



2008

# Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart

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REVA B. SIEGEL

## Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*

**ABSTRACT.** This essay on the law and politics of abortion analyzes the constitutional principles governing new challenges to *Roe*. The essay situates the Court's recent decision in *Gonzales v. Carhart* in debates of the antiabortion movement over the reach and rationale of statutes designed to overturn *Roe*—exploring strategic considerations that lead advocates to favor incremental restrictions over bans, and to supplement fetal-protective justifications with woman-protective justifications for regulating abortion. The essay argues that a multi-faceted commitment to dignity links *Carhart* and the *Casey* decision on which it centrally relies. Dignity is a value that bridges communities divided in the abortion debate, as well as diverse bodies of constitutional and human rights law. *Carhart* invokes dignity as a reason for regulating abortion, while *Casey* invokes dignity as a reason for protecting women's abortion decisions from government regulation. This dignity-based analysis of *Casey/Carhart* offers principles for determining the constitutionality of woman-protective abortion restrictions that are grounded in a large body of substantive due process and equal protection case law. Protecting women can violate women's dignity if protection is based on stereotypical assumptions about women's capacities and women's roles, as many of the new woman-protective abortion restrictions are. Like old forms of gender paternalism, the new forms of gender paternalism remedy harm to women through the control of women. The new woman-protective abortion restrictions do not provide women in need what they need: they do not alleviate the social conditions that contribute to unwanted pregnancies, nor do they provide social resources to help women who choose to end pregnancies they otherwise might bring to term. The essay concludes by reflecting on alternative—and constitutional—modes of protecting women who are making decisions about motherhood.

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**INTRODUCTION**

It is commonly assumed that restrictions on abortion protect the unborn—but the Court’s recent decision in *Gonzales v. Carhart*<sup>1</sup> introduces the possibility that a ban on methods of performing certain later abortions might protect women as well. This essay examines the social movement roots of the woman-protective antiabortion argument that appears in *Carhart*, and identifies constitutional limits on woman-protective abortion restrictions in the commitment to dignity that structures *Carhart* and *Planned Parenthood v. Casey*,<sup>2</sup> the case on which *Carhart* centrally relies.

Appeals to dignity recur in our case law and politics. *Carhart* appeals to human dignity as a reason to allow government to restrict abortion,<sup>3</sup> while *Casey* appeals to human dignity as a reason to prohibit government from interfering with a woman’s decision whether to become a parent.<sup>4</sup> As I show, in substantive due process and equal protection cases constitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality.<sup>5</sup> Attending to the usage of dignity in *Casey* and *Carhart*, we can see that a commitment to dignity structures the undue burden test itself,<sup>6</sup> which allows government to regulate abortion to demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women.<sup>7</sup>

This dignity-based reading of *Casey* and *Carhart* is responsive to the language of the cases, the constitutional principles on which they draw, and the social movement conflict out of which the cases have emerged. It supplies a framework for analyzing new, woman-protective justifications for regulating abortion discussed in *Carhart*,<sup>8</sup> which have been invoked to justify bans and informed consent restrictions in South Dakota and other states.<sup>9</sup> Ultimately, this dignity-based analysis identifies constitutional limitations on woman-

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1. 127 S. Ct. 1610 (2007).

2. 505 U.S. 833 (1992).

3. *Carhart*, 127 S. Ct. at 1633.

4. *Casey*, 505 U.S. at 851.

5. See *infra* Section II.A.

6. See *Casey*, 505 U.S. at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

7. See *infra* Section II.B.

8. See *infra* text accompanying notes 16-17.

9. See *infra* Sections I.B. & III.C.

protective antiabortion argument that emanate from the Constitution's due process and equal protection guarantees and the social norms and commitments they reflect. Exploring the roots, logic, and limits of the woman-protective antiabortion argument glimpsed in *Carhart* provides an occasion to appreciate how our Constitution enables community in conflict.

On its face, *Carhart* seems to be a case about protecting the unborn, not women. In upholding the federal Partial-Birth Abortion Ban Act<sup>10</sup> under *Casey*,<sup>11</sup> the Court emphasized congressional findings that the banned method had “disturbing similarity to the killing of a newborn infant”<sup>12</sup> and reasoned that the ban “expresses respect for the dignity of human life”<sup>13</sup> and would be useful in stimulating the moral education of the community.<sup>14</sup> But the Court also discussed an additional woman-protective justification for the ban that congressional findings never mention.<sup>15</sup> *Carhart* cites an amicus brief with

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10. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2005).
  11. See *Carhart*, 127 S. Ct. at 1632 (reasoning that the ban did not “impose[] a substantial obstacle to late-term, but previability, abortions”); *infra* notes 211-214 (discussing *Carhart*'s adherence to the *Casey* decision).
  12. *Carhart*, 127 S. Ct. at 1633 (quoting 18 U.S.C. § 1531 note (Supp. IV 2000)).
  13. *Carhart*, 127 S. Ct. at 1633.
  14. “The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.” *Id.* at 1634.
  15. The reasons Congress gave for banning certain abortion procedures concerned the protection of the unborn—not defects in women’s deliberative process. See 18 U.S.C. § 1531 (Supp. IV 2005). When Congress debated the merits of the Partial-Birth Abortion Ban Act, it did not consider the idea that late-term abortions result in psychological harm to women. See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201-06 (codified at 18 U.S.C. § 1531 note (Supp. V 2005)) (factual findings); H.R. REP. NO. 108-58, at 34-39 (2003).

Congress did consider, in some detail, the potential physical harms of later abortions. See Partial-Birth Abortion Ban Act of 2003 § 2, 117 Stat. at 1201-06; H.R. REP. NO. 108-58, at 34-39. Congress made no mention, however, of the psychological harm caused by abortions. The Nebraska District Court opinion in *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004)—the district court opinion in *Gonzales v. Carhart*—confirms this view. The lengthy 269-page decision in *Carhart v. Ashcroft* summarized the entire congressional record without discussing the prevention of psychological harm as a purpose of the statute. *Id.* at 822-52. Nor do appellate decisions record such a purpose. See Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. App’x 88 (2d Cir. 2007); Planned Parenthood Fed’n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev’d sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev’d* 127 S. Ct. 1610 (2007).

affidavits suggesting that women need protection from making uninformed abortion decisions they might regret, observing:

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow.<sup>16</sup>

The significance of these observations is unclear. *Carhart* notes in passing that “[t]he State has an interest in ensuring so grave a choice is well informed,”<sup>17</sup> yet the opinion shows no interest in how decisions about the banned procedure are actually made, discussing women as a “body” that is part of the Act’s “anatomical landmarks”<sup>18</sup> rather than as a deliberative agent, and never mentioning the health reasons that would lead women or their doctors to elect the banned abortion method, or the consultative process through which such a decision is ordinarily reached.<sup>19</sup>

What are we to make of the Court’s raising woman-protective considerations that Congress did not consider in enacting the Partial-Birth Abortion Ban Act? Why did the Court discuss deliberative errors in women’s decision making about whether to carry a pregnancy to term in a case

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The woman-protective argument that appears in *Carhart* seems to have entered the case not through findings of Congress or the lower courts, but rather through amicus briefs filed in the Supreme Court, including the brief filed by the Justice Foundation on behalf of Sandra Cano, see Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as *Amici Curiae* in Support of Petitioner at 22, *Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436684 [hereinafter Brief of Sandra Cano et al.], as well as briefs of several other pro-life organizations, see Reva B. Siegel, *David C. Baum Memorial Lecture, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1025-26 & n.142 (surveying woman-protective antiabortion argument in amicus briefs filed in *Carhart*).

16. *Carhart*, 127 S. Ct. at 1634; see *infra* note 108 and accompanying text.

17. *Carhart*, 127 S. Ct. at 1634.

18. *Id.* at 1627 (internal citations omitted):

Second, the Act’s definition of partial-birth abortion requires the fetus to be delivered “until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these “anatomical ‘landmarks’”—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply.

19. See *infra* note 110 and accompanying text.

concerning restrictions on the procedures doctors use to perform abortion? Paradoxically, *Carhart's* abortion-regret discussion seems so out of place that it invites attention.

Gender-paternalist reasoning in *Carhart* is no accident. The passage reflects the spread of abortion restrictions that are woman-protective, as well as fetal-protective, in form and justification. The abortion ban South Dakota voters defeated in 2006 and the ban the state's voters will consider again this fall have been justified as protecting women,<sup>20</sup> as has South Dakota's "informed

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20. For the abortion ban that South Dakota voters will consider in the 2008 election, see South Dakota Initiated Measure 11 - Regulate the Performance of Certain Abortions, To Reinstate the Prohibition Against Certain Acts Causing the Termination of the Life of an Unborn Human Being and To Prescribe a Penalty Therefore (2008), available at <http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2008/2008regulateperformanceofabortions.pdf>. The ban renders any person who "employs any . . . means, with the intent of causing the termination of an unborn human being . . . guilty of . . . a Class 4 felony." *Id.* § 2. The proposed ban has exceptions for rape, incest, and maternal health, but "the exceptions for rape and incest would require law enforcement authorities to be notified," and "the exception for a mother's health would require extensive documentation from doctors who would be forced to make swift choices under risk of felony charges." Monica Davey, *South Dakota to Revisit Restrictions on Abortion*, N.Y. TIMES, Apr. 26, 2008, at A14. ("Even though there are technically exceptions this time, the proposed law would make it nearly impossible to get an abortion.") (quoting Sarah Stoesz, President, Planned Parenthood Minnesota, North Dakota and South Dakota).

Woman-protective arguments for banning abortion in South Dakota are set forth in over half of a lengthy state task force report. See SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at [http://www.voteyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteyesforlife.com/docs/Task_Force_Report.pdf) [hereinafter SOUTH DAKOTA TASK FORCE REPORT]. See generally Siegel, *supra* note 15 (analyzing arguments of the Report in detail). Vote Yes for Life, the organization leading the initiative drive for the new 2008 ban, posts the South Dakota Task Force Report prominently on its Web site, as well as endorsements that invoke woman-protective arguments on behalf of the proposed ban. For an account of how the authors of the 2008 ban relied on the 2005 South Dakota Task Force Report, see Vote Yes for Life, Endorsements for the Initiative, <http://www.voteyesforlife.com/initiative.html#SamuelCasey> (endorsement of Samuel B. Casey) (last visited May 5, 2008). Among the endorsements invoking woman-protective justifications are statements from the following: Jack Willke, former director of National Right to Life Committee ("My total experience has also long since convinced me that abortion certainly kills a living human, but it is also very dangerous and damaging to mothers and to many fathers."); American Association of Pro Life Obstetricians and Gynecologists ("The medical literature attests to a rather marked increased incidence, after elective abortion, of suicide. Depression, substance abuse, and relational difficulties are increased. . . . There is also evidence of a future increase in breast cancer incidence, particularly from the loss of the 'protective effect' against breast cancer conferred on the woman by a full term pregnancy."); Frank Pavone, Priests for Life ("As National Pastoral Director of Rachel's Vineyard, I see every day the damage abortion does to the mothers and fathers of aborted children."); Alive Women with a Passion ("[A]bortion is harmful not

consent” statute that directs doctors to tell women not only that an abortion “will terminate the life of a whole, separate, unique, living human being,” but also to describe the mental and physical health risks of abortion, including depression, suicide ideation, and sterility.<sup>21</sup> The informed consent statute and the past and proposed ban all rely on a state task force report that gave great weight to the abortion-regret affidavits contained in the amicus brief Justice Kennedy cited in *Carhart*.<sup>22</sup> For these reasons, the antiabortion movement reads *Carhart* as support for much more than the partial-birth abortion ban strategy. Leslee Unruh, who led South Dakota’s 2006 effort to ban abortion on the grounds it would protect women,<sup>23</sup> greeted *Carhart* with delight: “I’m

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only to the tiny baby, but also to the woman and others involved. The so called freedom to choose that Planned Parenthood offers is actually bondage. If you are in bondage from an abortion or maybe even multiple abortions, please know that there is support for you. There is healing and forgiveness and a place of rest for you.”). See *Vote Yes For Life*, Endorsements for the Initiative, <http://www.voteyesforlife.com/initiative.html> (last visited May 5, 2008) (featuring endorsements from the above).

21. S.D.C.L. § 34-23A-10.1(1)(b), (c) (West 2007) (requiring physician to communicate to patient “[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; . . . (iv) All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility”). During production of this essay, the Eighth Circuit vacated a preliminary injunction that raised First Amendment objections to enforcement of this statute. See *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).
22. Operation Outcry, an initiative led by the conservative Justice Foundation in Texas, initially collected these affidavits for use in litigation that sought to reopen the *Roe* and *Doe* cases. See *Operation Outcry: A Project of the Justice Foundation*, <http://www.operationoutcry.org/> (last visited Feb. 4, 2007). The affidavits were then presented to the South Dakota Task Force. See *SOUTH DAKOTA TASK FORCE REPORT*, *supra* note 20, at 21-22 (“We find the testimonies of these women an important source of information about the way consents for abortions are taken . . .”); see also *infra* note 103 and accompanying text (quoting passages of the Report that credit affidavits as representative of “post-abortive” women). Thereafter the affidavits were offered to the Supreme Court via an amicus brief in the *Carhart* litigation, and to other state legislatures. See *Brief of Sandra Cano et al.*, *supra* note 15, at 16-21, 22 n.80, app. at 11-160 (referencing the South Dakota Task Force Report and including excerpts from the affidavits); Reva B. Siegel, *Brainerd Currie Lecture, The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *DUKE L.J.* 1461 (tracing the use of the affidavits in the South Dakota Task Force Report, the Supreme Court, antiabortion litigation efforts to reopen *Roe* and *Doe*, and in state legislative hearings). Leaders of the new abortion ban initiative in South Dakota prominently rely on the 2005 State Task Force Report. See *infra* note 101.
23. Monica Davey, *National Battle over Abortion Focuses on South Dakota Vote*, *N.Y. TIMES*, Nov. 1, 2006, at A5 (quoting Leslee Unruh) (“I refuse to show pictures of dead babies. . . . That’s what the old way was, and that’s why they were losing all these years.”).



ecstatic. . . . It's like someone gave me \$1 million and told me, 'Leslee, go shopping.' That's how I feel."<sup>24</sup> *Carhart* encouraged Unruh and the backers of South Dakota's 2006 ban to gather the signatures needed for a new abortion ban referendum that the state's voters will consider this fall.<sup>25</sup>

*Carhart* may have encouraged the current South Dakota abortion ban initiative, but reading *Carhart* in isolation is not sufficient to determine the proposed ban's constitutionality. Justice Kennedy wrote *Carhart* in revulsion at the "partial birth" procedure Congress banned and in estrangement from the understanding of *Casey* expressed in the *Stenberg* case.<sup>26</sup> But in writing *Carhart*, Justice Kennedy applies the *Casey* framework he helped author. Justice Kennedy's next steps cannot be adduced from *Carhart* alone—as even antiabortion advocates debating the wisdom of a South Dakota ban realize.<sup>27</sup> Absent dramatic new developments, the constitutionality of a ban based on gender-paternalist justifications for restricting abortion would be determined in a doctrinal framework that protects women's autonomy to decide whether to bear a child. As this line of inquiry makes clear, the gender-paternalist justification for restricting abortion is in deep tension with the forms of decisional autonomy *Casey* protects.

After *Carhart*, what principles govern restrictions on abortion, whether to protect women or the unborn? Attending to the ways *Casey* and *Carhart* reason about dignity illuminates core concerns and commitments of the case law. While *Carhart* invokes dignity as a reason for regulating abortion,<sup>28</sup> *Casey* invokes dignity as a reason for protecting women's abortion decisions from government regulation.<sup>29</sup> The normative valence of dignity varies in *Casey*, *Carhart*, and other Fourteenth Amendment decisions that Justice Kennedy has written for the Court or on his own behalf. At different points in these decisions, dignity concerns the value of life, the value of liberty, and the value

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24. When the decision came down, Unruh "spent the day conferring with lawyers on how to leverage the ruling to maximum effect in the states. 'We're brainstorming, and we're having fun,' she said." Stephanie Simon, *Joyous Abortion Foes To Push for New Limits*, L.A. TIMES, Apr. 19, 2007, at A25.

25. See *supra* note 20 and *infra* note 268.

26. Kennedy helped craft *Casey*'s undue burden standard, and then broke with his coauthors over its application to Nebraska's partial birth abortion ban in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and to the federal ban in *Gonzales v. Carhart*. In writing *Carhart* with *Casey*'s dissenters and two new Justices appointed by a president who campaigned against *Roe*, Justice Kennedy sought to correct what he viewed as *Stenberg*'s mistakes.

27. See Section III.C.

28. See *infra* note 122 and accompanying text.

29. See *infra* notes 131-132 and accompanying text.

of equality. Once we attend to these differences in usage, we can see how a commitment to dignity structures the undue burden test itself, which allows government to regulate abortion to demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women.<sup>30</sup>

This essay's focus on the different meanings of "dignity" in the opinions of Justice Kennedy responds, of course, to his pivotal role in writing *Casey* and *Carhart* and his likely influence in charting the Court's abortion jurisprudence in the years ahead. Yet the analysis offered here is not predictive. While the essay begins in the positive register in an effort to understand how the abortion debate is shifting, it moves to the normative register, as it asks: what principled guidance does the commitment to dignity expressed in *Casey*, *Carhart*, and other Fourteenth Amendment decisions provide in determining how government may regulate abortion? Given the many twists and turns of abortion politics and the myriad pressures on the Court however composed, an exercise in prediction would not provide substantial guidance, and in all events would require a different set of analytical resources than this essay brings to bear on the question.

Why focus on the ways Justice Kennedy reasons about dignity in opinions written for the Court and on his own behalf? The abortion cases express their core precepts in the language of dignity. Dignity is a value that bridges communities. It is a value to which opponents and proponents of the abortion right are committed, in politics and in law. It is a value that connects cases concerning abortion to other bodies of constitutional law, and connects decisions concerned with liberty to decisions concerned with equality. It is a value that guides interpretation of other national constitutions and of human rights law.<sup>31</sup>

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30. See *infra* Section II.B.

31. See Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict* 9 (unpublished manuscript, 2007) ("By considering the analytic bases of the judgments from these various jurisdictions, one can see the discussion around abortion move beyond the frameworks of privacy, liberty, and equality, which are the frequently proffered premises for supporting women's abortion rights in the United States. The issue of reproduction is located in broad sets of questions related to women's health and work, as the problem is addressed in terms of 'human rights,' to health and safety; to nondiscrimination on the basis of race, age, and gender; to economic opportunity; to freedom of speech, conscience, and religion; to autonomy and dignity."); *infra* Section II.A; see also Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039 (2007); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004).

Dignity can do all this good work because it is a compelling and multifaceted concept. It is no doubt for these reasons that dignity figures so frequently and consequentially in the decisions of a Justice who is now playing a leading role in the development of American constitutional law. Examining the complex commitment to dignity shaping these decisions is not, by itself, sufficient for predictive or comparative analysis. But because dignity-based analysis of *Casey* and *Carhart* is informed by the constitutional understanding of the Justice who is in dialogue with competing communities in the abortion debate, it supplies a principled basis for reasoning about the question facing the Court and the nation that is concerned with bridging this normative divide. Positive and normative analysis of contending claims on human dignity in the abortion debate offers a glimpse of how our Constitution enables community as it structures conflict.

Part I begins by locating constitutional law in constitutional politics, considering the social movement struggles that led to *Carhart* and are shaping the next generation of abortion restrictions that courts will confront. *Carhart* grew out of debates in the antiabortion movement over the reach and rationale of laws designed to challenge *Roe*. Should the movement attack abortion through absolute or incremental restrictions, for example, through categorical bans or through procedural obstacles depicted as “informed consent” regulations? Should the movement justify such restrictions as protecting the unborn or women? Examining tactical and moral debates over the reach and rationale of laws designed to challenge *Roe* illuminates important aspects of the *Carhart* opinion and the next round of test cases designed to probe its meaning.

As importantly, this examination of constitutional politics shows how the shape and justification of abortion restrictions has evolved with struggle over *Roe*. Over the years, in an effort to persuade decision makers who support *Roe*, *Roe*'s adversaries have begun to draw on the values the abortion right vindicates in order to attack *Roe*. Antiabortion strategists have fused talk of post-abortion harms, which originated at movement crisis pregnancy centers, with public health and feminist discourse. Those who would ban abortion now assert that restrictions on abortion protect women's health and freedom and promote their “informed consent.” The strategy is designed to erode the protections for women's decisions set forth in *Roe* and *Casey*, and the passing discussion of postabortion regret in *Carhart* suggests it may yet succeed.

For what reasons may the government regulate abortion? Are there constitutional limits on woman-protective antiabortion argument that are not expressed in *Carhart*? Part II of the essay analyzes this question of constitutional law by examining the commitment to dignity in *Carhart*, *Casey*, and other of Justice Kennedy's Fourteenth Amendment opinions. In upholding the Partial-Birth Abortion Ban Act, *Carhart* emphasized the importance of

protecting human dignity, the value of every life that inheres in its being alive.<sup>32</sup> Yet this is not the only form of dignity the Constitution protects. Justice Kennedy's opinion in *Casey*, as well as his opinions in substantive due process cases such as *Lawrence v. Texas*<sup>33</sup> and equal protection decisions such as *Parents Involved*<sup>34</sup> and *J.E.B. v. Alabama ex. rel. T.B.*,<sup>35</sup> express a commitment to dignity of other kinds. There, Justice Kennedy speaks passionately of the dignity of autonomous decisionmaking, insisting that the Constitution guarantees an individual freedom to choose her own life course and not to live as the instrument of another's will. Justice Kennedy is eloquent also in describing the protections against subordination that human dignity requires, declaring the Constitution guarantees persons freedom from the denigration and humiliation of treatment as second-class citizens.<sup>36</sup>

Once we attend to the multiple forms of dignity that the Constitution protects, we can understand the undue burden framework as both vindicating and reconciling commitments to several forms of dignity. *Casey* offers a differently inflected account of the interest in potential life, an account that focuses on the government's interest in regulating abortion to *express respect for life*, a regulatory interest which *Casey* holds can be reconciled with dignity-respecting protection of a woman's right to choose. *Casey* allows regulation of abortion that demonstrates respect for human life, but only insofar as such regulation does not impose an undue burden on a woman's right to decide whether to bear a child.<sup>37</sup> The undue burden framework gives doctrinal expression to the principle that government may regulate abortion to express respect for the dignity of human life so long as it does so by means that express respect for the dignity of women's lives.<sup>38</sup>

Part II concludes its analysis of the undue burden framework by exploring dignity-constraints on the regulation of abortion that are found in the joint opinion's application of the undue burden test to "informed consent" messages designed to persuade women to carry a pregnancy to term and to a requirement that a woman notify her husband before she could obtain an

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32. *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1633 (2007).

33. 539 U.S. 558 (2003).

34. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

35. 511 U.S. 127, 151-54 (1994) (Kennedy, J., concurring in the judgment).

36. See *infra* Section II.A.

37. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-78 (1992).

38. *Id.* at 877 ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").

abortion. This analysis shows that dignity-respecting regulation of women's decisions can neither manipulate nor coerce women: the intervention must leave women in substantial control of their decision, and free to act on it. Judgments about dignity are contextual and based on social meaning, especially where dignity implicates questions of equal respect. In reaffirming the abortion right and then holding that a requirement of spousal notice is an undue burden on the abortion decision, the Supreme Court makes plain that constitutional protections for the abortion right protect women from government pressure to conform to customary sex roles. *Casey* protects women's dignity on the understanding that there is a history of using law to coerce sex-role conformity that the abortion right renounces.

Part III of the essay applies a dignity-based analysis of the undue burden framework to woman-protective justifications for restricting abortion. *Carhart* signals receptivity to such arguments, but as the essay shows, the discussion in *Carhart* is just that: signaling of a kind that expresses receptivity to the claims for restricting the method of performing abortions that Congress banned, but that does not recognize protecting women as an independent basis for restricting women's decisions about whether to continue a pregnancy. The essay thus considers the constitutional status of woman-protective justifications for regulating abortion.

Woman-protective justifications for restricting abortion—such as those contained in the South Dakota Task Force Report on Abortion—point to a variety of disputed facts about women's welfare and choices as a basis for restricting abortion. The core problem arises when government invokes these narratives about women as legal justifications for imposing controls on women. When woman-protective antiabortion arguments present descriptive accounts of confusion or coercion in some women's decisions about abortion as a reason for regulating all women as persons whose life decisions need to be made by the state, they violate the premise that *Roe*, *Casey*, and the modern equal protection cases share: that women are able and entitled to decide their own life course, especially in matters concerning family roles. Gender paternalism of *this* kind denies women the very forms of dignity that *Casey* and the modern equal protection cases protect.

The problem with woman-protective antiabortion argument is not simply that it would treat individual women on the basis of generalizations about the group, or the stereotypes about women's capacity and women's roles on which the argument rests. These stereotypes obscure the profound mismatch between the injuries that the woman-protective antiabortion argument identifies and the sole remedy it proposes. Like old forms of gender paternalism, the new forms of gender paternalism remedy harm to women through the control of women. Abortion restrictions do not provide women in need what they need:

abortion restrictions do not alleviate the social conditions that contribute to unwanted pregnancies, nor do they provide social resources to help women who choose to end pregnancies they otherwise might bring to term. A Conclusion reflects on alternative—and constitutional—modes of protecting women who are making decisions about motherhood.

## I. LOCATING CARHART IN CONSTITUTIONAL POLITICS

The *Carhart* decision emerged from the efforts of an antiabortion movement frustrated by its inability to overturn *Roe*. Indeed, the opinion can be understood as the fruit of debates within the antiabortion movement over the best way to achieve this aim. One debate within the movement concerns the reach of antiabortion legislation: many believe it is crucial to oppose *Roe* as one approaches evil, categorically and without compromise, while others believe that the most effective way to reverse *Roe* is to oppose the decision incrementally, in a manner that allows for the reeducation of public opinion. Another debate within the movement concerns the rationale for antiabortion legislation. Many opponents of *Roe* oppose abortion in the interest of protecting unborn life only, while growing numbers within the movement argue for restricting abortion in order to protect *women* from abortion.

Situating the Partial-Birth Abortion Ban Act within the context of these intramovement debates helps illuminate the logic of the *Carhart* opinion as upholding incrementalist regulation enacted for fetal-protective purposes and subsequently defended on woman-protective grounds. It identifies some of the other incrementalist regulation that advocates will be employing to test the limits of constitutional protection for the abortion right, and shows how the leadership in the antiabortion movement has come to embrace the woman-protective argument as a new strategy for eviscerating the abortion right.

