

A PRO-FEMINIST LIFE: SHERRY COLB AND ABORTION RIGHTS

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In a classic work of feminist theory, *The Mermaid and the Minotaur*, Dorothy Dinnerstein described her project this way:

[T]o fight what seems about to destroy everything earthly that you love—to fight it not passively . . . , with denial; and not unrealistically, with blind force; but intelligently, armed with your central resource, which is passionate curiosity—is for me the human way to live until you die.¹

That passage captures perfectly Sherry Colb's work, particularly her own feminist project related to reproductive autonomy and abortion rights. That project was marked by a willingness to engage with a wide variety of arguments (for example, Sherry's response to "pro-life feminists"²), a talent for making striking connections (for example, Sherry's comparisons between human and animal motherhood³), and a fierce wit (for example, titles like *Ah, Look At All the Potential People* and *Commander Sam Alito, At Your Cervix*⁴).

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¹ DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* viii (1st. ed. 1976).

² See, e.g., Sherry F. Colb, *Feminists for Life and the Hard Questions It Must Confront*, FINDLAW (Apr. 15, 2009), <https://supreme.findlaw.com/legal-commentary/feminists-for-life-and-the-hard-questions-it-must-confront.html> [<https://perma.cc/6VTC-2S7U>] [hereinafter Colb, *Feminists for Life*]; Sherry F. Colb, *Would a Feminist Oppose the Right to Choose*, JUSTIA: VERDICT (July 27, 2018), <https://verdict.justia.com/2018/07/27/would-a-feminist-oppose-the-right-to-choose> [<https://perma.cc/UZ6C-EEAF>].

³ See Sherry F. Colb, "Never Having Loved at All": An Overlooked Interest that Grounds the Abortion Right, 48 CONN. L. REV. 933, 950–51 (2016) [hereinafter Colb, *The Interest in Never Having Loved at All (INHLAA)*].

⁴ Sherry F. Colb, *Ah, Look At All the Potential People*, DORF ON LAW (May 31, 2022), <https://www.dorfonlaw.org/2022/05/ah-look-at-all-potential-people.html> [<https://perma.cc/2L6R-LUU3>] [hereinafter Colb, *Potential People*]; Sherry F. Colb, *Commander Sam Alito, At Your Cervix*, DORF ON LAW (July 20, 2022), <https://www.dorfonlaw.org/2022/07/commander-sam-alito-at-your-cervix.html> [<https://perma.cc/79XY-EM2F>] [hereinafter Colb, *Commander Sam Alito*].

One of the signal virtues of Sherry's scholarship across doctrinal areas was her flair for creating taxonomies. In 2009, Sherry identified and then plumbed two distinct interests underlying the abortion right—the "Offspring Selection Interest" and the "Bodily Integrity Interest."⁵ The offspring selection interest encompasses an interest (either individual or societal) in deciding whether and when to have offspring. The bodily integrity interest refers to one's ability to protect one's body "against unwanted occupation."⁶ A decade later, Sherry identified what she described as a third, "new," interest that "goes unexpressed by the Bodily Integrity Interest and the Offspring Selection Interest alone."⁷ This interest, which Sherry termed the "Interest in Never Having Loved at All (the INHLAA)," centers on a woman's "interest in protecting herself from becoming attached and bonded to someone with whom she will be forced, by third parties or by circumstances beyond her control, to surrender and mourn."⁸ To my mind, the INHLAA is actually a species of the offspring selection interest, understood broadly, because it reflects a woman's interest in not having offspring with whom she will be unable to maintain a continuing bond after they are born.⁹ But either way, Sherry's analysis contributed to the argument for allowing women to choose.

In the final months of her life, Sherry published a series of posts at *Dorf on Law* regarding the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.¹⁰ These posts suggest yet a further refinement to Sherry's original framework. Sherry's response to *Dobbs* sketches the contours of a feminist version of Isaiah Berlin's foundational idea of "positive liberty" in which women are "deciding, not being decided for" and "conceiving"—there's that freighted word—"goals and policies

⁵ Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to "Future Generations"? Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1583 (2009).

⁶ *Id.* at 1595.

⁷ Colb, *The Interest in Never Having Loved at All (INHLAA)*, *supra* note 3, at 939.

⁸ *Id.* at 949.

⁹ Sherry herself implicitly recognized this point when she had earlier written that pregnancy "compels a level of intimacy that can result in bonding" that could "prove devastating" either because a woman "gives up the child for adoption" or because she "find[s] herself unable to give up the child," thereby subjecting herself to "the problems that motivated her to want an abortion in the first place." Colb, *supra* note 5, at 1613.

¹⁰ 597 U.S. 215 (2022).

of [their] own and realizing them.”¹¹ This fourth interest is centered on a woman’s equal entitlement to be treated as an end in herself, rather than as a means for pursuing some external actor’s goals.¹² This essay traces the evolution in Sherry’s thought.

