy, which would mean that the earliest stages begin with implantation.[135] However, RU-486 and other similar abortion methods function at the time of implantation. Are such abortion techniques then properly viewed as abortive, or contraceptive like the Pill and IUDs?

Furthermore, the Court acknowledged that "because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases."[136] Clearly, the Court is well aware of the "postconception potential life"

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131. "I fail to see how a decision on childbearing becomes *less* important the day [or week] after conception than the day before." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 767 (1986) (Stevens, J., concurring).

132. *See generally* KNIGHT & CALLAHAN, *supra* note 16, at 22.

133. "It should be noted here that once prescribed the doctor no longer controls the use of the compound. Once the drug is dispensed to a woman there is no guarantee when she will take it, or indeed whether she takes it or gives it to another person." A.P. Cole & J.G. Duddington, *Legal and Ethical Implications of the RU486 Abortion Pill*, 110 LAW & JUST. 62, 64 (1991).

134. *Casey*, 505 U.S. at 872 (emphasis added).

135. *See supra* note 99 and accompanying text.

136. *Casey*, 505 U.S. at 859. "Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty." *Id.* at 858.

implications of some forms of contraception, yet it maintains that in the "contraceptive" context the state's interest is subject to strict judicial scrutiny under *Griswold*. Why? Merely because the FDA approved the Pill and IUDs as contraceptive devices[137] and *Griswold* was about contraception? Does not this undermine the Court's emphasis on careful evaluation of the weight of the state's interest in potential life that lies at the heart of *Casey*?[138] Does there exist any difference between the Pill and IUDs on the one hand, and PCCs and RU-486 on the other, aside from being classified as either *contraception* or *abortion*?

One possible fact upon which to base such a distinction is the knowledge or intent a woman possesses when she chooses a method to defeat pregnancy. One chooses abortion to defeat a known or suspected pregnancy after sexual intercourse has taken place, although the decision to reject pregnancy and childbirth may have been made much earlier.[139] But with contraception that allows fertilization, one makes the choice to use such devices on a continuous basis to defeat pregnancy. Generally one does not know whether conception was actually prevented or not, and in some cases may remain ignorant of how the device actually functions.[140] The fact of when the choice was made and what the woman knew when

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137. In June 1960, G.D. Searle's Enovid was the first product approved by the Food and Drug Administration (FDA) for contraceptive purposes. KNIGHT & CALLAHAN, *supra* note 16, at 106. The IUD known as *Copper T 380A* was approved by the FDA in 1984 and is explicitly marketed as "a contraceptive option" for women who fit the necessary profile for safe use. *Id.* at 163-64. RU-486 is currently used in many foreign countries as a first-trimester medical form of abortion, and if approved by the FDA for use in this country, it would be considered a method of abortion, not contraception. John Schwartz, *RU-486 Is On Its Way To the U.S.*, WASH. POST, May 17, 1994, at A1.

138. *See supra* note 136.

139. In this country roughly half of the 3.5 million unwanted pregnancies that occur each year are a result of contraceptive failure. Peter Jaret, *The Morning After Pill*, GLAMOUR, Sept. 1993, at 61. The Court also recognized this fact: "Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control." *Casey*, 505 U.S. at 856.

140. KNIGHT & CALLAHAN, *supra* note 16, at 105, 223.

she made it, while perhaps significant to some,[141] is nonetheless an inadequate foundation upon which to base a legal distinction.[142]

In order for one's knowledge or intent to be significant in determining whether one's action is legally wrong, the prohibitory statute must include the mental state as an element of the crime.[143] For example, killing a person[144] with the intent to murder[145] is illegal because society has determined that taking the life of another—without justification or excuse—is not something that it wishes to allow. Some might contend this is so because murder is morally wrong or defies religious beliefs, but from a legal standpoint, this is not necessarily relevant. As a society we also declare that driving above a certain speed limit under certain conditions is wrong, and have enacted laws making such behavior illegal, but it could hardly be argued that there is any moral or religious ground for prohibiting such behavior.