For decades, the antiabortion movement opposed protecting women's right to choose because *Roe*'s opponents judged protecting the unborn of greater importance than protecting the autonomy and equality values that *Roe*'s supporters believe the abortion right vindicates. Yet something important happened during those decades of arguing with decision makers who support the abortion right: advocates of incremental and absolute abortion restrictions have increasingly come to justify such regulation in the frames of their opponents, and now often portray abortion restrictions as promoting women's informed consent, women's health, women's welfare, and women's freedom. Attending to these rhetorical transformations in antiabortion advocacy illuminates interpretive problems that courts will encounter as judges try to enforce bodies of constitutional law that guarantee women's autonomy and equality.

A. *The Reach of Antiabortion Legislation: Carhart and Incrementalism*

The Partial-Birth Abortion Ban Act may regulate a medical procedure, but its roots lie in constitutional politics, not the practice of medicine. “The term ‘partial-birth abortion’ was invented for purposes of writing legislation,” Cynthia Gorney reports. “There is no textbook reference to any operative procedure or medical state called ‘partial birth.’”<sup>39</sup> Antiabortion advocates were prominently involved in developing and drafting the legislation. Their object was to focus legislation and litigation on visceral details of one infrequently employed second-trimester procedure, with the aim of stimulating opposition to abortion generally.<sup>40</sup> “I mean, abortion advocates never want to talk about what’s *happening* in an abortion,” one legislative liaison observed. “They generally don’t even want to say the word ‘abortion.’ And another goal – this is

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39. Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything To Lose*, HARPER’S MAG., Nov. 2004, at 33, 33, available at <http://www.harpers.org/archive/2004/11/0080278>.

40. The chain of events leading to the statute’s enactment began in 1992 when a Dr. Martin Haskell presented a paper at a National Abortion Federation meeting that described a new abortion procedure called “intact dilation and evacuation” or “dilation and extraction” (D&X), which enabled the doctor to extract an aborted fetus in one piece. Jessica C. Gerrity, *Interest Group Framing in Congress and the Media: The Case of the Partial-Birth Abortion Ban Act Debate* 72 (Oct. 13, 2006) (unpublished Ph.D. dissertation, Indiana University) (on file with author). The National Right to Life Committee (NRLC) obtained a copy of the paper and disseminated it to antiabortion groups around the country, commissioning cartoons illustrating the procedure for publication in a 1993 story by *Life Advocate* magazine, which argued that the procedure amounted to infanticide. Jenny Westberg, *D&X: Grim Technology for Abortion’s Older Victims*, LIFE ADVOC., Feb. 1993, at 1. The editors of *Life Advocate* magazine were prominently involved in “rescues” and clinic blockades around the country and were arrested on multiple occasions for their more aggressive protest activities. *Life Advocate* was eventually shut down by a judge because it was linked to a Web site displaying photos of abortion providers with X’s over their faces. “A lawsuit brought by several of the providers who claimed that they were being targeted for assassination via the website was successful in shutting down the site.” Lisa LeRoy, *Defining Moments: The Politics of “Partial-Birth” Abortion* 106-07 (May 23, 2004) (unpublished Ph.D. dissertation, Brandeis University) (on file with author).

Response was powerful enough that the National Right to Life Committee proposed legislation barring the practice. Keri Folmar, a legislative aide who worked for Florida Republican Congressman Charles Canaday and had previously done legal work for the National Right to Life Committee, devised the label “partial-birth abortion” in a meeting with Canaday and the NRLC’s legislative director Douglas Johnson. See Gorney, *supra* note 39, at 38; see also Linda Greenhouse, *Narrow Abortion Case Before Court Leads to a Wider Debate*, N.Y. TIMES, Apr. 23, 2000, at 27 (“The National Right to Life Committee . . . devised the term ‘partial-birth abortion’ and since 1995 has lobbied Congress and state legislatures to ban the procedure . . . .”); cf. Gerrity, *supra*, at 73 (noting that most of the people involved impute responsibility for the term to the NRLC, but NRLC does not take public credit).

just another point that I wanted to see happen – was to get this bill before the Supreme Court.”<sup>41</sup> The National Right to Life Committee’s legislative director Douglas Johnson acknowledged that the ban on certain methods of performing later abortions was more effective for the message it sent than the lives it saved: “We would hope that, as the public learns what a ‘partial birth abortion’ is, they might also learn something about other abortion methods and that this would foster a growing opposition to abortion.”<sup>42</sup>

In this respect, the Partial-Birth Abortion Ban Act was of a piece with prevailing antiabortion strategy. Initially, the movement sought to overturn *Roe* with a Human Life Amendment but was unable to muster the support needed to amend the Constitution.<sup>43</sup> With frustration mounting throughout the 1980s, one wing of the movement turned to clinic violence. Another began to develop strategies to reverse *Roe* incrementally, through legislation and litigation that would erode support for abortion one step at a time.<sup>44</sup> The evangelical journal *Christianity Today* was quick to celebrate the Court’s decision in *Carhart* as proof that the incrementalist strategy works,<sup>45</sup> linking *Carhart* to other “popular measures—parental notification and informed

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41. Gorney, *supra* note 39, at 38–39.

42. Alissa Rubin, *Partial Truths*, NEW REPUBLIC, Mar. 4, 1996, at 27, 28 (“Pro-life legislators sought to highlight abortion’s most upsetting aspects by awakening the public to a method they could depict in particularly disturbing ways.”).

43. The National Committee for a Human Life Amendment reports that, since 1973, more than 330 HLA proposals have been introduced in Congress and several extensive hearings held. The only formal vote occurred in the Senate in 1983 on the Hatch-Eagleton Human Life Federalism Amendment, which failed on June 28, 1983, by a vote of 49–50. National Committee for a Human Life Amendment, Human Life Amendment, <http://www.nchla.org/issues.asp?ID=46> (last visited Jan. 26, 2008) (including legislative history and text of various HLA proposals); see also James Bopp, Jr., *An Examination of Proposals for a Human Life Amendment*, in RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT 3 (James Bopp, Jr., ed., 1984).

44. See Victor G. Rosenblum & T.J. Marzen, *Strategies for Reversing Roe v. Wade Through the Courts*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS (Edward R. Grant, Dennis J. Horan & Paige C. Cunningham eds., 1987); Jeanne Cummings, *Targeting Roe: In Abortion Fight, Little-Known Group Has Guiding Hand*, WALL ST. J., Nov. 30, 2005, at A1.

45. *Abortion Overreach: Today’s Supreme Court Decision Again Shows that the All-or-Nothing Strategy Is Not the Way To Go*, CHRISTIANITY TODAY, Apr. 18, 2007, <http://www.christianitytoday.com/ct/2007/aprilweb-only/116-32.o.html>; accord Ramesh Ponnuru, *Winning, and Losing, on Abortion*, NAT’L REV., May 8, 2006, at 34, available at <http://nrd.nationalreview.com/article/?q=ZTU1ODNhMGMzOWI4ZDdkZjg2NWQ2NGJiZmNlZjhlMjE>.



consent, for example—that shape public opinion and chip away at the decision.”<sup>46</sup>

Abortion restrictions that educate public opinion and are upheld in decisions that incrementally narrow the abortion right are the subject of passionate dispute within the antiabortion movement,<sup>47</sup> criticized by those who would advocate bans instead. Observes incrementalist Jill Stanek, “Purists believe supporting legislation with compromises or exceptions is supporting abortions of babies not covered by that legislation. Purists also oppose parental notification/consent laws, abortion informed consent laws, fetal pain laws and abortion clinic regulations, because they say those condone abortion, too.”<sup>48</sup> As Stanek sees it, “incrementalists and purists share the same goal: to make abortion illegal except to save the life of the mother, as was the law in every state before 1967. The ultimate goal of every incrementalist I know is a constitutional human life amendment.”<sup>49</sup> Incrementalists understand the dispute as purely strategic, a difference in how to achieve a shared goal. But their critics within the antiabortion movement charge that incrementalism is ineffective and unethical<sup>50</sup> (even the devil’s work<sup>51</sup>)—a charge that Americans United for Life and other incrementalists take great pains to refute.<sup>52</sup>

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46. *Abortion Overreach*, *supra* note 45.

47. See generally Mark Hansen, *Following the Beat of the Ban: After a Loss in South Dakota, Many in the Anti-Abortion Movement Reassess Their Legal Strategy*, A.B.A. J., Feb. 2007, at 33, available at [http://www.abajournal.com/magazine/following\\_the\\_beat\\_of\\_the\\_ban1/](http://www.abajournal.com/magazine/following_the_beat_of_the_ban1/) (discussing intramovement disagreement).

48. Jill Stanek, *Purely Fanatical*, WORLD NET DAILY, June 13, 2007, [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=56145](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=56145).

49. *Id.*

50. See, e.g., Damian Fedoryka, *Abortion Double Effect: The Two-Edged Sword* (pt. 1), LIFE ADVOCATE, Sept. 1995, at 36, 37 (“To the extent that an abortion compromise law allows any right to abortion, however regulated and restricted, it has conceded to the other side that there is a right to abortion. It has denied the unborn children a right to life, even if in so doing it has saved many more than it could have by insisting on a right to life. This means that if compromise involves giving up what does not belong to me, I am in justice forbidden to compromise. . . . [T]he life in question belongs to the innocent, not to the legislative parties.”); Damian Fedoryka, *Abortion Double Effect: The Two-Edged Sword* (pt. 2), LIFE ADVOC., Oct. 1995, at 10, 10, 14 (“[T]he ‘culture’ of the pro-life side shows that it shares, in some measure, the ‘culture’ of the [pro-choice] opposition, or that at least it has been infected by it. . . . If the unborn really have an ‘inalienable right to life,’ then it is senseless to speak of a ‘clash [of] rights,’ as if the other side had any ground to stand on. For there can be no clash of rights between the right of an unborn human being and some other ‘rights,’ only a clash between a right to life and the will [to] deny it for whatever reason.”).

51. Reverend Philip L. “Flip” Benham, one-time national director of Operation Rescue who claims to have or saved Norma McCorvey (“Roe” of *Roe v. Wade*, 410 U.S. 113 (1973)), attacks incrementalism as the “devil’s” work:

Celebration of the *Carhart* decision within the antiabortion movement as vindicating the incrementalist strategy brought tensions between the two wings of the movement to a boil. “The Supreme Court’s Partial-Birth Abortion Ban decision angered purists on two fronts,” Stanek observes. “They thought the ban was meaningless, even counterproductive. And they thought the joy incrementalist groups expressed demonstrated malfeasance.”<sup>53</sup> Refusing to celebrate *Carhart* as a victory for the movement, Brian Rohrbough, president of Colorado Right to Life, denounced the strategy for what it had failed to produce. As he saw the bottom line: “We’ve been promised for almost 40 years that the strategy of electing Republicans would get us a Republican Supreme Court that would end abortion, and that has not happened.”<sup>54</sup> Rohrbough

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This is the devil’s modus-operandi. It is called incrementalism. . . .

We have tried to overcome abortion by incrementally offering up compromising pieces of legislation: Parental Notification, Parental Consent, Twenty-four Hour Waiting Period, Partial Birth Abortion Ban, Fetal Pain Legislation, ad nauseam. These are certainly well intentioned pieces of legislation but each one of them violates God’s Word. STRATEGY HAS INDEED REPLACED TRUTH!

How so? Each of these cleverly crafted incremental legislative initiatives ends with a tiny unspoken caveat: “. . . and then you can kill the baby.” Surprised! You shouldn’t be. Who do you think authored this kind of legislation?

If you notify the parents . . . then you can kill the baby. If you have the parent’s consent . . . then you can kill the baby. If you wait twenty-four hours . . . then you can kill the baby. If you anesthetize the baby . . . then you can kill the baby. If you draw a late term baby out of the mother’s womb feet first, you cannot kill him by sucking his brains out and then crushing his skull—you must rip his arms and legs off first . . . then you can kill the baby.

This is an abomination before Almighty God! Using the devil’s means to accomplish God’s ends is a fatal error. Neither will this political strategy ever bring and [sic] end to abortion. God will not bless it. Oh, incremental legislation may stop some abortions, but it will never end ABORTION! The devil would be happy to sign on to any one or all of these ridiculous pieces of legislation. Of course, he is the author of them all.

Flip Benham, *The Partial Birth Abortion Boondoggle*, OPERATION RESCUE/OPERATION SAVE AMERICA, June 15, 2007, <http://www.operationsaveamerica.org/43.htm>.

52. See Clark D. Forsythe, *Prudence in Policymaking: Is Incrementalism Ethical and Effective?*, in AMERICANS UNITED FOR LIFE, *DEFENDING LIFE 2007: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA* 51, 51-58 (2007).
53. Stanek, *supra* note 48.
54. Stephanie Simon, *Absolutists Turn Against Other Foes of Abortion*, L.A. TIMES, June 6, 2007, at A1 (describing how Rohrbough—appalled that fellow antiabortion activists were touting *Carhart* as a victory and using it as a fundraising tool—published a public rebuke of James Dobson that later circulated as advertisements in the *Washington Times* and in Dobson’s hometown newspaper).

published an open letter to James Dobson of Focus on the Family attacking Dobson for celebrating *Carhart*:

Focus on the Family and many ministries celebrate this wicked ruling to justify the fifteen years of wasted effort. Pro-lifers gave tens of millions of dollars to the movement responding to countless fundraising pleas that mention the PBA ban. A major pro-life fundraising firm told Colorado Right To Life's V.P. Leslie Hanks, "The PBA script gets the best results."

...

Please stop foisting onto the church the falsehood that this gruesome ruling will "protect children." This decision, to use your word, is more "Naziesque" than the PBA it regulates.

...

Beyond the children, your praise helps destroy the souls of these wicked Justices who no doubt take comfort in the approval of Christian leaders. You help them feel safe as they violate God's enduring command, Do not murder; and then with hubris, they demand that abortionists follow their new regulation of how to murder a child. . . .

For more than a quarter century, the pro-life movement with your support, has adopted moral relativism and legal positivism, obsessing on process and overlooking fundamental justice. . . . *Gonzales v. Carhart* unequivocally affirms the "killing" of children as long as you follow its guidelines, and the pro-life movement cheers, for the ends now justify the means, and right and wrong have become negotiable.<sup>55</sup>

Rohrbough's letter led the National Right to Life Committee to repudiate its Colorado chapter.<sup>56</sup> The episode was the latest installment in a long running

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55. Open Letter from Brian Rohrbough, President, Colorado Right to Life, et al., to Dr. James Dobson, <http://www.coloradorighttolife.org/openletter> (last visited Apr. 1, 2008) (emphasis omitted). For Dobson's celebration of *Carhart*, see James Dobson, Focus on the Family, We Thank God for This Victory, <http://listen.family.org/miscdaily/A000000461.cfm> (last visited Jan. 31, 2007).

56. Posting of Alan Keyes to ProLifeBlogs, June 24, 2007, [http://www.prolifeblogs.com/articles/archives/2007/06/bad\\_fruit.php](http://www.prolifeblogs.com/articles/archives/2007/06/bad_fruit.php) (noting that NRLC purged its Colorado chapter for condemning the *Carhart* decision). On the NRLC's new replacement chapter, see National Right to Life, New Colorado Citizens for Life Group Speaks with "Logic & Love" (Aug. 23,

dispute between incrementalists and absolutists. In South Dakota only the year before, it was the absolutists who enacted an abortion ban that had an exception only to save a woman's life (and not even for abortions necessary to protect a woman's health or for pregnancies resulting from rape or incest); then it was the incrementalists who rose in objection. In 2004 and again in 2006, the National Right to Life Committee and Americans United for Life worked to block abortion bans in the state, worried that a ban would alienate moderate Americans and provoke judicial reprisal.<sup>57</sup>

This spring, those impatient to ban abortion have once again seized the initiative in South Dakota and gathered signatures to put a ban on the ballot, ignoring the warnings of incrementalists opposed to sending a ban to the Court in *Carhart's* wake.<sup>58</sup> Incrementalists set forth their very different vision of how the movement should proceed at a conference held just after *Carhart*:

Laws requiring women to be told in more detail how fetuses die in abortions. State-funded public-health campaigns warning women that abortions could cause psychological trauma. And requirements that abortion doctors report detailed demographic and medical information about their patients to the state. . . . [P]erhaps including a drive for state bans on other mid- and late-term abortion methods.<sup>59</sup>

*B. The Rationale of Antiabortion Legislation: Carhart and Gender Paternalism*

To this point, this essay has located *Carhart* in a debate over the reach of antiabortion legislation that pits absolutists seeking categorical prohibitions on abortion against incrementalists seeking to enact laws that would lead to such a regime one step at a time. *Carhart* is incrementalism triumphant. But the gender paternalism of the *Carhart* opinion emanates from a different strategy

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2007), [http://www.nrlc.org/News\\_and\\_Views/Aug07/nv082307.html](http://www.nrlc.org/News_and_Views/Aug07/nv082307.html) (discussing NRLC's new affiliate, Colorado Citizens for Life).

57. Hansen, *supra* note 47. Even as South Dakotans rejected the ban in an election day referendum, the ban's sponsor continued to defend the ban as getting "the pro life message out" and rejected incrementalism, which he likened to "moving the ball slowly down the field," in favor of the state's go-for-broke approach, which he called the "Hail Mary pass." *Id.*; see also *infra* note 98.
58. This spring, those who supported South Dakota's ban in 2006 announced that they had the signatures needed to put on the ballot a ban with narrow exceptions for rape and incest. See *supra* note 20 and accompanying text. For strategic debate over the ban, see *infra* Section III.C.
59. Simon, *supra* note 54; see also AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2007, *supra* note 52 (detailing at length the incrementalist legislative and litigation agenda).

debate within the antiabortion movement, concerning the *rationale* for abortion regulation rather than its *reach*.

Without a doubt, the dominant argument of the antiabortion movement over the last several decades has been that abortion wrongfully ends the life of the unborn. Argument over the morality of abortion focused on the ontological status of the embryo/fetus (Is it a person?), the justifiability of the practice (Is it murder?), and ultimately, the justifiability of efforts to stop the practice (Is it morally permissible to take a life to save a life?).<sup>60</sup>

But if this fetal-focused and increasingly confrontational line of argument was the dominant voice of the antiabortion movement in the several decades after *Roe*, it was not the only voice of the antiabortion movement. There was another voice within the movement, especially at the movement's growing network of "crisis pregnancy centers," where women sought to dissuade pregnant women from having abortions. Here argument against abortion tended to speak to the needs and interests of women as well as the unborn, and to assume a less confrontational form.<sup>61</sup> In the 1980s, Vincent Rue claimed that abortion produced trauma symptoms that he dubbed "post-abortion syndrome" (PAS), and Dinesh D'Souza urged Surgeon General Koop to find that abortion harmed women—an appeal that Koop, a passionate opponent of abortion, declined on the ground the scientific evidence was lacking, and the moral emphasis wrong.<sup>62</sup> "The pro-life movement had always focused—

60. See Ben Ehrenreich, *Operation Miscue*, L.A. WEEKLY, Apr. 5, 2002:

In 1994, anti-abortion extremists organized a conference in Chicago. In attendance was Paul Hill, there to push a biblical justification for the murder of abortion doctors. Just a few months later, Hill would kill a physician and his escort in Pensacola, Florida. Thirty-four people, including Joseph Foreman, at the time a close associate of Jeff White, ended up signing a statement declaring "the justice of taking all godly action necessary to defend innocent human life including the use of force." Flip Benham [head of Operation Rescue] . . . recalls attending the conference to argue against the proponents of "justifiable homicide." . . . Benham's move, and his insistence that his followers publicly condemn violence, was at least as important as a PR strategy as it was a principled stand. The belligerence of Operation Rescue's tactics had already alienated a good portion of American fundamentalist ministries, and Benham had every incentive to distance what was left of the group as far as possible from anyone who refused to openly condemn violence. . . .

61. See Siegel, *supra* note 22; *infra* notes 66-67.

62. On Rue's work in the 1980s, see Siegel, *supra* note 22. For accounts of Dinesh D'Souza's role in putting PAS on President Reagan's agenda, see CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 46 (2005) ("White House policy analyst Dinesh D'Souza hit on a clever idea. Remarking on the effectiveness of previous surgeons general in the battle against smoking, D'Souza suggested having Koop produce a report on the health consequences of abortion. The hope was to change the focus of the abortion debate, shifting away from legal questions

rightly, I thought—on the impact of abortion on the fetus,” Koop reasoned. “They lost their bearings when they approached the issue on the grounds of the health effect on the mother.”<sup>63</sup>

With Koop’s refusal to find a scientific basis for claims of abortion’s harm, woman-focused antiabortion advocacy might have remained embedded in the movement’s crisis pregnancy centers. But by the early 1990s, leadership of the antiabortion movement was reeling from several major setbacks. As Republican administrations committed to overturning *Roe* appointed Justices to the Court, *Roe*’s defenders mobilized with increasing urgency, helping to block the nomination of Robert Bork in 1987 and to elect Bill Clinton in 1992.<sup>64</sup> In 1992 Republican-nominated justices helped reaffirm the abortion right in *Casey*. Violence at the clinics had estranged the American electorate.<sup>65</sup>

In this period, the leadership of the antiabortion movement began to look for new ways of speaking to the American public.<sup>66</sup> They came to appreciate that talk of abortion’s harms, which had expressive and mobilizing purposes in the movement’s crisis pregnancy centers, might be addressed to a new audience, for new, strategic ends.<sup>67</sup> In the early 1990s, movement leadership

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toward a health-oriented approach that would ‘rejuvenate the social conservatives.’”); John B. Judis, *An Officer and A Gentleman*, NEW REPUBLIC, Jan. 23, 1989, at 19, 22.

Koop refused to apply the public health antismoking paradigm to abortion, concluding that there was insufficient scientific evidence with respect to abortion’s health consequences for women. Koop believed that the antiabortion movement should keep its moral focus on protecting unborn life. See *Medical and Psychological Impact of Abortion: Hearing Before the Subcomm. on Human Resources & Intergov’t Rel. of the H. Comm. on Gov’t Operations*, 101ST CONG. 193-203 (1989) (testimony of C. Everett Koop, M.D., Surgeon General, Dep’t of Health & Human Servs). For Koop’s critique of the PAS argument, see C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA’S FAMILY DOCTOR 274-75, 278 (1991).

63. KOOP, *supra* note 62, at 275.

64. See *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 233 (1987); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 44-57, 141-57 (2004).

65. See *supra* note 60.

66. For retrospective accounts of this “new rhetorical strategy” of the antiabortion movement, see Francis J. Beckwith, *Choice Words: A Critique of the New Pro-Life Rhetoric*, TOUCHSTONE, Jan.-Feb. 2004, at 56-62, available at <http://www.touchstonemag.com/archives/article.php?id=17-01-056-0> (featuring commentary by Beckwith and separate responses by Frederica Mathewes-Green, David Mills, and Terry Schlossberg).

67. In 1994, Gregg Cunningham, who produced Videotape: Hard Truth (Center for Bio-Ethical Reform 1994), a video showing aborted babies, worried that modes of advocacy developed in the movement’s crisis pregnancy centers (CPCs) had begun to infect and dilute its arguments in the public arena. Remarking on “[t]his particular estrangement between

began to experiment with using talk of post-abortion harms, not simply to deter pregnant women from choosing abortion or to recruit them to the movement's ranks, but also to persuade Americans *outside* the ranks of the antiabortion movement that government should impose legal restrictions on women seeking an abortion.

In this era of repeated setbacks, the antiabortion movement found itself unable to persuade a significant portion of the electorate that was responsive to women's rights claims. Growing numbers of movement leaders came to appreciate that woman-focused antiabortion discourse might have strategic utility in persuading segments of the electorate the movement had heretofore been unable to reach: it might reassure those who hesitated to prohibit abortion because they were concerned about women's welfare that legal restrictions on abortion might instead be in women's interest. And so in the early 1990s, leaders of the antiabortion movement began to use PAS for new purposes and for a new audience.

In the process they transformed PAS, a therapeutic or counseling discourse employed at the movement's crisis pregnancy centers to dissuade women from having abortions, into woman-protective antiabortion argument (WPAA), a political discourse that taps longstanding traditions of gender paternalism and is designed to persuade voters who ambivalently support abortion rights that they can help women by using law to restrict women's access to abortion. As a political discourse designed to counter feminist, prochoice claims, WPAA came to internalize elements of the arguments it sought to refute<sup>68</sup> – fusing the public health, trauma, and survivors idiom of PAS with language of the late twentieth-century feminist and abortion rights movements.<sup>69</sup>

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activists who are 'for women' and those who are 'for babies' (a.k.a. 'against abortion')," he criticized Guy Condon, president of Care Net (formerly Christian Action Council) and a leader of the CPC movement, for downplaying its antiabortion politics, complaining that Condon had "taken office promising to deemphasize what his organization is against (abortion) and reemphasize what it is for (women)." *Pro-Life Pro-Choicers? Is Extremism in Defense of Unborn Children a Vice or a Virtue?*, WORLD, Jan. 15, 1994, at 22. On the role of the crisis centers in developing some of these new forms of argument, see Siegel, *supra* note 22; see also *infra* note 71.

68. On the ways political argument is shaped in the movement-counter movement dynamic, see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 2005-06 Brennan Center Symposium Lecture*, 94 CAL. L. REV. 1323 (2006).
69. See generally Siegel, *supra* note 22 (discussing how social movement mobilization, conflict, and coalition each played a role in the evolution of the woman-protective antiabortion argument, in the process forging new and distinctly modern ways to talk about the right to life and the role morality of motherhood in the therapeutic, public health, and political rights idiom of late twentieth-century America).

We can see this decision to supplement fetal-focused arguments with appeals to woman-protective justifications for restricting abortion in the career of Jack Willke, head of the National Right to Life Committee. Willke pioneered fetal-focused arguments in the 1970s<sup>70</sup> and honed this mode of advocacy throughout the 1980s, but embraced WPAA in the early 1990s after opinion polling persuaded him that advancing claims about women's rights and welfare would help him persuade the uncommitted ambivalent middle.

Here is Willke, writing in 2001, recalling his conversion:

We had been making steady progress . . . [in] educating the nation, beyond reasonable doubt, that human life, in its complete form, began at the first cell stage. . . .

Then pro-abortion activists . . . changed the question. No longer was our nation arguing about killing babies. The focus, through their efforts, had shifted off the humanity of the unborn child to one of women's rights. They developed the effective phrase of "Who Decides?"

