

STRANGE BEDFELLOWS: THE DESTIGMATIZATION OF ANTI-ABORTION REFORM

TALI R. LEINWAND*

INTRODUCTION

As the United States abortion debate continues into its fifth decade since *Roe v. Wade*,¹ pro-life groups are increasingly aiming to align themselves and their messages with classically “feminist” or “liberal” interests. Pro-life groups now heavily focus on women’s rights as a platform for advancing their ideological arguments and achieving legislative measures that ultimately restrict access to abortion. The use of such platforms allows anti-abortion sentiment to appear more palatable to a broader swath of women while enabling the pro-life movement to soften its image and improve its appeal.

This strategy, which I will refer to as pro-life “destigmatization,” manifests itself most clearly in law and politics, wherein pro-life advocates frame their anti-abortion arguments in broadly appealing, women’s rights-oriented terms. This ironic alignment is demonstrated through three examples that collectively represent an underlying effort to destigmatize anti-abortion reform and portray it as a branch of women’s rights: 1) advocacy for the expansion of the Pregnancy Discrimination Act (PDA), particularly in the context of the recently decided Supreme Court case of *Young v. United Parcel Service*;² 2) political advocacy organizations’ support for pro-life women candidates and the creative framing of anti-abortion legislation in election campaigns; and 3) anti-abortion legislation that restricts abortions specifically performed for sex-selection purposes. In each of these examples, there is a deliberate appeal to ideals many women *already* value such that, in theory, there would not be much of a leap from supporting feminist concerns to supporting the pro-life movement writ large. This connection is so close because, as each of these example shows, the ultimate goal of chipping away at abortion rights is portrayed as secondary, if it is even acknowledged at all. Rather, the pro-life presence is positioned as advocating something different from abortion, be it pregnancy rights or tax reform.

* J.D., Columbia Law School 2015, B.A., University of Pennsylvania 2009.

1 *Roe v. Wade*, 408 U.S. 919 (1972).

2 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

Casting anti-abortion arguments in “feminist” terms is not a new effort.³ Scholars like Reva Siegel have long charted the development of the pro-life movement’s “women-protective antiabortion argument[s]” and the ways in which the pro-life movement has “supplant[ed] the constitutional argument ‘[a]bortion kills a baby’ with [the] new claim ‘[a]bortion hurts women.’”⁴ Similarly, Mary Ziegler’s 2013 article in the *Berkeley Journal of Gender, Law & Justice* provides a detailed history of pro-life feminism, assessing the evolution of “pro-life, socially conservative, self-proclaimed feminists” and their growing role in the abortion debate.⁵ Consider also the decades-old legislative history of the Pregnancy Discrimination Act, which, as discussed *infra*, shows the law’s twin goals of female equality in the workforce and the preservation of a woman’s right to bear and raise children.⁶

Still, the pro-life movement’s destigmatization strategy has gained traction in recent years as pro-life feminism targets “a new generation of young women who reject the illusion that to be pro-woman is to be pro-choice.”⁷ The examples discussed in this Note are contemporary ones that, when taken as a whole, coalesce into indications of a dominant trend. This Note adds to this area of scholarship by demonstrating how pro-life advocates, legislators, and courts are currently drawing on feminist and women’s rights movements to advance abortion bans and destigmatize anti-abortion sentiment.

I. Pregnancy Discrimination in the Workplace

An early example of the pro-life movement’s effort to insert itself into classically feminist causes is the movement’s role in the passage of the Pregnancy Discrimination Act (PDA), an amendment to Title VII of the Civil Rights Act of 1964 that “prohibit[s]

3 See, e.g., Reva Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument*, 57 DUKE L.J. 1641 (2008) (exploring the pro-life movement’s development of arguments that advance the idea that abortion restrictions are actually pro-women).

4 *Id.* at 1649.

5 Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 268 (2013).

6 See *infra* notes 8–16 and accompanying text.

7 Emily Buchanan, *Viewpoint: Pro-Life and Feminism Aren’t Mutually Exclusive*, TIME, Jan. 3, 2013, <http://ideas.time.com/2013/01/03/viewpoint-pro-life-and-feminism-arent-mutually-exclusive/> [<http://perma.cc/W9WV-ZSUJ>].

sex discrimination on the basis of pregnancy.”⁸ The amendment arose in part as a response to the Supreme Court’s decision in *General Electric Company v. Gilbert*,⁹ which allowed employers to exclude pregnancy from disability benefit plans.¹⁰ The PDA set a floor for the sort of accommodation that employers are required to provide their pregnant employees.¹¹ It was heralded as a “landmark act for working mothers” because it “outlawed previous[ly] common forms of discrimination, such as not being hired due to visible pregnancy or likelihood of becoming pregnant, . . . being fired after maternity leave, or receiving a pay cut due to pregnancy.”¹² Ultimately, the PDA became known for its role in combatting workplace pregnancy-based discrimination by broadening Title VII’s definition of sex discrimination to encompass discrimination based on “pregnancy, childbirth, or related medical conditions.”¹³

But the PDA’s original supporters were not limited to champions of workplace equality or pioneering feminists. Some members of Congress, for example, heralded the PDA as a means of combatting the economic vulnerability that might force female employees to have abortions if their employers would not support their pregnancies. Such sentiment was notably articulated by Democratic lawmakers. California Congressman Augustus Hawkins, chief House sponsor of the PDA, remarked that “some mothers, unable to afford the loss of income caused by discrimination, may be discouraged from carrying their pregnancy to term.”¹⁴ New Jersey Senator Harrison Williams, chief Senate sponsor, stated: “One of our basic purposes in introducing the bill is to prevent the tragedy of needless and unwanted abortions forced upon a woman because she cannot afford to leave her job without pay to carry out the full term of her pregnancy.”¹⁵ Then-Senator Joe Biden of

8 The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1978), <http://www.eeoc.gov/laws/statutes/pregnancy.cfm> [<http://perma.cc/58KG-7RUE>].

