

## THE NEW POLITICS OF ABORTION: AN EQUALITY ANALYSIS OF WOMAN-PROTECTIVE ABORTION RESTRICTIONS<sup>†</sup>

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*Asserting that abortions are coerced and subject women to physical and emotional harms, South Dakota recently passed legislation prohibiting abortion except where it would prevent the death of a pregnant woman. The use of woman-protective antiabortion argument to defend the South Dakota ban reflects a shift from fetal-focused to gender-based justifications for abortion regulation. Although the South Dakota ban was defeated by referendum, woman-protective antiabortion argument is spreading.*

*Proponents assumed the South Dakota ban would be constitutional if the Supreme Court overturned Roe v. Wade. This lecture argues that even if Roe is reversed, constitutional principles of equal protection constrain government regulation of abortion. The lecture demonstrates that woman-protective antiabortion argument of the kind used to justify the South Dakota ban rests on stereotypes about women's capacity and family roles. The ban was based on the understanding that the state should regulate women's decisions about abortion because the state knows better than women do what they really want and need in matters of motherhood. This lecture argues that the equal protection cases that prohibit state action enforcing sex stereo-*

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*types prohibit laws enforcing motherhood for gender-paternalist reasons of this kind.*

## INTRODUCTION

South Dakotans seized the spotlight in 2006 by enacting the most restrictive abortion statute in the nation. In a direct challenge to *Roe v. Wade*,<sup>1</sup> the state outlawed abortion, except where it would prevent the death of a pregnant woman.<sup>2</sup> South Dakota's abortion statute is constitutionally significant in yet another respect. The ban gave prominent official endorsement to a claim that has been quietly spreading for decades: that abortion harms women. Asserting that abortions are coerced and subject women to emotional and physical injuries, South Dakota prohibited abortion to protect women, the unborn, and what the state calls "the mother's fundamental natural intrinsic right to a relationship with her child."<sup>3</sup> Proponents simply assume that South Dakota's abortion statute would be declared constitutional if the Court reversed *Roe*.<sup>4</sup> This lecture challenges that premise. The lecture demonstrates that even if *Roe* is overturned, the South Dakota statute would still be unconstitutional on independent grounds: prohibiting abortion for these reasons denies women the equal protection of the laws.

With the abortion debate in a stalemate over the last several decades, a growing contingent of antiabortion activists have been working to revise their movement's message so that it would appeal to voters concerned about protecting women as well as the unborn. To reach these swing voters, the antiabortion movement has borrowed core elements of

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1. 410 U.S. 113 (1973).

2. H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006). The 2006 South Dakota abortion ban was rejected by voters in a referendum in November 2006. Monica Davey & Libby Sander, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8. Efforts continue to reenact the law. See Megan Myers, *Abortion Ban: Why Derailed?*, ARGUS LEADER MEDIA (Sioux Falls, S.D.), Feb. 26, 2007, <http://www.argusleader.com/apps/pbcs.dll/article?AID=2007702260302> ("Some say . . . a contentious petition drive and election campaign followed by a decisive 'no' vote from South Dakotans . . . drastically altered the legislative landscape on that issue this year. Others point to significant changes in political leadership; an influx of new legislators, splinters within the anti-abortion community itself and a general weariness for lawmakers to go through it all again as reasons for the lack of a strong force driving abortion legislation forward this year.").

3. S.D. H.B. 1215; see *infra* notes 68–78 and accompanying text.

4. The state saw itself as handing a newly constituted Supreme Court an opportunity to reverse *Roe*. State Representative Roger Hunt, who sponsored the South Dakota bill, pointed to the appointments of Chief Justice Roberts and Justice Alito and anticipated the possibility of Justice Stevens's retirement "in the near future and the naming of a conservative as his successor." Monica Davey, *South Dakota Bans Abortion, Setting up Battle*, N.Y. TIMES, Mar. 7, 2006, at A1. The governor justified the state's challenge to *Roe* on several grounds, recalling constitutional struggles over segregation that led to *Plessy's* overruling decades later in *Brown v. Board of Education*, 347 U.S. 483 (1954). Davey, *supra* ("The reversal of a Supreme Court opinion is possible," the governor said. "For example, in 1896, the United States Supreme Court ruled in the *Plessy vs. Ferguson* case that a state could require racial segregation in public facilities if the facilities offered to different races were equal. However, 58 years later, the Supreme Court reconsidered that opinion and reversed itself in *Brown vs. Board of Education*.").

the pro-choice claim, and produced a woman-protective antiabortion argument that mixes new ideas about women's rights with some very old ideas about women's roles. Prohibiting abortion, the movement now emphasizes, protects women's health and choices as mothers. Although South Dakota voters rejected the ban, complaining it lacked a rape/incest exception, the woman-protective antiabortion argument on which the ban was based continues to spread.<sup>5</sup>

South Dakota's statute illustrates the shift from fetal-focused to gender-based justifications for abortion restrictions. The legislative history gives a lengthy account of how abortion hurts women, sometimes explaining these harms in the language of public health, sometimes in the language of informed consent, and sometimes in the language of natural law. This lecture analyzes the state's claimed interest in protecting women from abortion and shows that these justifications rest on gender stereotypes about women's capacity and women's roles. Enacting a law to compel a pregnant woman to become a mother for these reasons violates the Equal Protection Clause.

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5. The campaign against the ban emphasized its lack of a rape/incest exception. *See infra* note 199. The harm-to-women approach has spread throughout the antiabortion movement. Several leading antiabortion organizations feature it as a primary argument against the availability of abortion. *See, e.g.*, AM. FEMINIST, Spring 1998, available at <http://www.feministsforlife.org/taf/1998/spring/Spring98.pdf> (issue devoted to examining the physical and psychological price women pay for abortion rights); Concerned Women for America, Abortion's Physical and Emotional Risks (Jan. 18, 2003), <http://www.cwfa.org/articles/3111/CWA/life/index.htm> ("Regardless of the supposed 'normalcy' of abortion, the procedure continues to pose countless physical and emotional risks to American women—sometimes even costing them their lives."); Focus on the Family, FAQ: What Can You Tell Me About the Possible Link Between Abortion and Breast Cancer, [http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std\\_adp.php?p\\_faqid=420](http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=420) (last visited Mar. 21, 2007) ("Recent studies reveal a correlation between abortion and breast cancer."); Focus on the Family, Post-Abortion Kit, <http://resources.family.org/product/id/102264.do> (last visited Mar. 21, 2007) (offering a Post-Abortion Kit for a suggested donation of \$10.00 which "helps women identify and overcome Post-Abortion Syndrome—while finding healing and forgiveness"); National Right to Life Committee, Abortion: Some Medical Facts, <http://www.nrlc.org/abortion/ASMF> (last visited Mar. 21, 2007) (summarizing articles describing abortion as physically dangerous due to risks of pain, bleeding, hemorrhage, and infection, and psychologically damaging due to risks of developing suicidal ideations, substance abuse problems, and "Post-Abortion Syndrome," among other problems); Operation Rescue, Post Abortion Healing, <http://www.operationrescue.org/?p=80> (last visited Mar. 21, 2007) ("Post-Abortion Syndrome (PAS) is a type of Post-Traumatic Stress Disorder. It occurs when a woman is unable to work through her emotional responses due to the trauma of an abortion.")

Other antiabortion organizations feature the harm-to-women argument as one among many abortion-related concerns. *See, e.g.*, American Life League, Abortion Risks, <http://www.all.org/article.php?id=10117> (last visited Mar. 21, 2007) (listing breast cancer, "post-abortion grief," and "emotional and physical disturbances" as among the most common risks of abortion); Priests for Life, After Abortion, <http://www.priestsforlife.org/afterabortion/index.htm> (last visited Mar. 21, 2007) (listing "healing" resources); Pro-Life Action League, Getting Help, <http://www.prolifeaction.org/faq/help.htm> (last visited Mar. 21, 2007) (listing organizations and books for "post-abortion healing"). The harm-to-women language is alive on college and university campuses as well, often through the work of the above groups. For one recent account of woman-protective antiabortion argument, see Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6 (Magazine), at 41. For an analysis of the rise and spread of woman-protective antiabortion argument, see *infra* Part II.D. *See also* Reva B. Siegel, 2007 Brainerd Currie Memorial Lecture: *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. (forthcoming 2007).

For centuries, government enforced different roles for men and women in the public sphere and in private life, but today we understand such laws to violate principles of equal citizenship. In this lecture, I review the equal protection cases that bar state action enforcing sex-specific family roles, and consider how these cases constrain the regulation of abortion. I then show that in the past, abortion legislation reflected judgments about women as well as the unborn, and that understandings of women on which nineteenth-century abortion law rested violate the Constitution as we understand it today. Finally, I show that, as in the nineteenth century, South Dakota's abortion ban is concerned with regulating pregnant women as well as the unborn life they bear. The legislative history makes clear the understandings of women's nature and roles upon which the abortion ban is based. The South Dakota ban differs in structure from the laws struck down in many of the classic sex discrimination cases, but as I demonstrate, it reflects and enforces many of the same gender stereotypes. An abortion ban reflecting and enforcing this understanding of sex roles violates constitutional guarantees of equal citizenship.

Exploring alternative constitutional limitations on the regulation of abortion sheds new light on the familiar constitutional framework set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>6</sup> Analyzing the equal protection limitations on the regulation of abortion identifies a concern for liberty at the heart of constitutional protection of women's equality, and a concern about sex equality at the heart of constitutional protection of women's choice.

## I. THE EQUAL PROTECTION FRAMEWORK

The Fourteenth Amendment declares that no state may deny persons the equal protection of the laws.<sup>7</sup> Since the early 1970s, the Court has enforced this guarantee with special attention to forms of state action that deny women equal citizenship with men. I open with a brief review of how equal protection cases prohibit state action enforcing gender-differentiated family roles, and then consider how this body of case law limits the regulation of abortion.

### A. *Government May Not Enforce Gender-Differentiated Family Roles*

Until the 1970s federal and state law commonly discriminated between men and women in allocating benefits and burdens, and such discrimination was justified as rationally reflecting differences in family

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6. 505 U.S. 833, 875 (1992) (reaffirming the constitutional right to abortion and establishing an "undue burden" standard).

7. U.S. CONST. amend. XIV, § 1.

roles.<sup>8</sup> Government programs were premised on the supposition that men were wage earners who supported their families, while women contributed to the family through nurturing and homemaking activities, living as dependents of male wage earners. In this vision, men are dominant in the market and public life, while women are dominant in the private family sphere. I refer to this gender-differentiated vision of family and civil society as the separate spheres tradition.

In a series of equal protection cases decided under the Fifth and Fourteenth Amendments in the 1970s, the Court struck down sex-based laws premised on the male breadwinner/female caregiver model, reasoning that government cannot enforce the gender-differentiated family roles of the separate spheres tradition: “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>9</sup> To cite but one of many such decisions, in *Califano v. Westcott*,<sup>10</sup> the Court invalidated a Social Security policy granting benefits to the children of unemployed fathers but not unemployed mothers. Explaining why the law was unconstitutional, the Court observed that the regulatory scheme was “part of the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.”<sup>11</sup> Since its 1971 decision in *Reed v. Reed*,<sup>12</sup> the Court has never sustained laws having the objective or purpose of preserving or perpetuating gender-differentiated family roles.

The Court has also emphasized that the Constitution’s prohibition on laws enforcing gender-differentiated family roles extends to laws that purport to protect women. The case law recognizes that laws restricting women’s civic participation have historically been rationalized as benign protections for women.<sup>13</sup> Such attempts at protecting women have since

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8. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (citing *Cray v. Boren*, 429 U.S. 190, 197–99 (1976)).

9. *Orr v. Orr*, 440 U.S. 268 (1979) (citing *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

10. 443 U.S. 76 (1979).

11. *Id.* at 89 (citations omitted).

12. 404 U.S. 71 (1971).

13. Since *Frontiero v. Richardson*, the case law has recognized that the nation’s “long and unfortunate history of sex discrimination” was “[t]raditionally . . . rationalized by an attitude of ‘romantic paternalism’ [about the different family roles of men and women] which, in practical effect, put women, not on a pedestal, but in a cage.” 411 U.S. 677, 684 (1973) (Brennan, J., plurality opinion). Justice Brennan’s opinion continues:

Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:

“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”

been prohibited, with the Court observing, in *Mississippi University for Women v. Hogan*, that:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.<sup>14</sup>

These cases do not hold that gender-differentiated family roles are wrong or harmful; rather, they assert that the Constitution prohibits government from imposing traditional sex roles. Citizens may choose to adhere to traditional separate spheres understandings of male and female family roles, but law may not enforce them. Striking down a sex-based alimony law in *Orr v. Orr*, the Court observed:

Appellant views the Alabama alimony statutes as effectively announcing the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State’s citizens. We agree, as he urges, that prior cases settle that this purpose cannot sustain the statutes. *Stanton v. Stanton*, 421 U.S. 7, 10 (1975), held that the “old notio[n]” that “generally it is the man’s primary responsibility to provide a home and its essentials,” can no longer justify a statute that discriminates on the basis of gender. “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”

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Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the “proper place” of women and their need for special protection.<sup>15</sup>

The equal protection cases prohibit the use of law to entrench family roles rooted in separate spheres ideology, not simply because this use of law restricts individual opportunity but also because it enforces group inequality. Government may not enforce family structures premised on separate spheres assumptions because these gender-differentiated under-

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*Id.* at 684–85 (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)). Justice Brennan added:

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.

*Id.*

14. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

15. 440 U.S. 268, 279–80, 283 (1979) (citation omitted).

standings of family roles have historically limited women's civic participation. In *United States v. Virginia*, the Court explained that, under intermediate scrutiny, government may recognize differences between the sexes, but only so long as in differentiating between the sexes, government does not restrict individual opportunities or enforce group inequalities:

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>16</sup>

This long line of equal protection cases holds that it is unconstitutional for the state to enact laws with the purpose of enforcing gender-differentiated family roles. Constitutional principles of equal citizenship prohibit government from enforcing its preference for family structures that limit women's civic participation. The case law treats laws that enforce gender-differentiated family roles, regardless of whether they purport to protect women, as enforcing an illegitimate form of stereotyping or caste resembling race discrimination.

*B. Equal Protection Constraints on the Regulation of Pregnant Women*

There has long been a question about whether and how the prohibition on sex-discriminatory state action applies to classifications concerning pregnancy. In an early case, *Geduldig v. Aiello*,<sup>17</sup> the Court held a disability benefits plan that excluded coverage for pregnancy did not violate the Equal Protection Clause, reasoning that not every classification concerning pregnancy was sex-based like the classifications in *Reed*<sup>18</sup> and *Frontiero*. *Geduldig* left open the possibility that a classification concerning pregnancy might be unconstitutional sex-based state action, if it can be shown that “distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one

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16. 518 U.S. 515, 533–34 (1996) (citations omitted).

17. 417 U.S. 484 (1974).

18. *Id.* at 497 n.20 (1974). The Court observed:

While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [*Reed* and *Frontiero*]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

*Id.*

sex or the other”<sup>19</sup>—a line of analysis I have explored in work on *Nevada Department of Human Resources v. Hibbs*,<sup>20</sup> which upheld the Family and Medical Leave Act.<sup>21</sup> But to structure my argument on uncontroversial grounds, I will follow the conventional reading of *Geduldig* and treat laws regulating abortion as facially neutral for purposes of equal protection review.

On this stipulated assumption, laws regulating pregnancy are unconstitutional under *Washington v. Davis*<sup>22</sup> and *Personnel Administrator of Massachusetts v. Feeney*,<sup>23</sup> if the challenging party can show that the statute was adopted with a discriminatory purpose: at least in part because of and not despite its impact on women. The unconstitutional purpose need not be the sole purpose for the law’s enactment. To demonstrate the law’s unconstitutionality, cases like *Village of Arlington Heights v. Metropolitan Housing Development Corp.* teach, the plaintiff would have to demonstrate that an unconstitutional purpose was a “motivating factor” in the law’s enactment.<sup>24</sup>

In this framework, laws regulating pregnant women are unconstitutional if enforcing constitutionally proscribed views of women was a motivating factor in the law’s enactment. Thus, if a law regulating pregnant women attempts to enforce stereotypes about women’s family roles, it violates the Equal Protection Clause, as the Court recently demonstrated in *Nevada Department of Human Resources v. Hibbs*.<sup>25</sup>

In *Hibbs*, the Court held that Congress could enact the Family and Medical Leave Act to remedy a pattern of state action violating the Equal Protection Clause. The record showed that states often awarded

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19. *Id.*

20. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); see Reva B. Siegel, “You’ve Come A Long Way, Baby”: *Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

21. 29 U.S.C. §§ 2601–2654 (1994).

22. 426 U.S. 229 (1976) (holding that where state action does not classify by race, the challenging party must demonstrate discriminatory purpose to establish an equal protection violation).

23. 442 U.S. 256, 272, 276 (1979) (holding that to prove discriminatory purpose, the challenging party must show that the challenged action was undertaken at least in part because of, and not merely in spite of, its impact on a protected class).

24. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). The Court observed:

*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

*Id.*; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing framework for proving mixed motive in a Title VII sex discrimination case); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

25. See Siegel, *supra* note 20, at 1873.



parenting leave to women and not men.<sup>26</sup> In addition, Chief Justice Rehnquist reported:

Many States offered women extended “maternity” leave that exceeded the typical 4- to 8- week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.<sup>27</sup>

*Hibbs* recognizes that state regulation concerning pregnancy can reflect and enforce unconstitutional sex-role assumptions about women’s role as mothers.<sup>28</sup>

## II. SEX-ROLE ASSUMPTIONS IN THE REGULATION OF ABORTION

I take as a given that abortion statutes are enacted by persons interested in protecting unborn life. I also proceed from a less widely shared premise: that arguments for imposing legal restrictions on abortion inevitably rest on judgments about women *and* the unborn. For purposes of this lecture, I restrict myself to a narrower argument: that arguments for criminalizing abortion *can* reflect judgments about women as well as the unborn, and these judgments about women may be of a kind that the Equal Protection Clause prohibits government to enforce by law. If separate spheres views of women’s roles played a motivating part in the enactment of abortion restrictions, the abortion restrictions violate the Equal Protection Clause.

In this portion of the lecture, I will demonstrate that sex-role assumptions about women can motivate the enactment of statutes prohibiting abortion, and that such unconstitutional assumptions played a significant part in the enactment of South Dakota’s abortion ban. I develop this claim in three stages. First, I will show—and have elsewhere extensively argued—that the statutes that first criminalized abortion and contraception in the nineteenth century were based on separate spheres understandings of women that today we would plainly view as unconstitutional.<sup>29</sup> Second, I will demonstrate that the understandings on which nineteenth-century criminal abortion statutes rested are not simply beliefs of the past. Even though these beliefs were energetically contested during the twentieth century and at least in part disestablished by equal protection law, many in the “traditional family values” movement are now seeking to give these beliefs new life through law—including the enactment of criminal abortion laws. To illustrate this, I discuss a recent

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26. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 730–31 (2003).

27. *Id.* at 731; *see also id.* at 731 n.5.

28. *See id.* at 736.

29. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

statement of the movement's aims and principles. Third, I demonstrate that the South Dakota statute reflects and enforces stereotypical views of women's roles. In recent years the antiabortion movement has been arguing that restrictions on abortion are needed to protect women as well as the unborn life they bear. South Dakota's statute reflects this shift from fetal-focused to gender-based justifications for abortion restrictions. I examine the woman-protective justifications that South Dakota offers for prohibiting abortion as these justifications have been expressed in the legislative history of the statute and by leaders of the national antiabortion movement. In Part III of the lecture, I show why an antiabortion statute enacted for these reasons violates the Equal Protection Clause.

A. *Separate Spheres Reasoning in the Nineteenth-Century Campaign to Criminalize Abortion*

At common law, the practice of contraception was wholly unregulated and abortion was legal until quickening, a pregnant woman's first perception of fetal movement.<sup>30</sup> This regulatory framework changed in the mid-nineteenth century, when doctors of the newly formed American Medical Association (AMA) advocated legislation that would criminalize contraception and abortion. Doctors invoked a set of interlocking arguments about human reproduction to justify these new legal controls on contraception and abortion, offering scientific arguments about women and the unborn life they might bear. Horatio Storer, the leader of the criminalization campaign, invoked the authority of medical science to argue that life begins at conception: "The first impregnation of the egg, whether in man or in kangaroo, is the birth of the offspring to life; its emergence into the outside world for a wholly separate existence is, for one as for the other, but an accident in time."<sup>31</sup> He also invoked the authority of medical science when he asserted that a woman had a duty to procreate that was dictated by her anatomy:

Were woman intended as a mere plaything, or for the gratification of her own or her husband's desires, there would have been need for her of neither uterus nor ovaries, nor would the prevention of their being used for their clearly legitimate purpose have been attended by such tremendous penalties as is in reality the case.<sup>32</sup>

In opposing contraception and abortion, the medical profession acted from beliefs about women as well as the future generations they

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30. WILLIAM BLACKSTONE, 1 COMMENTARIES \*129-30; JANE FARELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA (1997); LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA (2002); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978); ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA (2001).

31. HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 31 (1866).

32. *Id.* at 80-81.

might bear. Physicians who advocated criminalizing abortion and contraception argued that a woman who shirked her duty to bear children committed “physiological sin.”<sup>33</sup> The only way that a wife could ensure her health was to bear children, pregnancy being “a normal physiological condition, and often absolutely necessary to the physical and moral health of woman.”<sup>34</sup> There are volumes of this material. As Horatio Storer explained:

Is there then no alternative but for women, when married and prone to conception, to occasionally bear children? This, as we have seen is the end for which they are physiologically constituted and for which they are destined by nature. . . . [The prevention and termination of pregnancy] are alike disastrous to a woman’s mental, moral, and physical wellbeing.<sup>35</sup>

Thus, physicians arguing for the criminalization of abortion reasoned that life begins at conception, but their judgments about abortion were equally and explicitly premised on the view that a woman’s anatomy was her destiny, that a woman’s highest and best use was in bearing children. The doctors viewed a woman’s reasons for seeking an abortion as egoistic derogations of maternal duty. Dr. Augustus Gardner expressed the views of many when he objected: “Is it not arrant laziness, sheer, craven, culpable cowardice, which is at the bottom of this base act? . . . Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?”<sup>36</sup> The AMA’s 1871 *Report on Criminal Abortion* further denounced the woman who aborted a pregnancy: “She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity.”<sup>37</sup> Thus, the same doctors who invoked medical science to condemn abortion as “foeticide” also condemned the practice as violating women’s roles:

Woman’s rights and woman’s sphere are, as understood by the American public, quite different from that understood by us as Physicians, or as Anatomists, or Physiologists.

“Woman’s rights” now are understood to be, that she should be a man, and that her physical organism, which is constituted by

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33. HIRAM S. POMEROY, *THE ETHICS OF MARRIAGE* 97 (1888).

34. EDWIN M. HALE, *THE GREAT CRIME OF THE NINETEENTH CENTURY* 6 n. (C. S. Halsey ed., 1867).

35. STORER, *supra* note 31, at 74–76; *see also* HORATIO ROBINSON STORER, *IS IT I? A BOOK FOR EVERY MAN* 115–16 (1868) (“Every married woman, save in very exceptional cases, which should only be allowed to be such by the decision of a competent physician, every married woman, until the so-called turn in life, should occasionally bear a child; not as a duty to the community merely . . . but as the best means of insuring her own permanent good health.”).

36. Augustus K. Gardner, *Physical Decline of American Women*, in AUGUSTUS K. GARDNER, *CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH* 225 (J. S. Redfield ed., 1870).

37. D. A. O’Donnell & W. L. Atlee, *Report on Criminal Abortion*, 22 *TRANSACTIONS AM. MED. ASS’N* 239, 241 (1871).

Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.

The whole country is in an abnormal state, and the tendency to force women into men's places, creates new ideas of women's duties, and therefore . . . the marriage state is frequently childless. . . . These influences act and react on public sentiment, until the public conscience becomes blunted, and duties necessary to women's physical organization are shirked, neglected, or criminally prevented.<sup>38</sup>

To summarize, in the nineteenth century, the medical profession argued for the criminalization of abortion on the grounds that human life deserves protection from the moment of conception, buttressing this argument with claims from reproductive physiology. With equal fervor, these same doctors argued for the criminalization of abortion to ensure that women performed their proper roles as wives and mothers, also buttressing this argument with claims from reproductive physiology. In short, nineteenth-century criminal restrictions on abortion were enacted as caste legislation, for the purpose of enforcing gender-specific family roles. For several decades now the Court has interpreted the Equal Protection Clause to prohibit government from enforcing gender-differentiated family roles. Yet this vision of the family, and of government's role in protecting it, is still attractive to many.

### B. *The Traditional Family Values Movement*

Today, few who seek to ban abortion would oppose women voting as did the physicians who led the nineteenth-century criminalization campaign.<sup>39</sup> But a number of prominent conservative groups have expressed opposition to abortion in a statement that calls for government to reinforce traditional, gender-differentiated marriage and family roles.

In March of 2005, leaders of a group of organizations that oppose abortion gathered at the National Press Club to endorse a new statement of family values.<sup>40</sup> The statement, written by Alan Carlson and Paul Mero of the Howard Center, an affiliate of the World Congress of Families, was called *The Natural Family: A Manifesto*.<sup>41</sup> The *Manifesto* gives

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38. Siegel, *supra* note 29, at 303–04 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 205–06 (1869) (paper read before the Missouri State Medical Association in April 1868)).

39. MOHR, *supra* note 30, at 168.

40. See Susan Jones, *Conservative Leaders Issue 'Family Manifesto'*, CYBERCAST NEWS SERVICE, Mar. 15, 2005, <http://www.cnsnews.com/ViewCulture.asp?Page=%5CCulture%5Carchive%5C200503%5CCUL20050315a.html>.

41. Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, FAM. AM. (SPECIAL EDITION) 1, Mar. 2005, available at <http://www.heartland.org/pdf/17267.pdf>. For a list of other affiliate organizations of the World Congress of Families, see World Congress of Families IV: Warsaw 2007:

principled expression to a vision of sexuality and family roles that undergirds the group's opposition to abortion, extramarital sex, and same-sex marriage.<sup>42</sup>

The *Manifesto* opposes abortion in the course of opposing sex outside marriage. Its statement of principles reads: "We affirm the marital union to be the authentic sexual bond, the only one open to the natural and responsible creation of new life."<sup>43</sup> The *Manifesto* then affirms the group's belief in the "sanctity of human life from conception to natural death; each newly conceived person holds rights to live, to grow, to be born, and to share a home with its natural parents bound by marriage."<sup>44</sup> After asserting that each life conceived not only has a right to life, but more particularly, a right to be raised by its natural parents in marriage, the *Manifesto* then calls upon "[c]ulture, law, and policy" to regulate the sexes on the understanding that everything men and women do is governed by their different roles in parenting children:

We affirm that women 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. Everything that a man does is mediated by his aptness for fatherhood. Everything a woman does is mediated by her aptness for motherhood. Culture, law, and policy should take these differences into account.*<sup>45</sup>

The *Manifesto* also affirms belief in women's rights, but defines women's rights as a bundle of gender-specific rights that women have by virtue of their role as mothers:

We believe wholeheartedly in women's rights.

Above all, we believe in rights that recognize women's unique gifts of pregnancy, birthing, and breastfeeding. The goal of androgyny, the effort to eliminate real difference between women and men, does every bit as much violence to human nature and human rights as the old efforts by the communists to create "Soviet Man" and by the nazis [sic] to create "Aryan Man."<sup>46</sup>

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The Howard Center, <http://www.worldcongress.org/WCF4/wcf4.ini.htm> (last visited Mar. 21, 2007). I first encountered the *Manifesto* in reading Linda McClain's work on the role of the family in debates over human rights instruments, and I am grateful to her for inviting engagement with this document.

42. See Carlson & Mero, *supra* note 41, at 18 ("We will build legal and constitutional protections around marriage as the union of a man and a woman."); *id.* at 20 ("We will end the culture of abortion and the mass slaughter of the innocents.").

43. *Id.* at 15.

44. *Id.* at 16.

45. *Id.* (emphasis added). The *Manifesto* celebrates gender-differentiation and role-complementarity as the core of the marriage relationship: "We affirm that complementarity of the sexes is a source of strength. Men and women exhibit profound biological and psychological differences. When united in marriage, though, the whole becomes greater than the sum of the parts." *Id.* at 17.

46. *Id.* at 25.

The *Manifesto* presents the gender-differentiated family as a fact of nature to which law must conform. The *Manifesto* asserts that “the natural family is a fixed aspect of the created order, one ingrained in human nature,” and claims that “the natural family cannot change into some new shape; nor can it be re-defined by eager social engineers. . . . [A]ll other ‘family forms’ are incomplete or are fabrications of the state.”<sup>47</sup> It affirms that “the natural family, not the individual, is the fundamental unit of society”<sup>48</sup> and asserts “that the natural family is prior to the state and that legitimate governments exist to shelter and encourage the natural family.”<sup>49</sup> Yet, paradoxically, the “natural” family depends upon law and the state for its realization: Without laws to support it, the “natural” family is at risk of dissolution. The *Manifesto* looks “with affection” and “delight” “to earlier familial eras such as ‘1950’s America,’” and endorses policies that “aspire to recreate such results.”<sup>50</sup>

To realize this ideal, the *Manifesto* calls for policies that discourage sex outside of marriage and that condemn contraception and abortion, to encourage an increase of childbearing in marriage. “We will end the war of the sexual hedonists on marriage. . . . We will empower the legal and cultural guardians of marriage and public morality. We will end the coarsening of our culture.”<sup>51</sup> “To welcome more babies within marriage. . . . We will end state programs that indoctrinate children, youth, and adults into the contraceptive mentality. We will restore respect for life. We will end the culture of abortion and the mass slaughter of innocents.”<sup>52</sup> The *Manifesto* endorses policies that encourage childrearing by parents who stay at home.<sup>53</sup>

Although it affirms the value of each parent spending time with children, the *Manifesto* encourages the regulation of work and family relations so as to reward parents for playing gender-differentiated roles in raising a family. The *Manifesto* affirms women’s right to participate in education and employment, but does not affirm their right to participate on equal terms with men:

We reject social engineering, attempts to corrupt girls and boys, to confuse women and men about their true identities. At the same time, nothing in our platform would prevent women from seeking and attaining as much education as they want. Nothing in our platform would prevent women from entering jobs and professions to which they aspire. We do object, however, to restrictions on the liberty of employers to recognize family relations and obligations

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47. *Id.* at 15.

48. *Id.*

49. *Id.* at 16.

50. *Id.* at 24.

51. *Id.* at 19.

52. *Id.* at 19–20 (emphasis omitted).

53. *Id.* at 21 (“To bring mothers, and fathers, home. . . . We will ensure that stay-at-home parents enjoy at least the same state benefits offered to day-care users. We will end all discriminations against stay-at-home parents.” (emphasis omitted)).

and so reward indirectly those parents staying at home to care for their children.<sup>54</sup>

Rather than endorse the principle of equal pay for equal work, the *Manifesto* announces: “We affirm the ‘family wage’ ideal of ‘equal pay for equal family responsibility.’ Compensation for work and taxation should reinforce natural family bonds.”<sup>55</sup> Accordingly, the *Manifesto* opposes laws that require the equal treatment of men and women in employment and compensation:

- To create a true home economy. . .
- We will allow men and women to live in harmony with their true natures. We will end the aggressive state promotion of androgyny.
  - We will encourage employers to pay a “family wage” to heads of households. We will end laws that prohibit employers from recognizing and rewarding family responsibility.<sup>56</sup>

And so the *Manifesto* calls for government to reestablish the “family wage,” the practice of paying higher wages to “heads of households” in order to “reward indirectly those parents staying at home to care for their children”—a practice prohibited by federal employment discrimination law for almost a half century now.<sup>57</sup>

These are not the views of a marginal few. They have been endorsed by prominent national leaders of the traditional family values movement.<sup>58</sup> The *Natural Family Manifesto* has been endorsed by Jerry Falwell,<sup>59</sup> Paul Weyrich,<sup>60</sup> Phyllis Schlafly,<sup>61</sup> Gary Bauer,<sup>62</sup> and represen-

54. *Id.* at 25–26.

55. *Id.* at 17.

56. *Id.* at 21–22 (emphasis omitted).

57. Federal law bars the longstanding practice of paying men more than women because they are heads of household, and for this reason, closely scrutinizes compensation schemes that claim simply to reward heads of household. See Equal Pay Act, 29 U.S.C. § 206(d)(1) (2000); 29 C.F.R. § 1620.11(e) (2007) (“Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the ‘head of the household’ or ‘principal wage earner’ in the family unit, the overall implementation of the plan will be closely scrutinized.”).

58. See Paul Weyrich, *Traditional Family Values*, AM. DAILY, May 4, 2005, <http://www.americandaily.com/article/7675>.

59. The Natural Family: A Manifesto, Featured Endorsements, <http://www.familymanifesto.net/fm/endorsements.asp> (last visited Mar. 21, 2007) [hereinafter Manifesto Endorsements]. Conservative Christian activist Jerry Falwell led the Moral Majority from 1979 to 1989. The Moral Majority Coalition, The Moral Majority Timeline, [http://www.moralmajority.us/index.php?option=com\\_content&task=view&id=5&Itemid=29](http://www.moralmajority.us/index.php?option=com_content&task=view&id=5&Itemid=29) (last visited Mar. 21, 2007).

60. Manifesto Endorsements, *supra* note 59. Paul Weyrich founded the Heritage Foundation, an influential conservative think tank, and helped Falwell create the Moral Majority. William Martin, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 171–72 (2000). For a detailed résumé of his New Right activities, see Free Congress Foundation, <http://www.freecongress.org> (last visited Mar. 21, 2007).

61. Manifesto Endorsements, *supra* note 59. Phyllis Schlafly led the campaign against the Equal Rights Amendment in the 1970s, DONALD CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE 212–69 (2005), and is the founding president of the Eagle Forum, a multi-issue women’s organization that aims to “expose[] radical feminists.” Join Eagle Forum and Phyllis Schlafly, <http://www.eagleforum.org/misc/descript.html> (last visited Mar. 21, 2007).

tatives of Southern Baptist Theological Seminary,<sup>63</sup> Concerned Women for America,<sup>64</sup> the Heritage Foundation,<sup>65</sup> Priests for Life,<sup>66</sup> and Alliance for the Family.<sup>67</sup>

### C. South Dakota's Abortion Ban

In prohibiting abortion, the South Dakota Legislature expressed and enforced understandings of women's family role much like those expressed in the nineteenth-century criminalization campaign, and more recently in the World Congress of Families' *Natural Family Manifesto*. The South Dakota statute regulated women, not simply as an incident of the state's interest in protecting unborn life, but as an end in itself. The

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62. Manifesto Endorsements, *supra* note 59. Gary Bauer served as Chief Domestic Policy advisor to Ronald Reagan from 1986 to 1988, headed the Family Research Council from 1988 to 1999, and ran for President in 2000. His current projects include involvement in the American Values PAC, the Campaign for Working Families PAC, and Americans United to Preserve Marriage. SARA DIAMOND, NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT 236–37 (1998); American Values—Your Voice to Help Protect Life, Marriage, Faith, and Family, <http://www.ouramericanvalues.org> (last visited Mar. 21, 2007); Campaign for Working Families—Unapologetically Pro-Family, Pro-Life, and Pro-Growth, <http://www.cwfpac.com> (last visited Mar. 21, 2007); FRC Action, <http://www.frcaction.org/index.cfm?i=Wx06C16#AUPM> (last visited Mar. 21, 2007); People for the American Way—Family Research Council, <http://www.pfaw.org/pfaw/general/default.aspx?oid=4211> (last visited Mar. 21, 2007).

63. Manifesto Endorsements, *supra* note 59. R. Albert Mohler, Jr., Ph.D., is president of the Southern Theological Seminary and a leader in the Southern Baptist Convention. He served on the 2000 committee that revised the Southern Baptist statement of faith to enjoin women's submission to men in marriage. SOUTHERN BAPTIST CONVENTION, THE BAPTIST FAITH AND MESSAGE (2000), available at <http://www.sbc.net/bfm/pdf/The%20Baptist%20Faith%20and%20Message.pdf> (“A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ.”); Albert Mohler's Bio, <http://www.albertmohler.com/bio.php> (last visited Mar. 21, 2007).

64. Manifesto Endorsements, *supra* note 59. Janice Crouse is Senior Fellow at the Beverly LaHaye Institute, the think tank for Concerned Women for America, which LaHaye founded in 1979 to mobilize Christian women against the Equal Rights Amendment. Crouse served as a speechwriter for George H. W. Bush and was one of George W. Bush's delegates to the 2003 United Nations Commission on Women. Concerned Women for America—About CWA, <http://www.cwfa.org/history.asp> (last visited Mar. 21, 2007); Concerned Women for America—Janice Crouse, Ph.D. (Oct. 10, 2002), <http://www.cwfa.org/articledisplay.asp?id=2112>; see also DIAMOND, *supra* note 62, at 82.

65. Manifesto Endorsements, *supra* note 59. Patrick Fagan, the William H. G. FitzGerald Research Fellow in Family and Cultural Issues at the Heritage Foundation, was Deputy Assistant of Health and Human Services during the first Bush Administration and a Legislative Analyst to Senator Dan Coats (R-Ind.). The Heritage Foundation, Patrick F. Fagan, <http://www.heritage.org/About/Staff/PatrickFagan.cfm> (last visited Mar. 21, 2007).

66. Manifesto Endorsements, *supra* note 59. Dr. Paul Schenck is a Pastoral Associate at Priests for Life, which was founded in 1991 and is supported by Catholic leaders in the United States and the Vatican. Schenck also spent three years as Executive Vice President at the American Center for Law and Justice, which Pat Robertson created in 1990 to litigate on behalf of “religious liberties.” American Center for Law & Justice, History of ACLJ, <http://www.aclj.org/About/default.aspx?Section=10> (last visited Mar. 21, 2007); Bio Sketch of Paul Schenck, <http://priestsforlife.org/staff/schenck.htm> (last visited Mar. 21, 2007); What is the Purpose of Priests for Life?, <http://www.priestsforlife.org/intro/purpose.html> (last visited Mar. 21, 2007).

67. Audio file: Statement of Cristina Vollmer de Burelli Endorsing the *Natural Family Manifesto* on Behalf of Alliance for the Family (Mar. 15, 2005), available at <http://www.familymanifesto.net/fmMedia/fm.vollmer.mp3> (“Alliance for the Family fully supports the *Natural Family Manifesto*, and shares its vision, principles, and definition of the natural family . . .”).



abortion ban reflected and enforced beliefs about women and the family, as well as the unborn.

The state entitled the abortion ban the “South Dakota Women’s Health and Human Life Protection Act.”<sup>68</sup> By its title, the ban announced a concern with the regulation of women as well as the unborn life they might bear. The legislation made this purpose explicit, declaring that “to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the mother’s fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited.”<sup>69</sup> The statute made it a felony to provide drugs or procedures to a pregnant woman that terminate the “life of an unborn human being,”<sup>70</sup> excluding only those medical procedures performed by a licensed physician intended to prevent the death of a pregnant woman.<sup>71</sup> But even as the law imposed criminal sanctions on those who assist a pregnant woman in obtaining an abortion, it exempted the pregnant woman herself from criminal liability for seeking an abortion, providing that “[n]othing in this Act may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.”<sup>72</sup>

The South Dakota Legislature based the statute on the findings of a task force on abortion that it had appointed the year before the law was enacted.<sup>73</sup> The law explicitly incorporated the findings of the seventy-one-page *Report of the South Dakota Task Force to Study Abortion*, which was submitted to the Governor and Legislature of South Dakota in December 2005.<sup>74</sup>

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68. H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006).

69. *Id.*

70. House Bill 1215 reads:

No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.

*Id.*

71. *Id.*

72. *Id.*

73. The formation of the task force is outlined in part in South Dakota House Bill 1233. H.B. 1233, 2005 Leg., 80th Sess. (S.D. 2005) (appointing task force of fifteen members, appointed by the Legislature and the governor and providing that the “task force shall be under the supervision of the Executive Board of the Legislative Research Council and staffed and funded as an interim legislative committee”).

74. South Dakota House Bill 1215 incorporates the report into the statute:

The Legislature accepts and concurs with the conclusion of the South Dakota Task Force to Study Abortion, based upon written materials, scientific studies, and testimony of witnesses presented to the task force, that life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact that each human being is totally unique immediately at fertilization. Moreover, the Legislature finds, based upon the conclusions of the South Dakota Task Force to Study Abortion, and in recognition of the technological advances and medical experience and body of knowledge about abortions produced and made available since the 1973 decision of *Roe v. Wade*, that to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the

As one would expect, the legislative history of the ban discusses the physiology of human reproduction, and asserts “that as a matter of scientific fact an abortion terminates the life of a whole separate unique living human being.”<sup>75</sup>

The task force finds that the new recombinant DNA technologies indisputably prove that the unborn child is a whole human being from the moment of fertilization, that all abortions terminate the life of a living human being, and that the unborn child is a separate human patient under the care of modern medicine.<sup>76</sup>

Substantial portions of the report are devoted to analyzing prenatal development and to explaining the importance of prohibiting abortion in order to protect the unborn.<sup>77</sup>

But the *South Dakota Task Force Report* is not simply, or even primarily, concerned with discussing the unborn. Over half of the *Report* is devoted to explaining the state’s interest in prohibiting abortion to protect women.<sup>78</sup> The *Task Force Report* explains that women need protec-

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

S.D. H.B. 1215.

75. REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 5 (2005), <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf> [hereinafter TASK FORCE REPORT].

76. *Id.* at 31.

77. *See, e.g., id.* at 12–14, 22–30, 56–64.

