

“LIKE A WITHERED TREE, STRIPPED OF ITS FOLIAGE”: WHAT THE *ROE* COURT MISSED AND WHY IT MATTERS

J. SHOSHANNA EHRLICH*

INTRODUCTION

*The Legislature finds that pregnant women contemplating the termination of their right to their relationship with their unborn children . . . are faced with making a profound decision most often under stress and pressures . . . and that there exists a need for special protection of the rights of such pregnant women*¹

*Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The [Partial Birth Abortion] Act recognizes this reality . . . it seems unexceptional 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.*²

In 1973 in the landmark case of *Roe v. Wade*, the Supreme Court faced a constitutional challenge to a criminal abortion statute from the state of Texas, which, like the laws in effect in a majority of states, prohibited abortion unless a doctor determined the procedure

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* Professor, Women’s, Gender, and Sexuality Studies Department, University of Massachusetts Boston. The Article is part of a longer collaborative project with Alesha Doan, Associate Professor, School of Public Affairs & Administration and Women, Gender & Sexuality Studies, University of Kansas. I wish to thank both Professor Doan and Professor Paula Abrams for their thoughtful review of this Article. Many thanks also to Linda Greenberg for generously taking the time to speak with me regarding the *Roe* Court’s review of the historical record. This Article has greatly benefited from their combined insights and wisdom. Of course, any errors are mine alone.

1 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 5 (2005) (quoting H.B. 1166, 2005 Leg. Assemb., 80th Sess. (S.D. 2005), in which the Legislature set out a “woman-protective” rationale for the Task Force). For a detailed discussion of the Task Force, see Siegel, *The Right’s Reasons*, *infra* note 15, at 1651–57.

2 *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (internal citations omitted).

was necessary to save the life of a pregnant woman.³ Relying on a line of cases dating back to 1923 in which it had recognized a constitutional right of privacy with regard to “personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’”—such as the choice of a marriage partner, the use of contraceptives, and the raising of one’s children—the Court held that the “Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate a pregnancy.”⁴

In locating the right to abortion within this constitutional zone of privacy, the *Roe* Court focused on “[t]he detriment that the State would impose upon the pregnant woman by denying this choice.”⁵ Of particular relevance in the present context, in addition to identifying the risk of “medically diagnosable” harms, the Court zeroed in on the potential psychological and emotional risks of carrying an unwanted pregnancy to term:

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 childcare. 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 stigma* of unwed motherhood may be involved.⁶

3 *Roe v. Wade*, 410 U.S. 113 (1973). By the time the case reached the Court, about one-third of the states had liberalized their existing criminal law. Most of these states followed the route of relaxing the strict “life-saving” therapeutic exception in favor of also permitting abortion in other circumstances, such as in cases of rape, incest, or serious fetal anomalies, while a distinct minority opted for outright repeal of their criminal bans up through a designated point in pregnancy. *Id.* at 139 n.37.

The push for reform came mainly from professionals, most notably physicians, public health advocates, and lawyers who were largely motivated by concerns for the devastating impact of criminal abortion laws on the health of women as well as the risk to doctors of prosecution for pushing the boundaries of the therapeutic exception, while the drive for repeal reflected the emerging feminist demand that women had a right to control their own bodies. See LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT RULING* (2012); LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 34–49 (1992).

4 *Roe*, 410 U.S. at 152–53.

5 *Id.* at 153.

6 *Id.* (emphasis added).

In short, as seen by the Court, the primary harm of a strict criminal antiabortion regime was its power to foist motherhood upon a woman who was not ready or able to assume responsibility for a child at a particular moment in her life.

However sympathetic the Court may have been to the plight of a woman facing an unplanned pregnancy, it also made clear that the right to abortion was not absolute and must be “considered against important [state] interests in regulation”; namely, protecting the health of the pregnant woman and the potentiality of life.⁷ Aware of the “sensitive and emotional nature” of this balancing task given the “vigorous opposing views . . . and the deep and seemingly absolute convictions that the subject [of abortion] inspires,” the Court committed itself to “resolv[ing] the issue by constitutional measurement, free of emotion and predilection.”⁸

Reflecting its “earnest” determination to resolve the case in this manner, at the outset of the opinion, the Court announced its intention to inquire into and “place some emphasis upon medical and medical-legal history and what that history reveals about man’s attitudes towards the abortion procedure”⁹ In its review of the history behind the “criminal abortion laws in effect in a majority of states today,” the Court stressed that these laws were “of relatively recent vintage” having derived from “statutory changes effected, for the most part, in the latter half of the 19th century,” as the result of an active campaign by medical professionals.¹⁰

In examining the “significant role” that the medical profession played in the “enactment of stringent criminal abortion legislation during that period,”¹¹ the Court focused on the

7 *Id.* at 154–55. The Court ultimately settled upon its now famous trimester formulation as a way to accommodate the tension between a woman’s right to privacy and these countervailing state interests. In brief, during the first trimester, the Court held that neither state interest is sufficiently compelling to justify limitations on the abortion right; in the second trimester, when the procedure potentially is riskier, the state’s interest in the protection of health becomes compelling so as to permit regulations aimed at insuring the safety of the abortion procedure; and in the third trimester, the state’s interest in the protection of fetal life is deemed sufficiently compelling so as to permit the criminalization of abortion unless necessary to protect the health or life of the pregnant woman. *Id.* at 163–65.

8 *Id.* at 116.

9 The Court’s review extends as far back as the ancient Greeks and Romans; however, our focus is limited to its discussion of the evolution of abortion laws in the United States. *Id.* at 116–17.

10 *Roe v. Wade*, 410 U.S. 113, 129 (1973).

11 *Id.* at 141.

commitment of physicians to the protection of the unborn. Accordingly, its discussion of this history leaves the reader with the distinct impression that the nation's criminal abortion laws were enacted with the singular aim of halting "such unwarrantable destruction of human life."¹² Although this may well have been *a* goal of the physicians' activism,¹³ this reading of the historical record fails to tell the whole story behind their campaign as it elides the interwoven gendered and racialized tropes that they regularly invoked in support of their goal of making abortion a strict statutory crime. Critically in this regard, not even a careful read of the decision offers a hint that the physicians were seeking to manage the reproductive conduct of the married middle-class woman in order to preserve both the gendered domestic order and the racial character of the nation.

At first glance, this omission may not seem particularly significant. After all, the abortion battle has largely been waged over the legal and moral status of the fetus. Accordingly, the Court's recitation of the historical purpose of the nation's antiabortion laws has neatly meshed with the ongoing debate over the role the law should play in protecting fetal life. However, as the above-quoted passages from the Report of the South Dakota Task Force to Study Abortion and the Supreme Court's decision in *Gonzales v. Carhart* respectively demonstrate, the antiabortion movement no longer simply opposes abortion "because all human life is sacred."¹⁴ Rather, over the past few decades, this claim has been augmented, if not supplanted, by the increasingly widespread assertion that abortion should be restricted in order to protect women from emotional trauma.¹⁵

Reversing the *Roe* Court's narrative regarding the harms of unwanted maternity, proponents of what Reva Siegel refers to as the "woman-protective" antiabortion argument¹⁶ instead focus their critique of abortion on the devastating harms of disrupting the natural bond that exists between a mother and her unborn child. As David C. Reardon,

12 *Id.* (quoting Am. Med. Ass'n, *Report of the AMA Committee on Criminal Abortion*, 12 TRANSACTIONS AM. MED. ASS'N. 73, 78 (1859) [hereinafter *1859 Report*]).

13 *See, e.g.*, JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 167 (1978).

14 DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION* 3 (1996).

15 For a richly detailed history of the development of this approach see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) [hereinafter Siegel, *The Right's Reasons*]; Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007) [hereinafter Siegel, *The New Politics of Abortion*].

16 Siegel, *The Right's Reasons*, *supra* note 15.

a leading architect of this approach, puts it: “the only way to kill an unborn child is by maiming and traumatizing the child’s mother.”¹⁷ Given this increasingly popular framing of the antiabortion argument, which seeks to restrict access to abortion for women’s own purported good, it is hard to be quite as sanguine about the Court’s failure to account for the multi-dimensional origins of the nation’s criminal abortion laws.¹⁸

While it would certainly be too much to argue that a fuller exposition of this history would have somehow prevented the emergence of the “pro-woman” antiabortion position, I nonetheless contend that if the *Roe* Court had exposed the gendered origins of our criminal abortion laws, the deep paternalism of the woman-protective approach may well have attracted more critical attention than it did prior to 2007 when the Supreme Court’s embrace of the abortion regret trope served to focus greater public and scholarly attention on this development.¹⁹ In short, this historic knowledge serves to sharpen our understanding of the longstanding link between the regulation of abortion and the effort to control women’s reproductive bodies, thus making it clear that antiabortion activism has never simply been about protecting the fetus.

This Article proceeds in three parts. In Part I, we take a close look at the physicians’ mid-nineteenth century campaign to criminalize abortion. Specifically, we will focus on 1) the launch of their campaign; 2) the physicians’ framing of their effort as a “bold and manly” appeal;²⁰ 3) their focus on preserving and protecting women’s purity and divinely ordained maternal role; 4) their claim that abortion was rife with injurious impacts as embodied in the view that it marked the uterus with a “stamp of derangement”;²¹ and 5) the antiabortion physicians’ claim that abortion, as practiced by white, middle-class women, threatened the racial character of the nation. In Part II, we turn to the Court’s landmark decision in *Roe v. Wade*. Zeroing in on its examination of the historical underpinnings of the nation’s criminal abortion laws, we first take a look at what the *Roe* Court said about this history, followed by a discussion of what the Court missed—namely, its elision of the gendered

17 REARDON, *supra* note 14, at viii.

18 For an important article on the significance of the Court’s failure to account for this history, see Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1991) [hereinafter Siegel, *Reasoning from the Body*].

19 As Siegel observes, prior to the Court’s decision in *Gonzales*, “the rise of gender-based antiabortion arguments was barely noticed in the mainstream press or by scholars outside the public health field.” Siegel, *The Right’s Reasons*, *supra* note 15, at 1648.

20 HORATIO R. STORER, WHY NOT? A BOOK FOR EVERY WOMAN 102 (1866) [hereinafter STORER, WHY NOT?].

21 *Id.* at 60.

and racialized tropes that permeated the physicians' antiabortion campaign. In Part III, we examine the late twentieth-century emergence of the "pro-woman/pro-life" antiabortion argument. After consideration of the traditional fetal-centric "pro-life" position, we turn to the origins of this new frame. This discussion is followed by a comparison of the core themes of the nineteenth-century physicians' campaign with the contemporary woman-protective antiabortion position. These themes include: 1) that abortion is incompatible with women's true nature, 2) that meaningful consent is an impossibility, and 3) that abortion is inherently harmful to women. In conclusion, this Article circles back to the *Roe* Court's narrow reading of the physicians' campaign to argue that if the *Roe* Court had engaged in a more robust reading of this history, the gendered paternalism of the contemporary "pro-woman/pro-life" position would have been rendered far more visible as a discredited approach to pressing women into motherhood.

I. The Medical Campaign to Criminalize Abortion

In 1821, the state of Connecticut passed a law making it a crime to provide a woman who was "quick with child" with a "deadly poison" in order to induce a miscarriage.²² Enacted as part of an omnibus criminal reform statute, this measure was inserted between a provision governing the "intent to kill or rob" and one addressing the "secret delivery of a bastard child."²³ As James C. Mohr informs us in his seminal work on the subject, this was the first time an American legislative body sought to regulate the practice of abortion, which, at the time, was governed by common law principles.²⁴

According to Mohr, the Connecticut anti-poisoning law and other similar measures that a number of states enacted between 1821 and 1841 were aimed at regulating the *practice* of abortion, as the methods used to induce a miscarriage, such as toxic poisons, often killed the pregnant woman along with the fetus. These measures were generally enfolded into broad omnibus laws, and no lawmaker "cast a recorded vote for or against abortion as a question by itself" or "took a political stand" on the issue of criminalization.²⁵ In short, as he argues, they were aimed at "regulating the activities of apothecaries and physicians" rather than at "dissuading women from seeking abortions,"²⁶ and they were thus not imbued with the

22 MOHR, *supra* note 13, at 21.

23 *Id.* at 20–21.

24 *Id.* at 23.

25 *Id.* at 42.

26 *Id.* at 43–44.

profound moral and social significance that permeated the next wave of physician-inspired antiabortion laws.

In this initial legislative period, abortion was typically associated with the errant behavior of unmarried women who, as one physician put it, were seeking to “destroy the fruits of illicit pleasure, under the vain hope of preserving their reputation by this unnatural and guilty sacrifice.”²⁷ Due to its close association with illicit behavior, abortion was thus generally regarded as a “fundamentally marginal practice,” which did not attract much attention unless a woman died or was seriously injured.²⁸

By mid-century, however, the abortion rate had started rising, and regular physicians (meaning those who had been formally educated in the medical arts) reported on this trend with growing concern. Most alarming was the fact that the rates were rising among married women who were seeking to limit the size of their families.²⁹ Capturing the clear distinction that most drew between the errant maiden and the married woman, in his annual address to the San Francisco Medical Society, Dr. Henry Gibbons explained that:

We can appreciate the motives that lead to feticide in females who have slipped from the path of virtue—unjustifiable and criminal as the act still is. But that married women should follow in the path of the harlot admits not the shadow of a shade of an excuse or palliation.³⁰

Or, as Dr. August K. Gardner put it, “for the married shirk, who disregards her divinely-ordained duty, we have nothing but contempt. If glittering gems adorn her person, within there is foulness and squalor.”³¹ Compounding, or perhaps at the root of the horror that they felt over the fact that married women were adopting the behavior of the “harlot” who had “slipped from the path of virtue,” was that these women tended to be “white, Protestant, native-born . . . and of the middle or upper class.”³² In short, the married women who were

27 Hugh L. Hodge, *On Criminal Abortion: A Lecture Introductory to the Course on Obstetrics of Women And Children*, Introductory Lecture for the 1839 Medical Class at the University of Pennsylvania 18 (1854).

28 MOHR, *supra* note 13, at 44.

29 *Id.* at 86.

