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Abortion Privilege

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ABSTRACT

This Article launches a critical dialogue about the abortion privilege. On the one hand, most abortion patients are low income or live below the poverty line and are disproportionately women of color. Many of these patients encounter multiple restrictions on abortion and must travel lengthy distances to abortion care facilities. These patients take center stage in abortion rights cases and in abortion rights discourse. On the other hand, there is a smaller but not insignificant group of abortion patients for whom abortion care is paid for by private or public health insurance or available out-of-pocket funds. Many of these patients live in states where abortion is unrestricted, and abortion care facilities are accessible often in the county in which they live. These patients experience abortion as a form of ordinary health care and rarely show up in abortion rights cases and abortion rights discourse. They have the abortion privilege.

This Article reveals the abortion privilege and contends that its recognition and thoughtful incorporation into abortion rights law and discourse could help redistribute the oppressive load women without the same privilege carry in connection with the right and help shore up the abortion right. First, demonstrating widespread reliance on abortion, including by women with the abortion privilege, is crucial to the stare decisis argument to uphold Roe v. Wade. *Demonstrating widespread reliance on abortion would also help reduce the abortion stigma, which is both harmful to women and makes demonstrating widespread reliance on abortion so difficult in the first place. Second, the abortion debate and abortion itself has changed, but women's*

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experience with abortion as a form of ordinary health care has not surfaced as part of the public narrative about abortion. Such a narrative demonstrates that abortion is like other medical procedures and confirms that women have the knowledge to decide the outcome of their pregnancies without state intervention. Although not everyone may be willing to see abortion as ordinary health care today, they may be open to seeing it that way in the future if we begin to tell that story. Finally, as equality re-emerges as a prominent theme in legal and political arguments in support of the abortion right, to advance that argument with integrity and to coalesce a base of support around it, there must be concerted efforts within the abortion rights movement to acknowledge and reckon with the inequalities among women who make the abortion decision. The abortion privilege framework is designed to recognize these inequalities and prompt efforts to equalize them. In addition, the framework is designed to preempt the deprioritization of women without the same privilege and make clear to privilege holders that the abortion privilege perpetuates their inequality, too.

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I. INTRODUCTION

Even as one in four women in the United States continue to rely on abortion care,[1] the year 2021 highlighted once more how fragile

1. RACHEL K. JONES ET AL., GUTTMACHER INST., ABORTION INCIDENCE AND SERVICE AVAILABILITY IN THE UNITED STATES, 2017, at 3 (Michael Klitsch ed., 2019), https://

reproductive rights and justice law is—particularly as it relates to the abortion right. At the federal level, the United States Supreme Court granted certiorari in *Dobbs v. Jackson Women's Health Organization* to consider the constitutionality of Mississippi's ban on abortion after fifteen weeks of pregnancy.[2] In *Dobbs*, the Court could overturn *Roe v. Wade* or further curtail the abortion right by permitting states to ban abortion prior to viability.[3] In addition, in *Whole Woman's Health v. Jackson*, the Court refused to grant injunctive relief to prevent Texas' ban on abortion after six weeks of pregnancy from taking effect, resulting in abortion care becoming largely unavailable in that state while the lower courts decide the constitutionality of the law.[4] Meanwhile, at the state level, states enacted 106 new abortion restrictions, marking the highest number of restrictions on abortion care since the Court decided *Roe*.[5]

Although reproductive rights and justice advocates have held the legal line against most attempts to ban or unduly restrict abortion, primarily by prevailing in court challenges to various state laws,[6] after almost five decades of legalized abortion in the United States,[7] many no longer wonder whether but when an attempt to permanently ban abortion will be successful.[8] The conservative shift at the Supreme Court

www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

2. Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021); Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021) (No. 19-1392) (granting certiorari on the question of whether all pre-viability prohibitions on elective abortions are unconstitutional).

3. *See id.*; Greer Donley et al., *The Messy Post-*Roe *Legal Future Awaiting America*, ATLANTIC (Sept. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/09/after-roe-legal-mess-future-abortion-rights/620134/.

4. Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551 (U.S. 2021); Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021); Adam Liptak, *Supreme Court Allows Challenge to Texas Abortion Law but Leaves It in Effect*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/us/politics/texas-abortion-supreme-court.html.

5. ELIZABETH NASH, GUTTMACHER INST., FOR THE FIRST TIME EVER, U.S. STATES ENACTED MORE THAN 100 ABORTION RESTRICTIONS IN A SINGLE YEAR (2021), https://www.guttmacher.org/print/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year; DIANA GREENE FOSTER, THE TURNAWAY STUDY 3 (2020) ("Political and legal efforts to restrict access to abortion have never been more intense than they have been in the past decade.").

6. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) (holding unconstitutional Mississippi's ban on abortion after fifteen weeks of pregnancy).

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

8. Donley et al., *supra* note 3 ("America now faces the very real possibility that in just a few months' time, the Supreme Court will interpret the U.S. Constitution to no longer protect the right to abortion."); FOSTER, *supra* note 5, at 3 ("[A]ccess to abortion is in greater jeopardy than it has been since *Roe* was decided . . . .").

and in federal courts nationwide,[9] the brazen attempts to ban abortion in the face of established law,[10] and the societal fatigue surrounding the abortion issue[11] beg the question: what, if anything, can shore up the abortion right? This Article aims to help answer this question by starting a critical dialogue about the abortion privilege.

On the one hand, most abortion patients are low income or live below the poverty line and are disproportionately women of color.[12] Many of these patients encounter multiple state restrictions on abortion and must travel lengthy distances to abortion care facilities.[13] Take the case of Maleeha.[14] At age twenty, she had recently immigrated to the United States and was living in Texas.[15] She went to a "crisis pregnancy center" to confirm her pregnancy, and workers there misled her to believe that she could not obtain a medication abortion in Texas.[16] As a sexual assault survivor, she wanted a medication abortion to avoid having a pelvic exam or surgical abortion.[17] Ultimately, family friends helped her fund a flight to Colorado Springs where she obtained the necessary abortion medication.[18] She noted that trying to navigate Texas abortion laws was close to impossible.[19] Women like Maleeha and stories like hers that involve limited access to abortion care are familiar. These patients often take center stage in abortion rights cases and in abortion rights discourse.

9. John Wagner, *Senate Confirms 200th Judicial Nominee from Trump, a Legacy that Will Last Well Beyond November*, WASH. POST (June 24, 2020), https://www.washingtonpost.com/politics/senate-confirms-200th-judicial-nominee-from-trump-a-legacy-that-will-last-well-beyond-november/2020/06/24/8e8d7048-b61a-11ea-a510-55bf26485c93_story.html.

10. *See supra* note 5 and accompanying text.

11. Lauren Kelley, Opinion, *What if the Supreme Court Rules on Abortion and the Country Shrugs?*, N.Y. TIMES (June 21, 2020), https://www.nytimes.com/2020/06/21/opinion/supreme-court-abortion-june-medical.html.

12. GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf.

13. *See id.* (stating that nearly forty million women of reproductive age, or fifty-eight percent, live in one of the twenty-nine states hostile to abortion rights); *see also* JONES ET AL., *supra* note 1, at 7; *Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates,* GUTTMACHER INST. (Oct. 19, 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates (noting that abortion restrictions "could have made abortion more difficult to access," especially for poor women and women of color).

14. Maleeha Aziz, *Maleeha Aziz's Abortion Story*, WE TESTIFY, https://web.archive.org/web/20210118094727/https://wetestify.org/author/maleeha/ (last visited Oct. 19, 2021).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

On the other hand, there is a smaller but not insignificant group of abortion patients for whom abortion care is paid for by private or public health insurance or available out-of-pocket funds.[20] Many of these patients live in states where abortion care is unrestricted, or the abortion restrictions in place are not burdensome for them.[21] Abortion care facilities are also accessible often in the county in which they live.[22] Take the case of Mallory.[23] She is a white woman in Ohio and was married at the time of her abortion.[24] She had health insurance, which paid for her abortion procedure in its entirety. She also lived within twenty minutes of what she describes as "one of the best abortion facilities in the country."[25] Women like Mallory and stories like hers that involve abortion as a form of ordinary health care are less familiar.[26] These patients rarely show up in abortion rights cases and abortion rights discourse. They have the abortion privilege.

This Article reveals the abortion privilege and contends that its recognition and thoughtful incorporation into abortion rights law and discourse could help redistribute the oppressive load women without the same privilege carry and shore up the abortion right. Part I of this Article provides an overview of abortion rights law and explains how its evolution and the undue burden standard in particular have contributed to entrenchment of the abortion privilege. Part II of this Article reveals the abortion privilege and identifies the primary considerations that support it. Although a purely privileged or unprivileged abortion

20. INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

21. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2093 (2021) [hereinafter *Race-ing* Roe] (noting that the effect of abortion restrictions depends largely on a woman's social conditions and that laws like those that require waiting periods may have little impact on a woman's ability to obtain abortion care if she has resources like health insurance, transportation, and childcare); INDUCED ABORTION IN THE UNITED STATES, *supra* note 12 (stating that twenty million women of reproductive age—or thirty-five percent—live in one of the fourteen states supportive of abortion rights).

22. JONES ET AL., *supra* note 1, at 7, 17.

23. Mallory McMaster, *Mallory McMaster's Abortion Story*, WE TESTIFY, https://web.archive.org/web/20161009220511/http://wetestify.org/stories/mallorys-abortion-story/ (last visited Oct. 19, 2021).

24. *Id.*

25. *Id.*

26. Professor Katie Watson writes in her book, *Scarlet A: The Ethics, Law, and Politics of Ordinary Abortion*, that abortion is "ordinary" in that it is a routine medical procedure and consistent with the practice of medicine—a patient requests a doctor bring her body back to its natural or usual state, and the doctor uses a drug or procedure to do so. KATIE WATSON, SCARLET A: THE ETHICS, LAW, AND POLITICS OF ORDINARY ABORTION 20–21 (2018). See *infra* Part IV.A for a discussion of how abortion has become common and ordinary.

experience is uncommon,[27] as in other contexts examining privilege, defining the contours of the privilege here is necessary to reveal it and understand who has access to it.

Part III of this Article contends that, although the undue burden standard is focused on harm as opposed to privilege, and part of contemporary American life is the fact that society privileges some groups over others, there are openings in abortion rights law and discourse where the abortion privilege presses for recognition and thoughtful incorporation. In this regard, revealing the abortion privilege is intended to prompt privilege holders and other stakeholders to reflect on what role privilege plays in the abortion experience and in maintaining the precarious status quo of the abortion right. In addition, revealing the abortion privilege is intended to start a dialogue about how privilege holders and other stakeholders can help change the landscape of abortion by working to understand the experience of those without the abortion privilege and, importantly, by aligning with them in private and public ways.

To this latter point, first, at a time when *Roe v. Wade*[28] seems most likely to be overturned,[29] a crucial component to shoring up the legal right is demonstrating widespread reliance on abortion, including by women with the abortion privilege. Although "the rule of *stare decisis* is not an 'inexorable command,'" the Court has expressed reluctance to overrule precedent where, as here, those who have relied reasonably on the continued application of a rule would experience hardship or inequity.[30] "Coming out" to demonstrate widespread reliance on abortion would also help reduce the abortion stigma, which is both harmful to women and makes demonstrating widespread reliance on abortion so difficult in the first place.

27. Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 898 (1995). The authors explain that:

> Most of us are privileged in some ways and not in others. A very poor person might have been the oldest child in the family and exercised power over his siblings. The wealthiest African-American woman, who could be a federal judge, might still have racial, sexist epithets hurled at her as she walks down the street. The presence of both the experience of privilege and the experience of subordination in different aspects of our lives causes the experiences to be blurred, further hiding the presence of privilege from our vocabulary and consciousness.

Id.

28. 410 U.S. 113 (1973).

29. Donley et al., *supra* note 3.

30. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–56 (1992) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

Second, women's experience with abortion as a form of ordinary health care has not emerged as part of the public narrative about abortion, but there is power in harnessing that privileged experience. The current abortion rights narrative plays to the undue burden standard to reinforce how restricted abortion has become for many women. However, as that narrative portrays women as victims while they attempt to navigate the multitude of barriers to abortion care, it can inadvertently undermine women and bolster the antiabortion strategy that suggests abortion harms women and women need greater protection from abortion. A narrative that includes abortion as a form of ordinary health care would reinforce that women have the knowledge to decide the outcome of their pregnancies without state intervention and demonstrate that abortion can be, and is, like other medical procedures. It would also help counteract the antiabortion strategy. Although not everyone is willing to see abortion as ordinary health care today, they may be more receptive to the idea in the future if we begin to tell that story.

Finally, as equality or equal rights re-emerges as a prominent theme in legal and political arguments in support of the abortion right, to advance the argument with integrity and to coalesce a base of support around it, the abortion rights movement must first acknowledge and reckon with the inequalities among women who make the abortion decision. In other words, the abortion rights movement must recognize oppression from the outside but also from within. The abortion privilege framework is intended to help this process. As a start, abortion privilege aptly describes how some women experience abortion and recognizes the inequality among women who choose abortion. In addition, the abortion privilege framework is designed to prompt efforts to equalize the abortion experience while preempting the de-prioritization of women without the same privilege. Finally, although there is risk in confronting any privilege, the abortion privilege framework serves to show privilege holders that maintaining the abortion privilege perpetuates unprivileged women *and* privileged women's inequality.

To be clear, this Article is not intended to criticize or vilify women with the abortion privilege, call-out their experiences, or support any notion that "checking" the abortion privilege is a simple matter, especially given the contentious nature of abortion.[31] Nor by focusing on

31. Loretta Ross, one of the founders of the reproductive justice movement, explains that "call-out culture" can be counterproductive, and "calling in" can result in civil conversations and learning opportunities. Jessica Bennett, *What if Instead of Calling People Out, We Called Them In?*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html ("Calling out assumes the worst. Calling in involves conversation, compassion and context."); Michael Mascolo, *The Problem with "Check Your Privilege*," PSYCH. TODAY (Aug. 21, 2019), https://

women with the abortion privilege is the Article suggesting that they deserve attention or consideration at the expense of women without the same privilege who increasingly face unjust barriers and unduly burdensome restrictions to abortion care, often while existing at the margins of society. Rather, the goal of this Article is to reveal the abortion privilege, call-in privileged experiences, and demonstrate how recognition and thoughtful incorporation of the abortion privilege could help redistribute the oppressive load women without the abortion privilege carry and shore up the abortion right.

II. THE UNDUE BURDEN STANDARD AND ENTRENCHMENT OF THE ABORTION PRIVILEGE

The law and legal narratives help shape every day public perception and behavior and vice versa.[32] Law certainly influences how we think and talk about abortion, including who has abortions, what role abortion plays in their lives and in society, and how much stigma is attached to abortion.[33] Although *Roe v. Wade* legalized abortion in the United States,[34] *Planned Parenthood v. Casey*[35] and its progeny have shaped modern-day abortion rights jurisprudence and discourse. Specifically, under the Court's undue burden standard, abortion rights are won or lost based on how burdensome abortion restrictions are for women. As one might expect, women who must navigate these restrictions and limited access to abortion care have become the central focus of the abortion issue.[36] Although this focus is both relevant and necessary as a legal

www.psychologytoday.com/us/blog/values-matter/201908/the-problem-check-your-privilege (discussing how people of privilege can experience the "privilege walk" with enhanced awareness of their advantages when compared to others or by taking offense).

32. Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 422 (2017) [hereinafter *Liberty and the Politics of Balance*] (the Court responds to popular views about abortion); Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 731 (2011) (legal narratives shape public perception and behavior).

33. *See* WATSON, *supra* note 26, at 39–78 (discussing how *Roe*, *Casey*, and *Carhart* tell multiple stories about American abortion); Tracy A. Weitz & Katrina Kimport, *The Discursive Production of Abortion Stigma in the Texas Ultrasound Viewing Law*, 30 BERKELEY J. GENDER L. & JUST. 6, 10–13, 20–21 (2015) (examining a Texas abortion regulation and seven documents related to the law, including legal briefs challenging and supporting it and the court's decisions on the constitutionality of the law, and concluding abortion stigma can be perpetuated through law).

34. 410 U.S. 113 (1973).

35. 505 U.S. 833 (1992).

36. Sujatha Jesudason, *Who Are the Heroes in Abortion Narratives and What Role Do They Play in the Movement?*, 30 BERKELEY J. GENDER L. & JUST. 1, 3 (2015) (explaining that the abortion narrative focuses on the most vulnerable and victimized women, including

matter, the focus has entrenched the abortion privilege and obscured how some women can and do have abortions as a form of ordinary health care.[37]

In 1973, the Supreme Court decided the seminal abortion rights case *Roe v. Wade* and struck down a Texas law criminalizing abortion through all stages of pregnancy, except when a woman's life was in danger.[38] The Court held that the right to privacy found in the Fourteenth Amendment's liberty clause is broad enough to encompass a woman's decision to terminate a pre-viable pregnancy.[39] The Court made clear that "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."[40]

The Court established a trimester framework to determine the constitutionality of restrictions on abortion.[41] During the first trimester, a woman and her attending physician could make the abortion decision without state interference.[42] During the second trimester, the state could regulate abortion but only in ways reasonably related to maternal health.[43] Finally, after the fetus attained viability, the state could regulate, and even prohibit, abortion, except when necessary to preserve the life or health of the woman.[44] Under the *Roe* trimester framework, the constitutional inquiry focused on the substantive law as much as its timing—whether the law at issue regulated abortion during the first trimester, the second trimester, or after viability.[45]

In 1992, the Supreme Court in *Planned Parenthood v. Casey* reaffirmed *Roe*'s central holding that the right to privacy is broad enough to encompass the abortion decision before viability but upheld most parts

women of color, poor women, women who are victims of rape and incest, and women who receive fetal anomaly diagnoses, and on the extreme hardship and powerlessness they experience when confronting restrictions on abortion).

37. To be sure, *Roe* itself assumed a level of privilege. In recognizing a woman's right to decide whether to have an abortion in consultation with her doctor, *Roe* assumed women had access to medical providers to consult with and that women had a "choice," despite the social conditions they faced—including racial and gender injustice, financial insecurity, and lack of affordable childcare. *Race-ing* Roe, *supra* note 21, at 2049–50.

38. 410 U.S. at 164.

39. *Id.* at 164, 153.

40. *Id.* at 153.

41. *Id.* at 163–65.

42. *Id.* at 163–64.

43. *Id.*

44. *Id.* at 163–65.

45. *Id. Roe* permitted virtually no regulations of the abortion decision in the first trimester and permitted no regulations to protect potential life in the second trimester. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872, 876 (1992) (reasoning that the trimester framework prohibited any abortion regulations designed to advance state interests in protecting potential life before viability).

of a Pennsylvania law restricting access to abortion in the state.[46] The Court did away with the trimester framework because, in the plurality's view, it undervalued the state's legitimate interest in potential life throughout pregnancy.[47] Instead of the trimester framework, the Court adopted the undue burden standard.[48] An undue burden exists, and therefore a provision of law is invalid, if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[49] Under *Casey*'s undue burden standard, instead of the relevant constitutional inquiry focusing as much on the timing of the law, the inquiry shifted to the real-world impact the law has on women obtaining abortions.[50]

Although the *Roe* trimester framework provided much greater legal protection for the abortion right,[51] the undue burden standard forces courts to examine how abortion restrictions that stop short of banning abortion actually affect women who seek abortion care.[52] In this regard, the undue burden standard contextualizes the burdens women face when seeking abortion care.[53] Without question, the undue burden standard has been helpful in directing the Court's attention to the limited access

46. *Id.* at 845–46, 879–901 (upholding Pennsylvania's law related to informed consent and a 24-hour waiting period, parental involvement, certain recordkeeping and reporting requirements, but striking down Pennsylvania's spousal notification requirement).

47. *Id.* at 873, 876.

48. *Id.* at 876.

49. *Id.* at 877. In applying the undue burden standard to a Pennsylvania law, the Court held that a spousal notification requirement constituted an undue burden because it was tantamount to an improper veto, and a woman's husband could prevent her from obtaining an abortion by using "physical force or psychological pressure or economic coercion" against her. *Id.* at 897. At the same time, the Court held that a 24-hour waiting period before a woman could obtain an abortion did not constitute an undue burden even if it would increase the cost of abortion, risk delaying the procedure, or be particularly burdensome on some women. *Id.* at 885–87. The Court explained that "[w]hether a burden falls on a particular group is a distinct inquiry from whether [the law] is a substantial obstacle even [for] the women in that group." *Id.* at 887.

50. *Id.* at 894 (explaining that the undue burden analysis does not end with, but rather begins with, the women "for whom the law is a restriction, not the group for whom the law is irrelevant").

51. Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 325 (2013) [hereinafter *The Scarlet Letter*] (noting that applying strict scrutiny substantially protected women's decision-making authority up until viability).

52. *See id.* at 322 (comparing the *Roe* narrative presenting the woman as a passive recipient of medical judgment and the *Casey* narrative as more woman-focused even though the undue burden standard is less protective of the abortion right).

53. Joel Dodge, *"We Must Not Blind Ourselves": The Supreme Court & Abortion Access for Women Living in Poverty*, AM. CONST. SOC'Y 4 (Oct. 2019), https://www.acslaw.org/wp-content/uploads/2001/10/Abortion-Access-Dodge-IB-Final.pdf; *Liberty and the Politics of Balance*, *supra* note 32, at 437.

to abortion care in this country and the perils it poses. Most recently, in *Whole Woman's Health v. Hellerstedt* and *June Medical Services v. Russo*, the Court struck down targeted regulations of abortion providers in Texas and Louisiana based on the drastic impact these laws would have on women's access to abortion in those states.[54]

To be sure, abortion rights law and discourse should interrogate how abortion restrictions impose substantial barriers on the most vulnerable women seeking abortion care. As a matter of law, abortion restrictions are most relevant for them, and as a matter of fact, they are most likely to seek and obtain abortion care.[55] They are also underrepresented in state and federal government.[56] In other words, abortion restrictions hit hardest against them.[57]

However, as abortion rights law and discourse focus on women who must navigate abortion restrictions and limited access to abortion care, women who experience abortion under different circumstances, that is, women who experience abortion as a form of ordinary health care, are not reflected in the abortion narrative inside or outside of the courtroom.[58] Given that abortion was catapulted from the health care domain to the social, legal, and political domains long ago,[59] their

54. In *Whole Woman's Health*, the Court invalidated a Texas admitting privileges law that would have forced half of the state's abortion facilities to close (40 to 20), and the state's ambulatory surgical law that would have further decreased the number of abortion facilities in the state to seven or eight facilities. 136 S. Ct. 2292, 2312, 2316 (2016). The Court noted that such closures would result in "fewer doctors, longer waiting times, and increased crowding." *Id.* at 2313. Similarly, in *June Medical Services*, the Court invalidated a Louisiana admitting privileges law that would have forced two of the three remaining abortion facilities in the state to close, leaving Louisiana with one facility and making it unduly burdensome or impossible for women to obtain an abortion, particularly poor women. 140 S. Ct. 2103, 2129–30 (2020). In applying the undue burden standard, the lower federal courts have also examined how the laws at issue affect waiting times, crowding, travel time, childcare expenses, and missed work and pay. Dodge, *supra* note 53, at 2–3, 7. State courts have taken a similar approach. *Id*. at 7, 10.

55. Women electing abortion care are disproportionately women of color and low-income. *See* INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

56. *See* Kevin Uhrmacher et al., *Harris is the Pick, but Women of Color Remain Underrepresented in Government*, WASH. POST (Aug. 11, 2020), https://www.washingtonpost.com/politics/2020/08/11/women-of-color-representation-government/.

57. *Race-ing* Roe, *supra* note 21, at 2093 ("And because race and socioeconomic status are often related — particularly in those regions of the country where abortion restrictions are more extensive — the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups.").

58. In *June Medical Services*, Justice Gorsuch in dissent speculated about such women. 140 S. Ct. at 2176 (Gorsuch, J., dissenting) ("Suppose that for a substantial number of women Louisiana's law imposes no burden at all. These women might live in an area well-served by well-qualified abortion providers who can easily obtain admitting privileges.").

59. FOSTER, *supra* note 5, at 2 ("[P]olitics drives abortion access in the United States."); *id.* at 3 ("Since *Roe v. Wade*, abortion has dominated our political discussions in the United

experience with abortion as a form of ordinary health care is a privileged one and one worthy of a critical dialogue.

III. REVEALING THE ABORTION PRIVILEGE

In the abortion context, privilege is not an entirely new concept, particularly in discussions about how women managed unintended pregnancies before *Roe* and how women would manage them if the Court were to overturn *Roe*. Women with access to financial and health care resources would find ways to access abortion care while women without such access would struggle and could be forced to self-manage their abortion or carry unwanted pregnancies to term.[60] Under unlawful circumstances, it is easier to recognize privilege, but the abortion privilege exists even under lawful circumstances. In fact, legal abortion may mask privilege because it gives rise to a presumption of access to it. This section reveals the abortion privilege as it exists today and highlights the benefits it confers on people who possess it. As made clear in other privilege contexts, we must reveal privilege before we can begin to examine it or begin to address it to improve the status quo.[61]

States."); *id.* at 32–33 ("She read two years' worth of articles that mentioned the word 'abortion' in the *Washington Post*, *New York Times*, and Associates Press. . . . There are a lot of them—on average, one a day. . . . [M]ost articles merely mentioned the topic of abortion, usually as an example of a hot political issue."); DAVID S. COHEN & CAROLE JOFFE, OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA 9 (2020) ("Political attempts to interfere with abortion have been a constant in American political life since *Roe*."); Aziza Ahmed, *June Medical: Reason or Politics?*, L. PROFESSOR BLOGS NETWORK (June 30, 2020), https://lawprofessors.typepad.com/human_rights/2020/06/june-medical-reason-or-politics.html.

60. *Race-ing* Roe, *supra* note 21, at 2046 ("Wealthy, well-connected women could circumvent the law either by leaving the country to seek legal abortion care, or finding a psychiatrist who could attest to the woman's likely suicide if leave for a 'therapeutic' abortion was not granted. Those without the financial wherewithal to do so were left with the prospect of continuing a pregnancy or risking their lives in a 'back-alley' abortion."); RACHEL BENSON GOLD, THE GUTTMACHER REP. ON PUB. POL'Y, LESSONS FROM BEFORE *ROE*: WILL PAST BE PROLOGUE? 8, 10 (2003), https://www.guttmacher.org/sites/default/files/article_files/gr060108.pdf; Mark A. Graber, *The Ghost of Abortion Past: Pre-*Roe *Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 311, 376 (1994) (explaining that affluent women with professional or personal relationships with private physicians rarely encountered substantial obstacles to abortion care and that if *Roe* is overturned restrictions on abortion would "reproduce many of the worst features of the system of abortion regulation in place in the years before *Roe*"); *see generally* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 29–30 (2020) [hereinafter ABORTION AND THE LAW]; LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 16 (1997).

61. STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 8 (1996) ("Privilege is invisible only until looked for, but silence in the face of privilege sustains its invisibility."); Wildman & Davis, *supra* note 27, at 885.

By way of background, privilege is often discussed in the context of commonly recognized social orderings.[62] For example, privilege exists between whites and people of color and between men and women.[63] It also exists between heterosexuals and the LGBTQ+ community and between people who are able-bodied and people with disabilities.[64] Privilege is not limited to these commonly recognized social orderings, however. In *Privilege Revealed*, Professor Stephanie Wildman explains that privilege exists in relation to societal norms.[65] For privileged group members, their characteristics and attributes establish the societal norms or what is normal in society.[66] For unprivileged group members, their characteristics and attributes are judged against those norms.[67]

Professor Wildman uses her experience as a juror for an example of when she experienced being a member of a privileged group and a member of an unprivileged group.[68] On the one hand, she experienced being in a privileged group during *voir dire*.[69] She observed the defense attorney in the case ask each prospective juror who looked Asian if he spoke English.[70] The attorney did not ask Professor Wildman or anyone else the same question.[71] Although she considered saying, "I'm Stephanie Wildman, I'm a professor of law, and yes, I speak English," she acknowledges that she exercised her privilege with silence.[72]

On the other hand, Professor Wildman experienced being in an unprivileged group when it came to the juror schedule because she is a parent.[73] The court expected all jurors to serve until 5:00 p.m. She needed to pick up her children after school at 2:40 p.m. and bring them to their various after-school activities.[74] The courtroom norm was not designed to meet her needs; she was part of an unprivileged group and had to "conform to the norm."[75]

There are two core elements of privilege:

62. WILDMAN, *supra* note 61, at 95.
63. *Id.*
64. *Id.*
65. *Id.* at 13–14.
66. *Id.*
67. *Id.* at 14.
68. *Id.* at 14–16.
69. *Id.* at 16.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 14.
74. *Id.*
75. *Id.*

> First, the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group. Second, privileged group members can rely on their privilege and avoid objecting to oppression. Both the conflation of privilege with the societal norm and the implicit option to ignore oppression mean that privilege is rarely seen by the holder of the privilege.[76]

In the United States, mothers and women who do not have an abortion define the societal norm or what society expects from women with respect to abortion. As noted above, although "one in four U.S. women will have an abortion in their lifetime,"[77] statistically speaking, most women will not have one. Moreover, and equally important in defining the societal norm, abortion is heavily stigmatized or marked by disgrace or disapproval. As a result, in the United States, most Americans share a common and significantly underestimated belief about abortion—that it is rare.[78]

For purposes of this Article, I focus primarily on women who have had abortions and the privileged and unprivileged members *within* that group. First, to be sure, privileged group members have had an abortion, but their experience with abortion is as a form of ordinary health care. In addition, they are not reflected in abortion rights cases or abortion rights discourse, and they can more readily avoid suffering from the public stigma, shame, and oppression associated with abortion and being outside of the societal norm.[79] For example, as discussed below, privileged group members are able to avoid abortion restrictions, such as a mandatory waiting period, and have the advantage of not having to suffer through the indignity of the state second-guessing their decision and their ability to make their own health care decisions.