. . . .

Pro-lifers were still teaching in the traditional method that they had brought such astounding and continuing success until that time. They were still proving that this was a baby and telling how abortion killed the baby. However, increasingly, these facts fell on deaf ears, for this did not address the new argument of women's rights. This had to be answered, but we did not know what the effective answer was. The only way to find out would be by extensive market research. That's how they had come up with the idea of changing the question to "Who decides?" That was how we would discover how to countermand their new sales pitch. This would require extensive research, focus groups, polling and the testing of new ideas.

. . . We did the market research and came up with some surprising findings. . . . [The public] felt that pro-life people were not compassionate to women and that we were only "fetus lovers" who abandoned the mother after the birth. They felt that we were violent,

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70. In the 1970s, Jack Willke first drew on new photographic technologies to pioneer antiabortion argument through pictures of the embryo/fetus in utero—a technique that he and others perfected in ensuing decades. See Cynthia Gorney, *The Dispersion of John C. Willke*, WASH. POST, Apr. 22, 1990 (Magazine), at 20, 38-39.



that we burned down clinics and shot abortionists. We were viewed as religious zealots who were not too well educated. Clearly, their image of us was one that had been fabricated and delivered to them in the print and broadcast media by a liberal press.

After considerable research, we found out that the answer to their “choice” argument was a relatively simple straightforward one. We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan “Love Them Both,” and, in fact, the third edition of our Question and Answer book has been so titled, specifically for that reason.<sup>71</sup>

During this same period, David Reardon, a key proponent of woman-protective argument whose research is regularly cited by the antiabortion movement<sup>72</sup> and who has played a prominent role in promoting abortion restrictions in South Dakota and Missouri,<sup>73</sup> set out the main tenets of the

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71. J.C. Willke, *Life Issues Institute Is Celebrating Ten Years With a New Home* (Feb. 2001), <http://www.lifeissues.org/connector/01feb.html> (narrating how the Life Issues Institute “became a launching pad, nationally and internationally, for a new dynamic in pro-life education . . . [that] showcase[d] just how compassionate the movement is to women”); see also JOHN C. WILLKE & BARBARA H. WILLKE, *WHY NOT LOVE THEM BOTH? QUESTIONS AND ANSWERS ABOUT ABORTION* (1997); John & Barbara Willke, *Why Can't We Love Them Both?* in *LIFE AND LEARNING VII: PROCEEDINGS OF THE SEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE, JUNE 1997 AT LOYOLA COLLEGE*, at 10, 10 (Joseph W. Koterski, ed. 1998) (“My message tonight is not what I said five or ten years ago. Five or ten years ago my emphasis would have been on the right to life and on saving babies. But now I want to tell those who are involved in women’s helping centers that they are doing what I believe is the most important single thing that the pro-life movement is doing in our time. The big problem is that we have not publicized it enough—it’s a light hidden under a bushel—and so my message will be very direct. We’ve go to go out and sing from the housetops about what we are doing—how compassionate we are to women, how we are helping women—not just babies, but also women.”).
72. See, e.g., *Amicus Brief of the American Center for Law and Justice in Support of Petitioner at 6, 8-9, Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-1382), 2006 WL 1436693 (citing several works by David Reardon as authority); *Brief Amici Curiae of the United States Conference of Catholic Bishops and Other Religious Organizations in Support of Petitioner at 17, Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436693 (same); *Brief of Sandra Cano et al.*, *supra* note 15, at 22 (same); *Operation Outcry*, Linda Schlueter’s Testimony to South Dakota Task Force To Study Abortion (Oct. 20, 2005), *available at* <http://www.operationoutcry.org/pages.asp?pageid=29830> (same).
73. See Siegel, *supra* note 15, at page nn.150-52 and accompanying text (discussing Reardon’s role in supporting informed consent legislation and the 2006 abortion ban in South Dakota); Kit Wagar, *Abortion Foes Seek Vote in Missouri*, *KANSAS CITY STAR*, Nov. 30, 2007 (reporting that the Missouri ballot initiative is supported by Reardon and his organization,

emerging political strategy in a 1993 article entitled *Pro-Woman/Pro-Life Campaign Initiative*<sup>74</sup> and a 1994 article entitled *Politically Correct vs. Politically Smart: Why Politicians Should Be Both Pro-Woman and Pro-Life*,<sup>75</sup> subsequently published as his 1996 book *Making Abortion Rare*<sup>76</sup> (an antiabortion retort to Clinton's promise to make abortion "safe, legal and rare"<sup>77</sup>):

The abortion debate is about women's rights versus the rights of the unborn. Right?

Wrong. That is the way the pro-abortionists and media have framed the debate. They have consciously defined this issue in terms which polarize the public and paralyze the middle majority—the "fence sitting" fifty percent or more who feel torn between both the woman and the child—into remaining neutral.

....

... [W]e must insist that the proper frame for the abortion issue is not women's rights versus the unborn's rights, but rather women's *and* children's rights versus the schemes of exploiters *and* the profits of the abortion industry.<sup>78</sup>

In a section of the article entitled *To Love a Child, First Love the Mother*, Reardon squarely addressed the reservations of advocates who opposed abortion out of concern for the unborn:

While committed pro-lifers may be more comfortable with traditional "defend the baby" arguments, we must recognize that many in our society are too morally immature to understand this argument. They

the Elliott Institute); Letter from David C. Reardon, Ph.D., to Mo. Sec'y of State John Stegmann (Jan. 15, 2008) (on file with The Yale Law Journal) (recommending a ballot initiative to expand abortion providers' liability); *infra* note 92 and accompanying text.

74. David C. Reardon, *Pro-Woman/Pro-Life Campaign Initiative*, POST-ABORTION REV., Winter 1993, available at <http://www.afterabortion.info/PAR/V1/n1/prowoman.htm>.

75. David Reardon, *Politically Correct vs. Politically Smart: Why Politicians Should Be Both Pro-Woman and Pro-Life*, 2 POST-ABORTION REV., Fall 1994, available at <http://www.afterabortion.info/PAR/V2/n3/PROWOMAN.htm>.

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

77. See, e.g., Cynthia Tucker, *Making Abortion Safe, Legal and Rare*, SAN FRAN. CHRON., Jan. 22, 1993, at A31.

78. Reardon, *supra* note 75, at 1.

must be led to it. And the best way to lead them to it is by first helping them to see that abortion does not help women, but only makes their lives worse.<sup>79</sup>

A “committed pro-lifer” might understand the moral wrong of abortion as a wrong to the child, but others, less enlightened, needed to be “led” to this understanding, and would, if they were first led to believe abortion was a harm to women.

Where Willke discussed abortion’s harm to women in the language of Christian love, Reardon discussed abortion’s harm to women in the language of public health. Since the 1980s, Reardon had conducted numerous studies claiming to document post-abortion syndrome—studies that have subsequently been cited in movement documents such as the Report of the South Dakota Task Force on Abortion,<sup>80</sup> even as psychologists, psychiatrists, and government oncologists extensively criticize the findings.<sup>81</sup> In *Making*

79. *Id.* at 3 (emphasis added).

80. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 41 (reviewing testimony on “medical ethics” from Reardon); *id.* at 43 (citing Reardon’s study to show that “women with a known history of abortion experience higher rates of mental health problems of various forms when compared to women without a known abortion history”); *id.* at 44 (citing Reardon for the proposition that women who had abortions were more likely to experience Generalized Anxiety Disorder and clinical depression); *id.* at 45 (citing Reardon’s study linking abortion to substance abuse); *id.* at 50 (“Reardon and colleagues . . . found that women who aborted when compared to women who delivered, were 62% more likely to die from any cause.”).

81. On the issue of whether abortion is linked to adverse psychological sequelae, studies in psychology and psychiatry consistently refute movement claims that abortion causes clinically significant psychological harm (as distinct from feelings that accompany significant life events). For authorities that repudiate “post-abortion syndrome” or various of the claims associated with it, see Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194, 1202-03 (1992) (“The best studies available on psychological responses to unwanted pregnancy terminated by abortion in the United States suggest that severe negative reactions are rare, and they parallel those following other normal life stresses.”); David A. Grimes & Mitchell D. Creinin, *Induced Abortion: An Overview for Internists*, 140 ANNALS INTERNAL MED. 620, 624 (2004) (“[Based on a review of the literature], induced abortion does not harm women’s emotional health . . . . Indeed, the most common reaction to abortion is a profound sense of relief. In some studies, abortion has been linked with improved psychological health because the abortion resolved an intense crisis in the woman’s life.”); Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 168 CANADIAN MED. ASS’N J. 1257, 1257-58 (2003) (“[David Reardon and his colleagues] report that subsequent psychiatric admission rates were higher for women who had an abortion than for those who delivered . . . . This conclusion is misleading . . . . It is inappropriate to imply from these data that abortion leads to subsequent psychiatric problems . . . . The findings of Reardon and colleagues are inconsistent with a number of well-designed earlier studies . . . . All of these studies concluded that the emotional well-being of women who abort an unplanned pregnancy does

not differ from that of women who carry a pregnancy to term. . . ."); 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,  $SD = .94$ )."); Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777, 777, 780 (2000) ("Most women do not experience psychological problems . . . 2 years postabortion, but some do. Those who do tend to be women with a prior history of depression . . . . Results support prior conclusions that severe psychological distress after an abortion is rare."); Lisa Rubin & Nancy Felipe Russo, *Abortion and Mental Health: What Therapists Need To Know*, 27 WOMEN & THERAPY 69, 73 (2004) ("Antiabortion advocates allege that 'postabortion syndrome' is a type of post-traumatic stress disorder (PTSD), though no scientific basis exists for applying a PTSD framework to understand women's emotional responses to a voluntarily obtained legal abortion."); Nancy Felipe 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 Stotland, *The Myth of Abortion Trauma Syndrome: Update, 2007*, 42 PSYCHIATRIC NEWS 28, 28 (2007) ("[T]he assertions of psychological damage made by legislatures and the Supreme Court are contrary to scientific evidence. . . . APA [American Psychiatric Association] invests millions of dollars and years of expert deliberation to craft the titles and definitions of psychiatric diagnoses. 'Abortion trauma syndrome' and 'post-abortion psychosis' are inventions disguised to mimic those diagnoses, and they demean the careful process. . . . Co-opting psychiatric nomenclature and basing public policy on false assertions are not [worthy of our highest respect]."); see also AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed. 1994) (failing to recognize post-abortion syndrome). As this essay goes to press, the APA's Task Force on Mental Health and Abortion has just released a report finding that "[t]he best scientific evidence published indicates that among adult women who have an unplanned pregnancy the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy." APA TASK FORCE ON MENTAL HEALTH AND ABORTION, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 5-6 (2008), available at <http://www.apa.org/releases/abortion-report.pdf> (emphasis omitted).

On the issue of whether abortion is linked to an increased incidence of breast cancer, both the National Cancer Institute and the World Health Organization have conducted careful inquiries and concluded that the evidence shows no association. See National Cancer Institute, Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk (May 30, 2003), <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage>; National Cancer Institute, Summary Report: Early Reproductive Events and Breast Cancer Workshop (Mar. 25, 2003), <http://www.cancer.gov/cancerinfo/ere-workshop-report>; 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>. Nevertheless, the South Dakota Task Force Report refuses to follow these medical findings and strongly intimates that a correlation between abortion and breast cancer exists by asserting that "it is clear that the CDC [Center for Disease Control] statistics [on abortion mortality] do not include the vast majority of deaths due to abortions because they do not include deaths from suicide, deaths from physical complications from abortions, and deaths

*Abortion Rare*, Reardon is quite clear that empirical research on the psychological consequences of abortion is a useful way of talking about the moral evil of abortion in terms that have authority for audiences not moved by direct appeals to divine authority:

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, 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>82</sup>

But social science evidence is contestable, and Reardon does not urge advocates to rely on it alone. His 1990s articles also urge politicians to argue from a simple claim of sex-role morality that is in turn based in religious conviction. A pregnant woman is a mother, and a mother's interests are defined by the needs of her child, Reardon argued:

Pro-life leaders who are nervous about focusing more attention on the woman for fear that it will distract attention away from the unborn, should meditate on the following truism: One cannot help a child without helping the mother; one cannot hurt a child without hurting the mother.

This intimate connection between a mother and her children is part of our created order. Therefore, protecting the unborn is a natural

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*due to any of the cancers in which abortions may be a significant contributing factor,"* SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 49 (emphasis added).

82. REARDON, *supra* note 76, at 11. More recently, replying to critics in the antiabortion movement who, like Surgeon General Koop, questioned the empirical and moral basis of Reardon's work, Reardon explained:

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.

Interview by Zenit News Agency with Dr. David C. Reardon, Director of the Elliot Inst., in Springfield, Ill. (May 12, 2003), [http://www.afterabortion.info/vault/Zenit\\_News\\_PoorChoice\\_Interview.pdf](http://www.afterabortion.info/vault/Zenit_News_PoorChoice_Interview.pdf).

byproduct of protecting mothers. This is necessarily true. After all, in God's ordering of creation, it is only the mother who can nurture her unborn child. All the rest of us can do is to nurture the mother.

This, then, must be the centerpiece of our pro-woman/pro-life agenda. The best interests of the child and the mother are always joined—even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it. We can best help each by helping both. If we hurt either, we hurt both.

The goal of our pro-woman/pro-life agenda is to lead our nation to an understanding of this reality.<sup>83</sup>

Of course to make this claim about women's interest persuasive, Reardon needed some explanation for the large numbers of women seeking abortions. How would using the criminal law to control women help women? Reardon's response was to insist that women who have abortions do not in fact want them; they are coerced into the procedure or do not grasp its implications. In his 1993 article, *Pro-Woman/Prolife Initiative*, Reardon explained:

It is our belief that most politicians don't know how to handle the abortion issue to their best advantage. Candidates must learn to *project themselves as both pro-woman and pro-life*. This is done by emphasizing one's knowledge of *the dangers of abortion and the threat of women being coerced into unwanted abortions* by others. We have a program to train individuals, including politicians and lobbyists, on how to debate the abortion issue from the pro-woman perspective. This program includes detailed evidence which shows that many women are being coerced or manipulated into *unwanted abortions*. Effective measures to protect women from unwanted abortions, and to increase clinic liability for dangerous and unwanted abortions are fully detailed.

*This approach breaks down the myth that pro-lifers care only about the unborn while "pro-choicers" care about women.*<sup>84</sup>

In the following year's article, *Politically Correct vs. Politically Smart: Why Politicians Should be Both Pro-Woman and Pro-Life*, Reardon emphasized that claims of coercion and informed consent were at the heart of the pro-woman argument. "Reframing the abortion debate in this way is not difficult. But it

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83. Reardon, *supra* note 75, at 3.

84. Reardon, *supra* note 74 (emphasis added).

does require pro-life candidates to become familiar with new facts, arguments, and media ‘sound bites,’”<sup>85</sup> he argued. Key among them was that women are “being coerced into *unwanted* abortions” and need legislation “guaranteeing the right of women to make free and *fully informed* decisions about abortion.”<sup>86</sup> The law of tort now supplied a language to allege abortions were wrongfully imposed on women. (Reardon emphasized the political value of incorporating informed consent talk into antiabortion argument at a time when he had just completed a casebook advising tort lawyers how to sue abortion providers<sup>87</sup> and an amicus brief emphasizing informed consent themes in constitutional litigation under *Roe*.<sup>88</sup>)

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85. Reardon, *supra* note 75, at 1.

86. *Id.*

87. David Reardon, *Abortion Malpractice: The Book*, 2 POST-ABORTION REV., Winter 1993, at 1, available at <http://www.afterabortion.info/PAR/V2/n1/MALPRACT.htm>:

Last summer I was asked to write an introductory manual for attorneys on abortion malpractice. . . . Life Dynamics, a pro-life group spearheading education efforts for attorneys interested in abortion malpractice, has already distributed over 10,000 copies of this manual. In addition, on March 4th and 5th, Life Dynamics sponsored a conference for attorneys interested in representing plaintiffs in abortion malpractice.

The strategy of obstructing the provision of abortion services through malpractice litigation was gaining popularity at the time. See Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489. Professor Northern noted that:

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

*Id.* at 494-95 (footnotes omitted).

88. See David Reardon, *Elliot Institute’s Voice Heard at the Supreme Court*, POST-ABORTION REV., Winter 1993, available at <http://www.afterabortion.info/PAR/V1/n1/HeardbyCourt.htm>:

Drawing on our past research, the Elliot Institute provided evidence to the court demonstrating that the unregulated abortion industry is denying women

The antiabortion movement was now positioned not only to answer the claims of the women's movement that so troubled Willke, but to appropriate feminism's political authority and express antiabortion argument in the language of women's rights and freedom of choice. In *Making Abortion Rare*, Reardon urged antiabortion politicians to "take back the terms 'freedom of choice' and 'reproductive freedom'" and "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>89</sup> Woman-protective antiabortion argument fused therapeutic and public health talk of a post-abortion syndrome with talk of choice and informed consent drawn from feminism, constitutional law, and medical malpractice law.<sup>90</sup> Today, Reardon is advancing woman-protective antiabortion claims of harm and coercion through a website disseminating ads that call abortion the "Unchoice" and that

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information they need to make an informed choice about the risks of abortion versus childbirth. We also presented evidence showing that women who receive poor counseling are more likely to suffer greater post-abortion problems.

While the bulk of the brief was devoted to the informed consent issue, we also struck at the core issues underlying *Roe*.

Contrary to the above claims, however, no brief attributable to Reardon or the Elliot Institute appears in the Third Circuit docket sheet for *Casey*, nor in the Supreme Court amicus briefs.

89. REARDON, *supra* note 76, at 96. "[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." *Id.* at 96-97; see also EWTN, *A Challenge to Roe vs. Wade: Part I* (Eternal Word Television Network radio broadcast), available at [http://www.ewtn.com/vondemand/audio/file\\_index.asp?SeriesId=6619&pgnu](http://www.ewtn.com/vondemand/audio/file_index.asp?SeriesId=6619&pgnu) (interview between Frank Pavone and Harold Cassidy in the "Defending Life" radio program) (transcript on file with author). Cassidy argues that "any waiver of the fundamental right to a relationship with her child that a mother gives prior to the birth of child is uninformed," and responds to Pavone:

Pavone: You know Harold, the reason I really like this case is that while the abortion proponents always say "we're rallying for the rights of women," what's really happening here is that, this is showing that it's the abortionists who are taking away the rights of women. . . .

Cassidy: Well you're right, it's exposed the false allegation and perception that the abortion industry is interested in defending the rights of women. . . . What has been exposed is a common experience, that there isn't a full appreciation of what they're surrendering for themselves [when they choose to give up motherhood].

*Id.*

90. REARDON, *supra* note 76, at 96 ("[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.").



assert sixty-four percent of abortions are coerced,<sup>91</sup> as well as through a petition campaign for a tort statute in Missouri emphasizing the same message.<sup>92</sup>

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91. *Abortion Is the Unchoice*, Print Ads, <http://www.unfairchoice.info/display.htm> (last visited May 5, 2008) (featuring collection of twelve antiabortion advertisements). Several of the ads include the claim that sixty-four percent of abortions are coerced and state that sixty-five percent of women who have had abortions suffer symptoms of posttraumatic stress disorder. See, e.g., *Abortion Is the Unchoice, Like Most Women, Mary Didn't Want an Abortion*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/BrokenLamp4ColorAd.pdf> (last visited May 5, 2008); *Abortion Is the Unchoice, She Believed the Guy in the Letter Jacket Who Said He Loved Her . . . and the Guy in the White Coat Who Said It's Just a Blob of Tissue*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/Diner4ColorAd.pdf> (last visited May 5, 2008); *Abortion Is the Unchoice, They Gave Her a Choice Between an Unwanted Abortion . . . and a Night Sleeping in This*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/Box4ColorAd.pdf> (depicting cardboard box and stating that “[i]n Virginia, a homeless woman testified that she was forced to choose between an abortion and staying at the shelter”) (last visited May 5, 2008); *Abortion Is the Unchoice, If We Don't Help Her . . . One of These Days, She's Gonna Get It Right*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/Suicide4ColorAd.pdf> (depicting handful pills and quoting women who claim to have attempted suicide) (last visited May 5, 2008). One ad states that women who have terminated a pregnancy are six times more likely to commit suicide than women who have given birth. See *Abortion Is the Unchoice, For the Past 20 Years, Dr. Theresa Burke has Helped 3,245 Invisible Women*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/Burke4ColorAd.pdf> (last visited May 5, 2008). Another advertisement claims that substance abuse among women who have had an abortion is five times higher. *Abortion Is the Unchoice, Since the abortion . . . Mary has made a few new friends*, <http://www.unfairchoice.info/pdf/DisplayAds/4CAAds/Bottles4ColorAd.pdf> (last visited May 5, 2008).

The Unchoice Web site's twelve ads depict pressures on women deciding whether to end a pregnancy as emanating from sources such as poverty, domestic violence, and pressure from coercive partners, parents, and abortion providers. Other ads indicate that women who have had abortions suffer from alcoholism, suicide, depression, and physical injuries. Together, the ads depict social structural sources of injustice and injury in the family of concern to progressives, suggesting that these harms are all caused by and can be remedied through the restriction of abortion.

92. See Mo. Sec. of State, 2008 Initiative Petitions Approved for Circulation in Missouri, Statutory Amendment to Title XXXVI of the Revised Statutes of Missouri, Relating to Restricting Abortions, [http://www.sos.mo.gov/elections/2008petitions/o8init\\_pet.asp#2008027](http://www.sos.mo.gov/elections/2008petitions/o8init_pet.asp#2008027) (last visited May 5, 2008). A petition in Missouri, submitted by David Reardon on behalf of the Stop Forced Abortions Alliance, *id.*, sought to add to the November ballot a statute that would impose civil liability for medical negligence upon any physician who “recommends or performs an abortion” in absence of any of the following: (1) the woman seeking the abortion must have an evaluation beforehand by a licensed physician, psychologist, social worker, or registered nurse in order to “identify any pressures to consent to the abortion” and “risk factors”; (2) the results of this screening must be shared with the woman and the physician “in such detail that a reasonable patient may consider material to the decision of undergoing an elective procedure”; and (3) the physician

This story of women's decisionmaking as coerced or confused is a standard and seemingly central part of contemporary woman-protective arguments for abortion restrictions—whether absolutist or incremental in form. The claim is not only that women will be harmed by abortion but that they have been pushed into abortions they do not want and misled into abortions they will regret.<sup>93</sup>

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“has formed a reasonable medical judgment, documented in the permanent record” that either medical studies show that the risks associated with abortion are minimal for the woman in question, or that the risks of carrying the pregnancy to term are greater than those of an abortion, despite a “good faith effort” by the physician to find alternatives that would decrease the risks of pregnancy to be lower than those associated with abortion. Mo. Sec’y of State, Statutory Amendment to Title XXXVI of the Revised Statutes of Missouri, Relating to Restricting Abortions, 2008-027: The Proposed Amendment (2008), available at <http://www.sos.mo.gov/elections/2008petitions/2008-027.asp>.

The Secretary of State along with prochoice groups has characterized the bill as a de facto abortion ban, but proponents argue that it is just a “good consumer protection law.” See T.W. Farnam, *Antiabortion Initiatives Divide Movement*, WALL ST. J., Apr. 21, 2008, at A4; Stop Forced Abortions Alliance, *Frequently Asked Questions & Answers*, <http://www.stopforcedabortions.org/faq.htm> (last visited May 5, 2008). The Web site supporting the Missouri petition repeats the themes of Reardon’s “Unchoice” ad campaign when it asserts that “64% [of abortions] involve coercion, which can become severe” and that “[w]omen pay a high price for a choice that’s not a choice,” and similarly buttresses these claims with a series of graphic stories. See Stopped Forced Abortions Alliance, *Forced Abortion in America: Coercion, Violence, and Murder . . . Risks and Injustices to Women* (Dec. 2007), available at <http://www.stopforcedabortions.org/docs/ForcedAbortions.pdf>.

According to a recent article in the *Washington Post*, supporters of the initiative are unlikely to gain the approximately 90,000 signatures required to get the petition on the ballot. Farnam, *supra*, at A4.

93. Today, the woman-protective antiabortion argument conspicuously incorporates into its coercion claims progressive narratives of social injustice to women. See *supra* note 91. By contrast, in the nineteenth century, those who led the campaign to criminalize abortion and contraception made claims that controlling fertility was against women’s nature; but they generally ascribed abortion to women’s licentiousness—their desire for sexual gratification without the responsibilities of motherhood. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 294 (1992).

In the nineteenth century, Horatio Robinson Storer, the leader of the abortion criminalization campaign, argued that “[i]ntentionally to prevent the occurrence of pregnancy, otherwise than by total abstinence from coition, intentionally to bring it, when begun, to a premature close, are alike disastrous to a woman’s mental, moral, and physical well-being.” HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 76 (Boston, Lee & Shepard 1866); see also EDWIN M. HALE, *THE GREAT CRIME OF THE NINETEENTH CENTURY* 10 (Chicago, C.S. Halsey 1867) (observing that “abortion brings sickness and perhaps death, or numerous other evils in its train, besides *remorse*, which will come sooner or later.”).

When Harold Cassidy, one-time lawyer for Mary Beth Whitehead in the *Baby M* surrogacy case<sup>94</sup> and an architect of South Dakota's recent ban and "informed consent" laws, joined Allan Parker of the Justice Foundation to represent Norma McCorvey and Sandra Cano, the original plaintiffs in *Roe* and *Doe*, in an effort to reopen their cases, the evidence Cassidy and Parker submitted in support of the litigation was 1,000 affidavits demonstrating that abortion harms women—the same Operation Outcry affidavits that South Dakota later relied upon in enacting its 2006 abortion ban and that Justice Kennedy cited in *Carhart* in 2007.<sup>95</sup> Litigation documents from the suit to reopen *Roe* and *Doe* express Cassidy and Parker's belief that the affidavits would present the Court with a new understanding of women's decisional capacity in matters concerning abortion.<sup>96</sup>

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94. Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 97 (2007); Harold J. Cassidy & Associates, The Attorney, <http://www.haroldcassidy.com> (last visited May 5, 2008) ("Long known as an advocate and defender of the rights of pregnant mothers—he was chief counsel in the Baby M case which declared surrogacy contract unenforceable as exploitative of women and against public policy . . .").

