

ESSAY

GONZALES V. CARHART AND THE COURT'S
"WOMEN'S REGRET" RATIONALE

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"Any search for the 'true' nature of women will be hindered by the imprint of the stereotype of woman on the mind of the person who is searching, whether that person be male or female."¹

INTRODUCTION

Much can and undoubtedly will be written and said about *Gonzales v. Carhart*,² the United States Supreme Court's decision rejecting a facial constitutional challenge to the Federal Partial-Birth Abortion Ban Act of 2003 (the "Act"),³ legislation that prohibited performance of the dilation and extraction ("D & X") or intact dilation and evacuation ("intact D & E") abortion procedure.⁴ Issues and subjects warranting commentary and critique include the Court's deference to congressional proscription of the so-called "partial-birth abortion" procedure in a statute based on erroneous

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1. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 449.
2. 127 S. Ct. 1610 (2007).
3. Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2000 & Supp. 2005)).
4. "The term 'partial-birth abortion' is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. . . . The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E)." *Gonzales*, 127 S. Ct. at 1640 n.1 (Ginsburg, J., dissenting) (citations omitted).

legislative findings,⁵ especially the finding that the banned procedure was never safer than other abortion methods.⁶ This latter finding (“a legislative proclamation of a fact that is not a fact”),⁷ was made by a Congress reacting to the Court’s 2000 decision in *Stenberg v. Carhart*.⁸ In that case, the Court struck down a Nebraska “partial-birth abortion” law lacking an exception for abortions preserving the health of the mother because the Court determined that the “record shows that significant medical authority supports the proposition that in some circumstances [the banned practice] would be the safest procedure.”⁹ No such health exception is found in the federal statute validated by the Court in *Gonzales*.

Stenberg was decided by a five-to-four vote with Justices John Paul Stevens, Sandra Day O’Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer in the majority. Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas dissented. *Gonzales* was also decided by a

5. The Court conceded that several of the Act’s findings were incorrect, including Congress’s finding that no medical schools provided instruction on the D & X or intact D & E abortion procedure. *Id.* at 1638 (majority opinion) (“The testimony in the District Courts, however, demonstrated intact D & E is taught at medical schools.”); *id.* at 1643 (Ginsburg, J., dissenting) (“[I]n fact, numerous leading medical schools teach the procedure.”). Also erroneous was Congress’s finding that “there existed a medical consensus that the prohibited procedure is never medically necessary. . . . The evidence presented in the District Courts contradicts that conclusion.” *Id.* at 1638 (majority opinion); *see also id.* at 1644 (Ginsburg, J., dissenting) (noting the absence of a medical consensus on whether the banned procedure is ever medically necessary).

6. *See* Partial-Birth Abortion Act, Pub. L. No. 108-105 § 2(14)(B), 117 Stat. 1201, 1204 (“There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.”). In her dissenting opinion in *Gonzales*, Justice Ruth Bader Ginsburg argued (with no refutation by or rejoinder from the Court) that a number of physicians and associations have concluded that intact D & E is safer than other abortion methods. “No comparable medical groups supported the ban.” *Gonzales*, 127 S. Ct. at 1644 (Ginsburg, J., dissenting).

7. Charles Fried, Op-Ed., *Supreme Confusion*, N.Y. TIMES, Apr. 26, 2007, at A25 (Late Edition). Professor Fried argues that *Gonzales* “is disturbing because the court has on numerous occasions refused to allow Congress to overturn constitutional law by bogus fact finding,” *id.*, as the Court refused to do in *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil remedy provision of the federal Violence Against Women Act) and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s Fourteenth Amendment enforcement power).

8. 530 U.S. 914 (2000), discussed *infra* notes 60–71 and accompanying text.

9. 530 U.S. at 932.

vote of five to four, with Justice Samuel Alito¹⁰ (appointed by President George W. Bush to replace the retired O'Connor)¹¹ joining Justice Kennedy's opinion for the Court along with Chief Justice John Roberts (appointed by Bush after the death of Chief Justice Rehnquist)¹² and Justices Scalia and Thomas. Justices Stevens, Souter, Ginsburg, and Breyer found themselves in the dissenting position. Whether and how the change in the Court's composition impacted the outcome in *Gonzales* are questions of interest. In addition, one scholar looking at the Court's current membership has made "a painfully awkward observation: All five justices in the majority in *Gonzales* are Roman Catholic. The four justices who are not all followed clear and settled precedent."¹³

10. In a 1985 memorandum written while he served as assistant to the Solicitor General in the Reagan administration, Alito cautioned against a "frontal assault on *Roe v. Wade*" and asked: "What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?" Memorandum from Samuel A. Alito to Solicitor General Charles Fried 8, 17 (June 3, 1985) (copy on file with the author), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box18-SG-AbortionsAlt-1985.pdf> (reproducing Justice Alito's memorandum with comments from Charles Fried to Samuel A. Alito, Charles J. Cooper, Kenneth Crib, Stephen Galebach, Carolyn Kuhl, William B. Reynolds, and Richard Willard). This memorandum was the subject of a 2006 meeting between then-Supreme Court nominee Alito and then-Senate Judiciary Committee chairman (and abortion rights supporter) Arlen Specter (R.-Pa.). After that meeting, "Specter told reporters that Alito emphasized that he had been acting as an advocate." Joan Biskupic, *Reagan-Era Work Contains Clues on Alito's Views*, USA TODAY, Jan. 6, 2006, at 4A; see also JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 16–17 (2007) (discussing the Alito memorandum).

11. David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21.

12. Linda Greenhouse, *President Names Roberts as Choice for Chief Justice*, N.Y. TIMES, Sept. 6, 2005, at A1.

13. Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at 19. In Professor Stone's words:

Of course, that all of the Catholic justices voted as they did in *Gonzales* might have nothing to do with their personal religious beliefs. But given the nature of the issue, the strength of the relevant precedent, and the inadequacy of the court's reasoning, the question is too obvious to ignore.

Id. Deeming it "appropriate and necessary" to ask whether the *Gonzales* "majority ignored the critical line between religious belief and public morality," Stone found it "disconcerting" that Roberts, Alito, Scalia, Kennedy, and Thomas may have mandated their own moral code in upholding the Act. *Id.*; see also Michael J. Gerhardt, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional*, 4 U. ST. THOMAS L.J. 173, 187 (2007) ("[A]ll five of the current Catholic majority of the Court were appointed by Republican presidents determined to lower the wall of separation between church and state (and to

I wish to focus here on one aspect of Justice Kennedy's majority opinion in *Gonzales*: his statement that "some women come to regret their choice to abort the infant life they once created and sustained."¹⁴ Acknowledging that the Court could "find no reliable data to measure the phenomenon,"¹⁵ Kennedy cited the amicus brief of Sandra Cano (the "Mary Doe" of *Doe v. Bolton*)¹⁶ and "180 post-abortive women who have suffered the adverse emotional and psychological effects of abortion."¹⁷ In referring to the phenomenon posited in this brief, Kennedy, assuming facts not in evidence, gave to abortion-rights opponents something they have sought for a number of years—official recognition of the "women's regret" rationale and the Court's reliance on that justification in a decision upholding, for the first time, governmental prohibition of an abortion procedure.

This Article's discussion of this significant development in the Court's abortion-rights jurisprudence unfolds as follows. Part I provides a brief discussion of two of the Court's foundational decisions addressing the constitutionality of state restrictions on a woman's pregnancy-termination decision—*Roe v. Wade*¹⁸ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁹ Part II discusses *Gonzales*'s articulation of the "women's regret" rationale and the Court's acceptance and endorsement of what it viewed as the "unexceptionable" and "self-evident" premise that "some women" regret their choice to have an abortion.²⁰ Part III argues that the Court's recognition of the rationale is an important politico-legal

weaken *Roe*).").

Responding to Stone's focus on the religious background of the *Gonzales* majority, and criticizing what he calls the intellectual laziness of "[p]laying the religion card," Professor John Yoo argues that "[n]o one thinks religious belief explains the views of the dissenting justices. Justices Stephen Breyer and Ruth Bader Ginsburg, it seems, are Jewish, while Justices John Paul Stevens and David Souter presumably are Protestants." John Yoo, *Partial-Birth Bigotry*, WALL ST. J., Apr. 28–29, 2007, at A8.

14. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

15. *Id.*

16. 410 U.S. 179 (1973) (striking down certain provisions of a Georgia statute requiring, among other things, that abortions be performed in hospitals and be approved by a hospital's abortion committee).

17. Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner at 1, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380), 2006 WL 1436684 [hereinafter *Cano Brief*]; see also *infra* notes 86–92 and accompanying text.

18. 410 U.S. 113 (1973).

19. 505 U.S. 833 (1992).

20. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

victory for those on the “pro-life”²¹ side of this nation’s abortion-rights divide who have been engaged in a decades-long effort to place “women’s regret” front and center in the judicial and legislative arenas. As discussed therein, this triumph and the implications thereof illustrate the interrelationship of law and politics and one way in which Court doctrine can be influenced by and reflect positions espoused by the politico-legal campaigns of opponents of established legal regimes.

I. *ROE AND CASEY*

A. *Roe v. Wade*

Roe v. Wade,²² the Court’s seminal (and much criticized) abortion-rights decision,²³ held that Texas statutes prohibiting and criminalizing abortions at any stage of pregnancy, “except with respect to ‘an abortion procured or attempted by medical advice for the purpose of saving the life of the mother,’”²⁴ violated the Due

21. I place quotation marks around the term “pro-life” in recognition of the fact that advocates for and against abortion rights have chosen and prefer the labels “pro-choice” and “pro-life.” See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1012 n.6 (1989); Nadine Strossen, *Introduction*, 40 N.Y.L. SCH. L. REV. 855, 857 n.12 (1996). However, like Professor Sylvia Law, “I am not comfortable with this terminology. ‘Pro-life’ advocates are openly anti-choice. Pro-choice advocates honestly, and I think fairly, believe themselves to be pro-life. The labels pro-choice and anti-choice probably most accurately capture the nature of the debate.” Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 933 n.67. Recognizing “that the label ‘anti-choice’ is implicitly, if accurately, pejorative, in a culture that values diversity and choice,” Professor Law chose to “use the terminology ‘pro-choice’ and ‘anti-abortion.’” *Id.*

22. 410 U.S. 113 (1973).

23. See, e.g., Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 23 (2003) (“[N]o argument can be made that *Roe v. Wade* has any constitutional foundation whatever.”); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.” (footnotes omitted)); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007, 1008 (2003) (“*Roe* is utterly indefensible as a matter of constitutional text, . . . is pure judicial lawmaking, . . . [and] is an embarrassment—perhaps the worst work-product the Court has ever produced.”).

24. *Roe v. Wade*, 410 U.S. at 118 (quoting TEX. PENAL CODE art. 1196 (West 1973) (repealed)); see also *id.* at 117 n.1 (reprinting the full statute).