Terminating one's pregnancy on the other hand is not, in and of itself, illegal, and in many instances it is not at all illegal to undergo an abortion, only to perform one.[146] Perhaps this is due to the fact that until the availability of abortifacients, such as RU-486, abortions (properly and safely performed) required a procedure administered by a trained abortion provider, so criminalizing it at the source was believed effective to "eradicate" it. Under current privacy doctrine, if the state's interest in protecting fetal life and preserving maternal health were not legally recognized, or recognized yet insufficient to outweigh a woman's privacy

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141. "[M]any people simply object to the use of birth control 'after the fact.' They may view planned intercourse with planned protection as acceptable but feel that if a woman engages in unprotected intercourse she should have to pay for her transgression." KNIGHT & CALLAHAN, *supra* note 16, at 164.

> The term "free love" itself reveals the traditional religious view that coitus without the "purchase price" of potential pregnancy is sinful, . . . and although the United States is purportedly a secular nation committed to the separation of church and state, a residuum of religious taboo is undeniably (and unjustly) responsible for . . . much of the American reaction to the liberalization of abortion . . . .

Id. at 37-38.

142. Criminal abortion statutes generally make it criminal to perform or cause an abortion, but the penalties do not apply to the woman undergoing the procedure. *See, e.g.*, LA. REV. STAT. ANN. § 14:87(E)(1-2) (West 1995).

143. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.4, at 212 (2d ed. 1986).

144. "Person" is also defined by statute and, generally, in the criminal context person does not include a fetus. *Id.* § 7.1, at 607.

145. "Murder" is defined as "[t]he unlawful killing of a human being by another with malice aforethought, either express or implied." BLACK'S LAW DICTIONARY 1019 (6th ed. 1990).

146. For a discussion of the history of the applicability of criminal abortion statutes to providers alone, see Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774 (1991).

interest,[147] the state could not regulate abortion (aside from the routine standard of care which governs all medical procedures) and it would be perfectly legal to terminate a pregnancy up to the point of birth. It is only because the interest in terminating a pregnancy conflicts with a recognized competing interest (i.e., the state's interest in preserving potential life and maternal health) that it may, at certain times, be infringed upon in favor of those other interests.[148]

While many pro-life advocates maintain that abortion is murder,[149] the fact remains that the Court does not recognize abortion as murder because it does not recognize fetuses as people in the legal sense.[150] Fetuses are recognized as potential life, but they are not considered people deserving the full legal protection given to those whose potential for life has been realized.[151] Even the Court's recognition of viability does not confer legal personhood on a fetus, it merely marks a point at which the state's interest is deemed to outweigh the woman's interest.[152]

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147. The Court changed its stance on this point (at least) once, and could do so again. Balancing the weight of the state's interests relative to that of the woman's has presented an interesting issue for the Court. While the Court in *Casey* did not ostensibly increase the weight of the state's interest above what the Court in *Roe* had afforded it, it effectuated a similar result by dispensing with strict judicial scrutiny, thereby circumventing the need to declare if and when the state's interest became compelling enough to justify infringing upon a woman's privacy interest. *Casey*, 505 U.S. at 871.

148. While the state's interest in fetal life after viability is sufficiently compelling so that it may regulate and even proscribe abortion if it chooses, the Court did not mandate the states to do so. "[I]t might be argued that only a factor that gave rise to a state's duty to prohibit abortions could override the factors supporting a woman's right to have an abortion. For how could a factor that is so weak that the state may choose whether or not to act on it still override a right?" F. M. KAMM, CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY 18 (1992).

> For, unless the religious view that a fetus is a "person" is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. . . . Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.

Thornburgh, 476 U.S. at 779 (Stevens, J., concurring) (footnotes omitted).

149. *See, e.g.*, *Roe*, 410 U.S. at 158 (dismissing the argument that the fetus is a "person" within the meaning of the Fourteenth Amendment).