I

OFFSPRING SELECTION AND BODILY INTEGRITY IN THE ORIGINAL FRAMEWORK

Sherry’s initial work on abortion was written against the backdrop of the legal regime set out in *Roe v. Wade*¹³ and *Planned Parenthood v. Casey*.¹⁴ That regime treated a woman’s decision about whether to bear a child as implicating a fundamental liberty interest. Sherry explained how that liberty interest encompassed both a decisional and a spatial dimension and how the two dimensions interacted with respect to a variety of issues.

First, with respect to the decisional dimension, Sherry identified an “Offspring Selection Interest.” Every individual has an interest in deciding whether to become a parent, with whom (if anyone) to share that parenthood, when to become a parent, and how many times to become a parent.¹⁵ This decisional

¹¹ ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 130–131 (1970).

¹² Throughout this essay, I use “woman,” and associated terms (for example, “her” or “female”) to refer to individuals who are capable of becoming pregnant. I recognize, as Sherry did, that some nonbinary individuals and transgender men are also capable of becoming pregnant. But women make up the overwhelming majority of persons who face the possibility of an unwanted pregnancy, and that fact explains much of where we find ourselves today. Had society understood unwanted pregnancy as a condition unrelated to an individual’s sex, I wager the law’s approach to abortion would be quite different. Consider the dissimilar reactions in some quarters to the effects on reproductive autonomy from *Dobbs* and from the Alabama Supreme Court’s decision in *LePage v. Center for Reproductive Medicine, P.C.*, 2024 WL656591 (Ala. Feb. 16, 2024), treating embryos produced as part of the IVF process: “Abortion is generally portrayed as a woman’s issue; an unwanted or even dangerous pregnancy is her problem. Infertility, by contrast, is seen as a couple’s problem. That means there is a man involved And when men have a problem, we know the world is going to snap to attention” and respond to the potential restrictions on reproductive choice. Linda Greenhouse, *Let’s Thank the Alabama Supreme Court*, N.Y. TIMES (Feb. 29, 2024), <https://www.nytimes.com/2024/02/29/opinion/alabama-abortion-ivf.html> [<https://perma.cc/H9JF-LXVY>].

¹³ 410 U.S. 113 (1973).

¹⁴ 505 U.S. 833 (1992). The Court overruled the *Roe-Casey* regime in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹⁵ Sherry also showed that the offspring selection interest has a societal ingredient, reflected in prohibitions on nonmarital sex or practices like arranged

dimension is not inherently tied to whether a person is a woman, although the considerations that go into how people make decisions is doubtless often inflected by their sex. To take one obvious example, if women are expected to be primary caretakers for children, their calculus of the benefits and burdens of having a child may differ systematically from their male partners'.¹⁶

Second, every individual, regardless of sex, also has an interest in bodily integrity. Men and nonbinary individuals, as well as women, have an interest in not being raped or assaulted. Men and nonbinary individuals, as well as women, have an interest in deciding whether to undergo medical procedures including those connected with having children.¹⁷ But when it comes to reproductive autonomy, women also have a distinctive interest in bodily integrity that comes from the special costs that pregnancy imposes on one's body that are imposed nowhere else.

Sherry then showed how both pro-choice and pro-life theorists had failed to disentangle arguments resting on the offspring selection interest from arguments resting on the interest in bodily integrity. This "tendency to conflate" the two interests led to "confusion about which rights people ought to have and why such rights exist."¹⁸ Sherry showed, for example, how rigorous thinking about the two rights could explain why when a woman and a man disagree, the woman gets to decide whether to keep or terminate the pregnancy: she has both an offspring selection interest and an interest in bodily integrity at stake (the latter since either forced pregnancy or a compelled abortion would infringe on her control over her body), while the man, by the time the pregnancy occurs, has no remaining

marriages, each of which operates to "avoid[] creation of the 'wrong' offspring" as judged by society as a whole. Colb, *supra* note 5, at 1586.

¹⁶ For example, a recent study showed "significant gender differences in the parenthood status of academics." Female faculty members were less likely than their male counterparts to have children and, when they did have children, they had fewer. The authors concluded that the "parenthood status of academics is highly related to career considerations: For those with children, women are more likely than men to report that the number of children they have is related to career considerations" and "[a]mong those without children, women (59.9%) are more likely than men (43.2%) to report that career considerations played a role in their parenthood status." Xiang Zheng, Haimiao Yuan & Chaoqun Ni, *Meta-Research: How Parenthood Contributes to Gender Gaps in Academia*, 11 *eLIFE* 78909, 3-4 (2022). See also Colb, *Feminists For Life*, *supra* note 2 (discussing this dynamic).

