

# The Perversion of a Coerced Mother and Child Reunion

THE ADVENT OF ANTI-ABORTION LEGISLATION DESIGNED TO REFRAME THE ABORTION DECISION AS INVOLVING THE “MOTHER AND HER CHILD” INSTEAD OF THE “WOMAN AND THE FETUS,” DENIGRATING THE FUNDAMENTAL RIGHT OF FEMALES TO EXERCISE REPRODUCTIVE AUTONOMY AS WAS FIRST CODIFIED IN ROE V. WADE

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Mississippi has a population of just about three million people, 51.4% of whom are female<sup>1</sup>, yet it has only one abortion provider in the state: the Jackson Women’s Health Organization.<sup>2</sup> The clinic’s ability to provide those services is tenuous as a result of a 2012 Targeted Regulations of Abortion Providers (TRAP) Law,<sup>3</sup> Mississippi House Bill 1390, that mandates only doctors with hospital admitting privileges be permitted to perform abortion. Though neutral on face, Mississippi has another law in effect that allows for “healthcare facilities to refuse any medical service on religious grounds, which extends to granting admitting privileges;”<sup>4</sup> the sum effect of these two laws is to systematically eradicate abortion in the state. While doctors, all American Medical Association (AMA) board-certified Obstetricians and Gynecologists (OB-GYNs), at the Jackson Clinic applied for hospital privileges, they were rejected on the basis of association with an abortion provide<sup>5</sup>r, a condemnation of the practice but not of the doctor’s abilities to perform. Thus, on the basis of religiously motivated legislators and hospitals, the Jackson Clinic’s doctors failed to comply with the TRAP law, and the Clinic received a notice of intent from the Mississippi Department of Health that indicated that the Clinic was about to lose its license to operate.

After receiving the notice of intent, the Jackson Clinic had ten days to request a hearing with the Mississippi Department of Health before forced closure, had to wait thirty additional calendar days for the Department of Health to set a hearing date on the notice of intent, and knew during the entire process that hearing would not result in a favorable outcome.<sup>6</sup> This notion was reaffirmed by the Governor of Mississippi, Phil Bryant, when he declared that the primary consequence of the TRAP law, to further obfuscate attempts by Mississippi women to receive abortions and exercise autonomy in reproductive decisions by shuttering all state clinics to increase the distance they would have to travel (out of state) to receive such services, was “the first step in a movement... to try to end abortion in Mississippi.”<sup>7</sup> This is just one of the myriad of ways in which states are passing legislation that almost eliminates the availability of safe, legal, and convenient abortions. Leaving the 2,000 women in Mississippi that have abortions performed at the Jackson Clinic yearly to devise an alternative way to conclude their reproductive quandary in the manner they have chosen is victory for the anti-abortion movement; however, the anti-

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<sup>1</sup> "Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2012" (CSV). 2012 Population Estimates. United States Census Bureau, Population Division. December 2012.

<sup>2</sup> Katie McDonough, "Mississippi’s Last Abortion Clinic Hangs in the Balance," Salon Media Group, Inc., [http://www.salon.com/2013/02/01/mississippi\\_last\\_abortion\\_clinic\\_hangs\\_in\\_the\\_balance/](http://www.salon.com/2013/02/01/mississippi_last_abortion_clinic_hangs_in_the_balance/).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Alissa Quart, "Will Mississippi Close Its Last Abortion Clinic?," The Atlantic Monthly Group., <http://www.theatlantic.com/national/archive/2013/01/will-mississippi-close-its-last-abortion-clinic/267352/>.

<sup>6</sup> McDonough, "Mississippi’s Last Abortion Clinic Hangs in the Balance".

<sup>7</sup> Quart, "Will Mississippi Close Its Last Abortion Clinic?".

abortion movement is not composed of women forced to have a child they did not want and now must provide for financially or force to become a ward of the state.<sup>8</sup> Furthermore, since many women seeking abortions are in the lower spectrum of income,<sup>9</sup> some even struggling to procure the \$500 fee that most early stage abortions carry, it is extremely unlikely that these women will be able to support a child financially without significant assistance of the state.

The Jackson Women’s Health Organization’s story has a temporarily happy ending: an injunction was issued to keep the Clinic operational while it challenged Mississippi’s law in federal court, citing unconstitutionally, and Judge Daniel P. Jordan III of the U.S. District Court, while not deciding the constitutionality,<sup>10</sup> blocked provisions of the TRAP law such that the Clinic could remain open. The Judge opined that terminating the right of women to obtain abortions in Mississippi legally would “result in a patchwork system where constitutional rights are available in some states but not others.”<sup>11</sup> But, while the author of the TRAP law contended that the legislation intended to “reducing the number of abortions in Mississippi and assuring that abortions were performed by properly trained doctors who could take women to a hospital in an emergency,”<sup>12</sup> the underlying implications of the law are obvious: that the state intended to decrease the number of abortions, thereby limiting reproductive rights, by using a ludicrous medical justification and unsubstantiated assertions about the fitness of the Jackson Clinic doctors.

Mississippi is only one of the many states adopting TRAP laws to curtail abortion availability; Alabama, recently passed a law similar to MS HB 1390.<sup>13</sup> TARP laws, through extreme overregulation of abortion providers,<sup>14</sup> have been called “an incredibly effective attack on women’s reproductive freedom — rather than banning the procedure itself, abortion opponents hope to make it virtually inaccessible by

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<sup>8</sup> A “ward of the state” can mean a myriad of things. In this context, it refers to child currently under the care of child protective services that lives in either a foster or group home, resulting in immense costs to the state, until the time that they are adopted or “age out” of the system at an age proscribed by previous state law (typically 18-21).

<sup>9</sup> Rachel K Jones, Lawrence B Finer, and Susheela Singh, "Characteristics of Us Abortion Patients, 2008," New York: Guttmacher Institute (2010). “Forty-two percent of women obtaining abortions in 2008 reported family incomes that qualified them as poor, and an additional 27% were low-income (i.e., had family incomes of 100–199% of the federal poverty level).”

<sup>10</sup> Campbell Robertson, "Judge Prevents Closing of Mississippi’s Sole Abortion Clinic," The New York Times(Apr 15, 2013), <http://www.nytimes.com/2013/04/16/us/ruling-prevents-closing-of-mississippi-only-abortion-clinic.html>.

<sup>11</sup> Ibid.

<sup>12</sup> Robbie Brown, "Mississippi’s Lone Abortion Clinic, Given Temporary Reprieve, Fields Rush of Calls," *ibid.*(2013), <http://www.nytimes.com/2012/07/03/us/mississippi-lone-abortion-clinic-given-temporary-reprieve-fields-rush-of-calls.html>.