Process Clause of the Fourteenth Amendment.²⁵ In the second paragraph of his opinion for the Court, Justice Harry Blackmun

acknowledge[d] [the Court's] awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.²⁶

Seeking "to resolve the issue by constitutional measurement, free of emotion and of predilection," Justice Blackmun inquired into and emphasized "medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries."²⁷ Additionally, he quoted Justice Oliver Wendell Holmes' statement that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."²⁸

Acknowledging that a right of privacy is not expressly set forth in the Constitution,²⁹ Justice Blackmun noted the Court's recognition of "a right of personal privacy, or a guarantee of certain areas or zones of privacy" in decisions interpreting and applying the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.³⁰ "This

25. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

26. *Roe*, 410 U.S. at 116.

27. *Id.* at 116–17. Justice Blackmun concluded that a woman's decision to terminate a pregnancy was not a choice proscribed by tradition. He examined, among other things, "[a]ncient attitudes," the origins of the Hippocratic Oath, the common law and English statutory law, and the laws of the states, *id.* at 130–41, and concluded that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140. A woman's ability to choose to terminate a pregnancy "was present in this country well into the 19th century," the Justice wrote, and "[e]ven later, the law continued for some time to treat less punitively an abortion procured in early pregnancy." *Id.* at 141.

28. *Id.* at 117 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

29. *Id.* at 152.

30. *Id.*

right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is,"³¹ or in the Ninth Amendment,³² "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."³³ Focusing on the pregnant woman's choice and decision, Blackmun wrote:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.³⁴

This private right to terminate a pregnancy is not absolute, as "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."³⁵ As a pregnancy proceeds, there will be some point in fetal development at which "another interest, that of health of the mother or that of potential human life, becomes significantly involved."³⁶ The interests of the pregnant woman and the potential

31. *Id.* at 153.

32. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224–52 (2004) (discussing the mandate of the Ninth Amendment); DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 111–15 (2007) (discussing and critiquing the Court's decision in *Roe*).

33. *Roe*, 410 U.S. at 153.

34. *Id.* In *Doe v. Bolton*, decided the same day as *Roe*, the Court stated that a physician's "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." 410 U.S. 179, 192 (1973).

35. *Roe*, 410 U.S. at 154.

36. *Id.* at 159. Texas argued that the state's interest in life began at conception. "We need not resolve the difficult question of when life begins," said Justice Blackmun, as "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.*

human life “are separate and distinct,” Justice Blackmun wrote.³⁷ “Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes compelling.”³⁸

To accommodate and evaluate the interests of the pregnant woman and the “potential life,” Justice Blackmun set out the following legislative-like³⁹ trimester framework: (1) Prior to the end of the first trimester of a pregnancy,⁴⁰ “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician”;⁴¹ (2) after the end of the first trimester, the state may promote “its interest in the health of the mother” and may “regulate the abortion procedure in ways that are reasonably related to maternal health”;⁴² and (3) at the post-viability stage (i.e., the stage at which a fetus is capable of life outside the mother’s womb), a state “may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”⁴³

37. *Id.* at 162.

38. *Id.* at 162–63 (quotations omitted).

39. See Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier’s Right to Abortion*, 70 *FORDHAM L. REV.* 93, 137 n.236 (2001) (describing how Blackmun’s trimester approach “in legislative fashion circumscribed the ability of states to regulate abortion”).

40. Justice Blackmun acknowledged that his conclusion “that the end of the first trimester is critical . . . is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.” See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 580 (1994) (quoting Blackmun’s November 22, 1972, cover memorandum to members of the Court); see also LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 97 (2005) (quoting a statement in Blackmun’s December 11, 1972, memorandum to the Court Conference that viability “has logical and biological justifications” and takes into account the practical concern that pregnant women and younger girls “may refuse to face the fact of pregnancy” and not seek medical consultation “until the end of the first trimester is upon them or, indeed, has passed”).

41. *Roe*, 410 U.S. at 164. “This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.” *Id.* at 163.

42. *Id.* at 164.

43. *Id.* at 164–65. “This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.” *Id.* at 163; see also Paulsen, *supra* note 23, at 1019 (arguing that the viability cut-off point is not “foolish. As arbitrary moral cut-off points go, it is a fairly reasonable one. . . . But from a purely secular, human perspective, such a line is *still arbitrary*”).

B. Planned Parenthood v. Casey

In its 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁴ the Court addressed a constitutional challenge to certain provisions of the Pennsylvania Abortion Control Act of 1982.⁴⁵ In a joint opinion authored by Justices O'Connor, Kennedy, and Souter,⁴⁶ the Court reaffirmed the “essential holding” of *Roe*, including the requirement of an exception to post-viability restrictions where an abortion is necessary to preserve the life or health of the mother.⁴⁷ Rejecting *Roe*'s trimester framework,⁴⁸ the

44. 505 U.S. 833 (1992).

45. See 18 PA. CONST. STAT. §§ 3201–20 (West 2000). Applying the undue burden standard, see *infra* note 49 and accompanying text, the Court upheld the state law's medical emergency definition, informed consent requirements, twenty-four-hour waiting period, parental consent provision, and reporting and recordkeeping requirements. The Court did invalidate a section of the statute providing that, except in cases of medical emergency, a woman had to notify her spouse that she was going to have an abortion. See *Casey*, 505 U.S. at 887–98 (reviewing the Third Circuit decision, *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 721–27 (3d Cir. 1991), in which Judge (now Justice) Alito argued in dissent that the spousal notification provision was constitutional). In striking down that provision, the Court noted “a time, not so long ago, when a different understanding of the family and of the Constitution prevailed.” *Casey*, 505 U.S. at 896. The Court referred to *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring), wherein a concurring justice posited that “a woman had no legal existence separate from her husband,” and to the observation in *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), that a “woman is still regarded as the center of home and family life.” *Id.* at 896–97. “These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.” *Casey*, 505 U.S. at 897. For more discussion of *Bradwell v. Illinois*, see *infra* notes 108–10 and accompanying text.

46. The joint opinion was the product of a “secretive cabal” entered into by Justices O'Connor, Kennedy, and Souter. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 633 (2003). “Without advance notice, they sprang the joint opinion on the other members of the Court immediately after the Chief Justice circulated his opinion, which was designed to be the opinion for the Court. At the end of the day, the joint opinion became a plurality opinion for the Court.” *Id.*; see also JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 163–65 (1995) (discussing the provenance of the O'Connor-Kennedy-Souter joint opinion).

47. *Casey*, 505 U.S. at 846. The joint opinion stated that the Court's holding had three parts. “First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.” *Id.* Second, the Court reaffirmed its view that the state has the “power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health.” *Id.* “And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” *Id.*; see also *Ayotte v. Planned Parenthood of N.*

Court also declared that “the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”⁴⁹

Of especial relevance to the topic of this Essay is the joint opinion’s discussion of the pregnancy-termination decision.

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. *Our obligation is to define the liberty of all, not to mandate our own moral code.* The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.⁵⁰

The joint opinion also referenced prior Court rulings “afford[ing] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”⁵¹ and “cases recogniz[ing] ‘the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’”⁵² Pointing to precedent “respect[ing] the private realm of family life which the state cannot enter,”⁵³ the opinion stated that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁵⁴ (Justice Scalia has referred to

New Eng., 546 U.S. 320, 327 (2006) (“[A] State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” (internal quotation marks omitted)).

48. See *supra* notes 46–47 and accompanying text.

49. *Casey*, 505 U.S. at 876 (plurality opinion). “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877.

50. *Id.* at 850–51.

51. *Id.* at 851.

52. *Id.* (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

53. *Id.* (internal quotation marks omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

54. *Id.*

this phrase as the “famed sweet-mystery-of-life passage.”⁵⁵

Having articulated the Court’s recognition and understanding of the importance of the liberty, dignity, and autonomy of the individual woman as she makes this important reproductive decision, the *Casey* joint opinion turned to an “analysis of the woman’s interest in terminating her pregnancy.”⁵⁶ “Abortion is a unique act” that is “fraught with consequences” for the woman making the decision to end a pregnancy; “for the persons who perform and assist in the procedure; for the spouse, family, and society” with knowledge of the existence of “procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.”⁵⁷ But, the joint opinion continued, the state cannot prohibit this conduct in all circumstances

because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on *her* own conception of *her* spiritual imperatives and *her* place in society.⁵⁸

This recognition and declaration of the uniqueness of the pregnant woman’s liberty interest and concerns, and the opinion’s conclusion that the woman, rather than the state, has and must have the right to decide for herself the answer to the abortion question, are critical. They are critical because they rest upon a judicial determination that the state’s historical and cultural construction of the assumed or desired role of women is secondary, if not irrelevant, and cannot negate or frustrate a woman’s constitutionally protected liberty to construct her own world and life and to decide for herself “whether to bear or beget a child.”⁵⁹

55. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

56. *Casey*, 505 U.S. at 852 (plurality opinion).

57. *Id.*

58. *Id.* (emphasis added).

59. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

II. GONZALES V. CARHART

A. *The Partial-Birth Abortion Ban Act of 2003*

In its 2000 decision *Stenberg v. Carhart*,⁶⁰ the Court, by a five-to-four vote,⁶¹ struck down a Nebraska “partial-birth abortion” law lacking an exception for the health of the mother.⁶² “[A] statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception.”⁶³ Moreover, the Court concluded, the law imposed an undue burden on a woman’s right to decide to have an abortion in that the statutory language “covers a much broader category of procedures” than just D & X and did not “track the medical differences between [the permitted] D&E and [the banned] D&X.”⁶⁴

Reacting to the *Stenberg* decision, Congress passed bills banning what it termed partial-birth abortions in 1996 and in 1997;

60. 530 U.S. 914 (2000).

61. Justice Breyer’s majority opinion was joined by Justices Stevens, O’Connor, Souter, and Ginsburg. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented.

62. The state law provided that “[n]o partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000) (operative until Dec. 1, 2008). “Partial birth abortion” was defined as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Id.* § 28-326(9). Partial delivery was further defined as “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” *Id.* Violation of the statute constituted a Class III felony punishable by up to twenty years in prison or a fine of up to \$25,000, or both, and with the medical license of the convicted physician revoked automatically. *Id.* §§ 28-328(2), -105, -328(4).

63. *Stenberg*, 530 U.S. at 938; *see also id.* (“But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 830, 879 (1992))).

64. *Id.* at 939. The Court reasoned that “it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures.” *Id.* As D & E abortions are “the most commonly used method for performing previability second trimester abortions,” the Court expressed its concern that physicians employing the D & E procedure “must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman’s right to make an abortion decision.” *Id.* at 945–46.

however, because the legislation did not contain a health exception, President Bill Clinton vetoed both measures.⁶⁵

Thereafter, Congress, reacting to *Stenberg*, passed the Act, and President George W. Bush signed the Act into law in November 2003.⁶⁶ The Act defines “partial-birth abortion”⁶⁷ as one “in which the person performing the abortion . . . deliberately and intentionally vaginally delivers a living fetus until . . . the entire fetal head is outside the body of the mother, or . . . any part of the fetal trunk past the navel is outside the body of the mother” and does so “for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.”⁶⁸ A physician’s violation of the Act is a crime punishable by fine or imprisonment or both.⁶⁹ Repeating word for word the exception in the Nebraska

65. In 1995 both the United States House of Representatives and the Senate passed H.R. 1833, the Partial Birth Abortion Ban Act. *See* 141 CONG. REC. 35892 (1995); 142 CONG. REC. 31169 (1996). President Clinton vetoed the legislation. *See* 142 CONG. REC. 7467 (1996). The bill was reintroduced as H.R. 929 (subsequently replaced with H.R. 1122) and passed both Houses in 1997, *see* 143 CONG. REC. H1231 (1997) and 143 CONG. REC. S4715 (1997), before being vetoed again by Clinton, 143 CONG. REC. H8891–92 (1997). A sufficient number of votes to override both vetoes were cast in the House but not in the Senate. *See Stenberg*, 530 U.S. at 994 n.11 (2000) (Thomas, J., dissenting) (noting the unsuccessful overrides of Clinton’s vetoes); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 39–40 (2006) (noting Clinton’s 1995 veto of the partial birth abortion bill as an example of “the power that a dedicated president can exercise to thwart what, on the surface, is the desire of strong political majorities”).