78. Approximately forty of the *Task Force Report’s* seventy-one pages cover this issue.

In 2005, the Legislature commissioned the South Dakota Task Force to Study Abortion, S.D. H.B. 1233, and enacted a companion bill amending South Dakota’s Abortion Informed Consent Statute, H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005). South Dakota House Bill 1166 expressed the legislative finding, codified in section 34-23A-1.5 of the South Dakota Code,

that pregnant women contemplating their termination of the right to their relationship with their unborn children, including women contemplating such termination by an abortion procedure, are faced with making a profound decision most often under stress and pressures from circumstances and from other persons, . . . and that the State of South Dakota has a compelling interest in providing such protection.

TASK FORCE REPORT, *supra* note 75, at 5.

When the abortion ban statute recommended by the Task Force was introduced in the South Dakota Legislature in 2006, much of the testimony focused on how abortion harms women. *See, e.g.*, Audio file: Testimony of Rep. Roger W. Hunt before S.D. House State Affairs Committee on H.B. 1215 (Feb. 8, 2006), *available at* <http://legis.state.sd.us/sessions/2006/1215.htm> (click on the audio file icon for 02/08/2006) (“We know more about post-abortion physical and mental problems than was even conceived, if you would, at the time of the decision of *Roe v. Wade*. . . . *Roe v. Wade* was premised, I think we all need to remember, on what abortion did for women, but it did not address what abortion does to women. . . . We’re talking of protecting the health of the mother.”); *see also* Audio file: Testimony of Postabortion Counselor Nicole Osmundsen before S.D. House State Affairs Committee on H.B. 1215 (Feb. 8, 2006), *available at* <http://legis.state.sd.us/sessions/2006/1215.htm> (“The majority of the women that I counsel say that they are coerced into their decision. . . . [They later suffer from] depression, uncontrollable crying, bonding issues with subsequent children, regrets, to drug and alcohol abuse, to eating disorders, to divorce . . . to suicide attempts and very very destructive behaviors, as in even denying themselves the opportunity to have further children . . . . The most significant example I can give you was the woman that I counseled who could no longer vacuum her house because she can’t hear the sound of a vacuum; it reminds her of the suction machine of her abortion pro-

tion from abortion because women are misled into having abortions, coerced into having abortions, and are being harmed by abortions. In what follows I discuss each of South Dakota's woman-protective rationales for the abortion ban, and demonstrate its basis in the arguments of the national antiabortion movement. I then show how the argument for criminalizing abortion to protect women rests on gender-stereotypes about women. South Dakota has openly acknowledged that it is interested in prohibiting abortion, not simply because it is interested in protecting the unborn, but because it is interested in regulating women's conduct as mothers.

1. *Women-Protective Justifications for South Dakota's Abortion Ban: Preventing Misrepresentation, Coercion, and Societal Pressure*

The South Dakota Task Force asserted that women in the state have not actually chosen to have abortions. Rather, the Task Force maintained that women are misled or coerced into having abortions. The Task Force received the testimony of 1950 women,<sup>79</sup> and reported that “[v]irtually all of them stated they thought their abortions were uninformed or coerced or both.”<sup>80</sup>

The *Task Force Report* accuses abortion clinics of affirmatively misrepresenting the abortion procedure, by telling pregnant women that they were carrying nothing but some “tissue.”<sup>81</sup> The *Task Force Report* also accuses the clinics of misrepresenting the abortion procedure by omission, by failing to explain to the pregnant woman that the procedure would terminate the life of a “living human being.”<sup>82</sup> Sometimes, the *Task Force Report* argues that even where women having abortions knew the facts of reproductive physiology, their decisions were uninformed because the women lacked the professional expertise sufficient to evaluate the information:

The testimony of the nearly two thousand women who had abortions is replete with references to how they were left to fend for themselves and allowed to make decisions based upon false assumptions of biological fact. The abortion providers wanted the

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cedure. . . . Do they ever fully recover? I would fair to say no [sic].”). For antecedents of this trauma claim, see Siegel, *supra* note 5 (tracing testimony about vacuum symptoms back to the 1980s).

79. TASK FORCE REPORT, *supra* note 75, at 38.

80. *Id.*

81. *Id.* at 21 (“Women were not told the truth about abortion, were misled into thinking that nothing but ‘tissue’ was being removed, and relate that they would not have had an abortion if they were told the truth.”).

82. *Id.* at 38; *see also id.* at 16–17 (“It is impossible for a woman to give informed consent to an abortion if she does not fully understand that her child is in existence and that she is consenting to the termination of the life of her child. . . . We find that the withholding of the biological information from women has the effect of imposing the personal philosophy of Planned Parenthood and its agents upon these women. . . . This precludes the mother from making the decision for herself about whether the life of the human being in question has value.”).

women to make decisions about those biological facts themselves even though they had no expertise.<sup>83</sup>

At other junctures, the *Task Force Report* suggests that no matter what a clinic tells a client or however great her expertise, the abortion procedure *inherently* lacks consent because a pregnant woman cannot make a truly informed decision to give up a relationship with a child until *after* the child is born.<sup>84</sup> The *Task Force Report* suggests that women making a decision to abort a pregnancy cannot knowingly consent to the procedure unless they are in the position of women making a decision to give a child up for adoption, and have the opportunity to reconsider their decision *after* the child's birth.

The *Task Force Report* does not limit itself to the claim that women are misled into having abortions that they would not choose to have if they were better informed of the facts. It recounts testimony of women who "were coerced into having the abortion by the father of the child or a parent."<sup>85</sup> Sometimes the *Report* speaks of coercion; as often it objects that women are subject to "pressure" in deciding whether to abort a pregnancy; and at points it frankly acknowledges that its objections about coercion reflect concern about the pressures to which a woman making an abortion decision is subject. "[Abortion] has created a unique and especially painful exploitation of women. It has subjected women to the unjust and selfish demands of male sexual partners."<sup>86</sup> "[T]he abortion clinics also apply pressure to have the abortion."<sup>87</sup> "The Task Force finds that women are often subjected to coercion in the form of overt and subtle pressures from outside sources and from the abortion procedure itself that render their decision involuntary."<sup>88</sup> "[T]here are many pressures and coercive forces and elements, including some that are hidden and inherent in the nature of the procedure, that render most abortions not truly voluntary."<sup>89</sup>

In the end, the *Report's* argument that women have not truly chosen abortion because they were misled, coerced, or pressured in their abor-

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83. *Id.* at 39.

84. *Cf. id.* at 56 ("Even when the pregnant mother has the entire nine months of pregnancy to investigate her options and reach a reasoned decision about whether to parent her child, the law does not entrust the termination of the mother's rights to an adoption agency. Only a court of law, after a hearing, can terminate the mother's rights."); *id.* at 40 n.16 ("[W]ith adoptions, the mother does not make a decision until after birth when she has had an opportunity to see and hold her child and the reality of what she is giving up is concrete.")

85. *Id.* at 21.

86. *Id.* at 31–32.

87. *Id.* at 21. The Task Force continues, "[Women who have had abortions] almost uniformly express anger toward the abortion providers, their baby's father, or society in general, which promote abortion as a great right, the exercise of which is good for women." *Id.*; *see also id.* at 39–40 ("The process that takes place immediately before the abortion procedure also creates a coercive environment. The record reflects that women are pressured into making the decision quickly. . . . without time to reflect.")

88. *Id.* at 40.

89. *Id.* at 37.

tion decision converges with a distinct argument on which the informed consent argument may rest: that women *should not have chosen* abortion because abortion harms women.

2. *Women-Protective Justifications for South Dakota's Abortion Ban: Preventing Harm to Women's Health*

The *Task Force Report* argues that “the abortion procedure is inherently dangerous to the psychological and physical health of the pregnant mother.”<sup>90</sup> Lengthy sections of the *Report* discuss the psychological and physical harm that abortion allegedly inflicts on women.

*Psychological harm.* The *Task Force Report* rejects, as ideologically biased, the finding of the American Psychological Association (APA) that abortion has “no lasting or significant health risks.”<sup>91</sup> Citing studies that controvert the findings of major scientific and government authorities, the Task Force argues that abortion inflicts grave psychological injuries on women.<sup>92</sup> The *Task Force Report* asserts that a cascade of mental health disorders attend abortion, including bipolar disorder, depressive psychosis, neurotic depression, schizophrenia, guilt, anger, post-

90. *Id.* at 66.

91. *Id.* at 46 (“[M]ajor medical and mental health professional organizations support [an expert witness’s] belief that post-abortion depression is without foundation in scientific studies. Her belief is that if the American Psychological Association (APA), for example, concludes that abortion has no lasting or significant health risks, that this determination is made by an objective scientific organization of psychologists.”); see *id.* at 47 (stating that the Task Force “fails to concur with” the conclusions of the expert witness).

92. See *id.* at 41–47 (citing studies finding psychological harm attends abortion); cf. ELLIE LEE, ABORTION, MOTHERHOOD, AND MENTAL HEALTH: MEDICALIZING REPRODUCTION IN THE UNITED STATES AND GREAT BRITAIN 120 (2003) (discussing government and professional organizations that refute claims of a “postabortion syndrome”). For authorities that repudiate postabortion syndrome or various of the claims associated with it, see N. E. Adler et al., *Psychological Responses After Abortion*, 248 SCI. 41, 43 (1990) (“The time of greatest distress is likely to be before the abortion. Severe negative reactions after abortions are rare and can best be understood in the framework of coping with a normal life stress.”); Anne C. Gilchrist et al., *Termination of Pregnancy and Psychiatric Morbidity*, 167(2) BRIT. J. PSYCHIATRY 243, 243–48 (1995) (“No overall increase in reported psychiatric morbidity was found.”); Brenda Major et al., *Personal Resilience, Cognitive Appraisals, and Coping: An Integrative Model of Adjustment to Abortion*, 74 J. PERSONALITY & SOC. PSYCHOL. 735, 741 (1998) (“Overall, our sample of women did not report high levels of psychological distress 1 month following their abortions . . . . On average women also reported relatively high levels of positive well-being (M = 4.60 on a 6-point scale, SD = .69) and very high satisfaction with their abortion decision (M = 4.05 on a 5-point scale, SD = .94).”); Nancy F. Russo & Jean E. Denious, *Controlling Birth: Science, Politics, and Public Policy*, 61 J. SOC. ISSUES 181, 185 (2005) (“There is no scientific basis for constructing abortion as a severe physical or mental health threat.” (citation omitted)); Nancy F. Russo & Jean E. Denious, *Violence in the Lives of Women Having Abortions: Implications for Practice and Public Policy*, 32 PROF. PSYCHOL. 142, 142 (2001) (“When history of abuse, partner characteristics, and background variables were controlled, abortion was not related to poorer mental health.”); Nada L. Stotland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2078 (1992) (“This is an article about a medical syndrome that does not exist.”). See also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 1994) (postabortion syndrome not recognized). During the Reagan years, proponents of postabortion syndrome sought government recognition of the syndrome by Surgeon General C. Everett Koop, who was a prominent opponent of abortion, but he concluded the claim lacked basis in evidence. See *infra* notes 112–13 and accompanying text.

traumatic stress disorder, and suicidal ideation.<sup>93</sup> The *Report* finds that women who have abortions are more likely to have substance abuse problems, relationship and sexual problems, and parenting problems.<sup>94</sup> The *Report* also discusses studies suggesting that women who have abortions are subsequently likely to be abusive or failed mothers,<sup>95</sup> concluding that

The Task Force finds that it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.<sup>96</sup>

*Physical harm.* The *Task Force Report* contains an equally lengthy section on the physical health risks that abortion poses to women. This section disputes findings of the American College of Obstetricians and Gynecologists (ACOG) and the Centers for Disease Control (CDC), and asserts that women who have abortions are “at an increased risk of physical injury” and death than women who carry pregnancies to term.<sup>97</sup> Specifically, the *Task Force Report* challenges Planned Parenthood’s claim, based on CDC mortality statistics, that full-term pregnancies are several times more likely to result in death than early-term abortions. According to the *Task Force Report*, “the vast majority of deaths” stem from causes that the CDC does not connect to abortion, including suicides, homicides, accidental injuries, unspecified “physical complications,” and “cancers in which abortions may be a significant contributing factor.”<sup>98</sup> The *Report* asserts that the question “whether abortion causes an increased risk for breast cancer cannot be answered by this Task Force based on the record,” but concludes that “the reasons to suspect a connection [are] sufficiently sound” to call for further research.<sup>99</sup> The *Task Force Report* arrives at this conclusion without discussing the most comprehensive studies to date, by the *New England Journal of Medicine* in 1997 and the National Cancer Institute (NCI) in 2003, which find no connection between abortion and breast cancer.<sup>100</sup> The *Report* instead

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93. TASK FORCE REPORT, *supra* note 75, at 43–44.

94. *Id.* at 43–45.

95. *Id.* at 43–47.

96. *Id.* at 47–48.

97. *Id.* at 48–52.

98. *Id.* at 48–50.

99. The *Task Force Report* states:

The question concerning whether abortion causes an increased risk for breast cancer cannot be answered by this Task Force based on the record. However, the subject is of vital importance and the reasons to suspect such a connection sufficiently sound. We conclude that further study of this topic is justified and needed. Sorting out the science and truth of this matter is of the utmost importance so that relevant informed consent information can be provided to women considering an abortion.

*Id.* at 52.

100. See Collaborative Group on Hormonal Factors in Breast Cancer, *Breast Cancer and Abortion: Collaborative Reanalysis of Data from 53 Epidemiological Studies, Including 83,000 Women with*

relies on the testimony of Joel Brind, a pro-life biochemist whose Breast Cancer Prevention Institute argues for the link.<sup>101</sup>

At root, the *Report's* argument for protecting women against abortion turns on a claim about women's nature. Women who have abortions are mistaken or misled or coerced or pressured into decision they do not want to make and should not make because abortion violates women's nature as mothers:

[T]his method of waiver of the mother's rights expects far too much of the mother. It is so far outside the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child. Either way, this method of waiver denigrates her rights to reach a decision for herself.<sup>102</sup>

As this summary of the *Task Force Report* illustrates, the South Dakota Legislature prohibited abortion in order to protect unborn life and to protect women who might decide to have an abortion. The Legis-

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*Breast Cancer from 16 Countries*, 363 LANCET 1007, 1007 (2004) ("Pregnancies that end as a spontaneous or induced abortion do not increase a woman's risk of developing breast cancer."); Mads Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 NEW ENG. J. MED. 81, 84 (1997); National Cancer Institute, Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk (May 30, 2003), <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage> (review of relevant literature concluding that "newer studies consistently showed no association between induced and spontaneous abortions and breast cancer risk"); National Cancer Institute, Summary Report: Early Reproductive Events and Breast Cancer Workshop (Mar. 25, 2003), <http://www.cancer.gov/cancerinfo/ere-workshop-report> (rating as "well established" the conclusion that "[i]nduced abortion is not associated with an increase in breast cancer risk"); see also World Health Organization, Fact Sheet No. 240: Induced Abortion Does Not Increase Breast Cancer Risk (June 2000), <http://www.who.int/mediacentre/factsheets/fs240/en/index.html> ("Two major studies have been carried out using this methodology [historical cohort studies], and neither found an increased risk of breast cancer associated with first trimester abortion.").

U.S. Representative Henry Waxman has recently commissioned a report that described the findings of prominent professional and governmental authorities:

There is a medical consensus that there is no causal relationship between abortion and breast cancer. This consensus emerged after several well-designed studies, the largest of which was published in the *New England Journal of Medicine* in 1997, found no indication of increased risk of breast cancer following an induced abortion. In 2002, the Bush Administration edited a National Cancer Institute website to suggest that there was still an open scientific question about whether having an abortion might lead to breast cancer. After Rep. Waxman and other members of Congress protested the change, the National Cancer Institute convened a three-day conference of experts on abortion and breast cancer. Participants reviewed all existing population-based, clinical, and animal data available. Their conclusion was that "[i]nduced abortion is not associated with an increase in breast cancer risk." The panel ranked this conclusion as "[w]ell-established."

MINORITY STAFF SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS 7-8 (2006), available at <http://oversight.house.gov/Documents/20060717101140-30092.pdf> [hereinafter WAXMAN REPORT] (footnotes omitted). For a description of these debates over the claimed link between abortion and breast cancer, see CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 205-07 (2005).

101. MOONEY, *supra* note 100, at 205; TASK FORCE REPORT, *supra* note 75, at 41.

102. TASK FORCE REPORT, *supra* note 75, at 56.

lature claimed that women who have abortions have not knowingly and willingly chosen the procedure because they were misled or pressured into the decision, or should not have chosen the procedure because it violates women's "very nature as a mother."<sup>103</sup>

These claims are not unique to South Dakota. The *Task Force Report* relies extensively on evidence and arguments from the national anti-abortion movement. It is worth pausing to consider the reasoning of the national authorities on which the *Task Force Report* relies, before going on to consider the constitutional implications of the *Report's* justifications for banning abortion.

*D. Fetal-Focused and Gender-Based Arguments Against Abortion: National Authorities on Which the South Dakota Task Force Relies*

In the last several decades there has been an important shift in the dominant forms of antiabortion argument. In the 1970s and 1980s, arguments against abortion commonly focused on the unborn. Today, however, gender-based arguments against abortion are commonplace. Gender-based arguments against abortion embed claims about protecting the unborn in an elaborate set of arguments about protecting women. As we have seen, the criminal ban on abortion recently enacted in South Dakota is justified through such gender-based arguments. In what follows, I consider the gender-based argument against abortion as it has been elaborated by authorities in the national antiabortion movement that are cited and extensively relied upon in the *South Dakota Task Force Report*.

*1. Distinguishing Fetal-Focused and Gender-Based Arguments Against Abortion*

The traditional, fetal-focused argument against abortion elevates the value of protecting unborn life over any other concern. On the fetal-focused view, a human being is formed at conception of equal moral value to born persons; there is (virtually) no justification for ending that life; hence abortion is murder. On the fetal-focused view, the interests of the unborn trump the interests of women. It is more important to protect unborn life than to protect the pregnant woman's liberty and welfare. This view dominated the antiabortion movement in the 1970s and 1980s. In this period, it was a common complaint of those defending the abortion right that their opponents argued the morality and constitutionality of abortion in ways that completely effaced women.<sup>104</sup> Analyzing

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103. *Id.*

104. In the 1980s, the argument for protecting the unborn was a central focus of the antiabortion movement's case. Proponents of the abortion right objected that arguments against abortion ignored women and employed scientific evidence about the development of unborn life in ways that erased and excluded the pregnant woman from the frame of debate. See Siegel, *supra* note 29, at 325 (analyz-



the visual imagery of the antiabortion film *The Silent Scream* in the mid-1980s, Rosalind Petchesky observed: “From their beginning, such photographs have represented the fetus as primary and autonomous, the woman as absent or peripheral.”<sup>105</sup> In this era the antiabortion movement’s argument was so focused on the unborn that it took a sociologist interviewing movement leaders to demonstrate how arguments about abortion reflected judgments about women.<sup>106</sup>

As the South Dakota abortion ban vividly illustrates, however, there is another form of argument that is widespread in the antiabortion movement today. Gender-based arguments against abortion contend that restrictions on abortion protect both women and the unborn. As we will see, the new gender-based arguments against abortion define women’s needs and interests through motherhood, and so insist that there is no conflict of needs or interests between women and the children they bear. If the mantra of the fetal-focused argument is “abortion is murder,” the mantra of the gender-based argument is “abortion hurts women.”

Since the feminist movement advanced claims to reproductive liberty and equality in the period before *Roe*, there have been women who argued against the abortion right on the ground that abortion hurts women.<sup>107</sup> But in arguing that abortion hurts women, these 1970s feminists were criticizing social norms and institutions that made conceiving, bearing, and rearing children sites of disempowerment for women—a claim that nowhere appears in the *South Dakota Task Force Report*. The argument that abortion hurts women first assumed the medicalized form

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ing physiological evidence and argument deployed in the abortion debate during the 1980s and observing that “[e]ver since physicians of the nineteenth century employed physiological arguments to attack quickening doctrine, it has been possible to reason about the embryo/fetus and the dynamics of human development in scientific ways that do not refer to the physical and social work of reproduction that women perform”).

105. See Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 268 (1987); see also THE SILENT SCREAM (American Portrait Films 1984), available at <http://www.silentscream.org/video1.htm>. *The Silent Scream* argues the case against abortion as a question concerning the importance of protecting unborn life. Although the visual and narrative argument of the film is paradigmatically fetal focused, the film, at several junctures, gives voice to gender-based arguments against abortion that were then just beginning to circulate. See *Silent Scream, The Silent Scream Script & Photos*, [http://www.silentscream.org/silent\\_e.htm](http://www.silentscream.org/silent_e.htm) (last visited Mar. 21, 2007) (“In discussing abortion we must also understand that the unborn child is not the only victim. Women themselves are victims, just as the unborn children are. Women have not been told the true nature of the unborn child. They have not been shown the true facts of what an abortion truly is. Women in increasing numbers . . . hundreds . . . thousands . . . and even tens of thousands have had their wombs perforated, infected, destroyed. Women have been sterilized, castrated, all as a result which they have had no true knowledge. This film and other films which may follow like it, must be a part of the informed consent for any woman before she submits herself to a procedure of this sort.”).

106. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

107. Feminists for Life, which was formed by two antiabortion exiles from the National Organization for Women in 1972, argued that abortion harms women individually and as an oppressed class. See Cindy Osborne, *Pat Goltz, Catherine Callaghan and the Founding of Feminists for Life*, in PROLIFE FEMINISM YESTERDAY & TODAY 151–54 (Mary Krane Derr et al. eds., 1995).

employed by the South Dakota Task Force in the early 1980s, when Vincent Rue invoked the then-new concept of post-traumatic syndrome to describe the harms of abortion. This medico-psychological argument was then embraced by women in the antiabortion movement as a frame for organizing Women Exploited By Abortion (WEBA).<sup>108</sup>

“Postabortion syndrome,” or PAS, as its proponents now call it, acquired a variety of advocates. In 1986, Reverend Jerry Falwell advanced gender-based arguments against abortion in *If I Should Die Before I Wake*.<sup>109</sup> A year later, David Reardon published *Aborted Women: Silent No More*,<sup>110</sup> a collection of testimonials by abortion “survivors,” and went on to found the Elliot Institute, a center dedicated to educating the antiabortion movement and voters across the country about the dangers of postabortion syndrome.<sup>111</sup> During this period, leaders of the antiabortion movement urged President Ronald Reagan’s Surgeon General, C. Everett Koop, to make official findings that abortion posed a public health threat to women, on the model of the antismoking campaign.<sup>112</sup> But Koop, who was a prominent and passionate opponent of abortion, refused, concluding instead that there was insufficient scientific evidence to support the claim and urging that the movement keep its moral focus on protecting unborn life, rather than diverting the argument into what he saw as irrelevant and unproven claims about women.<sup>113</sup>

Despite this early defeat, advocates of the argument remained convinced of its strategic importance. Throughout the 1990s, a small but growing group of antiabortion advocates continued looking for ways to develop the gender-based or woman-protective antiabortion argument,

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108. In 1982, following a speech by Rue to the National Right to Life Committee convention, pro-life women who had had abortions formed WEBA. See Olivia Gans, *When the Mothers Found Their Voice*, <http://www.nrlc.org/news/1998/NRL1.98/oliva.html> (last visited Mar. 21, 2007).

109. See JERRY FALWELL, *IF I SHOULD DIE BEFORE I WAKE* (1986).

110. DAVID C. REARDON, *ABORTED WOMEN, SILENT NO MORE* (1987).

111. Reardon founded the Elliot Institute in 1988. See *AfterAbortion.org*, *Elliot Who?*, <http://www.afterabortion.info/elliott.html> (last visited Mar. 21, 2007).

112. See C. EVERETT KOOP, *KOOP: THE MEMOIRS OF AMERICA’S FAMILY DOCTOR* 270, 274–77 (1991) (recounting the author’s efforts to negotiate administration and movement politics); Ellie Lee, *Reinventing Abortion as a Social Problem: “Postabortion Syndrome” in the United States and Britain*, in *HOW CLAIMS SPREAD: CROSS-NATIONAL DIFFUSION OF SOCIAL PROBLEMS* 39, 55 (Joel Best ed., 2001) (recounting development of the postabortion syndrome argument during the Reagan years); *More on Koop’s Study of Abortion*, 22 *FAM. PLAN. PERSP.* 36 (1990) (recounting struggles within the Reagan administration over Koop’s inquiry); Siegel, *supra* note 5 (situating Koop episode in early history of claim’s dissemination).

113. For Koop’s statement, see *Medical and Psychological Impact of Abortion: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the H. Comm. on Gov’t Operations*, 101st Cong. 193–95 (1989). For Koop’s critique of the postabortion syndrome argument, see KOOP, *supra* note 112, at 274–75, 278 (“The pro-life movement had always focused—rightly, I thought—on the impact of abortion on the fetus. They lost their bearings when they approached the issue on the grounds of the health effect on the mother.”). For another antiabortion advocate’s critique of Reardon’s woman-protective arguments against abortion, see Francis J. Beckwith, *Taking Abortion Seriously: A Philosophical Critique of the New Anti-Abortion Rhetorical Shift*, 17 *ETHICS & MED.* 155, 162 (2001).

with Jack Willke of the National Right to Life Committee and David Reardon playing leading roles among them.

## 2. *The Logic of the Gender-Based Antiabortion Argument*

The gender-based antiabortion argument has many proponents, including Jack Willke and Wanda Franz of the National Right to Life Committee, postabortion syndrome theorist Vincent Rue, “Baby M” lawyer Harold Cassidy, and conservative advocacy groups such as the Family Research Council, Concerned Women for America, and Focus on the Family.<sup>114</sup> But the argument’s most prolific advocate is David Reardon, who publishes books that combine moral arguments that abortion is against women’s nature with medical arguments demonstrating how abortion harms women’s health and political analyses demonstrating how making this argument can win elections.

David Reardon’s 1996 book *Making Abortion Rare*<sup>115</sup> explained to allies in the antiabortion movement that the movement could not continue to emphasize arguments that privilege the interests of the unborn over the interests of the born if the movement wanted to persuade swing voters concerned with women’s welfare. Instead, Reardon argued, the movement should emphasize that restrictions on abortion are in women’s interest:

The abortion debate has typically been framed as a conflict between women’s rights and the rights of the unborn. Pro-abortionists have consciously defined the issue in these terms to polarize public opinion and paralyze the middle majority—the “fence sitting” 50 percent or more who feel torn between the woman and the child—so they will remain neutral.

Unfortunately, many pro-lifers are all too willing to accept this characterization of the issue. In practice, they even reinforce it by rushing to announce the conclusion, which the middle majority refuses to embrace, that the right of the unborn child to live must always prevail over the needs and desires of the woman. This conclusion, however morally sound, does not help the middle majority in its search to escape the paralysis of compassion for both the unborn and their mothers.

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114. See, e.g., JACK C. WILLKE, WHY NOT LOVE THEM BOTH? QUESTIONS AND ANSWERS ABOUT ABORTION (3d ed. 1997); Harold J. Cassidy & Associates, <http://www.haroldcassidy.com> (last visited Mar. 21, 2007); Concerned Women for America, *supra* note 5; Kenneth L. Connor, Panel on the Pro-Life Movement at Thirty: A Political Assessment, Family Research Council Symposium at the National Press Club (Jan. 16, 2003), <http://www.frc.org/get.cfm?i=PD03G01>; National Right to Life Committee, Abortion: Some Medical Facts, <http://www.nrlc.org/abortion/ASMF/asmf14.html> (last visited Mar. 21, 2007); ThinkAboutIt Online—It’s About Women, <http://www.thinkaboutitonline.com/women/A000000011.cfm> (last visited Mar. 21, 2007); see also *supra* note 5 (documenting the spread of woman-protective antiabortion argument in the national movement).

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

....  
To truly reframe the political debate to our advantage, it is not enough to simply highlight the part of the frame touching on the rights of the unborn. Instead, we must expand the frame to include more parties, so that we can convincingly show that it is we who are defending the authentic rights of both women and children. In short, we must insist that the proper frame for the abortion issue is not women's rights versus unborn children's rights, but rather women's *and* children's rights versus the schemes of exploiters *and* the profits of the abortion industry.<sup>116</sup>

How could the antiabortion strategist resolve the tension between the rights of women and the unborn? Reardon advocated that antiabortion activists begin to present themselves as "pro-woman":

We all know that pro-lifers have always shown compassion for women. . . . But this compassion has often been hidden behind the scenes in public debates which have been reduced to battles over women's rights versus the rights of the unborn. The solution to this bad publicity is to *always*—*ALWAYS*—place our arguments for the unborn in the middle of a pro-woman sandwich. Our compassion for the women must be voiced both first and last in all our arguments, and in a manner which shows that our concern for women is a primary and integral part of our opposition to abortion.

....  
Accepting the fact that the middle majority's concerns are primarily focused on the woman is a prerequisite to developing a successful pro-woman/pro-life strategy. Rather than trying to reduce public sympathy for women, we want to increase it and align it with our own outrage at how women are being victimized.<sup>117</sup>

Rather than oppose claims for women's rights, Reardon proposed that the antiabortion movement incorporate claims for women's rights into its case against abortion. At its core, the strategy involves countering and appropriating the authority of women's rights talk—especially its claim to respect women's choices.<sup>118</sup> Reardon and his allies argued that the antiabortion movement needed to

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116. *Id.* at 32–33; see also David C. Reardon, *A Defense of the Neglected Rhetorical Strategy*, 12 LIFE & LEARNING 77, 79 (2002), available at <http://www.uffl.org/vol12/reardon12.pdf> ("The failure of the traditional pro-life strategy is not in its moral reasoning. . . . Our argument is simply that pro-life efforts will be more effective to the degree that we succeed in presenting a moral vision that consistently demonstrates just as much concern for women as for their unborn children. Discussion of the harm that abortion does to women and of programs to promote post-abortion healing for women who have suffered that harm do not replace advocacy for the rights of unborn children. They simply broaden the base of arguments against abortion.")

117. REARDON, *supra* note 115, at 26–27 (second emphasis added).

118. See *id.* at 96–97 ("[Pro-choice advocates] claim to be concerned about the welfare and autonomy of women. We claim to be more concerned, for the very good reason that abortion is injuring women, not helping them. . . . [O]ur pro-woman bill . . . increases the rights of women by simply ensuring that their decisions to accept a recommendation for abortion are fully voluntary and fully informed."); *id.* at 142–46.

take back the terms “freedom of choice” and “reproductive freedom” . . . to emphasize the fact that we are the ones who are really defending the right of women to make an *informed* choice; we are the ones who are defending the freedom of women to reproduce without fear of being coerced into *unwanted* abortions.<sup>119</sup>

He advised:

By increasing public empathy for the suffering of women who have had abortions, by emphasizing the fact that women are being exploited by the abortion industry and coerced by others into unwanted abortions, and by focusing on expanding the legal rights of women to seek redress, we are aligning our interests with those of the middle majority in a way which advances our political agenda.<sup>120</sup>

Of course, to integrate a women’s rights claim into an antiabortion argument, the claim must be carefully defined. Reardon describes the understanding of women on which the “pro-woman” argument against abortion is based:

[F]rom a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself—a part of her heart, a part of her joy, a part of her maternity.

. . . .

If there is a single principle, then, which lies at the heart of the pro-woman/pro-life agenda, it would have to be this: *the best interests of the child and the mother are **always** joined*. This is true even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it. Thus, the only way that we can help either the mother or her child is to help both. Conversely, if we hurt either, we hurt both.<sup>121</sup>

Properly understood, the interests of women and the unborn are convergent and harmonious; abortion harms women and the unborn both. “The abortion debate, then, is not about women’s rights versus the rights of the unborn, because the rights of mother and her child can never be truly opposed to each other.”<sup>122</sup> Pro-woman discourse dissolves the conflict between women’s and children’s interests by addressing women as caregivers whose interests are realized in protecting and providing for their children. Because abortion violates women’s role as mothers, it is inherently harmful to women.

During the last two decades, Reardon and others have succeeded in persuading growing numbers of antiabortion advocates to adopt this approach, which a critic in the antiabortion movement calls “the new rhe-

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119. *Id.* at 96.

120. *Id.* at 26.

121. *Id.* at 5–6.

122. Paul Marx, Book Review, <http://www.afterabortion.info/marreview.html> (last visited Mar. 19, 2007) (reviewing REARDON, *supra* note 115).

torical strategy.”<sup>123</sup> Proponents of the new rhetorical strategy contend that the movement needs to persuade a divided public that abortion restrictions protect women’s welfare and freedom before it can persuade a divided public to protect the unborn.<sup>124</sup>

123. Beckwith, *supra* note 113, at 155; *see also id.* at 157 (criticizing Reardon’s argument on the grounds that “[the new rhetorical strategy] may have the unfortunate consequence of sustaining and perhaps increasing the number of people who think that unless their needs are pacified they are perfectly justified in performing homicide on those members of the human community, who pro-lifers believe, are the most vulnerable of our population. It is difficult to imagine that any reflective pro-lifer would think society would be morally better off in such a state of affairs.”). Beckwith also questions the social science claims on which the postabortion syndrome theory rests. *See id.* at 158 (“One can question whether the research done by [new rhetorical strategy] proponents are examples of good social science, and whether the inferences they draw from these data are warranted.”).

124. For retrospective accounts of this shift in the argument of the antiabortion movement, see Francis J. Beckwith, *Choice Words: A Critique of the New Pro-Life Rhetoric*, TOUCHSTONE: J. MERE CHRISTIANITY, Jan./Feb. 2004, available at <http://www.touchstonemag.com/archives/article.php?id=17-01-056-o> (featuring main article by Beckwith and separate responses by Frederica Mathewes-Green, David Mills, and Terry Schlossberg). As Frederica Mathewes-Green, longtime member of Feminists for Life, recalls the emergence of this new rhetorical strategy:

The “new rhetorical strategy” that Francis Beckwith critiques is getting up in years. My first book, *Real Choices: Listening to Women, Looking for Alternatives to Abortion*, was written in 1993. The Caring Foundation’s first ads appeared in the mid-nineties, as did Paul Swopes’s essay in *First Things* describing the results of their research. David Reardon’s book *Aborted Women: Silent No More* appeared in 1987.

Beckwith might have mentioned as well Dr. Jack Willke’s early-nineties project to develop a concise response to the other side’s “Who decides?” rhetoric (you may have seen “Love them both” placards) and the trend of pregnancy care centers to shift focus, changing from storefronts that discourage abortion to full-fledged medical clinics or professional counseling centers. The so-called “new” rhetorical strategies (for there are more than one) have been around for over a decade. No one yet, to my knowledge, has evaluated their success, though that would be a useful service; we’re still in the middle of this fight.

How it happened was this: Pro-life leaders noticed that the primary message of the previous couple of decades, our insistence on the unborn child’s full humanity and right to life, was no longer gaining ground. We had honed this message and it was ubiquitous and consistent, and we personally found it unassailable. Yet we were increasingly encountering people capable of dismissing it. Perhaps all the people susceptible to it had already been reached and converted. For the remainder, whom we termed “the mushy middle,” it was falling on deaf ears. We didn’t know why.

....  
One option might have been to back off from pressing the pro-life cause and undertake a broader national effort in remedial moral education. But most of us decided instead to attempt to get around this surprising roadblock by other means. We diversified, each person and group trying out strategies as they occurred to them. Some, of course, would continue to present the “It’s a baby and it deserves protection” message. This is the backbone of the pro-life movement and our final motivation, and we aren’t about to abandon it.

But others looked at subsets of the pro-choice population and began crafting ways to reach them.

Frederica Mathewes-Green, *Doing Everything We Can: A Response to Francis J. Beckwith*, TOUCHSTONE: J. MERE CHRISTIANITY, Jan./Feb. 2004, available at <http://www.touchstonemag.com/archives/article.php?id=17-01-056-o>.

Reardon also reports on the efforts of Jack Willke, former president of the National Right to Life Committee, to reconstruct the antiabortion message in the early 1990s. He recounts Willke shifting from a wholly fetal-focused argument to a gender-based argument, with dramatically improved results: “In essence, the Willkes have sandwiched fetal development between two layers of pro-woman compassion. According to Dr. Willke, ‘The result has been almost dramatic. . . . The anger and combativeness are gone. The questions are civil. We are listened to once again.’” REARDON, *supra* note 115, at 26; *see also* Joe Scheidler & Ann Scheidler, *Controversy in the Activist Movement*, PRO-LIFE ACTION NEWS, Aug. 2002, <http://www.prolifeaction.org/news/2002v21n2/controversy.htm> (“As Dr. Jack Willke has said for over three decades, ‘Why can’t we love them both?’”).

In *Making Abortion Rare*, Reardon advances this gender-based argument against abortion in three dimensions: as an argument about politics (the rhetorical “frames” in which to win the abortion debate), an argument about morality (a revelation of natural or divine law), and an argument about science (public health). Reardon views each of these forms of reasoning as consistent with, and even an integral aspect of, the other: as the book explains, “the morality of abortion is built right into the psychological effects of abortion.”<sup>125</sup> Reardon has elsewhere observed: “I do argue that because abortion is evil, we can expect, and even know, that it will harm those who participate in it. Nothing good comes from evil.”<sup>126</sup> “If an action is indeed against God’s moral law, it will be found to be injurious to our happiness. . . . [I]t is entirely consistent with a Christian view of morality to believe that *because* abortion is morally wrong, women will suffer.”<sup>127</sup> Reardon views his empirical research on the psychological consequences of abortion at the Elliot Institute as documenting the moral evil of abortion.<sup>128</sup>

Abortion is not evil primarily because it harms women. Instead, it is precisely because of its evil as a direct attack on the good of life that we can know it will ultimately harm women. *While the research we are doing is necessary to document abortion’s harm, good moral reasoning helps us to anticipate the results.*<sup>129</sup>

Reardon is frank in discussing his belief that empirical inquiry is a branch of moral reasoning. He is equally frank in discussing the political advantage of expressing judgments about morality and religion *as* empirical claims. In *Making Abortion Rare*, Reardon explains to Christian audiences that proving the public health harms of abortion will demonstrate abortion’s moral wrong in terms that command authority for secular audiences who will not vote in accord with appeals to divine command:

Christians rightly anticipate . . . that any advantage gained through violation of the moral law is always temporary; it will invariably be supplanted by alienation and suffering.

Thus, if our faith is true, we would expect to find compelling evidence which demonstrates that such acts as abortion, fornication, and pornography lead, in the end, not to happiness and freedom,

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For a social movement history of woman-protective antiabortion argument, which traces its evolution from a therapeutic discourse employed to recruit supporters at the movement’s crisis pregnancy centers to a political discourse strategically designed to quell concerns of the general voting public, see Siegel, *supra* note 5.

125. REARDON, *supra* note 115, at 10.

126. Reardon, *supra* note 116, at 4.

127. *Id.* at 6, 8.

128. See, for example, the Elliot Institute’s A List of Major Psychological Sequelae of Abortion, <http://www.afterabortion.info/psychol.html> (last visited Mar. 21, 2006).

129. *An Interview with Dr. David C. Reardon, Director of the Elliot Institute*, ZENIT NEWS AGENCY, May 12, 2003, available at <http://www.zenit.org/english/visualizza.phtml?sid=35425> (emphasis added).

but to sorrow and enslavement. By finding this evidence and sharing it with others, we bear witness to the protective good of God's law in a way which even unbelievers must respect.<sup>130</sup>

*Making Abortion Rare* advises that advocates employ this new woman-protective justification for restricting abortion in politics and in therapy. Gender-based arguments against abortion guide the counseling provided at the Elliot Institute and at other "crisis pregnancy centers" (CPCs), which encourage women to continue pregnancies and which help "postabortive" women recognize that they are symptomatic because they are in denial about the trauma of their past abortions.<sup>131</sup> *Making Abortion Rare* also advises politicians about how to advance gender-based antiabortion arguments in support of hypothetical or proposed legislation. Reardon encourages politicians to advocate incrementalist methods of limiting abortion in the manner advocated by Americans United for Life,<sup>132</sup> including:

- 1) Protecting women from being coerced into *unwanted* abortions;
- 2) Guaranteeing the right of women to make free and *fully informed* decisions about abortion;
- 3) Protecting the women most likely to be injured by abortion by requiring physicians to properly screen patients for characteristics which would place them at higher risk of physical or psychological complications; and

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130. REARDON, *supra* note 115, at 11; *cf.* Mathewes-Green, *supra* note 124 ("That's my 'new rhetorical strategy,' and it was based on my own attempts to analyze the present problem and figure a way around it. Others devised parallel approaches, and addressed different segments of society. (I was mostly speaking on college campuses and in secular media, which is why I never brought in God-talk; for these audiences, it was immediate grounds for mental dismissal.)").

131. Crisis pregnancy centers are volunteer organizations that discourage women from having abortions and provide emotional and material support during pregnancy and counseling to abortion "survivors." Most CPCs are religiously based, and since the mid-1980s have institutionalized post-abortion syndrome at the antiabortion movement's grassroots by using it as a diagnostic instrument. Shawna Reeves Nourzaie, *The Development of Post-Abortion Syndrome Within the Crisis Pregnancy Movement in America: A Historical-Theoretical Study* 49-57 (2003) (unpublished M.S.W. Thesis, Smith College School for Social Work) (on file with author); *see also* Alexi A. Wright & Ingrid T. Katz, *Roe Versus Reality—Abortion and Women's Health*, 355 *NEW ENG. J. MED.* 1, 3 (2006) (describing religious antiabortion centers counseling pregnant women on postabortion syndrome theory).

CPCs are now receiving increasing amounts of federal funding for counseling pregnant women, as well as those who have already had abortions, about the dangers abortion poses to women and the unborn. According to a recent report in the *Washington Post*, CPCs and local antiabortion centers have received over \$60 million in grants for abstinence education and other programs since 2001. State governments also provide funding to CPCs. Thomas B. Edsall, *Grants Flow to Bush Allies on Social Issues*, *WASH. POST*, Mar. 22, 2006, at A4. A recent report by Representative Henry Waxman critically analyzes the CPCs' federal funding sources and methods of operation. *See* WAXMAN REPORT, *supra* note 100.