¹⁷ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down an Oklahoma law that mandated vasectomies for men convicted of certain felonies).

¹⁸ Colb, *supra* note 5, at 1618.

interest in bodily integrity; his sperm, like Elvis, has left the building.¹⁹ At the same time, Sherry argued against uncritically translating this outcome to cases involving control over stored embryos, because there *neither* party has an ongoing interest in bodily integrity, so it would “stack[] the deck” to hold that the woman’s interest, either in having or in not having genetic offspring, must control if her interest conflicts with the man’s.²⁰

Most importantly, Sherry challenged the assumption that the offspring selection interest and the bodily integrity interest “necessarily coincide and that when the [former] disappears, so then must the [latter].”²¹ To be sure, there is near-universal consensus that an individual’s interest in offspring selection evaporates upon the existence of independent personhood—the desire not to have a child does not permit infanticide, after all. Many of the arguments against abortion stop here: If we agree that the fetus or the embryo or the zygote is a person, that is the end of the question; a woman can no more extinguish that being’s existence than she can put her toddler out with the trash.

But Sherry showed that even if personhood were to be pushed back into the prenatal period—and she argued convincingly that there was no secular justification for treating a zygote or an embryo as a person—a fetus’s personhood would not by itself extinguish a woman’s interest in bodily integrity and thereby resolve the question whether she could choose an abortion. Consider terminations undertaken to save the life of a pregnant woman, a situation in which even many pro-life partisans support a woman’s access to abortion. Sherry analogized these pregnancy terminations to a species of self-defense. Just as we “may justifiably kill in self-defense those who pose a threat of grave harm to us,” a pregnant woman could take similar steps against a fetus whose continued presence in her body threatens her life or other grave physical harm.²² And Sherry pointed out that a woman could engage in this form of self-defense “notwithstanding the full personhood of the embryo or fetus.”²³ After all, the general law of self-defense permits an individual to use deadly force to repel an attack even from an aggressor who lacks any blameworthy *mens rea*

¹⁹ *Id.* at 1598.

²⁰ *Id.* at 1599.

²¹ *Id.* at 1606.

²² *Id.* at 1607.

²³ *Id.*

(because, for example, the aggressor is delusional or insane) and even though the aggressor is undeniably a person.²⁴

Note the nature of this argument: It deploys a gender-neutral doctrine in the service of vindicating a sex-specific interest—the pregnancy-related interest in bodily integrity. Women may uniquely face the risk of death or serious bodily harm from a particular class of aggressors, but Sherry’s argument in favor of their entitlement to repel those aggressors derives from generally applicable law—indeed, law that was largely developed in the context of interactions between men.

II

DOBBS AND SHERRY’S TURN TOWARDS A POSITIVE CONCEPTION OF WOMEN’S EQUALITY

The core of Sherry’s major scholarly work on abortion rights was the proposition that women should not be compelled to bear the special burdens of pregnancy. Notably, both the special pregnancy-related interest in bodily integrity and the interest in not giving birth to someone she will be forced to surrender and mourn (the “INHLAA”) are interests rooted in biology. In Isaiah Berlin’s famous taxonomy of liberty interests, these interests would both be classified as essentially “negative” liberties, because they involve “liberty *from*”—that is, the ability to “ward[] off interference” from external forces or other individuals, including the government (and the fetus itself).²⁵ For Sherry, even the interest in choosing whether, when, and with whom to have children (the interest in offspring selection) was framed at least partially in negative terms—as her decision to lead off her discussion by focusing on the prohibition against rape illustrates. Taking away these special burdens—an interest rooted in negative liberty—would help to equalize women’s position in the world.

But in her work following the leak, and then the issuance, of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, Sherry began to sketch the demand differently.

²⁴ See *id.* at 1608–09. So, too, with abortion restrictions that contain a rape exception: The exception has nothing to do with the blameworthiness of the fetus or embryo. Indeed, the existence of rape exceptions reintroduces the offspring selection interest: A woman might well decide to terminate a pregnancy that is the result of a rape simply because she does not want to bear the rapist’s child, even if she might willingly have undergone all the physical effects (and future consequences) of a pregnancy that resulted, even accidentally, from having voluntarily engaged in sex.

²⁵ Berlin, *supra* note 11, at 127.