30 Henry Gibbons, *Annual Address Before the San Francisco Medical Society* 12 (Nov. 9, 1869).

31 AUGUSTUS K. GARDNER, *CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH, AND THEIR EFFECTS UPON THE FATHER, MOTHER AND CHILD* 112 (1870).

32 MOHR, *supra* note 13, at 46.

seeking to control their fertility were from the same social strata as the regular doctors, while women of “inferior” status were continuing to fulfill their maternal obligations.

A. The Launch of the Campaign

At the 1857 meeting of the Suffolk District Medical Society, Dr. Horatio Storer, a local, Harvard-educated gynecologist, alerted the Boston physicians in the audience to the alarming frequency of induced abortions among respectable married Protestant women in the city as observed by him in his medical practice.³³ Seeking to mobilize his peers to end what he would soon characterize as the “slaughter of countless children now perpetrated in our midst,”³⁴ he persuaded the local Boston medical society and the recently founded American Medical Association (AMA) to establish committees for the purpose of investigating the matter of criminal abortion with a view “to its general suppression.”³⁵

At its 1859 annual meeting, the AMA’s appointed Committee on Criminal Abortion presented its report (which was authored by Storer) condemning the “wanton and murderous destruction” of the unborn, and, in a series of unanimously adopted resolutions, the Association formally declared it the duty of its members “as physicians, and as good and true men” to “publically [sic] . . . enter an earnest and solemn protest against such unwarrantable destruction of human life laws” and to “present this subject to the attention of the . . . legislative assemblies . . . with the prayer that the laws by which the crime of procuring abortion . . . may be revised.”³⁶

Moving forward, the AMA remained “steadfastly and officially committed to outlawing the practice of abortion in the United States . . . and the vigorous efforts of America’s regular physicians would prove in the long run to be the single most important factor in altering the legal policies toward abortion in this country.”³⁷ Reflecting their efforts, by the end of the century, abortion had become a statutory crime in all states unless a doctor

33 Frederick N. Dyer, *Horatio Robinson Storer, M.D. and the Physicians’ Crusade Against Abortion*, in LIFE AND LEARNING IX: PROCEEDINGS OF THE NINTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3 (1999).

34 *1859 Report*, *supra* note 12, at 76.

35 *Id.* at 75.

36 PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 58 (1982).

37 MOHR, *supra* note 13, at 157.

certified that the procedure was necessary to save the life of the pregnant woman.³⁸

The logical question, of course, is what compelled Storer and his colleagues to take up the antiabortion cause? According to Mohr and Kristen Luker, authors of classic works on the subject, a key motivating factor was their desire to upgrade the status of the medical professional in order to distinguish “true” doctors from the lay practitioners who had flooded the field during the early decades of the century.³⁹ In addition to increasing the competition for patients, these “irregular healers” viewed the “medical profession as a bulwark of privilege” and, with some success, they appealed to state lawmakers to repeal the existing medical licensing laws on the grounds that they were “an expression of favor rather than competence.”⁴⁰

Dispirited by the competition for patients and the challenge to their status, regular physicians sought to find a way to “distinguish themselves both scientifically and socially from competing practitioners,” in order to persuade lawmakers that they were deserving of licensing laws that would drive irregulars out of the medical field.⁴¹ According to Luker, abortion proved the ideal vehicle for this task as an attack on the laxity of the law would enable elite doctors to “claim both *moral stature* (as a high-minded, self-regulating group of professionals) and *technical expertise* (derived from their superior training).”⁴²

While their antiabortion campaign may well have served professional aims, Storer and his colleagues were also actuated by deep and far-ranging objections to abortion, which they regarded as a subversive act. Laying claim to a manly sense of purpose, they drew upon normative understandings of women’s divinely ordained place in the domestic and social order, as shaped by racial, class, religious and ethnic considerations, to argue that the state should entrust the abortion decision to their expertise. Their template for reform was thus forged in a paternalistic and racialized code of white-male moral authority over women’s reproductive bodies.

38 According to Mohr, the only exception to this pattern was Kentucky, which achieved the same result by way of judicial decision rather than through a statutory enactment. *Id.* at 229.

39 See generally *id.* at 160–64; KRISTEN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 16–35 (1985).

40 STARR, *supra* note 36, at 58.

41 LUKER, *supra* note 39, at 27–31.

42 *Id.* at 31 (emphasis in original).

B. The “Bold and Manly Appeal” of the Antiabortion Physicians

Storer characterized the physician’s consultation room as a confessional “wherein under the implied pledge of secrecy and inviolate confidence, the most weighty and at times astounding revelations are daily made.”⁴³ In his role as intimate confidant, he was a self-described witness to the fearful reality that induced abortion interfered with “all the elements of domestic happiness and . . . the matron’s own self-respect,” and accordingly transformed the marital relationship from a “spiritual union” into a “sensual” one, by which it was reduced to the level of “legalized prostitution.”⁴⁴

Grounded in this truth as purportedly derived from their first-hand knowledge of women’s experiences, Storer and his colleagues proclaimed it their duty to rescue the abortion-minded matron from her potentially catastrophic anti-maternalist impulses. As framed, this was not simply a struggle between physicians who happened to be men and their patients who happened to be women; rather, it was a contest born out of a deeply gendered understanding of the social role and place of each in the natural order. Fused together as mutually reinforcing strands, activist physicians effectively deployed a binary model of female transgression and male moral responsibility as a catalyst for reform. Capturing the twining of these elemental assumptions, after impressing upon the members of the Philadelphia County Medical Society the importance of the physician’s duty to inform his patients that abortion is “the destruction of human life,” Dr. Coates advised his colleagues that if “after being properly instructed, they still persevere in importuning us . . . they are not only inviting us to step far, far down from our high position as physicians . . . they are offering an indignity to our manhood”⁴⁵

According to the 1859 Report of the AMA Committee on Criminal Abortion, authored by Storer, a physician’s duty towards his female patients was derived from the fact that they were the “physical guardians” of women.⁴⁶ Although delineated by the use of the term “physical” to matters of the body, as the following legal definition of the term “guardian” makes clear, this is an intrinsically unequalitarian relationship:

43 STORER, *WHY NOT?*, *supra* note 20, at 18.

44 *Id.* at 14.

45 Dr. Coates, *Remarks for Discussion on the Subject of Abortion: Its Causes, Dangers, and Treatment*, 4 *MED. & SURGICAL REP.* 538, 542 (1860).

46 *1859 Report*, *supra* note 12, at 76.

A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs.⁴⁷

Reinforcing the conflation of woman's physical body with her mental incapacity, Storer stressed that it was a woman's physiological makeup that rendered her incapable of self-management:

If each woman were allowed to judge for herself in the matter, her decision upon the abstract question would be too sure to be warped by personal considerations, and those of the moment. Woman's mind is prone to depression, and indeed, to temporary actual derangement During the state of gestation the woman is therefore liable to thoughts, convictions even, that other times she would turn from in disgust or dismay.⁴⁸

Wedded in a hierarchical relationship by women's decisional incompetence, Storer thus "reasoned from the body," to use Siegel's wonderfully evocative concept,⁴⁹ to justify his claim that the law should invest the physician with authority over women's reproductive decisions.

Embodying the manliness of their efforts, in an 1855 speech to the entering class of Harvard Medical School, Dr. David Humphrey—the father of Storer and a professor of obstetrics and medical jurisprudence—expressed his unmet hope that "one of the *strong men* of the profession . . . would have spoken . . . against [the] existing and universally acknowledged evil" of abortion.⁵⁰ Having, however, waited in vain for this wall of silence to be breached, he felt compelled to urge his audience to speak out as men against the evil that "stalks at midday through the length and width of the land" since a "*true man* fears, can fear, nothing."⁵¹

47 *Guardian*, THE LAW DICTIONARY, <http://thelawdictionary.org/guardian/> [perma.cc/W9ZZ-FMBP].

48 STORER, WHY NOT?, *supra* note 20, at 74–75.

49 See Siegel, *Reasoning from the Body*, *supra* note 18.

50 David Humphrey Storer, *Two Frequent Causes of Uterine Disease*, 6 J. GYNAECOLOGICAL SOC'Y BOS. 195, 195 (1872) (emphasis added) [hereinafter Storer, *Two Frequent Causes of Uterine Disease*].

51 *Id.* at 197 (emphasis added).

Reinforcing the potential power and authority of a united manhood, Storer, who credited his father for his interest in the abortion cause,⁵² subsequently advised his colleagues that a “bold and *manly* appeal” would be more effective than the “scattered influence of honorable practitioners alone” in ending the evils of abortion.⁵³ He thus decreed that a “bold and *manly* utterance of the truth . . . should be made by the members of the profession on every occasion.”⁵⁴ Echoing these sentiments in a lecture to medical students, Professor A.F. Small implored that “[b]y all that is human, all that is noble and grand in the attributes of *true manhood* . . . every physician should set up his face against this practice and hold it up as murder in public and private.”⁵⁵

Although clearly aimed at restricting women’s autonomy, doctors framed this distinctly masculine project as one of direct benefit to women. Waxing eloquent, Hodge proclaimed it was:

the absolute necessity of the science and practice of obstetrics to . . . protect and preserve a being so wonderfully constructed, so beautiful, so interesting, so moral, so intellectual, and so influential for good over the best interests of man, and over the destinies of nations.⁵⁶

Accordingly, as Storer and his activist colleagues urged, it was incumbent upon them to persuade lawmakers of the necessity of erecting “better and more effective safeguards . . . about *our* women to ‘protect them from themselves.’”⁵⁷ Poetically capturing the deep paternalism of this “pro-woman” sense of mission, Dr. Andrew Nebinger explained:

In this work, I desire to be regarded as the friend of woman So far from being pleased to behold her stained and spotted with crimes . . . I would have her as pure and as white, because of her freedom from vice, as

52 Dyer, *supra* note 33, at 4.

53 HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 102 (1860) (emphasis added).

54 *Id.* at 104 (emphasis added).

55 A.E. Small, *Criminal Abortion, A Lecture Before the Class of Hahnemann Medical College*, 2 MED. INVESTIGATOR 37, 38–39 (1865) (emphasis added).

56 Hodge, *supra* note 27, at 8.

57 G. Maxwell Christine, THE MEDICAL PROFESSION VS. CRIMINAL ABORTION, TRANSCRIPT OF THE 25TH SESSION OF THE HOMEOPATHIC MED. SOC’Y OF THE STATE OF PA. 69, 70–71 (1889) (emphasis added).

was Eve, when she, in full exemption from sin, dwelt in perfect purity and surpassing beauty in the garden of Eden.⁵⁸

As they sought to restore woman to her dwelling place of “perfect purity and surpassing beauty,” antiabortion physicians vacillated between themes of female ignorance and transgression to justify their assertion of authority over women’s pregnant bodies.

C. Preserving and Protecting the Citadel of Woman’s Purity and Her Divinely Ordained Maternal Role

The most generous explanation given as to why a married woman might choose to terminate a pregnancy was that she did not understand that the pre-quick fetus was fully human. As Hodge explained, even

[e]ducated, refined, and fashionable women—yea in many instances, women whose moral character is, in other respects without reproach . . . are perfectly indifferent respecting the foetus in utero. They seem not to realize that the being within them is indeed *animate*—that in verity, a *human being*.⁵⁹

In a similar vein, Storer elucidated that while all women “understood that abortion entailed” the “premature expulsion of the product of conception” it was less well known “that this product of conception is in reality endowed with vitality from the moment of conception itself.”⁶⁰ The attribution of women’s actions to their ignorance enabled doctors to avoid confronting the fact that women, and most particularly, those “educated, refined, and fashionable women,” of their social strata, might, in fact, be motivated by far more troubling considerations, namely the avoidance of their maternal obligations. By blaming the horror of abortion on “the completeness of [women’s] ignorance,”⁶¹ doctors could cast them as “*inadvertent* murderers, persons led astray because they believed in the doctrine of quickening,” which enabled them to “condemn the ‘sin’ without the necessity of condemning the ‘sinner.’”⁶²

58 ANDREW NEBINGER, CRIMINAL ABORTION: ITS EXTENT AND PREVENTION 32 (1870).

59 Hodge, *supra* note 27, at 18 (emphasis in original).

60 STORER, WHY NOT?, *supra* note 20, at 29.

61 NEBINGER, *supra* note 58, at 14.

62 LUKER, *supra* note 39, at 22 (emphasis in original).

The stress upon women's ignorance reinforced the above-discussed masculine nature of the physician's mission. Seeking to rescue them from the "relic[s] of a barbarous physiology,"⁶³ the burden fell to them "as good and true men," to "enlighten this ignorance."⁶⁴ Dramatically capturing the exigent nature of this mission, having called upon his colleagues to devise a "blessed plan" through which "women may be promptly and fully instructed in all that regards the life of the being in her womb . . . and as to the murderous nature of the offense of destroying it," Dr. Nebinger implored them to take immediate action: "'Why stand we here idle?' [W]hy sleep we like an unworthy and never watchful sentinel, when the citadel of woman's purity is being daily and hourly assailed, and not sound the alarm that 'all is not well with her?'"⁶⁵

By teaching them that the destruction of their unborn children was the moral equivalent of infanticide, doctors could claim that they were saving "these wretched women . . . [from] murdering their children through ignorance."⁶⁶ In turn, this would allow them to take credit for restoring domestic order as, once so enlightened, what virtuous woman "would be accessory to so foul a deed as the destruction of her offspring, nestling in the sanctuary assigned it by creative wisdom and benevolence?"⁶⁷

Although some antiabortion physicians may have genuinely assumed that women were careless in their attitude towards abortion because they mistakenly believed that the being within them was not fully human, a suspicious strand also flowed beneath this stream. As Storer remarked, "I have already stated *that in many instances* it is alleged by the mother that she is ignorant of the true character of the act of willful abortion, and in *some cases* I am satisfied that the excuse is sincerely given"; casting doubt, however, upon the veracity of even those whose "excuse is sincerely given" he continues on to state that "in these days of the general diffusion of a certain amount of physiological knowledge, *such ignorance would seem incredible*."⁶⁸ Echoing this view of the untrustworthy woman, Dr.

63 Henry Miller, President of the Am. Med. Ass'n, Address Delivered Before the American Medical Association at its 13th Meeting, in 13 TRANSCRIPT AM. MED. ASS'N. 54, 57 (1860).

64 1859 Report, *supra* note 12, at 76.