132. Jeanne Cummings, *Targeting Roe: In Abortion Fight, Little-Known Group Has Guiding Hand*, *WALL STREET J.*, Nov. 30, 2005, at A1.



- 4) Expanding the rights of injured patients to recover fair compensation for physical or psychological harm resulting from abortion.<sup>133</sup>

### 3. *The Spread of the Gender-Based Antiabortion Argument*

The antiabortion movement has adopted the strategy for woman-protective, choice-based, incrementalist restrictions on abortion that Reardon and others have advocated—a strategy that began before *Casey* and accelerated afterwards as the constitutional framework and political structure of the abortion debate evolved.<sup>134</sup> In 2003, Clarke Forsythe, head of Americans United for Life—which coordinates the national legislative strategy designed to chip away at *Roe*—reviewed the movement’s successes and failures, focusing on the movement’s need to counter the “myth” of abortion as a necessary evil. The key, Forsythe concluded, is “to raise public consciousness of the negative impact of abortion on women. If it can be shown that abortion harms women as well as the unborn, it will not be seen as necessary.”<sup>135</sup> To this end, in the last decade, the antiabortion movement has successfully enacted “right-to-know” laws in a majority of states that regulate abortion on the informed consent model; some states now specifically require providers to give women information about “postabortion” symptoms that are scientifically disputed.<sup>136</sup> In 2005, South Dakota enacted the most far-reaching of these

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133. REARDON, *supra* note 115, at 33; see also Editorial, *Costly Gestures*, NAT’L REV. ONLINE, Mar. 8, 2006, <http://www.nationalreview.com/editorial/editors200603080804.asp> (observing that “[p]ro-lifers have gained ground over the last decade and a half by pursuing a savvy incremental strategy”). On incrementalist strategies within the national antiabortion movement, see Robin Toner, *Step by Step: Abortion’s Opponents Claim the Middle Ground*, N.Y. TIMES, Apr. 25, 2004, § 4, at 1 (interviewing advocates on both sides of the debate).

134. Lawyers interested in incrementalist methods of chipping away at *Roe* embraced informed consent as one such strategy for state legislation and mobilization, and began to focus on it in the years after *Casey*. See Cummings, *supra* note 132. For contemporary sources, see AMERICANS UNITED FOR LIFE, *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* (1987); Gregory Wilmoth, *Abortion, Public Health Policy, and Informed Consent Legislation*, 48 J. SOC. ISSUES 1 (1992). Vincent Rue testified about postabortion syndrome in defense of the Pennsylvania informed consent statute at issue in *Casey*, but the district court, citing the Koop investigation, found his testimony “not credible.” *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990). Over time, and with the advocacy of Reardon and others, this legal strategy was developed as a basis of the woman-protective antiabortion argument.

135. Clark D. Forsythe, *An Unnecessary Evil*, FIRST THINGS, Feb. 2003, [http://www.firstthings.com/article.php3?id\\_article=437](http://www.firstthings.com/article.php3?id_article=437).

136. Nevada cites the “physical and emotional implications of having [an] abortion,” NEV. REV. STAT. § 442.253 (2007); and Michigan’s Department of Community Health warns that, “[w]hile rare, some women may experience depression, feelings of guilt, anger, sleep disturbance, or loss of interest in work or sex, as a result of an abortion.” Mich. Dep’t of Cmty. Health, Medication-Induced Abortion, [http://www.michigan.gov/mdch/0,1607,7-132-2940\\_4909\\_6437\\_19077-46297--,00.html](http://www.michigan.gov/mdch/0,1607,7-132-2940_4909_6437_19077-46297--,00.html) (last visited Mar. 19, 2007). See generally Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, GUTTMACHER POL’Y REV., Fall 2006, at 6, 8 (“[M]edically inaccurate claims of a link between induced abortion and breast cancer can be found in the required abortion counseling materials in five of the six states that have developed such materials . . . . In two of these states, the health department was expressly directed by the legisla-

informed consent statutes—a statute that requires abortion providers to tell patients about characteristics of the unborn and the risks of the abortion procedure to women and then to warrant that they believe their patients understand these facts under sanction of the criminal law.<sup>137</sup> Advocating for such laws provides the antiabortion movement an opportunity to assert that abortions are the product of misinformation and coercion, and to advance the argument that abortions hurt women as well as the unborn. The claim is also advanced by lawyers who bring tort suits against abortion providers based on various tenets of postabortion syndrome<sup>138</sup> (e.g., complaining of a provider's failure to warn patients of

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ture to include information on the abortion-breast cancer relationship . . ."). For discussion of the stereotypes about women these laws may reflect, see *infra* Part III.A.

137. South Dakota law provides, in addition to common law requirements of informed consent, an abortion decision is not informed and voluntary unless the physician certifies that the pregnant woman has read *and the physician believes the patient understands* a written statement explaining

- (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
- (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
- (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;
- (e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:
  - (i) Depression and related psychological distress;
  - (ii) Increased risk of suicide ideation and suicide.

S.D. CODIFIED LAWS § 34-23A-10.1(1) (2007). If the pregnant woman asks for an explanation of any of these statements, the physician's explanation must be in writing and must be made part of the permanent medical record of the patient. *Id.* The physician's failure to comply is punishable as a misdemeanor. Enforcement of this statute was preliminarily enjoined first in *Planned Parenthood Minnesota v. Rounds*, 375 F. Supp. 2d 881 (D.S.D. 2005), and again in *Planned Parenthood Minnesota v. Rounds*, No. Civ. 05-4077-KES, 2006 U.S. Dist. LEXIS 72778, at \*20 (D.S.D. Oct. 4, 2006). The district court's grant of an injunction was affirmed by a panel of the Eighth Circuit, *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716 (8th Cir. 2006), but the panel's opinion was vacated by the Eighth Circuit en banc on January 9, 2007. See *Planned Parenthood Minn. v. Alpha Ctr.*, No. 06-3142, 2007 U.S. App. LEXIS 1775, at \*3 (8th Cir. Jan. 25, 2007) (recounting most recent procedural history). For the legislative history of the statute, enacted in 2005 at the same time as the Task Force was created, see South Dakota Legislature, House Bill 1166, <http://legis.state.sd.us/sessions/2005/1166.htm> (last visited Mar. 21, 2007) (providing audio files of the Legislature's hearings).

138. This litigation began in the 1990s. See Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 494–95. Professor Northern noted that:

There are increasing indications that abortion malpractice litigation is on the rise. At least some of that litigation, moreover, may stem from pro-life advocates attempting to dissuade doctors from performing abortions. A 1995 article appearing in *Medical Economics* reports that there has been a significant increase in the number of medical malpractice actions filed alleging that the plaintiff was injured as a result of a negligently performed abortion procedure or the failure to provide informed consent to the procedure. In 1995, there were initial reports of "the newest anti-abortion strategy—malpractice suits against the doctors who perform abortions." One nonprofit group reported to have followed this strategy is Life Dynamics Inc., founded in 1992 by Mark Crutcher. The group reportedly engaged in legal research for expanding the kinds of cases brought against doctors who do abortions, solicited plaintiffs, and offered expert witnesses on controversial issues such as postabortion trauma and the causal nexus between a higher risk of breast cancer and abortion. In short, Life Dynamics offered to provide a panoply of services to attorneys representing clients who allege abortion malpractice. Life Dynamics, moreover, apparently acknowledged that one of its purposes was to limit the availability of abortions. A 1992 antiabortion manual the group distributed urged support for abortion malpractice law-

the breast cancer link or to advise them that the embryo/fetus is a “unique human being”). Perhaps the most active lawyer advocating woman-protective antiabortion arguments is Harold Cassidy, the chief counsel from the Baby M surrogacy case,<sup>139</sup> who has been representing CPCs as intervenors in litigation over South Dakota’s most recent right-to-know statute.<sup>140</sup>

Lawyers have used postabortion syndrome arguments in other abortion litigation, including efforts to reopen *Roe v. Wade* and *Doe v. Bolton*,<sup>141</sup> as well as in amicus briefs in Supreme Court cases, such as the Partial Birth Abortion Ban Act case that the Court is deciding this term.<sup>142</sup> For example, Phyllis Schlafly’s Eagle Forum amicus brief applies

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suits “to protect women, but also to force abortionists out of business by driving up their insurance rates.”

*Id.* (footnotes omitted); see also Siegel, *supra* note 5 (discussing elaboration of the strategy of shutting down the provision of abortion services through malpractice litigation as it was first elaborated in the 1980s).

For a student comment discussing a class action tort claim on the model of the antismoking suit, see Justin D. Heminger, Comment, *Big Abortion: What the Antiabortion Movement Can Learn from Big Tobacco*, 54 CATH. U. L. REV. 1273 (2005).

139. In a recent New Jersey case, Cassidy represented a woman who brought action against her physician, asserting claims of medical malpractice, negligent infliction of emotional distress, lack of informed consent, and wrongful death. The court remanded the case, holding that a genuine issue of material fact existed (“i.e., what medical information is material and must be disclosed by an obstetrician when advising a patient to terminate a pregnancy and what medical information is material when the patient asks if the ‘baby’ is already ‘there?’”). *Acuna v. Turkish*, 894 A.2d 1208, 1214 (N.J. Super. Ct. 2006). Cassidy also recently filed a class action complaint against Planned Parenthood/Chicago Area for wrongful death and negligent infliction of emotional distress, alleging that the defendants failed “to make proper disclosures of material facts” and made “false statements of fact to plaintiff and others similarly situated.” Complaint at 2, *Mary Doe v. Planned Parenthood* (Ill. Cir. Ct. Dec. 7, 2006) (unpublished complaint on file with author).

For an account of Cassidy’s advocacy efforts, see Kathleen Cassidy, *Post-Abortive Women Attack Roe v. Wade*, AT THE CENTER, Winter 2001, <http://www.atcmag.com/v2n1/article6.asp>; Jeffrey Gold, *NJ Court Allows Jury to Consider if Doc Mised Woman on Abortion*, Apr. 7, 2006, PHILLYBURBS.COM, <http://www.phillyburbs.com/pb-dyn/news/104-04072006-638234.html> (discussing New Jersey tort suit in which Cassidy is lawyer).

140. *Planned Parenthood of Minn. v. Rounds*, No. Civ.05-4077 KES, 2005 WL 2338863 (D.S.D. Sept. 23, 2005) (order granting motion to intervene); see *supra* note 137.

141. Norma McCorvey, the *Roe v. Wade* who has now become an antiabortion advocate, filed a suit in Texas, later appealed to the Fifth Circuit, arguing that the factual grounds upon which the Supreme Court based its ruling have been shown to be wrong, and therefore the judgment should be reviewed under Rule 60(b) of the Federal Rules of Civil Procedure. Her suit was denied, but Judge Edith Jones filed a concurrence to her own opinion for the court essentially saying she agreed with the over one thousand affidavits from women who claimed their abortions “had a negative effect upon their lives.” *McCorvey v. Hill*, No. Civ.A. 303CV1340N, 2003 WL 21448388 (N.D. Tex. June 19, 2003), *aff’d*, 385 F.3d 846 (5th Cir. 2004); see also Jason A. Adkins, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500 (2005) (analyzing *McCorvey*). On efforts to reopen the companion case in *Roe*, see *infra* note 142.

142. *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006). One amicus brief provides the *Carhart* Court extensive postabortion syndrome testimonials of the kind that South Dakota considered. Brief of Sandra Cano, the former “Mary Doe” of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner, *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006) (No. 05-380), 2006 WL 1436684. One hundred eighty “post-abortive” women joined Sandra Cano’s brief, which offers ninety-six pages of excerpts from affidavits testifying to “their real life experiences” of how “abortion in practice hurts women’s health.” *Id.* at 2. The brief informs the Court that the affidavits provided were merely a sampling from “approximately 2,000 on file with The Justice Foundation.” *Id.* app. B; see also *id.* at 9, 12–13 (comparing abortion to silicone breast implants, maintaining that women should

the postabortion syndrome argument to *Gonzales v. Carhart*: “There should be no judicially imposed health exception to a procedure that is, in fact, so harmful to health. Imagine the absurdity of a judicially imposed health exception to a ban on smoking.”<sup>143</sup>

The woman-protective antiabortion arguments supporting South Dakota’s ban are thus the work of the national movement over the last several decades. The state likewise relied on the national movement for the *evidence* the state cited in support of its claims. The approximately 2000 abortion testimonies cited in the *South Dakota Task Force Report* were supplied by Operation Outcry,<sup>144</sup> a division of the Justice Foundation.<sup>145</sup> Operation Outcry testimonies have since been entered as evi-

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not be afforded the opportunity to choose such a “dangerous and risky procedure” and likening the psychological state of women postabortion to the mental harm suffered by child pornography survivors).

Other amici briefs in *Carhart* argue that abortions harm women. See Brief Amici Curiae of the United States Conference of Catholic Bishops & Other Religious Organizations in Support of Petitioner at 17, *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006) (No. 05-380), 2006 WL 1436693 (stating that the finding in *Roe* that “abortion is safer than childbirth has come under serious challenge” (citation omitted)); Brief of Gianna Jessen, Zachary Klopfenstein (by and through his Parents, Terry and Jill Klopfenstein), & the Center for Moral Clarity as Amici Curiae in Support of Petitioner at 16–20, *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006) (No. 05-380), 2006 WL 1436685 (detailing the so-called partial birth abortion procedure in order to document its potential to create psychological trauma); Brief of John M. Thorp, Jr., M.D. & Materncare International as Amici Curiae in Support of Petitioner at 17, *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006) (No. 05-380), 2006 WL 1436682 (arguing that abortion is “affirmatively dangerous enough that a legislative body is within its constitutional authority to entirely prohibit the matter as a danger to public health”).

143. Brief of Amici Curiae Eagle Forum Education & Legal Defense Fund in Support of Petitioner at 21, *Gonzales v. Carhart*, 126 S. Ct. 1607 (2006) (No. 05-380), 2006 WL 1436691. An entire section of the Eagle Forum brief is entitled “Performed Under the Guise of ‘Health’, Abortions Have a Very Unhealthy Effect,” *id.* at 17–21, and asserts that

“[h]igher death rates associated with abortion persist over time and across socioeconomic boundaries.” Women who have a family history of breast cancer or other illnesses may be giving themselves the medical equivalent of a death sentence by submitting to an abortion. Even abortion advocates must concede that childbirth has a protective health effect lost to women who undergo abortion.

*Id.* at 18 (citations omitted).

The American Center for Law and Justice (ACLJ) also compares abortion to smoking. In an amicus brief filed in *Gonzales v. Planned Parenthood*, a second challenge to the Partial Birth Abortion Ban granted certiorari to the Supreme Court, the ACLJ argues that “[a] fair comparison of abortion with continued childbearing, like a fair comparison of smoking with nonsmoking, would have to take into account not just immediate consequences, but also all other statistically significant increased death risks.” Amicus Brief of the American Center for Law & Justice in Support of Petitioner at 7, *Gonzales v. Planned Parenthood Fed’n of Am.*, 126 S. Ct. 2901 (2006) (No. 05-1382), 2006 WL 2317063. The ACLJ was founded by Pat Robertson, and is currently led by Chief Counsel Jay Sekulow. Marc Fisher, *Unlikely Crusaders: Jay Sekulow, “Messianic Jew” of the Christian Right*, WASH. POST, Oct. 21, 1997, at D1; American Center for Law & Justice, *supra* note 66.

144. “OPERATION OUTCRY is the project of THE JUSTICE FOUNDATION to end legal abortion by exposing the truth about its devastating impact on women and families.” Operation Outcry, <http://www.operationoutcry.org/pages.asp?pageid=27784> (last visited Mar. 22, 2007). The Justice Foundation provides pro bono help to litigate a variety of conservative issues, including “enforcing laws to protect women’s health.” The Justice Foundation, <http://www.thejusticefoundation.org> (last visited Mar. 22, 2007).

145. SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, MINUTES OF THIRD MEETING 3 (Oct. 20–21, 2005), available at <http://legis.state.sd.us/interim/2005/minutes/MABO1020.pdf> (reporting that Linda Schlueter, Vice President and Senior Staff Attorney, The Justice Foundation, San Antonio, Texas, distributed written copies of her testimony and entered into the record affidavits of approxi-

dence in other state legislatures including Ohio<sup>146</sup> and Mississippi,<sup>147</sup> as well as in the federal Partial Birth Abortion Ban Act case.<sup>148</sup> The South Dakota Task Force cited to a significant number of empirical studies that were authored by David Reardon and his collaborators<sup>149</sup> to demonstrate the psychological and physical injuries that abortion inflicts on women. Both Reardon and Cassidy have been involved in enacting and defending informed consent legislation in South Dakota.<sup>150</sup> (Reardon spoke at a

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mately 1500 women who have had negative experiences with their abortions). For testimony, see Operation Outcry, Linda Schlueter's Testimony to S. Dakota Task Force, Oct. 20, 2005, <http://www.operationoutcry.org/pages.asp?pageid=29830> (citing David Reardon as authority).

146. See Center for Bio-Ethical Reform, Ohio Abortion Ban Gets Hearing, <http://www.cbrinfo.org/CBRMidwest/0706.html> (last visited Mar. 22, 2007); Marley Greiner, *God's Politics at the Statehouse: Ohio Abortion Hearing Goes to Sunday School*, COLUMBUS FREE PRESS, July 2, 2006, <http://www.freepress.org/departments/display/18/2006/2070>.

147. "Because of the scientific evidence we now have, because of testimony upon testimony of women about how abortion hurt them, because we now know it is not good for women and it really isn't a choice, abortion should no longer be legal." Operation Outcry, Prepared Testimony of Lisa Dudley Before the Legislature of Mississippi (Mar. 23, 2006), <http://www.operationoutcry.org/pages.asp?pageid=37528>; Operation Outcry, Prepared Testimony of Tracy Reynolds Before the Legislature of Mississippi (Mar. 23, 2006), <http://www.operationoutcry.org/pages.asp?pageid=37529>.

148. See *supra* note 142.

149. In the section on psychological harm, Reardon authored or coauthored five of the approximately twenty-five studies cited; his collaborator Priscilla Coleman authored twelve. See TASK FORCE REPORT, *supra* note 75, at 43–45. In the section on physical harm, Reardon authored one of the four studies cited. The other three were authored by Gissler. *Id.* at 50.

The Task Force received written testimony from Reardon as well. SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, MINUTES OF SECOND MEETING 4 (Sept. 21–22, 2005), available at <http://legis.state.sd.us/interim/2005/minutes/MABO0921.pdf> (reporting written testimony from Dr. David C. Reardon, of the Elliot Institute, on "psychological matters related to abortion and the affects [sic] on the mother").

150. As an "associate counsel" of the Thomas More Law Center, Harold Cassidy played a role in the near-successful effort to enact an abortion ban in South Dakota in 2004. For some accounts of his efforts, see Joe Kafka, *Abortion Bill Sent to House Floor*, ABERDEEN NEWS (Aberdeen, S.D.), Feb. 6, 2004, available at [http://www.lifeissues.net/writers/irvi/irvi\\_26southdakotaabbrbill.html](http://www.lifeissues.net/writers/irvi/irvi_26southdakotaabbrbill.html); John Brannian, Letter to Editor, *Futile Legislation*, ARGUS LEADER (Sioux Falls, S.D.), Feb. 23, 2004, at 5B; *South Dakota House Passes Bill Criminalizing Abortions; Challenge to Roe v. Wade*, Feb. 11, 2004, [http://www.thomasmore.org/show\\_news.html?NewsID=172](http://www.thomasmore.org/show_news.html?NewsID=172). In 2005, Cassidy testified for the bills that amended the state's informed consent law and created the Task Force. See South Dakota Legislature, Senate State Affairs Minutes (Feb. 23, 2005), <http://legis.state.sd.us/sessions/2005/cmminute/minSST02230745.htm>. He then represented a CPC that intervened in litigation concerning the state's informed consent statute. *Planned Parenthood of Minn. v. Rounds*, No. Civ. 05-4077 KES, 2005 WL 2338863 (D.S.D. Sept. 23, 2005); see *supra* note 137 (describing law and litigation).