Second, privileged group members can rely on their privileged experience to avoid objecting to the oppression associated with abortion. Privileged group members can afford to be silent about restrictions on abortion access because they are simply not relevant for them or are not

76. *Id.* at 13–14; Wildman & Davis, *supra* note 27, at 883 ("Rather than describing privilege as something bestowed upon us specially, privilege appears as the fabric of life, as the way things are.").

77. JONES ET AL., *supra* note 1, at 3.

78. Paula Abrams, *The Bad Mother: Stigma, Abortion and Surrogacy*, 43 J.L. MED. & ETHICS 179, 183 (2015) [hereinafter *The Bad Mother*] (strong moral disapproval of abortion is influenced by the lack of public awareness about how common abortion is); *see also* Sarah Kliff, *We Polled 1,060 Americans About Abortion. This Is What They Got Wrong.*, VOX (Feb. 29, 2016), https://www.vox.com/a/abortion-statistics-opinions-2016/poll.

79. *See* WILDMAN, *supra* note 61, at 14 ("The privileged characteristic is the norm; those who stand outside are the aberrant or 'alternative.'").

unduly burdensome for them. In fact, under the undue burden standard, privileged group member experiences with abortion could undermine the argument that a restriction constitutes a substantial obstacle, even though that analysis ostensibly requires focus on women for whom the restriction is relevant. In this regard, privileged group members can afford to be silent and may even think it is prudent to be silent.

Of course, to simply conclude that all privileged group members receive advantages by virtue of their experience with abortion as a form of ordinary health care and all unprivileged members do not would oversimply the matter. As tempting as it might be to take a categorical approach to the abortion privilege, most women will not experience abortion as a purely privileged or unprivileged event.[80] One aspect of the abortion privilege can intersect with an aspect of subordination or additional privilege, giving a woman more or less access to the privilege.[81]

For example, as noted above, abortion is heavily stigmatized in the United States. One could imagine a scenario where some privileged group members experience a heightened form of the abortion stigma because they are the same group members who have reproductive privilege more broadly. That is, in addition to having access to abortion, they have access to sex education, contraception, family planning resources, and other forms of reproductive health care. Yet, they are facing an unintended pregnancy. The irony is some privileged group members may experience a heightened form of stigma because they had access to an even greater or comprehensive reproductive privilege. With a heightened form of stigma (or any stigma), some privileged group members may not think that they carry a privilege at all with respect to abortion.

However, just as Professor Khiara M. Bridges and other racial justice scholars have recognized that "different groups of white people have different access to white privilege"[82] and in some instances white privilege can act as a "double-edged sword,"[83] here too, women with the

80. *See supra* note 27 and accompanying text; *see also* COHEN & JOFFE, *supra* note 59, at 12 ("There are different abortion paths in different parts of the country based on individual clinic practice and particular state and local laws, with some people facing many of the barriers . . . and others facing none."); Aspen Baker & Carolina De Robertis, *Pro-Voice: A Vision for the Future*, 36 OFF OUR BACKS 33, 36 (2006) ("Each facet of a person's background can affect their truth, their relationship with the world and their experience with abortion.").

81. *See* Khiara M. Bridges, *White Privilege & White Disadvantage*, 105 VA. L. REV. 449, 458–59 (2019) [hereinafter *White Privilege*]; *see generally* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770 *passim* (2020).

82. *White Privilege*, *supra* note 81, at 458.

83. *Id.* at 468 (emphasis omitted). In the context of white privilege, Professor Bridges explains that not all white people have access to white privilege in the same way. *Id.* at

abortion privilege may have different access to the advantages it confers. That privileged group members may not have complete access to the privilege or that privilege does not always work as an advantage, does not mean the privilege does not exist. Rather, the take-away should be that privilege in this context is worth revealing for the benefit of both privileged and unprivileged group members because privilege can work against both groups.[84]

Here, I reveal the abortion privilege by examining the abortion experience (or the process of obtaining the abortion) and the public stigma, shame, and oppression associated with abortion.[85] As reflected by Maleeha and Mallory's stories at the outset of this Article, there is no uniform abortion experience.[86] Every woman's abortion experience is unique, and a multitude of factors influence her experience, some of them in her control and others not.[87] In the same way women experience obstacles to abortion care differently, women experience privilege with

458. Professor Bridges uses the example of Carrie Buck, the plaintiff in the Supreme Court case *Buck v. Bell*, to demonstrate how white privilege may come with disadvantages. *Id.* at 468. In Buck's case, white privilege gave her access to the Virginia State Colony for Epileptics and Feebleminded, which was designed to care for vulnerable people when family could not. *Id.* at 453. Had Buck not been white, the institution would not have been open to her. *Id.* at 474–75. In addition, white privilege gave Buck membership to the race that people in power believed was superior. *Id.* at 468. However, Buck's whiteness also made her a target of eugenicists because they were always concerned with advancing the white race, and placed her in the path of being forcibly sterilized. *Id.* at 464, 468. Professor Bridges concludes that white privilege can act as a double-edged sword, making privilege dangerous for people with it and without it, and therefore, we all should strive to dismantle it. *Id.* at 482.

84. *See id.* at 480–82; *see also infra* Part IV.C for a discussion of how the abortion privilege perpetuates privileged women's inequality.

85. *See* WILDMAN, *supra* note 61, at 146 ("We must make visible the systems of privilege that exclude, and we must examine the role of the rule of law in maintaining those systems."); FOSTER, *supra* note 5, at 63 ("Access to abortion depends on when you discover you are pregnant, how much money you have, and, critically, where you live.").

86. See *supra* notes 14 and 23.

87. *See* MEERA SHAH, YOU'RE THE ONLY ONE I'VE TOLD: THE STORIES BEHIND ABORTION 8, 22 (2020); *see generally* FOSTER, *supra* note 5, at 63; Lindy West, *Foreword* to SHOUT YOUR ABORTION ix (Amelia Bonow & Emily Nokes eds., 2018). As Dr. Jennifer Gunter explained when writing about abortion and empathy, one patient could live in New York and have money and a pro-choice mother. Jennifer Gunter, *Dear Lena Dunham: Check Your Abortion Privilege*, KEVINMD (Jan. 18, 2017), https://www.kevinmd.com/blog/2017/01/dear-lena-dunham-check-abortion-privilege.html. She could have easy access to abortion care and have the abortion procedure done by eight weeks of pregnancy. *Id.* Meanwhile, another woman in Alabama could spend weeks searching the internet to find a provider and may need to work additional shifts to pay for her abortion. *Id.* At the same time, another woman may be a rape survivor or face a pregnancy with fetal anomalies while another woman may be in a domestic violence situation. *Id.*

respect to abortion care differently.[88] In light of how unique a woman's abortion experience is, my goal is not to rigidly define the abortion privilege so much as it is to reveal the most dominant aspects of the privilege and highlight the benefits it confers.[89]

Funds for Abortion. Having funds for the abortion—whether private, public, or out-of-pocket—is central to the abortion privilege.[90] The most common reason women in America choose to have an abortion is because they cannot afford to raise a/another child, yet the primary substantial obstacle that women face when obtaining an abortion is financial.[91] Although abortion costs vary depending on the timing and type of abortion procedure and the facility, the median cost of a first trimester abortion is $500.00.[92] An abortion after fourteen weeks but before twenty weeks costs on average $750.00, and after twenty weeks,

88. *See* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 72 (2017) ("[R]eproductive justice does not insist that one set of meanings or experiences describes the experiences of all people."). To define abortion privilege rigidly is to fall into a monolithic or essentialist trap. *See id.*; *see also* Wildman & Davis, *supra* note 27, at 898–99 (alteration in original) (footnote omitted) (citation omitted) ("The Koosh ball . . . 'highlights that each person is embedded in a matrix of . . . [categories] that interact in different contexts' taking different shapes. In some contexts we are privileged and in some subordinated, and these contexts interact."); Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 81 (2015) ("[A]bortion restrictions have enormously different consequences not only from person to person, but also from place to place.").

89. *See* Wildman & Davis, *supra* note 27, at 899–900.

90. In 2014, slightly more than half of abortion patients used out-of-pocket funds for their procedure. *See* INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

91. FOSTER, *supra* note 5, at 65 ("Among the primary obstacles people seeking abortions face—the cost of the procedure, the difficulty of getting to the nearest provider, the prospect of onerous abortion restrictions, the fear of stigma in their community, and the presence of protesters at the site itself—the most substantial is financial."). In the Turnaway Study, whose participants closely resembled women who obtain abortions nationally, half of the women were living in poverty. *Id.* at 19–20. About a quarter of the women who were economically privileged and middle-class or wealthier reported having private health insurance and stated, "they often or always ha[d] enough money." *Id.* at 20; Amanda Gelman et al., *Abortion Stigma Among Low-Income Women Obtaining Abortions in Western Pennsylvania: A Qualitative Assessment*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 29, 30 (2017) ("Low-income women are more likely than those who are economically better off to encounter difficulties in accessing timely and safe abortion services, and appear to often rely on social support to mitigate barriers to abortion access."); *see also* WILDMAN, *supra* note 61, at 11 ("The economic power system is not invisible—everyone knows that money brings privilege. But the myth persists that all have access to that power through individual resourcefulness. This myth of potential economic equality supports the invisibility of the other power systems that prevent fulfillment of that ideal.").

92. FOSTER, *supra* note 5, at 65; Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans, and Private Plans*, KFF (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/.

the cost is $1,750.00.[93] These costs do not include any necessary transportation, lodging, child care costs, or lost wages from time off of work.[94]

The cost of an abortion is particularly burdensome for low-income women, some of whom have to delay the abortion to raise funds for it.[95] Since 1977, the Hyde Amendment has prohibited the use of federal funding to pay for abortion, with limited exceptions.[96] The Supreme Court has upheld state and federal restrictions on abortion funding and has concluded that such funding is not part and parcel of the constitutional right to abortion.[97] In addition, state and federal regulations and insurance policies increasingly limit the availability of private insurance and state Medicaid funding for abortion care.[98] In eleven states, women have no coverage options for abortion under Medicaid, private insurance, or Marketplace plans.[99]

Access to Abortion Facilities. Having access to abortion care facilities and not needing to travel great distances for abortion care is part of the abortion privilege. The number of abortion facilities available to women has drastically declined from 2,700 in the early 1980s to around 800 now.[100] In two states, 90% of women live in a county without an abortion care facility—Mississippi and Wyoming.[101] In contrast, in five states, 90% of women live in a county with one or more abortion care facilities—California, Connecticut, Hawaii, Nevada, and New York.[102]

Women having to travel longer distances to an abortion care facility experience increased out-of-pocket costs, negative mental health

93. FOSTER, *supra* note 5, at 65.

94. *Id.* at 66.

95. *Id.* at 65 ("Needing time to raise money to cover travel and procedure costs was the most common reason for delay among our study participants, with nearly two-thirds of women who showed up close to the clinic's gestational limit reporting such costs as a reason for delay."); Salganicoff et al., *supra* note 92.

96. Salganicoff et al., *supra* note 92.

97. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

98. *See* Salganicoff et al., *supra* note 92. About fifteen states provide state funds to cover abortions for women on Medicaid. *Id.*; INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

99. Salganicoff et al., *supra* note 92.

100. FOSTER, *supra* note 5, at 277.

101. JONES ET AL., *supra* note 1, at 8; *see also* Pruitt & Vanegas, *supra* note 88, at 82 (arguing that the burdensome impact of an abortion regulation increases in proportion to the distance a woman must travel, which in turn can be exacerbated by other factors, such as if she is a low-income woman, has an inflexible work schedule, and/or lacks childcare if she already has children).

102. JONES ET AL., *supra* note 1, at 8.

outcomes, delayed care, and decreased use of abortion care services.[103] According to one recent study, close to 20%—or 155,000 women—had to travel fifty miles or more for abortion care in 2014; the main reason women chose their facilities was because the provider was the closest to them.[104]

Restrictions on Abortion Care. Being able to obtain an abortion in a state where the right is unrestricted is part of the abortion privilege. In 2019, fourteen states were considered supportive of abortion rights; 35% of women (twenty-four million women) live in these states.[105] In contrast, twenty-nine states were considered hostile to abortion rights; approximately 58% of women (forty million women) live in these states.[106] For women who encounter abortion restrictions in their states, these laws not only make abortion more costly and time-consuming, but they also impose the state's moral disapproval and shame on women and perpetuate the abortion stigma.[107]

Abortion restrictions typically come in two forms. The first type of restriction includes fetal personhood laws, including laws based on purported fetal pain and laws that elevate a fetus to a child.[108] They are designed to equate abortion and infanticide and are based on stereotypes about women as mothers because "what kind of woman would 'kill' her 'child'?"[109] The second type of restriction includes women protective-type laws, including "informed consent" laws, required waiting periods, mandatory ultrasounds, and targeted regulations of providers, such as

103. Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28 J. WOMEN'S HEALTH 1623, 1623–24 (2019).

104. *Id.* at 1629. In the Turnaway Study, one quarter of the women (23%) had to travel more than 100 miles to obtain their abortion. FOSTER, *supra* note 5, at 71–72. In 2014, 65% of women traveled twenty-five miles or less to obtain abortion care, 17% traveled between twenty-five and forty-nine miles, 10% traveled fifty to one hundred miles, and 8% traveled more than one hundred miles. INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

105. INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

106. *Id.*

107. *See* COHEN & JOFFE, *supra* note 59, at 8 (explaining how abortion restrictions represent "*abortion exceptionalism*: the idea that abortion is treated uniquely compared to other medical procedures that are comparable to abortion in complexity and safety"); Natasha Mehta et al., *The Association Between Reproductive Autonomy and Abortion Stigma Among Women Who Have Had Abortions in the United States*, 4 STIGMA & HEALTH 377, 380 (2019) (if a woman has more reproductive autonomy, she is less likely to experience abortion stigma); Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 WOMEN'S RTS. L. REP. 299, 300, 302 (2014) [hereinafter *Abortion Stigma*]; Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN'S HEALTH ISSUES (SPECIAL ISSUE) S49, S51 (2011).

108. *See Abortion Stigma*, *supra* note 107, at 318.

109. *See id.*

admitting privileges laws.[110] They are based on the premise that women who seek an abortion have made a wrong decision or need protection from abortion, and they raise questions about women's autonomy and judgment.[111] These laws can make women question their moral authority.[112]

Stigma. Living in a region and community where abortion is less stigmatized and having supportive partners, families, and social networks is part of the abortion privilege. Abortion stigma is defined as a "negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood."[113] Stigma affects a woman's physical and mental well-being and influences her decision-making and behavior around disclosure of her abortion.[114] Stigma can also lead to conflicts in her relationships with her partner, family, and friends.[115]

Regional attitudes about abortion strongly influence how a woman experiences abortion stigma. According to one study, women who live in the South and Midwest, where abortion care is limited and antiabortion activities—protests, antiabortion billboards, and harassment of women at clinics—are more common, are more likely to perceive abortion stigma than women who live in the Northeast.[116] In addition, although the West is seen as a progressive area of the country, women from states like Colorado, Idaho, Utah, and Wyoming where there is poor abortion access and states withhold Medicaid funding, also are more likely to perceive abortion stigma compared to women in the Northeast.[117]

Community attitudes also influence how a woman experiences abortion stigma. When women encounter negative attitudes about abortion from their partners, families, and social networks, including that abortion is morally reprehensible, a form of rejection of motherhood, and rare and therefore deviant, women experience "negative emotional,

110. *Id.* at 318–19.

