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RESPONSIBILITY FOR LIFE: HOW ABORTION SERVES WOMEN'S INTERESTS IN MOTHERHOOD

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lately i've been glaring into mirrors
picking myself apart
you'd think at my age I'd have thought of
something better to do . . .
but now here's this tiny baby
and they say she looks just like me
and she is smiling at me
with that present/infant glee
and I would defend
to the ends of the earth
her perfect right to be[1]

INTRODUCTION

As an attorney for the losing party in *Gonzales v. Carhart*,[2] I

[1] ANI DIFRANCO, *Present/Infant, on* RED LETTER YEAR (Righteous Babe Records 2008).

[2] 127 S. Ct. 1610 (2007) (upholding the federal abortion ban, also known as the "Partial-Birth Abortion Ban Act of 2003"). In *Carhart*, the Court upheld a law that prevents a woman from obtaining the intact D&E method of abortion, even where the woman's doctor believes it is the safest method for her and the one that best preserves her ability to bear children in the future, and despite the view of the leading medical association of obstetricians and gynecologists that intact D&E is the safest procedure for some women. *Carhart*, 127 S. Ct. at 1644 (Ginsburg, J., dissenting); *see also* Brief of the American College of Obstetricians and Gynecologists as *Amicus Curiae* Supporting Respondents at 11–16, Gonzalez v. Carhart, 550 U.S. 124 (2007) (Nos. 05-380, 1382), 2006 WL

read the opinion with considerable dread. But when I came to the now infamous passage[3] relying on maternal love to support the Court's decision, I stopped and shuddered. Justice Kennedy wrote for the Court:

> 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.[4]

In response to these words, my own bonds of love—desperate, animal-like, and imperfect as they are—twanged. Suddenly, our failure in the Court became more complete; at the same time, these words shed light on the decision and its irrationality.

The loss in *Carhart* and the rhetoric the Court employed point to a significant vulnerability in the movement for legal protections for women's reproductive health care—its conflicts over motherhood. This Article argues that the movement's failure to emphasize that abortion serves women's interest in, and respect for, motherhood divides it from its constituents and creates the vulnerability that the anti-abortion movement now exploits, contributing to the reduction of constitutional protections for abortion. Embracing abortion's supportive relationship to motherhood is essential to the survival of the abortion right, as well as to the vitality of our continuing battle to redefine motherhood in conditions of equality.

In Section I that follows, I explore the ways women's respect for the importance of motherhood and "bonds of love" with their children inform their decisions to obtain abortions. In Section II, I

2867888 (detailing significant safety advantages of intact D&E over non-intact D&E alternative).

[3] *See, e.g.*, Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at A18 (citing passage and noting that "[i]n his majority opinion, Justice Anthony M. Kennedy suggested that a pregnant woman who chooses abortion falls away from true womanhood.").

[4] *Carhart*, 127 S. Ct. at 1634 (internal citations omitted). The Court continued, "[w]hether to have an abortion requires a difficult and painful moral decision. 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. Severe depression and loss of esteem can follow." *Id.*

summarize the state of abortion jurisprudence, paying particular attention to the Court's vision of women's need for, or "interest in," abortion. I trace the emergence of the Court's discomfort with women's decision-making about abortion, linking it with decreasing protections for the right and increasing recognition that abortion serves an interest in women's social and economic equality. I demonstrate that the Court's increasing recognition that abortion serves an interest in self-determination that could result in a rejection of the role of mother, accompanied a decreasing recognition of abortion's importance to women's interests in motherhood itself, an interest in how any child they bear is cared for. This sense in which abortion serves women's interests in motherhood was last seen in *Planned Parenthood v. Casey*, where the Court acknowledged that the choice to have an abortion could be seen as reflecting "human responsibility and respect for [human life]."[5]

In Section III, I discuss *Gonzales v. Carhart* and argue that while the ruling itself is limited and much of the *Casey* standard remains intact, the decision reflects this diminishing sense of abortion as serving the woman's interest in motherhood. The Court's opinion reflected a view that abortion destroys motherhood, rather than the view that abortion enhances motherhood and enables women to mother their children in the best conditions possible, and in conditions closer to equality.

Finally, in Section IV I explore resistance in the feminist movement to stressing the ways abortion serves a woman's interest in, and respect for, the importance of motherhood. Despite real risks of appealing to and thus supporting regressive notions of motherhood, I make both normative and prescriptive claims that given the centrality of concerns for motherhood in women's decision-making about abortion, we must emphasize that women's interest in abortion in a constitutional sense includes not only her interest in her choice *not* to be a mother (an aspect of her decisional autonomy), her interest in her personal dignity,[6] her

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[5] Planned Parenthood v. Casey, 505 U.S. 833, 852–53 (1992).

[6] *See* Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (A "multi-

interest in her health and life (an aspect of her bodily integrity),[7] and her interest in privacy of the information about her decision,[8] but also includes her interest in motherhood itself and in deciding *how* she will mother any child she bears. I contend that these arguments about why women choose and why women need abortions can and should be made within, and not as an alternative to, a rights framework. Stressing that abortion serves women's interest in motherhood in a constitutional sense very clearly falls within such a framework, and is necessary to drawing a complete

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faceted commitment to dignity links *Carhart* and the *Casey* decision on which it centrally relies," that a "dignity-based analysis of *Casey*/*Carhart* offers principles for determining the constitutionality of woman-protective abortion restrictions that are grounded in a large body of substantive due process and equal protection case law," and that "protecting women can violate women's dignity if protection is based on stereotypical assumptions about women's capacities and women's roles, as many of the new woman-protective abortion restrictions are.") [hereinafter *The Politics of Protection*]; *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that liberty right protects the "dignity" of gay men and lesbians to choose intimate relationships).

[7] *See Casey*, 505 U.S. at 849–50, 857 ("*Roe* stands at an intersection of two lines of decisions"; the Constitution limits interference with "a person's most basic decisions about family and parenthood" and with a person's "bodily integrity"); *id.* at 857 (*Roe* "may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."); *see also Doe v. Bolton*, 410 U.S. 179, 211–13 (1973) (contrasting "freedom of choice in the basic decisions of one's life" with "freedom to care for one's health and person, freedom from bodily restraint . . . .") (Douglas, J., concurring).

[8] *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986), ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."); *id.* at 767 (striking Pennsylvania reporting requirements that would have allowed identification of women who had obtained abortions, thus "rais[ing] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy") (citations omitted); Bellotti v. Baird, 443 U.S. 622, 644 (1979) (requiring that judicial bypass procedures maintain a minor's anonymity); *cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 80 (1976) (upholding reporting requirements that were "reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy").

picture of the importance of abortion to women's liberty, equality, and dignity. It strengthens the woman's right to abortion and is vital to continued protection of the right under any level of scrutiny or in any constitutional framework.[9] The question is whether the next generation of childbearers is strong enough to assert their motherliness *and* control its meaning. I am betting yes.

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[9] Many have suggested that the right to abortion would be more firmly protected under a sex equality analysis or a hybrid analysis combining protections for liberty, equality, and/or dignity. *See generally* Siegel, *The Politics of Protection*, *supra* note 6, at 1694; Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (noting commonalities among sex equality arguments and collecting the literature); Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1238 & 1294-1302 (2007) (arguing that *Lawrence* supports an "equal sexual liberty" analysis under which men and women have "equal due process interests in deciding how to conduct their private lives in matters pertaining to sex"); Jack Balkin, Roe v. Wade: *An Engine of Controversy, Judgment of the Court, and Comment*, *in* WHAT ROE V. WADE SHOULD HAVE SAID 3–27, 37–62, 232–36 (N.Y. Univ. Press 2005); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 492 (2002) (arguing that "stereoscopic approach to the fourteenth Amendment – one in which understandings of liberty and equality inform one another – may change how courts come to see constitutional issues, and may lead to fuller and more just answers"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992) (arguing that "[p]roperly understood, constitutional limitations on antiabortion laws, like constitutional limitations on antimiscegenation laws, have moorings in both privacy and equal protection") [hereinafter *Reasoning*]; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–24 (1991) (addressing abortion regulation as issue of sex equality); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) (arguing that "the Court's *Roe* position is weakened, . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective"). Arguments for protection of the right will be strengthened under any one of these frameworks if the aspect of abortion that serves women's interest in motherhood is emphasized.

I. THE IMPORTANCE OF MOTHERHOOD AND OTHER REASONS WOMEN CHOOSE ABORTION

Accurate information about the incidence of abortion and the reasons women obtain them is central to the public's understanding of abortion and the courts' continued protection of the right. Unfortunately though, few people have accurate information and misperceptions about these essential facts abound. This section sets out some basic data on abortion incidence and then reviews data from recent studies of the reasons women obtain abortions and the impact of unintended childbearing that reveal the importance of considerations about parenting in abortion decision-making.

A. Pregnancy and Abortion: the Data[10]

Nearly half of the approximately six million pregnancies in the United States each year are unintended. In 2005, 22% of all pregnancies in the United States, both intended and unintended, ended in abortion. This equals a rate of 19.4 abortions for every 1,000 women aged 15 to 44 living in the United States. The abortion rate among women with unintended pregnancies is much higher, though; a full 40% of these women obtain an abortion.[11] At current rates,[12] and accounting for women who may have more

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[10] The Centers for Disease Control (CDC) and the Alan Guttmacher Institute (AGI) are recognized as collecting the best statistical abortion data, with the CDC recognizing the superiority of the information collected by AGI. *See generally The Limitations of U.S. Statistics on Abortion*, ISSUES IN BRIEF (Alan Guttmacher Inst., New York, N.Y.) (Jan. 1997) (discussing reliability of different sources of data). Other AGI publications include exhaustive reviews of many of the best studies. HEATHER D. BOONSTRA ET AL., ABORTION IN WOMEN'S LIVES 38–44 (Alan Guttmacher Inst. 2006).

[11] Rachel K. Jones, Mia R.S. Zolna, Stanley K. Henshaw, Lawrence B. Finer, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 9 (2008). BOONSTRA, *supra* note 10, at 8.

[12] Abortion rates began to decline in the 1990s, after remaining steady for most of the 1980s. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 6 (2003) [hereinafter *Incidence 2000*]. Though a dispute

than one abortion, more than *one-third* of American women will have had an abortion by the time they turn forty-five.[13] As this number reflects, facing an unintended pregnancy or an intended pregnancy gone wrong and choosing an abortion is *much* more likely to occur in the course of a woman's lifetime than many would like to believe.

In the United States, approximately 88% of abortions are obtained before thirteen weeks of pregnancy, as measured from the first day of the woman's last menstrual period (LMP).[14]

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rages about the causes of the decline, *see also id.* at 6–7 (discussing possible causes of decline), evidence from abroad, as well as the disparity in the rate of abortion in unintended versus intended pregnancies here in the United States, suggests that abortion rates will decline when the rate of unintended pregnancies declines. *See* BOONSTRA, *supra* note 10, at 10. For example, the abortion rate in the Netherlands is less than half of the U.S. rate despite that abortion in the Netherlands is free, legal and widely available. *Id.* In contrast, the highest rates of abortion occur in countries in which abortion is severely restricted by the law, and contraceptive use is socially unacceptable. *Id.* (reporting abortion rate of 50 per 1,000 in Peru, and 47 per 1,000 in the Dominican Republic).

[13] *See* LAWRENCE B. FINER & STANLEY K. HENSHAR, ESTIMATES OF U.S. ABORTION INCIDENCE, 2001–2003 (Alan Guttmacher Inst. 2006) [hereinafter *Incidence 2001–2003*]; *Incidence 2000*, *supra* note 12.

[14] *E.g.*, *Abortion Surveillance – United States, 2004*, MORBIDITY AND MORTALITY WEEKLY REPORT: SURVEILLANCE SUMMARIES (Ctr. for Disease Control, Atlanta, Ga.), Nov. 23, 2007 at 16 (Table 1). A note on terminology here. When a doctor discusses a woman's pregnancy with her, the doctor refers to gestational age of a pregnancy as dated from the first day of the woman's last menstrual period ("LMP"). Doctors use this dating because although pregnancy usually occurs approximately fourteen days after LMP, ovulation can occur at a different point in the cycle, making LMP the only sure date. If you think of yourself as fourteen weeks pregnant, conception probably occurred about twelve weeks ago. The alternative dating would be "as measured from conception." Unless there is a reference to dating being done from conception, dating is most likely being done from LMP.

I raise this detail because it can easily be manipulated. Lawyers for women and their doctors opposing abortion regulations have always used LMP dating. They use it because doctors and most federal reports on abortion use it. *See, e.g.*, David A. Grimes, *The Continuing Need for Late Abortions*, 280 J. AM. MED. ASS'N 747, 747 (1998) [hereinafter *Continuing Need*] (explaining federal use of LMP dating). They use it because the public thinks of pregnancy this way, and because they believe using any other dating would mislead the public. *See, e.g.*,

Approximately 5.5% take place after fifteen weeks LMP,[15] and of these only approximately 1.4% occur at twenty-one weeks or beyond.[16] Federal reports do not further break down the category of abortions occurring at twenty-one weeks or beyond to determine how many women obtain abortions in the third trimester, because reports are inaccurate and often include pregnancy terminations done for fetal demise.[17] One researcher reported in 1998 that the only published article on third trimester abortions examined abortions in Georgia at twenty-five or more weeks in 1979 and 1980 and reported only three cases out of approximately 70,000 induced abortions; two procedures were performed for fetal anencephaly (the lack of a forebrain), and insufficient information was available for the third.[18]

Over 60% of women obtaining abortions already have children. One study found that 61% of the women had children; with 34% having two or more children.[19] Another smaller study found that nearly 75% had children, nearly half with two or more.[20] Almost a quarter (23%) of women under the age of twenty terminating their pregnancies have at least one child.[21] The proportion of women seeking abortions who already have children has increased over the

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id. Others use conception dates, usually because they want to give the impression that something occurs two weeks earlier than it does. *See, e.g.*, Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. § 2(1) (2006) (claiming that fetus has structures to feel pain "20 weeks after fertilization," which actually refers to twenty-two weeks of pregnancy LMP).

[15] *Id.*

[16] *Id.*

[17] *Continuing Need*, *supra* note 14, at 747–48.

[18] *Id.* at 748 (citing Alison M. Spitz et al., *Third-Trimester Induced Abortion in Georgia, 1979 and 1980,* 73 AM. J. PUB. HEALTH 594. (1983)).

[19] Rachel Jones et al., *Patterns in the socioeconomic characteristics of women obtaining abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226, 228 (2002) [hereinafter *Socioeconomic Characteristics*].

[20] Rachel K. Jones et al., *"I Would Want to Give My Child, Like, Everything in the World": How Issues of Motherhood Influence Women Who Have Abortions*, 29 J. OF FAMILY ISSUES 79, 86 (2008) [hereinafter *Issues of Motherhood*].