95. Operation Outcry, a program of the Justice Foundation, first collected the affidavits for lawsuits filed by Allan Parker and Harold Cassidy on behalf of the original plaintiffs in *Roe v. Wade*, 410 U.S. 113 (1973) (Norma McCorvey), and *Doe v. Bolton*, 410 U.S. 179 (1973) (Sandra Cano), that sought to introduce new evidence of abortion's harm to women as grounds for reopening their cases. See Brief in Support of Rule 60 Motion for Relief from Judgment at 9–11, 28–30, *McCorvey v. Hill*, No. 3:03-CV-1340 (formerly Nos. 3-3690-B and 3-3691-C), 2003 U.S. Dist. LEXIS 12986 (N.D. Tex. 2003) (seeking to reopen *Roe*); *supra* note 22. The focus of the brief's argument and the affidavits appended to it was to put before the Court evidence alleging abortion's harm to women. See *id.* at \*4, \*35–\*42; see also Memorandum of Law in Support of Rule 60 Motion for Relief from Judgment at 12–19, *Cano v. Bolton*, No. 13676, 2005 U.S. Dist. LEXIS 41702 (N.D. Ga. Aug. 25, 2003), available at <http://www.thejusticefoundation.org/images/64456/DoeRule60Memorandum.pdf> (seeking to reopen *Doe v. Bolton*, by citing "post-abortive" women's affidavits stating that abortion had caused them psychological disorders, suicidal ideations, and physical complications, and were often the result of coercion); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (Kennedy, J., citing the amicus brief of Sandra Cano). The Cano brief in *Carhart* provided ninety-six pages of excerpts from the same Operation Outcry affidavits testifying that "abortion in practice hurts women's health" that were used in used in *McCorvey v. Hill* and *Cano v. Bolton*. See Brief of Sandra Cano et al., *supra* note 15, app. at 11-106 (sampling "178 Sworn Affidavits of Post Abortive Women" of the approximately 2,000 on file with The Justice Foundation).

The South Dakota Task Force Report also repeatedly relied on the Operation Outcry affidavits. See SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 21–22, 33, 38–39.

96. Memorandum of Law in Support of Rule 60 Motion for Relief from Judgment, *supra* note 95, at 22-23 ("The attached Affidavit testimony of more than a thousand women who actually had abortions shows the unproven assumption of *Roe* that abortion is "a woman's choice" is a lie. The 'choice,' a waiver of a constitutional right to the parent-child

Cassidy, who played a central role in introducing woman-protective arguments into South Dakota via a 2004 abortion ban bill<sup>97</sup> (which the

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relationship, requires a voluntary decision with full knowledge. In addition to being coerced, women are also lied to and misled.”); *see also* Brief in Support of Rule 60 Motion for Relief from Judgment, *supra* note 95, at 34 (“Under the assumptions of *Roe* and *Casey*, women were to be ‘free’ to make their own decision about whether to abort or carry a child to birth. This assumes that they are free from pressure or coercion, and that their physician has provided them with complete and adequate knowledge of the nature of abortion and its long term consequences. The women who have experienced abortion testify in sworn Women’s Affidavits how they were not informed of the consequences.” (citation omitted)).

97. The Thomas More Law Center announced that it had worked closely with South Dakota Representative Matt McCaulley, chief sponsor of the abortion ban bill, in the drafting and legal strategy of the bill, and identified Harold Cassidy as “associate counsel” for the Center. *See* Siegel, *supra* note 15, at 1027 n.150.

The legislative history suggests Harold Cassidy’s role in introducing woman-protective justifications for banning abortion to South Dakota legislature. On January 22, 2004, a bill banning abortion, H.B. 1191, was introduced into the South Dakota State House and referred to the Committee on State Affairs. *See* South Dakota Legislature, Journal of the House, 79th Sess. (Jan. 22, 2004), <http://legis.state.sd.us/sessions/2004/journal/jrnH01221400.htm#6360>. The proposed ban contained no woman-protective argument. *See* H.B. 1191, 79th Sess. (S.D. 2004) (as introduced in the South Dakota Legislative Assembly, 2004) available at <http://legis.state.sd.us/sessions/2004/bills/HB1191p.pdf>.

On February 5, 2004, the House State Affairs Committee held a hearing on H.B. 1191, at which time Harold Cassidy testified in favor of the proposed ban, as did a group of women who shared their feelings about abortion with the Committee. Cassidy asserted that the new claim that abortion emotionally harms women may encourage the Court to hear the case, and possibly overturn *Roe*. Cassidy concluded with respect to H.B. 1191 that “[i]f you can prove the facts, the allegations you made, it will be upheld.” Joe Kafka, *Abortion Bill Sent to House Floor*, ABERDEEN NEWS (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).

In addition to Cassidy, there were a good number of witnesses from out of state. Also present were a group of South Dakotans who represented organizations active in the national antiabortion movement. *See* South Dakota Legislature, House State Affairs Committee Minutes, 79th Sess. (Feb. 5, 2004), <http://legis.state.sd.us/sessions/2004/cmminute/minHST02051700.htm>. John Brannian, a professor of reproductive physiology at the University of South Dakota who testified in opposition to the bill, reported that “Cassidy praised the committee for its ‘progressive’ ideas and then presented a parade of carefully selected testimonials by people flown in from California, New York and elsewhere,” concluding that “Cassidy was effective.” John Brannian, Letter to the Editor, ARGUS LEADER MEDIA (Sioux Falls, S.D.), Feb. 23, 2004, at 5B. After Cassidy’s testimony, the Committee passed the bill by an “overwhelming” vote. In Brannian’s view the hearing “was an alarming example of how an outside special-interest group can manipulate our elected representatives.” *Id.*

On February 5, 2004, the day Cassidy testified, an amendment to H.B. 1191 was introduced and passed containing new language asserting the woman-protective antiabortion argument in the form Harold Cassidy had expressed it in his 2003 efforts to reopen Norma McCorvey’s case (namely, that abortion threatens a pregnant woman’s

incrementalist National Right to Life Committee played a role in blocking<sup>98</sup>) and then in crafting South Dakota's abortion "informed consent" laws, has

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legally protected interest in her relationship with her unborn child, that women who seek abortions have not given and perhaps are incapable of giving a "truly informed or voluntary consent" to the procedure, and that abortion subjects women to a variety of symptoms associated with PAS including depression, suicidal ideation, and attendant physical harm). See South Dakota Legislature, House State Affairs Committee Minutes, 79th Sess. (Feb. 5, 2004) (amendment to Bill 1191), <http://legis.state.sd.us/sessions/2004/cmminute/minHST02051700.htm#14690>:

The Legislature finds that, based upon the evidence derived from thirty years of legalized abortions in this country, the interests of pregnant mothers protected under the South Dakota Bill of Rights have been adversely affected as abortions terminate the constitutionally protected fundamental interest of the pregnant mother in her relationship with her child and abortions are performed without a truly informed or voluntary consent or knowing waiver of the woman's rights and interests. The Legislature finds that the state has a duty to protect the pregnant mother's fundamental interest in her relationship with her unborn child. . . .

The Legislature finds that abortion procedures impose significant risks to the health and life of the pregnant mother, including subjecting women to significant risk of severe depression, suicidal ideation, suicide, attempted suicide, post traumatic stress disorders, adverse impact in the lives of women, physical injury, and a greater risk of death than risks associated with carrying the unborn child to full term and childbirth.

*Accord* sources cited *supra* note 96 (making the same argument about women's lack of informed consent invoked in the *McCorvey v. Hill* and *Cano v. Bolton* litigation materials).

The newly amended H.B. 1191 containing the woman-protective rationale then passed the Committee the same day, see South Dakota Legislature, House State Affairs Committee Minutes, 79th Sess. (Feb. 5, 2004) (H.B. 1191, passed as amended), <http://legis.state.sd.us/sessions/2004/cmminute/minHST02051700.htm#14692> (last visited Feb. 4, 2008). In the following two weeks, the House and Senate of the South Dakota legislature passed abortion ban bills specifically including the woman-protective language. See H.B. 1191 (House), 79th Sess. (S.D. Feb. 10, 2004), available at <http://legis.state.sd.us/sessions/2004/bills/HB1191H.pdf> (last visited Feb. 4, 2008); H.B. 1191 (Senate), 79th Leg. (S.D. Feb. 24, 2004), available at <http://legis.state.sd.us/sessions/2004/bills/HB1191S.pdf> (last visited Feb. 4, 2008).

Harold Cassidy wrote an unpublished letter to the *New York Times* claiming that testimony showing abortion's harm to women had moved the South Dakota legislature to pass a ban bill that protected women from abortion. See Harold Cassidy, Weekly Column: Reply to N.Y. Times Editorial of March 12, "A Warning from South Dakota," <http://www.haroldcassidy.com/weekly.php> (last visited Feb. 4, 2008) ("the South Dakota Legislature, in February 2004, was moved by the tears and the pleas of these and many other women—who argued that abortion exploits women and destroys some of their most important rights and interests and adversely affects their health—to craft a Ban Bill designed to protect women from the harms of abortion.").

98. See Life Site News, South Dakota Governor Willing to Sign Abortion Ban with Minor Changes: South Dakota Right to Life and National Right Life Opposed to the Bill (Mar. 9, 2004), <http://www.lifesite.net/ldn/2004/mar/04030902.html> ("From the beginning,

made quite clear his doubt that women have the capacity to make “a rational, informed decision” about ending a pregnancy.<sup>99</sup> These views are now official state policy in South Dakota: they dominate South Dakota’s 2005 Task Force Report on abortion, which served as a justification for a draconian “informed consent” law enacted that same year, a ban on abortions in the state enacted the following year and then repealed by referendum,<sup>100</sup> as well as the presently proposed ban, which will appear in the ballot in the fall of 2008.<sup>101</sup> The

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officials with South Dakota Right to Life and National Right to Life have voiced opposition to the Bill stating this was not the right time to attempt a ban on abortions. Richard Thompson, President of the Thomas More Law Center, a public interest law firm that aided in the drafting and legal strategy of the legislation, responded to their opposition saying, “When is it the wrong time to do what is right? After 31 years and 40 million murdered babies under *Roe v. Wade*, it is essential that we continue to confront the Court with their immoral and lawless decision that has no basis in the Constitution, history or traditions of our nation.”); Life Site News, Law Center Issues Report Exposing Disturbing Details of National Right to Life’s Efforts to Kill South Dakota’s Abortion Ban (Apr. 1, 2004), <http://www.lifesite.net/ldn/2004/apr/04040106.html> (reporting NRLC’s opposition to South Dakota’s ban); Joe Kafka, *Anti-Abortion Sides Split over Legislation*, YANKTON DAILY PRESS DAKOTAN, Feb. 2, 2005, available at [http://www.yankton.net/stories/020205/news\\_20050202015.shtml](http://www.yankton.net/stories/020205/news_20050202015.shtml) (describing conflict among antiabortion groups and reporting that Senator Julie Bartling, chief co-sponsor of South Dakota’s 2005 task force and informed consent bills, stated, “[i]t is very important to law the groundwork for what we hope in the new [sic] few years will be a complete ban on abortions in South Dakota”).

99. See *supra* note 89; *infra* notes 247-248, 270 and accompanying text.
100. Each of these claims is repeatedly asserted in South Dakota’s task force report on abortion. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20; see also Siegel, *supra* note 15.
101. The Task Force Report is prominently posted on the Web site of Vote Yes For Life, the group spearheading the petition drive for the ban. See Vote Yes For Life, <http://www.voteyesforlife.com> (last visited May 5, 2008) (featuring the Task Force Report displayed alongside the ban initiative on front page). Samuel Casey, head of the Christian Legal Society and one of the lawyers prominently involved in drafting the 2008 ban, describes its relationship to the Task Force Report:

[T]he Attorney General of South Dakota instituted a working group of South Dakota citizens and legal counsel to review the legislative history of abortion regulation in South Dakota, including the Report of the South Dakota Task Force to Study Abortion, as submitted to the Governor and Legislature of South Dakota (December 2005) (the “Task Force Report”) and consult with him as to how to best draft constitutional legislation protecting an unborn child’s intrinsic right to life and the mother’s natural intrinsic right to a relationship with her child, with a priority concern for the protection of the mother’s health in light of the multitude of harms posed by abortion. . . . After months of work and extensive telephonic and face-to-face collegial deliberations, the Attorney General’s 13-member working group formally concurred in the proposed petition that is now being circulated (hereafter the “Abortion Initiative Measure”) for qualifying signatures by the Vote Yes for Life Campaign ([www.voteyesforlife.com](http://www.voteyesforlife.com)).

seventy-page task force report found that women in the state had not in fact chosen to have abortions; rather they were misled or coerced into having abortions. For these claims, the task force relied on the Operation Outcry affidavits Cassidy and Parker gathered in their bid to reopen *Roe*.<sup>102</sup> The South Dakota Task Force asserted it received the testimony of 1950 women, reporting that “[v]irtually all of them stated they thought their abortions were uninformed or coerced or both.”<sup>103</sup> The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or

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In my view, based upon the scientific and medical findings in the Task Force Report, the people of South Dakota are correct to enact such a law at this time. Based upon current scientific and medical knowledge and the legal testimony of women who have undergone abortions over the past thirty years, the report demonstrates that the most critical factual assumptions made by the United States Supreme Court in *Roe v. Wade* and subsequent decisions are incorrect to the detriment of the millions of women who have been subjected to the procedure. Enactment of this Abortion Initiative Measure will provide an opportunity to bring these facts to light for the first time in a court of law.

The Abortion Initiative Measure was composed with the public debate and election in mind, as well as the need to ultimately succeed in court. . . .

Let there be no mistake. The Abortion Initiative Measure is an incremental step that does not prohibit all abortions. While it does not represent the total prohibition sought by so many people of good will for the sake of the unborn child, it does prohibit all of those abortions we can constitutionally achieve at this time while laying the foundation for the long term goal of an America where every child by law is welcomed in life and every mother is protected from the harms of unnecessary abortion.

Vote Yes for Life, Endorsements for the Initiative: Samuel B. Casey, <http://www.voteyesforlife.com/initiative.html#SamuelCasey> (last visited May 5, 2008); see also Cara Hetland, Minnesota Public Radio, *Petition Drive To Ban Most Abortions in South Dakota*, Mar. 12, 2008, at <http://minnesota.publicradio.org/display/web/2008/03/12/sdabortionpetition/?rsource=1> (“We have contacted legal experts all over this nation, and we’ve had 22 legal experts from our own state of South Dakota that have looked at this law along with our Attorney General,’ Unruh [Executive Director of Vote Yes For Life campaign] says.”).

102. See 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 of the Justice Foundation, entered into the record affidavits of approximately 1500 women who had negative experiences with their abortions).
103. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 31, 38. The report relies heavily on the affidavits and repeatedly cites them as evidence. See, e.g., *id.* at 33 (“The nearly 2,000 post-abortive women who provided testimony to the Task Force described this damage to themselves. We find all of these testimonies moving and the following are examples of their expressions of guilt, sadness, and depression . . .”).

even the clinic—because “[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child.”<sup>104</sup> The Report asserted that a woman who is encouraged “to defy her very nature as a mother to protect her child,”<sup>105</sup> is likely to “suffer[] significant psychological trauma and distress.”<sup>106</sup> It thus recommended that the state ban abortion to protect “the pregnant mother’s natural intrinsic right to her relationship with her child, and the child’s intrinsic right to life.”<sup>107</sup>

Of course, the South Dakota legislature is not the only governmental body the Operation Outcry affidavits have influenced. The affidavits have now played a role in the Supreme Court. In *Carhart*, Justice Kennedy wrote:

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow.<sup>108</sup>

Justice Kennedy’s opinion for the Court took judicial notice of the fact that some women come to regret their decision to abort a pregnancy, illustrating this point by reference to an amicus brief containing the Operation Outcry affidavits,<sup>109</sup> even as it ignored another amicus brief featuring the stories of women who actually elected second-trimester abortions.<sup>110</sup> Given that the

104. *Id.* at 56.

105. *Id.*

106. *Id.* at 47-48. Openly rejecting the findings of numerous government and professional associations, the Task Force found that women who abort a pregnancy risk a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation, to breast cancer. *Id.* at 43-46, 52.

107. *Id.* at 67.

108. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

109. The opinion emphasizes that “[t]he State has an interest in ensuring so grave a choice is well informed,” and observes:

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

*Id.*

110. Justice Kennedy’s opinion ignores an amicus brief containing the stories of over 150 women who elected second-trimester abortions, see Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as *Amici Curiae* in Support of Respondents, *Carhart*, 127 S. Ct. 1610 (Nos. 05-1382, 05-380), 2006 WL 2736633 [hereinafter



Partial-Birth Abortion Ban Act is classic incremental and fetal-protective legislation—Congress and the lower courts never considered defects in women’s deliberative process as a reason for its enactment<sup>111</sup>—the discussion of regret and the selective reference to women’s stories is notable. Notwithstanding the Court’s concession that “we find no reliable data to measure the phenomenon,”<sup>112</sup> does *Carhart’s* discussion of regret and reference to the Operation Outcry affidavits indicate the Court is preparing to recognize a new constitutional justification for restricting women’s access to abortion?

*C. Next Steps: Kennedy and the Court After Carhart*

It should come as no surprise that the antiabortion community greeted *Carhart’s* discussion of the woman-protective rationale for restricting abortion with elation. Operation Outcry now quotes *Carhart* as reason to expand its internet drive.<sup>113</sup> Where Operation Outcry initially sought one thousand

Brief of the Institute for Reproductive Health Access et al.], and instead cites an amicus brief containing stories of women who regret their abortions, see Brief of Sandra Cano et al., *supra* note 15.

The Brief of the Institute for Reproductive Health noted that in the women’s narratives of decision making, three primary reasons for electing a second-trimester abortion emerged: “(1) they are carrying wanted pregnancies in which the fetus is diagnosed with grave anomalies; (2) their own health becomes endangered by their pregnancy; or (3) they have been unable to access care because of financial, geographic, or other delays.” Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as Amici Curiae in Support of Respondents, *supra*, at \*2. Kennedy’s opinion does not focus on these factors, emphasizing instead a discourse of female regret.

111. See *supra* note 15 and accompanying text.

112. *Carhart*, 127 S. Ct. at 1634.

113. A call for submissions of abortion stories reads:

Your testimony can help restore justice and end abortion[.]

Although the [*Carhart*] Court acknowledged the harm of abortion, it also stated it had “no reliable data to measure” the extent of the problem. The most effective way to show the Court the magnitude of the problem is to collect a much larger number of testimonies.

The Justice Foundation has collected affidavits and declarations through its project, Operation Outcry, from approximately 2000 women since the year 2000. This largest known body of direct, sworn testimony in the world that shows the harmful effects of abortion has been submitted to the U.S. Supreme Court, the U.S. Senate Judiciary Committee, state legislatures in Georgia, Louisiana, Mississippi, Ohio, South Dakota, and Texas, and, to lawmakers around the world.

Justice Foundation, The Supreme Court Is Listening!, available at [http://64304.netministry.com/images/WhywecollectDeclarationsw-pic-July07\\_4\\_.pdf](http://64304.netministry.com/images/WhywecollectDeclarationsw-pic-July07_4_.pdf) (last visited Dec. 15, 2007).

affidavits, it is now seeking one million.<sup>114</sup> Memos posted on an Operation Rescue website suggest that Harold Cassidy, who played a central role in efforts to reopen *Roe* and to enact restrictions in South Dakota, is now arguing that the movement can use a woman-protective rationale to persuade Justice Kennedy to uphold the ban on abortion that Cassidy is once again urging South Dakota to adopt.<sup>115</sup>

But these enthusiastic reactions do not capture the whole picture, even within the antiabortion community. Another memo posted on the Operation Rescue website voices the incrementalist objection: James Bopp of the National Right to Life Committee cautions that sending a ban to the Supreme Court might move Justice Kennedy to join *Carhart's* four dissenting justices, who assert that a woman's decision whether to become a mother is protected by the Constitution's liberty and equality guarantees.<sup>116</sup>

Bopp has reason to caution the antiabortion movement. As an architect of *Casey's* undue burden framework, Justice Kennedy would surely view the kind of ban South Dakota is now considering differently than the incrementalist law upheld in *Carhart*, which prohibited a method of performing an abortion without forbidding the abortion itself.

The *rationale* for abortion restrictions would be of constitutional significance to Justice Kennedy, as well. After all, the liberty and equality norms to which *Carhart's* dissenters appeal are norms that Justice Kennedy embraces outside the context of Partial-Birth Abortion Ban Act. Indeed, in arguing that a woman's right to choose is protected by constitutional guarantees of liberty and equality, Justice Ginsburg cites as authority opinions

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114. Operation Outcry, *The Supreme Court Is Listening!: Your Personal Story Can Help End Abortion!*, <http://www.operationoutcry.org/pages.asp?pageid=23067> (last visited Feb. 4, 2008) ("Help us collect a million declarations so we can show the Supreme Court how many have been hurt by abortion.").

115. See Memorandum from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro-Life Leadership Coalition 9-10 (Oct. 10, 2007), available at <http://operationrescue.org/pdfs/Legal%20Memo%20&%20Proposed%20South%20Dakota%20Abortion%20Bill%20%2810-10-2007%29.pdf>.

116. See *infra* text at note 243 (quoting dissent); see also memorandum from James Bopp, Jr. & Richard E. Coleson, Pro-life Strategy Issues (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf> (quoted *infra* note 266). For incrementalist caution, see *id.* at 3, 6 ("[N]ow is not the time to pass state constitutional amendments or bills banning abortion . . . . Eschewing incremental efforts to limit abortion where legally and politically possible makes the error of not saving some because not all can be saved. It also makes the strategic error of believing that the pro-life issue can be kept alive without such incremental efforts.").

that Justice Kennedy wrote or joined.<sup>117</sup> Not only was Justice Ginsburg's opinion an effort to persuade Justice Kennedy to strike down the Partial-Birth Abortion Ban Act, it was an urgent reminder that the principles articulated in Justice Kennedy's opinions govern the constitutionality of abortion restrictions in the vast majority of cases not implicating the infrequently used procedure at issue in *Carhart*.

How does the Constitution speak to the regulation of abortion? To explore this question, we will be examining a body of substantive due process and equal protection decisions written by Justice Kennedy that are centrally concerned with the protection of human dignity.

## II. CONSTITUTIONAL LAW: DIGNITY AND UNDUE BURDEN UNDER *CASEY/CARHART*

What constitutional principles govern abortion restrictions after *Carhart*? This essay derives a principled framework for abortion regulation from the competing conceptions of dignity that shape *Carhart*, *Casey*, and other substantive due process and equal protection opinions that Justice Kennedy has authored, for the Court and on his own behalf.

This line of analysis has several virtues. Chief among them is that it yields a principled framework, grounded in existing case law, for evaluating the constitutionality of abortion regulation that takes very seriously the commitments of the Justice at the center of the Court. Much is to be learned by considering decisions authored by a Justice who is responsive to both sides of the abortion debate and, perhaps most of all, to its conflicted middle.

Time and again these opinions emphasize the Constitution's protection for human dignity. Dignity is a value to which opponents and proponents of abortion right are committed, in politics and in law. It is a value that connects analysis of abortion regulation to other questions of constitutional law. It is a value that guides interpretation of other national constitutions and of human rights law.

But, most strikingly, taking dignity talk seriously helps make deep sense of much substantive due process and equal protection case law. In the analysis that follows, I show, first, that there are in fact several constitutionally

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117. Justice Ginsburg opens with a direct appeal of this kind. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640-41, 1649 (2007) (Ginsburg, J., dissenting). Later in the dissent, she contrasts Justice Kennedy's judgments about women's feelings in *Carhart* with his statement in *Casey* that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society." *Id.* at 1649.

significant forms of dignity that Justice Kennedy's opinions for the Court recognize: constitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality. Second, I show that the constitutional importance of respecting these several forms of human dignity explains the deep structure of *Casey's* undue burden test: *Casey* analyzes the government's interest in protecting potential life as an expressive interest that can and must be vindicated compatibly with a woman's constitutionally protected right to choose. Third, I examine what *Casey's* application of the undue burden test to informed consent and spousal notice requirements teaches about the ways that constitutional protections for women's dignity limit the regulation of abortion.

### A. Three Meanings of Dignity

The United States Constitution does not have a dignity clause, but Supreme Court opinions regularly and increasingly invoke dignity as a lens through which to make sense of the document's structural and individual rights guarantees.<sup>118</sup> This is not surprising: the right to be treated with dignity has global appeal,<sup>119</sup> even though dignity's requirements vary within and across

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118. On rights, see, for example, Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 233 (2005), which argues that “[b]oth *Casey* and *Lawrence* self-consciously shift the focus of substantive due process away from privacy and back toward its textual anchor, *liberty*. . . . Moreover, the liberty recognized in *Casey* and *Lawrence* is more closely linked to the notion of individual dignity than to privacy interests.” See also Erin Daly, *Constitutional Dignity: Lessons from Home and Abroad* (June 7, 2007) (unpublished manuscript, on file with The Yale Law Journal), available at <http://ssrn.com/abstract=991608>. On structure, see for example, Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

119. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), expressly protects human dignity, as do many state and national constitutions. See generally Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Christopher McCrudden, *Human Dignity* (Univ. of Oxford Faculty of Law Legal Studies, Working Paper No. 10/2006, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=899687](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899687).

Dignity's appeal may not, however, be universal. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (questioning on sociohistorical grounds whether conceptions of dignity are shared across the Atlantic by observing two western cultures of privacy and tracing the difference to an American commitment to liberty that diverges from European conceptions of dignity).

There is now a considerable body of queer theory that approaches dignity as disciplinary—as limiting respected sexual expression to “respectable” sex. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004);

legal systems.<sup>120</sup> The ensuing discussion is by no means comprehensive. I do not attempt to survey variations in the philosophical, sociological, or jurisprudential understandings of dignity in the international or even the national constitutional arena. My aims are considerably more modest: to examine the principled commitments animating Justice Kennedy's invocation of dignity in *Carhart*, *Casey* and several other opinions interpreting the individual rights guarantees of the Fifth and Fourteenth Amendments.

I have deliberately restricted the universe of usage I am examining to draw attention to some striking variances in the meaning of dignity as Justice Kennedy has invoked it in the substantive due process cases. The point of this demonstration is not to demonstrate slippage or inconsistency of usage, so much as to illuminate a richness of meaning and concomitant complexity of commitment. To keep faith with the Constitution, these opinions suggest, government must respect different dimensions of human dignity. In what follows, I show at least three distinct usages of dignity in the substantive due process and equal protection cases: dignity as life, dignity as liberty, and dignity as equality.