Reardon's proposed informed consent statute would have increased the standard of care for abortion providers and required them to treat patients in accordance with postabortion syndrome risk factors; it was enforceable through a private right of action. The bill was introduced in the legislature on January 24, the day that 1215, the bill to ban abortions, was introduced by the same legislator, Roger Hunt, but 1216 was tabled in favor of the ban statute. See SOUTH DAKOTA BILL HISTORY REPORT 73 (2006), available at <http://legis.state.sd.us/sessions/2006/billstatus.pdf> (reporting history of House Bill 1216, "An Act to define the applicable standard of care in regard to screening of risk factors for all abortions except in the case of a medical emergency, to provide civil remedies, and to exempt medical emergencies from the requirements of this Act"). Reardon was one of several witnesses testifying on behalf of House Bill 1216. See South Dakota Legislature, House Judiciary Minutes (Feb. 6, 2006), <http://legis.state.sd.us/sessions/2006/cmminute/minHJU02060715.htm>; Audio file: Testimony of David C. Reardon before S.D. Judiciary Committee on H.B. 1216 (Feb. 6, 2006), available at <http://legis.state.sd.us/sessions/2006/1216.htm> (follow audio hyperlink associated with "Judiciary Do Pass Failed") (audio broadcast with Reardon testifying at approximately twenty-three minutes that thirty to sixty percent of women who have abortions report that they are pressured to do so, and suggesting that "when

public event with South Dakota legislators held on *Roe*'s anniversary two days before an informed consent bill and the bill banning abortion were introduced into the legislature.)<sup>151</sup> An antiabortion Web site is now posting documents attributed to David Reardon that propose revisions to South Dakota's ban statute and other model legislation designed to appeal to Justice Kennedy.<sup>152</sup>

Just as the national movement contributed the core arguments and evidence of the *South Dakota Task Force Report*, the *Report* is now shaping legislative developments in other states. Months after the ban's enactment, a witness presented the *South Dakota Report* in a hearing of the Louisiana state legislature, and directly quoted, without attribution, significant passages of the *Report* in her own testimony.<sup>153</sup> After hearing postabortion syndrome testimony, the Louisiana legislature enacted a

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a woman violates her maternal desires, her moral beliefs and has an abortion," she will be at high risk for psychological injury).

151. See *Press Conference to Discuss Legislation and New Polling Data on Abortion and Sex Education in South Dakota*, U.S. NEWSWIRE, Jan. 20, 2006 (announcing a special question and answer session featuring "Dr. David Reardon, nationally recognized researcher, South Dakota Legislators, and Parents" at Holiday Inn, with a sponsoring contact at the National Abstinence Clearinghouse, to be held on *Roe*'s anniversary two days before introduction of the bill banning abortion). Additionally, Reardon testified in support of the South Dakota right-to-know statute. See *supra* note 150.

152. An antiabortion blog has posted model legislation and possible amendments to the South Dakota ban designed to make it more palatable to Justice Kennedy. The proposals are attributed to David Reardon and the Elliot Institute:

In light of the possibility that a number of states may follow the lead of South Dakota and Louisiana by enacting heightened abortion restrictions, up to and including some form of comprehensive prohibition or ban, the Elliott Institute has developed a number of possible variations to the South Dakota statute, as well as a separate model "Women's Health Protection Act" (with a related "Talking Points" Introduction) which sets forth screening requirements for certain risk factors before an abortion may be performed, enforceable through civil remedies.

David Reardon, Director of the Institute, asked that we make these materials available in order to encourage consideration of alternative approaches, with the hope that presenting alternative issues for the Supreme Court's consideration would increase the possibility [sic] of a favorable result.

The entry is posted by Carl Lundblad on June 11, 2006, on behalf of "The Law of Life Project [which] is a legal and legislative advocacy and public education project of the Christian Legal Society's Center for Law and Religious Freedom that desires to advance a culture of life from conception to natural death." Law of Life Project, [http://www.lawoflifeproject.com/blog/2006/06/alternative\\_proposals\\_for\\_stat.html](http://www.lawoflifeproject.com/blog/2006/06/alternative_proposals_for_stat.html) (June 11, 2006, 10:18 PM).

153. A document identified as Dr. McKissic Bush's testimony to the Louisiana state legislature recounts:

In my medical clinical experience, shared by the clinical experience with many other physicians with whom I have consulted, it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without substantial risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural and health [sic] capability of a woman whose natural instincts are to protect and nurture her child. *Prepared Testimony of Dr. Freda McKissic Bush, M.D.: Hearing on S.B. 33 Before the H. Admin. of Criminal Justice Comm.*, 2006 Leg., Reg. Sess. 6-7 (La. 2006), available at <http://www.lawoflifeproject.com/blog/Documents/Prepared%20Testimony%20of%20Freda%20McKissic%20Bush%2C%20MD.pdf>. Compare the quoted testimony to this passage from the *Task Force Report*:

The Task Force finds that it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.

TASK FORCE REPORT, *supra* note 75, at 47-48. There are many other similar passages and turns of phrase in the two documents.

“trigger ban,” set to go into effect if *Roe* is overruled.<sup>154</sup> Legislators in other states have cited South Dakota as a model, with Alabama State Senator Hank Erwin, who sponsored a bill criminalizing abortion remarking, “I thought if South Dakota can do it, Alabama ought to do it.”<sup>155</sup>

### III. SOUTH DAKOTA’S ABORTION BAN IS BASED ON UNCONSTITUTIONAL GENDER STEREOTYPES

In the years since *Roe*, abortion regulation has been constitutionally analyzed as if its sole purpose were to protect potential life and it scarcely concerned women at all. I have elsewhere argued that this framework is fundamentally mistaken; all efforts to restrict abortion aim to regulate women as well as the unborn.<sup>156</sup> The deficiencies of the prevailing approach are glaringly obvious once the state argues that it is regulating abortion for the purpose of protecting women.

Why is it constitutionally significant that the state seeks to regulate abortion in order to protect women as well as the unborn? Why would providing an *additional* justification for an abortion ban weaken its claim to constitutionality?

As we have seen, David Reardon and others first proposed woman-protective justifications for banning abortion in the 1980s and 1990s when the movement encountered difficulties in persuading governing majorities of voters to support legal restrictions on abortion using familiar fetal-focused arguments. Abortion bans based on fetal-focused arguments implicitly or explicitly value women’s freedom and well-being in ways that made many voters uneasy. However clearly these swing voters understood the case for protecting the unborn, they also understood the many reasons a pregnant woman might resist becoming a mother and

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154. Dorinda C. Bordlee & Nikolas T. Nikas, *Eroding Roe: Get on the PRA Bandwagon*, NAT’L REV. ONLINE, June 19, 2006, <http://article.nationalreview.com/?q=ZDM3OGUzNTE5OWU5N2Q4NTJlYzgwYzE4OTdhYmJkZmI=&c=1>. The *National Review* reported that:

Led by women with the courage to share their stories of profound grief and medical trauma that they suffered after they chose the “choice,” Louisiana has passed legislation to outlaw the human-rights violation known as abortion on demand. . . .

The tears in the eyes of the I-thought-I’d-seen-it-all legislators best told the story. In the house and senate committee hearings, woman after woman shared their experience of how abortion had led them into a downward spiral of medical and psychological distress that had even impacted their ability to bond with their future children. The faces of the committee members hearing the post-abortion testimony revealed profound empathy and pain that was likely, in many cases, related to how abortion had negatively impacted their own lives.

. . . .

The bottom line is that PRA legislation is both prudent and proactive. It is pro-woman and pro-life.

*Id.*

155. Rich Ehsen, *States Lining Up to Copy South Dakota Ban*, ST. NET CAPITOL J., Mar. 13, 2006, [http://www.statenet.com/capitol\\_journal/03-13-2006](http://www.statenet.com/capitol_journal/03-13-2006); Gudrun Schultz, *Alabama Legislators Push for Law to Ban Abortion*, LIFESITENEWS.COM, Mar. 27, 2006, <http://www.lifesite.net/ldn/2006/mar/06032704.html>.

156. See Siegel, *supra* note 29.

were unwilling for the state to impose motherhood in these circumstances. David Reardon described these voters as “the middle majority—the ‘fence sitting’ fifty percent or more who feel torn between both the woman and the child.”<sup>157</sup> Frederica Mathewes-Green of Feminists for Life suggests that within the antiabortion movement these voters were commonly referred to as the “mushy middle.”<sup>158</sup>

Woman-protective antiabortion argument seeks to allay voter anxieties about coercing women with assurances that in prohibiting abortion the state is in fact protecting women against misrepresentation, coercion, and harm in the abortion decision. But if these additional justifications for prohibiting abortion in fact work to reassure voters, they do so because they offer the public reasons for regulating women’s decisions about motherhood. No longer is the invitation to intervene in women’s decisions about whether to become a mother implicit, an incident of an effort to protect the unborn. Gender-based justifications for restricting abortion make oversight of women’s decision making about motherhood an express purpose of abortion regulation, offering benign, paternalist justifications for controlling women’s decisions. One branch of these gender-based justifications for regulating abortion is process oriented and is expressed in the language of informed consent (i.e., abortion is not a genuine choice), and the other is outcome oriented and is expressed in the language of public health (i.e., abortion is a bad choice). As the legislative history of the South Dakota ban illustrates, these justifications are often based, implicitly or explicitly, on stereotypical reasoning about women’s agency and women’s roles.

The remainder of this Part analyzes these justifications more closely, demonstrating that gender stereotyping supplies much of their persuasive force. Arguments for restricting abortion that persuade by appeal to gender stereotypes are politically effective because they allay public concerns about coercing women, but are unconstitutional for precisely this reason.

#### A. *Stereotypes About Women’s Capacity*

*The Report of the South Dakota Task Force to Study Abortion* seeks the elimination of abortion by the most effective means in the current le-

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157. See Reardon, *supra* note 116, at 32.

158. See Mathewes-Green, *supra* note 124. Frederica Mathewes-Green, longtime member of Feminists for Life, recalled that:

Pro-life leaders noticed that the primary message of the previous couple of decades, our insistence on the unborn child’s full humanity and right to life, was no longer gaining ground. We had honed this message and it was ubiquitous and consistent, and we personally found it unassailable. Yet we were increasingly encountering people capable of dismissing it. Perhaps all the people susceptible to it had already been reached and converted. For the remainder, whom we termed “the mushy middle,” it was falling on deaf ears.

*Id.*



gal and political climate.<sup>159</sup> The *Report* offers seventy-one pages of findings in support of an abortion ban or additional informed consent regulation.<sup>160</sup> As we have seen, these findings draw on the arguments and evidence of the national antiabortion movement, which has employed the language of informed consent in the last several decades to justify incremental restrictions on abortion not only to defend constitutionally permissible forms of regulation, but also to generate political support for such regulation by use of the politically potent discourse of “choice” long used by supporters of the abortion right.<sup>161</sup>

The *South Dakota Task Force Report* expresses its opposition to abortion in this incrementalist, informed consent paradigm. For this reason, the *Task Force Report* appears to address women as self-governing agents who are capable of making their own decisions about whether to continue a pregnancy. But the *Report* does not in fact view women in this way, nor does it encourage the public to do so. I first show the specialized usage of informed consent discourse in the antiabortion argument of the *Task Force Report*, and then demonstrate how it persuades by appealing to gender stereotypes.

Though it asserts that it is interested in protecting women’s freedom to make decisions about abortions, the Task Force is in fact more interested in preventing women from having abortions.<sup>162</sup> The *Task Force Report* expresses its moral judgments about abortion in the language of informed consent, describing decisions against abortion as “informed” and depicting decisions to have abortion as mistaken or coerced. When the *Report* advocates laws that encourage more “informed” abortion decisions, it is calling for laws that limit abortion:

*We find it untenable that the law allows a mother to be implicated in the termination of the life of her own child. Since the abortion providers repress information necessary for a full disclosure of this circumstance, there is a clear need for additional protections of the mother, not just to assist in helping make that decision better informed, but to prevent her short- and long-term suffering.*<sup>163</sup>

The *Report* repeatedly expresses concern about protecting women from misinformation and pressure that might lead them to abort a pregnancy, while expressing no concern about protecting women from misinformation and pressure that might lead them to continue a pregnancy.

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159. The *Report* acknowledges the difficulties of enforcing a ban so long as *Roe* is law, and observes that “while we recommend, and even urge, a legal ban on abortion, we nonetheless propose the following additional legislation in an effort to lessen the loss of life and harm caused by abortion until such a ban can be implemented.” TASK FORCE REPORT, *supra* note 75, at 69. The *Report* then proposes various forms of informed consent regulation, concluding its list by proposing “[a]ny other legislation that has as its goal to decrease the number of abortions in our State.” *Id.* at 69–71.

160. See generally *id.*

161. See *supra* text accompanying notes 130–40.

162. Cf. *supra* note 159 (discussing the Task Force’s support for a ban and its recommendation that the legislature adopt any legislation that would decrease the number of abortions in the state).

163. TASK FORCE REPORT, *supra* note 75, at 65–66 (emphasis added).

The *Report* is not interested in supporting women's decisions to postpone or avoid motherhood, and it does not acknowledge the possibility that a "normal" woman could make a free and informed decision to end a pregnancy. Instead the *Report* presents abortion as a bad decision, but in terms that systemically exonerate women of responsibility for deciding to have abortions. The plausibility of the *Report's* claims about capacity, coercion, and responsibility depends on stereotypes about woman as decision makers.

To attack abortion without criticizing women and to allay public concern about abortion regulation that coerces women, the Task Force repeatedly discounts women's agency in abortion. The *Report* suggests that women lack the judgment and independence necessary to make a responsible decision about abortion, and hence need protection:

The testimony of the nearly two thousand women who had abortions is replete with references to how they were left to fend for themselves and allowed to make decisions based upon false assumptions of biological fact. The abortion providers wanted the women to make decisions about those biological facts themselves even though they had no expertise.<sup>164</sup>

The *Report* far more commonly speaks of women "submitting to abortion" than "choosing" to have an abortion. "It appears that at Planned Parenthood, where women are not informed of information about the child, virtually every woman *submits* to an abortion."<sup>165</sup> "The only time the abortion doctor sees the patient is in the room where the procedure is to be performed, after the woman has already *committed to submitting* to the abortion by signing the consent form."<sup>166</sup> "In the overwhelming majority of cases, the decision to *submit* to an abortion is uninformed. Further, there are many pressures and coercive forces and elements, including some that are hidden and inherent in the nature of the procedure, that render most abortions not truly voluntary."<sup>167</sup>

The picture of women as decision makers in the *Report* resembles the picture of women as decision makers in the legislative findings that support the right-to-know law South Dakota enacted at the same time the Task Force was created, which emphasize that "a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures."<sup>168</sup> This portrait of the pregnant woman bears a certain re-

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164. *Id.* at 39.

165. *Id.* at 20 (emphasis added).

166. *Id.* at 18 (emphasis added).

167. *Id.* at 37 (emphasis added).

168. H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005) (cited in S.D. CODIFIED LAWS § 34-23A-1.4 (2006)).

The Legislature finds that procedures terminating the life of an unborn child impose risks to the life and health of the pregnant woman. The Legislature further finds that a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional

semblance to the woman hysteric who figures prominently in nineteenth-century antiabortion tracts.<sup>169</sup> Some individual men and women may make decisions in an agitated mental state, and targeted support and safeguards for them may be needed, but to regulate on the presupposition that agents are generally in this condition is to presume decision makers incapable of acting *sui juris*, hence requiring paternalistic oversight.

Just as the Legislature reasoned that pregnant women are generally confused, emotional, dependent, and unable to act in a principled fashion, so, too, did the Task Force. It presented the testimonies submitted by Operation Outcry as a fair representation of how women make decisions about abortion:

We received and reviewed the testimony of more than 1,940 women who have had abortions. . . . Women were not told the truth about abortion, were misled into thinking that nothing but “tissue” was being removed, and relate that they would not have had an abortion if they were told the truth. They relate that they were coerced into having the abortion by the father of the child or a parent, and that the abortion clinics also apply pressure to have the abortion. They almost uniformly express anger toward the abortion providers, their

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crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures. The Legislature therefore finds that great care should be taken to provide a woman seeking to terminate the life of her unborn child and her own constitutionally protected interest in her relationship with her child with complete and accurate information and adequate time to understand and consider that information in order to make a fully informed and voluntary consent to the termination of either or both.

*Id.*

169. A popular antiabortion tract authored by the leader of the nineteenth-century criminalization campaign derided women’s capacity to make decisions about abortion, suggesting that pregnant women were especially prone to hysteria:

If each woman were allowed to judge for herself in this matter, her decision upon the abstract question would be too sure to be warped by personal considerations, and those of the moment. Woman’s mind is prone to depression, and, indeed, to temporary actual derangement, under the stimulus of uterine excitation, and this alike at the time of puberty and the final cessation of the menses, at the monthly period and at conception, during pregnancy, at labor, and during lactation . . . .

Is there then no alternative but for women, when married and prone to conception, to occasionally bear children? This, as we have seen, is the end for which they are physiologically constituted and for which they are destined by nature. . . . [The prevention and termination of pregnancy] are alike disastrous to a woman’s mental, moral, and physical well-being.

STORER, *supra* note 31, at 74–76; cf. E. P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867) (citing “the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements,” i.e., “hysteria,” and “the liability of the female, in all her diseases, to intercurrent derangements of these functions” as factors that “might justly lead us to expect that violence against the physiological laws of gestation and parturition would entail upon the subject of such an unnatural procedure a severe and grievous penalty”). See generally Siegel, *supra* note 29, at 311 n.199 (surveying physiological arguments in nineteenth-century antiabortion literature and observing that “physiological arguments were used to attack the concept of voluntary motherhood in two ways. In addition to arguing that women’s capacity to bear children rendered them incapable of making responsible choices in matters concerning reproduction, Storer (and others) claimed that women would injure their health if they practiced abortion or contraception or otherwise willfully resisted assuming the role of motherhood.”).

baby's father, or society in general, which promote abortion as a great right, the exercise of which is good for women. They almost invariably state that they were encouraged to have an abortion by the mere fact that it was legal. . . . The overwhelming majority of women testified that they would never have considered an abortion if it were not legal. Their testimony revealed that they feel that the legalization of abortion simply gave a license to others to pressure them into a decision they otherwise would not have made.<sup>170</sup>

Operation Outcry's affidavits are of a piece with other arguments and evidence supplied by the national movement; they employ informed consent as a "pro-woman" frame in which to argue for restrictions on abortion. The Task Force enthusiastically relied on these affidavits to depict women's experience with abortion, despite obvious questions about the testimony's representativeness and reliability.<sup>171</sup>

If the *Task Force Report* had expressed concern about a group of women who were confused or coerced and asked questions about how to provide support and protections for such women in a fashion that would preserve freedom of choice for the many other women who were capable of making their own decisions about abortion, its report would sound radically different than the report it presented—in which women are generally depicted as confused and coerced decision makers. The displacement of the argument about the morality of abortion into a set of claims about the competence of women as decisional agents taps perniciously (or, depending on one's standpoint, fortuitously) into longstanding traditions of gender paternalism, increasing the likelihood that lawmakers will make judgments about regulating women's decision making that rest on stereotypical assumptions about women. Minority members of the Task Force complained bitterly that the majority had excluded from the *Report* all the nonconforming testimony about women's experi-

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170. TASK FORCE REPORT, *supra* note 75, at 21.

171. Operation Outcry solicits testimonies through organizations such as state Right to Life chapters, David Reardon's Elliot Institute, the Republican National Committee Blogger Forum, and Rachel's Vineyard. See Hawaii Right to Life, <http://www.hrtl.org> (last visited Mar. 22, 2007); Press Release, Elliot Institute, Post-Abortive Women to Overturn *Roe v. Wade* (May 3, 2001), <http://www.afterabortion.info/news/OperationOC.html>; Kim Priestap, [http://kimpriestap.typepad.com/kim\\_priestap/2006/01/operation\\_outcr.html](http://kimpriestap.typepad.com/kim_priestap/2006/01/operation_outcr.html) (Jan. 10, 2006, 03:34 PM); Rachel's Vineyard, Judges Decide Against Oral Arguments in the Case Against Abortion (Apr. 2004), <http://www.rachelsvineyard.org/publications/news/news0404.htm#Judge>. There is obvious selection bias in the source of the testimonies, and there seems to be witness prompting as well. Rachel's Vineyard instructs readers, "Operation Outcry needs not only the accounts of those who were physically injured but especially the accounts of those who have experienced emotional trauma, pain, and suffering." *Id.* On the Operation Outcry affidavit, a woman may volunteer to tell her story in more detail to an Operation Outcry representative over the phone. Standard questions include: "Were you adequately informed of the nature of abortion, what it is, what it does?"; "Were you adequately informed of the consequences of abortion?"; "Were you informed of any link between abortion and breast cancer? Have you had breast cancer?"; and "Did anyone pressure you into having an abortion? If yes, who?" See Operation Outcry, Affidavit, available at <http://www.operationoutcry.org/images/64304/AffidavitForm-11-06.doc> (last visited Mar. 22, 2007).

ence with abortion that had been presented to it<sup>172</sup>—including the views of the minority members themselves.<sup>173</sup> They went on to express their objections to the legislative findings supporting the state’s informed consent law as resting on “a sexist, insulting, condescending, and inaccurate stereotype of women” that “run[s] directly contrary to the well-established legal principle of personal responsibility, which has previously been applied to apply to any citizen regardless of gender.”<sup>174</sup>

Because the *Task Force Report* argues its case against abortion by presenting women as victims of misrepresentation and coercion who need regulation to protect them from access to abortion, it grounds its case against abortion in a picture of women as lacking sufficient knowledge, capacity for cognitive and moral judgment, and independence of will to be entrusted with responsibility for making decisions about the future course of their lives. But one need not consult the legislative history of the abortion ban for evidence of its paternalism. The abortion ban announces that its purpose is to protect women,<sup>175</sup> which it does by restricting women’s choices, while excusing their conduct. South Dakota’s law imposes criminal sanctions on those who help a pregnant woman abort a pregnancy, while exempting the woman who seeks an abortion from criminal liability for her actions: “Nothing in this Act may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.”<sup>176</sup>

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172. See SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF MINORITY 21 (2006), available at <http://www.argusleader.com/assets/pdf/DF34116714.PDF> [hereinafter MINORITY REPORT] (reproducing *Reproductive Health Decision Makers*, Motion Submitted for the Record (Dec. 9, 2005)). Citing the statements of seven doctors who testified before the Task Force, the *Minority Report* found that “every pregnancy is unique and the outcome is always uncertain. When faced with unintended pregnancy, women make informed and voluntary decisions.” *Id.*

173. The majority refused to include the views of the minority in the *Task Force Report*, and so the minority separately published their views. See *id.* at 2 (reproducing letter from South Dakota Task Force to Study Abortion to Governor M. Michael Rounds and members of the South Dakota Legislature (Jan. 13, 2006)).