[21] *Socioeconomic Characteristics*, *supra* note 19, at 230.

years from 44% in 1983 and 55% in 1994 to the present levels.[22]

Overall, adolescents and lower-income women are more likely than older, wealthier women to have abortions in the second-trimester.[23] While these groups are overrepresented, women obtaining second trimester abortions come from every conceivable demographic: rich and poor and middle-income; old and young and in between; Catholic, those who identify as "born-again," Buddhist, atheist, etc.; "pro-choice" and "pro-life."[24]

B. Why Women Have Abortions

Two new studies of the reasons women have abortions come to interesting conclusions about the role of motherhood in women's decision-making processes.[25] Not surprisingly, both studies report that the decision to have an abortion at any time in pregnancy is motivated by a number of different overlapping factors,[26] the most

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[22] Stanley Henshaw et al., *Abortion patients in 1994-95: Characteristics and contraceptive use*, 28 FAM. PLAN PERSP. 140 (1996).

[23] Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 CONTRACEPTION 334, 335 (2006) [hereinafter *Reasons for Delay*].

[24] Rachel K. Jones, et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226, 229–32, (2002); Brief of the Inst. for Reprod. Health Access & Fifty-Two Clinics & Orgs. as Amici Curiae Supporting Respondents at 21 n.30, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380) [hereinafter Brief of IRHA]. The "pro-life" category surprises some, but physicians often hear, "I am pro-life, but [my, my daughter's, wife's, sister's, parishioner's] case is different." The protester/patient dynamic is not uncommon. Physicians report treating protesters, or members of the protester's family. *See, e.g.*, SUSAN WICKLUND, THIS COMMON SECRET: MY JOURNEY AS AN ABORTION DOCTOR 178–84 (Public Affairs 2007).

[25] Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 117-18 (2005) [hereinafter *Reasons U.S. Women Have Abortions*]; *Issues of Motherhood*, *supra* note 20, at 79.

[26] *Reasons U.S. Women Have Abortions*, *supra* note 25, at 112–13; *Issues of Motherhood*, *supra* note 20, at 84 ("[M]otherhood issues and responsibilities for other children are often related to other issues, such as financial difficulties and the lack of a steady . . . partner. Thus, not just motherhood but broader

common of which were "I can't afford a baby now" (73%)[27] and "having a baby would dramatically change my life" (74%).[28] Forty-eight percent cited relationship problems or a desire to avoid single motherhood. Forty percent had completed their childbearing. One-third of women were not ready to have a child. Another 13% cited concerns about the health of the fetus and 12% cited concerns about their own health.[29] These reasons are the same as those cited in earlier studies.

When women were questioned about what was behind these general categories, though, concerns about their ability to nurture a child (or another child) both financially and emotionally emerged as a consistent theme.[30] As one study reports:

> More than half of the respondents indicated that their abortion decisions were influenced by the perceived disadvantages—material and abstract—that the future children would experience if they were to carry the pregnancies to term. Many of the respondents expressed the idea that children are entitled to conditions such as stable and loving families, financial security, and a high level of care and attention. Because the women were unable to provide these things at this time, they were not in a position to have a child (or another child). [31]

While many women expressed their desire to avoid single

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parenting and relationship issues play a role in many women's decisions to abort.").

[27] *Reasons U.S. Women Have Abortions*, *supra* note 25, at 112. This number breaks down into women who stated that having a child would disrupt education (38%) or work (35%), and those who said it would hurt their other children (32%). *Id.* at 113.

[28] *Id.* at 112. This number breaks down in those who were unmarried (42%), those who are students (34%), those who can't afford the basic needs of life (23%) and those who were unemployed (22%). *Id.* at 113.

[29] *Id.* at 113.

[30] *Issues of Motherhood*, *supra* note 20, at 84; *see also Reasons U.S. Women Have Abortions*, *supra* note 25, at 117 ("[M]ost women in every [category] cited concern for or responsibility to other individuals as a factor in their decision to have an abortion.").

[31] *Issues of Motherhood*, *supra* note 20, at 91.

parenting, they also expressed a desire to be ready to be the sole provider for their children if it became necessary as a way to avoid some of the most acute problems of single parenting, especially poverty. As one woman who did not yet have children stated, "I really do want a baby someday. I want to be able to support my child and give it everything it needs, and I don't want to depend on anyone else for it."[32]

Women who had children "spoke of the responsibilities they were shouldering, and many discussed their desires to provide a better home for their existing children and the children whom they might have in the future."[33] They hoped that "terminating the current pregnancies would help them achieve better lives for the children they already had."[34] Women who had not yet had children were aware of the responsibilities of motherhood, and they did not want to have a baby before they felt able to properly fulfill these duties.[35] As one respondent explained, "I can't have a newborn baby and not be able to take care of it, and I would want to give my child, like, everything in the world . . . I don't think that [my partner and I are], like, mentally ready."[36]

Even women's concerns about personal health were themselves often expressed in terms of their responsibility for others.[37] One

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[32] *Id.*

[33] *Id.* at 95.

[34] *Id.* at 96.

[35] *Id.* at 95.

[36] *Id.* at 91.

[37] By raising the specter of women making decisions that take others into account, especially here where those others are their children, I risk being accused of essentialism. *See* Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights Of Choice*, 32 MCGEORGE L. REV. 895, 897 (2001) (noting that "the title of Gilligan's *In a Different Voice* has caused a confusing oversimplification of Gilligan's basic ideas"); Pamela Karlan & Daniel Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 871 (1993) (discussing the dangers of relational feminism and essentialism); *see also* NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 150, 166–67 (1978). CAROL GILLIGAN, IN A DIFFERENT VOICE 1–2 (2d ed. 1993). But the fact that some women in some conditions will make decisions by taking others into account, as reported in

study reports that women "revealed how health concerns are linked to the concept of responsibility: some women saw the physical burden of pregnancy and its associated health conditions as threatening their ability to fulfill responsibility to dependents . . . [and saw another child as threatening] the economic security of their children."[38]

Studies show a significant increase in the percentage of women having abortions because they already have other children depending on them, from 19% in 1987 to 32% in 2004. Thus, it appears that these concerns about the importance of providing a positive nurturing environment for your children "play an increasingly salient role in women's abortion decisions."[39]

C. Special Reasons Women Have Abortions in the Second Trimester

The underlying reasons that women choose abortions in the second-trimester are the same as they are in the first, but there are additional factors that have delayed their choice. These additional factors can be divided into three major categories, some of which are well understood, others of which are more complex. The categories are: (1) medical factors, including fetal anomalies and maternal health conditions that are diagnosed or worsen after the first trimester; (2) problems that delay discovery of pregnancy until the second-trimester; and (3) obstacles that delay access to abortion, especially financial limitations and problems finding

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these two new studies, does not mean that I am claiming: 1) that all women make decisions this way; 2) that women would make decisions this way in conditions of "nature" or in conditions of equality, whether considered "natural" or "unnatural"; 3) that "relational" decision-making is in fact more common among women than men, or 4) that men, if faced with these same decisions, wouldn't also make decisions taking their families into account. Indeed, in a recent brief to the U.S. Supreme Court recounting the stories of women obtaining second trimester abortions, to the extent women reported on men who were involved in their decision-making process, men generally had the same considerations as the women. Brief of IRHA at 10–12, 22–23, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380).

[38] *Reasons U.S. Women Have Abortions*, *supra* note 25, at 117–18.

[39] *Issues of Motherhood*, *supra* note 20, at 84.

physicians who will provide abortions.[40] A much smaller group of women have difficulty deciding whether or not to carry the pregnancy to term or experience a change in their personal circumstances in the second-trimester, such as with a relationship or employment.

1. Medical Factors, Including Fetal Anomalies, and Women's Health Conditions

As noted above,[41] 13% of women seeking abortions seek them because they are concerned about fetal health, and 12% because they are concerned about their own health.[42] In the second trimester, the percentage of women citing fetal health concerns rises to 21%,[43] probably because many fetal anomalies are not diagnosed and confirmed until the second-trimester. The percentage of women citing personal health concerns remains fairly constant at 10%.[44]

Women's Health and Lives: Overall during the twentieth century as medical treatments improved, our ability to treat the

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[40] Ironically, many abortion regulations that are allegedly intended to convince women not to obtain an abortion, such as mandatory delay laws, or that are intended just to limit access to abortions altogether, actually push many women into the second-trimester of pregnancy, increasing the numbers of the least-favored and medically riskier abortions. To the delight of some, these types of restrictions also prevent some women from obtaining abortions altogether. *See* Michael J. New, *The I's Have It: Three cheers for pro-life incrementalism*, NATIONAL REVIEW ONLINE, April 19, 2007, http://article.nationalreview.com /?q=MTZlYzNmY2M4OTFhMjAzNWI4OGYwMDAyMjViZGI5NjA=#more (describing debate since 1970s).

[41] *See supra* text accompanying note 29.

[42] *Reasons U.S. Women Have Abortions*, *supra* note 25, at 116 (Table 6), 117.

[43] *Id.*, *supra* note 25, at 116 (Table 6).

[44] *Id.* Logically, women with preexisting health conditions advising against pregnancy altogether would terminate earlier in pregnancy; a second category of women whose health does not become problematic until the second trimester would terminate later. Many of the women in this second category are carrying wanted pregnancies and have often delayed as long as possible while doctors confirm an original bad diagnosis, or while their own health condition deteriorates, waiting and hoping that they can carry the pregnancy to term.

complications of pregnancy improved as well. As a result, the overall risk of death from pregnancy decreased from 850 per 100,000 in 1900 to approximately 7 to 8 women per 100,000 in 1982.[45] Progress stopped there however and mortality rates in the United States actually went up between 1991 and 1999. By 1999, 13.2 women per 100,000 died during pregnancy. The increase may be caused by the increase in pregnancy among women over thirty-five who have a greater risk for pregnancy-related illness. In terms of mortality, twenty-one per 100,000 women aged thirty-five to thirty-nine, and forty-five per 100,000 women aged forty and over, die each year from a pregnancy-related illness.[46] The leading causes of pregnancy-related death were embolism (20%), hemorrhage (17%), and pregnancy-induced hypertension (16%).[47]

In addition, an alarming disparity in the risk for pregnancy-related death exists between African-American women and white women. Overall, mortality ratios (deaths per 100,000 live births) for African-American women are 3 to 4 times higher than for white women. In other words, 30 out of every 100,000 African-American women, compared with 8 out of every 100,000 white women, die from a pregnancy-related illness each year.[48] The mortality rates and the racial disparities only increase as women age. At ages thirty-five to thirty-nine, seventy per 100,000 African-American women—versus less than 20 per 100,000 white women—die from a pregnancy-related illness each year.[49] For women forty and over, the numbers skyrocket, with 160 per 100,000 African-American women versus approximately 30 per 100,000 white women dying from a pregnancy-related illness each year, a ratio 5.5 times higher for African-Americans.[50]

The risks of morbidities—complications during pregnancy

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[45] Jeani Chang et al., *Pregnancy-Related Mortality Surveillance – United States, 1991-1999*, 52 CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT NO. SS-2 at 2 (CDC, Feb. 21, 2003).

[46] *Id.*

[47] *Id.* at 4–5.

[48] *Id.* at 2–3 & Table 1.

[49] *Id.* at Figure 2.

[50] *Id.*

which do not result in death—also increase dramatically for women over 35. Twelve out of 100 pregnant women over thirty-five are hospitalized for obstetrical complications prior to delivery.[51]

Pregnancy can impact a woman's health in three ways. First, women can develop conditions specific to pregnancy, such as hypertensive disorders,[52] hemorrhage,[53] hypovolemic shock[54] and disseminated intravascular coagulation,[55] and preterm birth,[56] all of which can place the lives and health of women at significant risk. One of the most serious is preeclampsia, a hypertensive disorder involving rapidly increasing blood pressure that puts the woman at risk of deterioration of function in a number of organs and systems and, eventually, eclampsia, which involves seizures, coma, and in

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[51] Trude A. Bennett et al., *Pregnancy-Associated Hospitalizations in United States in 1991 and 1992*, 178 AM. J. OBSTET. GYNEC. 346, 348 (1998).

[52] F. GARY CUNNINGHAM, ET AL., WILLIAMS OBSTETRICS 693–744 (20th ed. 1997) (describing complications associated with hypertensive disorders, such as preeclampsia and eclampsia) [hereinafter WILLIAMS OBSTETRICS].

[53] *Id.* at 745–82 ("Even though the maternal mortality rate has been reduced dramatically by hospitalization for delivery and the availability of blood from transfusion, death from hemorrhage remains prominent in the majority of mortality reports.").

[54] "Hypovolemic shock is an emergency condition in which severe blood and fluid loss makes the heart unable to pump enough blood to the body." *Hypovolemic shock* in MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *available at* http://www.nlm.nih.gov/medlineplus/ency/article/000167.htm#Definition; WILLIAMS OBSTETRICS, *supra* note 52, at 783–96 ("Despite the availability of modern blood-banking techniques, hemorrhage leading to hypovolemic shock remains a significant cause of maternal mortality in obstetrics.").

[55] "Disseminated intravascular coagulation (DIC) is a serious disorder in which the proteins that control blood clotting become abnormally active." Medline Plus Medical Encyclopedia: Disseminated intravascular coagulation, *available at* http://www.nlm.nih.gov/medlineplus/ency/article/000573.htm #Definition. DIC can lead to "temporary hemophilia." WILLIAMS OBSTETRICS, *supra* note 52, at 787–96. Small blood clots form within, and can clog up, the blood vessels, cutting off blood supply to various organs such as the liver or kidney. These organs will then stop functioning. The clotting proteins of the blood become "used up" by the clots, leaving the patient at risk for serious internal bleeding or bleeding from minor cuts and bruises. *Id.* It too can be deadly.

[56] WILLIAMS OBSTETRICS, *supra* note 52, at 797–826.

some cases death.[57] When moderate or severe preeclampsia does not improve after hospitalization, "delivery is usually advisable for the welfare of both mother and fetus."[58] The condition usually does not develop until after twenty weeks' gestation, and many women attempt to continue the pregnancy until well after viability to give their baby the best chance of survival.[59]

Another very serious pregnancy-related condition is chorioamnionitis, or infection of the uterine lining, which can develop from premature rupture of the membranes. Again, the fetus must be delivered and the infection treated so that the woman does not develop sepsis, an infection of her blood which can be fatal. It too is not likely to develop before the second trimester.[60]

Second, there are conditions that can happen to anyone, but that are more likely to occur in pregnant women. For example, the likelihood of thromboembolism—blood clots in the lower extremities that can lead to pulmonary embolism (blood clots in the lungs)—in a normal pregnancy and the period immediately after childbirth "is increased by a factor of five when compared with nonpregnant women of similar age."[61] As a leading textbook reports, "venous thrombosis and pulmonary embolism remain a major cause of maternal death in the United States."[62] Moreover, some fetal anomalies, including non-immune hydrops and fetal ascites,[63] are known to lead to serious maternal pregnancy

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[57] *Id.* at 702

[58] *Id.* at 717.

[59] *Id.* at 716–17; *see also* STEVEN GABBE, JENNIFER NIEBYL, JOE LEIGH SIMPSON, OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES (4th ed. 2001) [hereinafter NORMAL AND PROBLEM PREGNANCIES].