66. *See* 18 U.S.C. § 1531 (Supp. 2005).

67. *Id.* § 1531(b)(1)(A). For a description of abortion procedures, including intact D & E (“partial-birth”) and D & E, see Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380) 2006 WL 2867888 at *4–8.

68. 18 U.S.C. § 1531(b)(1)(A).

69. *Id.* § 1531(a). “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.” *Id.* In his *Gonzales* concurrence, Justice Thomas intriguingly noted that the question of “whether the Act constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court.” *Gonzales*, 127 S. Ct. at 1640 (Thomas, J., concurring).

However, any woman undergoing a partial-birth abortion “may not be prosecuted . . . for a conspiracy” to violate this law. 18 U.S.C. § 1531(e). The Act also provides for civil actions by the father who is married to the mother at the time of the abortion procedure and, if the mother has not reached the age of eighteen at the time of the abortion, by the maternal grandparents of the fetus. *Id.* § 1531(c)(1).

statute struck down by the Court in *Stenberg*,⁷⁰ the Act further provides that the federal prohibition “does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”⁷¹ Like the Nebraska law struck down in *Stenberg*, notably absent from the Act is an exception for intact D & E abortions necessary to preserve the woman’s health.

B. The Court’s Decision and the Regret Rationale

Planned Parenthood and doctors who performed second-trimester abortions, relying on the *Stenberg* Court’s invalidation of Nebraska’s partial abortion law, filed lawsuits challenging the constitutionality of the Act. In *Gonzales v. Carhart*,⁷² Justice Kennedy’s opinion for a five-justice majority⁷³ rejected their claims. The Court held, among other things, that the Act was not void for vagueness on its face⁷⁴ and did not impose an undue burden (i.e., an unconstitutional substantial obstacle) on women seeking late term but previability abortions;⁷⁵ that the Act was not rendered facially unconstitutional by the absence of an exception allowing the procedure when necessary to preserve the health of the mother;⁷⁶

70. See *supra* note 62.

71. 18 U.S.C. § 1531(a).

72. 127 S. Ct. 1610 (2007).

73. Justice Kennedy’s opinion was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

74. The Court concluded that “the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. . . . Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal charges.” *Gonzales*, 127 S. Ct. at 1628. But see Michael F. Greene, *The Intimidation of American Physicians—Banning Partial-Birth Abortion*, 356 NEW ENG. J. MED. 2128, 2128 (2007) (“[T]he last thing a provider needs is to have to worry that the procedure could potentially evolve into a criminal act if a fetus in breech presentation should slip out intact through a partially dilated cervix. But this is exactly the situation created by the partial-birth abortion bill.”); *id.* at 2129 (“Once the prosecutor knocks on the door, the onus will be on the physician to show that there was no intent to perform a banned procedure.”).

75. “The Act prohibits intact D & E” but “does not prohibit the D & E procedure in which the fetus is removed in parts.” *Gonzales*, 127 S. Ct. at 1629. Invoking the canon of constitutional avoidance and the rule “that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,” *id.* at 1631 (internal quotation marks omitted), the Court reasoned that “interpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms.” *Id.*

76. Noting that the Act would be unconstitutional if it subjected women to

and that the courts should not have entertained a facial (as opposed to an as-applied) challenge to the Act.⁷⁷

In support of the Court's conclusion that the Act does not impose an undue burden, Justice Kennedy, in a "sweet-mystery-of-fetal-life passage,"⁷⁸ wrote that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."⁷⁹ The Act "expresses respect for the dignity of human life" and furthers the government's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."⁸⁰ While "[n]o one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life," the procedure proscribed by the Act "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."⁸¹ Congress has concluded that the banned procedure has a "disturbing similarity to the killing of a newborn infant."⁸² Kennedy noted, however, that the

significant health risks, the Court stated that "whether the Act creates significant health risks for women has been a contested factual question." *Id.* at 1635. Concluding that "[t]here is documented medical disagreement" as to whether the Act would impose such risks on women, the Court determined that "[t]he Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." *Id.* at 1636, 1638. Justice Ginsburg's dissent argued that the plaintiffs' experts testified that intact D & E was safer for women with "uterine scarring, bleeding disorders, heart disease, or compromised immune systems" as well as "certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus." *Id.* at 1644–45 (Ginsburg, J., dissenting); *see also id.* at 1645 (setting forth safety benefits of intact D & E over D & E by dismemberment).

77. *See id.* at 1638 (majority opinion) ("[T]hese facial attacks should not have been entertained in the first instance."); *id.* at 1639 ("The Act is open to a proper as-applied challenge in a discrete case."); *id.* at 1652 (Ginsburg, J., dissenting) (arguing that allowing only as-applied challenges "jeopardizes women's health and places doctors in an untenable position" of risking criminal prosecution, conviction, and imprisonment).

78. Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16, 19. This sweet-mystery-of-fetal-life phrase clashes with *Casey's* sweet-mystery-of-life passage. *Id.*; *see supra* notes 54–55 and accompanying text.

79. *Gonzales*, 127 S. Ct. at 1633.

80. *Id.*

81. *Id.* A dissenting Justice Ginsburg argued that these concerns "could yield prohibitions on any abortion." *Id.* at 1647 (Ginsburg, J., dissenting).

82. *Id.* at 1633 (quoting Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, § 2(14)(L), 117 Stat. 1201, 1206 (codified at 18 U.S.C. § 1531 (2000 & Supp. 2005) (quotation marks omitted)).

Act drew “a bright line that clearly distinguishes abortion and infanticide.”⁸³

Justice Kennedy then turned his attention to what he termed “the bond of love the mother has for her child” and the “difficult and painful moral decision” of whether to have an abortion.⁸⁴ “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.”⁸⁵

The sole support cited by Justice Kennedy for this regret-their-choice proposition is the amicus brief of Sandra Cano and “180 post-abortive women.”⁸⁶ That brief argued, among other things, that “abortion hurts women physically, emotionally, and psychologically.”⁸⁷ Persons with this posited “Post-abortion Syndrome”

“experience symptoms of avoidance (efforts to escape from reminders of the event), intrusion (unwanted thoughts, nightmares, and flashbacks related to the event), and arousal (exaggerated startle reflex, sleep disturbance, irritability) for a month or more following exposure to a traumatic event.” Although for some women, the initial response is one of relief, many women later avoid the problem through repression and denial, usually for years—“5 years is common, 10 or 20 is not unusual.”⁸⁸

Arguing further that Cano’s affidavit and excerpts from other

83. *Id.* at 1633–34 (quoting Partial-Birth Abortion Act, Pub. L. No. 108-105, § 2(14)(G), 117 Stat. 1201, 1205 (quotation marks omitted)).

84. *Id.* at 1634

85. *Id.* (citations omitted).

86. *See id.*; Cano Brief, *supra* note 17 and accompanying text. Kennedy did not cite another amicus brief that “stake[d] a claim that it is a scientific fact women suffer Post Traumatic Stress Disorder (PTSD) as a result of having late-term or partial-birth abortions.” Brief of Gianna Jessen et al. as Amici Curiae in Support of Petitioner at 16, *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380) 2006 WL 1436685. “It is not necessary for post-abortion PTSD to be proven beyond reasonable scientific doubt before Congress may rely upon the evidence that does exist to conclude that at least partial-birth abortion is so fringe and naturally repulsive as to be a trigger of PTSD.” *Id.*; *see also id.* at *17 & n.13 (citing “numerous studies that demonstrate a link between abortion and psychological trauma”).

87. Cano Brief, *supra* note 17, at 5.

88. *Id.* at 19 (quoting REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 44 (2005), available at www.ivotemyvalues.com/pdf/contextmgmt/Task-Force-Report.pdf, and in WILLKE & WILLKE, ABORTION 50 (Hayes Pub. Co. 2003)).

affidavits attached to the brief “refute the assumption that abortion enhances female dignity, self-esteem, and autonomy,”⁸⁹ the brief stated that Dr. David Reardon,⁹⁰ “one of the world’s leading experts on the effects of abortion on women,” has described “the devastating psychological consequences of abortion.”⁹¹ According to Reardon, following an abortion,

there is emotional “paralysis” or post-abortion “numbness,” guilt and remorse, nervous disorders, sleep disturbances, sexual dysfunction, depression, loss of self-esteem, self-destructive behavior such as suicide, thoughts of suicide, and alcohol and drug abuse, chronic problems with relationships, dramatic personality changes, anxiety attacks, difficulty grieving, increased tendency toward violence, chronic crying, difficulty concentrating, flashbacks, and difficulty in bonding with later children.⁹²

Having injected the regret rationale and the Cano brief into the Court’s analysis, Justice Kennedy opined that doctors performing abortions “may prefer not to disclose precise details of the means

89. *Id.* at 21. Two appendices to the Cano Brief contain the affidavit of Sandra Cano and excerpts from 178 affidavits of postabortive women taken from approximately 2000 such affidavits on file with The Justice Foundation, “a nonprofit legal foundation that handles cases in landmark decisions.” *Id.* at n.1, apps. A, B. In her affidavit Cano states, “I carried my child to full term and gave birth. Because no one would help me I felt compelled to surrender my rights and give my baby up for adoption.” *Id.* at app. A, at ¶ 9. “[A]bortion is not in a woman’s interest Too many women who lost their children through abortion have told me of their emptiness, their sadness, the void in their lives, and how others forced them to have abortions and then blamed the abortion on the mother.” *Id.* at ¶ 19. Other affidavits state: “I’ve had nightmares for years. I’m worried that I may develop breast cancer.” “Psychologically damaged for the rest of your life (until God heals). I have regretted my choices the rest of my life.” “Guilt felt for years, unforgivable action.” “My life is worthless to me. There is nothing in it. Shame, guilt, regret, is hard to live with. I am 50 years old now.” “I did have a severe nervous breakdown.” “Mentally I feel like a murderer. I have been so unhappy and went through four marriages. Back to my first husband.” *Id.* at app. B, at 11, 13, 21, 28, 44, 55.

90. For a discussion of Dr. Reardon’s role, see *infra* notes 152–84 and accompanying text.

91. Cano Brief, *supra* note 17, at 22.

92. *Id.*; see also *id.* at 22–24 (noting that affidavit responses to the question “How has abortion affected you?” included “depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy” (footnotes omitted)); Amicus Brief of the American Center for Law and Justice in Support of Petitioner, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-1382), 2006 WL 2317063, at *8 (referring to studies showing “a heightened risk of suicide after abortion”).

that will be used, confining themselves to the required statement of risks the procedure entails.”⁹³ In his view, it “is precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed.”⁹⁴

Justice Kennedy then returned to the (purportedly obvious) women’s regret rationale.