174. See *id.* at 26–27 (reproducing *Informed Consent, Unintended Consequences*, Motion Submitted for the Record (Dec. 9, 2005)):

The Task Force finds that the legislative findings supporting South Dakota 34-23A-10.1 run directly contrary to the well-established legal principle of personal responsibility, which has previously been applied to apply to any citizen regardless of gender.

The Task Force finds that the legislative findings supporting South Dakota 34-23A-10.1, specifically that “a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures,” are a sexist, insulting, condescending, and inaccurate stereotype of women.

The Task Force finds that South Dakota 34-23A-10.1 offers a mitigation of personal responsibility for pregnant women and girls which may apply in a broader context than just health care decision making and could and possibly provide a defense for criminal, civil and contractual liability for such persons.

The Task Force finds that the legislative findings supporting South Dakota 34-23A-10.1 may offer grounds to justify employment discrimination against pregnant women and girls. Therefore, the Task Force recommends that the Attorney General of the State of South Dakota cease in the defense of South Dakota 34-23A-10.1 in Federal District Court.

*Id.*

175. See *supra* text accompanying note 68.

176. See *supra* note 70 (quoting statute).

Woman-protectionist arguments for regulating abortion draw persuasive force from familiar stereotypes about women's agency. The common law of coverture long excused women from responsibility while limiting their autonomy. In depicting women as lacking capacity to make independent decisions and justifying restrictions on women's choices as necessary to protect their welfare, the *Report* perpetuates these ancient traditions of gender paternalism.<sup>177</sup> But the *Report* also implicitly, and at times explicitly, draws upon another stream of stereotypes concerning women's roles. South Dakota treats women as impaired in their capacity to make life plans to the extent that their life decisions deviate from role expectations concerning women's obligations as mothers.

### B. Stereotypes About Women's Roles

South Dakota was quite frank in acknowledging that the purpose of its ban on abortions was not only to protect the unborn, but to regulate women's conduct as mothers:

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177. Anne Coughlin has examined gendered standards of responsibility in the criminal law. She traces excuses that presume women's coercion to marriage:

The presumption of coercion is startling for its complete reversal of the normal assumptions underlying the criminal law's inquiry into an accused person's responsibility for a crime. In cases where a (potentially) responsible actor is involved, the law starts from the assumption that the accused is a fit subject for punishment because he made a rational decision to commit a crime. The law then goes on to entertain only the most compelling evidence that the accused's cognitive and volitional capacities and opportunities were so deficient that he should not be blamed. By contrast, when a married woman came before the criminal court, the law started from the assumption that she had an inevitably malleable nature, and it attributed her crime, not to her own exercise of will, but to the influence exerted by her husband's will. The law only considered evidence suggesting that the woman should be punished if she acted "independently" of the man. In the eyes of the criminal law, then, the model female actor was the polar opposite of the model responsible actor.

It would be foolhardy to purport to draw firm conclusions about cultural and political assumptions underlying a rule of law that endured for at least twelve centuries. . . . Although the tenor of the judges' comments about the doctrine changed over time, virtually all of their reasons referred to, and endorsed, the unequal positions occupied by the individual parties to a marriage and the hierarchical structure of the marital entity itself. These references portray the judges' recognition that marriage was the dominant social institution in women's lives and that the husband, and not any processes of the criminal law, had been assigned the leading role in controlling women's misconduct.

Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 32-34 (1994). The law of coverture viewed married women as lacking competence to act sui juris; restrictions on women's agency were justified on the grounds that women were vulnerable to marital coercion, and so required a husband's supervision and representation. To see these understandings expressed as arguments against women voting, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 993-97 (2002). Justice Bradley famously expressed this paternalist vision of marriage when he explained why the Fourteenth Amendment did not protect women's right to practice law in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

*Frontiero v. Richardson* repudiated this vision of women's roles in a plurality opinion that recognized that the nation's "long and unfortunate history of sex discrimination" was "[t]raditionally . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973) (plurality opinion).

The Legislature finds, based upon the conclusions of the South Dakota Task Force to Study Abortion, and in recognition of the technological advances and medical experience and body of knowledge about abortions produced and made available since the 1973 decision of *Roe v. Wade*, that to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the mother's fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited.<sup>178</sup>

Assumptions concerning women's role as mothers ground South Dakota's claims about informed consent. The *Task Force Report* argues:

It is so far outside the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child. Either way, this method of waiver denigrates her rights to reach a decision for herself.<sup>179</sup>

Beliefs about women's roles also ground the *Report's* claims about women's health:

The task force finds that it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.<sup>180</sup>

In expressing claims about women's nature and claims about women's roles as claims about women's health, South Dakota is advancing woman-protective justifications for restricting abortion of the kind employed in the nineteenth-century criminalization campaign.<sup>181</sup>

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178. H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006).

179. TASK FORCE REPORT, *supra* note 75, at 56.

180. *Id.* at 47–48.

181. For an illustration, see *supra* Part II.A. A popular antiabortion tract authored by Horatio Storer, the leader of the criminalization campaign, argued:

Every married woman, save in very exceptional cases, which should only be allowed to be such by the decision of a competent physician, every married woman, until near the so-called turn of life, should occasionally bear a child; not as a duty to the community merely . . . but as the best means of insuring her own permanent good health. How frequently should this be? Usually the interval should be from two to two and a half or three years, so as to allow a sufficient time for nursing, so important for the welfare of the child and its mother, and an interval of subsequent rest.

STORER, *supra* note 35, at 115–16. Similarly, Edwin Hale characterized contraception as an “offence . . . against physiology, because it prevents the occurrence of pregnancy, which is a normal physiological condition, and often absolutely necessary to the physical and moral health of woman.” HALE, *supra* note 34, at 6 n. He makes the same argument against abortion. *Id.* at 5. “It is . . . women who do not pretend to guide the course of events, or make the laws of nature conform to their wishes, who are in health,” Augustus Gardner warned, “while the wise in their own conceit are sufferers, invalids, and useless.” Gardner, *supra* note 36, at 230. Edwin Hale further condemned the wife who seeks an abortion for “Love of Fashionable Life,” warning “[s]terility comes to punish her for the heinous crime of which she has been guilty. . . . [A]bortion brings sickness and perhaps death, or numerous

These sex-role-based claims about women's health are now common in the modern antiabortion movement. The Web site of the National Right to Life Committee<sup>182</sup> posts the 1989 congressional testimony of its president Wanda Franz: "When they are reminded of the abortion . . . the women re-experienced it with terrible psychological pain . . . . They feel worthless and victimized because they failed at the most natural of human activities—the role of being a mother."<sup>183</sup> The Web site of the Family Research Council asserts: "When certain practices violate human dignity and the intrinsic nature of womanhood and motherhood, they produce psychological problems based on the denial of the truth about the human person. . . . The natural inclination of a mother is to embrace the new life within her, and to protect and nurture all of her children . . . ."<sup>184</sup>

Even when the gender-based argument against abortion does not employ explicit claims about women's "nature," it continues to reason from stereotypes about women's roles. The most common of these is the assertion that prohibiting abortion protects both women and children because the rights, needs, and interests of women and children do not conflict. The argument addresses women as caregivers whose interests are perfectly realized in protecting and providing for their children.<sup>185</sup> As David Reardon explained:

If there is a single principle, then, which lies at the heart of the pro-woman/pro-life agenda, it would have to be this: *the best interests of the child and the mother are always joined*. This is true even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it.<sup>186</sup>

The *Task Force Report* expresses this argument as a finding of fact: We find that the unborn child possesses intrinsic rights that are in perfect harmony with and equal to the intrinsic rights of that child's mother . . . . These cherished rights are compatible and harmonious,

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other evils in its train, besides *remorse*, which will come sooner or later." HALE, *supra* note 34, at 10; see also *id.* at 9 ("In natural, healthy parturition, there is little or no actual *pain*. . . . Abortion, on the contrary, is always attended by a great amount of immediate or remote suffering.").

One commentator associated abortion, infanticide, masturbation, and contraception with the women's rights movement, and characterized all five as impulses that would result in sterility. See 3 ARTHUR W. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY FROM COLONIAL TIMES TO THE PRESENT 245 (1919); cf. Margarete J. Sandelowski, *Failures of Volition: Female Agency and Infertility in Historical Perspective*, 15 SIGNS 475, 480–86 (1990) (noting that physicians of the era advance the idea that female volition is an explanation of sterility).

182. See Path to Peace Found., The Servitor Pacis Award Recipients: 2000—Wanda Franz, [http://www.thepathtopeacefoundation.org/servitor\\_franz.html](http://www.thepathtopeacefoundation.org/servitor_franz.html) (last visited Mar. 22, 2007).

183. National Right to Life Committee, *supra* note 114.

184. Gladys A. Sweeney, *The Psychological Effects: Practices Opposed to the Culture of Life and to Women's Health*, AT THE PODIUM, July 10, 2002, <http://www.frc.org/get.cfm?i=PD02G5>.

185. REARDON, *supra* note 115, at 5 ("[F]rom a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself—a part of her heart, a part of her joy, a part of her maternity.").

186. *Id.*



regardless of the unfortunate circumstances that sadly invoke thoughts that she may not be able to avail herself of her great rights.<sup>187</sup>

Like Reardon, the *Task Force Report* defines women as mothers—as caregivers whose rights and interests are realized in caring for their children: “[Abortion] exploits the mother, destroys her rights, destroys her interests, and damages her health, *and does so by killing her child*. . . . It kills an innocent human being and in the process creates the illusion that a mother and her child—who in reality have interests in harmony with each other—are somehow enemies.”<sup>188</sup>

The *Task Force Report’s* arguments about informed consent, its arguments about health, and its arguments about rights and interests invoke assumptions about normal mothers and normal women—not normal fathers or normal parents. The Task Force appeals to commonsense understandings about women’s desires, women’s needs, and women’s roles while making almost no mention of men’s desires, needs, or roles. The Web site of Concerned Women for America makes the sex-role basis of the movement’s claims explicit: “Just as abortion demands that women violate their natural inclination to nurture, it forces men to reject their role as provider and protector.”<sup>189</sup> The *Task Force Report* is written from this same standpoint; its concluding recommendations suggest that the South Dakota Legislature should “[s]trengthen the child support laws, including the requirement that the father of an unborn child support the mother and their unborn child during the pregnancy and thereafter.”<sup>190</sup> But apart from this endorsement of a man’s obligation to support the mother of his children, the *Task Force Report* scarcely ever mentions men as parents, except in the role of abortion-coercer. Unlike the Concerned Women for America Web site, the *Report* does not feature comparative statements about the parental roles of men and women. Instead, the *Report* repeatedly talks about women, women’s nature, and women’s roles, inviting the public to draw inferences about the ways *women* act, or can reasonably be expected to act, as parents. The *Report’s* explicit claims about women are based on the implicit premise that women and men differ, not simply in biological sex roles, but in life aims: women’s rights and interests are coextensive with their role in caring for children—by implication, men’s are not.

The *Task Force Report* grounds this claim of difference in reproductive physiology. To explain why there is no conflict of interests between women and the children they bear and why a mother lives for her children (in a way that men do not), the *Report* draws on the work of Vin-

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187. TASK FORCE REPORT, *supra* note 75, at 67.

188. *Id.* at 34 (emphasis added).

189. Concerned Women for America, *Abortion’s Impact on Society* (Jan. 18, 2003), <http://www.cwfa.org/articledisplay.asp?id=3109&department=CWA&categoryid=life>.

190. TASK FORCE REPORT, *supra* note 75, at 70.

cent Rue (who first proposed postabortion syndrome in the early 1980s). A woman's identification with her children is a process that "begins almost immediately after conception" and "helps the mother transfer her interest from herself to her child, and to prepare herself for her unique role in the child's life."<sup>191</sup> This picture of the mother-child relationship is at the heart of the *Task Force Report's* antiabortion vision. When the *Report* argues the state should prohibit abortion in order to protect human life and to preserve the mother-child relationship, the one attribute of the mother-child relationship it singles out for celebration is its "unselfish nature."<sup>192</sup> South Dakota's ban on abortion not only claims to protect women and the unborn, but also preserves a certain vision of the mother-child relationship.<sup>193</sup>

C. *Why an Abortion Ban That Rests on Gender-Based Justifications and Gender Stereotypes Violates Equal Protection*

South Dakota enacted a law that proscribes abortion in nearly all circumstances. The state required a woman to carry a pregnancy to term even if: (a) the pregnancy is the result of rape or incest; (b) she believes, or her doctor believes, that carrying the pregnancy to term will physically harm her; (c) the father of the child has abandoned her or will do so if she gives birth; (d) the father has abused or battered her; (e) bearing and rearing the child will cost her education or job; (f) she has no means to support the child; (g) after giving birth to another child, whether healthy or disabled, she will be unable to provide for the material or emotional

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191. *Id.* at 54. Drawing on the work of Vincent Rue and coauthors, the Task Force found that [T]he attachment between mother and child begins almost immediately after conception and the basis of maternal attachment is both psychological and physical, and this process, and the natural protective urges of maternal attachment, often form irrespective of whether the pregnancy was intended or wanted.

This . . . bond helps the mother to transfer her interest from herself to her child, and to prepare her for her unique role in the child's life.

*Id.*

192. *Id.* at 67. The Task Force found that:

If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, in its unselfish nature, and, in its role in the survival of the human race, is the touchstone and core of all civilized society. This relationship, its beauty, its survival, its benefits to the mother and child, and its benefits to the State of South Dakota, and society as a whole, all rest in the self-evident truth that a mother is not the owner of her child's life, she is the trustee of it.

*Id.*

193. *See id.* at 55 ("The Task Force therefore finds that a mother's unique relationship with her child during pregnancy is one of the most intimate and important relationships, worthy of protection. The history and tradition of our nation has recognized this relationship as one that has intrinsic beauty and benefit to both the mother and the child, and it is recognized as one of the touchstones, and at the core, of all civilized society.").

needs of her other children; and (h) she is ethically and emotionally able to abort a pregnancy but not to abandon a child after birth.

South Dakota did not say that it weighed the interests of women and the unborn and chose the unborn over women. Instead, the Legislature rejected the view that there is any conflict, and asserted that the rights and interests of the pregnant woman and the unborn are “in perfect harmony . . . regardless of the unfortunate circumstances that sadly invoke [the pregnant woman’s] thoughts that she may not be able to avail herself of her great rights.”<sup>194</sup>

To quell public compunctions about coercing women to give birth who do not wish to become mothers, South Dakota offered gender-based justifications for its ban that explicitly or implicitly depend for their persuasive force on centuries-old stereotypes about women’s agency and women’s roles. It is through the persuasive force of these ancient stories about women that the state could argue that an abortion ban would not coerce women, instead it would protect women against coercion; the abortion ban would not harm women, instead it would protect women against harm. To drown out the objections of women who experience coercion and harm in having motherhood forced upon them by law, the state justified the ban with claims about what “normal” women want and what it is in women’s “very nature as a mother” to do.<sup>195</sup>

The Equal Protection Clause prohibits laws that ban abortion for these reasons. First, an assertedly benign interest in protecting unborn life cannot save an abortion ban from claims of sex discrimination if government recites woman-protective justifications to secure the statute’s enactment. Equal protection cases prohibit government from pursuing a discriminatory purpose, not only when a discriminatory purpose is the sole purpose for the challenged action, but also when that purpose is a “motivating factor” for the challenged action.<sup>196</sup>

In this case, there is good reason to believe that woman-protective justifications played a crucial role in the ban’s enactment. Jack Willke, David Reardon, and others in the national movement developed the woman-protective argument for abortion restrictions for the precise purpose of persuading “the middle majority—the ‘fence sitting’ fifty percent or more who feel torn between both the woman and the child.”<sup>197</sup> Whether or not this argument was crucial in persuading South Dakota legislators to back the bill, key actors emphasized and embraced the woman-protective argument as if it were a central reason for the law’s enactment. The statute recited that it was prohibiting abortion for the express purpose of protecting women and the mother-child relation-

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194. *Id.* at 67; *see also supra* text accompanying note 186 (discussing harmony of interests between mother and child).

195. TASK FORCE REPORT, *supra* note 75, at 56.

196. *See supra* note 24 and accompanying text.

197. *See supra* text accompanying note 116.

ship—and the *Task Force Report*, which was incorporated by reference into the statute, devoted over half its argument to elaborating and documenting these claims.<sup>198</sup> Finally, Leslee Unruh, who played a central role in enacting the ban and then led the referendum campaign to secure voter support for it, attributed the ban's enactment to woman-protective argument, and believed that public support for the ban might even be harmed by traditional fetal-focused appeals: "The face of this campaign [in South Dakota] has not been dead babies or babies, it's been the women. I get real angry when people want to come to South Dakota and drive around with pictures of dead babies . . . it just infuriates me."<sup>199</sup> Debate about the South Dakota statute, in the Task Force, the Legislature, and in the referendum campaign, emphasized protecting women. Regulating women's conduct as mothers was not an incidental purpose, but a significant motivating factor in the enactment of the South Dakota abortion ban.

Second, under the Constitution, citizens are free to embrace traditional gender-differentiated family roles, but government may no longer

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198. See *supra* text accompanying notes 68–78.

199. See Reva B. Siegel & Sarah Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 2006, at 22, 25, available at <http://www.prospect.org/UserOverride/TAPoct06.pdf>.

Indeed, to Leslee Unruh, a driving force behind the ban and the campaign manager of Vote YesforLife.com, the abortion-equals-murder argument is worse than useless. "When people stop doing what they have been doing, which has not worked, when they listen to the women speak, then there will be change," Unruh says. "We can't count on National Right to Life [Committee] to protect women. The pro-life movement has exploited us."

It's for this reason that Unruh takes obvious pride in what's happened in South Dakota. "The face of this campaign [in South Dakota] has not been dead babies or babies, it's been the women. I get real angry when people want to come to South Dakota and drive around with pictures of dead babies . . . it just infuriates me."

Unruh, a self-proclaimed feminist, is the founder of the Alpha Center, which counsels what they call "post-abortive" women, and president of the National Abstinence Clearinghouse. In 2004, she says, a South Dakota legislator came to her and said they were having a hard time getting a ban through, "would you come and talk to the legislators." She lined up 20 women to tell their post-abortion stories. One woman told legislators that she had been violently raped, but that the abortion had been like a second rape. Another said she had tried to kill herself as a result. One legislator, a witness later learned, excused himself and went to another room to weep. According to Unruh, the legislators were in "shock." Within a year, the South Dakota Legislature had convened a task force, on which Unruh's husband sat; two years later, they voted for the ban. Governor Mike Rounds, who had resisted a ban two years earlier was forced to sign.

Today, many organizations agree, and are collecting the testimony of post-abortive women specifically for use in litigation and legislation.

*Id.*

In the week before South Dakota's referendum, the *New York Times* offered a similar account of the referendum debate:

[T]he most extreme arguments are nowhere to be found. No bloody fetuses fill billboards, no absolute claims are being offered about women's rights. Instead, in calls from a phone bank at the ban opponents' headquarters, volunteers quietly tell potential voters that the law is just too narrow, failing to allow abortions in circumstances like rape or incest. The supporters of the ban, meanwhile, speak in gentle tones about how abortion hurts women. "I refuse to show pictures of dead babies," said Leslee Unruh, who leads Vote Yes For Life, the group that is campaigning for the law, reflecting on methods used by anti-abortion groups. "That's what the old way was, and that's why they were losing all these years."

Monica Davey, *National Battle Over Abortion Focuses on South Dakota Vote*, N.Y. TIMES, Nov. 1, 2006, at A5.

enforce these roles, as it did for centuries. Striking down a sex-based alimony law in *Orr v. Orr*, the Court observed:

Appellant views the Alabama alimony statutes as effectively announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reinforcement of that model among the State's citizens. We agree, as he urges, that prior cases settle that this purpose cannot sustain the statutes. . . . "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."

. . . .