[60] WILLIAMS OBSTETRICS, *supra* note 52, at 657–58*; id.* at 328–29 (noting that "if delivery is delayed for 24 hours or more after membrane rupture, there is increasing likelihood of serious intrauterine infection").

[61] *Id.* at 1112.

[62] *Id.*

[63] Non-immune hydrops, or "hydrops fetalis," is a serious condition in which abnormal amounts of fluid build up in two or more body areas of a fetus or newborn. *Hydrops fetalis* in MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *available at* http://www.nlm.nih.gov/medlineplus/ency/article/007308.htm #Definition. Fetal ascites similarly involves an abnormal accumulation of fluid in the peritoneal cavity, causing abdominal swelling. *See* WILLIAMS

complications.[64]

Finally, pregnancy can worsen a condition in a woman already unhealthy in some respect. For example, the blood volume of a pregnant woman at or near term averages about 40 to 45% above nonpregnant levels, and in some women, can be nearly double nonpregnant levels.[65] The pregnant woman's heart rate increases to pump this additional blood, taxing the cardiovascular system. As a result, a woman with any sort of heart or vascular condition, whether known or unknown, is at increased risk during pregnancy[66] and may be advised to terminate depending on her prognosis.[67] Overall, heart disease complicates about 1% of pregnancies.[68]

Similarly, pregnancy poses additional risks to women with, or at risk of, diabetes, the most common medical complication of pregnancy. The dramatic hormonal changes of pregnancy can make it difficult for a woman with preexisting diabetes to control her blood sugars, and clinical diabetes may appear in some women only during pregnancy. Women with pre-existing diabetes and women with gestational diabetes are at risk of seizures or diabetic coma if the woman's blood sugars are not controlled.

These cardiovascular or endocrine system conditions will worsen as pregnancy progresses,[69] as will the conditions of women with many other diseases, including some with diseases of the nervous system, some women with epilepsy, liver diseases, and certain cancers. Often, complications from preexisting conditions do not arise until the second trimester of pregnancy, or their

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OBSTETRICS, *supra* note 52, at 456–57.

[64] *See, e.g.*, WILLIAMS OBSTETRICS, *supra* note 52, at 995 (noting that maternal complications due to carrying a fetus with non-immune hydrops include an increased incidence of preeclampsia, preterm labor, and postpartum hemorrhage).

[65] *Id.* at 201.

[66] *See generally Chapter 47: Cardiovascular Diseases, in* WILLIAMS OBSTETRICS, *supra* note 52, 1079–1101.

[67] WILLIAMS OBSTETRICS, *supra* note 52, 1083.

[68] *Id.* at 1079.

[69] *See generally Section X: Common Complications of Pregnancy, in* WILLIAMS OBSTETRICS, *supra* note 52, at 693–894.

severity is tolerable until then.[70] As David Grimes, M.D.,[71] points out, the availability of abortion is pronatalist in the sense that some women, especially some in this last category, would not become pregnant and try to carry to term if abortion were not available to ensure that they could terminate the pregnancy if a problem does arise.[72]

Fetal Anomalies: There are hundreds of fetal anomalies that are either lethal or would result in a child with significant morbidity. Among these conditions are Trisomy 13 and 18, which are often fatal chromosomal anomalies;[73] neural-tube defects, including anencephaly, a lethal disorder characterized by the absence of the cranium[74] and open spina bifida, in which parts of the neural system are outside of the body;[75] conjoined twins;

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[70] *See, e.g.*, Brief of IRHA at 14–15, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380) (quoting statement from pregnant woman with lupus and a statement from pregnant woman with placenta previa (a placenta covering the birth canal which puts the woman at risk of massive hemorrhaging) who developed preeclampsia (high blood pressure of 220 over 135) and kidney problems creating a significant risk of stroke and seizure).

[71] David A. Grimes, M.D., is a well-known and highly respected obstetrician/gynecologist, who has had a dual career in clinical ob/gyn and preventive medicine for the past three decades. David A. Grimes, M.D., http://davidagrimes.com/index.html. Dr. Grimes currently serves as Clinical Professor in the Department of Obstetrics and Gynecology at the University of North Carolina School of Medicine, and Vice President of Biomedical Affairs at Family Health International. He also serves on the editorial boards of several prominent medical journals, including *The Lancet*, *Obstetrics and Gynecology*, *Obstetrical and Gynecological Survey*, and *Contraception* and has received numerous honors and awards for his research, teaching, and clinical work. He has served as an epidemiologist at the Centers for Disease Control for nine years, and a faculty member in four medical schools: Emory University, University of Southern California, University of California-San Francisco, and University of North Carolina. *Id.*

[72] *Continuing Need*, *supra* note 14, at 749.

[73] Nearly 50% of infants born with Trisomy 13 die in the first month, and relatively few survive past three years of age. NORMAL AND PROBLEM PREGNANCIES, *supra* note 59, at 141. Trisomy 18 is often detected in stillborn infants and mean survival rates are in the months. *Id.* at 142.

[74] WILLIAMS OBSTETRICS, *supra* note 52, at 907–08.

[75] *Id.*

congenital heart disease;[76] congenital diaphragmatic hernia;[77] genetic neurological disorders with progressive psycho-motor deterioration, such as Tay-Sachs and Canavan's diseases;[78] and Potter's syndrome (or renal agenesis), in which the kidneys fail to develop.[79] Women generally do not detect these anomalies until the second trimester.

Structural fetal anomalies, such as renal agenesis, anencephaly, and skeletal dysplasia, are typically not detected until the woman has her routine ultrasound, which usually takes place at around eighteen weeks LMP. Chromosomal fetal anomalies are typically not detected until the second trimester because amniocentesis, the most common test for genetic chromosomal anomalies, cannot be performed accurately before about fifteen to sixteen weeks LMP and the results are not available until at least one week afterward, well into the second trimester.[80] Even though a new screening test can be performed earlier in pregnancy, it is only useful to identify a limited subset of abnormalities identifiable by amniocentesis.[81]

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[76] *Id.* at 908.

[77] There is a high incidence of associated severe malformations or chromosomal anomalies with diaphragmatic hernia contributing to a high perinatal mortality rate and to the approximately 75% rate of death of affected fetuses or neonates; "uncomplicated" diaphragmatic hernia is fatal in approximately 45% of the cases. *Id.* at 911–12.

[78] *See* National-Tay Sachs & Allied Diseases Association website, http://www.ntsad.org/. Tay-Sachs disease is a progressive neurological genetic disorder in which development slows and the infant gradually regresses, eventually becoming blind, mentally retarded, paralyzed, and non-responsive to his or her environment. Canavan's disease begins with visual inattentiveness or an inability to perform motor tasks at around three to nine months, is evidenced by overall low muscle tone and lack of head control, a deterioration of motor skills and mental functioning, seizures and feeding problems. Many children with Canavan disease die in infancy, though some survive into adolescence and even occasionally into adulthood.

[79] *See, e.g.*, NORMAL AND PROBLEM PREGNANCIES, *supra* note 59, 909–10 (noting that one-third of infants with renal agenesis are stillborn and the longest reported survival is 48 hours); Brief of IRHA at 7–8, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

[80] *See generally Prenatal Genetic Diagnosis*, *in* NORMAL AND PROBLEM PREGNANCIES, *supra* note 59, at 152–83.

[81] NORMAL AND PROBLEM PREGNANCIES, *supra* note 59, at 155–58.

Moreover, women who are at low risk for fetal anomalies often do not have routine amniocentesis because of the risks that accompany the test. In those cases, chromosomal anomalies are sometimes suspected only after a routine ultrasound has been performed at approximately eighteen weeks LMP. When that occurs, amniocentesis to confirm suspected anomalies may not be performed until well *after* eighteen weeks LMP.

In describing their decision-making processes in these tragic cases, "[w]omen repeatedly state that one of the main reasons they choose to terminate wanted pregnancies is that the information they learn in the second trimester confirms, if the fetus were to survive, its life would be short and fraught with pain."[82] As the amicus brief filed by the Institute for Reproductive Health Access in *Planned Parenthood v. Gonzales* reported, one woman interviewed whose baby had "Cat-Eye Syndrome"[83] explained, "[w]e made this decision because we loved our daughter so much. We didn't want her to suffer the definite and the untold problems she was sure to endure, if she even made it . . . . We fought for her. We wanted her. But we didn't want to condem[n] her to [a] life of agony."[84] Another married woman and mother of a three-year-old described similar concern for her son:

> So all the fluid was shown on the brain [and] stomach and [the physician] believed the baby had a very severe case of heart defect. And most likely—90% chance that he was going to die in utero . . . . And even the 10% that he was going to be born he wasn't going to live very far without, I

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[82] Brief of IRHA at 11, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

[83] Trisomy 22, or "cat eye" syndrome, is a chromosomal disorder in which there are three copies of chromosome 22 rather than two. The most common association of symptoms include a hole in or absence of tissue from the iris, obstructions of the anus, and renal abnormalities such as missing or underdeveloped kidneys and cardiac defects. *See, e.g.*, Rosias PR et al., *Phenotypic variability of the cat eye syndrome: Case report and review of the literature*, 12 GENETIC COUNSELING 272-82 (2003) (noting that cat eye syndrome is characterized by large phenotypic variability), *abstract available at* http://www.ncbi.nlm.nih.gov/pubmed/11693792.

[84] Brief of IRHA at 11.

> mean, even with major interventions it was very unlikely that he was going to survive . . . . [S]o at the time, we made a decision to terminate because I couldn't—knowing the outcome of what was going to happen I just couldn't carry on. I mean why put the baby through suffering if I can end his life and set him free of his suffering that he had to endure. That was our thinking.[85]

After diagnosis, understandably some women and their families need time to decide what to do. Another woman reported:

> It took me an agonizing week to make this heartbreaking choice, but in the end I know it was the best decision for me, my family and most importantly, our child. We lost our oldest son at 6 years and 10 months old to complications from having a rare type of dwarfism. That dwarfism was exactly the reason why we had the CVS test done. We knew without a doubt that we could never in good conscience bring another child into this world with that disease . . . . Most genetic defects come with their own list of extra problems, which I didn't take into account, and put that child at risk for painful procedures and even death. No child deserves to come into a world of pain. That is what made my decision for me . . . .[86]

2. Delay in Obtaining Abortions

Two recent studies found that most women who obtain abortions in the second trimester, other than those obtaining abortions because of maternal or fetal health conditions, either did not know they were pregnant until the second trimester or had difficulty obtaining insurance coverage and raising funds to pay for the procedure.[87] Other delays were caused by government

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[85] *Id.*

[86] *Id.* at 10–11.

[87] *Reasons for Delay*, *supra* note 23, at 2; Eleanor Drey et al., *Risk Factors Associated with Presenting for Abortion in the Second Trimester*, 107 OBSTETRICS & GYNECOLOGY 128, 132 (Table 3) (2006) (hereinafter *Risk Factors*); s*ee also The Continuing Need*, *supra* note 14, at 748.

restrictions on abortion that made access difficult or by emotional issues that delayed an ultimate decision.[88]

Problems Suspecting and Confirming Pregnancy: On television and even in fairy tales, women wake up and vomit, or find their pants getting tight and—voila!—they realize they are pregnant. Both the *Risk Factors* and *Reasons for Delay* studies show however, that many women obtaining abortions in the second trimester had only recently discovered they were pregnant.[89] The simple fact is that for many women, pregnancy is not obvious. Consider also that, as one study showed, more than two-thirds of the women having abortions in the second trimester had been using contraception when they became pregnant, creating a false sense of security.[90]

Some women are unaware of the correlation between a missed period and pregnancy.[91] For others, such as women with irregular periods, women on certain forms of birth control, or those experiencing periods of stress or illness, the correlation does not even exist—a missed period is nothing out of the ordinary.[92] One woman explained:

> I was unemployed and had no health insurance . . . . I had no doctor, I had no gynecologist and was just trying to get a job so that I could support myself and take care of my immediate needs. So my health was very secondary. Also,

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[88] *Id.*

[89] *Id.* at 9–10 (reporting that 36% of the women who were delayed took a long time to find out about the pregnancy and that this was the third most common reason for delay); Risk Factors, *supra* note 87, at 130 & 132 (Table 3) (reporting that approximately 34% of the women who obtained second trimester abortions did not realize they were pregnant until well into the pregnancy).

[90] *Risk Factors*, *supra* note 87, at 130 & 131 Table 1.

[91] *Reasons for Delay*, *supra* note 23, at 9–10 (reporting that minors took a week longer than all other age groups to suspect pregnancy, that both minors and older teens took longer than average time to confirm pregnancies with a test, and discussing one adolescent who had missed her period for a few months but did not know this could be a pregnancy indication).

[92] Over one-half of respondents who took longer to suspect pregnancy had irregular periods prior to this pregnancy because of having had a baby or a miscarriage within the last six months and/or using an injectable contraceptive. *Id.* at 10.

> because of my personal health history it was normal for me to not menstruate for extended periods of time . . . especially when . . . I'm feeling stressed . . . . So because of those factors I just wasn't aware of what had happened.[93]

Another woman had a similar story:

> I had an IUD inserted in early November, and I was told that it was common for women to stop menstruating. I conceived a week after my IUD was inserted, despite using condoms as a back-up method. I wasn't even aware I was pregnant until the end of January, and even then, I only took a test out of paranoia . . . . The risks from an IUD pregnancy, coupled with our financial situation led us to make the decision for abortion. It was too soon for us to have another child. My daughter is still just an infant, and deserves all our love and attention.[94]

Other women's bodies will mask the signs of pregnancy; they will lose weight or continue to menstruate throughout the first trimester.[95] This can fool those who know the signs of pregnancy and even women who have been pregnant before. One woman I knew told me that while she was writing her Ph.D. dissertation and caring for her first child, she was under an extreme amount of stress, financially strapped and *losing* weight, not gaining. She finally missed a period, which she attributed to stress, and only went to the doctor because she was tired all the time and thought perhaps she was anemic because of the weight loss. She was shocked to find out she was twenty-two weeks pregnant.

Dr. Grimes points out that women, especially young teenagers or women with mental handicaps, who have become pregnant by rape or incest and did not receive medical attention[96] may not

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[93] Brief for IRHA at 20–21, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

[94] *Id.* at 19.

[95] *Risk Factors, supra* note 87, at 134 (stating that "many women seeking second-trimester abortions simply lacked pregnancy symptoms or were unaware of their last menstrual period").

[96] Half of all rape victims receive no medical attention. *Continuing Need, supra* note 14, at 749 (citing Melissa M. Holmes et al., *Rape-related pregnancy: Estimates and descriptive characteristics from a national sample of women*, 175

discover they are pregnant until they are in their second-trimester.[97] Thirty-two thousand pregnancies result from rape each year and one-third of these women do not discover their pregnancies until the second-trimester.