65 NEBINGER, *supra* note 58, at 12–13.

66 STORER, WHY NOT?, *supra* note 20, at 69–70.

67 Miller, *supra* note 63, at 57–58.

68 STORER, WHY NOT?, *supra* note 20, at 70 (emphasis added). This supposition fits with Luker's assertion that at the time the physicians launched their crusade "[w]omen (and the general public) knew that pregnancy was a biologically continuous process from beginning to end." LUKER, *supra* note 39, at 25 (emphasis in

Meredith D. Reese likewise suggested that “even the married, to postpone the cares of a family, the perils of parturition, the privations and duties of maternity” may persuade themselves “into the vulgar fallacy that there is no life before quickening, and that early abortionism is therefore less than murder,”⁶⁹ while Dr. William M. Pritchett commented on their sometimes “pretended surprise” at hearing from their medical attendant that abortion is tantamount to cold-blooded murder.⁷⁰

This vacillation regarding the sincerity of a married woman’s belief that her unborn child was not yet fully human reveals the physicians’ uncertainty over whether she was indeed a hapless victim of her own ignorance or instead the callous murderess of her unborn child—a tension in view that, as discussed below, would reemerge within the twentieth-century antiabortion movement. Certainly, attributing the abortion decision to female ignorance was a far more benign explanation for her behavior; however, far more typically, the aborting woman was cast as a domestic subversive whose behavior threatened natural hierarchies—a view that allowed doctors to position themselves as stalwart defenders of both the family and the nation.

The antiabortion physicians had little compassion for the “wicked freak of a married woman who does not wish any longer to be a mother.”⁷¹ Capturing this sentiment, Dr. William Pritchett declared that the profession had “nothing but contempt” for the “married woman who disregards her divinely-ordained duty” because she ““does not want to be bothered with any more brats . . . ’ ‘can hardly take care of those she has,’ ‘is going to Europe in the spring,’ etc.”⁷² In like fashion, Dr. Gardner denounced the married woman who destroyed her unborn child as a “pitiful, God-forsaken wretch” whom “all true humanity despises . . . and hoots at.”⁷³

But what accounts for the harshness of their views? Why did the physicians who

original).

69 MEREDITH REESE, TESTIMONY BEFORE THE SENATE OF THE STATE OF NEW YORK, REP. OF THE COMM. APPOINTED TO INVESTIGATE THE HEALTH DEP’T OF N.Y.C., Documents of the Senate of the State of New York, Vol. 2, 82d Sess., at 87, 95 (1859).

70 William M. Pritchett, *Criminal Abortion*, 7 MED. MIRROR 471, 471–73 (1896).

71 John Bell, *Report of the Committee on the Relations of Alcohol to Medicine*, 20 TRANSCRIPT AM. MED. ASS’N 237, 316–17 (1869).

72 Pritchett, *supra* note 70, at 471.

73 GARDNER, *supra* note 31, at 226.

spearheaded the antiabortion campaign lack compassion for the married woman who wished to avoid or postpone the obligations of motherhood? It is in answering these questions that we come face-to-face with the strength of their conviction that abortion was, as Siegel succinctly puts it, “a rebellious, incipiently political act,”⁷⁴ which they believed had to be vigorously suppressed if the gendered domestic and social order that they held dear was to remain intact.

Repeatedly in the articles they wrote for medical journals and in speeches they gave before their colleagues, antiabortion physicians characterized abortion as contrary to “nature and all natural instinct.”⁷⁵ As Storer proclaimed, “Is there no alternative but for women, when married and prone to conception, to occasionally bear children? This . . . is the end for which they are physiologically constituted and for which they are destined by nature.”⁷⁶ Accordingly, he opined that “[w]ere women intended as a mere plaything, for the gratification of her own or her husband’s desire, there would have been no need for her of neither uterus nor ovaries.”⁷⁷

As would again be the case with the modern proponents of the “pro-woman/pro-life” position, the antiabortion physicians’ concept of nature was inextricably conjoined with the divine. Storer thus declared it women’s “holiest duty . . . to bring forth living children,”⁷⁸ while Dr. Pritchett cast it as her “divinely-ordained duty.”⁷⁹ Directly linking this sacred duty to her physiology, Dr. Nathan Allen declared that “the organization of woman . . . demonstrate[s] that married life and the production of children are one of the primary objects of her creation . . . it is a law which God has made applicable to all races and nations.”⁸⁰

The phrase “physiological sin,” which Dr. H.S. Pomeroy employed to express his opposition to all acts, including abortion, that interfered with “Nature so that she cannot

74 Siegel, *Reasoning from the Body*, *supra* note 18, at 304.

75 STORER, *WHY NOT?*, *supra* note 20, at 15.

76 *Id.* at 75–76.

77 *Id.* at 80–81.

78 *Id.* at 81 (emphasis added).

79 Pritchett, *supra* note 70, at 471 (emphasis added).

80 Nathan Allen, *Population: Its Law of Increase*, Address Before the Meeting of the Western Social Science Association 16 (1868) (emphasis added).

accomplish the production of healthy human beings”⁸¹ neatly encapsulates this infusion of divine belief into the domain of science. As Siegel writes, the concept “enfolded old authority within new, using religion and science to define the obligations of marriage in reproductive terms.”⁸² In short, not only did the antiabortion doctors derive “a wife’s duty from . . . facts about her body,”⁸³ they imbued these facts with sacred meaning, thus impressing the stamp of the divine upon her corporeal being.

In addition to, as discussed below, drawing a direct causal link between the subversive nature of abortion and its proclaimed negative impact on women’s physical and emotional wellbeing, Storer and others also specifically warned of the adverse consequences of trifling with the divine. In this spirit, the 1871 Report of the AMA Committee on Criminal Abortion—which, as we will see, was referenced by the *Roe* Court in its historical recounting the nation’s criminal abortion laws—warned that the woman who “becomes unmindful of the course marked out for her by *Providence*,” and “yields to the pleasures but shrinks from the pains and responsibilities of maternity,” no longer “merit[s] the respect of a virtuous husband.”⁸⁴ Looking ahead to the future, she can thus expect to sink “into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul” and die “without the hand of affection to smooth her pillow”—a bleak fate that she has brought upon herself as “[s]uch was not the plan of *the Deity* with regard to woman; such is not the character of her high destiny.”⁸⁵ Equally dismal, Dr. Henry Gibbons, in the Annual Address before the San Francisco Medical Society, forewarned that the married woman who subverts the “holy instinct” is a monster who, through her “satanic perversion of nature,” destroys the “Divine image in [her] heart.”⁸⁶

Grounded in the view that woman’s divinely ordained duty was to bring forth living children, not surprisingly, the antiabortion physicians were highly dismissive of the reasons a married women might have for wanting to terminate a pregnancy, such as, for instance, the “fear of labor” or worries about the “care, the expense, or the trouble of

81 H.S. POMEROY, *THE ETHICS OF MARRIAGE* 97 (1895).

82 Siegel, *Reasoning from the Body*, *supra* note 18, at 295.

83 *Id.* at 296.

84 Am. Med. Ass’n, *Report of the AMA Committee on Criminal Abortion*, 22 *TRANSACTIONS AM. MED. ASS’N* 239, 241 (1871) (emphasis added) [hereinafter *1871 Report*].

85 *Id.* at 241–42 (emphasis added).

86 Gibbons, *supra* note 30, at 11.

children”—concerns that Dr. William M. Pritchett dismissed as “trifling and degrading.”⁸⁷ Encapsulating this overweening sense of contempt, an editorial in the *Medical and Surgical Reporter* opined that

the only reason given by [married women] for killing their own offspring, and making their bodies dens of murder is the *inconvenience* of having children . . . and not to be prevented by fulfilling maternal destiny, from running about town, visiting friends, dressing finely, and attending parties, theaters, and the like.⁸⁸

In a similar vein, Dr. J. M. Toner admonished his colleagues not to “pander to the depraved sentiments, or to succumb, for the love of gain, to the unnatural demands . . . [of] the fashionable [wife]” who “does not wish to have her family increased, or attend to the wants of her offspring, and thereby forego the pleasures and freedoms of society” as her “sole happiness seems to depend upon [her] being seen upon the public promenade, and participants in the desultory pleasure of ballroom dancing.”⁸⁹

Running beneath the surface of these varied explanations for why women were engaged in behavior that openly flouted the “holiest duty of [their] sex,” one can plainly glimpse the antiabortion physicians’ palpable fear that the respectable middle-class matron was being influenced to reject motherhood by the burgeoning Women’s Rights Movement, which launched its effort to overthrow the “absolute tyranny”⁹⁰ of men over women at its 1848 convention in Seneca Falls, New York. Boldly proclaiming in its founding document that “woman has too long rested satisfied in the circumscribed limits which corrupt customs and a *perverted application of the Scriptures* have marked out for her, and that it is time she should move in the enlarged sphere which *the Creator* has assigned her,” these early feminist activists thus directly challenged the physicians’ conflation of divinity and motherhood.⁹¹

The antiabortion physicians sounded the alarm that feminist agitation for an expanded realm of female activity had incited women to look upon “the carrying into effect the

87 Pritchett, *supra* note 70, at 473.

88 *Infantiphobia and Infanticide*, 15 MED. & SURGICAL REP. 212 (1866) (emphasis in original).

89 J.M. Toner, *Abortion in its Medical and Moral Aspects*, 5 MED. & SURGICAL REP. 443 (1861).

90 Declaration of Sentiments and Resolutions, Seneca Falls Convention (1848) <http://ecssba.rutgers.edu/docs/seneca.html> [perma.cc/MWQ7-S52P].

91 *Id.* (emphasis added).

noblest purposes of their being as alike a disaster and disgrace.”⁹² Echoing this sentiment, in a letter to the *Medical Record*, Dr. E.T. Milligan scoffed that “[m]ost American wives look on pregnancy as a domestic calamity and no amount of advice on the enormity of their sin or on their responsibility to Almighty God will deter them from what they believe to be the exercise of woman’s rights.”⁹³ Likewise expressing disdain for the era’s “weak-minded and fashionable wives” who “sneer at a neighbor because of her large family” and look “upon maternity as a disgrace,” Dr. Edwin Hale bemoaned the fact that maternity was no longer “considered a crown of honor” and a woman was no longer “revered in proportion to the number of her children.”⁹⁴

The doctors’ antipathy towards the “‘new woman’ [who] seems to think that having children is one those disagreeable incidents which must be avoided”⁹⁵ reflected their apprehension that the gendered order of creation was at risk of being dismantled by those who believed that “woman was born for higher and nobler purposes than the propagation of her species.”⁹⁶ As Dr. Montrose Pallen expounded: “[w]oman’s rights and woman’s sphere are, as understood by the American public, quite different from that understood by us as Physicians.”⁹⁷ Elaborating, he went on to explain that:

‘Woman’s rights’ now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.⁹⁸

He thus decried the fact that “the whole country is in an abnormal state” on account of recent attempts to “force women into men’s places.”⁹⁹

92 HORATIO STORER, *IS IT I? A BOOK FOR EVERY MAN—A COMPANION TO WHY NOT? A BOOK FOR EVERY WOMAN* 112 (1868).

93 E.T. Milligan, *Criminal Abortion*, 52 *MED. REC.* 32 (1897).

94 EDWIN M. HALE, *THE GREAT CRIME OF THE NINETEENTH CENTURY* 12–13 (1867).

95 *Correspondence: Editor Medical Mirror*, 13 *MED. MIRROR* 231 (1902).

96 STORER, *WHY NOT?*, *supra* note 20, at 198.

97 Montrose A. Pallen, *Foeticide, Or Criminal Abortion*, 3 *MED. ARCHIVES* 193, 205 (1868).

98 *Id.*

99 *Id.*

And although he claimed to “feel sympathy with nearly every effort that has been put forth by earnest and true women for the advancement of their sisters,” Dr. Pomeroy nonetheless went on to blame the Woman’s Right Movement for the fact that

there has grown to be a feeling among many women—some of them good and true ones, too—that the duties of maternity are a sort of low-grade drudgery which properly may be left to those who lack the will and the ability necessary to carry them into a higher sphere.¹⁰⁰

He thus chided those “apostles of woman’s rights who, in their well-meaning but misdirected efforts to arouse women to claim privileges now denied them, encourage their sisters to feel ashamed of the first and highest right which is theirs by the very idea of nature.”¹⁰¹

The antiabortion physicians accordingly implored married women to embrace their maternal obligations. Dr. Gardner thus urged them to “accept the noble office you are called upon to perform” by “fold[ing] your children into your own selves.”¹⁰² In so doing, he promised that the “true woman” would come to realize that her desire for “dress and fashion” was meaningless beside these “pure joys.”¹⁰³ While Dr. Pomeroy expressed the hope that women would come to appreciate the fact that “nations are made or unmade according to the love and care bestowed upon children before their birth, and the influence they receive in the nursery”; only then, he prophesized,

will woman learn the dignity and blessedness of maternity, and . . . redouble her endeavors to acquire and use her every right and to drink more deeply at the fountain of knowledge—not that she may fill a sphere higher than maternity, but prepare herself to fill that sphere so well that her descendants may be of earth’s noblest and best.¹⁰⁴

100 POMEROY, *supra* note 81, at 137–38.

101 *Id.* at 95.

102 GARDNER, *supra* note 31, at 235.

103 POMEROY, *supra* note 81, at 139.

104 *Id.*

D. Marking Her Uterus with a “Stamp of Derangement”

Having cast abortion as a “violation of all law, human and divine, of all instinct [and] all reason,”¹⁰⁵ it is not surprising that the medical literature was replete with stern warnings regarding the parade of horrors that awaited the woman who dared to “arrogate to [herself] a right to decide as to the morality of taking or destroying the life of an unborn child.”¹⁰⁶ Reflecting the senior Storer’s admonition that the laws of nature “cannot be broken with impunity” since the “Lawgiver is inexorable,”¹⁰⁷ these harms were frequently cast as punishment for a woman’s disregard of her place in the gendered order of creation. As Hale put it, “[p]regnancy is a natural condition which cannot be arrested without the most calamitous results not only to the local condition of the reproductive organs, but to the general physiological functions of the whole system”¹⁰⁸—results that Dr. Maxwell Christine characterized as the “evident punishment” which an “[o]utraged nature” unfailingly “inflicts upon the culprit.”¹⁰⁹ Although, moving away from the view that post-abortion suffering was a punishment, as we will see, proponents of the contemporary “pro-woman/pro-life” approach would likewise cast abortion as a traumatizing event.