111. *Id.*; *see also* FOSTER, *supra* note 5, at 141 ("Of course, the need for such decision-making help from the state is not rooted in evidence.").

112. *Abortion Stigma*, *supra* note 107, at 300, 302.

113. *Id.* at 305.

114. Kristen M. Shellenberg & Amy O. Tsui, *Correlates of Perceived and Internalized Stigma Among Abortion Patients in the USA: An Exploration by Race and Hispanic Ethnicity*, 118 INT'L J. GYNECOLOGY & OBSTETRICS S152, S152 (2012).

115. *Id.*

116. COHEN & JOFFE, *supra* note 59, at 8–9 (New York, Rhode Island, Vermont, and Maine—as well as Illinois and Nevada—recently passed laws to protect the abortion right in the event that the Supreme Court overturns *Roe v. Wade*); Shellenberg & Tsui, *supra* note 114, at S155–56; *see also Abortion Stigma*, *supra* note 107, at 316.

117. *See* Shellenberg & Tsui, *supra* note 114, at S155–57; *see also Abortion Stigma*, *supra* note 107, at 316.

physical, financial[,] and social consequences."[118] Some women respond to abortion stigma by perpetuating the stigma—by concealing their abortions or distinguishing their abortion from other women's abortions as "acceptable."[119]

Race. Being white is part of the abortion privilege. Abortion is closely connected with race. Three in five women who seek abortion care are women of color,[120] and African American women in particular have disproportionately high abortion rates.[121] As Professor Bridges explains, African American women's abortion rate should not be understood as simple exercises in autonomy or agency but rather "as a symptom of their vulnerability and marginalization."[122] In addition to facing violence in multiple forms, African American communities across the country are suffering from poverty, lack of health care coverage and access to contraception, and inadequate sex education in schools.[123] In this regard, although abortion is health care African American women elect, they also need and use abortion to manage the profoundly constrained social conditions they face as a result of structural racism.[124]

Abortion Alternatives. Being able to experience a healthy pregnancy and childbirth is part of the abortion privilege. In most instances, the alternative to abortion is childbirth. The United States maternal mortality rate is the highest of any developed country.[125] In

118. Gelman et al., *supra* note 91, at 2, 7.

119. *Id.* at 2. Professor Katie Watson explains that when women do not want to identify with other women who have had an abortion, that desire may be a product of stigma. WATSON, *supra* note 26, at 29. In these cases of "us" versus "them," rather than trying to understand the "them," some women work overtime to remain on the "us" side. *Id.*

120. COHEN & JOFFE, *supra* note 59, at 13. In terms of percentages, white women accounted for 39% of abortions, Black women accounted for 28% of them, Hispanic women accounted for 25% of them, and other races accounted for 9% of abortions. *Id.*; *see also* INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

121. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 2 (2008).

122. Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1044–51 (2021) [hereinafter *Reproductive Wrongs and the State*].

123. *Id.* at 1044–45.

124. *Id.* at 1051; *see also Race-ing* Roe, *supra* note 21, at 2090–91 ("As reproductive justice advocates make clear, for many people of color, the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities and lack of access to health care and affordable quality childcare."); April Shaw, Note, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 547–48 (2016) (arguing that *Casey*'s "undue burden test inevitably ignores how abortion laws more harshly regulate women of color").

125. COHEN & JOFFE, *supra* note 59, at 18.

2018, there were 658 maternal deaths in the United States.[126] The number of pregnancy-related deaths has "steadily increased from 7.2 deaths per 100,000 live births in 1987 to 17.3 deaths per 100,000 live births in 2017."[127] There are significant racial and ethnic disparities in pregnancy-related deaths.[128] For example, African American women's pregnancy mortality ratio was 41.7 deaths per 100,000 live births.[129] In contrast, white women's pregnancy mortality ratio was 13.4 per 100,000 live births.[130]

In the Turnaway Study, the first study to rigorously examine the effects of abortion by comparing women who had an abortion with women who were denied a wanted abortion, two women died—both were in the group who were denied a wanted abortion.[131] One woman died days after giving birth from an infection that is rarely fatal, except in connection with pregnancy, and a second woman died as a result of eclampsia post-childbirth.[132] Abortion is one of the safest medical procedures; continuing a pregnancy and giving birth are far riskier.[133] Being able to choose an abortion alternative is part of the abortion privilege, too.

In short, the abortion privilege can be more or less accessible and its benefits enhanced or diminished by the availability of private insurance or public funding, the number of abortion facilities in a woman's county, the number of restrictions on abortion in a state, sociodemographic and situational variables that affect whether a woman feels stigmatized or supported in her decision, a woman's race, and whether a healthy pregnancy and childbirth are a readily available alternative to abortion. Although these considerations are not an exhaustive list, they can heavily influence whether a woman experiences abortion as a form ordinary health care or as an event associated with oppression. This range in experience exists even though abortion is legal.

126. Gaby Galvin, *The U.S. Has a Maternal Mortality Rate Again. Here's Why That Matters.*, U.S. NEWS & WORLD REP. (Jan. 30, 2020), https://www.usnews.com/news/healthiest-communities/articles/2020-01-30/why-the-new-us-maternal-mortality-rate-is-important.

127. *Pregnancy Mortality Surveillance System*, CDC, https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm (last visited Oct. 19, 2021).

128. *See generally* Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229 (2020).

129. *Pregnancy Mortality Surveillance System*, *supra* note 127.

130. *Id.*

131. FOSTER, *supra* note 5, at 6, 149–50.

132. *Id.* There were no abortion-related deaths in the study. *Id.* at 150.

133. *See id.* at 142–43.

IV. PRESSING FOR RECOGNITION AND INCORPORATION OF THE ABORTION PRIVILEGE

Due to the undue burden standard's focus on harm, the abortion stigma, and the abortion privilege, women with the abortion privilege and their experience with abortion rarely show up in abortion rights cases and abortion rights discourse. Revealing the abortion privilege here was not an end in and of itself. Rather, revealing the abortion privilege is intended to alert privilege holders and other stakeholders to the privilege and prompt reflection about the role the abortion privilege plays in the abortion experience and in maintaining the precarious status of the abortion right. Moreover, revealing the abortion privilege is intended to start a dialogue about openings in abortion rights law and discourse where recognition and thoughtful incorporation of the abortion privilege experience could help redistribute the oppressive load women without the abortion privilege carry and shore up the abortion right.

In Part A of this section, I discuss how demonstrating widespread reliance on abortion, including by women with the abortion privilege, is crucial to the *stare decisis* argument to uphold *Roe*. In addition, demonstrating widespread reliance on abortion in the United States would help reduce the abortion stigma, which is both harmful to women and makes demonstrating widespread reliance on abortion so challenging in the first place. In Part B of this section, I discuss how women's experiences with abortion as a form of ordinary health care would enhance the existing public narrative about abortion by demonstrating that abortion can be, and is, like other medical procedures. It would also help counteract the antiabortion strategy that suggests abortion harms women, and women need greater protection from abortion. Finally, in Part C of this section, I discuss the need for the abortion rights movement to acknowledge and reckon with the inequalities among women who choose abortion in order to advance an equality argument in support of the abortion right. The abortion privilege framework recognizes these inequalities among women, allows for recognition and incorporation of privileged women's experiences without deprioritizing women without the same privilege, and helps crystallize how maintaining the abortion privilege perpetuates unprivileged women's *and* privileged women's inequality.

A. Demonstrating Widespread Reliance on Abortion and Reducing the Abortion Stigma

Women with the abortion privilege or women who experience abortion as a form of ordinary health care rarely show up in abortion

rights cases and abortion rights discourse but not because they do not exercise the abortion right. Although women of color and low-income women disproportionately rely on abortion care, women who have abortions are diverse in terms of "culture, age, socioeconomic status, faith and spiritual beliefs, race, physical ability, [and] immigration background."[134] At a time when *Roe v. Wade* seems most likely to be overturned, demonstrating widespread reliance on abortion, including by women with the abortion privilege, is crucial to the *stare decisis* argument necessary to uphold *Roe*. In addition, demonstrating widespread reliance on abortion would help reduce the abortion stigma, which is both harmful to women and makes demonstrating widespread reliance on abortion so challenging in the first place.

First, one of the cornerstones of the American legal system is the rule of *stare decisis*, which means "to stand by what has been decided."[135] The rule of *stare decisis* requires "that lower courts follow the decisions of superior courts and that the United States Supreme Court defer to [its] past decisions" if they involve the same or similar issues.[136] If the Supreme Court is going to overturn precedent, it may do so in accordance with the rule of *stare decisis* if it has special reasons for doing so.[137]

Stare decisis discussions have become a recurring feature in the Court's abortion rights decisions, and it is a "chief impediment" to the Court overturning *Roe*.[138] In *Casey*, when many expected the Court to overturn *Roe*, the Court penned a lengthy discussion about *stare decisis* before it decided to retain *Roe*'s essential holding.[139] In part, the Court focused on whether people had relied on *Roe* in a way that would lead to a special hardship and inequity if the Court overturned the decision.[140] The Court concluded that *Roe* had engendered reliance interests and explained that, "while the effect of reliance on *Roe* [could not] be exactly measured, neither [could] the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case."[141] The Court reasoned that:

134. Aspen Baker & Carolina De Robertis, *Pro-Voice: A Vision for the Future*, 36 OFF OUR BACKS 33, 36 (2006); *see also* INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

135. Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 309 (2020).

136. *Id.*

137. *Id.* at 309–10.

138. *Race-ing* Roe, *supra* note 21, at 2029–30, 2072–75.

139. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–61 (1992).

140. *Id.* at 854.

141. *Id.* at 856.

> [P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. 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.[142]

In 2020, the Supreme Court in *June Medical Services v. Russo* reiterated that reliance interests remain a critical component of the *stare decisis* analysis.[143]

Demonstrating widespread reliance on the abortion right will be key to asserting the legal argument that the Court should uphold *Roe*. As was true in 1992 when the Court decided *Casey*, today, generations of women—as well as their partners and families—rely on *Roe*'s right to make decisions in their intimate relationships and in their participation in economic and social life.[144] In light of the existing abortion rights narrative, it is not surprising that most Americans harbor under the false perception that abortion is rare and takes place among women of a certain race and socioeconomic status.[145]

However, as Professor Katie Watson writes in her book, *Scarlet A: The Ethics, Law, and Politics of Ordinary Abortion*, abortion in America is both common and ordinary.[146] As noted above, about one in four women will have an abortion during their lifetime.[147] In fact, since *Roe v. Wade*,

142. *Id.*

143. 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring); *id.* at 2171 (Alito, J., dissenting) ("The presence or absence of reliance is often a critical factor in applying the doctrine of *stare decisis*."); *see generally* Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013) (arguing that reliance should be a court's primary factor in deciding whether and when it will adhere to precedent); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013) (arguing that courts should move away from "backward-looking reliance" to forward-looking interests to manage adjudicative changes for society).

144. *Casey*, 505 U.S. at 856.

145. *See* WATSON, *supra* note 26, at 19; *The Bad Mother*, *supra* note 78, at 183; *Abortion Stigma*, *supra* note 107, at 300, 315; Palma Joy Strand, *The Civic Underpinnings of Legal Change: Gay Rights, Abortion, and Gun Control*, 21 TEMP. POL. & C.R. L. REV. 117, 128–29 (2011).

146. WATSON, *supra* note 26, at 19–20.

147. JONES ET AL., *supra* note 1; WATSON, *supra* note 26, at 34. On average, women in the U.S. want two children, which means they spend most of their reproductive lives—approximately three decades—trying to prevent pregnancy. GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (2019), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states. Even with advances in contraception, no contraception is 100% reliable at eliminating the risk of unintended pregnancy. *See id.* In the United States in 2011, 45% of pregnancies were unintended, and of those unintended pregnancies, 42% of them ended in abortion. *Id.* As noted above, in 2017, 862,320 abortions

more than 30 million women have had a legal abortion in the United States.[148] One way to visualize this number, Professor Watson explains, is "if all these women came together . . . in 2018, they would replace the population in the entire states of Texas, Nevada, and Maine."[149] A different way to visualize this number is "if all the women who ended pregnancies with legal abortion services between 1973 and 2014 were still living, they would be 25% of adult women in the United States."[150] In total, approximately 862,320 abortions took place in 2017.[151]

In terms of how ordinary abortion is, not only do women commonly make the choice to have an abortion, but they choose it for many of the same reasons—"having a baby would dramatically change their life [by] interfering with work, school, or their ability to care for" their existing children; they cannot afford to have a baby; and they would rather not be a single parent or are experiencing problems with their spouse or partner.[152] Abortion is also ordinary in that it is a routine medical procedure and consistent with the practice of medicine—a patient requests a doctor bring her body back to its natural or usual state, and the doctor uses a drug or procedure to do so.[153]

Although the abortion rights cases and public narrative rarely reflect it, the range of women who rely on the abortion right is diverse. In two of the Court's more recent abortion cases, attorneys sought to make this point. In one amicus brief in *Whole Woman's Health v. Hellerstedt*, more than one hundred attorneys and law students explained how exercising their constitutional right to abortion affected their educational access, provided them with professional freedom, and played a critical role in their lives as attorneys.[154] One senior public defender described how she was able to continue building her career and specialty because she was

were performed in the United States. INDUCED ABORTION IN THE UNITED STATES, *supra* note 12. In 2014, slightly more than half of abortion patients were using contraception during the month they experienced an unintended pregnancy. *Id.*; *see also* COHEN & JOFFE, *supra* note 59, at 14–15, 216 (stating that abortion remains very common in the U.S.—almost one million per year—even though it is declining likely due to increased contraceptive use, contraceptive coverage under the Affordable Care Act, and possibly due to women self-managing their abortions).

148. WATSON, *supra* note 26, at 19.

149. *Id.*

150. *Id.*

151. INDUCED ABORTION IN THE UNITED STATES, *supra* note 12.

152. WATSON, *supra* note 26, at 20.

153. *Id.* at 20–21.

154. Brief of Janice Macavoy, Janie Schulman, and Over 110 Other Women in The Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae in Support of Petitioners, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2016) (No. 15-274) (reaching the Supreme Court as *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)).

able to have an abortion after she had recently returned to work from maternity leave.[155] In a similar amicus brief in *June Medical Services v. Russo*, attorneys, law students, and other legal professionals argued that their reliance on abortion had been critical to their professional lives.[156] One attorney who had two children at the time described how she was able to continue building her family law practice because she was able to have an abortion.[157] Although amicus briefs hardly ever make headline news, these attorneys' briefs were "remarkable" because attorneys wrote them not for women in need but for themselves.[158]

In addition to helping demonstrate women's widespread reliance on the abortion right, making known how often women choose abortion and the range of women who choose abortion is necessary to helping members of society recognize their own reliance on abortion being legal and accessible.[159] For a moment, take women who have had an abortion—whether privileged or unprivileged—out of the picture. As the *Casey* Court recognized, "people" manage their personal and professional lives in reliance on legal abortion being available if their contraception fails.[160] Although they may not have an abortion themselves, they benefit from it being legal and accessible. Professor Watson refers to these people as "abortion beneficiaries."[161]

Men who did not want to have a child are the most obvious group of "abortion beneficiaries."[162] In addition, everyone who has not lost their "daughter, sister, mother, friend, or colleague" to an illegal or unsafe abortion is a beneficiary.[163] Parents who did not have to raise their teenage daughter or son's baby as well as anyone who experienced a better childhood than they would have had if their family's income or energy was pushed past the breaking point because of another child are

155. *Id.* at 19–20.