Financial and Other Logistical Barriers: Financial and other logistical barriers caused many women to delay their abortions significantly.[98] According to *Reasons for Delay*, the most common cause of delay was financial. Of the second-trimester abortion patients who would have preferred to have their abortions earlier, 36% reported that they needed additional time to raise money or obtain insurance coverage. The study reports that some women had made and cancelled multiple appointments "because they didn't have enough money to cover the procedure and one woman said that she had waited an entire month for her Medicaid coverage to become active."[99] Moreover, the price for the abortion often increases while women delay the procedure in an attempt to gather funds. The increase in costs can then cause further delays. A single mother of two reported:

> I was trying to get the money up but the longer you wait the more it is. Then I'm Rh negative so you have to pay for the shot. And it's just more and more. It builds up to the point where—what if I didn't have it today and it was $1500 in a week? And then it was almost $2000 . . . .[100]

AMER. J. OBSTETRICS & GYNECOLOGY 320, 320–25(1996)).

[97] *Continuing Need, supra* note 14, at 749; *see also* Brief for IRHA at 21 n.28, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380) ("He forced his way into my door into my living room and raped me on my living room floor . . . I . . . got the pregnancy test. And it was so positive . . . . And I cried for days.").

[98] *Reasons for Delay, supra* note 23, at 15 & Table 1; *see also, e.g.*, Stanley K. Henshaw & Lynn S. Wallisch, *Medicaid Cutoff and Abortion Servs. For the Poor*, 16 FAMILY PLANNING PERSEPCTIVES 170, 170 (1984) (finding that low-income women on average delay accessing abortion an additional two to three weeks because of difficulties in obtaining funds).

[99] *Id.* at 15.

[100] Brief for IRHA at 18, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

Financial factors were less significant in the *Risk Factors* study which examined a population in California, probably because California is one of seventeen states that provides coverage for abortions in its Medicaid program.[101] Even in this study, however, women obtaining abortions in the second-trimester were more likely than women obtaining abortions in the first trimester to report difficulty obtaining insurance coverage from private insurers as well as from the state's Medicaid program as a delaying factor.[102]

Additional logistical factors also cause significant delays for some women. In one study, an initial referral to a medical facility that could not perform that abortion "was the single most frequently reported delay causing factor by second-trimester patients."[103] One woman explained the problems she encountered finding an abortion provider:

> Once I realized and accepted I was pregnant, I made my appointment at Planned Parenthood of Idaho and was 5 days past the deadline. I was 14 weeks. Scared but being responsible I took a seven hour bus drive to Salt Lake City

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[101] The federal government and thirty-three states refuse to provide public funding for medically necessary abortions. GUTTMACHER INSTITUTE: STATE POLICIES IN BRIEF, STATE FUNDING OF ABORTION UNDER MEDICAID (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

[102] *Risk Factors*, *supra* note 87, at 134. Seventy-four percent of women pay "out-of-pocket" for abortion procedures, and four states restrict private insurers from providing coverage except in cases that would endanger a woman's life if carried to term. *See* GUTTMACHER INSTITUTE STATE POLICIES IN BRIEF, RESTRICTING INS. COVERAGE OF ABORTION 1 (2006).

[103] *Risk Factors*, *supra* note 87, at 130 (Table 3) (47% of women seeking second trimester abortions cited referral to another clinic as a factor causing delay); *see also Reasons for Delay*, *supra* note 23, at 13 (11% of women who were delayed had been to another clinic before finding the facility; these women took over twice as long on average to obtain the abortion). In 2000, abortion providers operated in only 13% of counties and three non-metropolitan areas in the United States. *Incidence 2000, supra* note 12, at 10–11. Only 33% of providers offer abortion services at twenty weeks gestation and 24% provide services at twenty-one weeks. Stanley K. Henshaw & Lawrence B. Finer, *Accessibility of Abortion Servs. in the U.S. 2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 18 (2003).

> and was turned away again because I was 7 days past 18 weeks (which increases by $500). I therefore had to leave . . . . I am currently at [a clinic in Oregon] . . . . I am 21 weeks [pregnant].[104]

Other Legal Restrictions on Abortion: In addition to bans on Medicaid funding for abortion and the subsequent desperate hunt for the funds to pay for abortion, other government-imposed restrictions on abortion can also delay abortions into the second trimester. For example, one study found that Mississippi's mandatory delay law, which requires a woman to make two in-person visits to a clinic prior to obtaining the abortion, was independently associated with delays in obtaining an abortion.[105] After implementation, the study found that "the proportion of second-trimester procedures increased by 53% (from 7.5% of abortions to 11.5%)" among women whose closest provider was in-state and subject to the law.[106] Parental involvement laws can also push young women into the second trimester because they are afraid to involve their parents, and it can take a significant amount of time to navigate judicial bypass systems and wait for court orders. Some young women even delay their abortions until they turn eighteen.[107]

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[104] Brief for IRHA at 18–19, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380).

[105] *See* Ted Joyce & Robert Kaestner, *The Impact of Mississippi's Mandatory Delay Law on the Timing of Abortion*, 32 FAM. PLAN. PERSP. 4 (2000) (hereinafter *Impact of Mandatory Delay*); *see also* A Woman's Choice-East Side Women's Clinic v. Newman, 132 F. Supp. 2d 1150, 1159–60 (S.D. Ind. 2001) (Enforcement of the Indiana waiting period law's provision "which effectively requires two trips to an abortion clinic," was likely to prevent approximately 10 to 13 % of the women in Indiana—1300 to 1700 women—who would otherwise obtain abortions from obtaining them and cause a significant increase in the proportion of second trimester abortions, which are both riskier and more expensive than earlier abortions, not because of any "persuasive effect" of the law, but instead because of "the burdens that the 'in the presence' requirement would impose on women."), *rev'd on other grounds,* 305 F.3d 684 (7th Cir. 2002).

[106] *Impact of Mandatory Delay*, *supra* note 105, at 4.

[107] Ted Joyce et al., *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 NEW ENG. J. MED. 1031, 1036 (2006); Brief for

Decision-making and Emotional Difficulties: In *Reasons for Delay,* Finer reports that 50% of the second-trimester patients who would have preferred to have their abortions earlier ultimately took a long time to decide whether to have an abortion. Thirty-three percent of these women reported that it was a difficult decision to make; 18% were worried about the cost; 15% reported it "took time" to talk to their husband/partner; and 15% had "religious or moral" concerns.[108] Nine percent of women were waiting for their relationship with their husband/partner to change, and 9% were afraid to tell their husband/partner or parents they were pregnant.[109] Similarly, *Risk Factors* reports that women cited similar factors causing delay such as difficulty deciding (57%), being "in denial" that they were pregnant (54%), being sad or depressed (67%), and fear to have the abortion (79%), but these factors were the same among second-trimester and first-trimester patients.[110]

D. The Impact of Unintended Childbearing

Studies show that women are correct in assessing the risks to themselves and to their children of unintended childbearing. Unhealthy behaviors and postpartum depression are more prevalent among mothers with unintended births than among those with intended or mistimed births, and these behaviors and a mother's mental health status can have a significant impact on children.[111]

IRHA at 20 n.25, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380); *see also* Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions,* 15 FAM. PLAN. PERSP. 259 (1983).

[108] *Reasons for Delay, supra* note 23, at Table 1.

[109] *Id.*

[110] *Risk Factors, supra* note 87, at 131.

[111] *See, e.g.*, Diana Cheng, Eleanor B. Scharz, Erika Douglas & Isabelle Horon, *Unintended Pregnancy and Associated Maternal Preconception, Prenatal and Postpartum Behaviors,* -- CONTRACEPTION --- (2008) (accepted article in press; on file with the Journal of Law and Policy) (hereinafter *Unintended Pregnancy*); Jennifer S. Barber, William G. Axinn & Arland Thornton, *Unwanted Childbearing, Health, and Mother-Child Relationships,* 40 J. HEALTH & SOC'L BEHAVIOR 231, 249 (1999) (hereinafter *Mother-Child*

For example, even after controlling for socio-demographic factors, one recent study found that women with unwanted or mistimed pregnancies were more than two times as likely to smoke during the last 3 months of pregnancy—and presumably throughout pregnancy because it is unlikely that women would *start* smoking while they are pregnant[112]—were more than twice as likely to report inadequate daily consumption of folic acid,[113] and were more likely to delay initiation of prenatal care until after the first trimester.[114] While many mothers with unintended births attempt to practice healthy behaviors such as initiation of breast feeding,[115] the study reports that "the more challenging [healthy] behaviors, such as continuing breastfeeding for 8 weeks' duration and smoking cessation, were less prevalent among women with [unintended pregnancies] than among women with intended or mistimed ones."[116] Moreover, studies have found "strong evidence that mothers who reported [unintended childbearing] have worse mental health in terms of self-reported depression and happiness" and that "[t]hese associations between having [unintended] births and [poor] mental health are quite strong."[117]

Relationships); *see also generally* THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES (Sarah Brown and Leon Eisenberg, eds., National Academies Press - INSTITUTE OF MEDICINE REPORT 1995) (hereinafter INSTITUTE OF MEDICINE REPORT).

[112] *Unintended Pregnancy*, *supra* note 111, at 2; INSTITUTE OF MEDICINE REPORT, *supra* note 111, at 68–70.

[113] *Unintended Pregnancy*, *supra* note 111 at 3.

[114] *Id.*

[115] *Id.* at 3–4 (also noting that these women were *as* likely as mothers with intended births to place their infants to sleep on their backs and use postpartum contraception).

[116] *Id.* at 4.

[117] *Mother-Child Relationships*, *supra* note 111, at 249; *see also Unintended Pregnancy*, *supra* note 112, at 4 (finding "women with unwanted births were nearly twice as likely to report feeling depressed during the postpartum period as women with intended births"); *id.* (noting that study results confirmed the results of previous studies which also found higher levels of depression among mothers with unwanted births); INSTITUTE OF MEDICINE REPORT, *supra* note 111, at 75.

Postpartum depression is a concern not only for the mother but also for her child. Postpartum depression "has been shown to result in poor mother-infant interactions and subsequent behavioral and cognitive difficulties for the child."[118] Specifically, "mothers who had [unintended births] spent significantly less leisure time outside of the home with their children,"[119] and spank or slap their children more often than other mothers.[120] While these "findings roughly parallel research on interaction between depressed mothers and their infants" which shows that "depressed mothers interact either aggressively (e.g., physical punishment) or in a withdrawn manner (e.g., spend less leisure time) with their infants,"[121] the incidence of withdrawn or aggressive behavior of mothers with unwanted childbearing towards their children does not correlate completely with their mental health status.[122] In other words, while poor mental health status "may *exacerbate* the relationship between unwanted childbearing and lower quality mother-child interactions," it does not account for it entirely.[123]

Not surprisingly, these poor parent child relationships that can develop from unwanted childbearing "impede[] the [child's] socialization process, [which] . . . may have implications for many other dimensions of well-being, even into adulthood.[124] For example, the socialization process "has been linked to a variety of important social outcomes such as educational attainment, occupational attainment, personality, child development, self-esteem and marital relationships."[125] Unintended childbearing and these poor parent-child relationships that develop continue to affect the way the mother-child relationship develops into adulthood;

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[118] *Unintended Pregnancy*, *supra* note 111, at 4 (citations omitted).

[119] *Mother-Child Relationships*, *supra* note 111, at 250.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 250–51 (finding that "mother's mental health . . . did not mediate the relationship between unwanted childbearing and physical punishment or . . . leisure time activities").

[123] *Id.* at 251.

[124] *Id.* at 253.

[125] *Id.* (internal citations omitted).

mothers with more births than they wanted give less social support to their adult children.[126]

In conclusion, unintended childbearing "leads to outcomes that are problematic for both mothers and their children, including mental health problems for mothers, lower quality relationships between mothers and children in terms of affection and social support, and increased violence and less leisure time interaction during childhood."[127] Many women who choose abortion are choosing to decrease the likelihood that these outcomes will become reality for them and their children. They are choosing abortion in the interest of motherhood.[128]

II. THE CONSTITUTIONAL ABORTION BALANCE: VALUING WOMEN'S INTERESTS IN ABORTION

Given the extensive evidence that supports what many women have long known, that women have abortions because they feel responsible for any life they bring into the world, and because they care about how any child they bear—if they are to bear one—will be mothered, the question is how has this aspect of abortion been

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[126] *Id.* at 246.

[127] *Id.* at 253.

[128] Pregnancy intention may even have an impact on physical maternal and birth outcomes, as a recent study examining the relationship between a woman's pregnancy intention and physical maternal and birth outcomes found. A.P. Mohallajee, K. M. Curtis, B. Morrow, & P.A. Marchbanks, *Pregnancy Intention and Its Relationship to Birth and Maternal Outcomes*, 109 Obstetrics & Gynecology 678 (2007) (noting that "[a] handful of studies have documented associations between pregnancy intention and other outcomes, such as depression, physical abuse, and postpartum depression, but research focused specifically on the relationship between unintended pregnancy and maternal outcomes is limited"); INSTITUTE OF MEDICINE REPORT, *supra* note 111, at 70–72 (finding association between unintended childbearing and low birthweight and infant mortality). One recent study reported that although research on the issue is limited, the results support the view that "pregnancy intention may be an indicator for increased risk of poor outcomes, including low birth weight, preterm delivery and premature rupture of the membranes." *Id.; but see Mother-Child Relationships*, *supra* note 111, at 249 (finding that poor "physical health is *not* significantly related to having unwanted births").

treated in abortion jurisprudence. The answer is that it is given short shrift. To the extent the Court has recognized this aspect of the decision, and it has, its recognition is fading. It is time for the courts to confront this reality and to consider its importance to generations of women. Without recognition that abortion serves women's interest in motherhood, in addition to the other important interests it serves, women's interests will continue to be undervalued in the constitutional equation.

Like the other constitutional standards—intermediate scrutiny, rational basis, rational basis with bite—the strict scrutiny standard applied in *Roe* set up a kind of equation by which the Court weighs the individual's interest at stake in the protected right on the one hand against the state's interest in regulation on the other hand.[129] This latter side, the "tell me why" side, as in "tell me why you get to restrict my right," is where most of the analysis is conducted under strict scrutiny. The Court asks if the state's "interest" in the regulation of the right is strong enough to outweigh the individual's interest in his or her right, and if so, whether and how well the regulation actually serves the asserted interest—whether it "fits." As the jurisprudence evolved away from strict scrutiny, less and less of a "fit" analysis was conducted by the Court. Much of this evolution involved a strengthening of the state's power to regulate on behalf of potential fetal life and a diminishing view of the importance of the right to abortion to women.

A. Women's Interests in Roe

On the "tell me why" side in *Roe*, the Court held that there were two "legitimate and important" state interests that could sometimes be "compelling" enough to justify restrictions on abortion: the state's interest "in preserving and protecting the health of the pregnant woman" and its interest "in protecting the potentiality of human life."[130] In weighing the woman's interests

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[129] Roe v. Wade, 410 U.S. 113, 162–63 (1973) (weighing interests).