9 *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976).

10 *See Shaw v. Delta Airlines*, 463 U.S. 85, 89 (1983) (“Congress overcame the *Gilbert* ruling by enacting § 1 of the Pregnancy Discrimination Act of 1978 . . .”).

11 *See Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987).

12 *GENDER AND WOMEN’S LEADERSHIP: A REFERENCE HANDBOOK* 276 (Karen O’Connor ed., 2010).

13 42 U.S.C. § 2000e(k).

14 Brief of Amici Curiae for 23 Pro-Life Organizations and the Judicial Education Project In Support of Petitioner at 20, *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013) (No. 12-1226) [hereinafter “*Young Pro-Life Amicus Brief*”].

15 *Id.*

Delaware commented that pregnancy-based discrimination effectively forces women “to choose abortion as a means of surviving economically.”¹⁶ Since its inception, the PDA has been regarded by some as a shield (protecting against pressures to get abortions) and as a sword (attacking discrimination that interferes with the right to bring up children) in its potential pro-life implications.

Pro-life groups most recently seized on this legislative history in the recently decided case of *Young*,¹⁷ which illustrated the way in which pro-life groups have adjusted their rhetoric to align with classically feminist interests. The *Young* case proceeded as follows: Peggy Young, a UPS delivery truck driver, took an approved leave of absence from her job to undergo *in vitro* fertilization treatment.¹⁸ Young subsequently became pregnant and returned to work with a doctor’s note restricting how much weight she could lift while pregnant.¹⁹ UPS then fired Young for the duration of her pregnancy (implicitly refusing to move her to a temporary alternate position) despite Young’s assurance that, in practice, her job rarely required her to exceed her doctor’s weight limitation.²⁰ Young sued UPS in federal court, arguing that UPS, by refusing her request for a temporary accommodation while accommodating other similarly situated employees, had violated the PDA.²¹ The Fourth Circuit rejected Young’s argument and articulated a strictly narrow interpretation of the PDA: “[T]he Pregnancy Discrimination Act does not, despite the urgings of feminist scholars[,] require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat women as badly as they treat similarly affected but non-pregnant employees”²² The Supreme Court granted review of the parameters of employer accommodation of pregnant employees, ultimately vacating the Fourth Circuit’s holding and remanding the case for the lower court to decide whether Young could demonstrate her employer’s discrimination under a newly articulated test.²³

16 *Id.* (internal quotations omitted).

17 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

18 *Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 195 (4th Cir. 2013).

19 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 440 (4th Cir. 2013).

20 *Id.* at 440–41.

21 *Id.* at 445.

22 *Id.* at 447 (internal citation and quotation marks omitted).

23 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1356 (2015). The additional substance and procedural history of this case, including the oral arguments, are beyond the scope of this paper, but for an interesting summary and analysis, see Lyle Denniston, *Argument Analysis: ‘As Compared to What?’*, SCOTUSBLOG

During the briefing stage of *Young*'s Supreme Court-level litigation, twenty-three pro-life groups filed an amicus brief, arguing that supporting pregnant women is a pro-life interest.²⁴ The groups, invoking the PDA's legislative history, collectively argued that protecting women from pregnancy-based discrimination in the workplace (1) reduces pressures among female employees to succumb to abortion²⁵ while (2) simultaneously strengthening their "fundamental rights" to bear children and raise a family.²⁶ Summarizing its interest as amici curiae, the groups wrote:

Economic pressure is a significant factor in many women's decision to choose abortion over childbirth. Protecting the ability to work can increase true freedom for women, promote the common good, and protect the most vulnerable among us. The PDA protects the unborn child as well as the working mother who faces economic and other difficulties in bearing and raising the child.²⁷

In other words, the groups argued, the PDA is certainly designed to protect pregnant employees from a host of workplace burdens or pregnancy-based discrimination. But it was "*explicitly* designed to protect [them] from the vulnerabilities that may arise from their economic position[s],"²⁸ i.e., from the temptations of abortion.

The pro-life groups' emphasis on women's rights contrasts with mainstream liberal groups' tendency to focus on these issues in gender-neutral terms. "Pro-life feminists have promoted an important counterargument to *equality*-based justifications for abortion rights: pro-life feminism helps paint abortion opponents as pro-*woman* and amenable to the needs of *women* who pursue higher education or professional careers."²⁹ This contrast has been especially stark in the employment context. Feminists for Life of America (FLA), for

(Dec. 3, 2014, 1:02 PM), <http://www.scotusblog.com/2014/12/argument-analysis-as-compared-to-what/> [<http://perma.cc/RS4A-BUH3>]; Lyle Denniston, *Opinion Analysis: Fashioning a Remedy for Pregnancy Bias*, SCOTUSBLOG (Mar. 25, 2015, 5:28 PM), <http://www.scotusblog.com/2015/03/opinion-analysis-fashioning-a-remedy-for-pregnancy-bias/> [<http://perma.cc/86F2-X74R>].

24 *Young Pro-Life Amicus Brief*, *supra* note 14, at 1–9.

25 *Id.* at 19.

26 *Id.* at 22–23.

27 *Id.* at 1.

28 *Id.* at 22 (emphasis added).

29 Ziegler, *supra* note 5, at 232 (emphasis added).

example, a pro-life organization that did not sign on to the *Young* amicus brief, has officially “recognize[d] that abortion is a reflection that our society has failed to meet the needs of women.”³⁰ The FLA’s website offers a wealth of information for female employees who are either pregnant or contemplating becoming pregnant. For example, under the “Resources: In the Workplace” section of its website, the FLA outlines the terms of the PDA (e.g., “job applicants are not required to reveal that they are pregnant”), publishes articles on topics such as “Avoiding the Parent Trap: Protecting Yourself from Pregnancy Discrimination,” and cites cases involving the PDA.³¹ These informational tools are designed to educate women about what they, as women, are entitled to in the workplace, and to ensure that they know about their right to be free from pressures to abort.