156. Brief for Michele Coleman Mayes, Claudia Hammerman, Charanya Krishnaswami, and 365 Other Legal Professionals Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae Supporting Petitioners, June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323 and 18-1460).

157. *Id.* at 15–16.

158. Emma Green, *The Power of Making Abortion Personal*, ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/notes/2016/01/texas-abortion-attoneys-brief/423351/. Of course, the briefs also offered the justices a bridge between the Court and the women whose lives would be affected by the Court's decision. Suffering is not universal, and judges are more likely to empathize with people if they are like them. Kathleen Woodward, *Calculating Compassion*, 77 IND. L.J. 223, 230 (2002).

159. *See* WATSON, *supra* note 26, at 19 (explaining that learning about how often women choose abortion can change how people think about it).

160. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

161. WATSON, *supra* note 26, at 26.

162. *Id.*

163. *Id.* at 27.

also beneficiaries.[164] Even people who truly do not know someone who has had an abortion but have been able to enjoy sex because they were not constantly afraid that a contraceptive failure would result in a child are beneficiaries.[165] Most people do not realize they are an abortion beneficiary because they do not know that women in their lives have had an abortion because they have not told them.[166] Thus, recognizing and incorporating the privileged abortion experience would not only help demonstrate women's widespread reliance on the right, but it also could help illuminate society's widespread reliance on it.

Of course, one of the challenges to demonstrating widespread reliance on abortion is the abortion stigma. The abortion stigma has contributed to a vicious cycle in society where women who have an abortion feel stigmatized and are less likely to share their experience with abortion which, in turn, ingrains the abortion stigma. If society understood that abortion has become common and ordinary—and there is widespread reliance on the right—that understanding would contribute to a virtuous cycle where women who have an abortion feel less stigmatized and are more likely to share their experience with abortion, which in turn would reduce the abortion stigma.

Historically, women talked about abortion with their partners, relatives, close friends, and doctors.[167] Abortion was a topic of conversation, "an open secret," meaning women spoke about it discreetly and selectively, but they did so openly.[168] As historian Professor Leslie Reagan explains:

> Emphasizing the 'silence' surrounding abortion inaccurately represents the history of abortion and ignores what women did say in other arenas; women talked about abortion often. . . . They did not proclaim their abortions in open, political forums, but they did speak of their abortions among themselves and within smaller, more intimate spaces. Women talked about abortion in 'private' spaces, at home, and in the semiprivate, semipublic spaces of medicine such as drug stores, doctors' and midwives' offices, hospitals, and birth control clinics. Discussion of abortion, like other female experiences of reproduction, was part of female life and conversation. These shared experiences, rooted in biology

164. *Id.*
165. *Id.*
166. *Id.* at 28. "In a study of over 4,000 women obtaining abortions at hospitals and clinics across the country, 58% of them agreed with the following statement: 'I need to keep this abortion a secret from my close friends and family.'" *Id.*
167. *See, e.g.*, REAGAN, *supra* note 60, at 21.
168. *Id.* at 19, 21.

> but socially created and culturally understood, helped forge the bonds of gender within social groups.[169]

In fact, evidence shows there was widespread and popular acceptance of abortion, despite its illegality and "the official views of medicine and religion."[170] For ordinary people, abortion was part of daily life.[171]

In contrast, more recently, abortion has become "clandestine," thereby masking women's widespread reliance on it and contributing to the abortion stigma.[172] "Women who have abortions generally [do not] talk about them," and, naturally, people who oppose abortion rights are far less likely to hear about a woman having an abortion than people who support abortion rights.[173] In fact, about 40% of Americans say they do not know a woman who has had an abortion, which is unlikely given how often women choose abortion.[174]

One of the ironies of *Roe*'s privacy approach is that there is a dearth of abortion stories, except those that take center stage in abortion rights cases and discourse that involve women who must navigate abortion restrictions and limited access to abortion care. Dr. Meera Shah, a family medicine doctor and chief medical officer of Planned Parenthood Hudson Peconic in New York, relayed an experience she had with a woman that helps capture women's reluctance to share their abortion experience even with loved ones.[175]

Dr. Shah was walking down the aisle of a Target in South Carolina and bumped into an elderly woman who she recalled looked like Mrs. Santa Claus.[176] The woman saw that Dr. Shah had a stethoscope and asked her whether she was a nurse.[177] Dr. Shah told her that she was a doctor specializing in sexual reproductive health and then reluctantly informed her that she also provided abortion care.[178] The woman "froze," but as a few people passed them, she leaned in and whispered to Dr. Shah, "I've had an abortion," and after a long pause said, "[i]n fact, I've had two."[179] She explained that with her first abortion she was young,

169. *Id.* at 21.
170. *Id.*
171. *Id.* at 22.
172. WATSON, *supra* note 26, at 19.
173. FOSTER, *supra* note 5, at 33. In the Turnaway Study, one-third of women did not tell anyone about their abortion, except the man with whom they were involved. *Id.* at 104.
174. *Abortion Stigma*, *supra* note 107, at 300–01.
175. SHAH, *supra* note 87, at 1–5.
176. *Id.* at 1.
177. *Id.* at 2.
178. *Id.* at 2–4.
179. *Id.* at 4.

and with her second abortion, she had already had two children.[180] "My husband had no idea. He still has no idea," she said.[181] Dr. Shah thanked the woman for sharing a piece of her life with her, and before they went their separate ways, the woman touched Dr. Shah on the arm and whispered, "You're the only one I've told."[182] "Ever?," Dr. Shah asked.[183] "Ever," she said.[184]

Traditional stereotypes based on women as self-sacrificing mothers and their sexuality being for procreation purposes give women who choose to have an abortion good reason to anticipate abortion stigma.[185] In fact, some form of abortion stigma has been around as long as abortion has been available. As early as the 1800s, when abortion was available to women before quickening, abortion was stigmatized as associated with "out-of-wedlock sex, promiscuity, and prostitution."[186] By the late nineteenth century, there were growing concerns that "white, middle class women were rejecting their [childbearing] 'roles'"—women who wanted abortions were considered "frivolous, self-indulgent, and small-minded."[187] During the twentieth century, before the Court decided *Roe*, abortion was thought of as "criminal, dirty, and harmful to women" in light of the "back alley" abortions culture.[188] Even after *Roe* and nearly

180. *Id.* at 4–5.
181. *Id.* at 5.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Abortion Stigma*, *supra* note 107, at 305; *see also The Bad Mother*, *supra* note 78, at 180, 184. Professor Courtney Megan Cahill has applied "disgust theory" to abortion. Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 413–14 (2013). She explains that, when people experience disgust in connection with abortion, it is not because of any act or harm involved with abortion, but rather, it is a reaction to seeing women "out of place." *Id.* at 409, 413–14, 439. Specifically, a woman who has an abortion is challenging the assumption that she is supposed to be a mother. *Id.* at 414, 440. Because motherhood is seen as a woman's essential role, seeking or having an abortion is a woman's decision to renounce that role, and she gets stigmatized for being "inferior to ideals of womanhood." *Id.* at 414. According to Professor Cahill, "abortion provokes disgust because it is thought by some to disrupt gender norms." *Id.* at 430. In other words, abortion stigma is related to a woman having non-procreative sex and not taking on the role of caring for children. Professor Kristin Luker notes that, historically, abortion was not viewed as morally problematic or taboo because it was associated with something akin to infanticide. *Id.* at 442–43. Rather, it was morally problematic or taboo because it meant "'getting caught in the consequences of sexuality." *Id.* at 443 (citing KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 129 (1984)). In this regard, sex, not abortion (or the death of a child), was the issue. *Id.* According to Professor Luker, on the surface, the abortion debate is the embryo's fate, but what is actually at issue is the meaning of women's lives. *Id.* at 443.
186. *Abortion Stigma*, *supra* note 107, at 308.
187. *Id.* at 308–09.
188. *Id.* at 309.

five decades of legal abortion, the social stigma persists. Abortion is still associated with women being "promiscuous, sinful, selfish, dirty, irresponsible, heartless or murderous."[189] In fact, even women who support abortion rights continue to not want to associate with it because of the stigma attached to it.[190]

Demonstrating widespread reliance on abortion would help destigmatize abortion, which would help improve women's health and encourage more women to share their stories with family and friends.[191] It is well established that the abortion stigma carries with it unnecessary and harmful consequences for women. Women who experience abortion as a stigmatizing event may delay the procedure, thereby increasing "health and legal obstacles" to abortion.[192] Women who experience abortion as a stigmatizing event also have an increased desire to keep the experience a secret.[193] Women who keep their abortion a secret report "insomnia, panic attacks, and anxiety."[194] Despite abortion being a frequent need among women and the prevalence of abortion, many women will not discuss their abortion even when they are in the circle of people who love them.[195] The abortion stigma can also be associated with "psychological distress and poor mental and physical health outcomes."[196]

Although abortion is a topic regularly visited in law, law too can produce and reinforce the abortion stigma.[197] For example, in *Gonzales v. Carhart*, the Supreme Court upheld the constitutionality of the Federal Partial-Birth Abortion Act.[198] In so doing, the Court wrote, "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to

189. *Id.* at 307 (citing Anuradha Kumar et al., *Conceptualizing Abortion Stigma*, 11 CULTURE, HEALTH, & SEXUALITY 625, 629 (2009)).

190. WATSON, *supra* note 26, at 19.

191. *See Effective Storytelling of Abortion Experiences: Evaluating the Impact of the 1 in 3 Campaign*, ADVOCATES FOR YOUTH (Sept. 2012), http://www.1in3campaign.org/wp-content/uploads/2015/04/Effective-Storytelling-of-Abortion-Experiences-1-in-3-Campaign.pdf.

192. *Abortion Stigma*, *supra* note 107, at 306; *see also The Bad Mother*, *supra* note 78, at 181, 184.

193. *See The Bad Mother*, *supra* note 78, at 184; *Abortion Stigma*, *supra* note 107, at 311.

194. *The Bad Mother*, *supra* note 78, at 184; *Abortion Stigma*, *supra* note 107, at 311.

195. *See* WATSON, *supra* note 26, at 17–18 ("Many women have abortions, and many women keep quiet about it."); *id.* at 220 ("I applaud women who donate personal narratives for public discussion, but as a student once put it, 'I don't want to "shout my abortion." I just want to be able to mention it when it's relevant.'").

196. Katie Woodruff et al., *Experiences of Harassment and Empowerment After Sharing Personal Abortion Stories Publicly*, CONTRACEPTION: X, 2020, at 1.

197. *Abortion Stigma*, *supra* note 107, at 317–18.

198. 550 U.S. 124, 168 (2007); *see also* Strand, *supra* note 145, at 125 n.53.

abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[199] The Court's language is based on and reinforces negative stereotypes about women related to their "judgment and moral authority" and suggests that women need the state to help them "make appropriate decisions about their own healthcare."[200]

Similarly, state legislatures produce or reinforce the abortion stigma when they pass restrictions on abortion. For example, in one study, authors examined a Texas law that requires women to undergo an ultrasound before they obtain an abortion.[201] After reviewing documents associated with the law from the time it was a bill to the time the U.S. Court of Appeals for the Fifth Circuit issued its decision overturning a preliminary injunction and reinstating the law, the authors concluded that the law reinforced abortion stigma based on two invalid constructions.[202]

First, the law was premised on the notion that women seeking an abortion did not and could not already know enough about their pregnancies to make the abortion decision; women purportedly needed the ultrasound "facts" to make the abortion decision.[203] In fact, empirical research demonstrates that women make the abortion decision based on their own expertise with respect to their life plans, financial means, and relationship status.[204] Second, the law conveyed that abortion providers are untrustworthy and that they would withhold objective information the ultrasound conveys "but for this law."[205] In fact, empirical research shows that ultrasound viewing does not dissuade women from having an abortion, and women are able to make decisions about their pregnancies without the state and an ultrasound technician.[206]

199. *Gonzales*, 550 U.S. at 159 (citation omitted).

200. Weitz & Kimport, *supra* note 33, at 10; *see also Race-ing* Roe, *supra* note 21, at 2088 ("In the wake of the Court's decision in *Carhart*, woman-protective arguments proliferated—both in antiabortion discourse and in mainstream press coverage of the abortion debate.").

201. Weitz & Kimport, *supra* note 33, at 10.

202. *Id.* at 10–20.

203. *Id.* at 18.

204. *Id.*

205. *Id.* The abortion stigma also extends to abortion as a medical procedure even though, as Professor Watson describes, abortion is ordinary medically. WATSON, *supra* note 26, at 20. It is safe and routine and consistent with medicine's goal: with a patient's consent, the doctor returns her body "back to its baseline state." *Id.*; *see also* Lisa H. Harris et al., *Physicians, Abortion Provision and the Legitimacy Paradox*, 87 CONTRACEPTION 11, 11 (2013) (stating that abortion providers are trapped in a "legitimacy paradox" because they "exist in public discourse as dangerous, deviant or illegitimate practitioners, despite the fact that they have provided safe abortion care to many millions of US women since *Roe v. Wade*").

206. *See* Weitz & Kimport, *supra* note 33, at 18–19.

In light of the way that law and policy produce and reinforce the abortion stigma, one might expect that successful court challenges to these laws would help reverse the abortion stigma. However, overturning laws in court or even succeeding in repealing laws in the legislature does not address the abortion stigma that portrays women as "passive, vulnerable, and incapable of making" the abortion decision.[207] A new discourse that reflects the "normality of choosing abortion" is necessary to reverse the stigma that surrounds abortion.[208]

Organizations such as We Testify and Shout Your Abortion encourage women to speak out about their abortions and maintain websites to increase the spectrum of women's abortion stories in the public sphere and reduce the abortion stigma.[209] Online and social media campaigns such as the "1 in 3 Campaign," the celebrity driven #YouKnowMe, and the UltraViolet campaigns also encourage women to open up about their abortion experience.[210] To be sure, even though five times as many women will have an abortion compared to the women who will receive a breast cancer diagnosis each year, we will likely never see a "Fun Run for Abortion."[211] However, demonstrating widespread reliance on abortion and attempting to start a reverse discourse about abortion does not require broadcasting abortion stories in such a fashion.[212] In fact, as history demonstrates, there is power in sharing stories openly, even in person-to-person conversations.[213]

Of course, abortion is a personal decision, and women should have complete autonomy to decide who they share their stories with, if anyone. However, personal disclosure is a key component to normalizing subjects

207. *Id.* at 20–21.

208. *Id.* at 21.

209. WE TESTIFY, https://wetestify.org/ (last visited Oct. 19, 2021); SHOUT YOUR ABORTION, https://shoutyourabortion.com/ (last visited Oct. 19, 2021).

210. Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 145 (2016); Ellen Friedrichs, *Four Ways to Destigmatize Abortion in Everyday Conversations*, REWIRE NEWS GRP. (May 20, 2019, 8:26 AM), https://rewirenewsgroup.com/article/2019/05/20/four-ways-to-destigmatize-abortion-in-everyday-conversations/.

211. WATSON, *supra* note 26, at 30.

212. In one exploratory study that sought to document the positive and negative experiences of women who have shared their abortion stories publicly (publishing an article, speaking with a journalist, sharing their story on social media, speaking at a public rally, or giving testimony at a legislative hearing), four out of five participants reported a positive experience that motivated them to continue sharing their stories, despite some of them receiving harassment or suffering other negative incidents after they shared their story publicly. Woodruff et al., *supra* note 196, at 1.

213. Friedrichs, *supra* note 210.

that are shrouded in stigma or shame.[214] Take breast cancer, for example. In the 1950s, Fanny Rosenow wished to print a notice about a breast cancer support group in the *New York Times*.[215] The society editor told her that the newspaper could not publish the word "breast" or "cancer."[216] Fast forward to 2013, and the *New York Times* published Angelina Jolie's opinion editorial explaining her decision to undergo a prophylactic double mastectomy and describing her breast reconstruction surgery.[217] Although the pink ribbon is now an internationally recognized symbol for breast cancer awareness, breast cancer was not a topic of discussion until the late twentieth century.[218] Only after personal disclosures that began with First Lady Betty Ford did discussions about breast cancer become normalized.[219]

Personal disclosure can also be a key component to advancing a social, legal, and political agenda. "Coming out" has proven central to advancing LGBTQ+ civil rights after the community long faced inadequate legal protection and endured social stigma.[220] LGBTQ+ people coming out to family, as well as "friends, parents, teachers, students, bosses, [and] complete strangers," has been key in advancing LGBTQ+ rights in both legal and political arenas.[221] As Professor William Eskridge has noted, "the LGBTQ rights movement relied on [members of the community] coming out . . . to change social attitudes."[222] Likewise, the Human Rights Campaign, which has promoted the National Coming Out Day for decades, maintains that "[w]hen people know someone who is LGBTQ, they are far more likely to support equality under the law. Beyond that, our stories can be powerful to each other."[223]

In short, there is a "prevalence paradox" where abortion in America is concerned.[224] Despite widespread reliance on abortion in terms of how many women rely on abortion and how many people benefit from abortion being legal and accessible, abortion rights law and abortion rights discourse often do not reflect it.[225] The abortion rights narrative focuses on the most vulnerable women, or women without the abortion privilege,

214. *See* CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 215–16 (2017).
215. *Id.* at 214.
216. *Id.*
217. *Id.*
218. *See id.*
219. *See id.*
220. Skinner-Thompson et al., *supra* note 210, at 142.
221. *Id.* at 142–43.
222. *Id.* at 143.
223. *Id.*
224. WATSON, *supra* note 26, at 19.
225. *See id.*

and by its very nature the focus is off of women with the abortion privilege.[226] Acknowledging how common and ordinary abortion is, including by women with the abortion privilege, would help demonstrate widespread reliance on abortion, which is crucial to the *stare decisis* argument to uphold *Roe* and necessary to reverse the abortion stigma cycle. Until the abortion rights discourse reflects that abortion has become "ordinary" among women, the abortion issue will persist as extraordinary.

B. Including Abortion as Ordinary Health Care in the Public Narrative

On January 22, 2021, abortion rights supporters marked *Roe v. Wade*'s 48th anniversary on social media by asking participants to #ReimagineRoe.[227] The campaign urged participants to imagine a world in which abortion is accessible, affordable, and destigmatized.[228] In asking participants to imagine a world in which every woman has the abortion privilege, the #ReimagineRoe campaign underscored the absence of abortion as a form of ordinary health care from the public narrative about abortion.[229] The current abortion rights narrative, which plays to the undue burden standard to highlight how restricted abortion has become for many women,[230] is necessary inside the courtroom, but the public narrative need not be so constrained. In light of the way that the abortion debate and abortion itself has changed, enhancing the public narrative to include abortion as a form of ordinary health care would help reinforce that women have the knowledge to decide the outcome of their pregnancies without state interference and counteract the antiabortion strategy that suggests women need protection from abortion. Not everyone is willing to see abortion as ordinary health care today, but they

226. *See* Jesudason, *supra* note 36, at 3.

227. Jessica Corbett, *48 Years After Landmark Ruling, Advocates Push to #ReimagineRoe and Build Abortion Justice*, COMMON DREAMS (Jan. 22, 2021), https://www.commondreams.org/news/2021/01/22/48-years-after-landmark-ruling-advocates-push-reimagineroe-and-build-abortion.

228. *Id.*

229. *Id.; see* FOSTER, *supra* note 5, at 24 ("Abortion-rights advocates often hold up the extreme cases—the woman with a violent partner, the woman with a life-threatening illness, the 14-year-old girl raped by a relative, the woman whose fetus wouldn't survive more than a few moments after birth. The motivation might be to try to evoke sympathy for someone in such dire circumstances. But the message communicated may be that abortion is an extreme remedy for an extreme situation. Instead, . . . abortion can be a normal part of planning a family and living a meaningful life."); COHEN & JOFFE, *supra* note 59, at 218 ("There is a better way, and what's heartbreaking about the current situation in this country is that it's painfully obvious that this better way already exists.").

230. *See* FOSTER, *supra* note 5, at 24.

may be open to the idea in the future if we draw attention to the fact that abortion can be, should be, and is like other medical procedures.[231]

In the past few decades, the terms of the abortion debate have changed. Professor Laurence Tribe once described the abortion debate as a "clash of absolutes" where abortion rights supporters fought for the right to choose, while abortion rights opponents defended the right to life.[232] Although these positions remain part of the abortion discourse, once the campaign to pass a constitutional amendment that would ban abortion stalled in the 1970s, both sides of the abortion divide began to focus on passing or defeating incremental restrictions that make abortion harder to obtain.[233] In so doing, both sides shifted their arguments to emphasizing the costs and benefits of abortion and laws restricting it for women, families, and larger society.[234]

For the antiabortion side, *Casey* made clear that the Court would protect the abortion right because women's equal participation in society was based on their ability to control their reproductive decisions and safe and legal access to abortion, so it shifted its strategy to demonstrating that abortion is supposedly harmful to women and leads to "depression, anxiety, and suicidal thoughts."[235] In fact, antiabortion advocates have sought to increase the abortion stigma by depicting it as "deviant and immoral."[236] Although not accepted by any leading medical or mental health organizations, antiabortion advocates have created a mental health condition called the "post-abortion syndrome."[237] In addition, 2,000 crisis pregnancy centers discourage women from obtaining abortions by telling them they will experience "psychological and physical harms."[238] Groups like Care Net believe, "we can no longer hope that the courts and legislatures will protect women from the abortion system."[239] Even in forward-thinking areas like San Francisco,

231. *Cf.* Austin Sarat, *Narrative Strategy Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 378–79 (1996) ("The narrative strategy necessary to write a history of the present in the face of the counternarratives produced in the legal process requires a bold willingness to speak the unspeakable, to tell the story that no one now wants to hear in the hope that future audiences will be more receptive.").

232. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 3 (1992); ABORTION AND THE LAW, *supra* note 60, at 1.

233. ABORTION AND THE LAW, *supra* note 60, at 2–3.

234. *Id.* at 2, 5.

235. FOSTER, *supra* note 5, at 4; *see also id.* at 123–24.

236. *Abortion Stigma*, *supra* note 107, at 309.

237. FOSTER, *supra* note 5, at 100.

238. *Id.*

239. ABORTION AND THE LAW, *supra* note 60, at 142.

California, antiabortion activists have placed billboards that proclaim "Abortion Hurts Women."[240]

The antiabortion side's shift in strategy is most evident in its legislative agenda, which has sought to restrict or regulate every aspect of abortion and has aggressively pushed the premise that abortion harms women, and women need protection from it.[241] Women protective-type laws have proliferated across the country and include "informed consent" laws, required waiting periods, and mandatory ultrasounds.[242] They also include targeted regulation of abortion providers, including admitting privileges laws and requirements that abortion facilities maintain the same standards as ambulatory surgical centers—facilities that specialize in elective, outpatient surgery.[243]

For the abortion rights side, it shifted its strategy to focus on pregnant women's suffering when they cannot obtain an abortion or when they face substantial obstacles to obtaining abortion.[244] This latter focus makes sense as a legal strategy. Broadly speaking, the American legal system is built on recognizing, protecting, and providing relief for victims.[245] In addition, as noted above, under the undue burden standard, abortion rights are won or lost based on how burdensome abortion restrictions are for women.[246] If judges understand women's suffering, they may offer their sympathy or compassion and try to alleviate that suffering in the form of relief from antiabortion laws.[247]

Although the abortion rights side's legal narrative must focus on demonstrating how abortion restrictions pose a substantial obstacle for women, the public narrative does not need to be so constrained. On the

240. FOSTER, *supra* note 5, at 100. These billboard campaigns have also targeted the African American community with billboards that read "Black children are an endangered species" and "The Most Dangerous Place for an African American is in the Womb." *Race-ing* Roe, *supra* note 21, at 2057.

241. COHEN & JOFFE, *supra* note 59, at 10 ("[A]nother strategy of the anti-abortion movement—enacting new legislation that regulates every aspect of abortion"); *see* FOSTER, *supra* note 5, at 21; *see also Abortion Stigma*, *supra* note 107, at 309.

242. *Abortion Stigma*, *supra* note 107, at 300 n.15.

243. *See* ABORTION AND THE LAW, *supra* note 60, at 125.

244. *See* Jesudason, *supra* note 36, at 3 (stating that the abortion rights narrative often concentrates on the burdens women face, the hardships they endure, and their powerlessness in the face of restrictions on abortion). *Cf.* COHEN & JOFFE, *supra* note 59, at 9 ("[M]edia attention has focused mostly on the threats that the anti-abortion states pose. . . .").

245. A victim is defined as "a person subjected to cruelty, oppression, or other harsh or unfair treatment or suffering death, injury, ruin, etc., as a result of an event, circumstance, or oppressive or adverse impersonal agency." Laura Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 288 (2001).

246. *See supra* Part II.

247. Woodward, *supra* note 158, at 228–30.

one hand, narratives that communicate pain and suffering to elicit compassion, empathy, and sympathy have been a key to progressive narratives.[248] In fact, such narratives played a role in securing abortion rights. Before *Roe*, part of the reason the abortion rights narrative was successful in achieving criminal law reform was because it portrayed women as victims "in a way that was palpable to the white, middle-class majority."[249] The narrative focused on women confronting an illegal abortion after a man had raped her or a family member had molested her, or when her pregnancy presented severe issues to her health or the health of the fetus.[250]

On the other hand, narratives that communicate pain and suffering can undermine a broader social justice movement.[251] As an initial matter, such narratives often do not reflect the broader public and social movement values in contemporary American culture, including independence, autonomy, agency, and equal rights.[252] In addition, in the

248. *Id.* at 228–29.

249. *The Scarlet Letter*, *supra* note 51, at 297.

250. *Id.*

251. Jennifer L. Dunn, *The Politics of Empathy: Social Movements and Victim Repertoires*, 37 SOCIO. FOCUS 235, 236 (2004) ("Becoming a victim has its price. . . ."). Legal scholars have recognized the limitations and harms of a compassionate or pity narrative in other civil rights contexts. For example, Professor Odeana Neal notes that African Americans and civil rights leaders used "images and rhetoric that displayed their long[time] suffering" as one device in their search for equality. Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y. L. SCH. L. REV. 679, 695 (1996). Specifically, civil rights images included young African American men and women being attacked by dogs and nine Black students entering Little Rock Central High School while surrounded by hostile Whites. *Id.* According to Professor Neal, there was a price to pay for using these images to promote the idea that Whites should pity African Americans and give them special legal protection. *Id.* Such pity quickly turned into anger when a new image of African American success emerged. There was support for the belief that African Americans no longer needed special protection through policies or programs such as affirmative action because racism did not constitute a disadvantage, unless that disadvantage reflected similar images and rhetoric. *Id.* at 695–96. Similarly, Professor Laura Rovner has examined the limitations and harms of a compassionate narrative in the disability rights context. *See generally* Rovner, *supra* note 245. The Americans with Disabilities Act places the "individual with a disability" at the center of the legal inquiry, but a person with a disability, defined as someone who is impaired and substantially limited in "one or more 'major life activities'" conjures up an image of people with disabilities who deserve pity because they are "broken, weak, unable to function," or suffer from personal misfortune. *Id.* at 248 n.3, 250. At the same time, a person with a disability may not see herself or himself in this way, and it may even be the "antithesis" of how she or he sees themselves. *Id.* at 252. Enforcing civil rights under disability law then can create or reinforce its own stereotypes in ways that are not limited to the litigation. *Id.* at 288. In the fight for equality, people with disabilities may be forced to adopt the very stereotypes that they had hoped to eradicate when Congress passed the Americans with Disabilities Act. *Id.*

252. *See* Dunn, *supra* note 251, at 239, 245.

abortion rights context, such narratives can inadvertently bolster antiabortion propaganda that suggests abortion harms women, and women need greater protection from abortion.[253] Finally, even if a narrative that communicates pain and suffering inspires temporary assistance in law, if a court invalidates an abortion restriction or a legislature repeals a law, those legal actions will not address the public stereotype that women who seek abortions are victims or incapable of making decisions about their pregnancies and reproduction or the abortion stigma.[254] To address the negative stereotypes about women who seek an abortion, the narrative must also reflect that abortion is safe and beneficial for women and that women have the knowledge and capabilities to make decisions regarding the outcomes of their pregnancies.[255] In other words, the narrative should include abortion as a form of ordinary health care.

Women's experience with abortion as a form of ordinary health care is simply not part of the abortion rights narrative even though abortion can and does take place this way.[256] As discussed above, the privileged abortion experience is not relevant under the undue burden standard, and the abortion rights side has not sought to incorporate it into its public strategy. Nor has the privileged abortion experience emerged organically as part of the public narrative. In fact, when women are brought together for abortion storytelling, they are inclined to tell other women's stories—the stories of women who have limited access to abortion.[257] When women tell someone else's story, they remove their experience from the narrative. They also take their personal stake out of the fight for the abortion right and remove one more connection people can have to abortion.[258]

253. FOSTER, *supra* note 5, at 3–4 ("Many restrictions on abortion are passed with the justification that they make abortion safer, or prevent women who might experience regret and psychological harm from getting an abortion.").

254. Weitz & Kimport, *supra* note 33, at 21.

255. *Id.* One of the other consequences of a victim narrative is that abortion providers are cast as predators. *See id.* When women are viewed having the knowledge and capability of making decisions regarding the outcomes of their pregnancies, abortion providers will be less likely to be seen as at odds with women or engaged in predatory or financially advantageous positions in providing abortion care. *Id.*; *see also* Pamela D. Bridgewater, *Legal Stories and the Promise of Problematizing Reproductive Rights*, 21 L. & LITERATURE 402, 403 (2009) ("[T]he key to reproductive justice is not our mastery of the doctrine but our mastery of the stories that we recover and reconstruct.").