The litany of predicted adverse physical outcomes ran the gamut from the “decay of womanly beauty,”¹¹⁰ to “chronic weakness, disease and disarrangement of her organs, and, possibly, by the forfeiture of her life.”¹¹¹ Storer likewise warned about the risk of death. Invoking the punishment trope, he declared that the loss of life was a “penalty of unwarrantably interfering with nature, being occasioned by syncope, by excess of pain or by moral shock from the thought of the crime.”¹¹²

Storer also made clear that the potential risks of trifling with nature were not limited in time, and that although a woman “may seem to herself and to others to successfully have escaped [the] dangers” associated with abortion, she might well succumb to its punishing

105 STORER, IS IT I?, *supra* note 92, at 94.

106 STORER, WHY NOT?, *supra* note 20, at 27.

107 Storer, *Two Frequent Causes of Uterine Disease*, *supra* note 50, at 200.

108 HALE, *supra* note 94, at 5.

109 Christine, *supra* note 57, at 73.

110 HALE, *supra* note 94, at 10.

111 Christine, *supra* note 57, at 73.

112 STORER, WHY NOT?, *supra* note 20, at 48.

consequences upon reaching the “critical turn of life . . . when the fountains of youth dry up” and she “ceases from the periodical discharges, which in health and with care are the secret of her beauty, her attraction, her charm.”¹¹³ Accordingly, once the “stamp of derangement” had been impressed upon the womb, there was little comfort for the woman who had “had her own way against the dictates of her conscience” as she could look forward to a future marked by “possible disease, invalidism or death as the direct consequence of her folly.”¹¹⁴

Particularly relevant for present purposes, in addition to stern warnings about the physical risks of abortion, the antiabortion physicians also warned of the likely adverse emotional consequences—a theme that, as we will see, would be picked up again in the twentieth century as the centerpiece of the woman-protective antiabortion position. With a prescient internal logic, Dr. Hale thus declared that remorse was the inevitable and predicable outcome of an act he characterized as the “sin of child-murder.”¹¹⁵ In a similar vein, Storer observed that:

there is probably always a certain measure of compunction for the deed in the woman’s heart—a touch of pity for the little being about to be sacrificed—a trace of regret for the child that, if born, would have proved so dear—a trace of shame at casting from her the pledge of a husband’s or a lover’s affection—a trace of remorse for what she knows to be wrong, no matter to what small extent, or how justifiable, it may seem to herself.¹¹⁶

Although Storer’s language appears to be somewhat gentle as he speaks simply of a “touch of pity” or “a trace of regret,” the theme of punishment is nonetheless apparent in his suggestion that women should expect to suffer from the commission of what she knows to be the wrongful act of “sacrificing” the “little being . . . that, if born, would have proved so dear.”

At other moments, Storer also paints a far grimmer picture of the likely emotional impact of abortion. Again, drawing upon the exacting demands of the laws of nature he remarks that “the thought of the crime, coming upon the mind at a time when the physical system is weak and prostrated, is sufficient to occasion death.” While at other times “[t]

113 *Id.* at 59–60.

114 *Id.* at 60.

115 HALE, *supra* note 94, at 10.

116 STORER, *WHY NOT?*, *supra* note 20, at 43–44.

he same tremendous idea, so laden with the consciousness of guilt against God, humanity, and even mere natural instinct, is undoubtedly able, where not affecting life, to produce insanity” either upon the “first and sudden occurrence [of the crime] to the mind, or, subsequently, by those long and unavailing regrets, that remorse, if conscience exists, is sure to bring.”¹¹⁷

Although perhaps the most outspoken in this regard, Storer was not alone in linking mental derangement to abortion. For instance, the superintendent of the Michigan Insane Asylum spoke of remorse-induced insanity in women who, once having borne a child, came to realize the “priceless value of the gift [they] previously refused to accept”;¹¹⁸ while Dr. John P. Gray, Superintendent of a State Lunatic Asylum, likewise remarked that for many years he had “received and treated patients whose insanity was directly traceable to this crime, through its moral and physical effects.”¹¹⁹

Storer and other antiabortion physicians regularly insisted that the emotional and physical tolls of abortion were significantly greater than those associated with childbirth.¹²⁰ However, in light of their view that the aborting woman was a gender outlaw whose criminal conduct ineluctably marked her uterus with a “stamp of derangement,” it seems rather evident that their view of the comparative risks were shaped by their *a priori* beliefs regarding the intrinsic evils of abortion compared to the sacred nature of motherhood.

Supporting this view, their contemporaries spoke out about the serious dangers of pregnancy and childbirth. For example, Dr. Charlotte B. Brown commented that repeated cycles of pregnancy and childbirth might well “cause women to be invalids, with special diseases”;¹²¹ while Dr. W. W. Johnston intoned that in many cases following childbirth “the health is never regained . . . [and the] principal manifestations of this persistent ill health are chronic anemia, with malnutrition, and impaired or altered function in all the organs, especially in those of the nervous system.”¹²² Similarly, neurologist George M.

117 *Id.* at 49.

118 *Abortion as a Cause of Insanity*, 7 N.Y. MED. J. 382 (1868).

119 John P. Gray, *Abortion and Insanity, Annual Report of State Report Asylum for 1776* [sic], 2 MED. REC. 240 (1867–1868).

120 STORER, WHY NOT?, *supra* note 20, at 38–44.

121 Charlotte Brown, *Rest Therapy in Gynaecology*, 17 MED. STANDARD 170 (1895).

122 W.W. Johnston, *Chronic Anemia and Wasting in Newly Married Women. Some of the Causes of Their Persistence and Incurability*, 1 TRANSACTIONS OBSTETRICAL & GYNECOLOGICAL SOC’Y WASH. 162, 163 (1887)

Beard asserted in his book on nervousness in America that the “simple act of giving birth opens the door to unnumbered woes . . . compelling a life-long slavery to sleeplessness, hysteria, or insanity.”¹²³

According to Dr. William F. Montgomery, it was not uncommon for women to feel “depressed or dispirited with gloomy forebodings” in the early months of pregnancy, and although, as he observed, these negative feelings usually lifted, he observed that on occasions this depression instead assumed:

a more serious aspect, and the woman is constantly under the influence of a settled and gloomy anticipation of evil, sometimes accompanied with that sort of apathetic indifference which makes her careless of every object that ought naturally to awaken an interest in her feelings.¹²⁴

Drawing a direct link between emotional and physical wellbeing, he went on to note that “when this occurs in pregnancy, it will generally be found accompanied by very evident derangements in bodily health.”¹²⁵

As Judith Walzer Leavitt accordingly writes in her classic work on the subject, not only did nineteenth-century women “spend considerable time worrying and preparing for the possibility of not surviving their confinements,” they were also generally well aware “that if procreation did not kill them, it could maim them for life.” For some, given the potential seriousness of post-partum injuries, “the fears of future debility were more disturbing than fears of death.”¹²⁶ Reinforcing the seriousness of the mental health complications of pregnancy and childbirth, puerperal insanity was thought to be “responsible for at least 10 percent of female asylum admissions.”¹²⁷

(paper read at the May 20, 1877 meeting).

123 GEORGE M. BEARD, *AMERICAN NERVOUSNESS: ITS CAUSES AND CONSEQUENCES* 76–77 (1881). For an excellent discussion regarding the deeply racialized and class-specific significance of the nineteenth-century “epidemic” of nervous disorders in women, see Laura Briggs, *The Race of Hysteria: “Overcivilization” and the “Savage” Woman in Late Nineteenth-Century Obstetrics and Gynecology*, 52 *AM. Q.* 246 (2000).

124 WILLIAM FETHERSTON MONTGOMERY, *AN EXPOSITION OF THE SIGNS AND SYMPTOMS OF PREGNANCY: WITH SOME OTHER PAPERS ON SUBJECTS CONNECTED WITH MIDWIFERY* 42–43 (1857).

125 *Id.*

126 JUDITH WALZER LEAVITT, *BROUGHT TO BED: CHILDBEARING IN AMERICA, 1750–1950*, 20, 28 (1986).

127 Nancy Theriot, *Diagnosing Unnatural Motherhood: Nineteenth Century Physicians and ‘Puerperal*

Deploying a critical intersectional lens, a number of scholars have documented the racialized understandings of the body that shaped these medical narratives of pregnancy and childbirth-related suffering. Grounded in “biologically essentialized” understandings of racial difference,¹²⁸ including claims about the specific characteristics of the “negro pelvis,”¹²⁹ some physicians asserted that while “savage women of the dark races gave birth painlessly, civilized white women suffered greatly in childbearing.”¹³⁰ Reflecting interlocking assumptions regarding race and gender, Miriam Rich explains that this “highly racialized construct of femininity” was linked to the view that “civilized women: white, native-born, middle or upper-class ladies” exhibited “a high degree of sensitivity to suffering” from which “savage women of the dark races” were immune due to their position on the bottom rungs of the evolutionary scale.¹³¹ Significantly, she argues that with the demise of slavery, which had previously functioned to “stabilize racial differences,” these “ascendant medico-scientific studies of race” were deployed to protect the “integrity of racial boundaries by embedding them in the measurements of the body and the conformation of the bones.”¹³²

It is hopefully apparent that a deeply troubling irony is at work here. Namely, it was the same class of women whom physicians believed were most likely to suffer from the travails of pregnancy and childbirth at which their antiabortion campaign was aimed.¹³³ This observation complicates our existing gendered analysis of the antiabortion campaign, and makes clear that this singular lens does not adequately capture the animating sentiments that drove the doctors to fight for the criminalization of abortion. We can catch a glimpse of the racialized themes that populated the campaign in Dr. W.W. McFarlane’s tongue-in-cheek proposal to end the “slaughter of innocents . . . practiced by *our* society women” by sending “Chinese women Missionaries on Nobb Hill to teach *our* aristocratic ladies the

Insanity, 30 AM. STUD. 69, 70 (1989).

128 Miriam Rich, *The Curse of Civilised Woman: Race, Gender and the Pain of Childbirth in Nineteenth-Century American Medicine*, 28 GENDER & HIST. 57, 64 (2016).

129 Briggs, *supra* note 123, at 261.

130 Rich, *supra* note 128, at 57.

131 *Id.* at 58, 57; *see also* Briggs, *supra* note 123, at 257–59.

132 Rich, *supra* note 128, at 65.

133 I am not seeking to establish that the individual doctors were one and the same. Rather, the point is that as a group, elite male physicians simultaneously engaged in both discourses regarding the reproductive conduct of the demographic cohort.

sacredness of motherhood and the wrong of murder.”¹³⁴ Revealed here in this deliberate reversal of the traditional missionary relationship is the antiabortion physicians’ palpable fear that “their” women had become ignorant of their maternal duties while the lowly “other” fully embraced it—a fear that, as discussed in the following section, led them to view abortion as “an offense of a national and political character.”¹³⁵

E. The Threat to White Anglo-Saxon Dominance

As we have seen, in pursuing the criminalization of abortion, Storer and his colleagues pushed back against woman’s rights activists, whom they charged with inciting women to abandon their maternal duties in favor of “the sterner right of voting and law making.”¹³⁶ Importantly, however, as Nicola Beisel and Tamara Kay stress in their seminal work on the subject, “the critical political context for the antiabortion movement was not only suffragists’ claims for women’s rights, but also the massive immigration that undermined Anglo-Saxon political power and social hegemony.”¹³⁷ Awash in the fear that immigrants would soon outnumber the native-born population, antiabortion physicians deployed racialized tropes to persuade their colleagues and the public at large that the use of abortion by “their” women threatened the Anglo-Saxon race.¹³⁸

By linking “reproductive politics” to “racial politics,” antiabortion physicians hoped to defend the nation from being overrun by immigrants, whom they viewed as “bearers and propagators of alien values that would ultimately destroy American culture.”¹³⁹ Building outwards from the domestic realm, not only did they claim, as Storer put it, that “all the elements of domestic happiness” and the preservation of marriage as a “spiritual union”¹⁴⁰

134 W.W. McFarlane, *Proceedings of Societies*, 35 P. MED. J. 308 (1892) (emphasis added).

135 HALE, *supra* note 94, at 4.

136 Pallen, *supra* note 97, at 205–06.

137 Nicola Biesel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOC. REV. 498, 499 (2004).

138 As Biesel and Tamara explain, today we do not typically conjoin the terms “race” and “Anglo-Saxon,” and instead “see only subtly varying shades of a mostly undifferentiated whiteness.” *Id.* at 500. However, in the nineteenth century, as immigration rates rose, native Anglo-Saxons increasingly regarded “the Irish and Germans, and later the Jews, Italians and Slavs . . . as members of inferior races who were unfit for self-government and a threat to the republic.” *Id.* at 501 (emphasis added).

139 *Id.* at 499.

140 STORER, WHY NOT?, *supra* note 20, at 13–14.

depended upon the married woman's fulfillment of her procreative duties, they also asserted that the future character of the nation hinged upon the willingness of native-born wives to reproduce and replenish their kind.

In his influential mid-century study, which was relied upon by many physicians as well as by the AMA's Committee on Criminal Abortion in the preparation of their 1871 Report, Dr. Nathan Allen worriedly concluded, based upon his analysis of census data, that "all or nearly all" of the increases in population in New England were attributable to those of "foreign descent."¹⁴¹ In like fashion, based upon his "most careful analysis of the births and deaths" in Massachusetts, Dr. Chickering gloomily described the growing population imbalance:

In many school districts of country towns, where the population is made up wholly or principally of American stock, you can hardly find now children enough to make in numbers a respectable school On the other hand, in large towns and villages, where the foreign population abounds, we find an abundance of children.¹⁴²

Encapsulating these demographic trends, Storer observed that "the population of our older States," to the extent that it "depends upon the American and native element . . . is stationary or decreasing,"¹⁴³ thus clearly marking immigrants and their children as other than American.