At first glance, the “feminist” sobriquet and ostensibly progressive policy aims appear inconsistent with the conservative realm of pro-life advocacy. There is a tension in espousing expansive economic opportunities for women in order to limit their reproductive freedoms. But whether these apparent contradictions are ideologically incoherent, politically canny calculations, or both, depends on one’s perspective. Advocacy for pregnancy accommodation illustrates how convergence between segments of the pro-life movement and other women’s rights movements in one respect—i.e., championing greater benefits—might mask serious discrepancies with regard to those same groups’ respective stances on abortion. Of course, support for pregnancy discrimination need not be a zero sum game; proponents of workplace equality might very well welcome support from any source, and an advocate’s ulterior motives might not be relevant where workplace equality is better secured. Rather, the concern is that advocates championing women’s rights in one context then turn around to undermine women’s rights in another context. Such maneuvering may not undermine that first goal of workplace accommodation, but it is dangerous to the extent it warms people to the idea of restricting abortion access.

The benefits that the pro-life movement gains by latching onto the broader aim of workplace equality are twofold. First, political affiliation and socioeconomic status tend

30 *Our Mission*, FEMINISTS FOR LIFE, <http://www.feministsforlife.org/our-mission-organization/> [<http://perma.cc/5RVY-PMYL>] (last visited Jan. 12, 2016).

31 *Raising Expectations in the Workplace*, FEMINISTS FOR LIFE, <http://www.feministsforlife.org/raising-expectations-in-the-workplace/> [<http://perma.cc/8CSR-6TYD>] (last visited Jan. 12, 2016); Sharon Serratore, *Avoiding the Parent Trap: Protecting Yourself from Pregnancy Discrimination*, FEMINISTS FOR LIFE, <http://www.feministsforlife.org/avoiding-the-parent-trap-protecting-yourself-from-pregnancy-discrimination> [<http://perma.cc/SMD4-8YML>] (last visited Jan. 12, 2016).

to dictate—or at least meaningfully inform—one’s position(s) with regard to abortion.³² Casting its message in terms of workplace equality enables the pro-life movement to erase some of these predetermined lines and appeal to women across party and class given that the underlying value of fair treatment appeals to nearly everyone’s professional *and* personal identities.

Second, the pro-life movement in this context utilizes an intriguing (albeit subtle) rhetorical framing device. By couching its argument in terms of pregnancy accommodation, pro-life proponents are able to use words like “mother” and “child” seamlessly in place of “pregnant woman” and “fetus.” It is largely unobjectionable that, in the context of a pregnant woman fighting for workplace accommodation, the woman may be referred to as a mother, and her fetus as an unborn child; as opposed to in the abortion context, the meaning of the terms here is not subject to question or rife with conflict. Though pro-life arguments typically use such vocabulary indiscriminately, pregnancy discrimination presents an opportunity to do so in an even more insidious manner. This framing device allows pro-life advocates to convey three interconnected messages. First, such language pushes forward the idea that a human life begins as soon as the mother begins to deal with or even contemplate pregnancy at work. Second, such framing, “by addressing women as caregivers whose interests are realized in protecting and providing for their children,”³³ advances the argument that “[b]ecause abortion violates women’s role as mothers, it is inherently harmful to women.”³⁴ Third and finally, the PDA’s protection of the working mother targets a category of women that evokes a sense of maternal solidarity, both among its members (working mothers grateful for additional support) and for the general population that might be equally sympathetic.

In these ways, the pro-life movement’s seizure of—or at least its role in—conversations and cases about pregnancy-based discrimination attracts a broad swath of women and subtly injects pro-life rhetoric into an area traditionally deemed pro-choice (or at least politically liberal). This tactic is made even more salient when considering how, in the nearly four

32 Interestingly, and confounding common perceptions, gender does not actually dictate one’s views on reproductive rights to the same extent as politics, class, or religion might. See Razib Khan, *The Abortion Stereotype*, N.Y. TIMES, Jan. 2, 2015, http://www.nytimes.com/2015/01/03/opinion/the-abortion-stereotype.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [<http://perma.cc/4BTJ-67Z2>] (citing a recent study by the General Social Survey that found gender to have a negligible impact in determining one’s views on abortion).

33 Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1019.

34 *Id.*

decades since the PDA's passage, pregnancy-based discrimination in the workplace has hardly subsided. In 2006, the Equal Employment Opportunity Commission received nearly five thousand complaints of pregnancy-based discrimination—a thirty percent increase from the previous decade.³⁵ In 2010, there were more than six thousand complaints filed.³⁶ Mainstream media outlets likewise frequently publish anecdotal examples of such discrimination.³⁷ All of which is to say that the topic of pregnancy discrimination is a malleable one with which many women are able to identify. By aligning itself with efforts to combat such discrimination, the pro-life movement becomes more relevant and relatable to women who would otherwise be reluctant to sign on. Such efforts, often inconspicuous, dovetail with the more visible presence that pro-life advocacy groups seek to secure for their candidates and positions, as discussed in the following section. There is, indeed, a symbiotic relationship between this legislative maneuvering—repositioning anti-abortion reform as compatible with feminism—and the political efforts that ultimately enables the pro-life movement to disseminate its positions and gain broader public support.