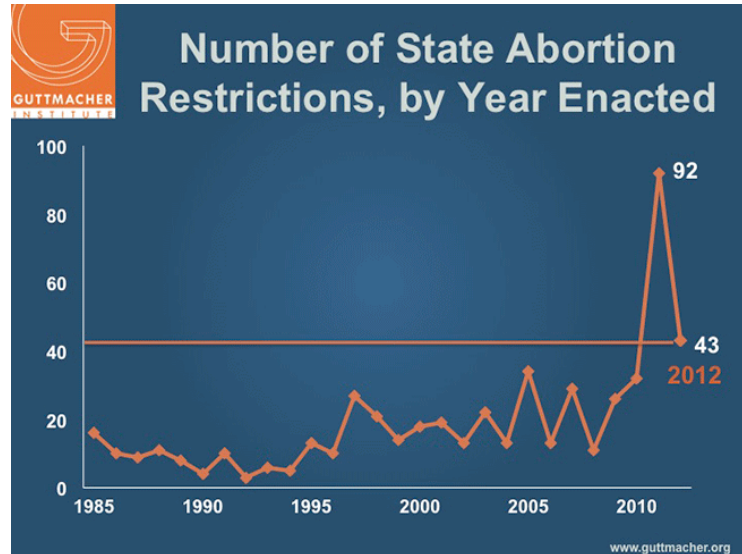
<sup>13</sup> Campbell Robertson, "Judge Prevents Closing of Mississippi’s Sole Abortion Clinic," *ibid.*(Apr 15, 2013), <http://www.nytimes.com/2013/04/16/us/ruling-prevents-closing-of-mississippi-only-abortion-clinic.html>.

<sup>14</sup> Most abortions occur within the first trimester, do not require surgery, and are outpatient procedures. They do not need to be performed by a physician; in fact, some states allow for telemedicine wherein a consultation with a medical employee, like an RN, allows for a prescription for medication that induces abortion in early stage pregnancies.

forcing clinics to close their doors — and it's advancing in states across the country."<sup>15</sup> At present, 39 states have laws that require abortions to be performed by a licensed physician<sup>16</sup>; others have stricter requirements like MS HB 1390's hospital privileges provision.

Moreover, this is part of a larger trend in state legislatures: passing laws that severely restrict the availability of abortions or burden the woman seeking the abortion. Anti-abortion legislation exploded in 2011, with legislators in 50 states introducing 1,100 pieces of legislation pertaining to reproductive rights with 135 enacted; 68% of which specifically addressed abortion.<sup>17</sup> In 2012, the trend continued:

43 more restrictions passed.<sup>18</sup> In the first three months of 2013, 694 provisions were introduced that included abortion restriction provisions with 93 passing in at least one House of a given State's Legislature.<sup>19</sup> This occurred despite public approval for first trimester abortions consistently rising, with 54% of the public believing abortion should



be legal “all or most of the time.”<sup>20</sup> By first examining the landmark Supreme Court cases on abortion, then focusing on the intersection of medicine, science, and law proliferated in those cases and in the abortion debate generally, and finally assessing the consequences of new state and federal legislation on a woman's right to choose, the sources instigating this anti-abortion trend will manifest itself. Through eradication of these sources, the woman's right to make an informed, personal decision about termination of *her* pregnancy can be made.<sup>21</sup>

<sup>15</sup> Culp-Ressler, "Federal Judge Prevents Mississippi from Shutting Down Its Last Abortion Clinic," Center for American Progress Action Fund, <http://thinkprogress.org/health/2013/04/16/1870931/mississippi-abortion-clinic-stays-open/>.

<sup>16</sup> Guttmacher Institute, "State Policies in Brief: An Overview of Abortion Laws," [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

<sup>17</sup> Rachel Benson Gold and Elizabeth Nash, "Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks," Guttmacher Pol Rev 15, no. 1 (2012).

<sup>18</sup> The Guttmacher Institute, "Laws Affecting Reproductive Health and Rights: 2012 State Policy Review," Annual State Policy Review 2013(2012).

<sup>19</sup> "Laws Affecting Reproductive Health and Rights: Trends in the First Quarter of 2013," Annual State Policy Review 2013(2013).

<sup>20</sup> Liz Marlantes, "Roe V. Wade at 40: A New Surge in Support for Abortion Rights," The Christian Science Monitor(January 22, 2013), [http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0122/Roe-v.-Wade-at-40-a-new-surge-in-support-for-abortion-rights?nav=638859-csm\\_article-bottomRelated](http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0122/Roe-v.-Wade-at-40-a-new-surge-in-support-for-abortion-rights?nav=638859-csm_article-bottomRelated).

<sup>21</sup> I stress “her” here because men cannot get pregnant. They cannot have an abortion, and they do not have to endure childbirth. In fact, men can impregnate someone and never see that person again. Thus, the fact that men typically oppose abortion at higher rates and are the chief actors behind many of these anti-abortion provisions is significant. These restrictive laws are demonstrative of male hegemony and treat women as incompetent such that they are unable to make decisions regarding their own bodies.

## Part I: Roe, Casey, and Carhart: A Motley Crew of Supreme Court Jurisprudence

Simplistically, *Roe v. Wade* (1973)<sup>22</sup> is the grandfather of abortion jurisprudence, while *Planned Parenthood v. Casey* (1992)<sup>23</sup> and *Gonzales v. Carhart* (2007)<sup>24</sup> are the child and grandchild, respectively. The child strays from the path of the grandfather, carving out a new path but retaining most of the grandfather's teachings. Two generations removed from the grandfather, the grandchild does not understand the grandfather, instead perceiving the grandfather as useless, except for birthday money. The grandchild is in a rebellious phase, taking the child's inherited teachings and perverting them. The child says "You are grounded for a week," and the grandchild eschews this punishment. When asked why, the grandchild responds, "I have been on the ground for a whole week! I never stepped foot on an airplane!" Thus, from grandfather to grandchild, the meaning is distorted and accumulates different valuations. Akin to *Roe*, *Casey*, and *Carhart*, *Roe* established a fundamental right, *Casey* limited that right but in a general manner, and *Carhart* essentially denied that the right was fundamental and that it necessitated limitations. In another view, *Roe* built a house with a door, *Casey* opened the door and performed renovations, and *Carhart* kept the façade of the home yet destroyed the remainder of it. It was *Carhart* that opened the can of worms for increasingly restrictive abortion legislation.<sup>25</sup>

*Roe* (1973) has always been a more contentious case than the Supreme Court's 7-2 vote would indicate. Even Ruth Bader Ginsberg, a staunch advocate of reproductive freedom, feminism, gender equality, and a Supreme Court Justice averred, with respect to *Roe*, "it's not that the judgment was wrong, but it moved too far, too fast" in guaranteeing the fundamental right for women to seek abortions legally."<sup>26</sup> Ginsberg wanted for the abortion issue to be decided by the states instead of abruptly by the Court. But, as history knows, the Court is skilled at "solving" issues of public disagreement.<sup>27</sup> *Roe* is as famous as it is contentious: 84% of respondents to a survey conducted by C-SPAN responded with "*Roe*" to the stimulus "name any case heard by the U.S. Supreme Court."<sup>28</sup> After "*Roe*" revealed, in the later years after the decision, that she was now staunchly pro-life, it can be said, with confidence, that *Roe* has

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<sup>22</sup> *Roe v. Wade*, 410 US 113(1973).

<sup>23</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833(1992).

<sup>24</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610(2007).

<sup>25</sup> As Justice Ginsberg notes in her dissenting opinion in *ibid.* at 1653: "In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court--and with increasing comprehension of its centrality to women's lives."

<sup>26</sup> Adam Liptak, "Shadow of *Roe v. Wade* Looms over Ruling on Gay Marriage," *The New York Times*(March 23, 2013), <http://www.nytimes.com/2013/03/24/us/roes-shadow-as-supreme-court-hears-same-sex-marriage-cases.html?pagewanted=all>.