This was hardly a neutral recitation of the changing composition of the nation. Decrying the plummeting birthrate of the native Puritans, Dr. Allen dolefully predicted that "if the average amount of children among the Americans to each marriage should continue to decrease . . . the best stock that the world ever saw, under what would be considered the best family training, the highest order of educational influences, and the purest religious instruction," was likely to "run out" and be replaced by "a people of foreign origin, with far less intelligence and a religion entirely different."¹⁴⁴ In similarly desultory fashion, James Whitmore reported that "we are fast losing our national characteristics, and slowly merging into those of our foreign population" due to the abortion practices of native-born

141 Allen, *supra* note 80, at 5.

142 As quoted in NEBINGER, *supra* note 58, at 8.

143 STORER, WHY NOT?, *supra* note 20, at 63.

144 Allen, *supra* note 80, at 5–6.

women.¹⁴⁵ Doctors also expressed their apprehension about the dilution of Anglo-Saxon political power. Gesturing to the future, Dr. Chickering pondered how long it would take if “a majority of all the youth and children under fifteen years of age in a place is made up from those of a foreign parentage” before “such a power will be felt in the management, if not in the control, of the municipal government of those towns and cities.”¹⁴⁶

Predicting that “it [would] not be many years before the Americans left on American soil, will be few and far between,” Hale declared abortion to be “an offence of a national and political character,” and he called upon the government to “interpose some check to its alarming increase.”¹⁴⁷ Similarly decrying the fact that “in so far as depends upon the American and native element . . . the population of our older States . . . is stationary or declining,” Storer proclaimed that abortion was not merely a crime “against the life of the child and the health of its mother . . . but that it strikes a blow at the very foundation of society itself.”¹⁴⁸ Looking to the “great territories of the West, just opening to civilization and the fertile savannas of the South,” which stood ready to “offer homes for countless millions yet unborn,” he posed the question whether those lands were to “be filled by our *own* children or by those of aliens? This is a question that our *own* women must answer; upon *their* loins depends the future destiny of the nation.”¹⁴⁹

In short, in addition to her duty to stabilize the domestic order by embracing her holiest obligation, the middle-class married matron was also declared to have a special responsibility to reproduce for the good of the nation. Standing as a bulwark against depopulation, her procreative capacity was not hers alone to manage; rather, it was something she owed to “an intelligent Christianity, and to an intelligent and safe civilization, and to the State and Nation . . . to the great American idea of free schools and a free Protestant religion.”¹⁵⁰

145 James S. Whitmore, *Criminal Abortion, A Paper Read Before the Woodford County Medical Society*, 31 CHI. MED. J. 385, 392 (1874).

146 As quoted in NEBINGER, *supra* note 58, at 8.

147 HALE, *supra* note 94, at 4.

148 STORER, *WHY NOT?*, *supra* note 20, at 64.

149 *Id.* at 85 (emphasis added).

150 Biesel & Tamara, *supra* note 137, at 509 (discussing J.T. COOK, *A BOOK FOR EVERY WOMAN AND EVERY HOME!* 36 (1868)).

II. The *Roe* Court's Examination of the Historical Record

Likely seeking to head off anticipated criticism that its decision was an abrupt break with legal tradition, the *Roe* Court began its historic inquiry with the observation that

[i]t perhaps is generally not appreciated that the restrictive criminal abortion laws in a majority of States today are of relatively recent vintage. Those laws . . . are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th Century.¹⁵¹

Underscoring their “relatively recent vintage,” the Court further observed that:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout a major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.¹⁵²

In tracing the shift away from the common law quickening rule that permitted abortion up until the woman first felt fetal movement, which generally occurs sometime between the sixteenth and twenty-fifth week of pregnancy,¹⁵³ the Court focused on the role that the medical profession played in the enactment of the nation's restrictive abortion laws.¹⁵⁴ Seeking to uncover the “attitude of the profession” towards abortion, it directed its attention to the two above-discussed reports that were issued by the AMA's Committee on Criminal Abortion in 1859 and 1871.¹⁵⁵

151 *Roe v. Wade*, 410 U.S. 113, 129 (1973).

152 *Id.* at 140.

153 Underscoring its point that women “enjoyed a substantially broader right to terminate a pregnancy” under common law as compared to their contemporaneous right, the Court further observed that the question of whether “the abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed.” *Id.* at 134.

154 According to the Court, the medical profession shared “the anti-abortion mood prevalent in this country in the late 19th century.” *Id.* at 141. However, as discussed below, the medical profession did not simply share passively in existing attitudes; rather, it played a major role in changing public attitudes towards abortion.

155 See *1859 Report*, *supra* note 12; *1871 Report*, *supra* note 84, at 258.

As noted in the introduction, the Court's reading of this record creates the distinct impression that the sole animating concern behind the physicians' campaign was the protection of the unborn. While these reports certainly reflect this objective, the 1871 Report, in particular, offers a far more complete record of their aims—a record that is wholly elided by the *Roe* Court's singular focus on the physicians' "pro-life" aims.

A. What the *Roe* Court *Did* Say About the Physicians' Nineteenth-Century Campaign to Criminalize Abortion

Drawing on the AMA Reports, the Court emphasized the medical profession's commitment to halting the "unwarrantable destruction of human life" as the prime reason behind its campaign to make abortion a statutory crime.¹⁵⁶ By way of documenting this commitment, it quoted the 1859 Report's assertion that "this general demoralization" was attributable to "wide-spread popular ignorance of the true character of the crime . . . the fact that the profession themselves are frequently supposed careless of foetal life . . . [and] the grave defects of our laws . . . as regards the independent and actual existence of the child before birth, as a living being."¹⁵⁷ As the Court further recounts, in response to this Report, the AMA unanimously adopted the Committee's resolutions "'protesting against such unwarrantable destruction of human life,' calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies in 'pressing the subject.'"¹⁵⁸ As confirmation of the physicians' fetal-centered focus, the Court also pointed to the admonition in the Committee's 1871 Report that when dealing with "human life," compromise was not possible.¹⁵⁹

Accordingly, even the most discerning reader of the *Roe* decision would come away without any awareness of the gendered and racialized tropes that the physicians regularly invoked in support of their goal of making abortion a strict statutory crime. However, this discerning reader might protest that I have missed something in my review by pointing to the quoted resolution in the 1871 Report in which the Committee on Criminal Abortion called "the attention of the clergy of all dominations to the *perverted views of morality*

156 *Roe*, 410 U.S. at 141 (quoting 1859 Report, *supra* note 12, at 73).

157 *Id.* (quoting 1859 Report, *supra* note 12, at 75–76).

158 *Id.* at 142 (quoting 1859 Report, *supra* note 12, at 78).

159 *Id.* (quoting 1871 Report, *supra* note 84, at 258). According to Mohr, the Committee published this report to ensure that local medical societies did not falter in their efforts to push for statutory change in the wake of Storer's departure from the country due to ill health. MOHR, *supra* note 13, at 159.

entertained by a large class of females—aye, and men also, on this important question,”¹⁶⁰ which arguably suggests that the Court was indeed attuned to the multi-dimensional nature of the physicians’ campaign. Although this is certainly plausible, unfortunately, this quote marks the end of the Court’s discussion of the physicians’ antiabortion crusade, save for its final observation that subsequent to the publication of the 1871 Report the medical profession periodically engaged in a “condemnation of the criminal abortionist.”¹⁶¹

B. What the *Roe* Court *Did Not Say* About the Physicians’ Antiabortion Campaign

Another possible objection to my critical evaluation of the *Roe* Court’s reading of this medical-legal history is that it is unfair of me to expect the Court to have tracked down and analyzed primary source materials—particularly given that the relevant documents were from a prior century. This is certainly a well-placed remonstrance—and, in fact, the *Roe* Court is to be commended for its impressive interdisciplinary approach that engages with a wide array of historical material. However, what is puzzling here is that a historical source that the Court actually referenced in the decision—namely, the 1871 Report of the AMA Committee on Criminal Abortion—is itself laden with the kinds of gendered and racialized arguments that the profession advanced in support of its goal of criminalization. In other words, the Court relied upon a primary source document that offered a direct window into the physicians’ view of abortion as a deeply destabilizing act that threatened both the domestic and the national order. To shed light on this omission, we turn to the 1871 Report itself to see what it actually offered the Court by way of further insight into the medical profession’s antiabortion campaign. Although these themes were discussed in Part I of this Article, they bear repeating here as specifically contained in the 1871 Report by way of casting light on what the Court could have readily gleaned from this document.

The 1871 Report positively bristles with indignation over the aborting woman’s willful subversion of her divinely impressed location in the created world. Recounting God’s commandment to Adam and Eve to “increase and multiply,” it asserts that woman’s “high destiny” is accordingly to “be instrumental in propagating the human family” within the sacred purity of marriage.¹⁶² The abortion-minded woman is thus warned that she who “becomes a participant in the destruction of her own offspring” steps down from this high place and is no longer “the appropriate representative of a refined age, a model of purity,

160 *Roe*, 410 U.S. 113, at 142 (quoting *1871 Report*, *supra* note 84, at 258) (emphasis added).

161 *Id.*

162 *1871 Report*, *supra* note 84, at 240–41.

[and] the center of honor and affection,” as child-murder “was not the intention of the Deity with regard to woman.”¹⁶³ Perhaps even more calamitously, as we have seen, the Report warns the woman who ignores “the course marked out for her by Providence” and “yields to the pleasure, but shrinks from the pains of responsibilities of motherhood” that she can expect to descend “into old age like a withered tree, stripped of its foliage, with the stain of blood upon her soul; she dies without the hand of affection to smooth her pillow.”¹⁶⁴

Driving home the Committee’s contempt for the married woman who turns to abortion, the Report continues on to glowingly recount the story of a Roman matron named Cornelia who, although “unaided by the light of Christianity,” responded to a friend’s request to see her jewels by explaining that her children “are my jewels . . . they are the pledges of a virtuous and honorable affection.”¹⁶⁵ Noting that such would be the response of “an honest matron of the day,” in a well-trod theme, the Report continues on to disparage the woman who instead turns to abortion for selfishly “regarding the care and expense of children as a burden, as well as in preferring pleasure and fashion to domestic duties and responsibilities.”¹⁶⁶

The Committee’s conviction that the aborting woman subverted God’s gendered order of creation was closely entwined with its nativist fears. In addition to specifically expressing concern that abortion was prevalent among “the intelligent, the refined, and the religious,”¹⁶⁷ its use of the above-noted descriptors such as “representative of a refined age,” “a model of purity,” and “the center of honor and affection”¹⁶⁸ conveyed the ideals of womanhood that were most closely associated with middle-class norms of respectable domesticity.

One does not, however, need to parse these descriptive hints regarding the true focus of their concern in order to uncover the Committee’s preoccupation with the depopulation of the nation. Going directly to the point, the Report relies upon Dr. Allen’s above-noted influential study of population shifts in New England and New York to sound the alarm

163 *Id.* at 241–42.

164 *Id.*

165 *Id.* at 242.

166 *Id.*

167 *Id.* at 244.

168 *1871 Report, supra* note 84, at 241.

that there was “something of a grave nature, something mischievous, something radically wrong” afoot in the nation.¹⁶⁹ It then highlights his demographic analysis showing that when compared to both their foremothers and the contemporary foreign-born, the birth rate of the “strictly American,” meaning those descended from the once “prolific” Puritans, had dropped precipitously—findings that the Committee regarded as “well calculated not only to surprise but to excite alarm.”¹⁷⁰

Encapsulating the intersecting nature of the medical profession’s concern with the aborting matron’s power to simultaneously destabilize the domestic and the national order, the Report shares Allen’s perplexity as to why married women who were “among the intelligent, the refined, and the religious” were placing “so low an estimate . . . upon the value of human life” and engaging in such a “persistent effort . . . to defeat one of the most important objects of the marriage institution.”¹⁷¹ It continues on to endorse his explanation for this state of affairs, namely, that “some radical change in the organization of woman” had blunted her “natural instincts” resulting in a state of affairs that, according to Allen, was unparalleled “in the history of any other civilized people, race, or nation.”¹⁷²

Although ignored by the Court, even a cursory reading of the 1871 Report thus makes it clear that the protection of fetal life, which is hardly even mentioned, was far from the sole, or perhaps even the primary, aim of the antiabortion physicians. Having cast the aborting matron as doubly subversive for refusing to display a large brood of children as the jeweled exemplars of an unwavering commitment to “a virtuous and honorable affection,” it reveals the physicians’ deep commitment to restoring domestic and national order by impressing upon married women—most notably those of “native” stock—that their primary obligation was to propagate the species in accordance with divine command.

Before considering the potential significance of the Court’s elision of the gendered underpinnings of our nation’s criminal abortion laws in relationship to the emergence of the contemporary woman-protective antiabortion argument,¹⁷³ it behooves us to briefly

169 *Id.* at 242. Allen’s work is discussed *supra* at notes 80, 141, and 144 and *infra* at note 226.

170 *Id.* at 242–44.

171 *Id.* at 244 (quoting Allen, *supra* note 80).

172 *Id.*

173 As we shift our gaze to the current pro-woman/pro-life platform, as noted in the Introduction, we also turn our gaze away from the racial and nativist underpinnings of our nation’s criminal abortion laws, as the continuity is less apparent, thus leaving this analysis to a future research project.

consider why it might have read the history of the physicians' antiabortion campaign so narrowly—although, of course, there is no way to be certain about this. In this regard, Linda Greenhouse's analysis of the *Roe* decision is quite instructive.

Zeroing in on the place of pride that the *Roe* Court gave to physicians in the decision-making process, with, for example, its concluding statement that the decision “vindicates the right of the physician to administer medical treatment according to his professional judgment,”¹⁷⁴ Greenhouse observes that “[t]o modern ears . . . *Roe*'s paternalistic assumption that doctors . . . know what is best for their female patients sounds archaic.”¹⁷⁵ Significantly, she writes that a reader of the decision “would come away with no reason to suspect that outside the four corners of this opinion, society was in ferment over a new discourse of women's rights” and that it “would be quite reasonable for our reader to assume, in fact, that none of this discourse had even been presented to the Court in *Roe*.”¹⁷⁶

However, as Greenhouse documents, this was not the case as both the brief submitted by Jane Roe as well as those filed by various amici provided the Court with vigorous “women's-rights argument[s] that reflected the broader social and political context in which the right to abortion was being debated.”¹⁷⁷ For example, an amicus brief filed by the American Association of University Women asserted that:

A woman whom the law would force to carry an unwanted pregnancy to term is, quite plainly, restricted and imposed upon to a greater degree than by any other action which the state could take, save execution of a sentence of death or possibly long term imprisonment.¹⁷⁸

But, as Greenhouse expounds, the “impact [of these arguments] on the Court was slight,” particularly when compared to the apparent influence that the briefs filed by the medical professions asserting that the existing criminal laws interfered with “the ability of physicians

174 *Roe v. Wade*, 410 U.S. 113, 166 (1973).