II. Political Advocacy and the Susan B. Anthony List

In the lead-up to the 2014 midterm elections, the Susan B. Anthony List (SBA), a pro-life political advocacy organization, and its president, Marjorie Dannenfelser, drew heightened media attention for their behind-the-scenes work in boosting the public images of pro-life, anti-abortion political candidates.³⁸ Though the group is named for the eponymous nineteenth century feminist and models itself on Emily's List (the “powerful pro-choice organization” that raises money for pro-choice Democratic female candidates), SBA has “little in common with most feminist groups [given that] its sole aim is to abolish abortion.”³⁹

Before assessing the SBA's and Dannenfelser's tactics, it is worth noting the

35 Darlena Cunha, *When Bosses Discriminate Against Pregnant Women*, ATLANTIC, Sept. 24, 2014, <http://www.theatlantic.com/business/archive/2014/09/when-bosses-discriminate-against-pregnant-women/380623/> [<http://perma.cc/C8JM-A48C>].

36 *Id.*

37 See, e.g., Rachel L. Swarns, *Doctor Says No Overtime; Pregnant Worker's Boss Says No Job*, N.Y. TIMES, Oct. 19, 2014, <http://www.nytimes.com/2014/10/20/nyregion/doctors-letter-spells-end-of-job-for-pregnant-employee.html> [<http://perma.cc/WR9N-5V6E>].

38 Kelefa Sannah, *The Intensity Gap*, NEW YORKER, Oct. 27, 2014, <http://www.newyorker.com/magazine/2014/10/27/intensity-gap> [<http://perma.cc/6Z3G-7NKV>].

39 *Id.*

significance of the group's name itself. On the most superficial, rhetorical level, a group that is unabashedly pro-life—and anti-abortion—carries out its mission in the name of a quintessential feminist.⁴⁰ As an organization that exists to support pro-life candidates (initially only women, but now men as well), the SBA reaps manifold benefits by pushing for incremental restrictions on abortion while undercutting charges of misogyny by explicitly name-checking a feminist icon. It “supports politicians who are pro-life (this, and not ‘anti-abortion,’ is their preferred term) and, ideally, female.”⁴¹ Similarly to how participating in the PDA debate enables the pro-life movement to reinforce notions of motherhood and the unborn child in an abortion-neutral context, this labeling either disguises the SBA's actual purpose or, even more powerfully, portrays its anti-abortion goals as furthering feminist objectives. As *The New Yorker* writer Kelefa Sannah observed, such labeling works “better to deflect the old but effective charge that the battle against abortion is necessarily a battle against the half of the population that might potentially undergo one.”⁴² Indeed, a study of the group's tactics suggests the great pains that are taken to avoid charges of misogyny or extremism, with Dannenfelser maintaining that Republicans should “speak better, not less” about abortion.⁴³ For example, the SBA does not encourage Republican candidates to support personhood amendments, which are continuously and broadly subject to vitriolic attacks.⁴⁴

The SBA's calculation to distance itself from personhood amendments is based on popular sentiment. Personhood amendments have faced strong resistance among many

40 It is important to note here that the subject of Anthony's own views on abortion has been one for debate for the last few decades. Though pro-life groups have claimed her legacy as one condemning abortion with “passionate abhorrence,” Anthony biographers and pro-choice proponents have maintained that “there is absolutely no basis to the claim that [she] opposed abortion.” Christine Stansell, *Meet the Anti-Abortion Group Pushing Presidential Politics to the Extreme Right*, NEW REPUBLIC, July 11, 2011, <http://www.newrepublic.com/article/politics/91669/abortion-pledge-susan-b-anthony-republicans-romney?page=0,1#> [<http://perma.cc/4QGF-TLPW>].

41 Sannah, *supra* note 38.

42 *Id.*

43 *Id.*

44 See, e.g., Grace Wyler, *Personhood Movement Continues to Divide Pro-Life Activists*, TIME, July 24, 2013, <http://nation.time.com/2013/07/24/personhood-movement-continues-to-divide-pro-life-activists/> [<http://perma.cc/3HH2-3BTF>]. (“Nationally, mainstream antiabortion groups like Americans United for Life and Susan B. Anthony List have distanced themselves from the personhood movement.”). For a sense of the division among pro-life groups, consider the article's report that of the more than ten states that have considered personhood measures, only one—North Dakota—has adopted an amendment, and that “many pro-life activists agree that personhood laws do not pass muster with the Supreme Court's past rulings.” *Id.*

states, particularly those in which pro-choice advocates have exposed the implications of such legislation for health issues other than abortion.⁴⁵ Maya Manian's 2013 article outlines the broader problem with personhood legislation:

The implications for women's liberty and equality, particularly in their healthcare decision-making during pregnancy, are wide ranging—from criminalization of behavior during pregnancy, to family-law implications for spousal control over pregnant women's medical treatment decisions, to employment-law practices regarding pregnancy discrimination.⁴⁶

Though Manian specifically describes the *pro-choice* movement's efforts to dismantle personhood legislation, the fact that a pro-life organization such as the SBA is distancing itself, if not indirectly undermining, those legislative efforts illustrates yet another example of the pro-life destigmatization efforts. As in the PDA context, we see again the pro-life movement manipulating language and rhetorical devices to disseminate and destigmatize its messages.

Like the pro-life movement's efforts at destigmatization through the PDA, supporting a popular cause while shoehorning in anti-abortion sentiment, the maneuvering here is similarly implicit. Under Dannenfelsler's tutelage, candidates are encouraged to whittle away at abortion rights in ways that appeal to other sensibilities. For example, Dannenfelsler has emphasized the Government Accountability Office's finding that healthcare reform has led to taxpayer-funded abortion because some subsidized insurance plans were failing to charge customers extra per month.⁴⁷ The strategic benefit here is clear: "it links the pro-life movement to less controversial causes, like fiscal discipline and general opposition to Obamacare."⁴⁸

Observations about the SBA's specific goal—and the pro-life movement's broader one—of deatigmatizing pro-life sentiment is one that Dannenfelsler embraces. Her goal in campaigns is not only to inspire pro-life voters but also to avoid "driving away everyone

45 See Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 75 (2013).

46 *Id.* at 93.

