

## Moving the Movement

*To protect the right to choose, the women's movement must defend not just reproductive rights, but reproductive justice. A response to Gloria Feldt.*

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as *Roe vs. Wade*, once seen as a great victory for reproductive freedom, actually the beginning of the end for the women's movement? In her review of Jeanne Flavin's *Our Bodies, Our Crimes*, Gloria Feldt laments that the *Griswold vs. Connecticut* and *Roe vs. Wade* "victories carried within them the seeds of their own demise, for they were not grounded in women's moral and legal agency for which the law should provide protection equal to men's" ["Beyond *Roe*," Issue #11]. According to Feldt, because those cases turned on the right to privacy—which is not explicitly enumerated in the Constitution—instead of the right to equal protection—which is—women's access to contraception and abortion has been eroded rather than cemented over the past few decades.

While *Griswold* and *Roe* provided watershed protections for reproductive rights in American jurisprudential history, and while those rights have been

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swiftly diminished over the years, it is not necessarily the case that, had the Court chosen another route, reproductive rights would be more secure today. Indeed, it was not only legal decisions but also political missteps—specifically, the pro-choice movement’s inability to address the distinctive concerns of women of color, young women, and poor women—that brought us to the point where reproductive rights still are denied to too many women and remain vulnerable to conservative attacks.

**T**he battle to control women, their fertility, and their sexuality is as old as the story of Adam and Eve. As Feldt herself notes, “*Griswold* and *Roe* didn’t end the fight for dominance over women’s sexual and procreative lives; they started a new round.” One or two Supreme Court cases by themselves could hardly settle the matter once and for all. Although the privacy doctrine has been susceptible to a particular set of critiques, it is difficult to imagine that the fight would be over by now, even if the Court had crafted an equality-based approach to abortion. Abortion opponents are as creative as they are relentless—no doubt they could have come up with an equally powerful offensive against an alternative defense.

Moreover, just because a right is expressly written in the Constitution does not mean it will automatically be protected, as arguments grounded in equal protection have themselves not always withstood assault. Conservatives have routinely fought affirmative action, for example, even though such policies were developed as a way to implement the equal protection clause. And even when equal rights arguments have been made on behalf of pregnant women, the Court has ignored those arguments or worse, finding that the classes of persons who should be compared in a constitutional analysis are “pregnant” and “nonpregnant” people rather than women and men.

Nor is it entirely accurate, as Feldt argues, that the right to privacy has never been “deemed an absolute value by the Court or the court of public opinion.” In fact, most Americans believe strongly in the right to privacy, and many even think—albeit incorrectly—that it is explicitly included in the Constitution. Among the current members of the Court, all except perhaps Justices Antonin Scalia and Clarence Thomas recognize a right to privacy. And the Court even expanded the doctrine’s scope in the 2003 case *Lawrence vs. Texas*, which recognized that the right to privacy confers on homosexuals the right to engage in private, consensual, sexual behavior.

That said, reproductive rights—including but not limited to abortion—are indeed on terribly shaky constitutional ground these days. The 2007 *Gonzales vs. Carhart* decision (also known as *Carhart II*)—which, for the first time, allowed an

abortion restriction to stand that did not include an exception to protect a woman's health—is simply the most recent and most stark example. The Court instead made the state's interest in protecting the potential life of the fetus its overriding concern, despite the acknowledged fact that not one abortion would be stopped by the law. Justice Anthony Kennedy, who authored *Lawrence* and mused endlessly about the right to privacy in that opinion, tellingly did not use the word “privacy” once in *Carhart II*. Neither did he mention the word “equality.” (It is hard to see how he could, riddled as his opinion is with essentialized notions of motherhood and paternalistic concerns about women regretting their decisions.)

What remains truly contested territory is not the right to privacy per se, but the right to abortion. But not because the right to abortion was grounded in privacy principles. Abortion is under attack because it is abortion—because it raises deeply personal and philosophical questions about the definition of personhood, and because social, cultural, religious, and political dynamics have manufactured it into a controversial, election- and nomination-deciding issue. It has become a proxy for women's liberation and equality, gender roles, family structure, and sexual mores. For all of these reasons, it is unlikely ever to be put to rest by Supreme Court doctrine alone—which is why the reproductive rights movement needs to put as much energy and resources into organizing as it has put into lawsuits.

**F**eldt and Flavin are right to emphasize how women and girls in the criminal justice system are among the most vulnerable in our society. Opponents of reproductive rights have long pursued a strategy of attacking the rights of the most unpopular and least powerful populations before expanding reproductive health restrictions to the general population. We see it in bans on public funding for abortions, the denial of family planning services abroad, and the proliferation of abstinence-only education around the world and in the poorest communities at home.