[130] *Id.* at 162–63 (Each of the state interests are "separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"); *see also id.* at 162–65 ("[U]ntil the end of the first trimester mortality in abortion may be less than mortality in

against the state's justifications, the Court determined that the validity of a given restriction on abortion must be evaluated in light of the changing nature of pregnancy, its risks and complications at different stages as compared to the risks and complications of abortion procedures at these different stages, and the developmental stages of fertilized egg, embryo, previable and finally viable fetus.[131] Taking these different aspects of pregnancy and fetal development into account, the Court announced the infamous trimester framework according to which restrictions on abortion were to be evaluated.[132]

The *Roe*[133] decision has been criticized for, among other things,[134] its scanty explication of the importance of abortion to

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normal childbirth" and that "[w]ith respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.").

[131] *See, e.g.*, *id.* at 162–65 (noting that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" and that "[w]ith respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.").

[132] Under the trimester framework, in the period before the fetus is viable, the government could restrict abortion only to serve the state's interest in protecting women's health; after viability however, the government could go so far as to prohibit abortion to protect potential life, as long as those laws made exceptions to permit abortion when necessary to protect a woman's health or life. *Id.* at 162–63. For all the criticism of the trimester framework set out in *Roe*, a trimester system recognized a fact still true thirty-five years later—that the level of medical complexity of abortion procedures, the level of risk associated with pregnancy, and important facts of fetal development all correspond closely with the transitions from trimester to trimester.

[133] Roe v. Wade, 410 U.S. 113 (1973).

[134] *Roe* is often criticized, indeed scoffed at, for basing the right to abortion on a privacy right found in the "penumbras" and "shadows" of the Bill of Rights. However, it was *Griswold*, not *Roe*, that relied on a right to privacy found in the "penumbras" and "shadows" of the many provisions of the Bill of Rights. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In *Roe*, the Court cited only the due process liberty right and the Ninth Amendment's

women's liberty[135] and explanation of its determination that the right to abortion was a "fundamental" one.[136] The *Roe* Court failed to discuss the evidence that demonstrated how enforcement through law of traditional gender roles in the family created

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reservation of rights to the people as *possible* bases for the privacy right, abandoning the penumbra argument, though it had been raised by the plaintiffs, and instead settling on the liberty right in the end. *Roe*, 410 U.S. at 153. Part of the confusion about penumbras may have stemmed from the Court's use of the privacy right as an intermediary between the due process liberty right and the right to abortion itself. Perhaps the doctrinal basis for the right would have been more readily accepted had the Court adopted Justice Stewart's concurring analysis, which expounded on the Court's decision and advocated that the right to abortion should have been grounded *directly* in the liberty right without the intermediary "right to privacy." *Id.* at 168 (Stewart, J., concurring) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed . . . . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.") (internal citations omitted). I suspect that the criticism would have flowed in any case, but one target of attack would have been removed. Regardless, the argument is irrelevant today. In *Casey*, the Court seems to have followed Justice Stewart's advice, grounding the right directly in the due process liberty right. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851–53 (1992).

[135] In *Roe*, the Court held that abortion was a "fundamental" right, 410 U.S. at 155, protected by the liberty guarantee of the Fourteenth Amendment's Due Process Clause. *Id.* at 153 (noting that whether the right to privacy is founded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" as "*we feel it is*" or in the Ninth Amendment's reservation of rights to the people, it is "broad enough to include abortion") (emphasis added).

[136] *See, e.g.*, *Reasoning*, *supra* note 9, at 274. ("Because Roe and its progeny treat pregnancy as a physiological problem, they obscure the extent to which the community that would regulate a woman's reproductive choices is in fact implicated in them, responsible for defining motherhood in ways that impose material deprivations and dignitary injuries on those who perform its work."); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); *id.* at 17 ("[T]he Court never adequately explains [why] 'the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it.'") (internal citations omitted).

conditions of inequality. It referred to the mental and physical harm caused by pregnancy, but failed to detail the ways and the frequency with which pregnancy can threaten women's health and lives. The Court failed to discuss the deaths and injuries caused by illegal abortions and the political uprising of thousands of women and men, and especially physicians and clergy, who joined the movement to secure access to safe abortion in the face of the tragedies of the time,[137] and the Court often referred to the right as one belonging to the physician rather than the woman herself.[138]

However, the language of *Roe* does support the view that the Court recognized that women's liberty—or freedom, equality, dignity, humanity—depends on their freedom in public and freedom in private, at work and at home, as citizen and as mother, and recognized that the abortion right was essential to liberty in both aspects of women's lives. To the extent the Court focused on the women obtaining abortions, it recognized that some sought to avoid maternity altogether while others sought to create the best circumstances for any children to whom they did give birth. In recognizing the risk to both physical and mental health posed by pregnancy and childcare, the Court noted that "[m]aternity, *or additional offspring*, may force upon the woman a distressful life

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[137] *See, e.g.*, ARLENE CARMEN AND HOWARD MOODY, ABORTION COUNSELING AND SOCIAL CHANGE: FROM ILLEGAL ACT TO MEDICAL PRACTICE; THE STORY OF THE CLERGY CONSULTATION SERVICE ON ABORTION (Valley Forge: Judson Press, 1973); LAURA KAPLAN, THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE (Univ. Chicago Press 1997); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (Univ. of Cal. Press 1985).

[138] *See Roe*, 410 U.S. at 163 ("For the period prior to the point at which the state's interest in potential life becomes compelling, *the attending physician, in consultation with his patient, is free to determine*, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.") (emphasis added); *id.* at 164 ("For the stage prior to approximately the end of the first trimester, *the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician*.") (emphasis added); *id.* at 166 ("*[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.*") (emphasis added).

and future," and expressed concern about the woman's ability, "psychologically and otherwise," to care for a child.[139] The Court recognized the "problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[140] In other words, the Court acknowledged that women sometimes obtain abortions because of their sense of responsibility to care for children to whom they "give" birth.

In recognizing the aspect of abortion that enables women to set the terms of their motherhood, the Court was responding to the arguments of the political movement for women's liberation and equality in the background of *Roe*. As Reva Siegel and Robert Post have meticulously detailed, the women's movement of the time sought women's equality in both of the so-called "separate" spheres of work and family, demanding legal abortion as one required component of the whole. In the "Women's Strike for Equality," a one day strike organized by feminists and held on August 26, 1970 in approximately forty cities across the country, the movement's demand for "Equality Now" included demands for childcare and abortion, as well as education and employment.[141] Part of choosing to decide whether to *bear* a child, the movement recognized, included considering issues related to one's family

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[139] *Id.* at 153.

[140] *Id.*; *see also id.* at 170 (Stewart, J., concurring) (recognizing "the interests of a woman in giving of her physical and emotional self during pregnancy and the *interests that will be affected throughout her life by the birth and raising of a child* are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390 (1923).") (internal quotations omitted).

[141] Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1988–91 (2003) (arguing that "for the second-wave feminist movement, women's emancipation required fundamental changes in the structure of family life"); *id.* at 1991 (claiming that "[i]n demanding 'Equal Rights Now' in childcare and abortion, as well as in education and employment, the strike emphasized that women would no secure equal citizenship with men until family life was organized on terms that presupposed the equal participation of both its adult members in public life").

life—how (in the world) that child would be reared if born—as well as issues related to one's public life—jobs and education.

Similarly, amicus briefs in *Roe* argued that women's constitutional rights were infringed not only when they were forced "to be child breeders," but also when they were forced to be child "*rearers* against their will,"[142] and when they were forced "into the intolerable dilemma of choosing between what in many instances would be a totally irresponsible act of bearing and casting off" or raising an unwanted child.[143] The attorneys tied women's unequal status at home—their disproportionate "domestic responsibilities"—to their inequality at work.[144] They drew a connection between the restrictions on the woman caused by pregnancy and the restrictions on the woman caused by parenting.[145] Abortion was essential to the adjustment from inequality to equality.

B. Women's Interests in Casey

In *Casey*, the Court's view of the interests that the abortion right serves shifted, and for the first time the Court explicitly acknowledged that abortion serves women's interests in equality in her public life.[146] The Court rejected (somewhat grudgingly)[147] the

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[142] Brief for New Women Lawyers et al. as Amici Curiae Supporting Appellants at 7, Roe v. Wade, 410 U.S. 113 (1973) (emphasis added).

[143] *Id.* at 13; *see also id.* at 19.

[144] As one amicus brief put it "restrictions on a woman's liberty and property only *begin* with pregnancy." *Id.* at 19–20. A woman who had to restrict the hours she was available to work outside the home to late afternoon and night shifts so that she could care for her children during the day was generally considered "unavailable for work" and thus not entitled to unemployment compensation. *Id.* (citing Lukienchuk v. Administrator, Unemp. Comp. Act, 176 A.2d 892, 23 Conn. Supp. 85 (Super. Ct., 1961)). The brief also noted that the only Connecticut case at the time in which the Court held that a woman who restricted her availability for "personal reasons" was still entitled to unemployment compensation involved a woman who had seven children. *Id.* (quoting Carani v. Danaher, 13 Conn. Supp. 109 (Super. Ct., 1943)).

[145] *Id.* at 26–27 (arguing that women carry burdens far beyond childbearing); *id.* at 41 (discussing the trauma of giving up a child for adoption).

[146] Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) ("The ability of

State's right to impose on the woman "its own vision of the woman's role," that is motherhood itself, "however dominant that vision has been in the course of our history and our culture." Although this "equality talk" in *Casey* has been properly lauded, it was accompanied by a decrease, not an increase, in the level of protection for abortion from strict scrutiny to the undue burden standard.

A clue to this decreasing protection for abortion can be seen in the *Casey* Court's fascinating discussion of the woman's interest in autonomous decision-making that accompanied the equality talk. For the first time, the Court expressed real discomfort with the decision to have an abortion—discomfort that was behind the downgrading of the abortion right and that foreshadows the *Carhart* Court's mother-love idolatry and difficulty with abortion decision-making expressed in the "bonds of love" paragraph. For example, in exploring the woman's right to self-determination—the right to decide whether or not to be a mother—the Court first boldly stated that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[148] However, while this aspect of the abortion decision provided the basis for the Court's generous view of human fulfillment in *Lawrence v. Texas*,[149] in the context of abortion it provides the Court little comfort. The Court writes, "[t]hese considerations begin our analysis of the woman's interest

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women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.") (citation omitted).

[147] I say grudgingly because the only reasons given for not imposing on the woman the state's vision of her role was that "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* at 852.

[148] *Id.* at 851.

[149] Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

in terminating her pregnancy but cannot end it," because "[a]bortion is a unique act," an act "fraught with consequences for others," including the woman "who must live with" her decision, her "spouse, family, and society" who must live with the knowledge that abortions take place, and "depending on one's beliefs, for the life or potential life that is aborted."[150] Almost sorrowfully the Court continues, writing that although "these sacrifices [of childbearing and child rearing] 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," this cannot "alone" be grounds for the state to insist she make the sacrifice.[151] In other words, while acknowledging that the woman has a right to decide *not* to be a mother, to decide *not* to make the sacrifice, the Court expresses its wish that the woman would make the sacrifice after all and reminds her how "ennobled" she would be if she were to do so.

Notably, the Court then continues by exploring aspects of the abortion decision-making process that it viewed as "of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection."[152] The Court recognized that some women choose abortion because of their sense of "responsibility and respect" for the life they are creating, and because they view "the inability to provide for the nurture and care of the infant [as] a cruelty to the child and an anguish to the parent."[153] These views are "intimate views with infinite variations, and their deep, personal character underlay [the Court's] decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant."[154] The Court was clearly more comfortable with this aspect of abortion and has "no doubt as to the correctness of"

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[150] *Casey*, 505 U.S. at 852.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 853.

[154] *Id.*

Griswold, et al., which "support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also *human responsibility and respect* for it."[155]

While the Court in *Casey* recognized, and was much more comfortable with, the woman who chose abortion because of her sense of "responsibility and respect" for her offspring—her concern about nurturing and caring for any child she would create—it seems to lose sight of this woman. The decision reads as if the woman who chooses abortion is not making a positive choice reflecting her sense of responsibility for any life she would create; rather, in *Casey*, the choice is the "fraught" choice. As such, it draws from Justice White's earlier characterization of the abortion right as "a negative one," the lesser of two evils.[156] As Justice White saw it, the right in *Roe* was "based not on the notion that abortion is a good in itself, but only on the view that the legitimate goals that may be served by state coercion of private choices regarding abortion are, at least under some circumstances, outweighed by the damage to individual autonomy and privacy that such coercion entails. In other words, the evil of abortion does not justify the evil of forbidding it."[157]

Given what we have learned since *Casey*, how close the Court was at the time to overruling the right to abortion entirely, and how hard the right was for Justice Kennedy to stomach,[158] this incorporation of negative views and diminished recognition of the positive aspects of abortion is perhaps not surprising. As the original members of the *Roe* majority left the Court and were replaced by those who personally opposed abortions, a more negative view of the right and the resulting diminished protections were perhaps inevitable.

However, the shift in focus reflected in *Casey* was also part of a larger shift occurring in the pro-choice movement as the

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[155] *Id.* at 852–53 (emphasis added).

[156] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 797 (1986) (White, J., dissenting).

[157] *Id.*

[158] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 182–206 (Henry Holt & Co., 2005).

movement, and especially the issue of abortion, found itself increasingly segregated from other issues of women's equality and liberation.[159] To the extent they addressed larger movement issues, the briefs of Planned Parenthood and the amici in *Casey* focused on the impact of abortion on women's economic equality, the gains women had made in the labor force because of their access to abortion,[160] and the importance of abortion to women's health.[161] Restrictive abortion laws, they argued, deprived women of basic control over their lives—of the freedoms of "spirit and self-determination"—because of the impact of parenthood on a woman's ability to participate in the marketplace.[162] Gone was any link of the right to abortion to responsible parenting or to equality in family life, and gone was a sense of the importance of equality in parenting at home to women's equality, liberty, humanity, or dignity.

The briefs do acknowledge that many women who have abortions go on to have children. For example, the briefs credit a woman's ability to control the "timing and spacing of her children" with allowing women to "continue their education, enter the workforce and otherwise make meaningful decisions consistent

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[159] Reva Siegel has described how "[a]s countermobilization against ERA and *Roe* converged, leadership of the women's movement struggled to defend ERA and *Roe* by separating them, over time engaging in ever more strenuous efforts of self-censorship." Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1397 (2006).

[160] *See* Brief of Petitioners and Cross-Respondents at 33–34, n.65, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (No. 91-744), 1992 WL 12006398 (noting the increase in women's labor force representation and diminution in the wage gap between men and women).

[161] *See also id.* at 31–32 ("*Roe's* guarantee of safe, legal abortion has been of profound importance to the lives, health, and equality of American women," because it "allowed millions of women to escape the dangers of illegal abortion and forced pregnancy," and because "the nationwide legalization of abortion following Roe resulted in dramatic advances in the safety of abortion, and, as a consequence, there were substantial decreases in the total number of abortion-related deaths and complications.").