<sup>27</sup> See *Brown v. Board of Education*; a unanimous decision that effectively made the entire Jim Crow system of the South invidious and unconstitutional.

<sup>28</sup> Linda Greenhouse and Reva B Siegel, "Before (and after) *Roe v. Wade*: New Questions About Backlash," *Yale LJ* 120(2010).

assumed a life of its own.

*Roe* resolved that the Due Process Clause and its penumbral rights protected the liberty of the abortion right, but it never used “equal protection” or “sex equality” to further enroot this right.<sup>29</sup> With *Griswold v. Connecticut*<sup>30</sup> having legitimized oral contraceptives under the postulation that certain relationships lie within a “zone of privacy created by several fundamental guarantees” found in the Third, Fourth, Fifth, and Ninth Amendments,<sup>31</sup> abortion codification was the next logical step in the establishment of constitutional protection for reproductive autonomy, contrary to Justice Ginsberg’s aforementioned statement. In this regard, *Roe*’s fundamental right to abortion was a rational decision, made with full awareness of the “sensitive and emotional nature of the abortion controversy.”<sup>32</sup> Furthermore, the rationality of *Roe* is bolstered by the Court’s explicit refusal to sanction any moral or theological suppositions as a “compelling state interest” such that it may licitly restrict the abortion right.<sup>33</sup>

Weighing the detrimental effects that children have on female social mobility into account against Texas, or any other state’s,<sup>34</sup> professed interest in protecting potential human life, the *Roe* court concludes that abortion legislation cannot sweep too broadly as to eclipse the right to privacy but must also serve the interests of the potential human life *at the “compelling point”* when the fetus is viable and can be considered a human life.<sup>35</sup> In utilizing the phrases “compelling state interest,” “tailored to the recognized state interest,” and “fundamental right,” the Court’s decision was interpreted by many to imply a strict scrutiny standard by which State regulations should be judge despite never explicitly delineating the standard.<sup>36</sup> The Court, by acknowledging the existence of limitations on the privacy right

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<sup>29</sup> Reva B Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression," Emory LJ 56(2006).

<sup>30</sup> *Griswold V. Connecticut*, 381 US 479(1965).

<sup>31</sup> *Ibid.* at 485. In *Roe*, the Majority at 152 notes that “The Constitution does not explicitly mention any right to privacy;” however, the penumbral rights of the Constitution imply that there is a right to privacy inherent. Since a right not explicitly defined in the Constitution cannot be construed as a right denied (as per the Ninth Amendment), and the concept of “penumbral” rights of the Constitution were characterized before *Griswold* in *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), where it was called a “peripheral” right of the First Amendment, jurisprudence holds that there is an inherent yet implicit right to privacy in the Constitution. *Roe* determined that “privacy” as a right was either founded in “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” or in the Ninth Amendment, a right “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Roe* Majority at 153.

<sup>32</sup> *Roe V. Wade*. Majority at 116.

<sup>33</sup> *Ibid.* Majority at 150.

<sup>34</sup> *Roe* concerns a Texas law prohibiting and criminalizing abortions except in cases where the woman’s health is at stake. The justification provided by Texas was that “life begins at conception,” so Texas has a responsibility to protect life once it begins. The Court, though, defiantly refuses to take a stance on this issue, relegating that question (of when life begins) to experts in theology, philosophy, and medicine. Concurrently, they do concede “at some point in time...the woman’s privacy is no longer sole and any right of privacy she possesses” must be balanced against the State interest in potential human life. *Ibid.* Majority at 159.

<sup>35</sup> *Ibid.* Majority at 162, 163.

<sup>36</sup> Valerie J Pacer, "Salvaging the Undue Burden Standard--Is It a Lost Cause: The Undue Burden Standard and Fundamental Rights Analysis," *Wash. ULQ* 73(1995). Page 309. “Rather, under *Roe*, courts automatically found that the fundamental character of the individual right at stake warranted strict scrutiny. Under that standard, any state attempt to persuade a

whilst dictating only that viability, occurring roughly at the end of the first trimester of pregnancy, be the “compelling point” whence the female’s “liberty” loses its absolute character, failed to consider both changing technological advances to shorten the time frame which viability occurs and that a woman’s health may be at risk after viability.<sup>37</sup>

The variability of viability poses an inherent problem; though the Court determined that the first trimester’s end approximated the duration during which legislatures could not pass restrictions on the right to obtain an abortion, new technology decreasing the “viability” time frame caused many abortion restriction laws to be permissible. The net effect was that “liberty” was not truly protected during *Roe*, only a vague notion retained constitutional protection. Though it was clear that a fetus was not protected under the Fourteenth Amendment and that “the unborn have never been recognized in the law as persons in the whole sense,”<sup>38</sup> the Court was ambiguous about whether the “compelling point” was a technological question of survivability or an ethical valuation of whether a fetus had reached the point where its development is significant enough to warrant protection from harm, conflating the technological with the ethical to cobble an untenable normative legal standard.<sup>39</sup> If potentiality of life warrants restrictions on abortion, then women that act recklessly while pregnant and miscarry should be subject to penal sanctions if the woman is past viability. Potentially, *Roe* could have covertly sanctioned draconian societal control measures to dictate female action, a hypothesis bolstered by *Roe*’s assertion that abortion is a decision between physician and patient, depreciating the cognitive ability of a female to make a decision about termination of pregnancy without guidance, whether warranted or not.

*“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, Roe v. Wade, 410 U. S. 113 (1973), that definition of liberty is still questioned.”*<sup>40</sup>

Thus, the advent of *Casey* reformed some, but not nearly all, of the glaring issues with *Roe* while simultaneously facilitating the passage of abortion-restrictive laws throughout the states. *Roe*’s viability

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woman to abandon her choice violated the Fourteenth Amendment.”

<sup>37</sup> Nancy K. Rhoden, “Trimesters and Technology: Revamping *Roe V. Wade*,” *The Yale Law Journal* 95, no. 4 (1986). Page 648. “By the early 1980’s, however, both technological advances and other Supreme Court decisions were raising additional questions about the meaning and continued validity of the first trimester/second trimester division.”

<sup>38</sup> *Roe V. Wade*. Majority at 162.

<sup>39</sup> “Trimesters and Technology: Revamping *Roe V. Wade*.” Page 672. “Yet by implying...that technological survivability is itself determinative, the Court’s decisions have created the misleading impression that a scientific or technological fact can give rise to a normative legal standard without being influenced by moral values and analysis. An abortion cut-off should not depend on one aspect of the medical context while ignoring others...But, if viability ceases to coincide with late gestation, it will no longer achieve the same goals. *Roe* does not, however, require the law to abdicate control of women’s constitutional fate to technology.”

<sup>40</sup> *Planned Parenthood of Southeastern Pa. V. Casey*. Plurality at 844.

framework necessarily truncated available abortion options and mandated childbirth after viability,<sup>41</sup> a concept antithetical to “liberty” and “fundamental rights.”<sup>42</sup> *Casey*, in its opening, affirms that it will “review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures”<sup>43</sup> to both uphold “the essential holding” of the *Roe* while making the holding workable through clarification of its compulsory parameters.<sup>44</sup> Ergo, the Court clarified the type of regulation that States were able to pass by abandoning the strict scrutiny review of *Roe* – that the State’s law must be related to a compelling governmental interest and that the law was tailored to achievement of that interest – and creating a new test balancing state and female interests.