As we have seen, in *Gonzales v. Carhart*,<sup>121</sup> Justice Kennedy emphasizes that the Partial-Birth Abortion Ban Act "expresses respect for the dignity of human life."<sup>122</sup> Quite strikingly, in *Carhart*, the government's interest in potential life is

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Libby Adler, *Dignity and Degradation: Transnational Lessons from the Constitutional Protection of Sex 1* (Berkeley Electronic Press Legal Working Paper Series, Paper No. 1873, 2006), available at <http://law.bepress.com/expresso/eps/1873> ("A careful reading of the sex cases reveals some risks associated with uncritical reliance on the dignity ideal. This article reviews the concept of dignity historically, examines contemporary sex cases from a few different national jurisdictions for possible historical and transnational continuities, and urges that dignity poses unique legal hazards to reformist efforts to gain constitutional protection for a wide array of sexual practices."). See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

120. See, e.g., McCrudden, *supra* note 119, at 24-25 ("In light of the wide variety of different functions that dignity plays, it would be surprising if judges used it consistently with each other. And in practice they do not; far from it. There are significantly differing expressions of the relationship between human rights and dignity, for example and significant variations between jurisdictions in how dignity affects similar substantive issues. In interpreting and applying the concept of dignity in the judicial context, I believe that no one jurisdiction has a coherent judicially-interpreted concept of dignity across the range of rights, but establishing that is unnecessary for the purposes of this article and I shall limit myself to arguing that no coherent conception of dignity emerges *transnationally*.")

121. 127 S. Ct. 1610 (2007).

122. *Id.* at 1633; see also *id.* at 1634 ("The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers,

vindicated, not by prohibiting abortions or saving particular fetuses, but instead by regulating the methods by which abortions are performed, for the purpose of marking the gravity of the act. Government's aims are expressive and didactic. *Gonzales v. Carhart* echoes Kennedy's dissent in *Stenberg v. Carhart*<sup>123</sup> where Kennedy asserted: "A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others."<sup>124</sup> Regulation of this kind creates social meaning: it generates value that affects social interactions that reach beyond the regulated act.<sup>125</sup>

When government's interest in regulating abortion to protect potential life is explained as an interest in expressing respect for human dignity, dignity means something like the inherent worth of a life. Indeed, we might call this usage dignity as "life," a usage I will be exploring in more detail below. This usage of dignity is certainly not the only usage in the case law. In other contexts in the substantive due process cases, Justice Kennedy uses dignity in a very different register, in ways that value the forms of freedom and respect we accord one another.

In some of these contexts, dignity resembles Kantian autonomy<sup>126</sup> – the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another's will.<sup>127</sup> We might call this usage dignity as "liberty." (Distinguishing

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and society as a whole of the consequences that follow from a decision to elect a late-term abortion.").

123. 530 U.S. 914 (2000).

124. *Id.* at 962 (Kennedy, J., dissenting). In *Stenberg*, Kennedy argued that Nebraska had reason to enact its partial-birth abortion ban because doctors needed to show respect for human life if they were to command respect as professionals: "D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect." *Id.* at 963.

125. See *infra* Sections II.B, III.B.

126. See McCrudden, *supra* note 119, at 5 ("In the Enlightenment, the dignity of man . . . came to be developed philosophically, used as the basis, most famously, of Kant's argument that individuals should be treated as ends and not simply as means to an end. Over time, this connection between dignity and the categorical imperative has become probably the most often cited non-religiously based conception of dignity. Some, indeed, regard him as 'the father of the modern concept of human dignity.'" (citation omitted)); see generally IMMANUEL KANT, THE METAPHYSICS OF MORALS 219-22 (Mary Gregor trans., 1991) (arguing that a categorical imperative exists never to treat people as a "means only and not as end").

127. See, e.g., MARGARET JANE RADIN, CONTESTED COMMODITIES 157 (1996) (enlisting the Kantian "means-ends" distinction as a synonym for the objectification and

what I am calling dignity as life and dignity as liberty, Ronald Dworkin has recently defined dignity as entailing “the principle of intrinsic value” which holds that each life “has value as potentiality,” as well as “the principle of personal responsibility,” which holds that “each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him.”<sup>128</sup>)

In yet other passages of Justice Kennedy’s substantive due process and related Fourteenth Amendment opinions, dignity has a different concern. Dignity in these passages is concerned with respect, honor, and social standing, and concerns the right of persons to be respected as an equal member of the polity rather than denigrated, subordinated, or excluded.<sup>129</sup> We can call the range of usages concerned with respect dignity as “equality.”

Justice Kennedy has used the concept of dignity to mean *both* decisional autonomy and social standing—dignity as liberty and dignity as equality—in

instrumentalization of persons); Ronald M. Green, *What Does It Mean To Use Someone as “A Means Only”?: Rereading Kant*, 11 KEN. INST. ETHICS J. 247, 252 (2001) (arguing that violations of the Kantian conception of dignity occur when other “ignore the individual’s physical-spiritual integrity and diminish the person’s dignity by locating his or her value in an ‘inferior’ body part or activity”).

128. RONALD DWORGIN, IS DEMOCRACY POSSIBLE HERE?, 9-10 (2006).

129. “Dignity” traditionally carried an honorific, aristocratic valence of status, rank, and social worth, presupposing inequality and concerned with discriminating among persons in a social hierarchy (e.g. “dignitaries”). In democratic societies, however, the usage of dignity concerned with respect has come to concern the respect individuals are owed as social equals. See generally Resnik & Suk, *supra* note 118, at 1924, tracing the shift from aristocratic and monarchical usages of the dignity of sovereigns; *id.* (“Dignity took a radical turn in the centuries that followed, as it became a quintessentially personal trait of all human beings and a marker of equality. Twentieth century human rights law embodies these premises through proclamations and agreements committing governments to respecting the dignity of all people.”); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1315 (2000) (describing “the transition from a world of social hierarchy to a world of formal equality—from a world of restricted aristocratic honor to a world of general human dignity”); *id.* at 1359 (describing the shift from “old norms of high-status honor as new norms of universal dignity”); *id.* at 1332 (“At the close of World War II, there was a concerted effort to establish new norms of dignity. Thus, the new Italian constitution of 1947 sanctified ‘social dignity’ for all. The German Basic Law of 1949 also guaranteed ‘human dignity’ in its first article. Still[,] . . . elsewhere in German constitutional thought an older terminology of honor hung on. In particular, the Basic Law continued to imagine that generalizing honor was what was needed for the healthy regulation of the public sphere . . . .” (citations omitted)); see also Universal Declaration of Human Rights, *supra* note 119., available at <http://www.un.org/Overview/rights.html> (recognizing “the inherent dignity and . . . the equal and inalienable rights of all members of the human family” and “the dignity and worth of the human person and in the equal rights of men and women”).

his prominent decisions regarding sexual autonomy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>130</sup> the portion of the plurality opinion attributed to Justice Kennedy<sup>131</sup> invokes dignity to explain why the Constitution protects decisions regarding family life and child rearing:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>132</sup>

In protecting dignity, *Casey* protects the ability of women to make self-defining and self-governing choices.<sup>133</sup> In *Lawrence v. Texas*<sup>134</sup> Justice Kennedy quotes

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130. 505 U.S. 833 (1992).

131. The plurality decision in *Casey* was jointly written by Justices Souter, O'Connor, and Kennedy. See THE SUPREME COURT CONFRONTS ABORTION: THE BRIEFS, ARGUMENT, AND DECISION IN PLANNED PARENTHOOD V. CASEY 14-17 (Leon Friedman ed., 1993). Although the "joint opinion" of Souter, Kennedy, and O'Connor purports to speak in a single voice, each Justice is understood to have written a discrete section of the opinion. As recently recounted by Jeffrey Toobin, Kennedy wrote the opening section discussing the undue burden test and announcing preservation of *Roe* (pages 843-853), Souter wrote the midsection confirming the importance of *stare decisis* (pages 854-879), and O'Connor wrote the final section striking down spousal notification provision (pages 880-902). See JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 54 (2007). It is also possible that Justice Kennedy may have played a role in drafting the portions of the joint opinion applying the undue burden test to the twenty-four hour waiting period. See also *id.* at 47-57 (discussing deliberations over and collaboration in drafting of joint opinion).

132. *Casey*, 505 U.S. at 851. A clear articulation of dignity as autonomy or self-determination is echoed in Justice Stevens's concurrence: "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience." *Id.* at 916. Similarly, arguing that the mandatory waiting period is unconstitutional, Stevens also claims:

Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

*Id.* at 920. This language of dignity is characterized by Scalia in his dissent as "empty." *Id.* at 983 & n.2 (Scalia, J., dissenting).

133. For my most recent account of the intertwining of liberty and equality values in *Casey*, see Siegel, *supra* note 15, at 1050-53. See also Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J.



just this passage in *Casey*, reasoning that to protect dignity the Constitution requires government to respect an individual's choice to engage in a same-sex relationship as it must respect an individual's decision whether to bear a child. Arguing that the principles articulated in *Casey* conflict with *Bowers v. Hardwick*,<sup>135</sup> Kennedy writes:

In [*Casey*], the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated . . . :

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.<sup>136</sup>

Note how *Lawrence* rejects *Bowers* because *Bowers* denies “[p]ersons in a homosexual relationship” the autonomy that “heterosexual persons” have. Denying to some forms of dignity accorded to others violates not only dignity as liberty, but dignity as equality as well. As *Lawrence* illustrates, laws enforcing social roles can violate dignity as autonomy and dignity as equality, at one and the same time. The dignity *Lawrence* protects concerns questions of autonomy and self-definition *and* questions of social standing and respect: the right to be treated as a full member of the polity, not excluded, subordinated, or

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815, 833-34 (2007) (situating *Casey* in decades of doctrinally evolving equality reasoning in support of the abortion right, and observing that commentators read the joint opinion as vindicating a right at the intersection of liberty and equality, or grounded in equality alone).

134. 539 U.S. 558 (2003).

135. 478 U.S. 186 (1986).

136. *Lawrence*, 539 U.S. at 573-74 (quoting *Casey*, 505 U.S. at 851).

denigrated.<sup>137</sup> There is no reason to split these rationales apart; the point is to appreciate the deep ways in which they are entangled.

In his equal protection opinions, Justice Kennedy has used the concept of dignity to highlight how restrictions on autonomy can communicate meanings about social role, respect, and social standing. Just last term in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>138</sup> Justice Kennedy's concurring opinion described the harm of the school district categorizing elementary and secondary school students on the basis of race as a harm to dignity:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is

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137. See Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1449, 1457 (2004) (“*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality. . . . The oscillation between equality- and liberty-based approaches in the generation since *Bowers v. Hardwick* reflects more than simply the tactical decisions of courts and litigators . . . . The situation of gay people provokes an ‘analogical crisis’ because in some ways it involves regulation of particular acts in which gay people engage, and so seems most amenable to analysis under the liberty prong of the Due Process Clause, while in other ways it involves regulation of a group of people who are defined not so much by what they do in the privacy of their bedrooms, but by who they *are* in the public sphere.”); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. REV. 99, 137 (2007) (“The equality discussed in the *Lawrence* opinion is the same as the equality discussed in *Romer*: equality of status for a social group defined by sexual orientation.”); Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1177 (2004) (“*Lawrence* is full of language that demonstrates the Court’s concern with the subordination of gays as a group, rather than just the liberty of individuals.”); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 99 (2003) (observing “how closely *Lawrence* comes to explicitly melding the concerns of equal protection with those of due process”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (“The ‘liberty’ of which the Court spoke was as much about equal dignity and respect as it was about freedom of action – more so, in fact.”).

That there are intimations of dignity-as-equality in *Lawrence* does not mean that the commitment is unqualified, or fully doctrinally realized. Cf. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) (“*Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance.”); accord Franke, *supra* note 119, at 1411 (“Without more, *Lawrence*-like decriminalization merely signals a public tolerance of the behavior, so long as it takes place in private and between two consenting adults in a relationship.”).

138. 127 S. Ct. 2738 (2007).

inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change.<sup>139</sup>

The passage depicts government classification by race as simultaneously an affront to dignity as liberty *and* to dignity as equality. Given the history of de jure segregation, Justice Kennedy seems to be saying, “[t]o be forced to live under a state-mandated racial label” is an affront to dignity as respect and as autonomy. Here, as in *Casey* and *Lawrence*, Justice Kennedy treats injuries to dignity as of constitutional consequence, recognizing how restrictions on autonomy communicate meanings about respect and social standing. Lest there be any doubt that Justice Kennedy is attentive to the injury to respect as well as to freedom, Chief Justice Roberts’s majority opinion in *Parents Involved* describes the harms of classifying schoolchildren by race by quoting Justice Kennedy in *Rice v. Cayetano*<sup>140</sup>: “[O]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>141</sup>

This same concern about dignity as respect and social standing appears in one of Justice Kennedy’s early equal protection sex discrimination opinions. In *J.E.B. v. Alabama ex rel. T.B.*,<sup>142</sup> Justice Kennedy argued that

“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.” For purposes of the Equal Protection Clause, an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors. The injury is to personal dignity . . .<sup>143</sup>

In that same case, Justice Blackmun explained how the peremptory strike violated women’s dignity:

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139. *Id.* at 2796–97 (Kennedy, J., concurring).

140. 528 U.S. 495 (2000).

141. Seattle Sch. Dist. No. 1, 127 S. Ct. at 2767 (quoting *Rice*, 528 U.S. at 517).

142. 511 U.S. 127 (1994).

143. *Id.* at 152–53 (Kennedy, J. concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)).

Striking individual jurors on the assumption that they hold particular views simply because of their gender is “practically a brand upon them, affixed by the law, an assertion of their inferiority.” It denigrates the dignity of the excluded juror, and, for a woman, reinvoles a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.<sup>144</sup>

Use of the peremptory strike to exclude women from the jury communicates inequality as it recalls women’s exclusion from the franchise, long justified on the ground that women lacked competence to participate in the collective self-governance of the community.<sup>145</sup> Concern that restrictions on women’s liberty can communicate meanings about women’s social standing lies at the heart of

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144. *Id.* at 142 (citation omitted). Dignity plays a role in the court’s early sex discrimination cases. See *Trammel v. United States*, 445 U.S. 40, 52 (1980) (“The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that ‘[n]o 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.’” (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975))); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (“In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. These concerns are strongly implicated with respect to gender discrimination in the allocation of publicly available goods and services. Thus, in upholding Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000a, which forbids race discrimination in public accommodations, we emphasized that its ‘fundamental object . . . was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.” (citations omitted)).

145. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1019-22 (2002) (discussing how women’s exclusion from suffrage and jury participation were linked in law).

the sex discrimination cases, especially those cases invalidating laws that deny women autonomy to make decisions about their family roles.<sup>146</sup>

Practices enforcing social roles can violate dignity as autonomy and dignity as equality simultaneously. The understanding that regulation of women's roles implicates questions of autonomy and equality for women shapes Justice Kennedy's initial description of the abortion right in *Casey*:

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. *Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. 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>147</sup>

#### B. Vindicating Dignity Through the Undue Burden Framework

In the substantive due process and equal protection opinions we have just examined, Justice Kennedy insists that government respect the dignity of human life, meaning, at various points, that government honor the intrinsic value of life, that government secure the autonomy of individuals, and that government treat all members of the community with equal respect. *Casey*'s undue burden framework insists that government restrictions on abortion vindicate dignity in all three of these dimensions. To see how, we need to examine more closely how *Casey* treats regulation protecting the state's interest in potential life.

Famously, the joint opinion announces that *Roe*'s trimester framework undervalues the state's interest in potential life, and proposes the undue

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146. For such a reading of the sex discrimination cases, see Siegel, *supra* note 15, at 995-97, 1042-44.

147. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (emphasis added). For sources reflecting on the intersection of autonomy and equality values in this passage of *Casey*, see *supra* note 133.

burden framework as an alternate framework for reconciling the state's interest in potential life with a woman's constitutionally protected right to decide whether to bring a pregnancy to term.<sup>148</sup> Where *Roe's* trimester framework prevented government from regulating abortion on behalf of potential life until the point of fetal viability, the undue burden framework allows government the opportunity to regulate abortion in the interest of potential life throughout the term of a pregnancy. The abortion right survives the shift in frameworks because of subtle shifts in the way the joint opinion understands the state interest in potential life.

Remarkably little attention has been devoted to clarifying the character of government's interest in restricting abortion to protect potential life. Conceivably, this regulatory interest might be (1) pronatalist (an interest in increasing population), (2) eugenic (an interest in improving the population),<sup>149</sup> (3) life-saving (an interest in protecting particular potential

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148. *Id.* at 875 (observing a “basic flaw in the trimester framework: . . . in practice it undervalues the State’s interest in the potential life within the woman”); *see id.* at 876 (“The trimester framework, however, does not fulfill *Roe's* own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman’s decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” (citations omitted)).

149. In its *stare decisis* analysis, the joint opinion in *Casey* observes:

If indeed the woman’s interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman’s right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions.

*Casey*, 505 U.S. at 859 (discussing lower court opinions). The passage seems to be suggesting that the government’s interest regulating abortion on behalf of potential life includes pronatalist and eugenics interests in reproduction that are constrained by the right *Roe* recognized, but might also be read as claiming that substantive due process law discredits such regulatory interests in reproduction altogether. Justice Stevens suggests that the interest in potential life does include pronatalist and eugenics interests, which are then constrained by a woman’s constitutionally protected liberty interests:

Identifying the State’s interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both

lives),<sup>150</sup> (4) moral and expressive (an interest in promoting the values and role morality associated with family or medical relationships),<sup>151</sup> or (5) political (an interest in promoting social cohesion and government authority under conditions of social conflict).<sup>152</sup> The Court has offered little guidance in

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humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State’s interest in potential human life.

*Id.* at 914-15 (Stevens, J., concurring and dissenting) (footnote omitted) (citations omitted). Justice Stevens views certain regulatory interests in reproduction as constrained by a woman’s constitutionally protected liberty interest. *See id.* at 915 n.3 (“While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman’s liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.”); *see also* Jed Rubenfeld, *On the Legal Status of the Proposition that “Life Begins at Conception,”* 43 STAN. L. REV. 599, 610 (1991) (“[T]he state has an equally clear interest in the size of its population, an interest raising numerous, complex issues.”).

150. This seems to be the way the Court conceived of the interest in potential life in *Roe*, and the way Justice O’Connor understood the question in her early dissents objecting that, because of advances in medical technology, the trimester framework was on a collision course with itself. *See City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456-57 (1983) (O’Connor, J., dissenting) (“Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.”); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”)
151. This openly moral register first appears in the joint opinion, and Justice Kennedy continues to develop it in his subsequent opinions. *See infra* note 157.
152. In deciding cases involving intense social controversy, the Court endeavors to render judgments that citizens can accept as grounded in their Constitution. *See Casey*, 505 U.S. at 856-66 (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances where their principled character is sufficiently plausible to be accepted by the Nation.”). In such circumstances, the Court needs to speak with authority to citizens who view the question from dramatically different standpoints, and to decide cases in such a way that all feel that their claims have been seriously and respectfully entertained. *See Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 428-33 (2007) (discussing the way in which the *Casey* plurality opinion engages

determining which expressions of these interests are constitutionally permissible, compelling, or illicit. (Plainly, certain expressions of these interests—for example, government efforts to promote the purity of the white race or to pressure women into assuming traditional family roles—are not merely trumped by the abortion right but instead are constitutionally illegitimate aims in their own right.<sup>153</sup>)

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with the political contestation surrounding the abortion issue and “accords great respect to both sides of the abortion controversy”). The Court may also wish to enable government to create opportunities for those who may experience themselves as losers to express dissent and thus to experience themselves as part of the community, rather than as outsiders. Cf. Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 794-97 (1996) (suggesting that joint opinion in *Casey* responded to Professor Mary Ann Glendon’s critique of *Roe* and provided expressive outlet for contending views about abortion in order to “reduce the degree of societal fracture over abortion” (citing MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987))).

All of these concerns may shape the way that the Court reasons about the state’s interest in potential life. See *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting) (“The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. The State’s constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.” (citations omitted)); see also *supra* note 149 (quoting Justice Stevens in *Casey* discussing, as part of the state’s interest in protecting potential life, the aim of minimizing offense to citizens who “believe that any abortion reflects an unacceptable disrespect for potential human life”).

153. Some years ago, I emphasized that the state’s interest in potential life recognized in *Roe* was an interest in overriding women’s decisions about whether to become mothers, and argued that some expressions of that regulatory interest were unconstitutional violations of equal protection. See Siegel, *supra* note 93, at 276-77 (“To the extent that *Roe* relied upon physiological reasoning to define the state’s interest in potential life, it unleashed a legal discourse of indeterminate content and scope—one legitimating boundless regulation of women’s reproductive lives should the Court abandon the trimester framework that presently constrains it. In recognizing the state’s interest in potential life, the Court ignored a simple social fact that should be of critical constitutional significance: When a state invokes an interest in potential life to justify fetal-protective regulation, the proposed use of public power concerns not merely the unborn, but women as well. Abortion-restrictive regulation is sex-based regulation, the use of public power to force women to bear children.”). Jed Rubenfeld has also observed that some expressions of the state’s interest in potential life would plainly be unconstitutional forms of “social engineering”—giving government undue control over the aims of life and demographic character of the polity. See Rubenfeld, *supra* note 149, at 611 (“Finally, there is another constellation of putative state interests surrounding the fetus, considered as a potential life, that may loosely be called social engineering interests. The importance of these interests in the abortion context should not be underestimated. They include preserving women’s traditional roles as wife and mother as well as shaping the genetic make-up of individuals’ offspring. These interests, if a state may properly invoke them, would strongly support governmental intervention in



Not surprisingly, the joint opinion in *Casey* offers a more extensive account than prior decisions of government's interest in restricting abortion. Insisting that *Roe* undervalues government's interest in potential life, the joint opinion declares that government has life-saving,<sup>154</sup> moral and expressive,<sup>155</sup> and political interests<sup>156</sup> in regulating abortion and should be able to act on those interests throughout pregnancy, *in ways that do not unduly burden a woman's decision whether to bear a child.*

Without repudiating the interest in potential life as an interest in saving particular potential lives, the joint opinion reasons about the interest in potential life in a new, hermeneutic register, as the kind of interest vindicated when government can "express profound respect for the life of the unborn."<sup>157</sup>

women's child-bearing decisions (including the decision of whom to beget children with). But surely these interests are constitutionally illegitimate; they contradict the very principle of privacy. To set up such interests as counter-balancing factors that could outweigh the privacy right would be like relying on a state interest in brainwashing the populace in order to override the first amendment.").

Dorothy Roberts in particular has focused on the constitutionally illegitimate role that concerns of race and class can play in the regulation of reproduction. See Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 944 (1995) ("Government control of reproduction in the name of science, social policy, or fiscal restraint masks racist and classist judgments about who deserves to bear children. The contraceptive welfare proposals implement a belief that poor people, especially Blacks, are less entitled to be parents."); Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343, 1343 (2005) ("[T]he social value placed on a woman's reproduction depends on her standing within the hierarchies of race, class, and other inequitable divisions."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424 (1991) ("The prosecution of drug-addicted mothers cannot be explained as simply an issue of gender inequality. Poor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status.").

154. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").
155. See *id.* at 878 ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.")
156. See *supra* note 152.
157. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992). Though the phrase "respect for life" appeared in briefs filed with the U.S. Supreme Court in abortion cases of the 1980s, see, e.g., Brief for Lawyers for Life as Amicus Curiae Supporting Petitioners at 12, *City of Akron v. Akron Ctr. for Repro. Health*, 462 U.S. 416 (1983) (Nos. 81-746, 81-1172) (arguing that continuing to uphold *Roe v. Wade* despite scientific advances "contributes to the further erosion of our traditional respect for the paramount value of human life"), the first abortion decision in which the Court itself used the language was in *Casey*, which states

*Casey* holds this interest can be vindicated as an integral part of an abortion-rights regime, and without banning abortion. Reasoning about the interest in potential life in this same hermeneutic register, Kennedy's opinion in *Carhart* observes that a statute that regulates how abortions are performed "expresses respect for the dignity of human life."<sup>158</sup>

In religious and political usage, the discourse of "respect for life" may fuse affirmations of life with affirmations of traditional sex and family roles,<sup>159</sup> but

that regulations that "express profound respect for the life of the unborn are permitted" under the Court's undue burden test. *Casey*, 505 U.S. at 877. Perhaps recognizing the Court's shift in *Casey*, several briefs filed before the Court supporting partial-birth abortion bans in *Stenberg v. Carhart*, 530 U.S. 914 (2000), and many more in *Carhart v. Gonzales*, 127 S. Ct. 1610 (2007), invoked this language. See, e.g., Brief for Jill Stanek and the Association of Pro-Life Physicians as Amici Curiae in Supporting Petitioner at 4, *Carhart*, 127 S. Ct. 1610 (No. 05-1382) (stating that the "partial-birth" abortion procedure "has been rightfully banned as impermissibly hostile to the foundational tenet of society—respect for human life"); Brief of Professor Hadley Arkes and the Claremont Institute Center for Constitutional Jurisprudence as Amici Curiae Supporting Petitioner at 16, *Carhart*, 127 S. Ct. 1610 (No. 05-1382) ("[T]he Fourteenth Amendment offers a foundation upon which Congress, via Section 5 of that Amendment, is on thoroughly defensible ground in enforcing fundamental respect for life at its earliest stage.").

Justice Kennedy continues to reason about the state's interest in potential life as an interest in expressing respect for the dignity of life in his subsequent opinions. See *Stenberg*, 530 U.S. at 962-64 (Kennedy, J., dissenting) ("The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.").

158. 127 S. Ct. at 1633; see also *id.* at 1634 ("The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.").

159. Asserting the importance of "respect for life" and the "dignity" of life is common in the religious and political discourse employed to express opposition to abortion, where it may be accompanied by statement of beliefs about sex and the family.

In 1967, Pope John Paul VI began to use the language of dignity to talk about procreation: "[W]hen the inalienable right of marriage and of procreation is taken away, so is human dignity." Encyclical of Pope Paul VI on the Development of Peoples (Mar. 26, 1967), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html). His 1968 Encyclical on the Regulation of Birth famously declared illicit "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation" singling out "above all, all direct abortion"; for "[m]arriage and conjugal love are by their nature ordained toward the procreation and education of children," and "[h]uman life is sacred." Encyclical of Pope Paul VI on the Regulation of Birth (July 25, 1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

these sex and family-role associations have not been incorporated into constitutional usage. Indeed, what is striking about the constitutional usage of “respect for life” is that it entered the abortion case law precisely at the point at which the Court was defining the state’s interest in potential life as the kind of regulatory interest that could and must be expressed compatibly with constitutional protection for a woman’s decision to have an abortion.