175 Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 *SUFF. L. REV.* 41, 42 (2008).

176 *Id.* at 45.

177 *Id.* at 45–47.

178 *Id.* at 47 (quoting Brief of Am. Ass'n of Univ. Women as *Amicus Curiae* Supporting Appellants at 23, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70–18, 70–14)).

to practice medicine in accordance with their highest professional standards” had on the Court.¹⁷⁹

Seeking to explain why the Court was “so attentive to one set of voices while evidently remaining oblivious to others,” Greenhouse concludes that it may not have been “ready to listen to the feminist voices . . . that were being raised in defense of reproductive freedom,” as this would have required it to “traverse two revolutions in thought in a single opinion.”¹⁸⁰ Reinforcing this theory, she further suggests that the “medicalized framing of *Roe*” may well have “offered the Court a safe realm . . . to which to entrust ‘decisions which required normative rather than scientific judgments, under a mask of professional expertise.’”¹⁸¹

Supporting Greenhouse’s explanation, in discussing why sex equality was “efface[d] . . . as a normative basis for the abortion right,”¹⁸² Siegel writes that at the time *Roe* was decided,

the Justices had scarcely decided any sex discrimination cases, and, while responsive, were plainly only beginning to understand the nature of the [women’s] movement’s claims. To the extent they did, the Justices nonetheless employed professional frames to justify the abortion right rather than the more *politically provocative* women’s rights frame, which called into question norms governing sex and family life.¹⁸³

Elaborating on the politically provocative nature of the women’s rights frame, Siegel notes that in the years leading up to *Roe*, the women’s movement’s “sex equality claims for

179 Greenhouse, *supra* note 175, at 47–48; see also Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010) [hereinafter Siegel, *Roe’s Roots*].

180 Greenhouse, *supra* note 175, at 48 (quoting JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID 23 (2005)).

181 *Id.* (quoting Nan D. Hunter, *The Myth of Medical Independence*, 72 BROOK. L. REV. 147, 197 (2006)).

182 Siegel, *Roe’s Roots*, *supra* note 179, at 1900.

183 *Id.* (emphasis added). As Siegel further explains, the emergence of a constitutionalized sex discrimination jurisprudence also “effaced equality as a basis for reproductive rights.” Critically in this regard, not only did the landmark decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973), which “stated the case for equal protection scrutiny of sex-based state action,” do so “without mentioning laws regulating reproduction,” but a year later, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court also “rejected arguments that laws discriminating against pregnant women reflect sex stereotyping, and held that, for equal protection purposes, discrimination on the basis of pregnancy was not necessarily the same as discrimination based on sex.” *Id.* at 1901.

abortion rights” and its push for an Equal Rights Amendment to the federal constitution had mobilized a conservative antifeminist backlash which cast feminism “as a total assault on the role of the American woman as wife and mother and on the family as the basic unit in society.”¹⁸⁴

Applying Greenhouse and Siegel’s view backward in time could possibly explain the *Roe* Court’s failure to grapple with the complex reality underlying our nation’s criminal abortion laws, although, again, there is no way of knowing this with any certainty. More specifically, had the Court confronted this legacy it would by necessity have been forced to recognize the fact that compelled maternity was not an inadvertent byproduct of these laws, but was, in fact, these laws’ intended purpose in order to inscribe normative understandings of divinely ordained domesticity upon women’s reproductive bodies. In turn, this recognition might well have obliged the Court to reason about the challenged Texas law within the “new feminist discourse of women’s rights”—a direction that, as these scholars argue, it was not yet ready to traverse.

III. Placing the “Abortion-Minded Woman” at the Center: The Reemergence of a Gender Paternalistic Antiabortion Argument

In the wake of the *Roe* decision, the antiabortion movement sought to persuade the public that abortion is wrong “simply because all life is sacred.”¹⁸⁵ As Rose writes, this fetal-rights frame “put women’s perceived interests in conflict with those of fetuses, casting the million-plus American women who have abortions each year as morally repugnant perpetrators of a crime against their own unborn children.”¹⁸⁶ This overarching focus “on the fact that children are being *killed* by abortion,”¹⁸⁷ was a well-placed counter parry to the *Roe* Court’s rejection of the idea of fetal personhood, which the state of Texas had urged it to embrace. As Luker puts it, the Court’s ultimate conclusion that “the embryo is not a person, but only a potential person” was an anathema to those with a “commitment to the sacredness of embryonic life.”¹⁸⁸

184 *Id.* at 1900 (quoting Phyllis Schlafly, *What’s Wrong with “Equal Rights” for Women?*, PHYLLIS SCHLAFLY REP., Feb. 1972, at 1, 4).

185 REARDON, *supra* note 14, at 3.

186 Melody Rose, *Pro-Life, Pro-Woman? Frame Extension in the American Antiabortion Movement*, 32 J. WOMEN, POL. & POL’Y 1, 7–8 (2011).

187 REARDON, *supra* note 14, at 1 (emphasis in original).

188 LUKER, *supra* note 39, at 140.

Although the dominant approach of the antiabortion movement was to make “its case in the public square as well as the courts by emphasizing the humanity of the fetus,”¹⁸⁹ the post-*Roe* era also witnessed the exponential growth of crisis pregnancy centers (CPCs), in which a mostly volunteer female staff counseled pregnant women towards motherhood in order to shield them from a life of emotional trauma.¹⁹⁰ As Karissa Haugeberg documents, during the 1970s and 1980s “CPC volunteerism operated at the grass roots and appealed to women who did not agree with the aims of the fetus-focused conventional activism and who did not identify with other activists who had begun organizing protests against abortion.”¹⁹¹ CPC counselors are often drawn to this work based on their own negative abortion history, as shaped by a religious belief that all children are gifts from God and all women are fated for motherhood.¹⁹²

Throughout the 1980s, this woman-centered approach largely remained ensconced within the intimate space of the CPCs and the emergent “abortion-regret” organizations, such as Women Exploited by Abortion (WEBA), which offered women a safe space within which to share personal stories of post-abortion grief.¹⁹³ In short, this feminized antiabortion discourse threaded women together in supportive environments with little discernible impact on the public face of the antiabortion movement. During this time, as Siegel notes, not only were claims about abortion’s harmful impact on women “overshadowed by fetal-

189 Francis J. Beckwith, *Taking Abortion Seriously: A Philosophical Critique of the New Pro-life Rhetorical Shift*, ETHICS & MED. 155, 155 (2001).

190 As Alesha Doan explains, the antiabortion movement is comprised of three branches or streams that “share the ultimate goal of wanting to end abortion but disagree on the best approach to achieving their goal.” ALESHA DOAN, OPPOSITION AND INTIMIDATION: THE ABORTION WARS AND STRATEGIES OF POLITICAL HARASSMENT 89 (2009). Specifically, the direct action stream focuses on “the immediacy of ‘saving’ babies and women by deterring women from seeking abortion services via direct intervention [and] keeps the issue visible and salient in local communities”; the political stream seeks to “keep an anti-abortion agenda visible in political institutions” and works to “shape change through traditional political channels such as lobbying, political campaigns, and litigation”; while the outreach stream, which is comprised of CPCs, “offers a variety of services for women experiencing a ‘problem pregnancy’. . . [in order to] encourage her to forgo an abortion and either keep the baby or place the child up for adoption.” *Id.* at 89–91.

191 KARISSA HAUGEBERG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY 19 (2017).

192 See generally *id.* at 9–22; Alesha Doan & J. Shoshanna Ehrlich, “Teaching Morality by Teaching Science”: *Religiosity and Abortion Regret*, in REPRODUCTIVE ETHICS: NEW CHALLENGES AND CONVERSATIONS (Lisa Campo-Engelstein & Paul Burcher eds., 2017); Kimberly Kelly, *In the Name of the Mother: Renegotiating Conservative Women’s Authority in the Crisis Pregnancy Movement*, 38 SIGNS 203 (2012).

193 Regarding abortion-regret groups, see HAUGEBERG, *supra* note 191, at 42–45.

focused arguments,” they were generally “powerfully opposed by antiabortion advocates who thought [them] an ungrounded distraction from the real moral states of the abortion debate.”¹⁹⁴ However, in the early 1990s, this woman-centered approach was appropriated by male antiabortion activists as a strategy for reinvigorating their movement.

A. The Emergence of the “Pro-Woman/Pro-Life” Antiabortion Position

During the early 1990s, the antiabortion movement began to lose momentum under the cumulative weight of a series of setbacks. These included the election of pro-choice presidential candidate Bill Clinton; the resounding failure of Congress to nullify *Roe* by way of a federal measure, either declaring that life begins at conception or returning the abortion issue to the states;¹⁹⁵ and the Court’s ignominious 1992 decision in *Planned Parenthood v. Casey* that reaffirmed the fundamental nature of the abortion right.¹⁹⁶ As a result, some activists lost faith in the use of “traditional political channels such as lobbying, political campaigns, and litigation” to accomplish their ends and instead turned to confrontational and violent tactics in order to shut down the abortion “industry.” Select tactics ranged from pickets and demonstrations to the firebombing of clinics and the targeted murder of abortion doctors and clinic staff.¹⁹⁷

In response to this radical turn, “the anti-abortion movement became perceived as a violent, extremist, and fanatical movement by more and more of the American public, creating a significant public relations challenge.”¹⁹⁸ This challenge was not lost on its leaders. Speaking directly to this point, John Willke, the president of the highly influential National Right to Life Committee, lamented that based on market research the general public viewed pro-life people as “right-wing religious zealots, [who] shoot abortionists and burn down clinics, [who] are fetus-lovers and care little about the mother after she delivers . . . and are not compassionate to women.”¹⁹⁹

194 Siegel, *The Right's Reasons*, *supra* note 15, 1161–62 (emphasis in original).

195 DOAN, *supra* note 190, at 83.

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

197 DOAN, *supra* note 190, at 89, 157.

198 PAUL SAURETTE & KELLY GORDON, *THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF PRO-WOMAN RHETORIC IN CANADA AND THE UNITED STATES* 78 (2015).

199 JOHN C. WILLKE & BARBARA WILLKE, *WHY CAN'T WE LOVE THEM BOTH: QUESTIONS AND ANSWERS ABOUT ABORTION* 16 (1997).

Seeking to counter this perception and persuade the public that “pro-lifers *are* compassionate to women,”²⁰⁰ some antiabortion activists accordingly began to argue that the time had come for the movement to shift away from its traditional fetal-rights frame in favor of a “pro-woman” message that would attract new adherents to the cause.²⁰¹ As a result, as Siegel writes, what had been a “therapeutic and mobilizing discourse initially employed to dissuade women from having abortions and to recruit women into the abortion cause” within the private and dominantly female CPC movement was transformed into a “political discourse,” or what Siegel refers to as the new “woman-protective antiabortion argument,” which was designed to “persuade audiences *outside* the movement’s ranks” that abortion should be restricted in order to protect women from harm.²⁰²

In 1996, David C. Reardon, a chief architect of this “pro-woman/pro-life” argument against abortion, published *Making Abortion Rare: A Healing Strategy for a Divided Nation* in which he called upon activists to place the “aborted-women” at the center of its plan to “create a culture where abortion is not just illegal, but is *unthinkable*.”²⁰³ He thus urged his compatriots to adopt a strategy aimed at persuading the “ambivalent majority,” by whom he meant those who are “discomfited by the killing of unborn babies” but are willing to set aside their uneasiness based upon their “concerns for the welfare of women,”²⁰⁴ to join their cause. Accordingly, rather than “reduc[ing] public sympathy for women,” who turned to abortion, Reardon insisted that they should instead seek to “increase it and align it with our own outrage at how women are being victimized” in order to advance “our political agenda.”²⁰⁵ In short, he hoped to reverse the “countercultural” nature of the “traditional pro-life strategy”²⁰⁶ due to its anti-woman nature by repositioning the movement as the

200 *Id.* at 17 (emphasis in original).

201 *See generally* Rose, *supra* note 186.

202 Siegel, *The Right's Reasons*, *supra* note 15, at 1649 (emphasis in original).

203 REARDON, *supra* note 14, at xv (emphasis in original). Although a minority voice at the time, Reardon was not alone in calling for this frame shift. Most prominently, in addition to John Willke, Frederica Mathewes-Green, a significant figure in the CPC movement, also pushed the movement to adopt a woman-focused approach in order to break out of the “It’s a baby,” “No, it’s her right” stalemate. Frederica Mathewes-Green, *Seeking Abortion's Middle Ground*, WASH. POST (July 28, 1996); *see also* Paul Swope, *Abortion: A Failure to Communicate*, 82 FIRST THINGS 31 (1998).

204 REARDON, *supra* note 14, at 21.

205 *Id.* at 27. As discussed *infra* notes 226–30, Reardon’s understanding of women’s victimization was firmly anchored in his religious beliefs regarding God’s intended plan for women.

206 *Id.* at 136–37.

advocate for the “*authentic* rights of women.”²⁰⁷

While a detailed discussion of the diffusion of the “pro-woman/pro-life” position is beyond the scope of this Article, one need only look at the Supreme Court’s decision in *Gonzales v. Carhart* and the Report of the South Dakota Task Force to Study Abortion, which are both quoted at the outset of this Article, to appreciate the extent to which the pro-woman message has spread.²⁰⁸ In *Gonzales*, although acknowledging the lack of “reliable data to measure the phenomena,” the Court nonetheless relied on the proposition that it was “unexceptional to conclude that some women come to regret their choice to abort the infant life they once created and sustained” and that “[s]evere depression and loss of self-esteem can follow” as a primary justification for its conclusion that the federal “Partial-Birth” Ban of 2003 was constitutional.²⁰⁹

In support of this proposition, the Court cited the amicus brief filed by the deeply conservative and religiously-oriented Justice Foundation on behalf of Sandra Cano (the plaintiff in *Doe v. Bolton*,²¹⁰ the companion case to *Roe v. Wade*)²¹¹ and “180 Women Injured by Abortion,” whose sworn testimonies of abortion grief were solicited by Operation Outcry—a self-described ministry of the Justice Foundation.²¹² Notably, the Court cited the pages of the brief that referenced the work of Reardon, and characterized him as “one of the leading experts on the effects of abortion on women,”²¹³ despite the fact that, as discussed

207 *Id.* at ix.