150. *Id.*

151. In 1994, "a National Institutes of Health advisory panel urged the NIH to end a 15-year ban on the funding of human embryo research[,]" arguing that embryos up to 14 days old do not have the same moral status as infants and children. *Embryo Research Allowed*, TIME, Oct. 10, 1994, at 27. Opponents of lifting the ban argued that life begins at conception and therefore such research is immoral, but the advisory panel concluded that the possible medical benefits outweigh these arguments. *Id.*

152. [T]here is no line other than viability which is more workable. . . . The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. . . . The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of

Intent is not a valid legal distinction in this instance. The fact that a woman intends to prevent pregnancy after conception, or merely does so without knowing that conception had occurred, is irrelevant. This is so because the state's countervailing interest in potential life is the same in both instances, regardless of what the woman knew or intended. And the state's interest in potential life is the only legally relevant factor (aside from protecting maternal health) in determining if and when avoiding pregnancy after fertilization can be regulated by the state. Since the state interest is implicated to an equal degree in both, the Court cannot justify the doctrinal disparity in its privacy jurisprudence. As Justice O'Connor admitted in *Casey*, "[c]onsistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[153] If the Court cannot justify the line between contraception and abortion as it exists, how can it be redrawn in a principled manner?

III. CONTRACEPTION + ABORTION = BIRTH CONTROL

Although the Court's decision in *Casey* marked a significant retreat from its decision in *Roe*, its reliance on stare decisis and its reaffirmation of the central holding of *Roe* means that a complete ban on abortion before viability will most likely remain unconstitutional.[154] However, by dismantling the trimester framework, increasingly intrusive state regulation of abortion from the earliest stages of pregnancy has been, and will most likely continue to be, upheld.[155] State regulation of contraception, on the other hand, will continue to be invalidated under the strictest judicial scrutiny afforded under *Griswold*.[156]

It is arbitrary and unfair to maintain this dual standard of review for reproductive privacy in light of the increasingly amorphous boundary between some types of contraceptives and new abortion methods. Under this dual privacy scheme women who choose "abortion" via RU-486 and

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the developing child.

Casey, 505 U.S. at 870-71.

153. *Id.* at 870.

154. Even though a complete ban on first trimester abortions would no longer be strictly scrutinized, it would almost certainly be considered a undue burden on a woman's right to choose. As the Court said of the woman's right to choose abortion: "[i]t is a rule of law and a component of liberty we cannot renounce." *Id.* at 871. The Court also distinguished between laws which "strike at the [privacy] right itself" and those which have the "incidental effect of making it more difficult . . . to procure an abortion." *Id.* at 874.

155. *See supra* note 65 and accompanying text.

156. *Casey*, 505 U.S. at 859.

similar procedures are subject to onerous state regulation,[157] while functionally similar methods of "contraception" can be obtained relatively free from state interference. Should a state try to regulate these forms of contraceptives, such laws would be subject to the strictest judicial scrutiny under *Griswold*.[158] How then can the lines be redrawn without dismissing well established legal precedent?

The Court in *Casey* rejected the trimester framework adopted by the Court in *Roe* while simultaneously reaffirming the "central holding" of *Roe*. In so doing, the Court in *Casey* recognized that medical technology had advanced to a point which rendered obsolete the legal reliance on outdated medical knowledge. The Court could—and should—do a similar re-evaluation of the technological assumptions which underlie the contraception-abortion dichotomy.

If we dispense with terms like contraception and abortion we are left with roughly five categories: (1) things which prevent fertilization (*e.g.*, abstinence, rhythm method, coitus interruptus, condom, diaphragm, and spermicide); (2) medical things which may prevent fertilization, but which also defeat or destroy early implantation if fertilization occurs (*e.g.*, the Pill and IUD); (3) medical things which defeat or destroy early implantation (*e.g.*, RU-486 and PCCs); (4) surgical things which destroy implantation of a non-viable fetus (*e.g.*, first and second trimester abortions); and (5) surgical things which destroy implantation of a viable fetus (*e.g.*, post-viability or third trimester abortions).