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the "proper place" of women and their need for special protection.<sup>200</sup>

Third, these constitutional constraints on the way government can regulate women's roles apply equally to the regulation of pregnant women, whether we treat the regulation of pregnant women as facially neutral or sex based within the Court's reasoning in *Geduldig v. Aiello*.<sup>201</sup> Laws regulating pregnant women are unconstitutional if enforcing constitutionally proscribed views of women was a motivating factor in the law's enactment.<sup>202</sup> If a law regulating pregnant women reflects or attempts to enforce stereotypes about women's family roles, it violates the Equal Protection Clause, as the Court recently demonstrated in *Nevada Department of Human Resources v. Hibbs*.<sup>203</sup>

In *Hibbs* the Court held that Congress had power to enact the Family and Medical Leave Act to remedy a pattern of state action violating the Equal Protection Clause.<sup>204</sup> Chief Justice Rehnquist's opinion found that pattern of unconstitutional state action in a practice of awarding maternity leave to women and not men.<sup>205</sup> In explaining why this tradition of allocating employment benefits evidenced a pattern of equal protection violations, Chief Justice Rehnquist observed that differential treatment of men and women in the award of maternity leave was not fairly attributable to differences in reproductive physiology, but instead reflected different sex-role expectations of male and female employees:

Many States offered women extended "maternity" leave that exceeded the typical 4- to 8- week period of physical disability due to pregnancy and childbirth, but very few States granted men a paral-

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200. 440 U.S. 268, 279–80, 283 (1979) (citations omitted).

201. 417 U.S. 484 (1974). *Geduldig* in fact recognizes that some forms of regulating pregnant women are sex based within the meaning of the Court's equal protection cases. See *infra* note 208. But however one analyzes that question, the equal protection cases still forbid government to pursue unconstitutional purposes in the ways it regulates pregnant women.

202. See Siegel, *supra* note 20, at 1891–96 (developing this argument).

203. 538 U.S. 721 (2003).

204. *Id.*

205. *Id.* at 730–31.

lel benefit. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.<sup>206</sup>

*Hibbs* recognized that state regulation of pregnant women can reflect and enforce unconstitutional sex-role assumptions about women's role as mothers, observing: "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be."<sup>207</sup> Chief Justice Rehnquist's opinion in *Hibbs* shows that government regulation of pregnant women on the basis of sex role stereotypes violates the Equal Protection Clause whether or not we deem it to be sex-based state action within the meaning of *Geduldig*.<sup>208</sup>

Fourth, the equal protection cases that, on occasion, allow government to discriminate between the sexes in ways that recognize their different physical roles in reproduction do not authorize the state to enforce gender-stereotypical family roles. For example, in *Nguyen v. INS*,<sup>209</sup> the Court held that rules for proving citizenship that varied for children born abroad of unmarried women and unmarried men were constitutional because the rules reasonably took account of differences in the physical re-

206. *Id.* at 731; *see also id.* at 731 n.5.

207. *Id.* at 736. The Court continued:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

*Id.*

208. *Geduldig* states:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero* . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

*Geduldig v. Aiello*, 417 U.S. 484, 496–97, 496 n.20 (1974). This passage in *Geduldig* has long been read as deciding, in the negative, the question of whether for purposes of equal protection analysis a law regulating pregnancy discriminates on the basis of sex. In fact, *Geduldig* holds that "not . . . every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* . . . and *Frontiero*." *Id.* 496 n.20. It leaves open the possibility that some legislative classifications concerning pregnancy are sex-based classifications like those considered in *Reed* and *Frontiero*, and *Hibbs* provides examples of legislative classifications concerning pregnancy (e.g., statutes that grant "maternity" leave and "pregnancy disability" leave) that the Court holds are "gender-discriminatory," *Hibbs*, 538 U.S. at 733 n.6, and rest on "the pervasive sex-role stereotype that caring for family members is women's work." *Id.* at 731; *see also id.* at 731 n.5.

209. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001).

lations of reproduction: government could regulate on the assumption that women would be aware that they had children, but could not assume the same of men.<sup>210</sup> But the Court was careful to impose limits on the forms of sex-specific regulation that reproductive difference authorized. Justice Kennedy emphasized that differential treatment of men and women was constitutionally permitted because it reflected a difference in practical situation grounded in biological difference and not stereotype:

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so diserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.<sup>211</sup>

Following *Nguyen*, laws that claim their justification in reproductive difference cannot be based on “stereotypes” that reflect “misconception and prejudice,” or “show disrespect” for men or women. In *United States v. Virginia*, Justice Ginsburg expressed this understanding: “‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. . . . [S]uch classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”<sup>212</sup>

Under the equal protection cases, then, government may recognize that men and women have different physical roles in reproduction, but it may not use those differences to justify laws that enforce different social roles in reproduction—especially the gender-differentiated caregiver/breadwinner roles of the separate spheres tradition. Pointing to physical differences in reproduction to justify laws that impose *these* gen-

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210. In *Nguyen* the Court held that government had an interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth. . . . Even if a father knows of the fact of conception, moreover, it does not follow that he will be present at the birth of the child. Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet. Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter.

*Id.* at 66–67.

211. *Id.* at 73.

212. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (citations omitted).

der-differentiated social roles is the kind of caste-based reasoning the Court embraced in cases like *Bradwell* and *Muller*;<sup>213</sup> it enforces the very stereotypes about sex-based family roles that the Court's equal protection cases condemn. As cases like *Bradwell* and *Muller* remind us, equal protection cases prohibit government from using law to enforce sex-stereotypical family roles, not just because this use of law inhibits individual opportunity but also because this use of law imposes group inequality; laws enforcing gender-differentiated family roles have long played a role in limiting women's civic participation. To summarize, then, under the Court's equal protection cases, the state may regulate in ways that recognize that men and women have different physical roles in reproduction, but may not invoke these physical differences to organize family or market relations in ways that perpetuate the gender-stereotypical social roles of the separate spheres tradition.<sup>214</sup> Citizens may choose to live gender-stereotypical lives, but government compromises the liberty and equality of its citizens if it uses law to impose gender-stereotypical roles on them.

It is precisely this constraint on government that Chief Justice Rehnquist recognizes in *Hibbs* when he describes constitutional violations involving lengthy "maternity" leave" and "other differential leave policies [that] were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."<sup>215</sup> Rehnquist did not see a constitutional violation in the award of *childbearing* leave to women only, but instead in the award of *childcare* leave to women only. Government may have believed that women, and not men, would or should stay home

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213. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."); see also *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the Court upheld protective labor regulation that limited the hours and places women could work, reasoning:

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. . . . [H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

*Id.* at 422–23.

214. Siegel, *supra* note 20, at 1888 ("Practices of sex differentiation [once justified as reflecting the different] physical roles of the sexes in reproduction . . . are now understood unconstitutionally to enforce different social roles in reproduction, 'part of the "baggage of sexual stereotypes" that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.'" (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979))).

215. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 & n. 5 (2003); see also *id.* at 731 n.5.



from work to provide childcare to infants, but, Rehnquist held, it violated the Equal Protection Clause for government to perpetuate that sex-role expectation by law. The *Hibbs* holding is an ordinary application of the principle that the state may have a “preference for an allocation of family responsibilities under which the wife plays a dependent role,” but laws that “seek[] for their objective the reinforcement of that model among the State’s citizens” are unconstitutional;<sup>216</sup> government may not use law for “reinforcing stereotypes about the ‘proper place’ of women and their need for special protection.”<sup>217</sup>

Thus, equal protection cases that recognize that men and women have different physical roles in reproduction do not authorize the South Dakota statute. These precedents do not even remotely sanction a law whose purpose is to regulate a female citizen to ensure that she acts like a “normal” woman and makes choices about continuing a pregnancy that reflect her “inherent” or “intrinsic” “nature as a mother.”

When South Dakota asserted an interest in prohibiting abortion to protect an embryo or fetus that is physically within a pregnant woman, it stated a regulatory aim that might justify singling out a pregnant woman under the line of cases we have just been examining. Even then, fetal-protective regulation of a pregnant woman’s conduct would still be subject to equal protection review, to ensure that gender bias did not shape the way government pursued a constitutionally benign interest in protecting potential life.<sup>218</sup>

But South Dakota not only regulated the pregnant woman’s conduct to protect the unborn life she carries; it regulated her conduct to protect the pregnant woman, by overseeing her decision about whether to assume, avoid, or defer the role of motherhood. South Dakota wanted to prevent women’s efforts to avoid or defer motherhood, prohibiting abortion “to fully protect . . . the mother’s fundamental natural intrinsic right to a relationship with her child.”<sup>219</sup> In findings supporting the ban and the state’s informed consent law, the state gave a fairly detailed account of the understanding of women’s agency and women’s roles on which its regulation was premised. The state sought to intervene in women’s decision making for the stated reason that a pregnant woman does not have the independence of judgment to make decisions about motherhood in her own best interest.<sup>220</sup> The state sought to intervene in women’s decision making in the stated belief that she would “suffer[] significant psychological trauma and distress” for acting contrary to “the normal, natural, and healthy capability of a woman whose natural in-

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216. *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (citation omitted).

217. *Id.* at 283 (citation omitted).

218. See Siegel, *supra* note 29; Siegel, *supra* note 20; see also *infra* text accompanying note 231.

219. H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006).

220. See *supra* Part III.A.

instincts are to protect and nurture her child.”<sup>221</sup> South Dakota prohibited abortion to enforce sex-role morality on resisting women.<sup>222</sup>

In 2007, prohibiting abortion for this purpose violates the Equal Protection Clause. South Dakota cannot use the criminal law to ensure that its female citizens choose and act like *women* should. The standard to which the state would have held women is unabashedly and unremittingly sex based.<sup>223</sup> The state judged the choices of its female citizens against an idealized model of a “normal” woman—not against an idealized model of a citizen or even a man—a model in which a woman’s interests are fully realized in caring for her young because the pregnant woman naturally “transfer[s] her interest from herself to her child”<sup>224</sup> as she becomes a mother whom the state exalts as having an “unselfish nature.”<sup>225</sup> In the *Task Force Report*’s view, these qualities are distinctive to women. The *Report* concludes with the observation that “the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, in its unselfish nature, and, in its role in the survival of the human race, is the touchstone and core of all civilized society.”<sup>226</sup> The state surely may celebrate qualities of selflessness in its citizens—but under the Constitution it may not single out some on whom to impose selflessness by law. When government enforces gender-stereotypical family roles, it reasons about the sexes and restricts their freedom in ways that perpetuate the separate spheres tradition—understandings and arrangements that citizens may choose but government may not enforce.

Today, government may no longer exclude women from the practice of law on the grounds that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>227</sup> Individual women can embrace motherhood as their central life pursuit or to integrate motherhood with other identities and activities—women vary dramatically in the emotional and practical strategies they employ—but government cannot impose its view of women’s nature. Under the equal protection cases, government cannot require a woman seeking an abortion to become a mother for the reason that the state knows a pregnant woman’s desires and needs better than the pregnant woman herself. This kind of gender-based paternalism

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221. TASK FORCE REPORT, *supra* note 75, at 47–48.

222. David Reardon expresses the point succinctly:

Therefore, when we are talking about the psychological complications of abortion, we are implicitly talking about the physical and behavioral symptoms of a moral problem. By focusing public attention on the symptoms of post-abortion trauma, we will inevitably draw the middle majority back to understanding the causes of the problem: the injustice of killing unborn children and the guilt of weakness and betrayal which haunts the mother’s heart.

REARDON, *supra* note 115, at 10.

223. See *supra* text accompanying notes 187–89.

224. TASK FORCE REPORT, *supra* note 75, at 54.

225. *Id.* at 67.

226. *Id.* at 67; see also *supra* note 192 (quoting the *Task Force Report*).

227. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

is forbidden by the Constitution, whether or not the government explains, as South Dakota has, “that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood.”<sup>228</sup> Citizens may seek counseling for abortion-related questions on this or any other premise, but it is not a view of women that government may use law to enforce. The Constitution forbids paternalism of this kind because of the mistaken and harmful judgments about women it engenders. Lawmakers reasoning from traditional forms of gender paternalism may not recognize that women who have abortions are competent decision makers grappling with complex practical and relational considerations. The gender stereotypes on which such paternalism is based make it “reasonable” to “help” women by coercing them into continuing pregnancies where an encounter with the actual reasons women have abortions might make reasonable other interventions that would enable women to continue pregnancies with less adverse consequence to them and their families. Gender-paternalism triggers equal protection concern where other forms of paternalism do not, because of the denigrating assumptions about women it reflects and the dangerous uses of law it may enable.

The Constitution prohibits the state from imposing sex-stereotyped roles on women even to protect them, not simply because of the attitudes about women such laws engender, but also because of the restrictions on women that such laws enforce. South Dakota expressed its sentiments about women in an abortion law, not a greeting card. Unlike greeting cards, abortion laws can deprive women of employment, education, and food for their children. Abortion laws can bind women to relations in which they have been or will be abused. Depriving women of choice in matters of motherhood, or control of timing in matters of motherhood, profoundly defines the course of women’s lives—something in which women take a not unnatural interest. The more a woman needs or wants to mother on her own, or to combine mothering with any life pursuit not traditionally occupied by mothers, the more such control matters.

The gender-based argument for abortion restrictions invites the public to ignore all of these concerns. The gender-based argument for abortion restrictions minimizes the public’s compunction about coercing women by presenting it as a benign form of protecting women. Because the gender-based argument for abortion restrictions actuates deep stereotypes about women, it predisposes the public to discount the dignitary and material impact of forced motherhood on women.<sup>229</sup>

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228. See the concluding statement of the *Task Force Report* quoted *supra* note 192 and *supra* text accompanying note 226.

229. Under the sway of these ancient stereotypes, abortion restrictions seem to some as reasonable ways of helping women. But criminalizing abortion is not responsive to the reasons women seek abortion, and there is little reason to believe it would provide relief, even to the suffering few. Criminalizing abortion would not, for instance, address the needs of women who seek an abortion because they lacked contraception or were raped or are living in abusive relationships, or will have to drop out of work or school to raise a child alone, or are stretched so thin that they cannot emotionally or finan-

When government regulates on the basis of stereotypes about women, it entrenches traditional arrangements that constrain women individually and as a class. In the passing moment that the *Task Force Report* considers how women are to survive if forced by the state to become mothers, the *Report* recommends that the South Dakota Legislature “[s]trengthen the child support laws, including the requirement that the father of an unborn child support the mother and their unborn child during the pregnancy and thereafter.”<sup>230</sup> At no point does the *Report* discuss enforcing or strengthening laws that prevent employers from discriminating against pregnant women and employees with childcare responsibilities.

The South Dakota legislative process illuminates reasons why abortion restrictions raise equal protection concerns, even if woman-protective antiabortion argument is invoked in support of an informed consent law instead of a ban<sup>231</sup>—and even if a ban is justified on fetal-protective rather than woman-protective grounds. Given the forms of reasoning about controlling women that are now openly circulating as justifications for abortion restrictions, it is plain that abortion regulation is the site of sex-role struggle, much as the regulation of the vote or women’s ability to practice law once was—indeed, much as the regulation of birth control was when states enacted the first laws banning abortion and contraception in the nineteenth century.<sup>232</sup>

The history of South Dakota’s abortion ban illuminates a fundamental question at the heart of the abortion debate, a question at the heart of the Fourteenth Amendment’s equal protection and substantive due process jurisprudence, a question that lives at the intersection of liberty and equality concerns: whether government respects women’s prerogative and capacity to make choices about motherhood.

#### IV. NOTES TOWARD A CONCLUSION: FROM REPRODUCTIVE LIBERTY IN THE SEX EQUALITY CASES TO SEX EQUALITY IN THE REPRODUCTIVE LIBERTY CASES

*Roe* was decided several years before the Court adopted its equal protection framework for analyzing questions of sex discrimination. *Roe* gave constitutional protection to the abortion choice, without fully ap-

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cially provide for their other children. Likewise, an informed consent law that threatens doctors if they do not tell women unproven “facts” about abortion or that would sanction doctors who fail to give a moral lecture to patients about terminating “the life of a whole, separate, unique, living human being” with whom “the pregnant woman has an existing relationship” may well intimidate women into continuing pregnancies—without ever addressing the reasons a pregnant woman has attempted to avoid or defer motherhood. Cf. S.D. CODIFIED LAWS § 34-23A-10.1 (2007).

230. TASK FORCE REPORT, *supra* note 75, at 70.

231. For a pathbreaking analysis of the First Amendment implications of an informed consent statute such as South Dakota’s, see Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939.

232. See *supra* Part II.A.

preciating that it was protecting values of equal citizenship as well as personal liberty. Indeed, *Roe* analyzed the state's interest in restricting abortion as if such regulation expressed a contested application of the harm principle—without considering the possibility that such regulation also might reflect contested views of women. *Roe* recognized the state's interest in regulating abortion to protect maternal health and potential life without subjecting expressions of those regulatory interests to scrutiny for gender bias as the Court's equal protection cases might; yet *Roe* sharply constrained government from acting on these regulatory interests, through the trimester framework that barred most regulation of the abortion decision.<sup>233</sup>

Two decades later, when the Court replaced *Roe*'s trimester framework with undue burden analysis in *Casey*, concern about the risk of gender bias in abortion regulation became a much more explicit part of the substantive due process inquiry.<sup>234</sup> In its statement of the abortion right, *Casey* observed:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>235</sup>

The Court's insistence that abortion regulation not enforce the gender-stereotypical understandings of the separate spheres tradition also shaped its application of undue burden analysis, specifically its rejection of a spousal notice requirement on the grounds that the abortion law reflected "a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."<sup>236</sup>

This understanding of the equality values supporting the abortion right is likely to develop as understanding of the sex discrimination faced

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233. See *Roe v. Wade*, 410 U.S. 113 (1973). For opinions rewriting *Roe* as a sex equality opinion, see WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (including opinions by Jack Balkin, Reva Siegel, and Robin West). My opinion in this volume examines the development of equal protection law in matters concerning pregnancy discrimination at the time of the *Roe* decision. See *id.* at 63.

234. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). For sources discussing liberty and equality values in *Roe* and *Casey*, see Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995) (surveying equality arguments for the abortion right in law review literature and in *Casey*); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); see also Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 531–35 (2003); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 147–50.

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

236. *Id.* at 898.

by pregnant women continues to accumulate. With each passing year, federal courts learn more about the dynamics of sex discrimination against “mothers or mothers-to-be”<sup>237</sup> as they enforce the 1978 Pregnancy Discrimination Amendment<sup>238</sup> to the Civil Rights Act of 1964<sup>239</sup> and the Family and Medical Leave Act.<sup>240</sup> *Hibbs* reflects this growing understanding, and, in its wake, courts are now beginning more closely to examine sex discrimination against pregnant women under the Constitution’s Equal Protection Clause.<sup>241</sup> As a body of law constraining government regulation of pregnant women under the Equal Protection Clause develops, courts will begin, as they already have, to explore the connections between *Hibbs* and *Casey*.

In coming years, equal protection values are likely to continue seeping into the elaboration of substantive due process doctrine. Just as *Casey* reviewed Pennsylvania’s spousal notice law with concern that it might perpetuate traditional views of marital roles now understood to violate equal protection, so too a court might scrutinize abortion laws to ensure that government does not reason from stereotypes about women’s agency or women’s roles when it vindicates legitimate interests in regulating the procedure.<sup>242</sup> Pronounced forms of underinclusivity or overinclusivity in the means by which the state has pursued its interest in protecting maternal health or potential life might reveal that abortion regulation is in fact driven by unconstitutional stereotypes about women—“increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.”<sup>243</sup>

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237. Nev. Dep’t of Human Res. v. *Hibbs*, 538 U.S. 721 (2003).

238. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000).

239. Civil Rights Act of 1964, 42 U.S.C. §§ 1971–2000h-6 (2000).

240. 29 U.S.C. §§ 2601–2654 (2000).

241. For an essay suggesting how this body of law developed over the decades through an examination of Chief Justice Rehnquist’s evolving views, see Siegel, *supra* note 20.

242. This understanding of *Casey* already finds expression in the case law. In *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004), a case involving an equal protection challenge to laws restricting access to abortion clinics, the Ninth Circuit held that constitutional values vindicated by equal protection intermediate scrutiny were an integral part of undue burden analysis. In the Ninth Circuit’s view, the equal protection restrictions that *Hibbs* imposed on the regulation of pregnancy were also enforced by undue burden analysis in *Casey*, as it limited an abortion-restrictive regulation that reflects paternalism or sex stereotyping:

In fact, elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard. See *Casey*, 505 U.S. at 882 (approving only of information provided to a woman seeking an abortion that is “truthful and not misleading”); *id.* at 898 (“A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.”).

*Tucson Woman’s Clinic*, 379 F.3d at 549 (internal citations omitted).

243. *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (citation omitted).

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And should the Court one day restrict *Casey*, or reverse *Roe*, as the South Dakota Legislature hoped,<sup>244</sup> constitutional principles of equal protection elaborated in cases spanning the decades from *Frontiero* to *Virginia* to *Hibbs* will remain as a constraint on the kinds of abortion regulation the Constitution allows in the twenty-first century—an understanding of the Equal Protection Clause that abortion laws like South Dakota’s will have helped engender.

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244. See *supra* note 4 and accompanying text.