208 For a detailed discussion of the Report of the South Dakota Task Force, see Siegel, *The Right’s Reasons*, *supra* note 15, at 1643–56; for details on the diffusion of the woman-protective antiabortion position, see *id.* at 1647 n.20 and Saurette & Gordon, *supra* note 198, at 301–08. One can also see the diffusion of this approach by looking at the websites of antiabortion groups such as Feminists for Life, (FEMINISTS FOR LIFE, www.feministsforlife.org [perma.cc/MU52-Z8AP]); Hope After Abortion (HOPE AFTER ABORTION, www.hopeafterabortion.org [perma.cc/6QV5-KKHG]); Operation Outcry, (OPERATION OUTCRY, <http://www.operationoutcry.org/> [perma.cc/DQ69-8XGR]).

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

210 *Doe v. Bolton*, 410 U.S. 179 (1973).

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

212 OPERATION OUTCRY, <http://thejusticefoundation.org/cases/operation-outcry/> [perma.cc/8A8K-NG69].

213 Brief for Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as *Amici Curiae* Supporting Petitioner at 22, *Gonzales v. Carhart*, 550 U.S. 124 (2006) (No. 05-380), 2006 WL 1436684. For a detailed critique of the Court’s reliance on this brief, see J. Shoshanna Ehrlich, *Ministering (In)justice: The Supreme Court’s Misreliance on Abortion Regret in Gonzales v. Carhart*, 17 NEV. L.J. 599 (2017).

below, his views have been discredited by the evidence-based research of highly respected professional organizations.²¹⁴

The Task Force Report likewise relied upon the Operation Outcry affidavits in supporting its claim that abortion is “inherently dangerous to the psychological and physical health of the pregnant mother.”²¹⁵ Grounded in the proposition that a “mother’s unique relationship with her child is one of the most intimate and important of relationships” it went on to explain that:

this method of waiver of the mother’s rights expects far too much of the mother. It is so far outside the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent . . . or the abortion provider must encourage her to defy her very nature as a mother to protect her child.²¹⁶

Echoing Reardon’s assertion that the time had come for the antiabortion movement to represent the “*authentic* rights of women,”²¹⁷ the Task Force accordingly stated that the “current legal policy found in our country today, that promotes the destruction of [a mother’s] relationship with her child . . . instead of her relationship with the child is a *denigration* of women”; and recommended replacing it with one that would instead “promote motherhood and counter [the idea] that the exclusive ‘right’ to abortion liberates women.”²¹⁸

Although the “pro-woman/pro-life” antiabortion position has clearly traveled far since Reardon first published *Making Abortion Rare*, as he ruefully acknowledged in the book’s introduction, at the time of publication in 1996, he faced an uphill battle persuading activists to adopt the pro-woman approach, which had been “misunderstood and treated like a distant relative of the ‘main’ pro-life cause.”²¹⁹ As he explains:

214 See *infra* note 255.

215 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 55, 66.

216 *Id.* at 56.

217 REARDON, *supra* note 14, at ix (emphasis in original).

218 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 66 (emphasis added).

219 REARDON, *supra* note 14, at vii.

I never intended to write this book. For the last twelve years, my goal has been to educate the general public about how women are seriously injured and exploited by abortion. I have discovered, however, that I am instead spending most of my time trying to explain to pro-life activists exactly *why* post-abortion issues are *the key* to converting hearts—*the key* to winning the battle for life.²²⁰

Although there is no reason to doubt the accuracy of Reardon's assessment of the difficulty of the task that lay before him, had he taken a longer view of the matter, he would have seen that rather than representing a radical break from the past, as we have seen, our criminal abortion laws were rooted in the woman-protective views he was now advocating. In short, as we have seen, these laws were never simply about protecting the unborn, but had from their inception been intended to manage women's reproductive bodies.²²¹

B. New Wine in Old Bottles

Although there certainly are some differences between the views of the nineteenth-century antiabortion physicians and the contemporary proponents of the "pro-woman/pro-life" position, as articulated most clearly by Reardon, a direct and demonstrable historic through-line nonetheless exists between the gendered narratives that each has employed in order to restrict women's bodily autonomy. This narrative arc is best conveyed by a consideration of three closely-linked core themes, namely: the idea of abortion as incompatible with women's true nature, the impossibility of meaningful consent, and the emotional costs associated with violating one's nature.

Before turning to these themes, two caveats are in order. First, as we are about to see, while there is an explicit narrative arc that directly connects the gendered arguments advanced by the physicians and those made by proponents of today's "pro-woman/pro-life" position across time and space, there is not an obvious link with regard to racialized themes. Given that these are not openly articulated in the same way, far more excavation is required to determine if and how such views are conjoined with the gender tropes in today's woman-protective antiabortion position. Accordingly, although we examined the nineteenth-century effort through an intersectional lens, this approach will not be carried

220 *Id.* (emphasis in original).

221 It is at this juncture that we drop the racialized tropes that were woven into our criminal abortion laws from our discussion. As indicated *infra* at notes 222–24, determining if these directly track forward into the contemporary "pro-woman/pro-life" position requires further inquiry.

through to the present within the confines of this Article.

Of course, this is not intended to suggest that current attacks on abortion rights are not deeply racialized. By way of example, antiabortion groups have erected billboards in predominantly African American neighborhoods that warn of a “black genocide” being waged by the likes of Planned Parenthood. This campaign is designed to persuade the community that their children are an “endangered species” due to the deliberate targeting of black women by a racially motivated white abortion industry.²²²

Fighting back against this initiative, the group SisterSong Women of Color Reproductive Justice Collective explains that this is a “misogynistic attack to shame-and-blame black women who choose abortion, alleging that we endanger the future of our children . . . [and] to claim that black women have a racial obligation to have more babies . . . despite our individual circumstances.”²²³ Also pushing back against this effort, Dr. Willie Parker, writes of his aversion, as “an African American abortion provider”²²⁴ to this cynical use of “women of color as pawns in a much bigger game,” the goal of which, he argues is to “eventually limit access to abortion for *all* women, including, and especially, white women. Because the thing that all too many white antiabortion activists really want, which they can’t say out loud, is for white women to have more babies in order to push back against the browning of America.”²²⁵

The second caveat is that the below discussion is intended to offer a comparative view of essential gender-focused (as distinct from fetal-focused) themes that cut across and link together two distinct generations of antiabortion activists. Given this focus, comprehensiveness is not the primary goal; rather it is to highlight the ways in which the

222 See TOOMANYABORTED.COM, <http://www.toomanyaborted.com> [perma.cc/HL8D-SALG].

223 SISTERSONG, POLICY REPORT, RACE, GENDER AND ABORTION: HOW REPRODUCTIVE JUSTICE ACTIVISTS WON IN GEORGIA (2010), https://www.trustblackwomen.org/SisterSong_Policy_Report.pdf [perma.cc/2ZVC-RM3C].

224 WILLIE PARKER, LIFE’S WORK: A MORAL ARGUMENT FOR CHOICE 161 (2017).

225 *Id.* at 164. For additional sources on the racial implications of contemporary attacks on abortion rights, including those writing within a reproductive justice framework, see generally LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE (2017); JAELE SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE (2016); Jessica Gonzalez-Rojas, *Abortion Laws Have Created Two Nations, and Women of Color Pay the Price*, THE HILL (Oct. 1, 2014), <http://thehill.com/blogs/congress-blog/healthcare/219340-abortion-laws-have-created-two-nations-and-women-of-color-pay> [perma.cc/EP5T-ZM8Q]; CENTER FOR REPRODUCTIVE RIGHTS, WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN (2010), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf [perma.cc/XJK6-U5WF].

contemporary woman-protective approach recapitulates the deeply paternalistic approach to women's reproductive bodies that was woven into the very fabric of the nation's criminal abortion laws.

1. Abortion as Incompatible with Women's True Nature

As discussed above, in contradistinction to the *Roe* Court's narrow fetal-focused framing of the physicians' nineteenth-century antiabortion campaign, these activists were in fact deeply preoccupied with the place and meaning of abortion in women's lives. Crucially, as we have seen, they pointed to "married life and the production of children" as the divinely ordained end points of female existence.²²⁶ Accordingly, they characterized abortion as a "physiological sin"²²⁷ based on the belief that the practice subverted a woman's "holiest duty . . . to bring forth living children."²²⁸ Not only did they derive "a wife's duty from . . . facts about her body,"²²⁹ they infused these facts with a deep religiosity, which inexorably led them to conclude that abortion was "against nature and all natural instinct."²³⁰

Like the antiabortion physicians, Reardon also firmly asserts that abortion is directly contrary to women's divinely constituted nature. In a section of *Making Abortion Rare* headed "The Natural Order of Things," he states as follows: "We begin with a very simple observation. In God's ordering of creation, it is only the mother who can nurture her unborn child. All that the rest of us can do, then, is to nurture the mother."²³¹ Grounded in this truth, he continues on to explain that this "is why, from a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself."²³² Paralleling the physicians' firm belief that woman was put on earth in order to procreate, Reardon thus insists that this natural law proposition "is not an optional truth. It reflects God's ordering of creation."²³³ Although less explicitly religious, the Task Force Report

226 Allen, *supra* note 80, at 16.

227 POMEROY, *supra* note 81, at 97.

228 STORER, WHY NOT?, *supra* note 21, at 81.

229 Siegel, *Reasoning from the Body*, *supra* note 18, at 296.

230 STORER, WHY NOT?, *supra* note 20, at 15.

231 REARDON, *supra* note 14, at 4.

232 *Id.* at 5.

233 *Id.* at 6. For further discussion of the ways in which criminal abortion laws and the Court's jurisprudence

likewise embraces this essentialized understanding of woman's true nature. Yoking her destiny to her reproductive physiology, it explains that "the intrinsic beauty of womanhood is inseparable from the beauty of motherhood," which accordingly makes it far outside the "normal conduct of a mother to implicate herself in the killing of her own child."²³⁴

Although the nineteenth-century physicians framed their antiabortion argument in terms of woman's divinely ordained duty to bring forth living children, and Reardon instead focuses on the divinely inscribed bond between a woman and her unborn child, for both, the travesty of abortion is that it subverts a natural and unalterable truth derived from women's biological capacity to bear children. In short, it is this disruption of God's gendered order that must be righted through the wrapping of the law around woman's reproductive body so as to restore her rightful place in the kingdom.

Although resolutely united in their view of abortion as being in direct and irresolvable tension with women's true nature, two important differences between the antiabortion physicians and the contemporary proponents of the pro-woman/pro-life position should be noted here. First, as we have seen, with the possible exception of the married woman who did not realize that the pre-quick fetus was alive, the nineteenth-century physicians had "nothing but contempt" for the "married shirk who disregards her divinely-ordained duty"²³⁵ by rejecting motherhood.

In contrast, the modern woman-centered approach seeks to recast the aborting woman as a victim. As Reardon explains, although "[m]any good-hearted people continue to recoil in horror at anyone who could 'kill her baby,'" and they wonder "'[w]hat kind of monster could do such a thing?'" it is important to instead "portray aborting women as confused, and driven by despair" in order to persuade the ambivalent majority that abortion harms women, and thus attract them to the movement.²³⁶

reflect "stereotypes about women's judgment and morality," see Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293, 294 (2013); Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409 (2013); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009); Siegel, *The Right's Reasons*, *supra* note 15; Siegel, *Reasoning from the Body*, *supra* note 18.

234 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 56, 67.

235 GARDNER, *supra* note 31, at 8, 112.

236 REARDON, *supra* note 14, at 8, xiv.

Secondly, while the nineteenth-century physicians made no attempt to conceal the religious origins of their views regarding women's true nature as they took their cause into the public arena, in *Making Abortion Rare*, Reardon expressly recognizes that for purposes of public consumption, the divine wellspring underpinning the woman-protective approach must be buried under the guise of scientific rationality. He accordingly proposes that the movement adopt the strategy of "teaching morality by teaching science," in order to persuade "nonbelievers" of the truth of their message, which, it should be noted, he asserts will eventually lead them to "respect the wisdom of God's law."²³⁷

In like fashion, Allan Parker, president of the Justice Foundation, shared with his followers that the brief, which the Justice Foundation went on to file in the *Gonzales* case, was inspired by a revelation from God when he was *en route* home from the annual March for Life Rally in Washington, D.C. in 2000. Speaking to Parker in the Dulles-Fort Worth airport, the Lord informed him that "only through the testimonies of women hurt by abortion could [they] refute the lie that abortion is good for women."²³⁸ However, the amicus brief itself makes no mention of this revelatory pathway to the Court, and although the appended affidavits of the 180 injured women are shot through with religious motifs, the excerpted portions in the body of the brief were carefully edited to exclude any hint of religious themes.

2. The Impossibility of Meaningful Consent

Flowing directly from the shared view of abortion as inimical to women's essential and inviolable maternalism, we come to another shared theme—namely, the virtual impossibility of meaningful consent. As understood, this impossibility is linked either to a woman's ignorance regarding the humanity of her unborn child, or more likely to the meaninglessness of authorizing an act that threatens to destroy one's essential being.

Starting with the antiabortion physicians, as we have seen, some attributed the married woman's decision to abort to her ignorance regarding the fact that "the being within [her] is indeed *animate*—that it is, in verity, a *human being*."²³⁹ In turn, this claim of ignorance enabled them to view her as the unintentional destroyer of her unborn child who would be stricken with "grief and remorse" were the truth laid upon her "otherwise innocent

237 *Id.* at 11.