How do we allocate these categories between *Griswold* and strict scrutiny, and *Casey* and undue burden analysis? Categories one and five are perhaps the easiest. Category one clearly does not implicate the state's interest in potential life. Its constituents are unambiguously within the realm of contraception because they only prevent conception. Category

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157. One notable exception is PCCs. Presumably, rape victims or other women who receive PCCs in emergency rooms or health clinics are not subjected to informed consent laws, mandatory waiting periods, etc., as it needs to be administered within 72 hours of sexual intercourse. *See supra* notes 120-22 and accompanying text. If, however, the Pill is relabelled to include its use as a PCC as well as a daily "contraceptive," would it be subject to abortion regulation? *See infra* note 164.

158. This is so not because the Court is unaware that these forms of contraception implicate "potential life," but rather because under *Griswold* the state's interest in potential life was not recognized or given sufficient weight to countervail the privacy interest at issue. *Griswold*, 381 U.S. at 485-86. It is possible that the Court was not aware of the "post-fertilization" function of some forms of contraception at the time *Griswold* was decided. Whether or not this is true is uncertain. IUDs and the Pill were certainly around in the mid-1960s. KNIGHT & CALLAHAN, *supra* note 16, at 106-07, 149-50. But some members of the Court clearly were aware of this fact by the time *Webster* was decided, and yet, still affirmed *Griswold*'s protection of such contraceptive devices. *Webster*, 492 U.S. at 522-23 (O'Connor, J., concurring). Again in *Casey* the Court reaffirmed *Griswold*'s protection of all forms of contraception. *Casey*, 505 U.S. at 859.

five is also straightforward. The Court defines viability as the point at which the state's interest becomes sufficiently weighty to justify regulating abortion, even proscribe it, as long as the health of the woman is not otherwise jeopardized.[159] Theoretically, as medical technology advances and neonatal intensive care improves, viability would be attainable earlier than twenty-three weeks. One day, viability could reach back to the point of conception with the invention of an artificial womb. However, researchers in the field of neonatal medicine have suggested that before twenty-three weeks fetal lungs lack sufficient tissue to exchange gases, so rescuing fetuses younger than twenty-three weeks would require radical new technology like an artificial placenta.[160] While such technology would raise new issues concerning the legal significance of viability, until such devices are developed, tested, and approved, viability appears infeasible before the twenty-three week point.[161]

It is the second, third, and fourth groups that defy easy categorization. Category two and three both involve medical things and so involve place-oriented privacy as well as decisional privacy. Both categories also implicate the state's interest in potential life as they function after fertilization. What level of judicial scrutiny should be afforded to regulations which impact such devices, strict scrutiny under *Griswold* or undue burden analysis under *Casey*? Is it enough to look at how such things have been categorized by the FDA? Clearly not if the Court bases the justification for state regulation on its interest in potential life.

And what about group four, surgical things? Let us say that group two and three are sufficiently similar to warrant *Griswold*'s strict scrutiny because they are non-surgical, while group four is not. Upon what then would the distinction rest? Is the fact that category two and three involve medical things and category four involves surgical things enough to justify upholding regulation of group four and not two and three? Moreover, is the state's interest in twelve-week-old, non-viable potential life greater than the state's interest in six-week-old, non-viable potential life?

There is, of course, another permutation to consider. Groups two and three could be viewed as sufficiently similar to group four, and all three

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159. Although post-viability abortion "on demand" is problematic from a political and philosophical standpoint, practically speaking, third-trimester abortions are by definition performed on only a limited basis. Few physicians are trained to perform late trimester abortions. S.K. Henshaw et al., *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63-70 (1987). Of the total 1.5 million abortions performed annually, only between 100 to 200 are done after 24 weeks. Telephone Interview with Terry Sollom, Alan Guttmacher Institute, Washington, D.C. (Feb. 20, 1996). Only .01% of all abortions are performed in the third trimester. *Id.*

160. Frey, *supra* note 71, at 29.

161. *Id.*

categories would be accorded undue burden analysis under *Casey* since each instance invokes a state interest in potential life. This raises an interesting point about enforcement—an issue of notable concern to the Court in *Griswold*.[162] If a woman cannot tell when, in any given month, a category two device functioned[163]—pre-fertilization or post-fertilization—how could a law regulating such devices be implemented? Would a statute which did not distinguish between fertilization or implantation, be invalidated as overinclusive or unconstitutional under *Griswold*?[164]