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing⁹⁵ brain of her unborn child, a child assuming the human form.

Concluding that it is a reasonable inference that the communication of the means used in the banned procedure will “encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions,” Justice Kennedy expressed his belief that the medical profession can accommodate the congressional ban on the intact D & E procedure by “find[ing] different and less shocking methods to abort the fetus in the second trimester.”⁹⁶ And, he concluded, “[t]he State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.”⁹⁷

A dissenting Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, was alarmed by the Court’s decision.

It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists It blurs the line . . . between previability and postviability abortions. And for the first time since *Roe*, the Court blesses a

93. *Gonzales*, 127 S. Ct. at 1634.

94. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (plurality opinion) (“States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.”)). Kennedy’s opinion sets out, in graphic detail, the intact D & E procedure, *see Gonzales*, 127 S. Ct. at 1620–23, as does his dissent in *Stenberg v. Carhart*, 530 U.S. 914, 958–60 (2000) (Kennedy, J., dissenting); *see also id.* at 985–89 (Thomas, J., dissenting).

95. *Gonzales*, 127 S. Ct. at 1634.

96. *Id.*

97. *Id.*

prohibition with no exception safeguarding a woman's health.⁹⁸

Justice Ginsburg also complained that “the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from severe depression and loss of esteem.”⁹⁹ Agreeing with the Court that “for most women, abortion is a painfully difficult decision,” Ginsburg quoted the following statement from a 2006 study:

“[N]either the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have”¹⁰⁰

As for the Court's concern that “[b]ecause of women's fragile emotional state and . . . the ‘bond of love the mother has for her child’ . . . doctors may withhold information about the nature of the intact D & E procedure,”¹⁰¹ Ginsburg offered a solution. Instead of “depriv[ing] women of the right to make an autonomous choice, even at the expense of their own safety,”¹⁰² “require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks.”¹⁰³

For Justice Ginsburg, the Court's “way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.”¹⁰⁴ She cited the Court's 1908 decision in *Muller v. Oregon*.¹⁰⁵ There, the

98. *Id.* at 1641 (Ginsburg, J., dissenting).

99. *Id.* at 1648 (quotations, alterations, citation, and footnote omitted).

100. *Id.* at 1648 n.7 (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, GUTTMACHER POL'Y REV., Summer 2006, at 8); see also *id.* (citing other papers and studies addressing the abortion trauma syndrome).

101. *Id.* at 1648. Justice Ginsburg noted that “not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity.” *Id.* at 1648 n.8 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 891 (1992) (“[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault.”)).

102. *Id.* “Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies.” *Id.* at 1649 n.9.

103. *Id.* at 1648–49.

104. *Id.* at 1649.

105. *Id.* (citing *Muller v. Oregon*, 208 U.S. 412 (1908)); see also Laura Oren, *Honor Thy Mother?: The Supreme Court's Jurisprudence of Motherhood*, 17

Court upheld an Oregon law limiting the daily number of hours worked by women employed in laundries and opined: “That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is *obvious*. This is especially true when the burdens of motherhood are upon her.”¹⁰⁶ Relying on the “abundant testimony of the medical fraternity,” the *Muller* Court reasoned that a woman’s day-to-day working on her feet for long periods of time “tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”¹⁰⁷

In *Bradwell v. Illinois*,¹⁰⁸ also cited by Justice Ginsburg, Justice Joseph Bradley’s concurring opinion provided the following (purportedly self-evident) rationale for the Court’s holding that the Constitution did not prohibit Illinois’ refusal to license women to practice law:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex *evidently* unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹⁰⁹

Thus, Bradley opined, “[t]he paramount destiny and mission of woman [is] to fulfil[l] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”¹¹⁰

HASTINGS WOMEN’S L.J. 187, 205–07 (2006).

106. *Muller*, 208 U.S. at 421 (emphasis added); *see also id.* at 422 (noting that a woman’s “physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man”).

107. *Id.* at 421.

108. 83 U.S. (16 Wall.) 130 (1873).

109. *Id.* at 141 (Bradley, J., concurring) (emphasis added).

110. *Id.* at 141–42; *see also* *Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948) (“Michigan could, beyond question, forbid all women from working behind a bar [since] bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures . . .”).

Far from being “self-evident,” Justice Ginsburg opined, the *Gonzales* Court’s “women’s regret” rationale is contrary to and flies in the face of *Casey*’s pronouncement that the “destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.”¹¹¹ Moving away from *Casey*’s emphasis on an individual woman’s self-determination and self-conception, *Gonzales* shifts the constitutional and analytical focus away from the independent judgment of the woman facing the abortion decision in light of the facts and circumstances applicable to her situation and medical needs. The Court constructs and views a woman as part of an undifferentiated class of “women” in need of other-determined and other-conceptualized protection from the regret of the decision to terminate a pregnancy and the “[s]evere depression and loss of esteem [that] can follow.”¹¹² This substitution of *Gonzales*’s “women’s regret” rationale for *Casey*’s “woman’s dignity and autonomous choice” rationale is grounded, not in “the actual experiences of real women affected by the partial-birth abortion ban,” but in Justice Kennedy’s “intuitive understanding of what women are feeling”¹¹³ and in the Court’s belief that it “has a unique and solemn responsibility to define the essential nature of women’s dignity.”¹¹⁴ For many, this is nothing more than rank paternalism based on “an essentialist vision of motherhood.”¹¹⁵

111. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion)).

112. *Id.* at 1634 (majority opinion).

113. Rosen, *supra* note 78, at 19.

114. *Id.*

115. Karen Frantz, *The Female Nature: A Woman’s Destiny?*, HUMANIST, July–Aug. 2007, at 4, 5; see also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1034 (“[C]laims about the competence of women as decisional agents taps perniciously (or, depending on one’s standpoint, fortuitously) into longstanding traditions of gender paternalism, increasing the likelihood that lawmakers will make judgments about regulating women’s decision making that rest on stereotypical assumptions about women.”); *Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, GUTTMACHER POL’Y REV., Spring 2007, at 19 (commenting on “Kennedy’s paternalistic and moralistic statement” of the mother-infant bond and the women’s regret rationale); *Abortion Wars: US Pro-Choice Voters Are Ready to Fight Back in 2008*, FINANCIAL TIMES (London), Apr. 24, 2007, at 12 (“The paternalistic, patronising language of the ruling . . . has enraged many American women, and not just rabid feminists.”); Tony Mauro, *Kennedy Swings, Abortion Rights Take Hit*, LEGAL TIMES, Apr. 23, 2007, at 8 (describing how women’s groups attacked Justice Kennedy’s opinion as “paternalistic”).

III. THE POLITICO-LEGAL PATH TO THE RATIONALE

The *Roe* to *Casey* to *Gonzales* arc in the Court's abortion-rights cases is one in which the Court's jurisprudential and rhetorical emphases have changed from (1) in *Roe*, the "woman and her responsible physician"¹¹⁶ and the "fetus" and "protecting potential life,"¹¹⁷ to (2) in *Casey*, a woman's liberty, dignity, and autonomy in considering and making reproductive choices, albeit it with reference to the "mother" who "gives to the infant a bond of love,"¹¹⁸ to (3) in *Gonzales*, "abortion doctors"¹¹⁹ and concern for the mother who "come[s] to regret [her] choice to abort" her "unborn child."¹²⁰ The Court has thus moved from a woman's-decision-protective understanding of the Constitution to a women-protective jurisprudence "premised in part on a claim about women's capacity and in part on a claim about women's roles."¹²¹

The *Gonzales* Court's reference to and endorsement of the "women's regret" rationale is an important development in the ongoing debate over the constitutionality of governmental restrictions on a woman's decision to terminate a pregnancy. As discussed in this Part, the Court's express recognition of the rationale is the culmination of a decades-long effort by abortion-rights opponents to gain political and judicial acknowledgement of their position that women who have abortions experience "post-abortion syndrome" and other psychological problems.¹²² Understanding that "constitutional law is made in continuous dialogue with political culture"¹²³ and is "in part constituted by, and responsive to, claims of autonomous professional reason" and "reason incarnate in the body politic,"¹²⁴ those seeking to place the rationale front and center in both the political and judicial arenas

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

117. *Id.* at 154, 156.

118. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion).

119. *Gonzales v. Carhart*, 127 S. Ct. 1622, 1635 (2007).

120. *Id.* at 1634.

121. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 431 (2007); see also Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 835-36 (2007) (discussing the spreading "woman-protective antiabortion argument" and arguing for the application of a sex equality framework to ensure that the woman-protective justification "does not enforce views of women associated with traditions of gender paternalism the nation has renounced").

122. See *infra* Part III.A-D.

123. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 570 (2006).

124. *Id.* at 570-71.

set out on the politico-legal path to their desired destination.

A. *The 1980s*

The “post-abortion syndrome,” posited by Vincent Rue in his 1981 testimony before Congress, is “a variant of post-traumatic stress disorder that [Rue] claimed was afflicting women.”¹²⁵ According to Rue (a licensed marriage and family counselor and a psychotherapist),¹²⁶ the syndrome includes “suppressed hostility, unresolved mourning for the loss of the fetal child and a re-experiencing of the abortion.”¹²⁷ “I’m not even saying it’s a common problem,” Rue said in 1989, “I’m saying that it’s a real entity that needs attention.”¹²⁸ It is noteworthy that Rue’s testimony as an expert for the State in the district court proceedings in the *Casey* litigation was deemed not credible because he “lack[ed] the academic qualifications and scientific credentials possessed by plaintiffs’ witnesses” and because his testimony was “based primarily, if not solely, upon his limited clinical experience.”¹²⁹ The district court also noted that a study coauthored by Rue, *The Psychological Aftermath of Abortion*, had been submitted for peer review by scientists in several institutions, including the Centers for Disease Control and the National Center for Health Statistics, and “was found to have ‘no value’ and to be ‘based upon a priori beliefs rather than an objective review of the evidence.’”¹³⁰

In the late 1980s, President Ronald Reagan asked Surgeon General C. Everett Koop to prepare a report discussing the health effects (both mental and physical) of abortion on women. According to Koop (a self-professed evangelical Christian who opposes abortion

125. Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAG., Jan. 21, 2007, at 40, 43.

126. See *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333 (E.D. Pa. 1990).

127. *Child Born After Abortion Turns Mom into Crusader*, NEW ORLEANS TIMES-PICAYUNE, Apr. 24, 1989, at A4 (quoting Rue).

128. Kim Painter, *Is There Long-term Trauma for Women?*, USA TODAY, Jan. 26, 1989, at 5D (quoting Rue). This article notes that Rue’s wife, “who had an abortion in 1975,” believed that “women who have abortions do feel initial relief over ending an unwanted pregnancy, but eventually grieve over their lost children, as do women who have miscarriages or lose newborns.” *Id.*

129. *Casey*, 744 F. Supp. at 1333. The district court concluded, further, that Rue’s “testimony is devoid of . . . analytical force and scientific rigor” and that “his admitted personal opposition to abortion, even in cases of rape and incest, suggests a possible personal bias.” *Id.* at 1333–34.