238 E-mail from Allan E. Parker, President, The Justice Found. (Nov. 11, 2015) (on file with author).

239 Hodge, *supra* note 27, at 18 (emphasis in original).

bosom.”²⁴⁰ In like manner, the South Dakota Task Force to Study Abortion claims that many women do not realize that abortion will “terminate the life of a human being,” and that this basic “lack of understanding” is compounded by abortion providers who are intent upon deceiving them into believing that their unborn child is “nothing but tissue.”²⁴¹ So viewed, a woman’s consent to abortion is thus effectively vitiated by her lack of understanding that she is essentially authorizing the murder of an existing child who is already a member of her family.²⁴²

However, ignorance itself is not the key consideration here. As we have seen, most nineteenth-century physicians attributed the abortion decision to trivial and frivolous considerations, such as that a woman “‘does not want to be bothered with any more brats,’ ‘[c]an hardly take care of those she has,’ ‘is going to Europe in the spring,’ etc.”²⁴³ Accordingly, no matter how fervent and sincere her desire to avoid the burdens of motherhood, because, for example, she was overwhelmed by caring for her existing children, or had other aspirations, her concerns were dismissed as flimsy and unwarranted justifications for permitting her body to become “a den of murder.”²⁴⁴ In tautological fashion, the reasons underlying a woman’s decision to terminate her pregnancy were dismissed as inauthentic because they were at odds with her divinely-ordained nature, and because they contravened her essentialized being, they were dismissed as intrinsically without merit. Even more blatantly dismissive of women’s decisional capacity, Storer simply declared that pregnant women were predisposed to “temporary actual derangement,” and thus were prone to make a decision (namely to terminate a pregnancy) that “at other times [they] would turn from in disgust or dismay.”²⁴⁵

Compounding the believed inauthenticity of a woman’s consent, many physicians blamed the Women’s Rights Movement for misleading women into thinking that “the

240 STORER, *WHY NOT?*, *supra* note 20, at 35.

241 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 4.

242 Both South Dakota and Missouri have resolved this problem by requiring that women be informed that an abortion will “terminate the life of a whole, separate, unique, living being.” MO. REV. STAT. § 188.027.1(2) (2017); S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2017). The Missouri law requires that this statement be included in the printed materials provided by the Department of Health and Human Services that a physician must provide to woman prior to performing an abortion.

243 Pritchett, *supra* note 70, at 471.

244 *Infantiphobia and Infanticide*, *supra* note 88, at 212.

245 STORER, *WHY NOT?*, *supra* note 20, at 75.

noblest purposes of their being as alike a disaster and disgrace.”²⁴⁶ Accordingly, the abortion-minded, married woman was regarded as laboring under the false belief that “she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance.”²⁴⁷ So viewed, consent to abortion was effectively dismissed as the product of a false messiah who deluded women into the view that they were “born for higher and nobler purposes than the propagation of [the] species.”²⁴⁸

Moving forward in time, Reardon and others in the antiabortion movement who have likewise mobilized around the claim that abortion “seriously hurt[s] women,”²⁴⁹ likewise challenge the ability of a woman to authorize a procedure that demands she “defy her very nature as a mother to protect her child.”²⁵⁰ As explained by the South Dakota Task Force, it “expects far too much of the mother” to expect her to “implicate herself in the killing of her own child,” as this act is outside the parameters of her “normal conduct.”²⁵¹ Another way to look at this is that, in consenting to abortion, a woman would also be authorizing her own destruction since, as Reardon vividly puts it, it is “impossible to rip a child from the womb of a mother without tearing out a part of the woman herself—a part of her heart, a part of her joy, a part of her maternity.”²⁵²

Accordingly, if not based in ignorance, consent is typically viewed as the result of third-party coercion. It may be at the hands of the “abortionist,” who encourages her to defy her nature, perhaps because, as Reardon asserts he stands to profit from the practice or is “focused on creating the perfect society through population control.”²⁵³ Or it may be a male partner or parent who pressures a woman into “accepting an unwanted ‘safe and legal’ abortion because it will be ‘best for everyone.’”²⁵⁴ Reinforcing this view, Reardon

246 STORER, *IS IT I?*, *supra* note 92, at 112.

247 Pallen, *supra* note 97, at 205.

248 Storer, *Two Frequent Causes of Uterine Disease*, *supra* note 50, at 198.

249 See, e.g., Siegel, *The New Politics of Abortion*, *supra* note 15; Siegel, *The Right's Reasons*, *supra* note 15, at 1023–29; FEMINISTS FOR LIFE, *supra* note 208; OPERATION OUTCRY, *supra* note 208.

250 REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 56.

251 *Id.*

252 REARDON, *supra* note 14, at 5.

253 *Id.* at 29–30.

254 *Id.* at 34; see also REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 1, at 4–5, 39. Of course, this discussion is not intended to ignore the possibility some women may indeed feel pressured

proclaims that if women were “guaranteed a free and informed choice,” in most instances it would naturally lead them to “decide that childbirth is clearly their healthiest choice.”²⁵⁵

Of course, the view that women lack the decisional capacity or the moral agency to make an informed decision about abortion “reflects a gender-stereotyped view of women’s nature,”²⁵⁶ which extends both back in time and well beyond this singular act. It invokes the discredited regime of protective labor laws which were premised on the view, as the Court explained in *Muller v. Oregon*, that women required “special care that her rights may be preserved.”²⁵⁷ A view that, as Justice Ginsburg succinctly put it in her dissenting opinion in *Gonzales*, “reflects ancient notions about women’s place in the family and the Constitution—ideas that have long since been discredited.”²⁵⁸

3. The Emotional Cost of Violating One’s Nature

The last shared theme under consideration is that of the adverse emotional consequences that both generations of activists assert flow directly and ineluctably from the deliberate disruptions of woman’s divinely ordained maternal nature. As understood by the nineteenth-century physicians, this suffering was a form of righteous punishment for flouting the injunctions of respectable womanhood. As seen by Storer, this breach of nature essentially insured that at some point in her life, the aborting woman would awaken to the

into terminating a pregnancy, just as some may feel pressured into carrying an unintended pregnancy to term, or into having unprotected sex in the first instance. Importantly, however, many public health professionals argue that the stress by the antiabortionists on abortion coercion “sidestep[s] the broader issue of domestic and sexual violence, which is at the root of coercion . . . be it by trying to force the woman to continue with the pregnancy or to abort.” *Health Experts Challenge Coerced-Abortion Laws*, THE AMERICAN INDEPENDENT INSTITUTE, <http://americanindependent.com/217196/health-experts-challenge-coerced-abortion-laws> [perma.cc/33C7-ND3L]. Regarding the link between what is known as reproductive coercion and intimate partner violence, see Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737 (2010); *Fact Sheet: Intimate Partner Violence and Reproductive Control*, PLANNED PARENTHOOD FED’N OF AM. (2012), https://www.plannedparenthood.org/uploads/filer_public/fb/70/fb70f966-e4a2-46e8-900c-9137fed3e636/ipv_and_reproductive_coercion_fact_sheet_2012_final.pdf [perma.cc/4XU5-7HMM].

255 REARDON, *supra* note 14, at xiv.

256 Manian, *supra* note 233, at 225.

257 *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

258 *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

reality that she had acted “against God, humanity, and even mere instinct,”²⁵⁹ and would accordingly suffer “long and unavailing regrets” that would likely lead to “derangement, disaster, or ruin.”²⁶⁰

Tightly moored to the view that abortion is “inherently harmful,” proponents of the pro-woman/pro-life platform place considerable stress on the urgent need to protect women from the devastating emotional consequences of abortion despite the fact that the overwhelming body of evidence-based research, including that conducted by professional organizations such as the American Psychological Association and the Academy of Medical Royal Colleges, soundly refutes the assertion that abortion leads to serious psychological distress.²⁶¹ This discrepancy, however, is not surprising if one recognizes that, as claimed by Reardon, despair is the inevitable result of breaching God’s ordered creation:

we must remember that the interests of a mother and her child are permanently intertwined. This means that the morality of abortion is built right into the psychological effects of abortion. Everyone knows that there is no psychological trauma association with the discarding of menses. But the discarding of an unborn child’s life? *That . . . is inherently traumatic.*²⁶²

Cutting to the chase, he thus makes clear that “when we are talking about the psychological complications of abortion, we are implicitly taking about the physical and behavioral symptoms of a *moral* problem.”²⁶³

259 STORER, WHY NOT?, *supra* note 20, at 37.

260 *Id.* at 49, 37.

261 A detailed discussion of this literature is beyond the scope of this article. For a thoughtful review of major studies, see MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., COMM. ON GOV’T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS (2006) (prepared for Rep. Harry A. Waxman), <http://www.chsourcebook.com/articles/waxman2.pdf> [perma.cc/429L-CAAS]. For more recent studies, see Academy of Medical Royal Colleges, National Collaborating Center for Mental Health, *Induced Abortion and Mental Health* (2011); Brenda Major et al., *Abortion and Mental Health, Evaluating the Evidence*, 64 AM. PSYCHOL. 863 (2009); BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008), <http://www.apa.org/pi/women/programs/abortion/mental-health.pdf> [perma.cc/ZN8Q-883Y].

262 REARDON, *supra* note 14, at 10 (emphasis in original).

263 *Id.* at 10 (emphasis added).

Departing, however, from the nineteenth-century antiabortion physicians who did not seek to disguise the causal link between suffering and the deliberate breach of one's feminine nature, Reardon astutely recognizes that although this link will be immediately apparent to pro-life Christians who "rightly anticipate . . . that any advantage gained through violation of the moral law is always temporary [and] will invariably be supplanted by alienation and suffering," conversion of the ambivalent majority requires "an alternative way of evangelizing."²⁶⁴ As noted above, he thus argues for the "teaching morality by teaching science" in order to appeal to this group's "self-interest" since one can "expect to find compelling evidence" through research that "abortion . . . lead[s] in the end, not to happiness and freedom, but to sorrow and enslavement" since acting against God's moral law is always "injurious to our happiness."²⁶⁵

CONCLUSION

Circling back to the *Roe* decision, although the Court clearly repudiated the view that women's holiest duty is to bear children, it did so without any discussion of the fact that our nation's criminal laws were motivated by a fierce desire to compel married women, particularly if of "native" stock, to fulfill this divinely ordained obligation. Reasoning about the history of these laws as if they were enacted solely to protect prenatal life, the Court missed a vital opportunity to explore how they were also, as Siegel puts it, a type of "caste legislation," which constituted "a traditional mode of regulating women's conduct, concerned with compelling them to perform the work that has traditionally defined their subordinate social role and status."²⁶⁶

We will never know exactly why, once it had decided to engage in an historical analysis of the "medical-legal" history of abortion to uncover what that history "reveal[ed]" about man's attitudes towards the abortion procedure," the *Roe* Court opted to read out the gendered and nativist themes that populated the medical profession's antiabortion campaign. Its narrow reading of this history is made even more perplexing by the fact that it relied upon the 1871 Report of the AMA Committee on Criminal Abortion to excavate the origins of our criminal laws, which, as we have seen, stressed the importance of both of

264 *Id.* at 11.

265 *Id.* Reardon carries out this work through the Elliot Institute, which he founded in 1988 to promote "pro-woman efforts" through research, education, and advocacy. *Our Mission & Ministry: Post-Abortion Research, Education, and Advocacy*, ELLIOT INST. (June 13, 2017), <http://www.afterabortion.org/Resources/ElliotInstitute.pdf> [perma.cc/P39V-HXWK].

266 Siegel, *Reasoning from the Body*, *supra* note 18, at 351.

these themes. It may well be, tracking Greenhouse's suggestion, that the Court was simply not ready to entwine two highly-charged issues within the boundaries of a single decision, or it may be that this history seemed immaterial in light of the fact that Texas sought to defend its law in the name of the fetus.

Almost twenty years later, in *Planned Parenthood v. Casey*,²⁶⁷ the Court moved closer to reasoning about the abortion right within an equality framework, as many feminist scholars have urged it to do.²⁶⁸ It both recognized that the ability of women to “participate equally in the economic and social life of the Nation [had] been facilitated by their ability to control their reproductive lives”²⁶⁹ and made clear that the state’s “vision of the woman’s role, however dominant that vision has been in the course of our history and our culture,” does not warrant the imposition of motherhood as “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.*”²⁷⁰ Although it is evident that the *Casey* Court grasped the connection between abortion regulation and gender status, nothing in the opinion suggests it was aware that this “dominant vision” had been encoded into our criminal abortion laws in order to manage the unruly matron. Rather, the Court located this vision generally within the nation’s history and culture.

As the woman-protective approach has spread, the Court’s failure to recognize the gendered history of our criminal abortion laws assumes greater importance. Had the Court paid closer attention to the reports of the AMA Committee on Criminal Abortion, it would have seen that the protection of fetal life was hardly the sole animating force behind the physicians’ antiabortion campaign. Even a cursory glance at language in the 1871 Report, such as that predicting that a woman who had aborted would end her days as a “withered tree, stripped of its foliage” and bereft of the tender affections of her husband, would have rendered the narrative arc of gender paternalism that links this past effort with the contemporary pro-woman/pro-life agenda far more visible.

In turn, this awareness of the historic continuity in understanding and purpose that unites the nineteenth-century antiabortion physicians and today’s proponents of the pro-

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

268 For a detailed discussion of both the evolution and the value of this approach, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 816 (2007).

269 *Casey*, 505 U.S. at 855–56.

270 *Id.* at 852 (emphasis added).

woman/pro-life position would have opened a discursive space within which at least one additional Justice (most likely Justice Kennedy, author of the majority opinion) might have recognized this long arc of gender paternalism. As a result, he might have been persuaded to join Justice Ginsburg's dissent in which she lashes out at the majority's invocation of regret as an "antiabortion shibboleth" that masked long discredited ideas "about women's place in the family and under the Constitution."²⁷¹ Of particular relevance here is the discredited idea that the "paramount destiny and mission of women are to fulfil[] the noble and benign offices of wife and mother"²⁷²—an "ancient notion" that both undergirds and connects past and present efforts to manage women's bodies based on a naturalized assumption about their fixed and proper place in the universe. In short, had the *Roe* Court reasoned within a gendered paradigm, it would have been clear that the abortion regret narrative seeks to press women into motherhood in derogation of the *Casey* Court's admonition that "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."²⁷³

271 *Gonzales v. Carhart*, 550 U.S. 124, 183–85 (2007) (Ginsburg, J., dissenting).

272 *Id.* at 185 (quoting *Bradwell v. State*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

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