Beyond the reproductive rights staples of abortion, contraception, and sex education, disenfranchised women routinely face additional violations of their reproductive rights: As Flavin details in her book, women in the criminal justice system, for instance, are temporarily or permanently sterilized as a condition of punishment or parole; receive substandard reproductive health care while confined by the state; are prosecuted rather than treated for using drugs or alcohol while pregnant; are denied access to their children while imprisoned; and have their parental rights terminated without adequate due process.

This is where the reproductive rights movement must do better—in protecting the rights of marginalized women and girls. Yet Feldt overlooks its past stumbles. It is unfair and inaccurate to place blame solely with the courts and

legislatures. In retrospect, it is possible to see that some strategic decisions that made sense at the time, including resource allocation and political compromises, may not have benefited the movement or its constituency in the long run. Put more bluntly, there are women and girls whom the pro-choice movement left behind—whether through complacency, negotiation and compromise, or rhetoric that failed to resonate.

For example, while women of color have been disproportionately burdened by abortion restrictions, they also are enduring other unacceptable health disparities, with HIV/AIDS, cervical cancer, and maternal and infant mortality rates that eclipse those of white women. Moreover, the failure of the pro-choice movement to prevent or repeal the Hyde Amendment, which prohibits Medicaid money from being spent on abortion in most circumstances, was and still is seen

by many as a betrayal of poor women and women of color.

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This is not to point fingers but simply to acknowledge that in order to stay relevant, a movement must periodically take stock and recognize where it is on course and where it may have missed the boat. Abortion is important, but it is

not always the issue that will be of primary importance to diverse communities. The reproductive rights movement must be able to do more than simply assert its arguments with greater force; it must reexamine and recast them when necessary to reach and expand its constituency. Reproductive justice can provide the framework necessary to do so.

While Feldt advocates for reproductive justice in her piece, she does not draw a meaningful distinction between the complimentary but discrete concepts of reproductive justice and reproductive rights; in fact, she seems to conflate the two. “Reproductive justice” is a relatively new term, developed by women of color advocates who found that existing constructs of reproductive rights did not speak to their realities—realities that too often constrained the exercise of abstract rights. Asian Communities for Reproductive Justice, a grassroots community-based organization that advocates on behalf of Asian and Pacific American women and girls, explains that “reproductive justice...will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.” This perspective emphasizes the right to be a parent as much as the right not to be a parent and recognizes the ways race, ethnicity, immigration status, class, sexuality, and

disability affect access to reproductive health care.

What does it mean to apply this framework in a constitutional setting? It means examining the effect of a law on the most vulnerable among us—the disenfranchised, the poor, and the marginalized. While the Court has often championed the rights of the minority, it has rarely acknowledged that real-life circumstances can present significant and severe obstacles to effectuating rights. For more than 15 years, abortion jurisprudence has required a plaintiff to show that a law represents an “undue burden” on the decision to have an abortion, with little clarity as to what constitutes an undue burden and how many women have to be unduly burdened before a restriction can be struck down. Indeed, the Court said in *Planned Parenthood vs. Casey* that the “fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it.” It is for this reason that many women in this country have not experienced the full promise of *Roe* in their own lives.

**T**he women’s movement should not stop arguing that reproductive rights are bound up in the rights to privacy *and* equality, as well as several other constitutional rights. But it must also work to ensure that the Court not only recognizes those rights but guarantees them. Feldt is right that a human rights framework, which requires governments to respect, protect, and ensure rights, can help accomplish this goal. Worldwide, governments are recognizing reproductive rights as human rights, and the United States must follow suit. Reproductive rights encompass so much more than the right to abortion: They involve ensuring that people have the ability to become pregnant and to parent with dignity, to determine whether and when to have children, to have healthy pregnancies, and to have safe and healthy families and relationships. Advocates must connect the right to rear one’s child to the right to marriage equality; the right to be free of sexual violence to the right to a healthy workplace for women and men of reproductive age. These are all part of the same bundle of rights that honor self-determination, autonomy, equality, and dignity.

This new agenda must be comprehensive and holistic. In all branches and at all levels of government, we as progressives must ensure that the reproductive and sexual rights of all women and men are respected and protected. Feldt is correct that human rights and reproductive justice should be our overriding values as we pursue better rulings from the Supreme Court. But we should not limit our work to arguments based on the equal protection clause alone. There are numerous routes we can pursue in support of reproductive justice—both within and outside of the Supreme Court—and we should pursue them all. **■**