[162] *Id.* at 26–27 (focusing on parenthood's impact on "a woman's educational prospects, employment opportunities, and self determination").

with their own moral choices."[163] The focus of the briefs can also be understood as a product of the time, and can be credited with reaching three potentially anti-*Roe* Justices with arguments about the importance of abortion in women's lives. But the briefs reflect the view that the ultimate prize served by abortion is the freedom to be educated and work in conditions of equality, unencumbered by one's children, and do not discuss the additional ways in which abortion serves the goal of gaining the freedom to raise children and to mother them in conditions of equality.

III. LESSONS FROM *GONZALES V. CARHART*: A LIMITED BUT DANGEROUS DECISION

In *Gonzales v. Carhart*,[164] the Court upheld the federal "Partial-Birth Abortion Ban Act of 2003" ("the Act"), reversing course from *Stenberg v. Carhart*,[165] a decision issued just seven years before. Although I have criticized[166] the 5 to 4 decision

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[163] *Id.* at 33 & n.65 (noting that there has been "a substantial increase in women's labor force representation and a diminution in the wage gap between men and women" since *Roe*).

[164] Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

[165] Stenberg v. Carhart, 530 U.S. 914 (2000). In *Stenberg*, the Court struck down a Nebraska law banning so-called "partial-birth abortion" that was nearly identical to the later-enacted federal ban. First, the Court held that Nebraska's law was so broadly worded that it would have banned D&E abortions, which account for approximately 90% of all second-trimester abortions, and not just intact D&E abortions as Nebraska claimed. *Id.* at 938–45. Second, the Court held that even if the law were narrowly construed to ban only "intact D&E," the ban would be unconstitutional because a "significant body of medical opinion . . . supports the proposition that banning" intact D&E "could endanger women's health." *Id.* at 938 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)).

[166] *See* Postings of Priscilla J. Smith to Balkinization blog, http://balkin.blogspot.com/search?q=priscilla+Smith+and+carhart (April 26, 2007, 15:23 EST); *id.* (May 9, 2007, 12:18 EST), *available at* http://balkin.blogspot.com/search?q=priscilla+Smith+and+carhart; *see also* Posting of Michael Dorf to Dorf on Law blog, http://michaeldorf.org (May 6, 2007, 00:47 EST); *see generally* Postings by Jack Balkin to Balkanization blog, http://balkin.blogspot.com/search?q=Carhart (April 18, 2007); *id.* (April 19, 2007); Posting by Marty Lederman to Balkanization blog, http://balkin.blogspot.

written by Justice Kennedy as a misapplication and betrayal of many of the principles of *Planned Parenthood v. Casey*,[167] I have also argued that there is much in the opinion that reaffirms the *Casey* framework.[168] *Carhart* "eliminates neither the core decision-making aspect of the right to abortion, nor the rule that a state may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'"[169] Doctrinally, the language of regret that starts this essay is dicta brought on by what the court saw as a ban on one gruesome and unnecessary medical procedure that had minimal if any safety benefits and thus should have limited impact on future cases.[170]

To view the constitutional standard applied in *Carhart* this way, one must see the opinion from the perspective of the Justice in the majority who most limited the decision, presumably Justice Kennedy, although potentially Chief Justice Roberts or Justice Alito—something many pro-choice attorneys will find difficult. From that perspective though, the Court's tortured interpretation of the statute to ban only intact D&E abortions,[171] and to leave untouched "the vast majority of D&E abortions,"[172] as the basis for its determination that the statute did *not* have the effect of imposing a substantial obstacle to obtaining an abortion, becomes an act that preserves second-trimester abortions. The justifications for the Act—those the Court found were weighty enough to allow a ban on a narrowly defined set of intact D&E procedures—would

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com/search?q=Carhart (June 4, 2007, 00:35 EST); Posting by Andrew Koppelman to Balkanization blog, http://balkin.blogspot.com/search?q=Carhart (Apr. 23, 2007, 18:12 EST); Posting by Mark Graber to Balkanization blog, http://balkin.blogspot.com/search?q=Carhart (May 4, 2007, 21:12 EST).

[167] 505 U.S. 833 (1992).

[168] Priscilla J. Smith, *Is the Glass Half-Full?:* Gonzales v. Carhart *and the Future of Abortion Jurisprudence,* 2 HARV. L. & POL'Y REV. at 1 (Online) (April 9, 2008), http://www.hlpronline.com.

[169] *Id.* at 1–2.

[170] *Id.*

[171] *Carhart*, 127 S. Ct. at 1631 ("[I]nterpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms.").

[172] *Id.* at 1632.

not have been enough to allow a ban on "the vast majority of D&E abortions."[173] If we take the Court at its word, that it is protecting "standard D&E" procedures, *Carhart* does not impact the decisional autonomy strand of the right.[174]

Similarly, the holding on the constitutional health requirement in *Carhart* is limited to the Court's "determination that there was 'uncertainty over whether the barred procedure is *ever* necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.'"[175] Again, seeing this as a limited decision requires one to view the holding from the Court's skeptical perspective. The evidence in *Carhart* may have cracked Justice Kennedy's absolute belief, as expressed vehemently in dissent in *Stenberg*,[176] that the intact D&E would never provide anything other than "minimal" health advantages;[177] unfortunately for the plaintiffs, this was not enough for the Court. The decision was "based on what [the Court] saw as a failure of proof, rather than an elimination of the underlying rule"; it "upheld the Act because it held that the Act did not violate the health requirement."[178]

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[173] *Id.*

[174] *See* Smith, *supra* note 168, at 8.

[175] *Id.* at 9 (quoting *Carhart*, 127 S. Ct. at 1638 (emphasis added)). The Court has been rightly taken to task for its conclusion that there was "uncertainty" over the safety benefits of the intact D&E and its undue crediting of congressional "facts" over the testimony of highly credentialed and experienced medical experts for the plaintiffs and admissions by government witnesses. *See, e.g.*, *Carhart*, 127 S. Ct. at 1640 (Ginsburg, J. dissenting); Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict*, *in* THE COURTS AND THE MAKING OF PUBLIC POLICY (The Foundation for Law, Justice and Society 2008), *available at* http://www.fljs.org; Pamela S. Karlan, *The Law of Small Numbers: Gonzales v. Carhart, Parents Involved in Community Schools, and Some Themes From the First Full Term of the Roberts Court*, 86 N. Car. L. Rev. 1369, 1381–84 (2008).

[176] *Stenberg*, 530 U.S. at 1014–16 (Kennedy, J., dissenting).

[177] Perhaps this is why the press reported after argument that "Justice Kennedy's questioning suggested that he . . . remained open to persuasion." Linda Greenhouse, *Justices Hear Argument on Late-Term Abortion*, N.Y. TIMES, Nov. 9, 2006, at A25.

[178] Smith, *supra* note 168, at 9; *Carhart*, 127 S. Ct. at 1635 ("The prohibition in the Act would be unconstitutional, under precedents we here

As a doctrinal matter, the key to the different result reached in *Carhart* was the Court's reversal of the burden of proof on the question of whether a regulation subjects women to health risks. In *Stenberg*, the Court recognized that "a division of medical opinion . . . at most means uncertainty, a factor that signals the presence of risk, not its absence."[179] Where a "significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view,"[180] the burden of proof lay with the government to prove that "a health exception is '*never* necessary to preserve the health of women.'"[181] But in *Carhart* suddenly, "uncertainty"—the risk that the woman would be harmed—gave the victory to the state, placing the burden on the woman to prove harm.[182]

While the case *should* have a limited impact on the constitutional standard,[183] the decision is alarming because it

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assume to be controlling, if it 'subject[ed] [women] to significant health risks.'").

[179] *Stenberg*, 530 U.S. at 937.

[180] *Id.*

[181] *Id.* at 937–38 (emphasis added).

[182] *Carhart*, 127 S. Ct. at 1627.

[183] Subsequent opinions from the Sixth and Fourth Circuit Courts of Appeal support this view of *Carhart's* impact. Both the Fourth and Sixth Circuits carefully applied the *Carhart* Court's limited interpretation of the federal statute to a subset of intact D&Es, those that physicians intended to perform at the outset of the procedure. The Fourth Circuit, for example, noted that it was critical to the Court's holding in *Carhart* that criminal liability does *not* attach where "a doctor . . . sets out to perform a standard D & E that by accident becomes an intact D&E." Richmond Med. Ctr. v. Herring, 527 F.3d 128, 131 (4th Cir. 2008); *see also* Northland Family Planning v. Cox, 487 F.3d 323, 336 (6th Cir. 2007) (striking Michigan statute applying "when 'any anatomical part' of the fetus passes the vaginal introitus," calling the statute "sweeping" and "burdensome"); *id.* (noting that "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy."). The Fourth Circuit also agreed that the *Carhart* Court did not scrap the health requirement; rather, the failure of the plaintiffs' health claim was based on a failure of proof. *Richmond Med. Ctr.*, 527 F.3d at 136 (noting that the Court viewed the issue as a "contested factual question") (citing *Carhart*, 127 S. Ct. at 1638); *cf. Northland Family Planning*,

reveals an increasing discomfort with and distrust of the woman's decision-making process. Though the Court retains the *Casey* doctrinal framework, its application of the framework is feeble, especially in its analysis of whether and how well the ban "fits" the asserted interest, and whether the means chosen by the state to further the interest in potential life is "calculated to inform the woman's free choice, not hinder it."[184]

The Court's claim is that the ban conveys "knowledge" that will encourage some women to carry to term, reducing the overall number of abortions after the first trimester. The Court appears to argue that the ban conveys knowledge because it promotes "a dialogue" that will inform "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,"[185] and that that dialogue advances the "State's interest in respect for life" because it might in fact dissuade some women from having second-trimester abortions.[186] Incredibly, the Court confuses the political discourse that accompanied advocacy for and against the ban in Congress and in the courts for the discourse between patient and medical provider that will occur after the ban is upheld. In the Court's attempt to shove the ban into the "informed consent" framework of *Planned Parenthood v. Casey*, it ignores that the ban conveys no "knowledge" to the woman; it fails to "inform" her choice as *Casey* requires, and in fact shuts down the dialogue a physician could otherwise have had with the patient about how best to perform the abortion to preserve her health.[187]

In *Carhart* the aspect of abortion that serves the woman's interest in the quality of mothering is gone. What is at stake is "solely" the woman's physical safety and her decision *not* to mother—neither of which the Court sees as impacted by the federal ban. These interests are now pitted against what the Court assumes will be the woman's horror if she comes to regret her

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487 F.3d at 336 (noting "it is unnecessary for us to address exceptions to an unconstitutional and unenforceable general rule.").

[184] Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

[185] *Carhart*, 127 S. Ct. at 1634.

[186] *Id.*

[187] *Id.*

abortion and then finds out how the abortion was performed.[188] Completely lacking here is any sense of the woman making a decision informed by her responsibility for mothering.[189] What is left, in the Court's view, is a woman who made a bad decision about the abortion itself, a decision she will come to regret. She is at best uninformed and at worst duped by her physician about what the procedure involves. The physician who performs the abortion does so not for safety reasons, the Court claims, but for reasons of "mere convenience."[190] Thus, *Carhart* teaches that the pro-choice movement's greatest vulnerability lies in the Court's view of how and why women decide to have abortions. This view reflects the idea promoted by anti-abortion activists[191] that a woman's decision to have an abortion can only be a result of exploitation by the "abortion industry" or male predators of her natural weakness,[192]

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[188] *Id.* ("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.").

[189] In fact, the Court ignored evidence that removing the fetus intact in an intact D&E is often desirable to families, especially those with wanted pregnancies obtaining abortions because of fetal indications, because it offered them the opportunity to hold their baby and say goodbye and gave the physicians the opportunity to obtain evidence concerning the fetal abnormality. Carhart v. Ashcroft, 331 F.Supp.2d 805, 904 (D. Neb. 2004) (quoting testimony of Dr. Doe that "'these are pregnancies, generally, that were planned and very much wanted, and the patient and family are going through a very stressful time and frequently want the opportunity to say good-bye to the fetus, to be able to hold it and examine it'"; noting that Dr. Doe testified that "many patients aborting wanted pregnancies for fetal anomalies wish to see, touch, and hold the aborted fetus and cry, and say good-bye; some patients wish to have a burial or memorial service"), *rev'd on other grounds sub nom*, Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

[190] *Carhart*, 127 S. Ct. at 1638.

[191] Reva Seigel has demonstrated that these depictions of women's decision-making about abortions are being promoted by the anti-abortion movement. *See The Politics of Protection*, *supra* note 6, at 992–93.

[192] *See Unfair Choice Posters*, http://www.unfairchoice.info/posters.htm (last visited Oct. 10, 2008) (promoting anti-abortion advertising campaigns with posters that include text such as: "[s]he believed the guy in the letter jacket who

or of her betrayal of her natural feminine instincts—a betrayal that denies women their only real source of love and self-esteem.[193]

IV. "COVERING" VS. CONTROLLING MOTHERHOOD

In the preceding sections, we have seen that many women choose abortions because they are concerned about, and feel responsible for, how any children they bear will be cared for. By giving women the freedom to decide when they will have children, abortions allow women more control over the conditions in which they care for children they already have or children they will bear in the future.[194] In turn, having the freedom to design the conditions in which one's children are raised, whether one will be sole caretaker, primary caretaker in a couple, secondary caretaker in a couple, or whether one will share caretaker duties with a partner also allows women to define the kind of mother they will be and gives women more control over how they will model parenting, and thus gender roles, to their sons and daughters. Thus, abortion allows women the freedom to mother their children in either traditional or non-traditional ways, and to seek equality in their public and in their private lives.

We have also seen that the understanding that women have abortions for these reasons, while more acceptable to the Court than the view that women have abortions solely to avoid motherhood, has largely receded from the Court's consciousness, and seems to have lost salience in the pro-choice movement. Three questions remain: (1) why has women's interest in deciding *how* to

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said he loved her . . . and the guy in the white coat who said it's just a blob of tissue"; "he picked up the tab . . . but she'll never stop paying for the abortion"; and, with a picture of a broken lamp lying on the ground, "[l]ike most women Mary didn't want an abortion . . . but her husband can be very persuasive").

[193] *See id.* (posters including text such as: "when her baby's heart stopped, hers stopped too"; "you won't hear his mother cry, either," with a photo of an empty highchair; "[w]hen she was 17, her mom told her the abortion would only hurt for a little while . . . but 40 years, 2 sons and 3 grandkids later, it still hurts," with photo of empty baby carriage; and "21 years ago, Brian withdrew $300 and drove his wife to the clinic . . . [o]ne house, two minivans and three kids later, there's still no one who can fill these shoes", with photo of baby shoes).

[194] *See* Section I, *supra*.

care for their children been such a minor part of our cultural and legal discussion of abortion; (2) how would emphasizing motherhood impact efforts to increase protections for the right to abortion; and (3) how should this aspect of the right be articulated?