This test, named the “Undue Burden”<sup>45</sup> test, was the metric by which the Court ruled on the constitutionality of five anti-abortion provisions in a Pennsylvania law: spousal notification stipulation, prohibition against minors seeking abortion, informed consent mandate to be read by the patient by a physician, 24-hour waiting period prior to acquiring an abortion, and obligatory reports from clinics regarding certain aspects of their provided abortion services.<sup>46</sup> Only the spousal notification requirement

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<sup>41</sup>Walter Dellinger and Gene B. Sperling, "Abortion and the Supreme Court: The Retreat from *Roe v. Wade*," *University of Pennsylvania Law Review* 138, no. 1 (1989). Page 93. "It has not been fashionable to emphasize the extent to which *Roe* was a case concerning a person's right to decide among medical treatment options, but there are substantial health and medical risks for women compelled by law to forgo an abortion procedure. All pregnancies present a significant health risk, but women are willing to assume it when they desire to have a child. When the government imposes the risk, though, it creates an extraordinary imposition."

<sup>42</sup> A quandary that exists throughout abortion law is the notion of a “compelling interest” to preserve potential life forceful enough that a state has the ability to tamper with a woman’s reproductive autonomy. If the potential life is truly a state interest, why would the state allow for any abortions in cases of rape or incest? Pregnancies resulting from those cases are just as full of potential life as are those resulting from a careless sexual encounter. Furthermore, if the life of the mother is at stake, and potential life exists, the state, in allowing an abortion for the mother, acts against its own professed interest by terminating potential life; if it restricted medical abortion, the state would be sanctioning a death sentence for either one or both parties. If the state equates abortion with infanticide to such a degree that an organism living from the sustenance of another organism is allowed to continue its parasitic effect on the host organism without any potential avenues to redress the host organism’s grievances, it elevates the parasite over the host. “Preserving life,” either that of the fetus or that of the woman carrying the fetus must be a state initiative practiced consistently or it is not compelling.

The idea that liberty is a continuum, not incidental, coincides with Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, 543: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

<sup>43</sup> *Planned Parenthood of Southeastern Pa. v. Casey*. Majority at 845.

<sup>44</sup> *Ibid*. Majority at 846. “*Roe*’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”

<sup>45</sup> *Ibid*. Plurality at 877. “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.” Informing free choice, though, is necessarily coercion. If a decision is forcibly “informed,” then it can never be a decision made by an autonomous individual.

<sup>46</sup> *Ibid*. Plurality at 844. “At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as



was found to be unconstitutional, sanctioning States to enact copious types of abortion restrictions before and during the period of fetal viability. The State would be restricted in its legislation whence “a threshold level of interference”<sup>47</sup> with the right to freedom of choice regarding abortion was reached. The State’s interest no longer needed to be compelling; the woman’s liberty is imperiled at the instant when the state’s regulations become “reasonably related” to their professed goals of the legislation “unless [the state measure] has an effect on [the woman’s] right of choice.”<sup>48</sup>

The Court explicitly rejected condemnation of abortion as a legitimate interest in *Casey*, asserting it was the Court’s “obligation is to define the liberty of all, not to mandate our own moral code;”<sup>49</sup> further asserting that a state may not pass anti-abortion legislation based on their belief that abortion is morally wrong, the state may express a “preference” for childbirth since it is in their interest of protecting fetal life<sup>50</sup> in spite of its overtly moral implication.<sup>51</sup> Thus, if a State’s goal is to “persuade” a woman seeking abortion to “choose life” instead, its informed consent regulation could stipulate that a doctor tell his patient that her “child” can feel pain if the procedure is performed. The words “child” and the dubious claim about fetal ability to feel pain<sup>52</sup> are permissible because the Court saw “no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”<sup>53</sup>

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amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203–3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra*, at 902. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent’s consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a “medical emergency,” which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).”

<sup>47</sup> Pacer, "Salvaging the Undue Burden Standard--Is It a Lost Cause: The Undue Burden Standard and Fundamental Rights Analysis." Page 303.

<sup>48</sup> *Planned Parenthood of Southeastern Pa. V. Casey*. Plurality at 164.

<sup>49</sup> *Ibid.* at 177.

<sup>50</sup> *Ibid.*

<sup>51</sup> Since legislation is composed by a handful of human beings, each with ideological motives and ethical codes guiding their life decisions, before being introduced into a House of a state’s legislature, the legislation, from its naissance, is infected with bias. Protecting “fetal life” assumes that a fetus is a life, a moral position. The fact that some doctors are required to read informed consent provisions to their patients by law including this obviously ideological speech is apparently not a First Amendment violation according to *Casey*. An argument akin to this is posited in Scott W Gaylord and Thomas J Molony, "Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment," *Elon University Law Legal Studies Research Paper*, no. 2012-02 (2012). That article assets that “The Supreme Court’s First Amendment decision in *Casey* expressly rejected the notion that a state may require distribution only of ideologically neutral information regarding abortion that is, information that not only is truthful and not misleading, but also that does not express a preference in favor of either childbirth or abortion, because Pennsylvania’s challenged informational materials did express a preference for childbirth over abortion.” This is especially problematic because “In seeking to promote childbirth over abortion, the State exercises not only its “significant” authority to regulate the medical profession, but also its right to express its own views as a speaker: “The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.”” Page 632.

<sup>52</sup> Barbara Hewson, "Reproductive Autonomy and the Ethics of Abortion," *Journal of Medical Ethics* 27(2001).

<sup>53</sup> *Planned Parenthood of Southeastern Pa. V. Casey*. At 882.

As concluded by Professor Sonia Suter, *Casey* signaled that “the Court no longer distinguished between disclosure aimed at informing versus persuading or influencing.”<sup>54</sup>

After *Casey*, though, there was “no going back” on abortion legality as an essential liberty.<sup>55</sup> However, its holdings solidified that States could restrict this liberty as long as their legislation did not explicitly state “Abortion is amoral.”<sup>56</sup> *Casey* invited a bevy of new abortion restrictions; with their abandonment of the trimester structure as the threshold for abortion legislation, the floodgates opened. Many state legislators, in creating new laws addressing the entire span of pregnancy, framed their anti-abortion provisions as a safeguard for women, justifying restrictions and regulations on the precept that women have a “right to know” the consequences of abortion. They professed concern for female safety (physician hospital privileges restriction; late term abortion restriction; telemedicine restriction), female mental health (“post-abortion” syndrome<sup>57</sup>; appeals to motherhood to sanction counseling mandates, “regret” for decision to abort), female physical health (inserting information about “cancer” caused by abortion and issues with future fertility), and female lack of fortitude to make the “right” decisions about their reproductive health (ultrasound requirements, waiting periods, restrictions on minors, fetal heartbeat requirements).<sup>58</sup>

Professor Riva Siegel describes this anti-abortion strategy as “woman-protective, choice-based, increment list restrictions on abortion;”<sup>59</sup> by reframing the issue of abortion in terms of women’s rights, the ease with which one could explicitly identify an impermissible, morality-based law against abortion

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<sup>54</sup> Sonia M Suter, “The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making,” *Am. J.L. and Med.* 39(2013). Page 22.