47 Sannah, *supra* note 38.

48 *Id.*

else.”⁴⁹ Purely in terms of optics, SBA’s success in electing pro-life *women* to Congress confers upon those pro-life advocates “authority” to speak on the subject in a way that men simply lack. In addition, some of the specific legislation that SBA supports enjoys at least nominally pro-women justifications. In 2011, for example, the Senate passed the Woman’s Right to Know Act, which requires a doctor performing an abortion to show patients an ultrasound of the fetus and to provide a detailed explanation of its features.⁵⁰ Though these laws are built on the expectation or hope that such knowledge will ultimately dissuade women from going through with an abortion, SBA counsels politicians on framing these types of laws as attempts to protect women from doctors who withhold information or from dangerous clinics.⁵¹ This approach is not unique to the SBA; other pro-life groups such as Americans United for Life (AUL) have likewise made “women—not the ‘unborn’—the focal points of its [legislative] efforts.”⁵² Indeed, the Women’s Right to Know Act, along with several other abortion-related legislative efforts, have been included by AUL in a “package it has dubbed the ‘Women’s Protection Project.’”⁵³

SBA represents, and has been bolstered by, the pro-life’s “women-friendly” approach that scholars like Reva Siegel have chronicled.⁵⁴ Indeed, on its face, this approach protects and caters to women—and, therefore, appeals to legislators and their constituents. However, the implication that women require such protection to guard them from their worst selves, or from stumbling into a painful moral decision rife with profound grief and sorrow,⁵⁵ raises serious concerns of paternalism. Indeed, as Siegel has argued, the sorts of “woman-protective” anti-abortion arguments that groups like the SBA stands for

49 *Id.*

50 *Id.* See also “*Woman’s Right to Know Act*,” N.C. DEP’T OF HEALTH & HUMAN SERV., <http://wrtk.ncdhhs.gov/> [<http://perma.cc/D58D-BL3N>] (last visited Jan. 12, 2016).

51 Sannah, *supra* note 38. See also Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) (arguing that mandatory ultrasounds are intrusive and pernicious in the context of abortions).

52 Janet Reitman, *The Stealth War on Abortion*, ROLLING STONE, Jan. 15, 2014, <http://www.rollingstone.com/politics/news/the-stealth-war-on-abortion-20140115> [<http://perma.cc/WV95-2M98>].

53 *Id.*

54 Siegel, *supra* note 33, at 991.

55 See *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007) (upholding Congress’s ban on partial-birth abortions out of a concern that “women come to regret their choice to abort the infant life they once created and sustained”). See also Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1699, 1712–33 (2008) (commenting on the “[g]ender-paternalist reasoning” in *Carhart* and its indication of “the spread of abortion restrictions that are women-protective”).

actually rely on and perpetuate “stereotypes about women’s capacity and family roles.”⁵⁶ The embedded gender-based assumptions should give pause to those persuaded by the pro-life movement’s embrace of “feminist” ideals and objectives.

III. Sex-Selection Abortions and Incremental Regulation

Observations about the SBA’s rhetorical and demographic strategies (its name and the gender of the candidates it throws its weight behind) show how the pro-life movement tries to make abortion regulation and restrictions broadly appealing through superficial tactics. But such observations should not suggest that the movement is not also focused on specific, substantive legislation. Legislation banning sex-selective abortion offers a useful example to show how pro-life advocates capitalize on feminist or women-friendly ideals to push through anti-abortion legislation in a way that seems perfectly rational to even the most pro-choice supporters. However, the implications of such legislation, and the legal theory grounding it, are more troublesome and controversial than they initially appear.

Sex-selection legislation specifically prohibits abortion when done for sex-selection purposes. Though eight states currently ban these types of abortions,⁵⁷ data suggests that the practice is relatively uncommon in the United States.⁵⁸ Laws regulating sex-selective abortion are touted as a means of combatting gender-based discrimination. Consider, for example, Texas Congressman Lamar Smith’s statement that “[t]he reason for opposing sex selection is uniform: the desire to combat discrimination,”⁵⁹ or the stated purpose of the Prenatal Nondiscrimination Act of 2013 “to prohibit discrimination against the unborn on the basis of sex.”⁶⁰ Similar to (but more overt than) the pro-life movement’s focus on pregnancy-based discrimination, this stance positions pro-life advocates as championing women’s rights and combating the type of discrimination (be it gender- or pregnancy-based) that almost all women, regardless of their positions on abortion, work to overcome.

56 Siegel, *supra* note 33, at 991.

57 UNIV. OF CHI. LAW SCH. INT’L HUMAN RIGHTS CLINIC ET AL., REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION IN THE UNITED STATES 1 (2014) [hereinafter SEX-SELECTION REPORT].

58 Sarah Kliff, *Congress Debates Ban on Sex-Selective Abortions as Researchers Explore How Often They Happen*, WASH. POST., May 30, 2012, http://www.washingtonpost.com/blogs/wonkblog/post/congress-debates-ban-on-sex-selective-abortions-as-researchers-explore-how-often-they-happen/2012/05/30/gJQAwhpN2U_blog.html [http://perma.cc/8YYA-CQ23].