Her focus shifted from emphasizing women's negative liberty claims (claims rooted in liberty that had the additional effect of promoting equality as well) to asserting a conception of women's equality, resting on their positive liberty interest in being "doer[s]," full members of the community who are "self-directed" rather than "decided for."²⁶

The starting point for this argument was Sherry's withering critique of the Court's historical argument against abortion rights. Justice Alito denied that the right to obtain an abortion could be "rooted in the Nation's history and traditions," pointing to common-law prohibitions on at least some abortions.²⁷ Sherry responded that that history and tradition failed to recognize women's full personhood. At the time of the framing, women "barely registered as separate individuals from their fathers and husbands."²⁸ Quite the contrary: Matthew Hale, one of the "eminent common-law authorities" on whose work the Court relied,²⁹ "viewed a wife as a thing owned by a husband and properly available to that husband" to use sexually as he wished.³⁰

In this world, women were means towards an end; in invoking this history, "the implicit premise" of the Court's opinion "is that women are things to be used to turn a single sperm and egg into a baby inside their wombs and against their will."³¹

For Sherry, this history and tradition warranted condemnation, not invocation:

[Justice Alito]'s opinion [for the Court] announces loudly and clearly that women simply do not matter. And why don't they (we) matter? Because centuries ago, men held almost master-like power over the women in their lives, a power that men used to inflict violence on their spouses, children, and enslaved persons. Yes, because men violently abused women with complete impunity in 1789 (and 1689!), they are thereby entitled to do so in 2022.³²

²⁶ *Id.* at 131.

²⁷ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 250 (2022).

²⁸ Colb, *Potential People*, *supra* note 4.

²⁹ *Dobbs*, 597 U.S. at 243 (quoting *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020)).

³⁰ Sherry F. Colb, *Rationalizing Misogynist Religious Rules*, DORF ON LAW (May 26, 2022), <https://www.dorfonlaw.org/2022/05/rationalizing-misogynist-religious-rules.html> [<https://perma.cc/EB8U-3FVE>].

³¹ Sherry F. Colb, *Alito, Syphilis, and Unwanted Pregnancy*, DORF ON LAW (May 23, 2022), <https://www.dorfonlaw.org/2022/05/alito-syphilis-and-unwanted-pregnancy.html> [<https://perma.cc/E9B2-MWGY>].

³² Colb, *Commander Sam Alito*, *supra* note 4.

Sherry offered an alternative view of women, one in which “their lives (our lives)” would not “count less than the ‘life’ of a fertilized egg the size of the period at the end of this sentence.”³³ In her world, “a woman’s reproductive tract is [not] a public resource with a mandatory easement on it.”³⁴ For her, women, “like our nonhuman animal friends whom most people consider resources as well, are ‘someones,’ not ‘somethings,’ a moral proposition that the theocrats on the Supreme Court would do well to understand.”³⁵

That moral proposition goes beyond a demand for negative liberty. It is an affirmative assertion of women’s entitlement to dignity and respect for their decisions. Being a someone, rather than a something, situates women as ends in themselves, rather than means for producing babies. This equality explains why they are entitled to various forms of liberty, including the decision whether to become or remain pregnant. In decisions like *Planned Parenthood v. Casey*, members of the Court had treated equality as a product of liberty: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”³⁶ But Sherry’s work shows how liberty turns out to be as much a consequence as a cause of equality and full personhood.

The poet laureate Robert Pinsky wrote that “[a] country is the things it wants to see.”³⁷ Sherry showed how the Supreme Court’s decision in *Dobbs* rested on Matthew Hale’s misogynist vision and rendered women’s interests “invisible to the law.”³⁸ But her final work did more than demolish the Court’s

³³ *Id.*

³⁴ Sherry F. Colb, *The Link Between Justice Alito’s Leaked Abortion Opinion and Rape Culture*, DORF ON LAW (June 16, 2022), <https://www.dorfonlaw.org/2022/06/the-link-between-justice-alitos-leaked.html> [<https://perma.cc/HU9N-7WVH>].

³⁵ *Id.* In this, Sherry echoed part of future Justice Ginsburg’s argument:

The conflict, however, is not simply one between a fetus’ interests and a woman’s interests, narrowly conceived, nor is the overriding issue state versus private control of a woman’s body for a span of nine months. Also in the balance is a woman’s autonomous charge of her full life’s course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 383 (1985).

³⁶ 505 U.S. 833, 856 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.).

³⁷ ROBERT PINSKY, AN EXPLANATION OF AMERICA 8 (1979).

³⁸ Sherry F. Colb, *Rational Basis Scrutiny?*, DORF ON LAW (May 17, 2022), <https://www.dorfonlaw.org/2022/05/rational-basis-scrutiny.html> [<https://perma.cc/4769-LRPN>].

arguments. “[E]ven in the darkest of times we have the right to expect some illumination”; that illumination most often comes from the light “that some men and women, in their lives and their works, will kindle under almost all circumstances and shed over the time span that was given to them.”³⁹ Sherry’s abortion-related work did just that, illuminating not only the darkness of the Court but also an affirmative vision of why and how women’s lives matter.

³⁹ HANNAH ARENDT, *MEN IN DARK TIMES* ix (1968).