A. Why We "Cover" Motherhood

A significant part of the answer to the first question lies in the conflicting notions of motherhood in the feminist movement—its meanings, its importance, its bonds and its bondage—a debate about the dangers of asserting and the dangers of ceding motherhood.[195] Ultimately, in the process of trying to resist old-fashioned notions of motherhood, some of us have denied the importance of motherhood to many women. This version of feminist "covering"[196] threatens to unravel feminism and undermine one of its central goals—achieving equality in parenting. I see three different conflicts that have led us down this path.

First, some feminists have expressed concern that promoting women's interests in motherhood in a movement to allow women to avoid or control the terms of motherhood is counter-productive.

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[195] Concerns reflected in this debate reflect those in feminist debates over "equality-versus-difference" approaches to sex inequality. As one scholar described, "both 'focusing on and ignoring difference risk recreating it. This is the dilemma of difference.'" *See* Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, *in* CONFLICTS IN FEMINISM 134, 139 (Marianne Hirsch & Evelyn Fox Keller, eds., Routledge, Chapman & Hall 1990) (quoting Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 L. & CONTEMP. PROBLEMS 157, 160 (1984)); *see generally* Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers*, *in* CONFLICTS IN FEMINISM 149 (Marianne Hirsch & Evelyn Fox Keller, eds., Routledge, Chapman & Hall 1990) (discussing conflicts between feminists on pregnancy and maternity leave policies and on pornography, and noting that these "fights within the movement have been draining and, at times, disturbing").

[196] *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) ("Covering means the underlying identity is neither altered nor hidden, but is downplayed. [For example, c]overing occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.").

They argue that an emphasis on motherhood would support essentialist arguments that undermine the rights of women who choose not to bear and raise children.[197] As the movement struggled to challenge existing stereotypes of women, advocates avoided celebrating notions about the woman's role *as mother*, fearing that "by recognizing the desire to be a mother, one may inadvertently strengthen or validate arguments that oppose abortion and women's claims to control their fertility."[198] If women continue to be lauded, "ennobled in the eyes of others" as the plurality put it in *Casey*, for sacrificing themselves to motherhood, women who chose not to be mothers would continue to be considered selfish and even evil. Perhaps abortions would be allowed for women who choose abortion because of their concerns for their future children, but not for those who choose abortion because they want no part of motherhood.

These are not trivial concerns. Anti-abortion advocates have used traditional notions of motherhood successfully to restrict abortion. For example, a South Dakota law already forces physicians to tell a woman seeking an abortion that, among other things, a pregnant woman has an "existing relationship" with the "unborn human being" which "enjoys protection under the United States Constitution and under the laws of South Dakota" and that

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[197] *See generally* Pamela Karlan and Daniel Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 871 (1993) (discussing debate).

[198] Carol Sanger, *M is for Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 24 (1992). For example, while calling for feminists to "acknowledg[e] and [fully describe] the substantial room that motherhood takes up in women's lives," Carol Sanger describes dangers in the use of "motherhood" imagery. Motherhood, "despite its capacity to overwhelm, [should] not be mistaken for the whole show." *Id.* at 31 (arguing that "attempts at distilling all women into mothers and all mothers into good ones are bound to be unreliable"). Stories about "good" mothers, she pointed out, raise traditional notions of selfless beings and cast those rejecting this traditional role in opposition, "as wicked creatures, usually characterized by some version of selfishness." *Id.* at 36; *see also id.* at 20–21 (describing avoidance of motherhood in curricula and scholarship and arguing that " [t]he identification of motherhood as a source of subordination led early feminists to direct their energies toward creating social structures less encumbered by maternal obligation").

"by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated."[199] However, it is exactly the success of this anti-abortion advocacy that demonstrates the cost of ceding discussions of motherhood. Rather than preventing anti-abortion advocates from using gender stereotypes against us, our failure to counter anti-abortion advocates' images of motherhood has allowed them to define the relationship between abortion and motherhood, and indeed to define motherhood itself, in their image and not ours.[200]

Second, by avoiding an emphasis on women's interest in motherhood, movement advocates avoid aggravating numerous conflicts in our movement over the concept of motherhood. Women seeking liberation and equality for the female gender are not a uniform lot.[201] There are those on whom motherhood has been thrust and those whose motherhood has historically been disparaged, discouraged, and often denied.[202] There are those who

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[199] H.B. 1166, codified at S.D. CODIFIED LAWS § 34-23A-10.1 (2008); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Physician Compelled Speech*, 2007 U. ILL. L. REV. 939 (describing statute); *see also* Sanger, *supra* note 198, at 36–37 (describing how mothers' interests were "recast from noble to selfish," in debates in the late 1980s over federal Family and Medical Leave legislation).

[200] *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1634 (2007) ("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. Severe depression and loss of esteem can follow."); REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005) (espousing view later expressed by the Supreme Court in *Carhart*), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf; *see also* H.B. 1233, 2005 Leg., 80th Sess. (S.D. 2005) (describing creation of legislative task force to study and report on abortion).

[201] *See generally* Teresa Lauretis, *Upping the Anti (sic) in Feminist Theory*, *in* CONFLICTS IN FEMINISM 255 (Marianne Hirsch & Evelyn Fox Keller, eds., Routledge, Chapman & Hall 1990).

[202] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (challenge to public hospital's policy of secretly searching urine of pregnant women for cocaine use and reporting positive results to law enforcement); Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?* 4 MICH. J. RACE & L. 325 (1999); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

embrace and celebrate themselves as "not-mother," and those that embrace the role of mother with a gooey selflessness.[203] There are women who have sex with men, women who have sex with women, and women who have sex with men and women. There are feminists and there are "womanists."[204] There are womanists who are also feminists and vice versa. There are women who are not mothers and women who mother children they did not bear themselves who must struggle to forge a new identity from the "barren spinster" role that was assigned them in the past. And there are those who enjoy privilege as the "good mother." There are women from communities where women have always "balanced" or juggled work and family; there are others for whom balancing work and family is a new challenge. And there is everyone in between.[205]

Some of these conflicts between conceptions of motherhood play out in debates in the feminist movement over public policy. For example, feminists argue about whether seeking benefits and accommodations for caregiving will result in a regressive view of women's roles or whether it is necessary if "we want to improve the situation of real women living in the real world, often in poverty with real children."[206]

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[203] I confess that I have found myself in each category and between at different times in my life.

[204] *See* ALICE WALKER, IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE (Harcourt Brace & Co. 2004). The concept of a "womanist" was presented in Walker's *In Search of Our Mother's Gardens*, and, as the theologian Delores Williams noted, many other women have "appropriated it as a way of affirming themselves as black while simultaneously owning their connection with feminism and with the Afro-American community, male and female. The concept of womanist allows women to claim their roots in black history, religion and culture." Delores Williams, *Womanist Theology: Black Women's Voices,* CHRISTIANITY AND CRISIS (March 2, 1987), *available at* http://www.religion-online.org/showarticle.asp?title=445.

[205] *See generally* Minow, *Adjudicating Differences, supra* note 195, at 160 ("If feminists seek to challenge institutions that were designed without women in mind, and social practices that subordinate women, the construction of a feminist agenda must address all women.").

[206] Mary Becker, *Caring for Children and Caretakers*, 76 CHI. KENT L. REV. 1495, 1539 (2001) (citing Joan Williams, *From Difference to Dominance*

In some quarters, there is an intergenerational conflict over motherhood, similar to that described by Robin West between traditionalist anti-Equal Rights Amendment women and those she calls "their ERA besotted daughters."[207] This conflict plays out between the "ERA besotted" ones—second-wave feminists, those from the movement taking place in the 1960s-70s—and their daughters, some of whom consider themselves "third-wave" feminists.[208] Some "third wavers" extol the pleasures of motherhood, sometimes in reaction to a real or perceived denigration of motherhood by none other than their own mothers.[209] Just as the ERA-besotted daughter "define[d] herself not just as 'not you,' but against and in negation of her traditional mother,"[210] so the third-waver feels her own mother's rejection of motherhood as a rejection of herself. In an attempt not to repeat

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to Domesticity: Care as Work, Gender as Tradition, 76 CHI. DENT L. REV. 1441, 1454–57 (2001)). *Compare* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001) ("contend[ing] that first and second wave legal feminists who argued that "women's participation in the wage labor market be compatible with our responsibilities as mothers . . . tend[ed] to collapse women's identity into motherhood"); *id.* (arguing that "issues of gender collapse quite quickly into the normative significance of our roles as mothers" and that feminists should not start with the "centrality, presumption and inevitability of our responsibility for children"); *id.* at 197 (arguing that "feminists must not "abandon a concern for the role of reproduction and mothering in women's lives"), *with* Becker, *supra*, at 1529 (calling Franke's argument simply "nonsense."); *id.* at 1535 (arguing that "if most women are mothers, feminists should be pushing for changes to improve the lives of women who are mothers," which will require support for the care movement).

[207] Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CAL. L. REV. 1465, 1469 (2006).

[208] *See, e.g.*, Third Wave Foundation, http://www.thirdwavefoundation.org/ (last visited Oct. 10, 2008).

[209] REBECCA WALKER, BABY LOVE: CHOOSING MOTHERHOOD AFTER A LIFETIME OF AMBIVALENCE 8–9 (Riverhead Books 2007) ("[When I found out I was pregnant,] I didn't know that the showdown between the ideas of my mother's generation and my own was inescapable, and slated to play out personally in our relationship. I didn't know that those fifteen years [that I had been wanting a baby] constituted my real first trimester, and all that time my baby was coming toward me, and I was moving toward my baby.").

[210] West, *supra* note 207, at 1470.

this cycle of rejection in relation to her own offspring, she embraces the role of mother and defines herself against her own mother. The third-waver rejects stereotypes of motherhood and believes she can find a way to embrace motherhood while asserting and maintaining her own liberty and equality.[211] Her mother might experience the daughter's embracing of motherhood as a rejection of her own reasons (or excuses, depending on one's generational point of view) for her unhappiness as mother and accuses the daughter of being ungrateful. She also fears the daughter is naïve and will lose everything feminists of the 1970s-80s have worked for.[212]

Third, some, particularly Robin West, have argued that the theoretical paradigms adopted in the Court's abortion jurisprudence, and thus used by legal advocates to protect the right, have themselves discouraged discussion of women's interests in motherhood. As Professor West argued, the "insularity of the decision to abort accorded by the liberal notion of 'right,' . . . obfuscates the moral quality of most abortion decisions."[213] There

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[211] A most dramatic example of this conflict can be found in the very public exchanges between "third-wave" feminist Rebecca Walker and her mother, the famous writer and activist Alice Walker, described by Rebecca in her book and articles. *See* BABY LOVE: CHOOSING MOTHERHOOD AFTER A LIFETIME OF AMBIVALENCE, *supra* note 175; Rebecca Walker, *How my mother's fanatical views tore us apart*, (May 23, 2008), *available at* http://www.dailymail.co.uk/femail/article-1021293/How-mothers-fanatical-feminist-views-tore-apart-daughter-The-Color-Purple-author.html; Rebecca Walker, *Feminist Infighting* (March 1, 2008), *available at* http://www.huffingtonpost.com/rebecca-walker/feminist-infighting_b_89339.html.

[212] *See* Jessica Valenti, *The Sisterhood Split*, THE NATION (March 6, 2008), *available at* http://www.thenation.com/doc/20080324/valenti; Bridget Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 167 (2007) ("Third-wave feminism is largely a reactive critique that fails to advance its own positivistic view of how its goals should be accomplished . . . . Third-wave feminists respond to incomplete and distorted images of second-wave feminism. Their indictment of second-wave feminism has led to a significant tension between older and younger feminists, and division among young feminists themselves.").

[213] Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81 (1990). Similarly, Carol Sanger argued that "because the right to abortion developed within a framework of privacy that focused on a woman's right to

are dangers in "[c]eding motherhood . . . as an experience, a symbol, and a virtue to the anti-abortion camp," she argues; "[b]y insisting that the 'right' to an abortion, like all rights, is not contingent on the morality of the right-holder or the moral quality of the conduct the right protects," we may "inadvertently bolster . . . the pernicious and false claims that the decision to abort is more often than not based on nothing more than a woman's 'convenience.'"[214]

Indeed, one could see *Carhart* as the inevitable result of protection of the right to abortion as a right that "insulates both the right-holder and the act that the right protects from the community's scrutiny, judgment and understanding."[215] While the anti-abortion community has worked hard[216] to fill the moral vacuum, we have been almost precluded from doing so by our doctrine.[217] The moral vacuum was then filled in by the dominant culture, which in our case is one that does not believe that pregnant women are equal to non-pregnant persons,[218] and promotes the

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control her trimestered body," attention was diverted away from a "woman's interest in controlling her post-pregnant, child-now-out-of-body life." As abortion became a reproductive rather than a maternal issue, the very idea of motherhood became antithetical to a prochoice position instead of its essence. Sanger, *supra* note 198, at 23.

[214] West, *supra* note 213, at 81–82; *see also* Sanger, *supra* note 198, at 23–24 (arguing that ceding motherhood "has had consequences for how we explore (or do not explore) other issues relating to mothers").

[215] West, *supra* note 213, at 81.

[216] *See, e.g.*, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005) (arguing that abortion harms women physically and mentally by, *inter alia*, depriving them of their "constitutionally protected" relationship with the "unborn child"), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf.

[217] In one district court oral argument, as I began to explain reasons women obtain abortions in the second trimester, the judge politely stopped me and said, "that is none of my business." His job was not to question why, but to determine whether the state had any business interfering.

[218] *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("The [challenged insurance] program divides potential recipients into two groups-pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."). *But see* Reva Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy*

idea that the decision to abort is based only on a woman's convenience.

On the other hand, as West allows, the alternative of resting reproductive freedom "on the demonstrated capacity of pregnant women to decide whether to carry a fetus to term or to abort responsibly," would allow the dominant culture's view of women to control just as readily, if not more so, than in a rights mode. Such a "responsible woman" standard invites scrutiny of each woman's decision for compliance with some sort of responsibility-based moral code[219] which, in the current world, is likely to be "badly tainted" by bias of misogynist and racist perceptions of women.[220] Indeed, one could also read *Carhart* as foreshadowing the result of resting reproductive freedom on the majority's view of women's "moral responsibility." What would the result have been, after all, if there was no "right" at all? Either the statute would have gone into effect without any limiting construction and doctors would have been unable to provide second-trimester abortions at all or, in the perfect world newly informed by arguments about women's moral reasoning, the statute would never have been enacted in the first place.

B. Emphasizing the Aspects of Abortion that Serve Motherhood

Resuscitating and emphasizing the argument that abortion serves women's interest in motherhood has at least two

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Discrimination in Hibbs, 58 STAN. L. REV. 1871, 1873–74 (2006) (arguing that "*Hibbs* is the first Supreme Court opinion to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes, and so introduces an important new understanding of when discrimination on the basis of pregnancy is discrimination on the basis of sex under *Geduldig v. Aeillo*."); *id.* at 1873 ("I am prepared to treat Rehnquist's change in perspective as the nation's."); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

[219] I can imagine, for example, the imposition of a kind of judicial bypass procedure for adult women, where judges would decide whether the woman's decision was responsible "enough."