130. *Id.* at 1333 (citing THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTION ON WOMEN, H.R. REP. NO. 101-392, at 12 (1989)).

on moral but not political grounds),¹³¹ “Reagan had . . . embraced a silly idea touted by one of the neophyte right-wingers on the White House staff that the evidence of adverse health effects (presumably mental) of abortion on women that the Surgeon General could pull together would be sufficient to overturn *Roe v. Wade*.”¹³² Koop believed that the “pro-life movement had always focused . . . on the impact of abortion on the fetus. They lost their bearings when they approached the issue on the grounds of the health effects on the mother.”¹³³ Reviewing scientific papers and concluding that the literature reflected the authors’ biases on abortion, and finding anecdotal information but not statistically determinative evidence,¹³⁴ Koop advised a White House aide that “[t]here was as much evidence of positive effects of abortion on women as negative.”¹³⁵ He further advised that an appropriate study of the matter would require funding of between ten million and one hundred million dollars.¹³⁶

In a January 1989 letter to President Reagan, the Surgeon General, “separat[ing] science from [his] personal views,”¹³⁷ wrote the following:

I believe that the issue of abortion is so emotionally charged that it is possible that many who might read this letter would not understand it because I have not arrived at conclusions they can accept. But I have concluded in my review of this issue that, at this time, the available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those pro-

131. See C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA’S FAMILY DOCTOR 86 (1991) (“I always called myself an evangelical Christian.”); *id.* at 281 (“[A]bortion is primarily a moral issue that should defy political categorization.”). Koop’s opposition to abortion was grounded in his “belief that it violates our basic ethical tradition of preserving human life” and “defending the weakest members of our society.” *Id.*; see also Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 308 (1994) (book review of BARBARA HINSON CRAIG & DAVID M. O’BRIEN, ABORTION AND AMERICAN POLITICS (1993)) (“Surgeon General C. Everett Koop had written and lectured against abortion.”).

132. KOOP, *supra* note 131, at 274.

133. *Id.* at 274–75; see also *id.* at 278 (“The issue of abortion is not to be decided in terms of its effect upon the mother, but in terms of its effect upon the unborn child.”).

134. See *id.* at 275.

135. *Id.* Koop noted that he had counseled women who felt remorse and guilt after having an abortion, and that he had encountered other women who indicated that having an abortion had saved their job or their marriage. *Id.* at 278–79.

136. See *id.* at 275.

137. *Id.* at 278.

choice.¹³⁸

Koop continued:

Today considerable attention is being paid to possible mental health effects of abortion. For example, there are almost 250 studies reported in the scientific literature which deal with the psychological aspects of abortion. All of these studies were reviewed and the more significant studies were evaluated by staff in several of the Agencies of the Public Health Service against appropriate criteria and were found to be flawed methodologically. In their view and mine, the data do not support the premise that abortion does or does not cause or contribute to psychological problems. Anecdotal reports abound on both sides. However, individual cases cannot be used to reach scientifically sound conclusions. It is to be noted that when pregnancy, whether wanted or unwanted, comes to full term and delivery, there is a well documented, low incidence of adverse mental health effects.¹³⁹

Koop's letter angered many in the antiabortion movement, and he was condemned and accused of abandoning his principles.¹⁴⁰ "Many in the pro-life crowd thought, erroneously, that I had betrayed them because I had refused to falsify my findings in the letter on the health effects of abortion on women I had sent to Reagan just before he left office."¹⁴¹

Surgeon General Koop's letter was only a snapshot in the longer and still developing motion picture of the story of the "women's regret" rationale. Efforts to articulate and gain judicial and sociopolitical acceptance of the rationale's underlying post-abortion syndrome continued. In *Hartigan v. Zbaraz*,¹⁴² an amicus brief submitted to the Supreme Court by the American Victims of Abortion and three minors who procured abortions without their parents' knowledge argued that

138. *Id.* at 276; see also *The US Surgeon General on the Health Effects of Abortion*, 15 POPULATION & DEV. REV. 172 (1989) (reprinting Koop's January 1989 letter to President Reagan).

139. *The US Surgeon General on the Health Effects of Abortion*, *supra* note 138, at 174 (quoting Koop's letter); see also Constance Holden, *Koop Finds Abortion Evidence "Inconclusive,"* 243 SCIENCE 730, 730 (1989).

140. See KOOP, *supra* note 131, at 278.

141. *Id.* at 314.

142. 484 U.S. 171, 172 (1987) (per curiam). In *Hartigan*, an equally divided Supreme Court affirmed a decision by the Court of Appeals for the Seventh Circuit holding that a twenty-four-hour waiting period imposed by the Illinois Parental Notice Abortion Act was unconstitutional. See *Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd per curiam*, 484 U.S. 171, 172 (1987).

[t]he symptoms of the “post abortion syndrome” stress disorder include mentally re-experiencing the abortion event, numbing of responsiveness to the external world leading to reduced involvement, sleep disturbance, impaired memory or difficulty in concentrating, guilt feelings about surviving when the fetal child did not, and increased irritability and impulsive behavior.¹⁴³

In addition, the brief contended (citing Vincent Rue), persons suffering from the disorder experience “psychic numbing,” depression, guilt, drug or alcohol abuse, and “anniversary reactions.”¹⁴⁴

Postabortion syndrome was also referenced in amicus briefs in *Webster v. Reproductive Health Services*;¹⁴⁵ in fact, Focus on the Family and the Family Research Council’s brief stated that “[s]ome clinicians are now using the term Post-Abortion Syndrome (PAS) to describe a family of psychiatric symptoms related to abortion,” with “PAS . . . discovered in a significant percentage of women who have had abortions, especially multiple abortions.”¹⁴⁶ The Rutherford Institute’s brief noted that “[t]here is also much speculation, but apparently no definitive research, about ‘post abortion syndrome’ and other psychological problems associated with abortion. These problems appear to have credence and may, after due investigation, provide yet another perspective on ‘maternal health’ requiring restriction of the abortion right.”¹⁴⁷ For the United States Catholic Conference, “[i]t is beyond question . . . that post-abortion trauma *does exist*, and can be lethal, especially for the woman most frequently cited as a beneficiary of legalized abortion—the pregnant teenager.”¹⁴⁸

143. Brief Amicus Curiae of American Victims of Abortion et al. in Support of Appellant, *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (No. 85-673), 1986 WL 727961, at *9.

144. *Id.* (citation omitted).

145. 492 U.S. 490, 520 (1989) (upholding a Missouri law prohibiting the use of public employees and facilities for the performance of or assistance in performing nontherapeutic abortions).

146. Brief Amici Curiae of Focus on the Family, and Family Research Council of America, in Support of Appellants, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127645, at *22. According to the brief, PAS symptoms fall into three categories: “(1) re-experience of the abortion trauma, (2) avoidance behaviors, [and] (3) associated symptoms not present prior to the abortion.” *Id.*

147. Brief of the Rutherford Institute et al., Amici Curiae, in Support of Appellants, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1127614 at *22.

148. Brief of the United States Catholic Conference as Amicus Curiae in Support of Appellants, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1127604 at *26–27; *see also* Roman Catholic Diocese of Rochester, *Conception to Birth*,

Taking a contrary position, a brief submitted on behalf of the American Medical Association, American College of Obstetricians and Gynecologists, the American Psychiatric Association, and other organizations argued that “serious psychiatric disease after either abortion or childbirth is unusual” with less than 0.3% of pregnant women developing a “serious mental illness” after abortion or childbirth, and that “[m]ost women respond to abortion with relief.”¹⁴⁹ The American Psychological Association found it “difficult to make a clear distinction between any putative diagnostic rubric such as ‘post-abortion stress syndrome’ and a normal psychological process in response to a life stress that is limited in duration and intensity and does not require psychological intervention.”¹⁵⁰ And the brief of Women Who Have Had Abortions and Friends contained excerpts from letters of women who had abortions and did not regret their choices.¹⁵¹ While the Court was thus aware of arguments for, and against, judicial recognition of the postabortion syndrome, its decision in *Webster* said nothing about the subject.

B. Into the 1990s

Antiabortion advocates, led by David Reardon¹⁵² of the Elliot

<http://www.dor.org/Charities/cle/conceptiontobirth.htm> (last visited on Feb. 9, 2008) (“An unknown but significant percentage of women who abort, experience symptoms of post-traumatic stress syndrome throughout life.”).

149. Brief of the American Medical Association et al. as Amici Curiae in Support of Appellees, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1127705, at *20–21.

150. Brief for Amicus Curiae American Psychological Association in Support of Appellees, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1127695, at *14.

151. See Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1115239, at *90 (“This time, neither my husband nor I could face another baby. . . . I do not regret my choice.”); *id.* at *86–87 (“Had I not had the abortion, had I decided to keep the baby, I would have had to quit school. . . . Instead I had the opportunity to go to law school and become a successful, contributing tax-payer. . . . I do not have a moment of regret about the choice I made in 1970.”); *id.* at *91 (“Nice, middle-class comfortably married ladies are not supposed to have abortions, and although I feel apprehensive of social censure (that’s why I don’t want you to use my name), I do not regret my choice.”).

152. Reardon has been called the “Moses” of the abortion-hurts-women view. See Bazelon, *supra* note 125, at 42–43. Reardon “is said to have a doctorate in biomedical ethics from Pacific Western University, an unaccredited correspondence school.” *Id.* at 44. That university was investigated by the U.S. Government Accountability Office “in a report on ‘diploma mills and other unaccredited schools’” and is not listed in the Council for Higher Education Accreditation’s database of accredited institutions. CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 209 (2005).

Institute,¹⁵³ pushed ahead. In his 1996 book *Making Abortion Rare: A Healing Strategy for a Divided Nation*,¹⁵⁴ Reardon argued that while “over 70 percent of Americans admit believing that abortion is immoral . . . 40 to 50 percent would still allow it under special circumstances or simply because they do not want to ‘impose their morality’ on others, especially loved ones.”¹⁵⁵ Seeking “to unravel the conflicted hearts of the middle majority” in pursuit of “our goal to create a pro-life society,”¹⁵⁶ Reardon wrote, “[v]ictory, then, requires a radical restructuring of our strategy.”¹⁵⁷ That strategy—a “pro-woman/pro-life strategy”—involved “increasing public empathy for the suffering of women who have had abortions.”¹⁵⁸ Thus, “[t]o truly reframe the political debate to our advantage . . . we must insist that the proper frame for the abortion issue is not women’s rights versus unborn children’s rights, but rather women’s *and* children’s rights versus the schemes of exploiters *and* the profits of the abortion industry.”¹⁵⁹

In relating this information, I am not confusing or equating credentials with knowledge or expertise. But it is noteworthy that credentials were important to Justice Kennedy in his dissenting opinion in *Stenberg v. Carhart*, wherein he unfavorably compared Dr. Leroy Carhart, who challenged the Nebraska partial-birth abortion statute, with “board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists.” 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting).

153. “According to his Web site, in 1988, Reardon founded the Elliot Institute, a research center in Springfield, Ill., which in 2005 had a \$120,000 budget.” Bazelon, *supra* note 125, at 44; *see also* MOONEY, *supra* note 152, at 208 (noting the “prolific (and pro-life) David Reardon, of the Illinois-based Elliot Institute”).