The problem would not be solved either by declaring medical abortifacients (like RU-486 and PCCs) contraceptives, thereby reestablishing the old medical/surgical, home/hospital divide implicit in such statements as "[a]bortion is a unique act."[165] This poses no principled solution because the state's interest in potential life in the contraceptive context remains unacknowledged as compared to the same interest in the abortion context. There is a solution however, that would require the court to refine its jurisprudence—much in the way it did in *Casey*—in light of current technology.

The Court could re-establish strict judicial scrutiny of any reproductive technology that affects pre-viable potential life, whether it be contraception or abortion. Under such a scheme the state would again need a compelling interest (i.e., in potential life) and any regulation would need to be narrowly tailored to advance that compelling interest. This would implicitly bring into accord *Casey*'s recognition of the state's interest in potential life with that of *Griswold*. In other words, before viability the state has no compelling interest in protecting potential life.

The Court finally may be required to do that which it has been loathe to do since *Roe*: decide when a potential life legally becomes a person. Is it enough to declare that a state has a heightened interest in a viable

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162. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

163. *See supra* note 117 and accompanying text.

164. This is clearly at issue regarding the Pill. In November 1994, The Center for Reproductive Law & Policy submitted a Citizen's Petition to the FDA as counsel for The American Medical Women's Association, the American Public Health Association, and Planned Parenthood of New York City mandating relabeling of oral contraceptives to indicate appropriate directions for use as postcoital emergency contraception. THE CENTER FOR REPRODUCTIVE LAW & POLICY, CITIZENS'S PETITION 1 (Nov. 23, 1994). Their claim is that in failing to include in the labeling all possible uses of the oral contraceptive, "the FDA has sanctioned violation of the criminal misbranding statute by the manufacturers of oral contraceptives, thereby endangering the lives and health of American women and inflating rates of unintended pregnancy and abortion in this country." *Id.*

165. *Casey*, 505 U.S. at 852.

fetus because it can survive separate from its mother, if, in fact, it is not separate from its mother and cannot achieve separation without her help?[166] The Court has only recognized the state interest in protecting potential life, not the potential-life's interest in realizing its potential.

If the Court wants to recognize prenatal life as persons it should do so in a forthright way rather than relying on vague and ambiguous distinctions to cabin the recognized rights of women who choose not to be pregnant. If the Court does not wish to declare itself in this way, then it must re-evaluate its privacy jurisprudence to ensure that, in the Court's own words, it can "justify the lines [it] draw[s]."[167]

CONCLUSION

The United States Supreme Court can no longer narrowly evaluate all decisions regarding whether to bear or beget a child as either abortion or contraception. When the right to make such choices privately and free from governmental intrusion was first recognized, such simple classifications were less troublesome, and largely unquestioned. However, technology has advanced the discourse beyond this simple dichotomy. Technology has blurred the lines between contraception and abortion, even as the public debate and the Court's privacy jurisprudence continues to insist that such distinctions are still warranted.

The debate rages on. Indeed, it has become increasingly polarized, and at times violent. But, as divisive as the issue is, the fact remains that contraception and abortion are closely related in purpose. That is, the goal in seeking an abortion and using contraception is to control one's reproductive capacities, in other words, to avoid giving birth if one so chooses.

Sometimes abortion and contraception are distinct in name only and are functionally quite similar. In such instances, the same level of constitutional protection against governmental intrusion should be afforded.

Annemarie Brennan

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166. "[T]he fetus will not retain its life independently of [the woman carrying it] if it needs her help to be free of her, and if these efforts are excessive, it has no right to them." KAMM, *supra* note 148, at 94. The fetus has no right to a woman's efforts needed to be free of her because as a non-person it is not a "rights bearer." *Id.* at 17.

167. *Casey*, 505 U.S. at 870.