[220] West, *supra* note 213, at 83; *see also* Pamela Karlan & Daniel Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 871 (1993).

advantages. First, not only should this emphasis increase the weight of the woman's interest in abortion as against the state's interest in limiting it in the constitutional equation, it also provides additional arguments for the protection of the right itself. I discuss this more in the section that follows.[221]

Second, stressing this argument should increase public support for and understanding of abortion. In making this argument, I respond to Robin West's call for "Liberals and feminists [to] develop alternative, public-regarding arguments supporting [reproductive rights] and the liberty they protect that transcend the circular and increasingly false insistence that they simply exist."[222] Given the high percentage of women who have an abortion in their lifetimes or who are close to a woman who has an abortion, this aspect of the abortion decision-making process is likely to resonate with women in the United States, and stressing it will make abortion patients more recognizable to themselves and to the public. In fact, it is likely that one reason many women do not see themselves in the public image of an abortion patient is because women obtaining abortions are not portrayed in a way that they recognize.[223]

Moreover, this argument may be comforting to those who, like Justice Kennedy, still hold on to some old-fashioned notions of pregnancy, motherhood, and gender roles. As David Cohen has demonstrated, Justice Kennedy's jurisprudence in cases addressing "the parent-child relationship" relies on "traditional and paternalistic gender stereotypes about nontraditional fathers, [and] idealized mothers."[224] At least as long as Justice Kennedy remains

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[221] *See infra* at Section IV.C.

[222] *See* West, *supra* note 213, at 84.

[223] Perhaps this is why, as has been reported by many an abortion provider, so many patients can say, "I believe abortion is murder, but in my case, it's different." *See e.g.*, WICKLUND, *supra* note 24, at 178–84; Cornelia Dean, *Telling the Stories Behind the Abortions*, N.Y. TIMES, Nov 6, 2007, at F5. Women are making the decision themselves for reasons they view as responsible, caring reasons about children they would otherwise bear, reasons that are different from the reasons they are told others obtain abortions.

[224] David Cohen, *Justice Kennedy's Gendered World,* 59 S.C. L. REV. 673, 688–90 (2008) (evaluating Justice Kennedy's votes and opinions in sex-

at the Court's center, pro-choice advocates should demonstrate how abortion serves both the women's interest in the importance of motherhood, and in *how* she will care for any child she would otherwise bear, as well as the woman's interest in whether she will bear a child at all. By making these arguments, pro-choice advocates will not appeal to those who believe that motherhood is women's only true calling.[225] However, they will appeal to those who believe that women should be able to seek fulfillment outside the home, who accept that abortion is necessary, but who are comforted by the reality that many women still view caring for children as an integral part of their lives.

C. Articulating How Abortion Serves Motherhood in a Rights Framework

The final question then is whether we can reflect the realities of women seeking abortions in a way that reveals the moral quality of their decisions and appeals to a sense of "responsibility," but continue to make our arguments in a rights-based model, be it a liberty, privacy, equality, dignity or human right. I reject the idea that a rights-based model and a model infused with notions of responsibility are mutually exclusive; after all, we already have a rights-based model infused with notions of irresponsibility. It seems entirely reasonable to articulate that the rights of liberty and equality do not just mean freedom from family but also freedom in family, and to chart abortion's role in family as well as in avoiding

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discrimination cases and arguing that in those "sex-discrimination cases involving the parent-child relationship, Justice Kennedy relies on traditional and paternalistic gender stereotypes about nontraditional fathers, idealized mothers, and second-guessing women's decisions").

[225] *See, e.g.*, Allan Carlson, Paul Mero, *The Natural Family: A Manifesto*, *in* 19 THE FAMILY IN AMERICA 1 (March 2005) ("[W]omen and men are equal in dignity and innate human rights, but different in function. Even if sometimes thwarted by events beyond the individual's control (or sometimes given up for a religious vocation), the calling of each boy is to become husband and father; the calling of each girl is to become wife and mother."); *see also* Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1002–06 (2007) (hereinafter "*New Politics"*) (summarizing the manifesto and describing its origins).

family. We are, after all, in the lucky position of telling the truth about abortion.

Framing women's decisions to obtain abortions in reference to their views of the importance of motherhood in both litigation and in legislative advocacy does this, and should do it without pitting one woman against another, as long as the decisions of women who choose abortions in all different circumstances are described—the decisions of women who are mothers, women who want to be mothers at some point but not now, and also those who do not want to be mothers at all, and whose "life's work"[226] is located elsewhere entirely.

Appealing to concerns for motherhood will strengthen the right to abortion by adding the woman's right to control how she will parent to the list of aspects of our rights to liberty and equality that abortion serves.[227] Abortion in this view is a positive and essential means for the creation of a happy citizenry, a tool which along with contraception helps women protect their health and lives, control their own futures, and, when they choose to raise children, to raise them in the best circumstances they can. This aspect of the right to abortion, the aspect that serves women's interest in motherhood, should be protected by the right to control how one's children are raised, a right clearly embraced by the Court as a liberty right.[228]

Moreover, placing women's control over motherhood front and center in our demand for abortion should also strengthen a right to abortion based in the right to equal protection of the laws. As others have argued,[229] abortion restrictions that enforce, or are

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[226] *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1888 (2000) (developing a vision of social justice).

[227] *See supra* notes 6–8.

[228] *See* Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925) (enforcing due process liberty right of parents "to direct the upbringing and education of [their] children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (due process liberty guarantee includes right to "establish a home and bring up children").

[229] As Reva Siegel has argued, under *Casey* the courts should examine a state's interest in a given regulation to insure that it is not merely a guise through which to enforce the "state's vision of the woman's role." *See Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992); *see also* Siegel, *Sex Equality*,

justified by reference to, gender stereotyped notions of motherhood violate notions of sex equality under either the equal protection clause,[230] the equal right to liberty recognized in *Thornburgh*,[231] or *Casey's* rejection of the State's right to insist "upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture."[232] While many have argued that an equality analysis provides a stronger doctrinal basis for the right to abortion than the privacy right grounded in liberty in *Roe*,[233] and although such an analysis has already seeped into abortion jurisprudence, the availability of the doctrine has done nothing to increase protections yet. Rather than following *Casey*, the Court turned its back on *Casey's* admonition that the state cannot insist "upon its own vision of the woman's role," and ignored *Casey's* improper purpose rule which demanded more of an analysis of the

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supra note 9, at 815–16 ("Whatever sex role differences in intimate and family relations custom may engender, government may not entrench or aggravate these role differences by using law to restrict women's bodily autonomy and life opportunities in virtue of their sexual or parenting relations in ways that government does not restrict men's."); *id.* at 823–24 (noting that this argument was presented by amici in *Roe*).

[230] *See, e.g.*, *New Politics*, *supra* note 225, at 991–92 ("argu[ing] that the equal protection cases that prohibit state action enforcing sex stereotypes prohibit laws enforcing [stereotyped views of] motherhood."); Siegel, *Sex Equality*, *supra* note 12, at 816 (describing sources claiming doctrinal support for reproductive rights in the 14th Amendment's due process clause, the equal protection clause, privileges and immunities and the 13th and 19th Amendments).

[231] Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (noting that the promise of liberty is extended to "women as well as to men"); *id.* (acknowledging that the central sphere of liberty is "guarantee[d] equally to all."); *see also* Siegel, *Sex Equality*, *supra* note 9, at 831–32 (discussing Court's development of an equality analysis in the liberty right); *id.* at 831–34 (discussing *Tuscon Women's Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004)).

[232] *Casey*, 505 U.S. at 852. *See also* Siegel, *Sex Equality*, *supra* note 9, at 834 ("Courts can enforce equal citizenship values by evaluating restrictions on reproductive decision making to ensure that such restrictions do not reflect or enforce gender stereotypes about women's agency or their sexual and family roles.").

[233] *Id.*

potentially discriminatory motives behind state regulations. The *Carhart* Court actually relied on a rationale that resuscitates gender-stereotyped notions of women's role in the family and a paternalistic view of the necessity of abortion regulation,[234] an unconstitutional rationale whose purpose is to impose a burden on women that is undue.[235]

In fact, the way that sex equality notions have been ushered into abortion jurisprudence with an emphasis on equality in the labor force[236] has focused the Court on a decision it is uncomfortable with—a decision to have an abortion so one can be equal in the workplace. As Reva Siegel warned in 1992:

> So long as accounts of the abortion decision exempt men and society at large from their responsibility for shaping the conditions under which women conceive, bear, and rear children, it is only the woman seeking an abortion who appears to attach negative value to pregnancy. In these circumstances, her decision to seek an abortion will appear to reflect traits of the feminine character—be it frail, overwrought, selfish, or capricious.[237]

When the decision is so "fraught" and potentially faulty, the Court is likely to tolerate more "burden" on the woman than it would tolerate on men.

This may be just another way of saying that the equality argument will not prevail until the Court views *pregnant* women as

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[234] Interestingly, the argument that intact D&E procedures were harmful to women was not made by the government in the course of litigation. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007).

[235] *See* Siegel, *New Politics*, *supra* note 225, at 999 *("*If separate spheres views of women's roles played a motivating part in the enactment of abortion restrictions, the abortion restrictions violate" equality guarantees.); *id.* at 1040–43.

[236] In *Casey*, the Court finally explicitly acknowledged that abortion serves women's interests in achieving social and economic equality, pronouncing that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. at 856 (citation omitted).

[237] Siegal, *Reasoning*, *supra* note 9, at 274 n.49.

truly equal.[238] Where the Court views the pregnant woman's "bonds of love" for her child as an ultimate expression of respect for human life, an argument that the Constitution protects a pregnant woman's liberty to reject this relationship, or her equality right not to have the relationship foisted upon her, will be viewed with skepticism, confusion, pity, and ultimately a desire to protect, as it was in *Carhart*. The Court's approach to these cases, unless the woman is the most sympathetic—a rape or incest victim perhaps, or a woman whose condition is life threatening beyond a shadow of a doubt thus rendering her decision more apparently sound[239]—will likely remain the same, employing a shoddy "fit" analysis if it applies one at all. A claim, even one revealing that a given restriction was designed to impose traditional stereotyped roles on women, will not prevail without or a radical change in our cultural views of gender roles,[240] or a different focus to the equality argument such as that I am proposing here, no matter whether grounded in liberty, equal protection, dignity, human rights, or

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[238] Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) ("The [challenged insurance] program divides potential recipients into two groups-pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."); *see also, e.g.*, *Reasoning*, *supra* note 9, at 275 (citing *Geduldig*, 417 U.S. at 496 n.20 and arguing that Court would continue to see the pregnant woman as "inherently different" from *Geduldig's* "nonpregnant persons" as long as it considered the pregnant woman "from what it conceives to be a strictly physiological standpoint."); *id.* at 277 (Abortion-restrictive regulation is sex-based regulation, the use of public power to force women to bear children. Yet, the Court has never described the state's interest in protecting potential life as an interest in forcing women to bear children.").

[239] *Cf.* Amy Goldstein, *Ailing Woman Becomes Abortion Symbol: Both Sides Take up the Case of Michelle Lee, Whose Heart Problems Make Pregnancy Dangerous*, PITTSBURGH POST-GAZETTE Oct. 25, 1998, at A11 (reporting that doctors in a Louisiana public hospital where abortions are allowed only where pregnancy is life-threatening, denied abortion to pregnant woman with serious heart condition whose chance of dying was not greater than 50 percent).

[240] *See* Siegel, *Reasoning*, *supra* note 9, at 360 ("Although the separate spheres tradition no longer receives official public sanction, the sex-role concepts it fostered continue to play a crucial part in the abortion controversy, supplying norms of sexual and maternal comportment for women that inform public judgments about the propriety of abortion.").

even the Ninth Amendment.[241]

Finally, the Court should also protect the right as a hybrid equal right of liberty based on its holdings in *Meyer* and *Pierce* on the one hand[242] and *Eisenstadt v. Baird*[243] on the other. As Kim Buchanan has argued with respect to one's right to sexual liberty, men and women have "equal due process interests in deciding how to" control the raising of their children;[244] *Eisenstadt* stands for the proposition that "whatever the scope and nature" of the due process liberty right to raise one's children, "equal protection requires that women must enjoy it equally with men."[245] Restrictions on abortion that prevent women from controlling these conditions are therefore unconstitutional for this reason as well.

CONCLUSION

Carhart marks an important moment for the movement not just for access to abortion, but also for women's liberation generally.

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[241] Many scholars have argued that the right to abortion, again like the rights of gay men and lesbians, should be articulated as some version of a "hybrid" constitutional right—one that connects our Constitution's liberty and equality values. *See* citations in note 9 *supra*. Reva Siegel has carried the analysis further within the reproductive rights arena both by revealing the existence of a hybrid analysis already employed by the Court to recognize constitutional protections for notions of "dignity" that included both liberty and equality elements, and applying that dignity framework to a review of the dicta in *Carhart* used to justify the regulations approved in that case. Siegel, *The Politics of Protection*, *supra* note 6.

[242] *See supra* note 161.

[243] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[244] Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1238, 1294-1302 (2007); *see also Sex Equality*, *supra* note 9, at 831–32 (discussing Court's development of an equality analysis in the liberty right); *Thornburgh*, 476 U.S. 747, 772 (1986) (declaring that: (1) the Constitution promises an equal guarantee of liberty to "women as well as men" and (2) the woman's decision whether to end her pregnancy is among the most "basic to individual dignity and autonomy" of all the decisions protected by this equal right to liberty and thus is "fundamental.").

[245] *Id.* at 1237 & n.11 (citing *Eisenstadt*, 405 U.S. at 453 ("[W]hatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike.")).

Since *Roe*, the sense that abortion serves women's interests in liberty and equality in the family, as well as in civic life, has been decreasing. The *Carhart* Court's decision has finally turned motherhood against us explicitly, and speaks about our "bonds of love" as if we needed to be reminded of them, as if in straying so far from home we have lost touch with love itself. This insult lays down the gauntlet. It is time we respond to take up the challenge, to reclaim motherhood in our own image. Emphasizing that abortion serves women's interest in motherhood will benefit the movement for reproductive freedom whether our courts become more liberal or more conservative, and will promote a fuller understanding of the role abortion plays in women's lives.

The question is whether we are strong enough as a movement to protect our right to celebrate maternity without regressing into "maternal essentialism," that is, "the belief that the real, true 'whatness' of women is motherhood."[246] Can we do this without giving up our right to decide how to use our "generative potential,"[247] and while claiming our right to decide this in part on behalf of our own children's wellbeing? The women who rely on abortion or the possibility of obtaining an abortion deserve to be described by us in a way that is recognizable to them. If we do not take up this challenge, I fear they will no longer be able to rely on the right at all.

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[246] Sanger, *supra* note 198, at 19.

[247] Robert Goldstein, *Reading* Casey: *Structuring the Woman's Decision-Making Process*, 4 WM. & MARY BILL RTS. J. 787, 880 (1996).