The Elliot Institute’s website can be found at <http://www.afterabortion.info/>. For other organizations providing information and support for postabortive women, *see* Hope After Abortion, <http://www.hopeafterabortion.com/index.cfm> (last visited Jan. 29, 2008); Post Abortion Stress Syndrome Support, <http://afterabortion.com/> (last visited Jan. 29, 2008); and The National Office of Post-Abortion Reconciliation & Healing, <http://home.wi.rr.com/noparh/> (last visited Jan. 29, 2008).

154. DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION* (1996).

155. *Id.* at 18; *see also* JOHN C. WILLKE & BARBARA H. WILLKE, *WHY NOT LOVE THEM BOTH?: QUESTIONS & ANSWERS ABOUT ABORTION* 16 (1997) (arguing that approximately fifty percent of the general public “have not yet formed a firm conviction on the abortion issue”).

156. REARDON, *supra* note 154, at 25; *see also* WILLKE & WILLKE, *supra* note 155, at 16 (applying the label “conflicted middle” to persons without a firm conviction about abortion).

157. REARDON, *supra* note 154, at 25.

158. *Id.* at 27.

159. *Id.* at 32–33.

The “single principle . . . at the heart of the pro-woman/pro-life agenda . . . would have to be this: *the best interests of the child and the mother are **always** joined.*”¹⁶⁰ This principle “is not an optional truth,”¹⁶¹ Reardon wrote. “It reflects God’s ordering of creation. This principle is so important that I must repeat it again: *Only the mother can nurture her unborn child. All that the rest of us can do is to nurture and protect the mother.*”¹⁶² Concluding that “[t]he pro-woman/pro-life strategy, which places defense of women’s rights at the center of our national debate,”¹⁶³ “is pragmatic, meaning achievable,”¹⁶⁴ Reardon made clear his purpose:

In focusing attention on post-aborted women, we are actually allowing their voices to be better heard. It is their witness on behalf of their unborn, not ours, which will soften hearts and open eyes. In this sense, by focusing on women’s rights, we are not ignoring the unborn but, instead, are preparing the stage for the most compelling advocates of all for the unborn—their mothers.¹⁶⁵

This focus would reveal, in his view, that “[t]he psychological effects of abortion can be particularly devastating, literally crippling a woman’s ability to function in normal relationships with family or friends, and even at work.”¹⁶⁶

Placing the preabortion and postabortion woman within a contest between “Christ and the devil,”¹⁶⁷ Reardon called for an increase “in the area of research and education relevant to the negative effects of abortion on women, men, siblings, family structures, and society at large.”¹⁶⁸ He proposed the formation of a “Post-Abortion Healing and Research Foundation” which would, among other things, “[s]upport the development of a unified group of

160. *Id.* at 5.

161. *Id.* at 6.

162. *Id.*

163. *Id.* at 14.

164. *Id.* at 13.

165. *Id.* at 14.

166. *Id.* at x.

167. *Id.* at 108; *see also id.* at 109 (noting that in Reardon’s view, “[b]efore the abortion, Christ condemns it and Satan makes excuses for it. After the abortion, Satan is the one condemning it while Christ wants to forgive it” (footnote omitted)); *id.* (stating that when women choose abortion Satan “tries to keep them trapped in despair so as to strip away everything else. Indeed, Satan pumps as much despair into their lives as he can generate”); MOONEY, *supra* note 152, at 211 (noting that Reardon has “stated that he is able to ‘put on different hats’ and act as a scientist and as a religious believer at different times”).

168. REARDON, *supra* note 154, at 121.

post-aborted women who have achieved healing and can bring their public witness to bear in the secular press and in the political arena.”¹⁶⁹ By fighting as advocates for the rights of women, “we gain the political high ground—which, when combined with the moral high ground of the pro-life position, is an impregnable position.”¹⁷⁰ For Reardon, the debate over “pro-woman” state and federal antiabortion laws “will increase public awareness of post-abortion injuries and provide a vehicle for building common ground with the middle majority.”¹⁷¹ Devoting a chapter of his book to legislative antiabortion initiatives,¹⁷² Reardon even provided pro-woman/pro-life sound bites for candidates for public office.¹⁷³

In another book Reardon and his coeditors discussed the importance of legislative hearings in the context of women who became pregnant as the result of sexual assault.¹⁷⁴ He suggested that women’s stories, and not political or moral arguments, are the “principal way in which public perceptions and attitudes are changed.”¹⁷⁵ “It is the women who have lost their children to abortion who are the best possible spokespersons for their children. It is their testimonies that most accurately reflect the truth about abortion and about the sanctity of unborn children.”¹⁷⁶ Emphasizing the importance of women sharing their stories in legislative hearings, Reardon wrote:

In the case of abortion, I am firmly convinced that it is the stories of women and men who chose abortion and have suffered so much from that dreadful mistake that are the key to changing the general public’s attitudes about abortion. Through their stories, we hear that these women and men did not lose “products of conception”; they lost their *children*. When we hear their stories—either directly or as relayed to us by politicians, pro-life advocates, or in the media—we become witnesses to the emotional connection between women and the children they have aborted. These stories will convert minds and hearts far more effectively than political arguments or moral reasoning.¹⁷⁷

169. *Id.* at 124–25.

170. *Id.* at 137.

171. *Id.* at 80.

172. *See id.* at 80–98.

173. *See id.* at 167–70 app. B.

174. *See* VICTIMS AND VICTORS: SPEAKING OUT ABOUT THEIR PREGNANCIES, ABORTIONS, AND CHILDREN RESULTING FROM SEXUAL ASSAULT (David C. Reardon et al. eds., 2000).

175. *Id.* at 178.

176. *Id.*

177. *Id.*

Another Reardon book makes the claim that virtually all women who have abortions “suffer from emotional or psychological aftershocks.”¹⁷⁸ In a chapter entitled “The Psychological Impact of Abortion,”¹⁷⁹ Reardon acknowledges that “the psychological damage caused by abortion is practically impossible to quantify,” writing that “it is much easier to count scarred uteruses than scarred psyches.”¹⁸⁰ “The real issue,” he contends, “is not exactly how many women suffer, but that they *do* suffer”¹⁸¹ in the following “major categories of post-abortion sequelae”:¹⁸² guilt and remorse, broken relationships and sexual dysfunction, depression and sense of loss, deterioration of self-image and self-punishment, and suicide.¹⁸³ Given these risks posed by abortion, Reardon concludes, “it is clear that the responsible physician, one interested in his client’s overall health, would be extremely reluctant ever to recommend or perform an abortion.”¹⁸⁴

C. Important Judicial and Political Developments

The planting of the “pro-woman/pro-life strategy” seed did bear judicial and political fruit as the nation entered the twenty-first century. In its 2004 decision *McCorvey v. Hill*,¹⁸⁵ the Court of Appeals for the Fifth Circuit denied the motion of Norma McCorvey (the “Roe” of *Roe v. Wade*) for relief from the Supreme Court’s 1973 judgment.¹⁸⁶ Writing for the court, Judge Edith Jones concluded

178. DAVID C. REARDON, *ABORTED WOMEN, SILENT NO MORE*, at xi (1987). In a chapter, this book also sets out the author’s assessment of the immediate, short-term, and long-term physical risks of abortion. *See id.* at 89–114; *see also* Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1195 & n.30 (1991) (book review of LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990)) (citing REARDON, *supra*, in a footnote accompanying the statement in the text that “many [women] feel grief and guilt and regret, often for many years, after making too hasty a decision”).

179. *See* REARDON, *supra* note 178, at 115–42.

180. *Id.* at 115.

181. *Id.* at 121.

182. *Id.*

183. *See id.* at 121–29. Reardon also discussed what he termed commonly reported “minor symptoms” in postabortive women: extreme anger and rage, a distortion of maternal bonding with later children, sleeping problems (including nightmares), phantom children (“a woman imagines her aborted child as old as it would have been if it had been born,” *id.* at 130), hopelessness, suppressed feelings of remorse, and psychotic and schizophrenic reactions (including anxiety and paranoia). *Id.* at 129–31.

184. *Id.* at 142.

185. 385 F.3d 846 (5th Cir. 2004).

186. *See id.* at 847 (“McCorvey, her identity then protected as ‘Jane Roe,’ was the named appellant in *Roe*.”).

that McCorvey's motion was moot because the Texas statute declared unconstitutional in *Roe* had been repealed.¹⁸⁷

In a separate concurring opinion,¹⁸⁸ Judge Jones expressed her regret that McCorvey's case was moot as "the serious and substantial evidence she offered could have generated an important debate over factual premises that underlay *Roe*."¹⁸⁹ That evidence included "about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision."¹⁹⁰ Citing a David Reardon affidavit, Jones wrote that "[s]tudies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions."¹⁹¹ Pointing to other post-*Roe* developments that Jones believed go "to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child,"¹⁹² Jones lamented that the "perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter."¹⁹³ She concluded: "It takes no expert prognosticator to know that research on women's mental and physical health following abortion will yield an eventual medical

187. *Id.* at 849.

188. *Id.* at 850 (Jones, J., concurring). For a discussion and an endorsement of Judge Jones's concurrence, see Andrew A. Adams, *Aborting Roe: Jane Roe Questions the Viability of Roe v. Wade*, 9 TEX. REV. L. & POL. 325 (2005).

189. *McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

190. *Id.*

191. *Id.* at 850–51 & n.3.

192. *Id.* at 850. Judge Jones argued that "*Roe*'s assumption" that women would closely consult with their doctors when considering whether to have an abortion was "called into question by affidavits from workers at abortion clinics" indicating that "women are often herded through their procedures with little or no medical or emotional counseling." *Id.* at 851 & n.4 (citing to Reardon's and others' affidavits). In addition, she continued, McCorvey urged that the "sociological landscape" has changed post-*Roe* because unwed mothers no longer face "social ostracism" and government programs provide medical care and social services, and most states have enacted "Baby Moses" laws in which newborn infants can be left with the state until they are adopted. *Id.* Further, "neonatal and medical science . . . now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed." *Id.* at 852; see also Paulsen, *supra* note 23, at 1017–19 (noting that, for some, "the onset of brain-wave or nerve activity, or the capacity to feel pain, provides a line" in the "sliding scale" argument that the moral entitlement to be treated as human life fluctuates with the stage of fetal development).

193. *McCorvey*, 385 F.3d at 852 (Jones, J., concurring).

consensus”¹⁹⁴

Political recognition of the regret rationale was pursued in hearings held by the South Dakota Task Force to Study Abortion in September and October 2005. Issuing its report in December 2005,¹⁹⁵ the task force noted that it heard live testimony of a number of witnesses and experts and considered the written reports and testimony of other experts,¹⁹⁶ and that the task force had before it the statements of

close to 2,000 women who have had abortions . . . detailing their experiences, trauma, and the impact abortion has had on their lives. Of these post abortive women, over 99% of them testified that abortion is destructive of the rights, interests, and health of women and that abortion should not be legal.¹⁹⁷

The task force reported, among other things, that postabortive women “are stunned by their grief and the negative impact [abortion] has had on their lives.”¹⁹⁸ Noting that Norma McCorvey of *Roe*, who “actually never had an abortion herself,”¹⁹⁹ now believed that “abortion violates the rights, interests, and health of women,”²⁰⁰ the task force report stated that

[a] year ago, Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit, often mentioned as a candidate for the U.S. Supreme Court, wrote a published opinion in which she referred to the evidence provided by Ms. McCorvey in the *Roe* case, including the sworn affidavits submitted to this Task Force.²⁰¹

In a section of its report addressing the effects and health risks

194. *Id.* at 853.