59 SEX-SELECTION REPORT, *supra* note 57, at 21.

60 *Id.*

In reality, however, such laws advance their drafters' broader stance against abortion in general. As a 2014 study authored by University of Chicago Law School academics found, though "proponents of laws banning sex-selective abortion in legislatures and civil society groups around the country claim that the laws will prevent gender discrimination[,] . . . it [is] clear that restricting access to abortion generally is the primary motivation for sex-selective abortion bans in the United States."⁶¹ Despite the normative appeal of these purported justifications, the politicians supporting such bans are "at the forefront of the movement to make abortion illegal."⁶² As in the PDA and SBA contexts, the anti-discrimination rationale behind such legislation is, in many cases, simply a pretext to gain a foothold in rolling back abortion rights. For example, Arizona Congressman Trent Franks, who sponsored a ban on sex-selective abortion in both Congress and in the Arizona state legislature, stated that he "made it one of [his] priorities in public office to fight for the end of abortion on demand."⁶³ Similarly, New Jersey Congressman Chris Smith, who supports federal bills that would ban sex-selective abortion as well as bills that would prohibit federal funding for abortion services and groups like Planned Parenthood, has stated that "abortion is a serious, lethal violation of fundamental human rights," adding that the "pro-life movement is not only on the side of compassion, justice, and inclusion," but also "the right side of responsible science and of history."⁶⁴

Conservative scholars have been even *more* explicit about the underlying purpose of such normative and incremental restrictions on abortion. In 2008, for example, Steven Mosher, head of the Population Research Institute, a leading anti-abortion group, stated: "I propose that we—the pro-life movement—adopt as our next goal the banning of sex- and race-selective abortion."⁶⁵ Steven Calabresi, an influential conservative thinker and law professor, likewise wrote in an article that same year: "The key to eroding *Roe v. Wade* . . . is to pass a number of state or federal laws that restrict abortion rights in ways approved of by at least fifty percent of the public," such as "a ban on abortion for sex selection."⁶⁶ This incrementalist approach, which has previously been most successful with respect to late-term abortion, depends on targeting an unpopular procedure without explicitly linking

61 *Id.*

62 *Id.*

63 *Id.*

64 SEX-SELECTION REPORT, *supra* note 57, at 21. In the North Dakota and Texas state legislatures, sponsors of sex-selection bans have also sponsored bills that prohibit abortion after the detection of a fetal heartbeat. *Id.*

65 *Id.*

66 *Id.* at 21–22.

its ban to the larger goal of limiting all abortion rights. The strategy is one touted by pro-life activists, including SBA leaders, for shrewdly undercutting reproductive rights,⁶⁷ and is widely acknowledged by public policy observers as a political ploy to eradicate *Roe*.⁶⁸

In addition to “covertly” pushing through anti-abortion legislation, sex-selection legislation tacitly invokes a larger and recurring rhetorical move that permeates the pro-life movement’s destigmatization strategy: framing legislation in terms of children or, even more specifically, in terms of daughters. These laws use language to underscore notions of motherhood and of the fetus as an unborn child. Legislative text consistently refers to the “unborn child” and “defines abortion sought based on the sex of the fetus as ‘the intentional killing of unborn females.’”⁶⁹ Such discussion of the fetus in terms of its gender—a quality attributed to real, living humans—reifies the fetus and turns it, almost automatically, into an unborn child. This step helps the pro-life movement shift the focus from a clinically-regarded fetus into an emotions-generating human to whom we assign characteristics, feelings, and a life.⁷⁰ Anti-abortion regulation in turn becomes easier to understand and support.

Characterizing the fetus as a child pushes abortion rhetoric against “child” language. By acculturating people—and women in particular—to the idea that every fetus is in fact an “unborn child,” any form of abortion essentially becomes more troublesome as it becomes increasingly difficult to separate conceptions of the fetus from human life. Similar fetus personification tactics are employed through ultrasound visualization requirements.⁷¹ For

67 *Ohio Law Would Limit Late-Term Abortion*, SUSAN B. ANTHONY LIST: SUZY B BLOG (Jan. 18, 2011), <http://www.sba-list.org/suzy-b-blog/ohio-law-would-limit-late-term-abortion> [<http://perma.cc/J4ZJ-3EP3>] (“Susan B. Anthony List congratulates and encourages all the states who continue to push for legislation that protects unborn children from abortion, especially late-term abortion, and advances the Pro-Life cause with these incremental steps that grant the unborn their due legal representation.”).

68 See SCOTT H. AINSWORTH & THAD E. HALL, *ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE* 108 (2010). See also Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 975 (2014) (noting the “ascendancy of incrementalist litigators in the pro-life movement”); Simon van Zuylen-Wood, *A Radical New Ploy to Destroy Roe v. Wade—Which Just Might Work*, NEW REPUBLIC, Sept. 2, 2011, <http://www.newrepublic.com/article/politics/94470/personhood-abortion-mississippi-roe-wade> [<http://perma.cc/68UD-6M28>].

69 SEX-SELECTION REPORT, *supra* note 57, at 22.

70 Similar work is done by fetal technology, the emotionalization and celebration of ultrasounds, and so on.

71 See, e.g., Woman’s Right to Know Act, ALA. CODE § 26-23A-4 (2014) (requiring women seeking an abortion to complete a form to acknowledge that she either saw the ultrasound image of her unborn child or that she was offered the opportunity and rejected it).

example, pro-life programs such as Windows to the Womb “offer training techniques that accentuate any baby-like qualities of the fetus and that otherwise treat the fetus as a child, for example by calling it by a name.”⁷² Indeed, “[f]or sonographers who work in pro-life Crisis Pregnancy Centers or other clinics that do not provide abortion, a guided ultrasound is crucial to the explicit task of persuading the woman not to abort.”⁷³ These fetus reification issues are also at the forefront of the debate between pro-choice activists and supporters of MISSING ANGELS Acts,⁷⁴ which are “laws that authorize parents to request, and require the state to provide, a birth certificate for a stillborn child.”⁷⁵ Though such gestures are profoundly personal and, perhaps, not without value, as Carol Sanger has pointed out, legal abortion supporters are concerned that “issuing certificates to children who have never lived may serve as yet another legal marker equating fetal life with that of born persons and that this will, sooner or later, play its part in the recriminalization of abortion.”⁷⁶

Incremental regulation that is grounded in socially appealing terms is a savvy political move. It certainly allows the pro-life movement to shed its image as religious zealots who are out of touch with modern women’s interests. But these examples of increasing intent-based abortion regulation are actually quite dangerous. It does not take much imagination to guess how such incremental restrictions could lead to more extensive threats to abortion rights.⁷⁷ Consider, for example, the way in which *Casey* “retained” and “reaffirmed” *Roe*’s holding only to dismantle it.⁷⁸ More specifically, the notion of restricting abortions based on intent—no matter how problematic something like sex-selection might seem—

72 Sanger, *supra* note 51, at 372.

73 *Id.*

74 MISSING ANGELS BILL LEGISLATIVE REFERENCE SITE, http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61 [<http://perma.cc/FJ5J-4WVZ>] (last visited Dec. 18, 2014).