The joint opinion does not understand abortion regulation as a zero-sum game requiring a choice between dignity as life and dignity as liberty or equality; instead, the undue burden framework requires government to vindicate multiple dimensions of human dignity, concurrently. The joint opinion adopts an undue burden framework that allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation respects the dignity of women.

Indeed, when the interest in potential life is understood as an interest in expressing respect for life and human dignity (rather than an interest in increasing population, understood as human capital), it makes little sense to vindicate this value by means that manipulate women or use women as instruments for bearing children. Accordingly, the joint opinion adopts an undue burden framework that insists that regulation on behalf of potential life must assume a form that respects women’s dignity:

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By the 1980s, the church was explaining its opposition to abortion as rooted in a fundamental “respect for life” that is inextricably linked with traditional notions of marriage and the family. *See, e.g.*, Charter of the Rights of the Family, Presented by the Holy See to All Persons, Institutions and Authorities Concerned with the Mission of the Family in Today’s World (Oct. 22, 1983), *available at* [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_19831022\\_family-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html) (“[M]arriage is the natural institution to which the mission of transmitting life is exclusively entrusted . . . Human life must be respected and protected absolutely from the moment of conception.”). With increasing frequency, the church has used this discourse in political advocacy, linking opposition to abortion to other social issues, such as euthanasia, and the promotion of an “ethic of life.” United States Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States* (2007), *available at* <http://www.priestsforlife.org/magisterium/bishops/fcstatement.pdf>.

During this same time period, “respect for life” developed a life in politics where it has been employed by antiabortion groups and politicians, especially in the Republican Party. In 1976, the first Republican Party platform to address abortion searched for “a position on abortion that values human life.” 1976 Republican Party Platform, *available at* <http://www.presidency.ucsb.edu/platforms.php>. Every subsequent Republican platform, from the one in 1980 to the most recent 2004 platform, has advocated “the appointment of judges who respect traditional family values and the sanctity of human life.” *Id.*

[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

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What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. *Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.* . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.<sup>160</sup>

Even as the joint opinion dramatically expands government authority to regulate abortion expressively, it prohibits regulation that restricts the autonomy of the pregnant woman or treats her instrumentally, as a means to an end.<sup>161</sup> Women's decisional autonomy is a core value the undue burden framework vindicates. Government may "persuade" a woman to carry a pregnancy to term; it may not, however, manipulate, trick, or coerce her into continuing the pregnancy. The undue burden framework thus allows modes of vindicating the state's interest in potential life that create meaning, promote values, or communicate with a pregnant woman and her community—that may deter abortion, rather than prohibit it.

In what follows the essay explores some of the dignity-constraints on the regulation of abortion expressed in the joint opinion's application of the undue burden standard in *Casey*. As the dignity-constraints expressed in the joint opinion's discussion of the 24-hour waiting period upheld in *Casey* and the spousal notice requirement struck down in *Casey* differ, the essay examines them each in turn.

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160. *Casey*, 505 U.S. at 877-78 (emphasis added).

161. See *supra* note 132 and accompanying text.

### C. *Dignity Constraints in Casey's Application of the Undue Burden Framework*

In what follows, this Section shows how *Casey's* undue burden framework imposes dignity constraints on incremental regulation of the informed consent variety, even as the Court upholds a law mandating a 24-hour waiting period. *Casey* deviates from informed consent principles in allowing regulation designed to persuade a woman to carry a pregnancy to term. Yet even in deviating from informed consent principles to this extent, *Casey* imposes limits on such regulation that reflect the dignity commitments of the undue burden framework. Government must persuade by truthful, nonmisleading information. Under the undue burden framework, dignity-respecting regulation of women's decisions can neither manipulate nor coerce women: the intervention must leave women in substantial control of their decision, and free to act on it.

There is a further implication of the dignity-based understanding of the undue burden framework that emerges with special clarity as the Court analyzes the spousal notice provision in *Casey*. *Casey* bases the abortion right, and its application of the undue burden test, on the understanding that government cannot enforce customary or common-law understandings of women's roles. In striking down the spousal notice requirement, the Court vindicates both dignity-as-liberty and dignity-as-equality, analyzing abortion regulation with attention to history and social meaning of the kind required to identify violations of equal respect.

#### 1. *Dignity and the Use of Law To Regulate Informed Consent*

We begin with *Casey's* application of the undue burden test to so-called "informed consent" laws that mandate that information be given to women seeking an abortion. Breaking with earlier decisions that barred fetal-protective abortion regulation prior to viability, the joint opinion reasons that government may vindicate the state's interest in potential life by "giving . . . truthful, nonmisleading information"<sup>162</sup> to a woman who is obtaining an

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162. See *Casey*, 505 U.S. at 882-83:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled. . . . Those decisions, along with *Danforth*, recognize a substantial government interest justifying a requirement that a

abortion so long as “the means chosen by the State to further the interest in potential life [are] calculated to inform the woman’s free choice, not hinder it.”<sup>163</sup> Reasoning along these lines, Justices Kennedy, O’Connor, and Souter uphold a 24-hour waiting period in which a pregnant woman is given “truthful, nonmisleading” information designed to persuade her to carry a pregnancy to term.

As this essay shows, the undue burden framework allows communications that deviate in some respects from informed consent principles as those principles are applied in medical ethics and tort law; but the joint opinion nonetheless imposes significant constraints on such communications that flow from the dignity principles structuring the undue burden framework itself. (In addition to substantive due process constraints, the joint opinion points out that the First Amendment may also restrict state intervention in women’s deliberative process.<sup>164</sup>)

*Casey*’s undue burden framework allows government to regulate abortion in the interests of informing a woman’s choice—that is, providing a woman information about the health risks of abortion and the alternative of carrying a pregnancy to term. In the ordinary understanding of the practice, an informed consent dialogue is designed to provide a patient information about the benefits and risks of proposed treatment and any relevant alternatives. According to American Medical Association guidelines on informed consent: “Health care professionals should inform patients or their surrogates of their clinical impression or diagnosis; alternative treatments and consequences of

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woman be apprised of the health risks of abortion and childbirth. . . . [W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.

163. *Casey*, 505 U.S. at 877.

164. See *Casey*, 505 U.S. at 884; Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939. For an article that thoughtfully explores how *Casey* diverges from the ordinary medical model of informed consent and locates limits on regulation on behalf of potential life that are grounded in the First Amendment, see Goldstein, *supra* note 152. Goldstein’s analysis is rich, and our readings are in important respects complementary. There are several important differences, however. Goldstein heavily relies on the First Amendment as a source of limitations on government regulation of women’s abortion decisions—whereas my account derives constitutional limits on such regulation from the different dimensions of dignity that substantive due process doctrine vindicates. In addition, my account scrutinizes more closely the social movement history and explicit sex-role assumptions of woman-protective regulation, and therefore gives far greater weight to equality norms (deriving from substantive due process law and the Equal Protection Clause) as a constitutional limit on such regulation.

treatments, including the consequence of no treatment; and recommendations for treatment.”<sup>165</sup> Such counseling is designed to provide the patient information that facilitates her autonomous decisionmaking. The “primary justification advanced for requirements of informed consent has been to protect autonomous choice.”<sup>166</sup> Informed consent to a medical intervention occurs “if and only if a patient or subject, with substantial understanding and in absence of substantial control by others, intentionally authorizes a professional to do something.”<sup>167</sup> According to a 1982 President’s Commission for the Study of Ethical Problems in Medicine, “Since voluntariness is one of the foundation stones of informed consent, professionals have a high ethical obligation to avoid coercion and manipulation of their patients.”<sup>168</sup>

Tort doctrines of informed consent protect patient autonomy by imposing on medical professionals a duty to disclose all risks of treatment, in a comprehensive and balanced fashion. The lead duty-to-disclose case, *Canterbury v. Spence*,<sup>169</sup> holds that “adequate disclosure” is “a *sine qua non* of informed consent.”<sup>170</sup> *Canterbury* requires the physician to disclose “the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated.”<sup>171</sup> Facts “material[] to the patient’s decision” may not be omitted; rather, “all

165. Am. Med. Ass’n, H-140.989 Informed Consent and Decision-Making in Health Care para. 1, available at [http://www.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=resultLink&doc=policyfiles/HnE/H-140.989.HTM&s\\_t=informed+consent&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&st\\_p=15&nth=2&](http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-140.989.HTM&s_t=informed+consent&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&st_p=15&nth=2&) (last visited Feb. 4, 2008). The AMA has long “oppose[d] legislative measures that would impose procedure-specific requirements for informed consent or a waiting period for any legal medical procedure.” Am. Med. Ass’n, H-320.951 AMA Opposition to “Procedure-Specific” Informed Consent, available at [http://www.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=resultLink&doc=policyfiles/HnE/H-320.951.HTM&s\\_t=informed+consent&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&st\\_p=15&nth=12&](http://www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-320.951.HTM&s_t=informed+consent&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/DIR&&st_p=15&nth=12&) (last visited Feb. 4, 2008).

166. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 77 (5th ed. 2001).

167. *Id.* at 78.

168. 1 PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 68 (1982).

169. 464 F.2d 772, 782 (D.C. Cir. 1972). In *Canterbury*, a physician failed to warn his patient of a risk of paralysis incident to back surgery. When the patient underwent surgery and that risk materialized, he sued the doctor, claiming the physician had breached his duty to disclose the risks of the operation.

170. *Id.* at 780.

171. *Id.* at 782.

risks potentially affecting the decision must be unmasked . . . .”<sup>172</sup> Numerous cases since *Canterbury* have reaffirmed the duty of physicians to provide the knowledge to allow the patient to make an autonomous choice. “The keystone of this doctrine is every competent adult’s right to forego treatment, or even cure, . . . however unwise his sense of values may be in the eyes of the medical profession, or even the community.”<sup>173</sup>

Medical ethics and tort law thus enshrine patient autonomy at the heart of the informed consent dialogue. The goal of informed consent counseling is not to intervene in a patient’s understanding of her own self-interest, her family’s interest or the appropriate balance between them (e.g. whether to risk cardiovascular surgery that might improve quality of life but poses a threat to longevity or whether to undergo chemotherapy that might increase longevity but reduce quality of life). Instead, a professional seeks to provide the patient information about possible benefits and risks of various courses of treatment that would enable the patient to make the medical decisions that—in *her* judgment—best serve her own self-interest and the interests of others dependent upon her.

The implications for abortion counseling are clear. Under ordinary informed consent principles, professionals counseling a woman about the abortion decision would make available information that is pertinent to a woman’s decision whether to have an abortion or to carry a pregnancy to term, presented in a fashion that is designed to maximize the woman’s autonomous decisionmaking and the vindication of her own value choices. For this reason, under the informed consent model, counseling in decisions concerning reproductive health care is typically “nondirective.”<sup>174</sup> The Supreme Court

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172. *Id.* at 787.

173. *Wilkinson v. Vesey*, 295 A.2d 676 (R.I. 1972); *see, e.g.*, *Harrison v. United States*, 284 F.3d 293 (1st Cir. 2002); *Kissinger v. Lofgren*, 836 F.2d 678 (1st Cir. 1988); *Randall v. United States*, 859 F. Supp. 22 (D.D.C. 1994); *Tune v. Walter Reed Army Med. Hosp.*, 602 F. Supp. 1452 (D.D.C. 1985); *Ketchup v. Howard*, 543 S.E.2d 371 (Ga. Ct. App. 2000); *Brown v. Dibbell*, 582 N.W.2d 134, 136 (Wis. Ct. App. 1998).

174. There is a practice of nondirective counseling employed in health care decisions concerning reproduction that is designed to achieve these goals. The counselor seeks to impart a balanced understanding of all relevant risk information, but to withhold any direct advice, enabling patients to reach voluntary decisions. Medical ethicists explain that nondirective counselors are supposed to see themselves as neutral conveyors of facts who leave all responsibility for decision making to the patient. Gerhard Wolff, *Non-Directiveness: Facts, Fiction, and Future Prospects*, in *THE NEW GENETICS: FROM RESEARCH INTO HEALTH CARE: SOCIAL AND ETHICAL IMPLICATIONS FOR USERS AND PROVIDERS* 32 (I. Nippert, H. Neitzel & G. Wolff eds., 1999). In their *Genetic Counseling Casebook*, Eleanor Gordon Applebaum and Stephen K. Firestein describe the role of nondirectiveness in terms of “the counselor [who] does not seek to superimpose his own objective upon that of the counselees.” ELEANOR



authorized informed consent counseling of abortion on this model in the years immediately after *Roe*.<sup>175</sup>

But *Casey* seems to authorize regulation that deviates, in some degree, from the ordinary informed consent dialogue designed to facilitate the patient's aims. The statute upheld in *Casey* required that a woman be informed "of the nature of the procedure, the health risks of the abortion and of childbirth[,] . . . the 'probable gestational age of the unborn child,'" and "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."<sup>176</sup> Regulation of this kind provides information that communicates to a woman seeking an abortion her community's judgment that she reconsider the decision that brought her to the

GORDON APPLEBAUM & STEPHEN K. FIRESTEIN, *GENETIC COUNSELING CASEBOOK* 210 (1983). Applebaum and Firestein give examples of how a genetic counseling should respond under the informed consent model of nondirectiveness if asked by a patient how to proceed under the circumstances:

It really wouldn't be helpful for me to answer that question for you because I won't have to live with the consequences of the decision. I believe I can be of assistance by helping you to discuss your feelings, to consider all options, and to understand the facts upon which your decision should be based.

*Id.*

In the 2001 edition of their *Medical Ethics* casebook, Baruch Brody and colleagues apply the nondirectiveness model of informed consent to the abortion context:

Induced abortion (before viability) is a safe, legally sanctioned procedure and therefore counts as medically reasonable. It follows that, to implement respect for the pregnant woman's autonomy in the informed consent process, a physician must provide her with information about *both* alternatives [pregnancy and abortion]. This is a professional obligation for every physician who cares for pregnant patients. Because the moral status of the fetus as a person is disputed and because the moral status of the pre-viable fetus as a patient depends on the pregnant woman's decision to confer that status on the fetus, the physician is not in a position to claim or act on a particular view about the independent moral status of the fetus or the status of the pre-viable fetus as a patient. It follows that counseling the pregnant woman about these two medically reasonable alternatives should be neutral—that is, no recommendation should be made for one or the other of these alternatives. This is known as nondirective counseling and requires the physician to prevent personal bias from consciously influencing the medical process. This is an especially important obligation when the physician counsels the pregnant woman about the results of prenatal diagnosis.

BARUCH BRODY ET AL., *MEDICAL ETHICS: ANALYSIS OF THE ISSUES RAISED BY THE CODES, OPINIONS, AND STATEMENTS* 46-47 (2001).

175. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

176. *Id.* at 881.

scene of the “informed consent” dialogue, and perhaps give different weight to the balance of considerations that led her to seek an abortion. In the 1980s, *Akron I*<sup>177</sup> and *Thornburgh*<sup>178</sup> rejected this kind of regulation of a woman’s decisionmaking process as impermissibly biased. In *Casey*, Justice Stevens denounces such regulation as violating a woman’s decisional autonomy and failing to respect the dignity of women who chose not to carry a pregnancy to term.<sup>179</sup>

In authorizing regulation that communicates the *community’s* values with the aim of influencing a woman’s abortion decision, *Casey* deviates from informed consent premises.<sup>180</sup> Yet there are other passages of the joint opinion that continue to invoke principles associated with informed consent. As we have seen, ordinary informed consent practice provides information designed to facilitate a patient’s consideration of risks and benefits of the treatment decision and its alternatives, presented in a balanced and even-handed way. The joint opinion adheres to this model when it holds that government may require doctors to provide “truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth”<sup>181</sup> and again when it “recognize[s] a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.”<sup>182</sup>

Analyzed with attention to *these* passages, the undue burden framework would seem substantially to adhere to informed consent principles, or to the value of dignity on which the informed consent paradigm is based. Consider the constraints the joint opinion imposes on abortion regulation on behalf of potential life. Government may regulate on behalf of potential life by means that inform, not hinder, a woman’s choice; it may persuade women by truthful, nonmisleading means to carry a pregnancy to term. Regulation that fails to respect these constraints is an undue burden on the abortion right.

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177. *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416 (1983).

178. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

179. *Casey*, 505 U.S. at 919 (Stevens, J., concurring and dissenting) (“The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State’s preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.”); see also *supra* note 132.

180. See Goldstein, *supra* note 152, at 807-29.

181. *Casey*, 505 U.S. at 882.

182. *Id.*

Then ask: given the government's great interest in potential life, why can't government mislead a woman into carrying a pregnancy to term? The requirement that government persuade women, and further that it persuade woman by truthful and not misleading means, is itself an expression of the dignity constraints that organize the undue burden framework: coercing or manipulating women into continuing a pregnancy instrumentalizes women as childbearers, violating both dignity as autonomy and equality values. Regulation seeking to vindicate the dignity of human life must also respect the dignity of women.

Reading the application of the undue burden framework in *Casey* as vindicating human dignity explains how the joint opinion deviates from conventional informed consent practice and why it substantially adheres to informed consent principles. As importantly, it makes sense of the limits on "informed consent" regulation of abortion that the joint opinion imposes, and suggests that even these limits are not exhaustive; they represent the minimum, not the maximum that dignity requires.

As we have seen, where the government is intervening in a woman's decision to end a pregnancy and endeavoring to persuade her to carry the pregnancy to term, government must address women as subjects with dignity—as competent and entitled to decide great questions concerning their lives. Whatever regulatory means government employs to express respect for the dignity of human life and to persuade a woman to carry a pregnancy to term must leave a woman in substantial control—both in making and in acting on her own decision. The great interest in vindicating human dignity may warrant a departure from ordinary informed consent principles of non-directive counseling, but it is not the kind of interest that warrants vindication through the manipulation or coercion of women.<sup>183</sup>

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183. Medical ethicists distinguish persuasion from coercion and manipulation. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 95-98 (5th ed. 2001). Ruth Faden and Tom Beauchamp discuss informational (1-3) and psychological (4-5) manipulation, which they regard as inconsistent with informed consent in *any* medical context:

- (1) intentionally overwhelming a person with excessive information so as to induce confusion and a reduction of understanding,
- (2) intentionally provoking or taking advantage of fear anxiety, pain, or other negative affective or cognitive states known to compromise a person's ability to compromise a persons' ability to process information effectively, and
- (3) intentionally exploiting framing effects by presenting information in a way that leads the manipulate to draw certain predictable inferences.
- (4) appeal[ing] to emotional weakness,
- (5) inducing of guilt or feelings of obligation.

Minimally, *Casey* tells us government must persuade by “truthful, nonmisleading” means. This is not the only dignity-constraint on government’s regulation of women’s decisionmaking, yet it is foundational. But what does the obligation not to mislead mean? It means at least that government refrain from leading women to believe matters that are untrue. This *Casey* plainly requires, and is the minimum reading of the constraints on persuasion imposed by the undue burden framework. One could read the undue burden test narrowly, and apply a “not misleading” standard appropriate to arms-length market transactions, allowing government to enlist women into continuing pregnancies as a used car salesman is allowed to make profit on the unwitting consumer. This reading of “not misleading,” however, presupposes no fiduciary obligation on government as it intervenes in women’s decision about abortion and is hardly consistent with a purported regulatory interest in vindicating human dignity.

The dignity-respecting constraints that undue burden analysis imposes are necessarily contextual. So, the question is whether the means government employs to persuade a woman to continue a pregnancy are of a kind that leaves a woman in substantial control of her decision and free to act on it. Even if *Casey* is read to authorize government engaging in partisan advocacy—not simply in the public sphere, but as government intervenes in the decisionmaking of individual women—the injunction against misleading women constrains *how* government can advocate. Dignity-constraints on misleading counsel apply if the government is not open about the fact that it is engaged in advocacy or committed to inculcating a particular moral viewpoint. If government does not acknowledge that it is inculcating a particular moral viewpoint, but instead employs the forms and borrowed authority of the scientific, clinical, or counseling professions and endeavors to elicit the reliance those professions invite, then government must conduct itself with commensurate fiduciary responsibility. If government endeavors to speak with the authority of professions that give balanced counsel, then, so, too, must government.

Nor does the problem of misleading women exhaust the dignity-constraints on government efforts to persuade women to continue a pregnancy. Dignity-respecting regulation of women’s decisions may neither manipulate nor coerce women. The intervention must leave women in substantial control of their decision, and free to act on it. Thus, even if one believes—as many supporters and opponents of abortion do—that emotion as well as reason is

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RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 366 (1986).

appropriate to making decisions of this kind, questions remain about the *kinds* of emotions law may interject into a woman's decision making about abortion, and the contexts in which government may be stimulate such emotions.<sup>184</sup> Would communications that target the woman obtaining an abortion at the moment of the procedure with her community's implicit or explicit recriminations count as persuasion or manipulation?

Medical ethicists regularly characterize the use of guilt or shame in counseling as manipulation;<sup>185</sup> yet one still might ask, why can't a community seeking to persuade a woman to continue a pregnancy employ stigma, shame, and sanction in an effort to secure compliance with its norms? Where the norm to be enforced is wholly benign, we might move directly to asking about the forms of social pressure that are commensurate with dignity. But there are special problems in this case that preclude analyzing it as a case involving the enforcement of a wholly benign social norm.

A community expressing respect for life and concern for the unborn by pressuring a pregnant woman into becoming a mother is engaged in a course of conduct that may or may not be wholly benign from a constitutional standpoint. Many who would restrict abortion to express "respect for life" explain this value in terms of proper sex and family roles.<sup>186</sup> Whether and to

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184. See Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 27 (2008) (arguing that although *Casey* condones state efforts to persuade a woman to forego an abortion in favor of childbirth, the opinion's "truthful and not misleading" language can be read more broadly than it traditionally has, to mean that "even a truthful message may mislead when it inappropriately takes advantage of emotional influence to bias an individual's decision away from the decision that would be made in a non-emotional, fully informed, state"); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 46 (2007) (arguing that informed consent legislation mandating explicit or graphic information about the fetus or the abortion procedure may violate *Casey*'s "truthful and not misleading" standard because "individuals hearing emotionally-laden communications eliciting fear or anxiety may be more susceptible to persuasion by that message" and may "come to a decision different from that which she might under a less emotional judgment process").

185. See *supra* note 183.

186. For theological and political accounts of respect for life that explain the norm in terms of proper sex and family roles, see *supra* note 159. Many groups that oppose abortion link abortion to views about sex and family. See Post & Siegel, *supra* note 152, at n.232 and accompanying text (listing examples of antiabortion groups whose mission includes opposition to same-sex marriage and advocacy of abstinence-only education, such as "the Heritage Foundation, <http://www.heritage.org/research/abstinence>, Focus on the Family, <http://www.citizenlink.org/FOSI/abstinence>, Eagle Forum, <http://www.eagleforum.org/alert/2005/03-08-05.html>, Free Congress, <http://www.freecongress.org/commentaries/2005/050929.aspx>, <http://www.freecongress.org/commentaries/2005/050216.aspx>, and the

what extent views about proper sex and family roles shape expression of “respect for life” in any given case is a contextual inquiry. So, too, is it important to examine the degree and kind of public pressure government brings to bear against women who are resisting becoming mothers. In short, constitutional oversight is required when government expresses respect for life by pressuring a woman into continuing a pregnancy. This is exactly what *Casey* holds.

*Casey*'s undue burden framework insists that the state can express respect for the dignity of life only if it does so in ways that respect the dignity of women. *Casey* allows government to persuade women to continue a pregnancy, but prohibits government from manipulating and coercing women into becoming mothers. Determining what forms of pressure are coercive and an undue burden on women's decisional autonomy is fundamentally normative. To decide whether government can use guilt, shame, or stigma to deter women from having an abortion and pressure them into bearing a child, we need to look to the constitutional values expressed in *Casey* and beyond.

What we uncover is constitutional constraint on the use of public power to impose traditional family roles on women. The modern constitutional order was founded when government emancipated women to decide *sui juris* whether

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Howard Center for Family, Religion, and Society, [http://www.profam.org/docs/acc/thc\\_acc\\_sellout.htm?search=contraception&opt=EXACT1](http://www.profam.org/docs/acc/thc_acc_sellout.htm?search=contraception&opt=EXACT1)”).

Leslie Unruh, Executive Director of Vote Yes for Life, the organization spearheading the campaign to ban abortion in South Dakota, is also founder and president of the Abstinence Clearinghouse, “a non-profit educational organization that promotes the appreciation for and practice of sexual abstinence.” Abstinence Clearinghouse, <http://www.abstinence.net/about> (last visited Apr. 30, 2008). Vote Yes urges voters to support the proposed ban in order to prohibit “abortion from being used as birth control.” Video: VoteYesForLife.com – Collect Signatures (Vote Yes For Life 2008), [http://www.godtube.com/view\\_video.php?viewkey=795b6186ef7c2a98bae8](http://www.godtube.com/view_video.php?viewkey=795b6186ef7c2a98bae8); see also Vote Yes for Life, *supra* note 101 (“[T]his bill prohibits abortions used as birth control.”); Monica Davey, South Dakota To Revisit Restrictions on Abortion, N.Y. TIMES, Apr. 26, 2008, at A14 (“It’s not a ban – it’s stopping abortion as birth control.” (quoting Leslie Unruh)).

Thus in South Dakota, advocates of banning abortion suggest that it is wrong to use abortion as “birth control,” while at the same time promoting abstinence-only education for students in the state. Cf. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 70-71 (proposing legislation that would “include a definition of sexual abstinence and a statement that abstinence education in South Dakota is to exclude contraceptive-based sexuality education”). The chairwoman of the South Dakota Task Force on Abortion—who opposes abortion—resigned in part because the Task Force rejected her recommendation that the state include, as part of its antiabortion policy, sex education that would provide both contraception and abstinence information. Instead, the Task Force advocated banning abortion and providing abstinence-only education. See Siegel, *supra* note 22, at 138-39 & n.135.

to assume family roles and how to integrate family roles and other activities of citizenship into their lives. Protecting women's decisions whether to become a mother vindicates both dignity as autonomy and dignity as equality. *Casey* marks this understanding time and again: in its articulation of the abortion right,<sup>187</sup> in its discussion of stare decisis values,<sup>188</sup> and in its application of the undue burden test to strike down the spousal notice requirement.