195. *See* REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), http://www.voteeyesforlife.com/docs/Task_Force_Report.pdf [hereinafter REPORT].

196. *Id.* at 6.

197. *Id.* at 7. The statements of women who had abortions were provided to the task force by Operation Outcry, an organization seeking “to end legal abortion by exposing the truth about its devastating impact on women and families.” Operation Outcry, <http://www.operationoutcry.org/pages.asp?pageid=27784> (last visited Jan. 28, 2008). Operation Outcry is a project of The Justice Foundation, an organization representing clients without charge in cases involving, among other issues, the enforcement of laws protecting women’s health. *See* The Justice Foundation, <http://www.txjf.org/> (last visited Jan. 28, 2008).

198. REPORT, *supra* note 195, at 21.

199. *Id.* at 21–22; *see also* GARROW, *supra* note 40, at 461 (noting that McCorvey gave birth to “the ‘*Roe*’ baby”).

200. REPORT, *supra* note 195, at 21.

201. *Id.* at 22; *see supra* notes 188–94 and accompanying text.

of abortion,²⁰² the task force referenced the testimony of “distinguished experts” and the “powerful” testimony “received into the record from post-abortive women who were willing to publicly share their experiences.”²⁰³ With regard to the mental health effects of abortion, the report discussed and relied on the “informative, comprehensive, and credible” testimony of Dr. Priscilla Coleman, “a nationally and internationally recognized expert in the mental health risks of induced abortion”²⁰⁴ and set forth Coleman’s view that “a minimum of 10-20% of women experience adverse, prolonged, post-abortion reactions. This translates into at least 130,000 to 260,000 new cases of serious mental health problems each year in the U.S.”²⁰⁵ Basing its findings on the “key results” of a “table summarizing 12 studies” published by Coleman and her colleagues (including, notably, David Reardon) since 2002,²⁰⁶ the task force concluded, among other things, that

[w]omen with a history of induced abortion are at a significantly higher risk for the following problems: a) inpatient and outpatient psychiatric claims, particularly adjustment disorders, bipolar disorder, depressive psychosis, neurotic depression, and schizophrenia; b) substance use generally, and specifically during a subsequent pregnancy; and c) clinically significant levels of depression, anxiety, and parenting difficulties . . .²⁰⁷

202. See REPORT, *supra* note 195, at 48–52 (discussing the physical health risks of abortion, possibly including breast cancer).

203. *Id.* at 41.

204. *Id.*

205. *Id.* at 42.

206. *Id.* at 42–43.

207. *Id.* at 42–43; see also *id.* at 43 (“The results of the four largest record based studies in the world have consistently revealed that women with a known history of abortion experience higher rates of mental health problems of various forms when compared to women without a known abortion history.”); *id.* at 43–46 (“Specific negative effects of abortion reported include” guilt, post-abortion anger and resentment, anxiety, post-traumatic stress disorder, psychological numbing, depression, suicidal ideation, substance abuse, relationship problems, and parenting issues); *id.* at 47 (finding persuasive the testimony of Dr. Martha Shuping, a psychiatrist, who “contended that the source of much of the psychological suffering evidenced in the lives of women who have aborted can be traced to the biologically based attachment processes that occur during pregnancy”).

Not all members of the task force agreed with these conclusions. A minority report submitted to the South Dakota governor and legislature by four members of the task force noted that the task force had not accepted a motion containing the following statements: (1) “The Task Force finds that reputable studies by respected scientific institutions conclude that abortion is not a significant cause of mental illness. The vast majority of women have abortions

Another section of the report set forth the task force's view on "the nature of the relationship between a pregnant woman and her unborn child."²⁰⁸ "Of all human relationships, the relationship between a mother and her unborn child is unique in both its biological and psychological nature."²⁰⁹ According to the report, "the mother detects the presence of the child at the end of its first week of life when it prepares for attachment to the mother's uterine wall."²¹⁰ Studies show that the "mother's bond with her child (and the child's attachment to her) begins during pregnancy and even at its early stages,"²¹¹ with this attachment

evidenced by intuitive responses in the mother, such as cravings, nausea, changes in the woman's breasts, and aversions to certain foods and other substances. Further, when a mother has an ultrasound and sees the child on the screen, she instinctively puts her hand on her belly to touch her child.²¹²

The task force ultimately concluded that, on the record before it, including "the powerful and moving testimonies of the almost two thousand women, there is no question that there is need for additional protections of the rights of pregnant women."²¹³ Finding that "abortion adversely affects the rights, interests, and health of women,"²¹⁴ the task force declared: "We find it to be *self-evident* (and supported by the record) that a mother's relationship with her child, at every moment of life, has intrinsic worth and beauty for the mother and child alike."²¹⁵ As abortion "is inherently dangerous to

without psychiatric problems or secondary consequences"; (2) "The Task Force finds that the rates of disorders such as depression and post-traumatic stress disorder are not elevated in women who have had abortions. In addition, the incidence of psychiatric illness after abortion is the same as or less than after birth of a child"; (3) "The Task Force finds that abortion does not pose any elevated risk of adverse mental health outcomes in the adolescent population. In fact, evidence shows those adolescents who chose abortions had better life outcomes and more positive psychological profiles"; and (4) "The Task Force finds that women who have had abortions experience positive emotions more often and more strongly than negative emotions." REPORT OF MINORITY, THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 30 (2006), <http://www.womenrun.org/media/SD%20Minority%20Report.pdf> [hereinafter MINORITY REPORT].

208. REPORT, *supra* note 195, at 52.

209. *Id.*

210. *Id.*

211. *Id.* at 53.

212. *Id.*

213. *Id.* at 65.

214. *Id.*

215. *Id.* (emphasis added).

the psychological and physical health of the pregnant mother,” the report stated, “[t]here is a need for better protection of the mother’s health.”²¹⁶ While the task force would have preferred the complete abolition of the abortion right, the report proposed “legislation in an effort to lessen the loss of life and harm caused by abortion until such a ban can be implemented.”²¹⁷

In 2006, the South Dakota legislature, agreeing with and accepting the views and conclusions of the task force, enacted the Women’s Health and Human Life Protection Act.²¹⁸ Declaring that “life begins at the time of conception”²¹⁹ and prohibiting and criminalizing abortion²²⁰ except where the procedure would prevent the death of a pregnant mother, the South Dakota legislature found that

to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the mother’s fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited. Moreover, the Legislature finds that the guarantee of due process of law under the Constitution of South Dakota applies equally to born and unborn human beings, and that under the Constitution of South Dakota, a pregnant mother and her unborn child, each possess a natural and inalienable right to life.²²¹

The South Dakota antiabortion regime was short lived, however; in November 2006, the voters of the state rejected the Women’s Health and Human Life Protection Act by a vote of 185,948 to 148,666.²²²

216. *Id.* at 66.

217. *Id.* at 69; *see also id.* at 69–71 (listing fourteen proposals for additional legislation).

218. *See* H.B. 1215, 81st Leg. (S.D. 2006) (repealed 2006).

219. *Id.* § 1; *see also id.* (“[E]ach human being is totally unique immediately at fertilization.”).

220. Violations of the statute were felonies. *Id.* § 2. The statute also made clear that the law could not be “construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.” *Id.* § 4.

221. *Id.* § 1.

222. *See* S.D. CODIFIED LAWS §§ 22-17-7 to -12 (Supp. 2007) (recording the rejection by referendum and the number of votes); *Ballot Initiatives: Pay Me More, Don’t Let Them Wed*, *ECONOMIST*, Nov. 11, 2006, at 39 (reporting that South Dakota voters overturned state anti-abortion law fifty-six percent to forty-four percent); *VoteMaster Election Report*, Keloland Television, Nov. 8, 2006, <http://www.keloland.com/CustomPages/ElectionResults/Index.cfm>; *see also* Dale A. Oesterle, *The South Dakota Referendum on Abortion: Lessons from a Popular Vote on a Controversial Right*, 116 *YALE L.J. POCKET PART* 122 (2006),

Another antiabortion bill, H.B. 1293, was introduced in the South Dakota legislature in January 2007.²²³ Unlike the law rejected by the voters in 2006, which only exempted abortions necessary to save a woman's life, H.B. 1293 contained exemptions for abortions in cases of rape or incest or "a serious risk of a substantial and irreversible impairment of a major bodily function of the mother should the pregnancy be continued."²²⁴ As explained by one sponsor of the bill, South Dakota Representative Gordon Howie: "What the voters told us was that they were uncomfortable with the rape and incest circumstances. And so this bill is one that was specifically designed for the majority of South Dakotans or with them in mind"²²⁵ In early 2007, the state House of Representatives passed the bill by a vote of forty-five to twenty-five, but "[t]he Senate State Affairs Committee voted 8-1 against the legislation."²²⁶ Bob Gray, a Republican senator, voted against H.B. 1293, as did Republican Senator Brock Greenfield (who is also the executive director of South Dakota Right to Life).²²⁷ Greenfield explained that he will continue to oppose antiabortion legislation in South Dakota so long as the Democratic Party holds the majority position in the United States Congress and while the campaign for the 2008 presidential election is underway.²²⁸

Although the Women's Health and Human Life Protection Act is no longer on the books, the "women's regret" rationale remained a feature of South Dakota law. In 2005, the state legislature enacted a law providing that (unless there is a medical emergency) a physician shall not perform an abortion until after "the physician first obtains a voluntary and informed written consent of the pregnant woman upon whom the physician intends to perform the abortion."²²⁹ The statute further provides that a woman's consent to an abortion is not voluntary and informed unless the physician provides her with a written statement detailing certain statutorily-

<http://yalelawjournal.org/images/pdfs/70.pdf>.

223. See H.B. 1293, 82d Leg. (S.D. 2007).

224. *Id.* § 2(2)-(3).

225. Joe Kafka, *S.D. Will Try Abortion Ban Again*, COMMERCIAL APPEAL (Memphis, Tenn.), Feb. 12, 2007, at A4 (quoting Howie).

226. See Joe Kafka, *Panel Stops Ban*, AM. NEWS (Aberdeen, S.D.), Feb. 22, 2007, at 1A; Bob Mercer, *Support for Abortion Ban Dwindling*, AM. NEWS (Aberdeen, S.D.), Feb. 23, 2007, at 1A.