256. *See* COHEN & JOFFE, *supra* note 59, at 219 ("There are states around the country where this ideal is already bearing fruit.").

257. Jesudason, *supra* note 36, at 4.

258. *Id.* In addition, of course, women should have the space to tell their own story about abortion without professional advocates or privileged women doing it on their behalf—no matter how well-intentioned they are. *See id.*

Provided there is recognition that abortion as a form of ordinary health care is a privilege, there is power in sharing that experience even without centering it. It demonstrates by example that abortion is like other medical procedures when it is stripped of the layers of state intervention. It also demonstrates that women can decide the outcome of their pregnancies—without regret—in consultation with medical professionals and with use of medical technology and advancements when they have access to health care and are not constrained by social conditions like economic insecurity and racial injustice that might shape the decision.[259]

First, abortion is ordinary health care in that it is like other medical procedures and is safe and enhances a woman's life and future. In 2020, the Turnaway Study demonstrated that any suggestion that abortion is not safe or that abortion harms women physically or emotionally is false.[260] As noted above, the Turnaway Study examined how abortion affects women by comparing women who had an abortion to women who wanted an abortion but were turned away from an abortion because they were too late.[261] During their in-depth, ten-year investigation, the authors interviewed more than a thousand women and followed-up with them every six months for more than five years to understand how receiving or being denied an abortion affected their lives.[262] Women who had an abortion experienced better health and life satisfaction compared to women who were denied an abortion.[263]

In terms of their physical health, where the two groups of participants experienced different outcomes, they were to the detriment of women who were denied an abortion. Specifically, as noted above, two of the participants who were denied an abortion died as a result of childbirth-related causes.[264] Other women who were denied an abortion were more likely to experience complications from childbirth, extending over the next five years, including increased chronic head and joint pain, and hypertension.[265] Women who were denied an abortion were also more

259. *Race-ing* Roe, *supra* note 21, at 2050, 2055, 2090–91; *see* Skinner-Thompson et al., *supra* note 210, at 147; Weitz & Kimport, *supra* note 33, at 21.

260. FOSTER, *supra* note 5, at 21.

261. *Id.* at 6.

262. *Id.* at 6–7.

263. *Id.* at 21. Serious complications from abortion—whether medication or surgical—are rare. *Id*. at 142–43. The risk of a major complication from abortion that would result in needing surgery, a blood transfusion, or time in a hospital is less than one quarter of 1%. *Id.*

264. *Id.* at 149–50. According to the Centers for Disease Control national data, one in 160,000 women who has an abortion will die compared to one in 11,300 women who gives birth will die. *Id.* at 142.

265. *Id.* at 147.

likely to self-report poorer health when asked to rate their overall physical health.[266]

In terms of their mental health, where the two groups of participants experienced different health outcomes, again, they were to the detriment of women who were denied an abortion. Specifically, women who were denied an abortion experienced greater anxiety and stress as well as lower self-esteem and life satisfaction in the short run.[267] Fortunately, in the long run, the two groups of participants experienced no differences in their mental health.[268] The author of the study made clear that this latter result should not be interpreted as both groups were unhappy.[269] Rather, the author makes clear that both groups experienced improvement in their mental health over time, pointing to women's resiliency.[270]

Finally, in terms of women's life satisfaction and family well-being, where the two groups of participants experienced different outcomes, once more, they were to the detriment of women who were denied an abortion. Specifically, women denied an abortion experienced reduced employment, increased reliance on public assistance, increased household poverty, increased chances that they would be single parents raising children without family support, and reduced chances of being in a very good relationship years later.[271] In short, abortion is ordinary health care and like other medical procedures in that it enhances women's physical health, mental health, and life satisfaction.

Second, when abortion is accessible, affordable, and free from unnecessary government interference, abortion is administered as ordinary health care. In fact, largely missing from the public narrative about abortion is how abortion itself has changed in the last two decades because of the availability and use of medication abortion.[272] Medication abortion involves a pregnant woman taking two drugs—Mifepristone (also known as RU-486) and Misoprostol.[273] Many women may prefer medication abortion over surgical abortion because it is noninvasive, and women can complete it at home or in a chosen setting.[274] In states that are not hostile to abortion, women can consult with doctors via

266. *Id.* at 147–48.
267. *Id.* at 108, 115–16.
268. *Id.* at 108–09, 127–28.
269. *Id.* at 127.
270. *Id.* at 108–09, 127–28.
271. *Id.* at 165, 185, 238–39.
272. *See The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (June 16, 2021), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/.
273. *Id.*
274. *Id.*

telemedicine, and doctors can virtually prescribe medication abortion.[275] Since 2000, when the U.S. Food and Drug Administration approved medication abortion, use of it has greatly increased, even as the overall abortion rate has decreased.[276] In 2017, almost 40% of abortions were medication abortions.[277] Medication abortion reinforces the position that women are capable of not only making the decision to have an abortion but also effectuating that decision in their homes.[278]

Finally, abortion is ordinary health care in that, contrary to the abortion stigma, not all women have a "difficult" time making the abortion decision.[279] Both sides of the abortion debate benefit from a narrative built on abortion being a difficult decision. If abortion is a difficult decision for abortion rights supporters, they appear to be considering the potential human life involved. If abortion is a difficult decision for antiabortion proponents, it supports their position that women need protection from abortion, and state intervention is both necessary and desired. Even the Supreme Court seems to take comfort in abortion being a difficult choice. In 1992, in his concurring opinion in *Casey*, Justice Stevens referred to the abortion decision as a "traumatic" decision.[280] In 2007, in the Court's majority opinion in *Gonzales*, Justice Kennedy suggested the abortion decision was a "difficult and painful

275. *See* Susan Rinkunas, *A Bitter Pill*, MARIE CLAIRE (Jan. 13, 2021), https://www.marieclaire.com/politics/a35203155/pandemic-abortion-telemedicine/.

276. *The Availability and Use of Medication Abortion*, *supra* note 272 (citations omitted).

277. *Medication Abortion*, GUTTMACHER INST. (Feb. 1, 2021), https://www.guttmacher.org/print/evidence-you-can-use/medication-abortion.

278. *See* COHEN & JOFFE, *supra* note 59, at 222. When medication abortion is geographically accessible, affordable, and unrestricted, medical professionals are allowed to be creative in the same way medical professionals are in other fields and can make abortion care more accessible. In New York, Gynuity Health Projects is involved in a pioneer effort that mails Mifepristone and Misoprostol to a patient at home. *Id.* To start, the patient reaches out to the clinic from her telephone or computer and consults with the doctor. *Id.* She receives orders for an ultrasound and blood test at a general health care clinic—not abortion specific. *Id.* Once the doctor reviews her ultrasound and blood test results, she is mailed Mifepristone and Misoprostol and takes them. *Id.* She then has a virtual follow-up appointment. *Id.* This process is more cost effective and convenient and eliminates the patient having to deal with a potentially hostile environment at a local abortion clinic. *Id.* "[S]uccess rates are comparable to in-clinic appointments, and [patients] report high degrees of satisfaction." *Id.* In April 2021, the Biden Administration announced that the FDA would no longer require that medical providers dispense medication abortion in person; providers in some states are now allowed to prescribe abortion medication via telemedicine and send the medication by mail. Kate Smith, *Biden Administration to Lift Abortion Pill Restriction Amid Pandemic*, CBS NEWS (Apr. 13, 2021, 11:30 AM), https://www.cbsnews.com/news/abortion-pill-restrictions-lifted-pandemic-fda/.

279. WATSON, *supra* note 26, at 50–52.

280. Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part).

moral decision."[281] In her dissent in *Gonzales*, Justice Ginsburg also suggested that for most women "abortion is a painfully difficult decision."[282] Because people assume that the abortion decision is difficult and painful, they assume the aftermath must be difficult and painful, too.[283]

However, the vast majority of women do not have a hard time coping with abortion, and 95% of women who have an abortion report that they feel they made the right decision.[284] According to the Turnaway Study, almost half of women find the abortion decision "very easy," "somewhat easy," or "neither easy or difficult."[285] Dr. Willie Parker, an abortion care provider, describes his experience with patients as follows:

> One of the cultural falsehoods that I most rail against is this: each and every abortion is a terrible tragedy and every woman who chooses to have an abortion is therefore a tragic figure. In this popular narrative, women are helpless victims—and not clear-eyed individuals making a sensible choice to benefit themselves and the people around them. I know, from seeing women every day, how far this is from being true. Most of the women I see are utterly matter-of-fact about what they're doing. . . . It may be difficult in a misogynist culture to regard

281. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

282. *Id.* at 183 n.7 (Ginsburg, J., dissenting).

283. FOSTER, *supra* note 5, at 101.

284. *Id.* at 124; Lindy West, *Foreword to* SHOUT YOUR ABORTION, at ix (Amelia Bonow & Emily Nokes eds., 2018).

285. FOSTER, *supra* note 5, at 304; WATSON, *supra* note 26, at 53–54. As Philosophy Professor Bonnie Steinbock has recounted:

> Frankly, I am sick and tired of this particular piety. The decision to have an abortion is not inevitably agonizing, wrenching, or traumatic—at least, not in my experience. . . . At the time, I was living with a man with whom I was very much in love, but who I knew was not as much in love with me. I did not think about the embryo at all; for me, a five-week-old embryo is not the kind of being to which one can have moral obligations. Rather, I thought that if I had the child, my real purpose would be to get my boyfriend to marry me, and that would be incredibly manipulative. Thus, for me, the abortion decision was not difficult. I do not wish to minimize the anguish an abortion decision causes many women. Indeed, there are situations in which I would find abortion terribly difficult, despite my pro-choice leanings. If we'd been engaged or married, but not ready to have a child, I would have had a lot more trouble deciding what to do. Nevertheless, to assume that the decision to have an abortion is always difficult not only ignores the experiences of women like me, but worse, implies that women who do not find the decision difficult are somehow deficient psychologically or morally. And that is a canard women can live without.

Id. at 51.

> women who freely choose sex and who freely choose to have abortions when needed as free agents taking their lives into their own hands. But the alternative is to see them as less than fully human and requiring of paternalistic intervention.[286]

Notably, there is widespread support among Americans for abortion to remain legal and for abortion to be treated as a form of ordinary health care.[287] In 2018, PerryUndem conducted a poll of unusual depth with respect to abortion.[288] First, similar to other polls, the results showed that a strong majority of Americans believe abortion should be legal. Seventy-two percent said they did not want the Court to overturn *Roe*, and only a small fraction of participants said state or federal politicians (4%) or the Supreme Court (9%) as opposed to "some combination of the woman, her partner, and her doctor," should make this decision.[289] Moreover, in terms of how women should experience abortion, respondents said women should receive medically accurate information (96%), staff should be nonjudgmental (80%), women should not endure burdens such as waiting periods (81%), abortion care should be available in her community (80%), and abortion care should be covered by insurance (67%).[290] In addition, respondents said women should be supported by their loved ones (88%), and not have shame (75%) or guilt (73%), and they would support a friend or family member who had an abortion (88%).[291]

In short, although the undue burden standard constrains the legal narrative about abortion, it does not constrain the public narrative. Provided the public narrative acknowledges that abortion as a form of ordinary health care is a privilege, including abortion as ordinary health care in the public narrative helps demonstrate that abortion is safe, it is administered like other medical procedures, and it enhances women's health and life satisfaction. It also powerfully demonstrates that women have the knowledge and are capable of making decisions regarding the outcomes of their pregnancies without state intervention. At the same time, it helps counteract the antiabortion strategy that avows abortion harms women, or women need protection from abortion. Finally, abortion as ordinary health care is consistent with public support. Even though

286. WATSON, *supra* note 26, at 58–59.
287. *See* COHEN & JOFFE, *supra* note 59, at 231–32.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*

not everyone may be willing to see abortion that way today, they may be more receptive to the idea if we begin to tell them that story.[292]

C. Equality and Addressing Oppression from Within

After *Casey*, sex equality became a recurring theme in legal arguments and political arguments in support of the abortion right.[293] To advance an equal rights argument with integrity and to coalesce a base of support around it, however, the abortion rights movement needs to systematically recognize and reckon with the inequalities among the women who make the abortion decision. Put another way, there must be concerted efforts to address oppressions related to abortion that come from the outside but also that come from within.[294] The abortion privilege framework is designed to help facilitate such efforts. As a start, abortion privilege aptly describes how some women experience abortion, and abortion privilege recognizes the inequality among women who make the identical decision to have an abortion. In addition, the abortion privilege framework is designed to both preempt the deprioritization of women without the same privilege and make clear to privilege holders that maintaining the abortion privilege perpetuates their inequality, too.

The *Roe* Court held that the right to privacy encompasses a woman's abortion decision,[295] but since *Casey*, sex equality has become a common thread in abortion rights legal arguments.[296] In *Casey*, the Court reaffirmed *Roe*'s essential holding, but in addition to relying on the right to privacy, the Court explained that women have been able to participate equally in society's economic and social developments because of their ability to make reproductive decisions and the availability of abortion.[297] The Court made clear that women must be able to shape their destiny

292. *See* Sarat, *supra* note 231, at 378–79.

293. Sex equality was advanced as an argument in favor abortion rights before *Roe*, but it is increasingly common now to hear equality, as well as privacy, asserted to support the abortion right. *See, e.g.*, Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 141 S. Ct. 2619 (2021) (No. 19-1392); *Race-ing* Roe, *supra* note 21, at 2047–48; *see also* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1877–78 (2010) [hereinafter Roe*'s Roots*].

294. *See, e.g.*, Angela Mae Kupenda, *For White Women: Your Blues Ain't Like Mine, but We All Hide Our Faces and Cry—Literary Illumination for White and Black Sister/Friends*, 22 B.C. THIRD WORLD L.J. 67, 95 (2002) (explaining how a white woman can identify as white and female but cannot be connected with womanhood and humanity-based justice if she is oppressed and an oppressor).

295. Roe v. Wade, 410 U.S. 113, 153 (1973).

296. *See supra* text accompanying note 293.

297. Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

based on their own ideas about their role in society, irrespective of how dominant the state's vision of a woman's role in society has been in our history and culture.[298]

Shortly after *Casey*, in 1993, Justice Ruth Bader Ginsburg was confirmed as an Associate Justice to the Supreme Court, and she became the most vocal member of the Court to advance the position spotlighted in *Casey* that a woman's ability to make the abortion decision was essential to her equality.[299] Most notably, in her dissent in *Gonzales v. Carhart*, she characterized the abortion right as a matter of equality not privacy:

> As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status

298. *Id.* at 852. In his concurring opinion in *Casey*, Justice Harry Blackmun also explained that when a state restricts a woman's right to abortion, the restriction implicates constitutional guarantees of gender equality. He wrote:

> State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.

Id. at 928 (Blackmun, J., concurring).

299. On September 18, 2020, Associate Justice Ruth Bader Ginsburg passed away from complications of metastatic pancreatic cancer. Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020) https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html. Justice Ginsburg, only the second woman to sit on the U.S. Supreme Court, was a lifelong women's rights advocate and a steadfast supporter of abortion rights. *Id.* As early as 1993, during her Supreme Court confirmation hearing, she explained that *Casey* recognizes the abortion decision involves a woman's body and life; men are not similarly situated to women in this regard. She made clear that a woman's choice must control, and imposing restrictions on that choice would disadvantage her on the basis of sex. JUDICIAL NOMINATIONS 396 (Neal Devins & Wendy L. Watson eds., 1995). Her testimony was consistent with the views she expressed in her early publications that a woman's ability to control the abortion decision was not only a matter of individual autonomy but also essential to women's equality. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985) ("[I]n the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.").