2. *Dignity Informed by History: The Use of Law To Enforce Family Roles*

To this point, this essay has explored how commitments to dignity explain *Casey's* divergence from and fidelity to the informed consent paradigm. Dignity, we have seen, is at the root of *Casey's* injunction that government persuade by truthful and nonmisleading means. In exercising its prerogative to persuade, government may not manipulate women—nor may government coerce women. Government intervention must leave a woman in substantial control of her decision and free to act on it.

It is the joint opinion's application of the undue burden analysis to the spousal notice requirement that most clearly elucidates noncoercion as a dignity constraint on regulation of women's abortion decisions. *Casey* is emphatic that women should not have to make decisions about whether to continue a pregnancy under conditions of domestic abuse, or the fear of it.<sup>189</sup>

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187. *Casey*, 505 U.S. at 852 (“Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . 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.”)

188. *Casey*, 505 U.S. at 856 (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); see also ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 109, 133 n.7 (rev. ed. 1990) (“The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”)

189. *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (“The unfortunate yet persisting conditions we document above [regarding the prevalence of domestic abuse] will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.”).

This form of pressure, the Court holds, is “undue.” But this is not the only reason why the Court rules that the spousal notice requirement is unconstitutional. The Court emphasizes that the spousal notice requirement violates the Constitution because of the sex role the law imposes on women. *Casey* holds that government may not empower husbands with forms of authority over their wives that resemble the sex roles that custom, common law, and the Constitution imposed on women before women were emancipated by modern constitutional law:

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, three Members of this Court reaffirmed the common-law principle that “a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . .” Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities” that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution . . . .

The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. . . . 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. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual’s family.<sup>190</sup>

In these remarkable passages, the joint opinion insists that, under the undue burden framework, government must vindicate the dignity of human life in ways that respect the dignity of women’s lives.

Here and throughout, the *Casey* Court treats as absolutely crucial the distinction between family roles that are chosen and family roles that

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190. *Id.* at 896-98 (citation omitted).



government imposes by law. Important social goods flow from bonds of family—love, respect, and intimacy. Yet however precious spousal communication may be, intimate relations are not achieved, but instead, violated, when imposed by law. Legally coerced intimacy is not only a poor substitute for spontaneous intimacy, but an unconstitutional imposition on women. The use of law to make a wife responsive to her husband’s desires violates a woman’s autonomy and equality at one and the same time, precisely as it perpetuates a centuries-old understanding of marital roles the Constitution now repudiates.

These passages of *Casey* echo the opening sections of the decision in which Justice Kennedy explains that the Constitution protects women’s decisions about motherhood because there is a fundamental difference between family roles that women choose and family roles that government imposes on women by law. The Constitution protects the abortion decision because government may not impose on women “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.”<sup>191</sup> Respecting women’s capacity to decide whether and when to become a mother—and prohibiting government policies that impose traditional sex-roles on women—simultaneously vindicates the autonomy and the equality dimensions of dignity, much as the Court’s equal protection sex discrimination opinions do.<sup>192</sup>

In reaffirming the abortion right and then ruling that the spousal notice requirement is an undue burden on the abortion decision, *Casey* protects women from government pressure to conform to customary family roles. It interprets the Constitution on the understanding that not all uses of law to enforce family relations are benign and that there is a history of using law to coerce sex-role conformity that the abortion right renounces. In these and other passages, *Casey* self-consciously grounds the justification and shape of the Constitution’s protection of women’s decisions about motherhood in history.

*Casey* locates government regulation of women’s decisions about motherhood in a history of customary, common-law, and constitutional laws imposing family roles on women that we now repudiate. *Casey*’s pointed references to history make plain *why* control over motherhood is a question of

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191. *Id.* at 852 (explaining that the Constitution prevents government from imposing on women “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture” and asserting that “[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society”).

192. See sources cited *supra* note 133.

dignity for women. Just as the nation's history makes labeling of individuals by race a practice that can violate dignity,<sup>193</sup> so too, does the nation's history make restricting the agency of individuals by sex a matter of dignity for women, especially where law pressures women to conform to customary family roles, or questions their competence to make decisions about integrating their role in the family and other activities of citizenship. Constraints on women that evoke or perpetuate this history violate women's dignity, denying women forms of respect and well-being that they are entitled to as free and equal citizens.

*Casey* understands that, for women, making decisions about sex and family roles free of state coercion implicates dignity as autonomy and dignity as equality. Not surprisingly, the *Casey* Court interprets the Due Process Clause in ways that are deeply informed by modern understandings of the Equal Protection Clause. Synthetic or intratextual interpretation of this kind is not simply appropriate, but necessary, if the Constitution is to protect dignity in meaningful ways.

In reaffirming *Roe*, the *Casey* Court set out to explain the constitutional values secured by protecting women's freedom to decide whether to become a mother. In 1992, the Court's explanation of *Roe*'s meaning was shaped by the understanding of equal citizenship that had developed in the Court's sex discrimination cases in the intervening decades. *Casey* appreciates that for women, a crucial dimension of freedom is freedom from legally imposed family roles. This historical understanding shapes the ways the Court protects women's dignity. At multiple junctures in *Casey*, the Court explains that there are equality values secured by the decisional autonomy *Casey* protects. To this point in time, the Court has protected these equality values through its decisions in *Roe* and *Casey*—though it could also do so directly through the authority of the Equal Protection Clause.<sup>194</sup>

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193. Collective memory commonly plays a role in imbuing social practices with dignitary implications. Consider how Justice Kennedy's opinion in *Seattle School District No. 1* implicitly invokes the history of segregation when it describes the harm of government categorizing students on the basis of race as a harm to dignity: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007).

194. See Siegel, *supra* note 15, at 1050-53 (discussing the ways that liberty and equality values intersect in *Casey*); Siegel, *supra* note 133, at 833-34 (situating *Casey* in several decades of equality reasoning in support of the abortion right, and observing that commentators read the joint opinion as vindicating a right at the intersection of liberty and equality, or grounded in equality alone).

### III. DIGNITY AS A CONSTRAINT ON WOMAN-PROTECTIVE JUSTIFICATIONS FOR ABORTION RESTRICTIONS

There is deep tension between the forms of decisional autonomy *Casey* protects and woman-protective justifications for restricting women's access to abortion. In what follows, this essay explores the status of the woman-protective justification for abortion restrictions after *Carhart*.

*Casey* mentions woman-protective justifications for abortion restrictions in passing,<sup>195</sup> while *Carhart* invokes these concerns in the much remarked upon passage that opens this essay.<sup>196</sup> The Court's gender-paternalist observations in *Carhart* have drawn wide notice, and plainly signal receptivity to woman-protective antiabortion argument.<sup>197</sup> Yet the Court stops well short of adopting this rationale as a justification for restricting access to abortion under *Casey*.

The most significant constitutional questions about the gender-paternalist justification for abortion restrictions arise, not from the brevity of the Court's discussion in *Carhart*, but instead from *Carhart's* reliance on *Casey*. *Carhart* takes its authority from *Casey*, and as analysis to this point should make clear, the woman-protective rationale for restricting abortion is in deep and direct conflict with forms of dignity *Casey* protects.

From the standpoint of the Constitution's dignity commitments, fetal-protective and woman-protective justifications for restricting abortion importantly differ.<sup>198</sup> Fifth and Fourteenth Amendment cases decided since the

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195. *Casey*, 505 U.S. at 882 (“In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.”).

196. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007); see *supra* text accompanying note 16.

197. See *supra* note 24 (Leslee Unruh expressing delighted reaction to *Carhart*); *supra* note 113 (The Justice Foundation citing the success of its Operation Outcry affidavits in persuading Justice Kennedy) and 115 (Harold Cassidy memo discussing court's receptivity to woman-protective rationale).

198. Doctrine clearly differentiates regulation of abortion undertaken for the purpose of protecting the unborn and for protecting women. The case law does not sufficiently address the ways that fetal-protective regulation of abortion may also be based on judgments about women. See Siegel, *supra* note 93 (drawing on history of nineteenth-century campaign to criminalize abortion and contraception to show how judgments about protecting the unborn also entail judgments about women); see also *supra* note 159 (theological and political sources asserting “respect for life” and the “dignity” of life which link opposition to abortion and support for traditional sex and family roles). That said, the cases are clear in tying

1970s treat as weighty the state's interest in protecting potential life, but treat as deeply suspect the state's interest in restricting women's choices for the claimed purpose of protecting them—and treat as *especially* suspect gender-paternalist claims in the tradition of *Muller v. Oregon*<sup>199</sup> that would impose protective restrictions on women in order to free them to be mothers.<sup>200</sup> While *Casey* and *Carhart* do not articulate specific doctrinal limits on the woman-protective justification for restricting abortion, as we have seen, these doctrinal limits can be derived from core principles of both the substantive due process and the equal protection cases.<sup>201</sup>

This Part examines, first, what the Court has affirmatively said about the gender-paternalist justification for abortion restrictions in *Carhart*. It then considers limitations on gender-paternalist justifications for abortion restrictions that flow from the Court's substantive due process and equal protection case law. These limitations become apparent as we examine presuppositions about the rights holder that the substantive due process and equal protection cases share, and the traditions of regulating women's family roles that these two bodies of constitutional law repudiate. This inquiry reveals deep connections between the forms of dignity *Casey* protects and the equal protection cases.

The modern constitutional canon prohibits laws that restrict women's autonomy for the putative purpose of protecting women and freeing women to be mothers. Justifications for restricting abortion to protect women that are advanced by advocates of South Dakota's proposed abortion ban, and the State Task Force Report on which it relies, are gender-paternalist in just this way. These woman-protective justifications for restricting abortion deny women forms of dignity that both *Casey* and the modern equal protection cases protect.

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government's prerogative to restrict abortion to the regulatory purpose of protecting potential life.

199. 208 U.S. 412 (1908).

200. See *UAW v. Johnson Controls*, 499 U.S. 187, 205-06 (1991) (ruling that fetal-protective restrictions on the employment of fertile women violate the pregnancy discrimination amendment to federal employment discrimination laws, citing an article that ties such policies to the sex-based labor protections upheld in *Muller*, and observing that “[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself”); see also *infra* note 191 and accompanying text.

201. On the intertwining of liberty and equality values in the substantive due process cases, and equality-based arguments for the abortion right founded on various clauses including the Equal Protection Clause, see *supra* note 133.

A. *Woman-Protective Discourse and Counter-Signals in Carhart*

There is no doubt that the Court's discussion of post-abortion regret and its reference to the Operation Outcry affidavits in *Carhart* signal receptivity to antiabortion advocacy and the abortion-hurts-women claim. It is not simply that the Court upholds the Partial-Birth Abortion Ban Act in terms that make abortion restrictions harder to challenge.<sup>202</sup> At numerous junctures, the *Carhart* decision speaks in an idiom that is distinctly responsive to the antiabortion movement. The opinion employs the discourse of female "depression" and "regret," and the movement-inflected usage of a "choice [that] is well informed."<sup>203</sup> The opinion also makes disparaging reference to "[a]bortion doctors,"<sup>204</sup> insistently refers to a woman who has had an abortion as a "mother,"<sup>205</sup> and provocatively shifts in its description of antenatal life from "the life of the fetus that may become a child,"<sup>206</sup> to the "unborn child,"<sup>207</sup> "infant life,"<sup>208</sup> and "baby,"<sup>209</sup> and finally again to the fetus. In speaking of women's regret, referring to women who have had abortions as mothers, and discussing the unborn child, *Carhart's* use of the antiabortion movement's idiom communicates the Court's receptivity to the movement's claims, without deciding questions of law.

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202. Cf. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641-43, 1650-52 (2007) (Ginsburg, J., dissenting) (protesting the majority's ruling on the health exception and facial challenges).

203. *Carhart*, 127 S. Ct. at 1635 (majority opinion) (Kennedy, J.). The antiabortion movement has given the discourse of informed choice a specialized meaning in the abortion context. In antiabortion usage, a well-informed choice is a choice *against* abortion. For the development of this form of talk as a movement strategy, see *supra* Section I.B. See also Siegel, *supra* note 15, at 1031 ("The [South Dakota] *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 . . .").

204. *Carhart*, 127 S. Ct. at 1635.

205. *Id.* at 1627, 1630 (describing the "partial-birth abortion" procedure by reference to the body of the "mother"); *id.* at 1634 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief . . .").

206. *Id.* at 1633.

207. *Id.* at 1634.

208. *Id.*

209. *Id.* at 1622. Justice Ginsburg documents and protests the majority opinion's apparently deliberate blurring of the description of antenatal and postnatal life. See *id.* at 1650 (Ginsburg, J., dissenting).

Language of this kind certainly signals sympathy for the claims of the antiabortion movement, even as it leaves unclear the extent to which the Justices in the majority share the beliefs of the antiabortion movement. In a constitutional democracy, when the Court interprets guarantees that are the focal point of decades of social movement conflict, responsive interpretation of this kind is commonplace and serves a variety of system goods. It communicates that the Court has respectfully engaged with a movement's claims and recognizes as serious the point of view from which the claims emanate. Engaging with movement claims in this way helps establish the Court's authority and engenders in advocates the expectation that the Court may one day recognize movement claims that to this point in time the Court has not. Nothing prevents the Court from responding in like fashion to multiple claimants in a constitutional conflict, in one opinion establishing its authority with a movement *and* its agonist.<sup>210</sup>

Thus, before we assess the discussion of post-abortion regret in *Carhart*, we should also take account of the many ways that *Carhart* reasons within the logic and idiom of the abortion rights movement. Most prominently, *Carhart* applies *Casey*. Justice Kennedy understands *Casey* to require protection for ordinary second-trimester abortions, and *Carhart* construes the Partial-Birth Abortion Ban Act to protect these standard second-trimester procedures, applying "[t]he canon of constitutional avoidance [to] extinguish[] any lingering doubt as to whether the Act covers the prototypical D & E procedure. '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"<sup>211</sup> Thus *Carhart* reaffirms protection for second-trimester abortions.

But *Carhart*'s allegiance to *Casey* runs deeper. Not only does the Court protect second-trimester abortions, it presents itself as respecting women's decisional autonomy even as to the procedures the Partial-Birth Abortion Ban Act regulates. *Carhart* does not offer itself as limiting a woman's decision whether or when to end a pregnancy. To the contrary, the Court decides the case as if the only question in issue was the question of the medical *method* by which doctors would effectuate a woman's abortion decision; the Court

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210. See *supra* note 152 (discussing this dynamic in the *Casey* decision); cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV.L.REV. 1470, 1546-47 (2004) (discussing how cases enforcing *Brown* establish their authority by appeal to a principle of ambiguous import that commands the allegiance of Americans with very different views about how *Brown* should be enforced).

211. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (citation omitted); see also Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. (ONLINE) (2008), [http://www.hlpronline.com/Smith\\_HLPR.pdf](http://www.hlpronline.com/Smith_HLPR.pdf).

authorizes regulation of the abortion procedure to the extent it does not pose an undue burden on women's decision making.<sup>212</sup>

The Partial-Birth Abortion Ban Act is incrementalist regulation, and *Carhart* upholds it as such, reasoning about the statute in a framework that presupposes the abortion right. As antiabortion critics of the incrementalist strategy emphasize, *Carhart* upholds the statute while discussing constitutional and unconstitutional methods of performing second-trimester abortions in vivid detail, involving the Court in approving how doctors are to perform an act that would be infanticide, *if* the Court itself did not view the distinction between pregnancy and birth as absolutely fundamental in determining the act's ethical and legal character. It is because *Carhart* compares but so fundamentally distinguishes abortion and infanticide that absolutist antiabortion critics condemn *Carhart* as "Naziesque" and the "devil's" work, and vilify the movement strategy that produced the ruling and antiabortion advocates who now celebrate it.<sup>213</sup> Indeed, the Court understands the law it is upholding in *Carhart* as *clarifying* the distinction between abortion and infanticide.

The *Carhart* decision is remarkable for the ways that it manages to express meanings and messages of the antiabortion movement within an abortion-rights framework. The opinion emphasizes the importance of expressing respect for life and affirming dignity as *life as part of the practice of abortion*. The Court upholds a statute that requires abortion providers to perform abortions in ways that express respect for human life, without endeavoring to prevent women from obtaining an abortion.<sup>214</sup> The opinion's gender paternalism seems to be similarly expressive in character. *Carhart* speaks of protecting women from decisions they might regret while upholding a statute that the Court presents as constraining *doctors'* decisions about how to perform an abortion, not women's decisions about whether to have an abortion. By signaling in this

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212. *Carhart*, 127 S. Ct. at 1633 ("The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to *allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.*") (emphasis added).

213. Two such passionate critiques of the *Carhart* opinion include the protests of Rev. Philip L. "Flip" Benham (former national director of Operation Rescue who claims to have saved Norma McCorvey), *see supra* note 51, and of Brian Rohrbough (President, Colorado Right to Life), *see supra* notes 54-55 and accompanying text.

214. *See supra* text accompanying notes 157-161.

fashion, the Court provided *Roe*'s opponents an exhilarating moment of recognition—which, as we will see, has encouraged the movement to act in South Dakota and beyond—within the very same opinion in which the Court reaffirmed the *Casey* framework as governing the regulation of abortion.

There is, of course, a possibility, turning on events beyond the reach of this analysis, that *Carhart* could be a station on the way to *Roe*'s overruling. Without confidence in anyone's capacity to engage reliably in such long-term political forecast, I instead read *Carhart* to restrict abortion as *Casey* did, altering the law of abortion in order to create opportunities, within an abortion-rights regime, for *Roe*'s opponents to express moral opposition to the practice.

The status of *Carhart*'s observations concerning post-abortion regret can be described in more conventional doctrinal terms. The Court may have discussed claims of post-abortion regret that some women might experience if their doctors employed the abortion method Congress banned; but the Court did not discuss, much less sanction, the kind of restrictions on women's decisionmaking that the authors of the amicus brief on behalf of Sandra Cano advocate.<sup>215</sup>

*Casey* and *Carhart* each base the state's interest in restricting abortion on the state's interest in protecting potential life; and the undue burden framework that Justice Kennedy adopted in *Casey* and applied in *Carhart* focused on the state's concern about protecting potential life.<sup>216</sup> While *Roe* recognized a state interest in regulating abortion in the interest of protecting maternal health,<sup>217</sup> the state interest in protecting maternal health that *Roe* recognized was based on an understanding of maternal health that bears *no* connection to the post-abortion syndrome (PAS) and coercion claims the antiabortion movement is now making, as advocates of PAS and coercion

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215. The Cano brief argued that the Partial-Birth Abortion Ban Act should be upheld because “after thirty-three years of real life experiences, postabortive women and Sandra Cano, ‘Doe’ herself, now attest that abortion hurts women and endangers their physical, emotional, and psychological health.” Brief of Sandra Cano et al., *supra* note 15, at 5. The brief cited the findings of the South Dakota Task Force at length, *id.* at 17-21, and relied on a collection of affidavits to support the proposition that “abortion hurts women emotionally and psychologically, and therefore, abortion should be banned to protect the health of the mother.” *Id.* at 20-21. One of the coauthors of the brief, Allan E. Parker, Jr., helped to form the Justice Foundation in 1993, which has joined with Harold Cassidy to represent Norma McCorvey and Sandra Cano, in seeking to reopen their cases. See *supra* note 95-97 and accompanying text.

216. See *supra* Section II.B.

217. *Roe v. Wade*, 410 U.S. 113, 162 (1973).



claims are themselves quick to assert.<sup>218</sup> Given the normative universe separating the understanding of the state's "interest in preserving and protecting the health of the pregnant woman"<sup>219</sup> in *Roe* and many of the premises and claims of the new gender-paternalist arguments for restricting abortion now appearing in constitutional litigation, the gender-paternalist rationale for restricting abortion requires much closer scrutiny.

Advocates of the gender-paternalist rationale for restricting abortion oppose the rights *Roe* and *Casey* grant women by advancing a descriptive claim. As Part I shows, antiabortion advocates now assert that women seeking abortions are vulnerable, dependent, and confused, and need restrictions on abortion to protect them from coercion and their own mistaken decision making and to free them to fulfill their natures as mothers.<sup>220</sup> From this (highly contested) descriptive claim, advocates wish courts to refashion the abortion right, premised on a "new" view of the rights holder as ascriptively dependent—a move that would neatly reinstate the picture of women as constitutional persons that *Casey* and the modern sex discrimination cases repudiate.

The woman-protective justification for abortion restrictions violates the very forms of dignity *Casey* protects. Analyzing these constitutional limitations uncovers deep connections between the forms of dignity *Casey* protects and the equal protection sex discrimination cases. Woman-protective justifications for abortion restrictions would reinstate a legal regime that addresses women as ascriptively dependent—reviving forms of gender paternalism that the Court and the nation repudiated in the 1970s.

### *B. Ascriptive Autonomy and Dependence: Gender Paternalism Old and New*

What picture of the rights-holder do *Roe* and *Casey* presuppose? As *Casey* emphasizes in reaffirming the abortion right and in striking down the spousal notice provision, *Roe* and its progeny rest on views of women that the modern constitutional order embraced as it recognized adult women as competent to make decisions *sui juris*, and as it repudiated the understanding of women as

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218. The antiabortion movement claims that the *Roe* Court did not understand post-abortion syndrome and coerced abortions, and that the evidence the movement is presenting thus warrants reopening *Roe* on a claim of change facts. See *McCorvey v. Hill*, 385 F.3d 846, 850-52 (5th Cir. 2004) (Jones, J., concurring); see also *supra* note 95-97 and accompanying text.

219. *Roe*, 410 U.S. at 162.

220. See *supra* Part I; *infra* notes 247-258 and accompanying text.

dependent on their husbands that prevailed at common law and for much of our constitutional tradition.<sup>221</sup>

*Roe* emancipated women from the hazards and humiliations of a “therapeutic” abortion regime<sup>222</sup> during the same decade in which the nation was beginning to repudiate common law and constitutional traditions that allowed government to impose family roles on women and to exclude them from participation in the market and public sphere. The decision to emancipate women from doctor’s authority was in part a decision to emancipate doctors from the hazards of random prosecutions; in part it reflected concern about the hazards to women of illegal abortions. But also in deep and increasing measure, the abortion right was articulated and defended as part of a transformation in the terms of membership of women in the constitutional community.<sup>223</sup> Whatever the Burger Court understood about the connection

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221. See Subsection II.C.2. This process begins with legislative reform of the common law marital status rules during Reconstruction, continues through the enfranchisement of women in the progressive era, and culminates in the late twentieth century with the flowering of equal protection and associated civil liberties for women.

222. Before *Roe*, the legal system prohibited abortion except as doctors therapeutically permitted the procedure, requiring women to plead with doctors to diagnose them as too physically or psychologically infirm to become a mother; the alternative, especially for women who lacked resources, was to risk illegal and unsafe abortions. On the gendered logic of the therapeutic abortion, see Siegel, *supra* note 93, at 273, 365 & n.414. At the time of *Roe*, there was widespread concern about the disparities in access that the therapeutic abortion regime produced across class and about the threat that “back alley” abortions posed to women of all classes. In this era, the equality argument for abortion was first of all understood as concerned with wealth equality, then sex equality. See Reva B. Siegel, *Siegel, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID* 63, 63-85 (Jack Balkin ed., 2003) (rewriting *Roe* as a sex equality opinion); see also MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 42-43, 76 (1996) (demonstrating that prior to *Roe*, abortion bans were haphazardly enforced and coexisted with a “gray market” in safe abortions that provided “affluent white women with de facto immunities from statutory bans on abortion” and that socioeconomic power and access to the “gray market” for abortion services mitigated the negative effects of bans upon women of privilege, while simultaneously forcing poor women and women of color to risk dangerous procedures to obtain the same result). *Roe* freed women from these forms of subjection by declaring women competent to make the decision whether to end a pregnancy themselves.

223. See GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 274-75 (2005) (“[A]bortion rights feminist groups . . . had come to frame restrictive abortion laws as an unjust oppression forced upon women.”); LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (2002); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 118, 120 (1984) (“Once they [women] had choices about life roles, they came to feel that they had a right to use abortion in order to control their own lives. . . . The demand for repeal of all abortion laws was an attack on both the segregated labor market and the cultural expectations about women’s roles.”). For feminist claims that the abortion right was

between its equal protection decisions and its substantive due process decisions in the 1970s, by the decade's end social conflict over sex equality and reproductive rights converged to make the nexus painfully clear.<sup>224</sup>

These struggles are not merely *Casey*'s background but instead are woven into the substance of the decision. The Court issued *Casey* after some two decades in which the nation passionately debated the social meaning and practical stakes of the abortion decision for women. If *Casey* reflects community concern about protecting potential life, it *also* reflects community concern about respecting the autonomy and equality of women.

At multiple points in the decision, *Casey* reflects deep appreciation of the connections between the equal protection and substantive due process decisions that may not have been clear to the Court in the 1970s.<sup>225</sup> As we have seen, *Casey* reaffirms the abortion right, specifically denying to government the prerogative to impose customary family roles on women, and applies the undue burden framework, specifically renouncing common law traditions that made women the ascriptive dependents of men.<sup>226</sup>

This history helps define the forms of dignity and autonomy *Casey* protects. The abortion right was articulated and defended over a several decade period in which women were resisting the power of the state to impose family-role based restrictions on their civic freedom. Just as a history of segregation imbues classification by race with dignitary meaning, so, too, a history of legally imposed family roles helps make family-role based restrictions on women's freedom reverberate with dignitary affront, raising issues of respect as well as questions of immense practical significance for women.

Sometimes these customary, common-law, and constitutional restrictions on women's freedom were justified in terms that denigrated women's competence, but often they were justified paternalistically, as redounding to women's benefit. A special tradition of gender paternalism played a role in

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a sex equality right and tied to claims concerning the conditions in which women worked, raised children, and other activities of citizenship, see Siegel, *supra* note 133, at 826. See also *id.* at 831 (“[*Casey*] expressed constitutional limitations on abortion laws in the language of . . . equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.”).

224. See Post & Siegel, *supra* note 152, at 418-20; Siegel, *supra* note 68, at 1369, 1393-1400; Siegel, *supra* note 133, at 827 (“[Opponents of the Equal Rights Amendment] mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote.”).

225. For discussion and survey of the large body of literature observing these features of the decision, see Siegel, *supra* note 133, at 833 n.63.