227. See Mercer, *supra* note 226, at 1A.

228. See *id.*

229. S.D. CODIFIED LAWS § 34-23A-10.1 (Supp. 2007). A physician who knowingly or recklessly disregards this mandate is guilty of a class two misdemeanor. S.D. CODIFIED LAWS § 34-23A-10.2 (2004).

mandated information,²³⁰ including “[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) [d]epression and related psychological distress, [and] (ii) [i]ncreased risk of suicide ideation and suicide.”²³¹

As Professor Robert Post has argued, the South Dakota requirement that physicians inform women that depression, suicide ideation, and suicide are statistically significant risk factors is constitutionally problematic “because it is very likely that [the statute] require[s] physicians to disclose information that is false.”²³² This information is false, Post suggests, because the South Dakota requirement is “the most recent chapter in a long struggle by antiabortionists [who] argue, in the face of much scientific evidence to the contrary, that abortion causes dire psychological consequences.”²³³

While the Supreme Court has indicated that informed consent requirements may be permissible where “the information the State

230. The written document must provide “[t]he name of the physician who will perform the abortion” procedure and must state that “the abortion will terminate the life of a whole, separate, unique, living human being,” that “the pregnant woman has an existing relationship with that unborn human being” protected by the United States Constitution and South Dakota law, and that an abortion will terminate that relationship. § 34-23A-10.1(1)(a)–(d). In addition, the statement must include “[t]he probable gestational age of the unborn child at the time the abortion is to be performed, and a scientifically accurate statement describing the development of the unborn child at that age,” and must indicate “[t]he statistically significant medical risks associated with carrying her child to term compared to undergoing an induced abortion.” § 34-23A-10.1(1)(f)–(g). A physician must certify that the patient “understands the information imparted.” § 34-23A-10.1(2).

In a recent decision, the New Jersey Supreme Court affirmed the dismissal of a lawsuit in which the plaintiff alleged that her doctor committed malpractice when he did not inform her of “the scientific and medical fact that [her six- to eight-week old embryo] was a complete, separate, unique and irreplaceable human being.” *Acuna v. Turkish*, 930 A.2d 416, 418 (N.J. 2007) (quotations omitted, bracketed material in original). The New Jersey high court concluded that the physician did not have a common law duty to instruct the patient that “the embryo is an ‘existing human being.’” *Id.* Nor did the court find a consensus in New Jersey’s medical community showing that the “plaintiff’s assertions are medical facts, as opposed to firmly held moral, philosophical, and religious beliefs.” *Id.*

231. § 34-23A-10.1(e)(i)–(ii).

232. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 961.

233. *Id.* at 966 (footnote omitted); see also *id.* at 962–63 (discussing Post-Abortion Syndrome and a study refuting the claim “that women typically regret an abortion”); *id.* at 964–65 (discussing the “pro-woman” antiabortion rhetorical strategy).

requires to be made available to the woman is truthful and not misleading,²³⁴ the South Dakota law compelled a physician to express a position—the *state's* position—on postabortion depression and suicide that may conflict with and be contrary to the physician's knowledge and judgment and medical professional norms. In the absence of a statutory provision allowing the physician to disagree with and disassociate herself from the state's viewpoint when reviewing the mandated information with a patient, the free speech implications of this compelled speech are manifest, and the "South Dakota legislature is pushing the doctrine of informed consent to the edge of a new constitutional fault line."²³⁵ In a legal challenge contending that certain aspects of the state's physician disclosure requirement violate the First Amendment to the United States Constitution,²³⁶ Planned Parenthood successfully moved for an injunction preventing the law from going into effect.²³⁷

Another opportunity to advance the "women's regret" rationale arose in litigation before the Supreme Court concerning the constitutionality of a New Hampshire law prohibiting physicians from performing abortions on minors until forty-eight hours after delivery of a written notice of the upcoming abortion to the minor's parent or guardian.²³⁸ The law did not contain an exception for abortions necessary to preserve the health of the pregnant minor. Arguing that the lack of a health exception did not violate the Constitution, the American Center for Law and Justice's amicus brief to the Court contended that the cost of a broad health exemption included "the grave emotional and physical toll" of abortion on minors and adult women.²³⁹ Providing links to the web sites of the Elliot Institute and other organizations,²⁴⁰ the brief stated that "[m]ore and more published, peer-reviewed studies are indicating that abortion, far from being a health panacea, may in fact be a health disaster for women (not to mention, of course, their unborn children)."²⁴¹ Another amicus brief supporting New

234. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion).

235. *Acuna*, 930 A.2d at 427.

236. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

237. *See* *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881 (D.S.D. 2005), *aff'd*, 467 F.3d 716 (8th Cir. 2006).

238. *See* N.H. REV. STAT. ANN. §§ 132:24–:28 (LexisNexis 2006).

239. Amicus Brief of the American Center for Law and Justice in Support of the Petitioner at 8, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 1902070.

240. *Id.*

241. *Id.*

Hampshire advised the Court that the “choice to abort” is “a paramount *moral* choice with lasting *spiritual* effects. The decision will linger in [the minor’s] character; it will make her into a certain kind of person.”²⁴² While there will be post-abortion freedom “to pursue interests and pleasures and dreams which being a mother would have postponed[,] . . . she is not necessarily free of memory and – as *Casey* suggests – regret and even guilt.”²⁴³

Reviewing the lower courts’ permanent injunction of the enforcement of this parental notification law, in *Ayotte v. Planned Parenthood of Northern New England*²⁴⁴ the Supreme Court, per Justice O’Connor, noted that “New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”²⁴⁵ Because the courts below invalidated the entire statute, the Court remanded the case for consideration of the question whether the injunction should be limited to the constitutionally flawed provision and not apply to the statute in toto.²⁴⁶ The Court made no mention of the postabortion regret phenomenon.

D. Court Endorsement of the Rationale (And Why It Matters)

As noted above,²⁴⁷ Justice Kennedy’s opinion for the Court in *Gonzales* concluded that “some women come to regret their choice to abort the infant life they once created and sustained.”²⁴⁸ Acknowledging that the Court found “no reliable data to measure the phenomenon,”²⁴⁹ Kennedy made clear that the absence of any valid empirical support for or scientific validation of this “unexceptionable” conclusion did not matter.²⁵⁰ What mattered—all that mattered—was the view of (five members of) the Court that it is “self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound

242. Brief Amicus Curiae of the Family Research Council, Inc. and Focus on the Family in Support of the Petitioner at 29, *Ayotte*, 546 U.S. 320 (No. 04-1144), 2005 WL 1902076.

243. *Id.*

244. 546 U.S. 320 (2006).

245. *Id.* at 327 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion)); see also *id.* at 331 (noting that in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court invalidated Nebraska’s “partial-birth abortion” statute because the law lacked a health exception).

246. *Id.* at 331–32.

247. See *supra* Part II.B.

248. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

249. *Id.*

250. *Id.*

when she learns,” post-abortion, “that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”²⁵¹

The language of the Court’s opinion reveals and reflects an asserted moral certainty and worldview based upon (in the Court’s view) an inarguable premise and conclusion about abortion and “women.” Granted, Justice Kennedy states that “some women” (we are not told what percentage or how many) regret their decision to have a “partial-birth” abortion, but when this rationale is proffered as a justification for the total ban of the at-issue procedure, the operative meaning of “some women” is, in effect, “all women.” Thus, because “some women” (a few? many? most?) may later regret their decision, no woman may consider and make her own decision about the safer or safest procedure with the lower or lowest medical and health risks given her particular circumstances and medical needs. Kennedy’s approach to and discussion of the issue erases the “*woman*-decision-protective” right and places in its stead a “*women*-protective” regret rationale and ground for upholding congressional proscription of the intact D & E procedure. On that view, the individual woman’s liberty rights and interests are extinguished; again, because “some women” experience regret, Congress may constitutionally decide for all women and their physicians that intact D & E is not a medically appropriate and available procedure.

Moreover, and significantly, the logic of the regret rationale sweeps far beyond the partial-birth abortion context. If “self-evident” postabortion regret, depression, and loss of self-esteem constitute justifications supporting the constitutionalization of the Act, could not the very same proposition provide support for restrictions on other abortion procedures? Recall Justice Kennedy’s statement that providing a woman with “information concerning the way in which the fetus will be killed” is a legitimate state interest and concern.²⁵² Recall also his description of the “more anguished” grief and sorrow of the mother who learns the details of the procedure after an intact D & E abortion is performed.²⁵³ One can anticipate that in the forthcoming post-*Gonzales* litigation the argument will be made that these same informational interests of the state and concern about the mother’s post-abortion grief should be considered in the context of the equally “brutal”²⁵⁴ and

251. *Id.*

252. *Id.*; see *supra* note 94 and accompanying text.

253. *Gonzales*, 127 S. Ct. at 1634; see *supra* note 252 and accompanying text.

254. See *Gonzales*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting). Justice Ginsburg noted that the Act does not proscribe nonintact D & E abortions. But why not, one might ask. “Nonintact D & E could be equally characterized as

“gruesome”²⁵⁵ but still lawful procedure of D & E by dismemberment. *Gonzales* thus provides a judicially validated wedge for those who see and will certainly use the Court’s decision to extend the reach of the regret rationale beyond the intact D & E setting in their continuing effort to chip away at and ultimately achieve the interment of the *Roe-Casey* legal regime. Indeed “[o]nly hours after the Supreme Court’s ruling [in *Gonzales*], a lawmaker in Alabama introduced a measure that would ban almost all abortions in the state.”²⁵⁶

The Court’s recognition and endorsement of the “women’s regret” rationale is also significant given the politico-legal path to *Gonzales* discussed earlier.²⁵⁷ Believers in the “women’s regret” justification and postabortion syndrome set out to obtain legal recognition of the rationale and understood that law (both judicial and legislative) and politics do not exist in separate or only occasionally touching or partially overlapping spheres. Law and politics are both part of the quest for constitutional interpretations and legislative enactments reflecting the preferred legal, political, and social policies of participants in the antiabortion/pro-choice debate. Recognizing this reality, those seeking the prohibition of partial-birth and other (eventually all) legal abortion consciously, indeed aggressively, pursued an interwoven law-and-politics campaign. This campaign, benefiting from a problematic conflation of politics and knowledge,²⁵⁸ has succeeded as the Court has now openly and unreservedly embedded into law a supposedly “self-evident” and “unexceptionable” “women’s regret” rationale.

CONCLUSION

Positing the postabortion syndrome in books and articles; determinedly adhering to the theory in the face of the opposition of

brutal . . . involving as it does tearing a fetus apart and ripping off its limbs . . .” *Id.* (quotations, brackets, and citations omitted).

255. “[T]he notion that either of these two equally gruesome procedures [intact D & E and nonintact D & E] . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.” *Stenberg v. Carhart*, 530 U.S. 914, 946–47 (2000) (Stevens, J., concurring); *see also* *Hope Clinic v. Ryan*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, C.J., dissenting) (“[T]here is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other.”).

256. Kirk Johnson, *New State Push to Restrict Abortions May Follow Ruling*, N.Y. TIMES, Apr. 20, 2007, at A18.

257. *See supra* Part III.A–C.

258. *See* Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1053 (2007) (“We have begun to conflate politics and *knowledge*.”).

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scientists and established organizations and others; filing amicus briefs calling judicial attention to antiabortion advocates' concerns about "women's regret" and postabortion psychological and other problems; obtaining express recognition of those concerns in a published opinion by a federal appellate court judge; playing an active and prominent role in South Dakota's study of and effort to outlaw abortion: all of these actions were part of a committed and perseverant campaign to rewrite the narrative and to change the terms of the abortion-rights debate. This sustained politico-legal movement has now achieved one of the desired objectives of the antiabortion position—the Supreme Court's placement of its imprimatur on the "women's regret" rationale.