75 Carol Sanger, “*The Birth of Death*”: *Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 272 (2012).

76 *Id.* at 305.

77 See Danielle Lang, *Truthful but Misleading? The Precarious Balance of Autonomy and State Interests in Casey and Second-Generation Doctor-Patient Regulation*, 16 U. PA. J. CONST. L. 1353, 1376–83 (noting that “the incrementalist strategy seeks to use [anti-abortion] incremental regulations to slowly undermine the legal foundations of the abortion right” and that the pro-life movement has supplemented this strategy with a “women-protective discourse” premised on the idea that restriction of abortion is necessary to protect women).

78 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). See also *Gonzales v. Carhart*, 550 U.S. 124, 147–68 (2007) (chipping away at abortion rights and setting the bar even higher for what constitutes an undue burden).

is worrisome because it opens the door to much more onerous restrictions on abortion. This slippery slope threatens to make the category of “acceptable” abortion (often limited by the pro-life camp to cases of rape, incest, or threats to the health of the mother) even more exclusive. And yet, when couched in terms of female equality, such dangers are easy to overlook. Just as casting anti-abortion arguments against the backdrop of workplace equality or tax policy neutralizes the pro-life movement, so too does relying on ulterior justifications for abortion restrictions help the pro-life movement advance its anti-abortion goals.

CONCLUSION

The core issues in the national abortion debate have been so thoroughly discussed over the years that staunch pro-life and pro-choice positions have ossified into orthodoxies. Thus, in order to make tangible progress, both sides must appeal to those citizens in the middle rather than solely to their own partisans. As demonstrated by the three examples above, the pro-life camp has injected their advocacy into seemingly unrelated and certainly more neutral areas of law and politics.

The success of these strategies in turning the cultural tide toward anti-abortion sentiment may have even extended to the pro-choice movement. The climate of anti-abortion sentiment is such that the tone of the pro-choice movement has almost changed from advocacy to something closer to apology. In turn, there is increased interest among pro-choice leaders like Katha Pollitt to portray abortion “not as a moral compromise requested by poor, weak women—we’re sorry, and we promise we’ll make it rare, but please, forgive us, we’ll still need it in extremis—but as a positive doctrine of women’s control over their own bodies, and of their own lives and destinies.”⁷⁹ These leaders are now urging pro-choice supporters to stop perpetuating the “‘awfulization’ of abortion.”⁸⁰ The idea is to embrace abortion,

79 Adam Gopnik, *Arguing Abortion*, NEW YORKER, Nov. 18, 2014, <http://www.newyorker.com/news/daily-comment/arguing-abortion> [<http://perma.cc/WJ44-PK4B>].

80 Hanna Rosin, *Abortion Is Great*, SLATE, Oct. 13, 2014, http://www.slate.com/articles/double_x/doublex/2014/10/katha_pollitt_s_pro_reclaiming_abortion_rights_reviewed.html [<http://perma.cc/5EB3-96ZQ>]. Though Katha Pollitt is most recently attributed with advancing the awfulization argument—largely because of her recently published book, *Pro: Reclaiming Abortion Rights* (2014)—the origin of the term is a bit murkier. It seems that the feminist leader Janet Hadley first used the term in her book *Abortion: Between Freedom and Necessity* (1996), having adopted it from an Australian book titled *We Women Decide: Women’s Experience in Seeking Abortion in Queensland, Australia, and Tasmania 1985–1992* that was published in 1994 by a number of Australian academics. Susan Himmelweit, *Abortion: Between Freedom and Necessity*, 60 FEMINIST REV. 115, 117 (1998) (book review). Interestingly, though Pollitt uses the term to advocate integrating discussion of abortion into everyday conversation and de-stigmatizing abortion as something unexceptional,

especially rhetorically, as a “social good.”⁸¹ The motive underlying these arguments rests in casting abortion in the language of autonomy and in values women hold dear—abortion as a norm rather than as an exception—so that in the public’s eye, abortion becomes an integral right rather than “a privilege to be used as infrequently as possible.”⁸² As Pollitt and others seem to recognize, the pro-life’s destigmatization successes demand a more comprehensive response from the pro-choice movement that not only confronts abortion in its entirety but also acknowledges the ways, both remarkable and unremarkable, it fits in with everyday life.⁸³

It is ironic that as pro-life groups increasingly latch onto liberal or feminist platforms to launch and frame their messages, the pro-choice movement—intuitively more in line with those liberal or feminist messages—is struggling to broaden its appeal. The target audience on both sides of the abortion debate, it seems, does not want to hear about complicated medical justifications for abortion *or* about why women who abort are selfish murderers. Leaders on both sides seem to have decided that neither message is interesting or marketable, or that both are too difficult to swallow, or some combination. What has emerged instead is a series of proxy debates about abortion that are being fought on such ground as workplace equality, Obamacare, fiscal irresponsibility, and gender discrimination. As this Note’s three main examples show, the mainstream abortion debate is no longer solely about abortion. The pro-life movement has either focused on advancing neutral messages such that one does not immediately notice their abortion-related goals, or it has emphasized abortion legislation in terms of women’s rights so that the restriction on abortion is not ultimately deemed problematic. But while tiptoeing around abortion, or justifying abortion in creative ways, has empowered the pro-life movement in destigmatizing its position, that

Hadley’s version represented an argument “for abortion to be seen primarily as a medical procedure to be used by women in certain circumstances.” *Id.* By Pollitt’s standards, Hadley actually awfulized abortion herself. Similarly to Pollitt’s book, Hadley did seek to combat the perception that abortion is “morally problematic, and a traumatic, negative, desperate decision for women.” Dianne Proctor, *Abortion: Between Freedom and Necessity*, 14 J. AUSTRALIAN POPULATION ASS’N 120, 122 (1997) (book review). But one sees the different directions in which each author took the premise.