<sup>55</sup> David J Garrow, “Abortion before and after Roe V. Wade: An Historical Perspective,” *Alb. L. Rev.* 62(1998). “*Casey* resolved the basic constitutional question of abortion for all time. The Court has made crystal clear that after *Casey*, there is simply no going back... It ought to be very difficult for anyone to read the *Casey* opinion with any sort of independent or quasi-objective attitude toward this question and come away from that opinion with any doubt about whether this is a declaration on which the Court somehow could ever go back.” Page 845.

<sup>56</sup> With the “undue burden” standard, the state does not bear the burden of proof in a challenge to legislation; the burden of proof rests of the individual to prove that the legislature’s motivations were not neutral but were morally or ethically motivated. Pacer elaborates on this principle by postulating that “under the *Casey* undue burden standard, a state may avoid this strict [scrutiny] of its legislative motive. As long as a law does not create an undue burden on the exercise of a fundamental right, the law can permissibly coerce people into conforming to the majoritarian morality.” Pacer Page 317.

<sup>57</sup> “The concept of “post-abortion syndrome” ... was first proposed in the early 1980s by Vincent Rue, who has since become an international authority in the antiabortion movement ... In 1981, Rue—then a professor of family relations who directed the Sir Thomas More Clinics of Southern California—testified before the Senate about abortion’s social effects. His testimony, which described abortion as ... “a psychological Trojan Horse for women”—a claim Rue advanced by attacking the pervasive clinical view within psychology that the procedure had “only temporary, nonpathological, and limited adverse emotional sequelae. In Rue’s view, ‘guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will.’” Reva B Siegel, “The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument,” *Duke Law Journal* 57(2008). Page 117.

<sup>58</sup> By enforcing the notion that women benefited from state-mandated pre-abortion counseling and that female minors were not mentally able to formulate decisions without the help of their parents reinforced gender stereotypes about female weakness, a “significant departure from the women’s movement’s initial goals, which had discussed abortion as a locus for empowerment. Instead, the abortion doctrine now carried the very same antiquated perceptions of women that the movement had initially intended to undo.” Victoria Baranetsky, “Aborting Dignity: The Abortion Doctrine after *Gonzales V. Carhart*,” *Harv. J.L. & Gender* 36(2013). Page 143.

<sup>59</sup> Reva B Siegel, “The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,” *University of Illinois Law Review, Baum Lecture* (2007). Page 1023.

decrease significantly. *Casey*, articulation of gender normativity, and states' increased discretion in the sphere of enacting legislation burdening the abortion right (but not amounting to an undue burden) primed the “harm-to-women” strategy utilized by the anti-abortion movement. Furthermore, by vividly depicting the process of “partial-birth abortion” (late term abortion) and the potentiality of harm, physical or mental, to women that receive the procedure, partial-birth abortion bans spread. Federally, the Partial-Birth Abortion Act was upheld in *Gonzales v. Carhart* as a constitutional restriction on abortion. Ergo, the interest of the mother, especially in late term abortions, was the same as the child – to live and be protected from abortion – thus engendering the mother and child reunion rhetoric<sup>60</sup> in anti-abortion discourse.

## **Part II: *Gonzales v. Carhart*: Medicine, Science, and Social Mores**

*“...though the abortion decision may originate within the zone of conscious and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others [...] Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear...”*<sup>61</sup>

There are many medically recognized types of abortion. “Partial-Birth” is not one of them.<sup>62</sup> Therein lays the first problem with the Court’s decision in *Gonzales v. Carhart*: it was subjected to bias from its inception. Justice Kennedy, writing for the majority, uses the terms “child” and “fetus” and “mother” and “woman” almost interchangeably, subconsciously reinforcing the gender disempowerment faced by women as a result of their uteruses. The fact that women bear children does not force every woman to become a mother; the fact that some women experience trauma after abortions does not mean that type of abortion should be made illicit for all women. Especially with respect to the

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<sup>60</sup> This is my term, but it is derived from both my love of Paul Simon and a piece by Reva Siegel. “Thus, the only way that we can help either the mother or her child is to help both. Conversely, if we hurt either, we hurt both. Properly understood, the interests of women and the unborn are convergent and harmonious; abortion harms women and the unborn both. The abortion debate, then, is not about women’s rights versus the rights of the unborn, because the rights of mother and her child can never be truly opposed to each other.” “The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument.”

<sup>61</sup> *Planned Parenthood of Southeastern Pa. v. Casey*. At 852. This eloquent passage ends with “That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.” In *Gonzales*, the Court summarizes this quote as “Whether to have an abortion requires a difficult and painful moral decision, *Casey*, 505 U. S., at 852–853, which some women come to regret.” *Gonzales v. Carhart*. Slip at 6.

<sup>62</sup> *Gonzales v. Carhart*. (Ginsberg, dissenting at Slip 2). Partial birth abortion is a term “neither recognized in the medical literature nor used by physicians who perform second-trimester abortions...The medical community refers to the procedure as either dilation & extraction (D&X) or intact dilation and evacuation (intact D&X).”

increasing number of barriers to obtaining an abortion that were enacted between *Casey* and *Gonzales*, the persons that would seek a later-term abortion would most likely be those that were burdened and unable to have an abortion at an earlier time. As D&X is most routinely used in later-trimester abortions, its prohibition fundamentally compels these women to have unwanted children. To understand the inherent gender biases, flawed science, and misguided intentions found in *Carhart*, it is imperative to grasp the range of abortion types, the frequency of abortion, the demographics of abortion recipients, the (general) scientific and medical consensus about abortion's effects, and the consequences that unwanted pregnancies have on society in both the fiscal and communal sense.<sup>63</sup>

First and foremost, it should be recognized that abortion is the only medical procedure that is regulated by the government and that carries criminal penalties for violation of those regulations. Abortion exceptionalism<sup>64</sup> is the concept that abortion, in the United States, is treated as a medical procedure wholly different from all other medical procedures. Because of the Hyde Amendment, Medicaid, or any other federal funds may not be used to pay for abortion procedures except in cases of rape, incest, and where the woman's life is at risk; states may still use their own funds to provide abortion assistance, and seventeen states utilize this practice.<sup>65</sup> Conversely, thirty-two states explicitly prohibit assisting in procuring an abortion financially unless the funds are provided by the federal government – so only in cases of potential death, rape and incest.<sup>66</sup> Furthermore, forty-six states allow the right of refusal, meaning health care providers can refuse to participate in an abortion; forty-three states extend this right to institutions (but sixteen of these states only allow religious and private institutions to exercise this right).<sup>67</sup> Private insurers are restricted from providing abortion coverage in eight states except in cases where the woman's life is in danger.<sup>68</sup>

Interestingly, persons that qualify for Medicaid coverage are, by definition, poor and unlikely to

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<sup>63</sup> This is, obviously, an incomplete list of the factors necessary to fully comprehend to accurately assess *Carhart*. Incidentally, this illustrates a fundamental problem with the undue burden test: it focuses on each restrictive provision in the abstract. Taken in the aggregate and compounded with the passage of more restrictive laws, the cumulative effect of these restrictions cannot be considered anything *but* an undue burden on a woman's freedom to exercise her liberty with respect to her body, her future, and her self-ideology.