> under the Constitution." Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.[300]

With a now solidly conservative Supreme Court that has expressed skepticism and hostility towards the abortion right as currently recognized,[301] one might expect to see more legal arguments centered on equality-based reasoning.[302] As Professor Reva Siegel has long maintained, equality can be and is expressed explicitly or implicitly in a variety of constitutional frameworks—the Fourteenth Amendment's Due Process Clause, Equal Protection Clause, and Privileges and Immunities Clause.[303] Indeed, since *Casey*, a number of prominent legal scholars have analyzed how equality arguments help illuminate liberty values, and there has been a steady drum beat for the Court to adopt an equality framework for abortion rights.[304]

Sex equality has also become a common thread in abortion rights political arguments. Equal rights is a "master frame" that is foundational, adaptable, and appealing, so social movements often invoke it or use it in an effort to resonate with potential movement

300. 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) (alteration in original) (citations omitted).

301. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021). Justice Amy Coney Barrett, Justice Ginsburg's replacement on the Court, has ruled to uphold restrictions on abortion as an appellate judge, and as a law professor she signed an ad criticizing *Roe v. Wade* as "barbaric." Alexandra Hutzler, *Amy Coney Barrett Could Rule on Multiple Abortion Cases if Appointed to the Supreme Court*, NEWSWEEK (Oct. 23, 2020, 1:13 PM), https://www.newsweek.com/amy-coney-barrett-could-rule-multiple-abortion-cases-if-appointed-supreme-court-1541750; *see also* Interview by David Greene with Sarah McCammon, *A World Without Legal Abortion: How Activists Envision a "Post*-Roe" *Nation*, NPR (Oct. 27, 2020, 5:02 AM), https://www.npr.org/transcripts/927862869.

302. *See* Roe*'s Roots*, *supra* note 293, at 1900–02.

303. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 816 (2007) [hereinafter *Sex Equality*].

304. *Id.* at 833–34; *see, e.g.*, Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 403–04 (2011).

participants.[305] In the abortion rights context, the equality argument makes sense for messaging purposes. First, it takes account of the physical aspects of reproduction.[306] In addition, the argument takes account of the social aspects of reproduction in that it raises skepticism around the traditional or conventional female roles and the ways custom structures female and male roles in society.[307] The equality argument also recognizes that a woman's ability to time motherhood is necessary to her health and welfare, sexual freedom, education and employment, and ability to manage relationships and family.[308] Finally, most people who support the equality argument oppose legal restrictions on abortion because "they have conscripted the lives of poor and vulnerable women without similarly constraining the privileged."[309]

To move forward with an equality argument with integrity and to use it as a framework to build a broad base of support around the abortion right, systematically acknowledging and addressing the inequalities among women who make the decision to have an abortion is necessary.[310] The abortion privilege framework is designed to help. To begin with, abortion privilege describes how some women experience abortion relative to others. That is, although women with the abortion privilege and women without the abortion privilege make the identical decision to have an abortion, their experiences are vastly different. Only some women have trouble accessing abortion care. Only some women bear the brunt of the public stigma and shame associated with legal restrictions on abortion. Only some women are the face associated with abortion because of abortion rights law and the abortion rights narrative.

In addition, the abortion privilege framework is designed to prompt efforts to equalize the abortion experience and address social conditions that shape it, and importantly, preempt any deprioritization of historically marginalized women. The mainstream women's rights movement has not always represented or advanced the reproductive needs and interests of women of color, low-income women, and other women society has historically marginalized, resulting in a fractured and

305. Dunn, *supra* note 251, at 239.
306. *Sex Equality*, *supra* note 303, at 817.
307. *Id.*
308. *Id.* at 819.
309. *Id.* at 822.
310. To be sure, sex equality arguments in favor of the abortion right are concerned with equalizing the sex roles between women and men. *Id.* at 817–18. Nevertheless, as this Article makes clear, there is no one-size-fits-all abortion experience for women. On the same token, a one-size-fits-all sex equality victory would produce benefits that are accessible to some women and illusory for others. In other words, revealing the abortion privilege and taking inventory of or accounting for women's experiences in the abortion rights discourse is an exercise in honesty and utility.

less organized social movement to support the abortion right.[311] In fact, the mainstream women's rights movement has taken positions that have had the effect of deprioritizing historically marginalized women.

For example, in the 1970s, the mainstream women's rights movement opposed mandatory informed consent laws before a woman could be sterilized.[312] Although the movement condemned coerced sterilization, it feared that if lawmakers could interfere with sterilization, they could interfere with abortion, too.[313] At the same time, however, advocates on behalf of women of color were demanding changes and protection from sterilization abuses because women of color were being coercively sterilized throughout the United States sometimes as part of federally funded family planning programs.[314]

Similarly, after *Roe*, the mainstream women's rights movement chose to focus on the right to abortion itself instead of barriers to abortion access, particularly abortion funding bans.[315] Although the mainstream movement opposed funding bans, it was worried about its donors and grassroots activists who were less concerned about incremental restrictions.[316] The movement was also aware of the increasing racialized politics and hostility towards welfare and misjudged how the Court would view these funding bans.[317] At the same time, however, abortion funding bans were of primary importance to women of color and low-income women because these bans disproportionately hurt nonwhite women.[318] They argued that the bans pushed "poor, minority, and working women into unwanted childbirth, back-alley abortions, and unwanted sterilizations."[319]

311. ROSS & SOLINGER, *supra* note 88, at 113; *see also* Renee Bracey Sherman, *Whitewashing Reproductive Rights: How Black Activists Get Erased*, SALON (Feb. 25, 2014, 12:00 AM), https://www.salon.com/2014/02/25/whitewashing_reproductive_rights_how_black_activists_get_erased/ ("As black feminists from the '70s onward sought to expand racial, gender and economic equality for women of color, they found themselves being left out of mainstream conversations about equal pay and reproductive rights. Their stories were left untold in a women's rights movement, led by mainly white women.").

312. *See* ABORTION AND THE LAW, *supra* note 60, at 47–48.

313. *See id.*

314. *See, e.g.*, MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 880 (2015); *e.g.*, Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 97, 97–98 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); *e.g.*, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977); *e.g.*, Madrigal v. Quilligan, 639 F.2d 789 (9th Cir. 1981) (unpublished table opinion).

315. ABORTION AND THE LAW, *supra* note 60, at 40–41.

316. *Id.* at 41.

317. *Id.* at 40–41, 45.

318. *Id.* at 48.

319. *Id.*

Finally, in 2003, the mainstream women's rights movement began planning the March for Choice, a massive protest in support of the abortion right.[320] Many women of color leaders in the reproductive justice movement publicly expressed reluctance to help organize the march after seeing themes of the white-centric feminism.[321] Only after the mainstream movement agreed to change the name of the march to the March for Women's Lives and broaden the scope of the march beyond abortion to include other reproductive and social justice issues that prioritized issues of importance to women of color did SisterSong, the National Latina Institute for Reproductive Health, the Black Women's Health Imperative, and the National Asian Pacific American Women's Forum agree to help organize the march.[322]

Given the mainstream women's rights movement's history of deprioritizing women of color, low-income women, and women society has historically marginalized, there might be hesitation if not resistance to a call-in to women with the abortion privilege.[323] However, to be clear, this Article is intended to explore openings where recognizing and incorporating the abortion privilege could redistribute, not overshadow or compound, the oppressive load women without the abortion privilege carry in connection with the right.

By using the term privilege, the abortion privilege framework encourages approaching the abortion issue with an intersectional lens.[324] In addition, by using the term privilege, the abortion privilege framework puts the onus on privilege holders and other stakeholders to reflect on what role the privilege plays in the abortion experience and what role privilege plays in maintaining the precarious status quo of the abortion right. By using the term privilege, the abortion privilege framework also places the responsibility on the privilege holder and other stakeholders to work to understand the personal experience of women without the privilege and to align themselves in private and public with them in a way that acknowledges their privilege. Thus, the abortion privilege framework is designed to recognize the inequalities among women who make the decision to have an abortion and prompt efforts to equalize them in a way that avoids deprioritizing historically marginalized women.

320. ROSS & SOLINGER, *supra* note 88, at 242.

321. *Id.* at 66–67, 242.

322. *Id.* at 66–67.

323. *Id.* at 113. Reproductive justice advocates have questioned whether mainstream white women can appreciate the reproductive justice framework without recentering the conversation around white women and non-intersectional practices. *Id.*

324. *See Race-ing* Roe, *supra* note 21, at 2033–62 (providing a historical overview of race and abortion).

Finally, the abortion privilege framework is designed to highlight for privilege holders that, although there is risk in confronting the abortion privilege, maintaining the privilege perpetuates their own inequality. To be sure, there is risk for privilege holders to talk about the abortion privilege. Specifically, privilege holders must confront their role as oppressors or beneficiaries of oppression.[325] Similar to any privilege holder, women with the abortion privilege benefit from the privilege.[326] As discussed above, not only do women with the abortion privilege experience abortion as a form of ordinary health care, but also they can more readily avoid suffering from the public stigma, shame, and oppression associated with abortion. In addition, they can avoid objecting to the oppression associated with abortion because it is not relevant for them. Given the strong stigma associated with abortion, they have a strong incentive to ignore the oppression.

In fact, when women with the abortion privilege observe how women without the abortion privilege are treated, their observations can coerce them to "assimilate" into the dominant group norm.[327] This assimilation effect can be seen in other areas of reproduction. For example, privileged women are indirectly coerced to act in accordance with what is considered normal maternal behavior to avoid coerced interventions that unprivileged women experience, including forced cesarean sections and prosecution for prenatal drug use.[328] As Professor Nancy Ehrenreich explains:

> Just as many women in society know . . . the courts are unlikely to find that a woman has been raped if she was drinking heavily or wore revealing clothes, so women are becoming aware that medical and legal authorities will not hear a woman's objections to coercive interventions in her pregnancy if she acts "irresponsibly," contests medical authority, or seems unwilling to sacrifice her own well-being to that of her fetus.[329]

In other words, privileged holders may fear losing their privilege.[330] Privileged holders within a subgroup, here women who have had an abortion, may also implicitly or explicitly become invested in their

325. *See* WILDMAN, *supra* note 61, at 97.

326. Wildman & Davis, *supra* note 27, at 891 ("Members of the privileged group gain many benefits by their affiliation with the dominant side of the power system.").

327. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 300–01 (2002).

328. *Id.* at 302.

329. *Id.*

330. *Id.* at 290.

privilege.[331] However, insofar as there is reluctance to acknowledge the abortion privilege, the privilege not only undermines equal rights arguments by maintaining inequality among women who choose abortion, but the privilege also perpetuates privileged women's own inequality.[332] That is to say, privilege comes at a price.[333]

There are two ways that privilege supports and obscures the subordination a privilege holder experiences. First, when privilege holders in a subgroup ignore members of the subgroup without their same privilege, they reinforce the very systems that oppress the subgroup and limit achieving the subgroup's overall goal.[334] The same stereotype that benefits privilege holders in one context is the same stereotype that subordinates the privilege holders in another context.[335] Here, when women with the abortion privilege align or assimilate with the norm that women do not have abortions or women who do not have abortions are somehow more responsible and moral, that alignment or assimilation acts as a double-edged sword.[336] On the one hand, women may avoid experiencing abortion in ways similar to women without the abortion privilege. On the other hand, they perpetuate the perception that abortion is rare and the stereotype that women who have abortions are irresponsible or immoral, and incapable of making independent, rational reproductive health care decisions.[337]

Second, when privileged holders in a subgroup ignore those without the same privilege or accept their subordinated status, ideological investment can occur.[338] Ideological investment occurs when privileged group members come to believe that they deserve their privilege status but not their overall subordination status, or that they are actually free from the conditions of the subordination.[339] Here, women with the abortion privilege may convince themselves that anyone without the

331. *Id.* at 268–69. For example, Professor Ehrenreich points to the white feminist movement's success in obtaining workplace reforms and explains that the success came at the expense of low-income women and women of color who took care of their children and cleaned their homes. *Id.* The movement failed to improve their lives, such as with living wages or affordable day care out of ignorance and an unwillingness to give up the privilege they had because of the availability of cheap domestic labor. *Id.*

332. *Id.* at 306 ("[T]he privilege individuals enjoy comes not just at the expense of *another* group, but at their *own* expense as well."); Kupenda, *supra* note 294, at 84 ("[T]he white patriarchal system *kills* for white women but also inflicts injury upon them."); *see* Wildman & Davis, *supra* note 27, at 885.

333. Ehrenreich, *supra* note 327, at 257.

334. *Id.* at 257, 282.

335. *Id.*

336. *Id.* at 257, 307–08.

337. *See id.* at 307.

338. *Id.* at 307, 313–14.

339. *Id.*

privilege is deserving of their circumstances and blame them.[340] Although they may be internalizing the abortion stigma, they may also be hiding from their privilege.[341] Ideological investment can be seen in other areas of reproduction, too. Using the example above, for privileged women to believe that they will not be coerced into having a cesarean section if they act "responsibly," they must believe that women who experienced forced cesarean sections are acting "irresponsibly."[342] Thus, although there is risk involved in confronting the abortion privilege, failure to do so not only maintains the status quo's existing inequalities, but also perpetuates privileged holders' own inequality.

In short, as equality arguments find their way into legal and political arguments in support of the abortion right, there needs to be greater recognition of, and reckoning with, the inequalities among the women who make the abortion decision. Although contending with outside sources of oppression can be all consuming, addressing inside sources of inequality is essential to advance an equal rights argument with integrity and to build a base of support around it. The abortion privilege framework is intended to help describe how some women experience abortion while preempting the deprioritization of women without the privilege and making clear for privilege holders that confronting the abortion privilege is necessary to avoid perpetuating their own inequality.

V. CONCLUSION

In revealing the abortion privilege, this Article sought to add a new dimension to the way that we think and talk about abortion, including the women who choose to have abortions, the ways in which women experience abortion, and the unequal treatment women receive in connection with abortion. The Article focused on privileged women because, by definition, privileged women may not be aware they are privilege holders and because their experience represents abortion care as it could be, should be, and is—at least for them. This Article also sought to explore ways to recognize and incorporate the abortion privilege into abortion rights law and discourse to help redistribute the oppressive load that women without the abortion privilege carry and to shore up the abortion right. Despite the ongoing and seemingly

340. *Id.* at 313–14 ("This ideological investment in one's privileged status comes in part from internalization of one's own (dominant) group's norms, and belief that compliance with those norms is necessary for success.").

341. *Id.* at 313.

342. *Id.* at 314–15.

intractable nature of the abortion issue, at a time when *Roe v. Wade* seems most likely to be overturned, it is worth critically examining and re-examining the issue. A woman's employment, education, life aspirations, and accomplishments are all affected by whether she is able to have an abortion or must carry a child to term.[343]

343. FOSTER, *supra* note 5, at 165.