81 Rosin, *supra* note 80.

82 *Id.*

83 Additional campaigns employing this strategy have emerged in the last year. *See, e.g.*, Tamar Lewin, *#ShoutYourAbortion Gets Angry Shouts Back*, N.Y. TIMES, Oct. 1, 2015, <http://www.nytimes.com/2015/10/02/us/hashtag-campaign-twitter-abortion.html> [<http://perma.cc/GQ7D-VDN3>]; 1 IN 3 CAMPAIGN, <http://www.1in3campaign.org/en/> [<http://perma.cc/8TMR-WQ4V>] (last visited Jan. 12, 2016); MY ABORTION MY LIFE, <http://www.myabortionmylife.org/> [<http://perma.cc/9VFW-XX4H>] (last visited Jan. 12, 2016).

same tactic has hurt the pro-choice movement, now struggling to reach out beyond its base of supporters.

Pro-life successes have followed from dichotomizing the parameters of abortion: on one side, they have used advancing ultrasound technology and neonatology to demarcate late-term abortions as impermissible. On the other side of the spectrum, abortions because of rape, incest, and the life of the mother are relatively sacrosanct, at least for the time being. Most abortions, of course, fall into neither of these discrete categories, but are early-term elective procedures.⁸⁴ It would seem that pro-choice advocates should be able to secure control of this middle area by disseminating success stories of women, for example, who chose early to terminate a pregnancy and then went on to have successful careers and families on their own timetable. These are stories that the anti-awfulization movement would like to tell. However, the combination of social stigma and legal issues surrounding patient privacy makes it more likely that the publicized personal abortion stories will continue to come from the pro-life side. In this way, the pro-life and pro-choice movements are on seriously different footings, with the former maintaining an inherent but important advantage in the fight for public or mainstream approval.

These three examples—pregnancy accommodation, political advocacy, and sex-selection legislation—are primarily exercises in redefining the pro-life cause favorably in a human rights framework, particularly feminism and women's rights. On the one hand, there is no surer sign of feminism's success than the fact that such goals as workplace rights for the pregnant, increased female representation in government, and the prevention of sex-selective abortion are so normative as to be seen as tent poles (or Trojan Horses, depending on one's perspective) for the pro-life camp. On the other hand, it is no doubt discouraging for pro-choice advocates that abortion rights are seen as falling outside the realm of these widely accepted feminist objectives.

The appropriate response from the pro-choice side would be to assert the centrality of reproductive rights, including abortion, to women's rights. The anti-awfulization campaign is a good start. Likewise, it may be constructive to link abortion explicitly to less

84 GUTTMACHER INST., FACT SHEET: INDUCED ABORTION IN THE UNITED STATES (2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html [<http://perma.cc/CX4P-C5WT>] (noting that in 2010, eighty-nine percent of abortions occurred within the first twelve weeks of pregnancy). See also Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 110 (2005) (reporting that in 2005, nearly seventy-five percent of women who reported electing to have an abortion did so because they thought having a child would interfere with their education, work, or ability to care for dependents).

controversial means of reproductive rights such as barrier or hormonal contraception. In this way—portraying elective termination as a common decision chosen by many women (which we know it is⁸⁵) along a spectrum of other means of popular family-planning mechanisms—the pro-choice perspective would come to be seen as the normative position, and as particularly congruent with women’s rights. Indeed, the pro-choice movement has started to experiment with such an approach. As *Time* magazine reported in an article about the changing of the guard in the pro-choice movement:

Young abortion-rights activists have a strategy to modernize the cause, which includes expanding it. They often don’t even mention the term pro-choice, which they say is limiting and outdated. Instead these young leaders have embraced a cause known as reproductive justice—a broader, more diffuse agenda that addresses abortion access but also contraception, child care, gay rights, health insurance and economic opportunity.⁸⁶

Younger pro-choice activists are deploying a more “holistic frame” to their advocacy rather than taking the more traditional pro-choice route of fixating on the contours of the right itself.⁸⁷ For example, activists are focusing on helping young women realize the economic and educational opportunities that an abortion could lead to, and are appealing to their peers by speaking publicly, be it in clinics or on college campuses, about personal reproductive rights and birth control choices.⁸⁸

Pro-life groups are persuasively and unabashedly tapping into the liberal woman’s “inner feminist.” In this way, they are succeeding in portraying anti-abortion reform as less paternalistic and more intuitively appealing. As a result, pro-life tenets are, their proponents hope, no longer combative, scary, or anti-women. Instead, they are transformed into a movement that all women should seemingly support in order to be true to themselves and to the feminist movement writ large.

Strategically and politically, this new strategy makes perfect sense: destigmatizing anti-abortion sentiment facilitates public acceptance. It is thus not surprising that as the pro-

85 *Id.*

86 Kate Pickert, *What Choice?*, TIME, Jan. 14, 2013, <http://content.time.com/time/magazine/article/0,9171,2132761,00.html> [<http://perma.cc/N5CH-APY4>].

87 *Id.*

88 *Id.*

choice movement urges its proponents to stop awfulizing abortion, the pro-life movement is developing its own set of tactics to spread and popularize the idea that abortion is, indeed, awful, and should be reserved for rare circumstances. It remains to be seen whether the pro-choice movement will be able to conjure an effective response. In the meantime, when juxtaposed with the pro-choice movement's awfulization effects, pro-life destigmatization of anti-abortion attitudes and legislation promises to dominate.