<sup>64</sup> Ian Vanderwalker, "Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics," *Mich. J. Gender & L.* 19(2012). Page 3. Abortion Exceptionalism encompasses a vast number of burdens that are unique to abortion procedures while the super-majority of medical procedures are guided by the same standards established by the medical licensing board. This lacuna in regulation of other ethically questionable activities is succinctly summarized by Vanderwalker: "there are no similar provisions prohibiting taxpayer money from funding other activities that are morally offensive to large numbers of Americans, such as the production of highly destructive military weaponry."

<sup>65</sup> Magda Schaler-Haynes et al., "Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets," *U. Pa. J.L. & Soc. Change* 15(2011).

<sup>66</sup> Institute, "State Policies in Brief: An Overview of Abortion Laws".

<sup>67</sup> *Ibid.* Still, in what situation would a doctor be forced to participate in an abortion? With all the regulations surrounding who is licensed to perform abortions, it is highly unlikely that this situation would occur.

<sup>68</sup> *Ibid.*

be financially able to support a child without State assistance. With surgical abortions ranging from \$300 to \$950 during the first trimester<sup>69</sup> and \$300 to \$800<sup>70</sup> for medication abortion during the first trimester, and later-gestation abortions ranging into the thousands (and illegal in most cases), those that cannot afford an abortion during the early stages of pregnancy are typically priced out of the market.<sup>71</sup> Thus, the effect of being unable to receive Medicaid funding, compounded with the spillover effect of restrictive laws (on both Clinics through regulation and Women through lost wages due to waiting periods) and the high cost of later abortions, has a wholly and targeted detrimental effect on the ability of women in lower income brackets to exercise their fundamental right to make a decision regarding the termination of their pregnancy. If anything, the refusal to fund abortions for those in the lower income bracket is wholly detrimental to the welfare system of the state, given the comparative cost of providing food stamps for a child for eighteen years versus the aforementioned cost of a single abortion.<sup>72</sup> . Though states claim that those opposed to abortion would not want to “indirectly fund” something they morally oppose, those same people, indirectly forcing others into unwanted pregnancies, would likely find it distasteful to have their taxes raised in order to fund someone’s unwanted child.

Public Health Policy consultant and Columbia University professor Magda Schaler-Haynes observes that “Women who delay abortions into the second trimester of pregnancy are disproportionately people of color and more likely to be lower-income than those who obtain abortions in the first trimester.”<sup>73</sup> In their 2008 study of abortion patients in the US, the Guttmacher Institute’s data vividly illustrates the profile of women typically seeking abortions: a plurality of abortions are performed on younger, women of color, either without insurance or covered by Medicaid, unmarried, with at least one child, in the lower income brackets.<sup>74</sup> Equal protection questions automatically arise on multiple levels

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<sup>69</sup> "What Happens During an Abortion - in-Clinic Abortion Cost," Planned Parenthood Federation of America Inc., <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp>.

<sup>70</sup> "Abortion Pill - Cost of Abortion Pill - Medication Abortion," *Health Info & Services: Abortion* 2013(2013).

<sup>71</sup> Marshall H. Medoff, "The Response of Abortion Demand to Changes in Abortion Costs," *Social Indicators Research* 87, no. 2 (2008). "The price of obtaining an abortion is a significant determinant of the abortion choice...This funding also implies that a restrictive abortion law may have a spillover effect on the abortion demand. The spillover effect of a restrictive abortion law is the increase in the abortion price that results from the higher expenses imposed on abortion providers because of the restrictive abortion law...Since restrictive abortion laws do not violate women's right to have an abortion, then it could be argued that restrictive abortion laws may have the not so incidental effect of pricing some women with unwanted pregnancies out of the market."

<sup>72</sup> Hill argues that insurance bans have no true purpose other than to limit abortion availability. "Insurance bans do not further the purported purpose of encouraging childbirth. The Court in Casey stated that the government may encourage childbirth by ensuring that a woman's choice to obtain an abortion was thoughtful and informed, and by enacting laws to promote respect for fetal life. An insurance law, by contrast, does not inform a woman's choice with any new information, but instead simply increases the out-of-pocket cost for an abortion. Coercing a woman through financial pressure violates Casey's mandate that abortion laws must serve to inform a woman's free choice, not hinder it.." Lucy E Hill, "Seeking Liberty's Refuge: Analyzing Legislative Purpose under Casey's Undue Burden Standard," *Fordham L. Rev.* 81(2012). Page 406/.

<sup>73</sup> Schaler-Haynes et al., "Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets." Page 328.

<sup>74</sup> Jones, Finer, and Singh, "Characteristics of Us Abortion Patients, 2008."

because of the number of cross-cutting identity cleavages, some categories triggering heightened scrutiny, disproportionately affected by abortion restrictions.

On a larger scale, though, abortion affects women of all backgrounds: an estimated 1 in 3 women have an abortion by age 45, and abortion is one of the most common medical procedures for those of reproductive age.<sup>75</sup> In 2009, 48 reporting areas<sup>76</sup> submitted information on the abortions provided in their states to the Center for Disease Control (CDC)<sup>77</sup>; 784,507 abortions were reported for that year. The abortion rate (number of abortions for women aged 15-44 years old per 1,000 women) for 2009 15.1 abortions; the abortion ratio (ratio of the number of abortions to number of live births per 1,000 live births) was 227 abortions.<sup>78</sup> 57.1% of abortions occurred among women aged 20-29.<sup>79</sup> 64% of abortions occurred before or at 8 weeks gestation, 91.7% before or at 13 weeks, 7% between 14 and 20 weeks, and 1.3% at greater than or at 21 weeks.<sup>80</sup> By method, 74.2% involved curettage (surgery) at ≤ 13 weeks gestation, 16.5% utilized medical abortion (the abortion pill) during early gestation, 8.1% involved curettage at more than 13 weeks gestation, and the remaining types of procedures were “uncommon;”<sup>81</sup> ergo, D&X is rare occurrence in the overall portrait of abortion. Most likely, D&X, with its increased risk of health complications, limited availability, and higher price, is not the method of choice but rather the method utilized only out of necessity. Thus, it is even more condemning that most women electing to undergo D&X are denied that right.

Imbued with race, class, and gender implications, the decision in *Gonzales v. Carhart* looks suspect on its face. The fact that a similar case, *Stenberg v. Carhart*<sup>82</sup>, involving a Nebraska “Partial Birth Abortion” ban, was struck down by the Court only 7 years earlier yet, as jurisprudence, was discarded by the Court in its analysis is also suspicious. Synchronously, a cursory glance at the Opinion exhibits tremendous gender bias. Reva Siegel chides the decision as being a “discussion of gender-paternalist justification for abortion restrictions.”<sup>83</sup> Justice Kennedy, writing for the Court, spared no detail when describing D&X and intact D&X.<sup>84</sup> His romanticiation of the relationship between mother and child is

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<sup>75</sup> Ibid.

<sup>76</sup> Reporting areas include the District of Columbia; New York City, and 46 states. California, Delaware, Maryland, and New Hampshire do not report. Karen Pazol et al., "Abortion Surveillance—United States, 2009," *Morbidity and mortality weekly report. Surveillance summaries (Washington, DC: 2002)* 61, no. 8 (2012). Page 2.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Although, redundant, this reinforces that an abortions is a woman’s decision because 0% of all abortions were men aged 0-1,000. Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> *Stenberg V. Carhart*, 530 US 914(2000). Hereafter, *Stenberg*.

<sup>83</sup> Siegel, "The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument." At 110.

<sup>84</sup> *Gonzales V. Carhart*. Majority at 1634. Justice Kennedy accepts as factual that the process of D&X and intact D&X bears

verging on saccharine<sup>85</sup>. His degradation of women to their stereotypical gender roles, further implying females have weakness of heart, lack of foresight, and inability to understand consequences, is embarrassing given his stature as one of the nine most important legal minds in the United States.<sup>86</sup> The most deplorable conclusion drawn by the opinion is that, when weighing “mother” and “future child” with respect to their fundamental rights, the “future child,” once not even considered a “whole person” as per *Roe*,<sup>87</sup> retains more rights than the mother.<sup>88</sup>

In upholding a restrictive abortion law without any shred of factual basis, instead qualifying the

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“disturbing similarity to the killing of a newborn infant;” in accordance with Congress’s justification for passing the law, citing *Casey*’s assertion that “where [the state] has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power... in furtherance of its legitimate interests ...” Therefore, Justice Kennedy assumes that his Congress’s perception that D&X is “disturbingly similar” to infanticide is sufficient to constitute an abridgement of female autonomy, in spite of his remark that the Act purposes to “place a substantial obstacle in the path of a woman seeking an abortion,” which would implicate an undue burden on a woman’s right to choose.

Some highlights of Justice Kennedy’s horror story depiction of D&E and intact D&E include:

“The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.” At 1633

The fetus is “deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” At 1627.

“Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus’ body will soften, and its removal will be easier.” At 1621.

“The doctor, often guided by ultrasound, inserts grasping forceps through the woman’s cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus.” At 1621.

“In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart.” At 1622.

<sup>85</sup> *Ibid.* Some highlights of Justice Kennedy’s conflagration of the mother-child relationship, uniting their interests include:

“It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.” At 1634.

“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” At 1634.

“Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well.” At 1634.

<sup>86</sup> *Ibid.* Some highlights of Justice’s Kennedy’s paternalistic view of women as weak, passive agents unable to ration include:

“[It cannot] be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.” At 1634.

“The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.” At 1634.”

“The State has an interest in ensuring so grave a choice is well informed.” At 1634.

<sup>87</sup> *Roe V. Wade*. Justice Blackmun concurring in part at 162. “In short, the unborn have never been recognized in the law as persons in the whole sense.”

<sup>88</sup> This would tend to support arguments made by anti-abortion advocates regarding fetal personhood. Mark Strasser agrees with me. “First, if there is another change on the Court, for example, if Justice Ginsberg retires, then the abortion jurisprudence may undergo a wholesale revision. Suppose that the post-Ginsberg Court were to hold that the Federal Constitution neither protects nor prohibits abortion, but instead permits the States to regulate it as they deem fit. n109 In that event, the personhood amendments would do a significant amount of work because even very early abortions would be impermissible unless, for example, a plausible self-defense argument could be offered.” Mark Strasser, “The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies,” (2012).

Partial Birth Abortion Act of 2003 by anecdotal accounts of women distressed after the procedure, a biased state interest, and the supposition that women could not be trusted to be informed about their role as mothers with regard to attempting to undergo the procedures, *Carhart* signaled to the anti-abortion movement that the composition of the Court had changed. Without Justice Sandra Day O'Connor (replaced by the thoroughly insipid Justice Alito), the ideological balance of the Court had shifted, inspiring anti-abortion groups to proliferate restrictive anti-abortion legislation across the country.<sup>89</sup> *Carhart* reinforced the trimester framework by essentially prohibiting abortions outside the first trimester through upholding the illegality of D&X, the procedure most commonly used in the uncommon procedure of late-term abortions; moreover, the aforementioned viability questions that blossomed after *Roe* forced abortion law to become interwoven, again, with a "jurisprudence of doubt."

### **Part III: Personhood, Ultrasounds, Fetal Heartbeats, Waiting Periods, and the Future**

With the possibility of first trimester restrictions (and prohibition otherwise) of the abortion procedure and the further enfeeblement of the Undue Burden standard, the rights of women articulated in *Roe* practically vanished with *Carhart*. With the majority of state legislatures controlled by Republicans in the wake of the 2010 midterm election overhaul, and the majority of state governors affiliated with the Republican party, 2011 initiated open season on abortion after *Carhart* solidified the right to disregard women in the abortion question. These legislatures have seen the new composition of the Court, mostly Catholic and more socially conservative, and read their decisions indicating a fundamental "mistrust of women," encouraging the passage of more biased laws.<sup>90</sup> Although this has a detrimental effect on women, with pregnancy carrying a higher mortality rate than abortion<sup>91</sup> and the risk of mental health repercussions from pregnancy exceeding those from abortion<sup>92</sup>, the ideological rhetoric of the

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<sup>89</sup> "As further proof of the extent which the *Carhart* decision was informed by moral valuations, not jurisprudence, "Pro-choice activists were not the only ones to recognize that the *Carhart* decision relied on outmoded, traditional stereotypes of women. The week after the Supreme Court announced its decision in *Carhart*, Richard Land of the Southern Baptist Convention (known for their conservative image of women) hailed, "Thank God for President Bush, and thank God for Chief Justice John Roberts and Associate Justice Samuel Alito." Right-wing conservatives who protested the right to abortion considered *Carhart* a major victory. The opinion simultaneously revived more aggressive tactics by right wing conservatives. n151 But most importantly, the decision marked the fact that the pro-life movement's long-fought battle over the rhetoric of abortion was won. Depicting the procedure as a bloody execution was finally included in a Supreme Court opinion." Baranetsky, "Aborting Dignity: The Abortion Doctrine after *Gonzales V. Carhart*." Page 145-146.

<sup>90</sup> Vanderwalker, "Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics." Page 44. "Legislatures have been encouraged by the fact that the Supreme Court upheld Pennsylvania's biased counseling in *Casey*, as well as the mistrust of women apparent in the Court's decisions, to enact biased counseling laws that go far beyond the Pennsylvania statute that was before the Court in 1992."

<sup>91</sup> The supposition that anti-abortion laws are enacted in the interest of female health is particularly ludicrous in this respect. One state's mandate informed consent booklet discouraging abortion enumerates all the worst possible outcomes of abortion before, in fine print at the bottom of the page, mentions that childbirth also carries health risks: "Pregnancy and birth is usually a safe, natural process although complications can occur." This statement occurs without recognition that abortion is also usually a safe procedure. The state's interests lie in framing the abortion choice such that it may prompt "false beliefs about the relative risks of abortion and childbirth," not in providing actual informed consent. *Ibid.* Page 42.

<sup>92</sup> Post-Partum depression is recognized by the vast majority of physicians as a legitimate condition. Post-Abortion Syndrome is not. A large-scale study conducted to evaluate the claim that abortion grotesquely disfigures a woman's mental health



anti-abortion movement is louder and free from the restraints of *Roe*.

After passing “the most restrictive abortion law in the country”<sup>93</sup> at the time, including heartbeat provisions, a restriction on abortions performed after six weeks of gestation, mandatory ultrasound provisions, the elimination of licit embryonic testing and sex selection, and with a mandate that abortion providers have hospital-admitting privileges,<sup>94</sup> North Dakota Governor Jack Dalrymple released a press statement: “Although the likelihood of this measure surviving a court challenge remains in question, this bill is nevertheless a legitimate attempt by a state legislature to discover the boundaries of *Roe v. Wade*. Because the U.S. Supreme Court has allowed state restrictions on the performing of abortions and because the Supreme Court has never considered this precise restriction in HB 1456, the constitutionality of this measure is an open question.”<sup>95</sup> The fact that, forty years after *Roe*, the constitutionality of abortion measures is yet to be solidified is troubling. Likewise, there is a palpable threat of the Court deciding in favor of North Dakota were the case to reach that level. Women denied abortions are twice as likely to be victims of domestic abuse than women able to obtain abortions; coerced childbirth does not produce a loving “mother and child reunion” but rather a life below the poverty line, fraught with anxiety, and, most importantly, with the responsibility of caring for an unwanted child.<sup>96</sup> In a country where a New Mexico state legislator introduced legislation stipulating that a woman receiving an abortion, even after a rape, is guilty of a felony,<sup>97</sup> Virginia’s requirement that women undergo an ultrasound prior to obtaining an abortion is closer to state-mandated sexual abuse than to a medical procedure,<sup>98</sup> and the murder trial of an abortion doctor is front-page news, *Roe’s* forty-first birthday looks to be bleak. But, in the midst of all the abortion-bashing vitriol, occasionally the human side of abortion appears. A former abortion hotline employee, in an article recalling her experience, reminded the portion of the population

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concluded that “rates of a first-time psychiatric contact before and after a first-trimester induced abortion are similar. This finding does not support the hypothesis that there is an overall increased risk of mental disorders after first-trimester induced abortion.” Trine Munk-Olsen et al., “Induced First-Trimester Abortion and Risk of Mental Disorder,” *New England Journal of Medicine* 364, no. 4 (2011). Page 338.

<sup>93</sup> That is, until Kansas passed its anti-abortion law, declaring that life begins “at fertilization.” John Hna, “Gov. Brownback Signs Sweeping Anti-Abortion Bill,” *Kansas City Star*, <http://www.kansascity.com/2013/04/19/4191137/kan-governor-signs-sweeping-anti.html>.

<sup>94</sup> Sarah Kliff, “What North Dakota’s Six-Week Abortion Ban Says About the Antiabortion Movement,” (2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/15/what-north-dakotas-6-week-abortion-ban-says-about-the-antiabortion-movement/>.

<sup>95</sup> Jack Dalrymple, Press Release, March 26, 2013.

<sup>96</sup> “The researchers found that “a year after being denied an abortion, 7 percent reported an incident of domestic violence in the last six months,” compared to 3 percent of the women who received abortions.” Amanda Hess to *The XX Factor*, Nov 14, 2012, [http://www.slate.com/blogs/xx\\_factor/2012/11/14/the\\_turnaway\\_study\\_what\\_happens\\_to\\_women\\_who\\_are\\_denied\\_abortions.html](http://www.slate.com/blogs/xx_factor/2012/11/14/the_turnaway_study_what_happens_to_women_who_are_denied_abortions.html).

<sup>97</sup> Katie McDonough, “New Mexico Lawmaker Resurrects Bill Making Abortion after Rape a Felony,” *Salon Media Group, Inc.*, [http://www.salon.com/2013/01/28/new\\_mexico\\_lawmaker\\_resurrects\\_bill\\_making\\_abortion\\_after\\_rape\\_a\\_felony/](http://www.salon.com/2013/01/28/new_mexico_lawmaker_resurrects_bill_making_abortion_after_rape_a_felony/).

<sup>98</sup> Sara Dover, “Virginia Ultrasound Bill Goes into Effect Sunday,” *CBS News* (Jun 29, 2012), [http://www.cbsnews.com/8301-201\\_162-57464167/virginia-ultrasound-bill-goes-into-effect-sunday/](http://www.cbsnews.com/8301-201_162-57464167/virginia-ultrasound-bill-goes-into-effect-sunday/).

that does not believe “legitimate rape” to be a “legitimate” phrase to stand in solidarity:

*“My work on the hot line was almost half my lifetime ago. Thinking about it reminds me of a time when I bore witness to the terrible truths of womanhood in America. An unwanted pregnancy can hurtle a woman onto a perilous landscape where the laws of man don’t protect her. You don’t hear about this dark side of life very often in the daylight. But look around you. One in three women have been there.”<sup>99</sup>*

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<sup>99</sup> Kerry Sheridam, "My Job at the Abortion Hot Line," Salon Media Group, Inc., [http://www.salon.com/2013/05/01/my\\_job\\_at\\_the\\_abortion\\_hot\\_line/](http://www.salon.com/2013/05/01/my_job_at_the_abortion_hot_line/).

### **Addendum 06/20/2014**

In my personal life, I have been very open about the fact that I am a survivor of rape. On December 23, 2010, I was unconscious and taken advantage of in the vilest way possible. I did not file a report with the police or university administration because, at the time, I did not know that what had occurred constituted rape. I found out months later, at a dinner, when I asked if it was rape if someone had sex with you while you were unconscious. The table started laughing until one of my friends spoke up and said, “Guys, I think she’s serious.” It was then I could put a name to the terrible feelings inside – the self-loathing, the blame, the violation, the anger, and the myriad of other emotions that still rage within me. Even if I had known that rape had occurred at the moment of the act, I would not have reported it. The embarrassment of explaining what had happened to me to multiple parties directly following the sexual violence I experienced would have been far too daunting for my mental state at that time.

In my mind, those that limit the “choice” to have an abortion to those that have been victims of rape or incest do not understand the dynamics of the mind of a person that has been through such harrowing experiences. Furthermore, those that cite numbers indicating that a low percentage of rape/incest as named cause for abortion also do not understand the aforementioned dynamic. But, it is the rhetoric of the “legitimate rape” crowd, the “rape and incest only” cohort, and the “life begins at conception” that couples the tendency for rape/incest victims to blame themselves for the violence against them and the pregnancy it begot. The shame is put on those that choose – those that allow themselves to be raped or choose to “end a life” for their own needs – but the shame should be cast upon those that create this patriarchy that systematically instills that shame for all those that violate the sacred sacrament of protestant chastity, whether willingly or unwillingly.

As states pass more restrictive abortion laws, the Court is bound to act eventually. Until then, the free expression of woman as woman is hampered. When the law says “choice” where no choice realistically exists, like laws restricting abortion after 8 weeks of probable conception, the law is giving women the façade of freedom whilst usurping that same freedom. If I were to have gotten pregnant as a result of my rape, I would have sought an abortion with almost 100% certainty. If they had asked me the reason for my abortion, I would have said anything but “I was raped.” With the number of unreported rapes almost gargantuan, I hypothesize that the hypothetical manner which I would deal with a pregnancy resulting from my rape is far less hypothetical for many women in this country.

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