226. See *supra* Subsection II.C.2.

rationalizing family-role based limitations on women's civic freedom. For centuries, law employed descriptive claims about women's vulnerability and dependence to justify a regime of "protection" that imposed legal disabilities on women and so made women into ascriptive dependents of their husband and the state.<sup>227</sup> Cases beginning with *Frontiero* condemn these sex-specific limitations on women's freedom.<sup>228</sup>

Paradigmatically, these gender-paternalist restrictions claimed to free women from male coercion, often for the express purpose of enabling women to fulfill their natures as wives and mothers. For example, the common law of coverture, which *Frontiero* repudiated, restricted married women's ability to act as independent legal agents, whether to file suit, sign contracts, or be held accountable for crimes.<sup>229</sup> This regime of ascriptive disabilities was commonly justified by descriptive claims about women's vulnerability. Thus, "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."<sup>230</sup> Depriving women of legal capacity was said to protect women from male coercion.

The telling, and morally problematic, feature of this tradition of gender paternalism was its habit of redressing male dominance by laws that empowered men and disempowered women. Instead of protecting women from coercion by restricting the dominating husband, the common law invoked the putatively benign purpose of protecting women as a rationale for depriving *women* of legal agency, rationalizing gender hierarchy in the

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227. Cf. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) ("[W]here descriptive autonomy refers to the actual condition of persons and views autonomy as partial and contingent, ascriptive autonomy marks a moral right to personal sovereignty. Where descriptive autonomy is an ideal that can be promoted or protected, sometimes through paternalistic legislation, ascriptive autonomy signifies a right to respect that is incompatible with much if not all paternalism.").

228. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

229. See *id.* at 684; 1 WILLIAM BLACKSTONE, COMMENTARIES \*431 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant. . . . And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable."); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1995).

230. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 32 (1994). The classic summary of the legal fiction of marital unity resides in 1 WILLIAM BLACKSTONE, COMMENTARIES \*431. See *supra* note 229.

discourse of protection.<sup>231</sup> This common law model served as a foundation for women's roles in a wide variety of settings. Similar stories about women's family roles and women's vulnerability to coercion justified women's exclusion from voting, jury service, and other acts of collective self-governance.<sup>232</sup> Women were too weak to be entrusted with legal agency to act autonomously, and the male will to control was too powerful to be constrained by law:

If the husband is brutal, arbitrary, or tyrannical, and tyrannizes over her at home, the ballot in her hands would be no protection against such injustice, but the husband who compelled her to conform to his wishes in other respects would also compel her to use the ballot if she possessed it as he might please to dictate.<sup>233</sup>

Denying women the vote thus protected them from male coercion: “[W]hat remedy would be found for the inflictions . . . which [women] would suffer at home for that exercise of their right which was opposed to the interests or prejudices of their male relations?”<sup>234</sup>

Protecting women from male coercion was one justification for restricting women's legal agency: it had the salutary effect of preserving natural family roles in which the husband was to govern and represent the wife. Another powerful tradition of gender paternalism justified limitations on women's agency as freeing women to inhabit their natural family roles. Thus, denying women the right to practice law freed them to serve in their natural capacity as wives and mothers.<sup>235</sup> Protective labor legislation restricting the hours and jobs

231. States preserved the status roles of marriage, even as they reformed the common law of coverture. See Siegel, *supra* note 229, at 2127-32 (describing the interpretation of earning statutes that ostensibly abolished coverture by giving wives rights in their labor, yet preserved family roles by refusing to give wives rights in their household labor); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2169-75 (1996) (tracing the modernization of marital status roles and showing how they were transformed yet preserved in the way the law enforced companionate understandings of marriage).

232. See Siegel, *supra* note 145, at 983-87 (exploring connections between the common law of coverture and the justifications for women's disfranchisement).

233. *Id.* at 995 (quoting S. REP. NO. 48-399, pt. 2, at 6-7) (emphasis omitted) (describing the argument of members of the Senate Woman Suffrage Committee who opposed the Sixteenth Amendment on grounds that enfranchising women would not protect them from domestic violence and would merely exacerbate marital conflict).

234. L.P. BROCKETT, *WOMAN: HER RIGHTS, WRONGS, PRIVILEGES, AND RESPONSIBILITIES* 248 (Books for Libraries Press 1970) (1869).

235. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (denying a female petitioner license to practice law in Illinois because she was a married woman and

in which women might work freed women to perform their natural role as mothers.<sup>236</sup>

It is this common law and public law tradition that the modern constitutional canon specifically rejects.<sup>237</sup> It repudiates the picture of women's roles and capacities long employed to justify gender-paternalist restrictions on women's freedom, and it repudiates the classic form of protection the common-law tradition offered women, in which restricting *women's* agency was the means chosen to protect and free them: "an attitude of 'romantic

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noting that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. 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"); *In re Goodell*, 39 Wis. 232, 244-46 (1875) (denying the motion of a female to be admitted to the bar for the practice of law in the state of Wisconsin and noting that "it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours").

236. In *Muller v. Oregon*, 208 U.S. 412, 421 (1908), the United States Supreme Court upheld an Oregon statute placing maximum hours restrictions on women as an appropriate measure to protect women's health and reproductive capacity, noting that long hours may result in "injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care." See also Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN'S L.J. 457, 470-77 (1996) (arguing that protective labor legislation was animated by concern over preserving women's fertility and reproductive usefulness).

237. See *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. 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 paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.' *Bradwell v. State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring). As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . ."). Title VII cases repudiate gender-paternalist limits on women's freedom, as well. See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 211 (1991) (holding that company may not exclude all women with the capacity to become pregnant from certain positions and noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. . . . It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make"); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>238</sup>

In the modern constitutional tradition, it does not state a constitutionally cognizable reason for imposing substantial, sex-specific restrictions on women's freedom to argue that women lack competence to make legally responsible choices; that the best way to protect women against male coercion is to restrict *women's* choices; or that it is in women's interest for government to restrict their choices to free them to assume their natural roles as mothers.<sup>239</sup> Longstanding custom and common law traditions may give arguments premised on gender-stereotypic conceptions of women's roles and capacities a ring of common sense to some; by reason of this very same tradition, however, they inflict deep dignitary affront to others.

More to the point, several decades of sex discrimination cases starting with *Reed* and *Frontiero* insist that the state may not regulate women on the basis of stereotypic, group-based generalizations, but must proceed on the basis of individualized determinations wherever possible, and where not, must satisfy some form of least-restrictive means inquiry to ensure that sex-based restrictions are substantially related to important governmental ends and are not "used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."<sup>240</sup>

Justice Ginsburg and a growing community of scholars have long argued that this body of equality law governs abortion restrictions.<sup>241</sup> Respecting women's choices about whether and when to become a mother simultaneously vindicates autonomy and equality values<sup>242</sup>—values integral to respecting

238. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

239. See Siegel, *supra* note 15, at 996 (quoting equal protection cases).

240. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (citation omitted).

241. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-201 (1992); Siegel, *supra* note 133, at 828-29 (recounting history of sex-equality arguments for the abortion right, in the period before and after the ERA campaign). For my equality analysis of fetal-protective abortion restrictions, see Siegel, *supra* note 93, and Siegel, *supra* note 222. For my equality analysis of woman-protective abortion restrictions, see Siegel, *supra* note 15.

242. See Siegel, *supra* note 15, at 1050 ("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."). Some scholars view the substantive due process cases as guaranteeing women equal citizenship in

human dignity that this essay explores, in cases ranging from *Lawrence* and *Casey* to *Parents Involved* and *J.E.B.*

For this reason, it was to the Court's substantive due process *and* equal protection cases that *Carhart's* dissenting justices appealed in protesting the Court's decision to uphold the Partial-Birth Abortion Ban Act. Justices Ginsburg, Breyer, Souter, and Stevens understand the right *Roe* and *Casey* protect as a right grounded in constitutional values of autonomy and equality:

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny. . . . "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.<sup>243</sup>

In opening her dissenting opinion on these terms, Justice Ginsburg is appealing to Justice Kennedy in the name of commitments they both share.<sup>244</sup> In the next case, if not this, the dissenters seem to be saying to Justice Kennedy, you will recognize abortion restrictions that violate women's dignity and encroach upon "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."

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matters concerning the regulation of abortion, while others argue that the equal protection cases properly apply. See Siegel, *supra* note 133, at 824-26.

243. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (citations omitted).

244. *Cf. id.* at 1649 (Ginsburg, J., dissenting) (citing Justice Kennedy's opinion in *Casey* as contrary to his reasoning in *Carhart*).



C. *Claims on Which Woman-Protective Justifications for Abortion Restrictions Rest*

There are some, at least in the antiabortion movement, who credit this possibility. But not Harold Cassidy, who has played a leading role in advancing woman-protective argument, in South Dakota and elsewhere.<sup>245</sup> Cassidy argues that the best way to move the Court to adopt a ban on abortion is to argue, as he did in a suit with Allan Parker that sought to re-open *Roe*, that women lack competence to make responsible choices about abortion; that restricting women's legal and practical capacity to choose abortion will protect women against coercion, as well as their own confusion about what is in their own and their family's interest; and that restricting women's ability to make choices concerning their own lives and the lives of their existing family members will free them to assume their roles as mothers.<sup>246</sup> When Harold Cassidy explains woman-protective antiabortion argument, he typically emphasizes claims about women's capacity and claims about women's roles:

It took the experimentation with abortion to disprove the central fundamental question or fundamental assumption of *Roe*, and the fundamental assumption that there can be a known, there can be a voluntary, there can be an informed waiver of the mother's interest. It took the experience of millions of women, who now have come forward, and said, "I didn't know what I was doing. I wasn't told the truth."

Walk away from it, and live with it, and forget about it. She can't forget, she can't live with it, and it's not just an unnatural act, it is an unnatural, evil act. And for the men of this nation, and the seven male judges who created this, who think that women can deny that they are women, they can deny that they are mothers, without consequence, is not only ignorant, it's cruel.<sup>247</sup>

Litigation documents from the suit to reopen *Roe* and *Doe* express Cassidy and Parker's belief that the affidavits would present the Court with a new understanding of women's decisional capacity in matters concerning abortion:

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<sup>245.</sup> See *supra* notes 94-99 and accompanying text.

<sup>246.</sup> See *supra* note 96; *infra* text accompanying notes 247-248, *infra* notes 268, 270 and accompanying text (quoting litigation documents, a memorandum, and interviews).

<sup>247.</sup> EWTN, *supra* note 89 (Cassidy discussing the Donna Santa Marie tort suit against an abortion provider).

The United States Supreme Court in *Roe* and *Casey* assumed that abortion would be a voluntary choice. Rather than being the result of a knowing, voluntary, dignity-enhancing woman's choice, the attached Women's Affidavits from more than a thousand women who have had abortions reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers, abortionists, or circumstances. Of course, women are intelligent beings capable of making rational, informed decisions. However, it is difficult in a pressured pregnancy situation to make a rational, informed decision under such extreme circumstances with so little truthful information provided.<sup>248</sup>

Similar arguments dominate the South Dakota Task Force Report, the legislative history for the ban the state's voters considered in 2006 and will consider again this year.<sup>249</sup> Relying on the Operation Outcry affidavits, the South Dakota Task Force asserted it received the testimony of 1950 women, reporting that "[v]irtually all of them stated they thought their abortions were uninformed or coerced or both."<sup>250</sup> The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or even the clinic—because "[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child."<sup>251</sup> The Report asserted that a woman who is encouraged "to defy her very nature as a mother to protect her

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248. Memorandum of Law in Support of Rule 60 Motion, *supra* note 95, at 17, 22-23 ("The attached Affidavit testimony of more than a thousand women who actually had abortions shows the unproven assumption of *Roe* that abortion is 'a woman's choice' is a lie. The 'choice,' a waiver of a constitutional right to the parent-child relationship, requires a voluntary decision with full knowledge. In addition to being coerced, women are also lied to and misled."); *see also* Brief in Support of Rule 60 Motion for Relief from Judgment, *supra* note 95, at 34 ("Under the assumptions of *Roe* and *Casey*, women were to be "free" to make their own decision about whether to abort or carry a child to birth. This assumes that they are free from pressure or coercion, and that their physician has provided them with complete and adequate knowledge of the nature of abortion and its long term consequences. The women who have experienced abortion testify in sworn Women's Affidavits how they were not informed of the consequences." (citation omitted)).

249. *See supra* text at notes 20, 100-107.

250. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 31, 38; *cf. id.* at 21-22 ("We find the testimonies of these women an important source of information about the way consents for abortions are taken . . ."). The Report relies heavily on the affidavits and repeatedly cites them as evidence.

251. *Id.* at 56.

child,”<sup>252</sup> is likely to “suffer[] significant psychological trauma and distress.”<sup>253</sup> It thus recommended that the state ban abortion to preserve “the pregnant mother’s natural intrinsic right to her relationship with her child, and the child’s intrinsic right to life.”<sup>254</sup> (The chair of the South Dakota Task Force on Abortion, an obstetrician who opposes abortion, resigned from the Task Force and repeatedly spoke out against the Report because of its disrespect of scientific facts and method.<sup>255</sup>)

The preamble of South Dakota’s 2005 “informed consent” statute enacts the Task Force Report’s claims about women’s decisional capacity into law.<sup>256</sup> The statute is based on an official legislative finding:

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 crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures.<sup>257</sup>

South Dakota’s stated rationale for intervening in women’s decisionmaking is based on generalizations about women as a class that sound in familiar

252. *Id.* at 56.

253. *Id.* at 47-48. Openly rejecting the findings of numerous government and professional associations, the Task Force found that women who abort a pregnancy risk a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation, to breast cancer. *Id.* at 42-46, 52.

254. *Id.* at 67.

255. See Siegel, *supra* note 22, at 139-40 (discussing decision of the chair of the South Dakota Task Force on Abortion, who opposes abortion, to resign and speak out against the report because of its failure to conform with scientific facts, method, and authority); see also *supra* note 81 (citing public health authorities that repudiate post-abortion syndrome).

256. H.B. 1166, 2005 Leg., 80th Sess. 3 (S.D. 2005) (codified in S.D. CODIFIED LAWS § 34-23A-1.4 (2005)), available at <http://legis.state.sd.us/sessions/2005/1166.htm>.

257. *Id.* The statute further states:

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.

S.D. CODIFIED LAWS § 34-23A-1.4 (2005); see *infra* note 259 (quoting statute).

stereotypes about women's capacity and women's roles<sup>258</sup>—here barely cloaked in public health frames. These gender-conventional convictions—that women are too weak or confused to make morally responsible choices and need law's protection to free them to be mothers—are here used to justify an “informed consent” script between doctor and patient designed to frighten and shame a woman into choosing to carry a pregnancy to term.<sup>259</sup>

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258. 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 93, at 74-76; cf. E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 119, 145 (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 93, 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.”).

259. The law directs doctors to tell women that an abortion “will terminate the life of a whole, separate, unique, living human being,” and 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,” and directs the doctor to provide the woman seeking an abortion:

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; . . . (iv) All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility.

In addition to the limitations of the First Amendment,<sup>260</sup> *Casey* imposes dignity-respecting constraints on such “informed consent” dialogues. Whatever its putative protective purpose, “informed consent” counseling that provides a woman false counsel—for example that having an abortion may increase her risk of breast cancer<sup>261</sup>—is an undue burden on a woman’s

S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), (c) & (e) (2005). Given that the doctor is to communicate this information, inquire whether the patient understands, and record any questions she has, under the sanction of the criminal law, it is not at all clear what freedom a doctor has to deviate from the message provided in the statute and the Task Force Report that is its legislative history. S.D. CODIFIED LAWS § 34-23A-10.1 (S.D. 2005).

260. See *Casey*, 505 U.S., at 884 (“To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” (citation omitted)); see also *supra* note 164 (discussing authorities who address the First Amendment concerns raised by “informed consent” regulation of abortion).

261. Kansas requires that women receive a state-produced pamphlet at least twenty-four hours before having an abortion which lists breast cancer among the long-term risks of abortion:

Several studies have found no overall increase in risk of developing breast cancer after an induced abortion, while several studies do show an increase [sic] risk. There seems to be consensus that this issue needs further study. Women who have a strong family history of breast cancer or who have clinical findings of breast disease should seek medical advice from their physician irrespective of their decision to become pregnant or have an abortion.

Kansas Dep’t of Health and Env’t, *If You Are Pregnant*, available at <http://www.driller.com/bk1.html> (last visited May 5, 2008). Whereas the pamphlet claims there is consensus about the need for more study, both the National Cancer Institute and the World Health Organization have concluded after extensive study that abortion is not associated with an increased risk of breast cancer. The more recent and better-designed studies have consistently shown no link between abortion and the risk of breast cancer. See sources cited *supra* note 81.

In Texas, the physician must inform a woman seeking an abortion “when medically accurate” of several medical risks, including “the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer.” Tex. Health & Safety § 171.012 (1), available at <http://tlo2.tlc.state.tx.us/statutes/hs.toc.htm>. This is at best misleading because medical research indicates that it is never medically accurate to inform a woman of an increased risk in breast cancer. It is not clear how much discretion a doctor truly has. To the extent that physicians are required to inform women that an abortion may increase the risk of breast cancer, the state is requiring the provision of false information.

Doctors are required to inform patients that they have the right to view state-created pamphlets, which also describe a possible link between abortion and an increased risk of breast cancer. The pamphlets state:

Your chances of getting breast cancer are affected by your pregnancy history. If you have carried a pregnancy to term as a young woman, you may be less likely to get breast cancer in the future. However, you do not get the same protective effect

decision. So, too, an “informed consent” dialogue that misleads women unduly burdens their decision making: Misleading can occur, not only when government “persuades” by leading a woman to believe facts that are not true,<sup>262</sup> but *also* when government offers women counsel that invites reliance because it resembles the speech of counseling professionals but breaches

if your pregnancy is ended by an abortion. The risk may be higher if your first pregnancy is aborted.

While there are studies that have found an increased risk of developing breast cancer after an induced abortion, some studies have found no overall risk. There is agreement that this issue needs further study. If you have a family history of breast cancer or clinical findings of breast disease, you should seek medical advice from your physician before deciding whether to remain pregnant or have an abortion. It is always important to tell your doctor about your complete pregnancy history.

Texas Dep’t of State Health Svcs., *Woman’s Right to Know: After an Abortion*, (Dec. 17, 2007) <http://www.dshs.state.tx.us/wrtk/after-abortion.shtm>. It is medically untrue that the risk of breast cancer “may be higher if your first pregnancy is aborted.” It is also false that “there is agreement that this issue needs further study.” *Id.*

262. For example, a pamphlet that suggests that infertility is a risk of a first trimester abortion impermissibly misleads women who are not at risk. The state-created pamphlet that Texas requires physicians to make available to women seeking an abortion describes the risks an abortion poses to future childbearing:

The risks are fewer when an abortion is done in the early weeks of pregnancy. The further along you are in your pregnancy, the greater the chance of serious complications and the greater the risk of dying from the abortion procedure. Some complications associated with an abortion, such as infection or a cut or torn cervix, may make it difficult or impossible to become pregnant in the future or to carry a pregnancy to term.

Some large studies have reported a doubling of the risk of premature birth in later pregnancy if a woman has had two induced abortions. The same studies report an 800 percent increase in the risk of extremely early premature births (less than 28 weeks) for a woman who has experienced four or more induced abortions. Very premature babies, who have the highest risk of death, also have the highest risk for lasting disabilities, such as mental retardation, cerebral palsy, lung and gastrointestinal problems, and vision and hearing loss.

Texas Dep’t of State Health Services, *supra* note 261. This information may be true, but it is certainly misleading: medical research shows that abortions performed in the first trimester do not pose an increased risk to future fertility. See Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL. REV. 6, 11 (2007); FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, REPORT TO HOUSE COMM. ON GOV. REFORM (2006). Texas also requires doctors “when medically accurate” to inform patients of “the potential danger to a subsequent pregnancy and of infertility.” Tex. Health & Safety § 171.012 (1), *supra* note 261. If this risk is disclosed to all women seeking abortions, it would certainly be misleading as this danger is only applicable to a certain (small) class of women who have abortions.

fiduciary responsibilities ordinarily imposed on those who counsel—for example, by counseling women in ways that distract them from the balance of considerations that a reasonable person in the woman’s position might deem relevant.<sup>263</sup>

But these are ordinary applications of the undue burden framework. The undue burden framework we considered in Part II of this essay was premised on the assumption—shared by *Casey* and *Carhart*—that the purpose of abortion restrictions was to protect the unborn and express respect for life. *Casey* authorized government to persuade women to continue a pregnancy to advance government’s interest in potential life—not to promote an interest in sex-role conformity.

None of the Court’s abortion decisions uphold a law that restricts women’s decision making for the kinds of reasons that the South Dakota Task Force Report offers: that women lack capacity to make decisions about abortion or that the abortion decision is against women’s “nature.” Woman-protective

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263. In Minnesota, physicians are required to inform women seeking an abortion that they have the right to review state-created materials that includes a section on “The Emotional Side of Abortion.” See Minnesota Dep’t of Health, *If You Are Pregnant: Information on Fetal Development, Abortion, and Alternatives*, available at [www.health.state.mn.us/wrtk/wrtk-handbook.pdf](http://www.health.state.mn.us/wrtk/wrtk-handbook.pdf). The pamphlet provides no information about the “emotional side” of childbirth, however, and does not at all discuss the risk of post-partum depression or any other emotional or mental health effects of carrying a pregnancy to term:

Each woman having an abortion may experience different emotions before and after the procedure. Women often have both positive and negative feelings after having an abortion. Some women say that these feelings go away quickly, while others say they last for a length of time. These feelings may include emptiness and guilt as well as sadness. A woman may question whether she made the right decision. Some women may feel relief about their decision and that the procedure is over. Other women may feel anger at having to make the choice. Women who experience sadness, guilt or difficulty after the procedure may be those women who were forced into the decision by a partner or family member, or who have had serious psychiatric counseling before the procedure or who were uncertain of their decision.

Counseling or support before and after your abortion is very important. If family help and support is not available to the woman, the feelings that appear after an abortion may be harder to adjust to. Talking with a professional and objective counselor before having an abortion can help a woman better understand her decision and the feelings she may experience after the procedure. If counseling is available to the woman, these feelings may be easier to handle.

Remember, it is your right and the doctor’s responsibility to fully inform you prior to the procedures. Be encouraged to ask all of your questions.

*Id.*; cf. Texas Dep’t of State Health Svcs., *supra* note 261 (comparing the “emotional side of an abortion” and the “emotional side of birth”).

antiabortion argument makes up over half of the lengthy Task Force Report,<sup>264</sup> which in turn is the basis for the state's 2005 informed consent statute, the abortion ban that South Dakota voters rejected in 2006, and the abortion ban that voters in the state will consider this fall.<sup>265</sup> It is Harold Cassidy's view that it is precisely the Report's woman-protective argument that will establish the constitutionality of the state's current proposed ban in the eyes of Justice Kennedy.

In a debate posted on an Operation Rescue website, James Bopp of the National Right to Life Committee, a strong proponent of incrementalism, has warned that sending the Court bans on abortion might push Justice Kennedy to join the *Carhart* dissenters who believe such bans to violate the constitutional guarantees of both liberty and equality.<sup>266</sup> The opposing

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264. See SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20.

265. See *supra* note 101 (discussing the ban's relation to the Task Force Report); see also *supra* note 20 (woman-protective argument in endorsements for the ban that are posted on the Web site of the group leading the initiative campaign for the ban).

266. See Legal Memorandum from James Bopp, Jr. & Richard E. Coleson on Pro-life Strategy Issues 3, 6 (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf> (arguing that "now is not the time to pass *state* constitutional amendments or bills banning abortion," and that "[e]schewing incremental efforts to limit abortion where legally and politically possible makes the error of not saving some because not all can be saved. It also makes the strategic error of believing that the pro-life issue can be kept alive without such incremental efforts"). The memo argues:

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg, in fact did so. See *id.* at 1641 (Ginsberg, J., joined by Stevens, Souter, and Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, and so on. A law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women's right-to-know laws, waiting periods, and other



position is staked out by Cassidy, who played a leading role in developing the state's unimplemented 2004 and 2006 abortion bans, the ban that will appear on the state's 2008 ballot, as well as its "informed consent" statute.<sup>267</sup> A memo credited to Cassidy and Samuel Casey ridicules Bopp's objections and exhorts South Dakotans to renew their drive to ban abortion, arguing that Justice Kennedy's opinion in *Carhart* suggests that he is open to reversing *Roe* and *Casey* with a showing of new facts about women's need for protection.<sup>268</sup> The

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legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.

*Id.* at 3-4.

267. See *supra* notes 95-97 and accompanying text.

268. See Legal Memorandum from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro-Life Leadership Coalition on the Proposed 2008 South Dakota Abortion Bill 9 (Oct. 10, 2007), available at <http://operationrescue.org/pdfs/Legal%20Memo%20&%20Proposed%20South%20Dakota%20Abortion%20Bill%20%2810-10-2007%29.pdf>. Analyzing Justice Kennedy's position on *Roe*, the memo observes:

The joint opinion in *Casey* expressly states that if *Roe* was in error—and clearly Kennedy had thought that it was—that error only went to the “weight to be given to the state’s interest in fetal life.” *Casey*, 505 U.S. at 855. But, the Justices writing the joint opinion held that if that is the only error or consequence of the error, it was insufficient to justify overturning *Roe* because that error did not affect the “women’s liberty.” *Id.* Kennedy and O’Connor were bothered by the perception that protecting the unborn child by banning abortion was at the expense of the liberty interests of the women; and the perception that to do so was anti-women.

Woman-protective argument is responsive to this diagnosis, precisely because it offers a claim of changed facts and thus provides Justice Kennedy the opportunity to back away from *Roe* and *Casey* without appearing to be “anti-women”:

The entire approach that South Dakota has adopted and advances will satisfy the *Casey* stare decisis analysis. This legal and factual analysis has, especially with the witness of the women who have had abortions, and the professionals and pregnancy help centers that care for them, the power to persuade members of the Court that the *Casey* stare decisis analysis has been satisfied.

There will be those who will argue that we can’t win Justice Kennedy back to where he was between 1989 and 1992; that his vote in *Gonzales v. Carhart* was simply his asserting the compromise he thought he struck with Justices O’Connor and Souter in the *Casey* case.

However, we know that he knows *Roe* was wrongly decided. He wrote with passion in *Gonzales* about the harm abortion causes women. He demonstrated a predisposition and receptiveness to proof about such harm. More importantly, perhaps, he wrote with passion about the beauty of the bond between mother and child: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.” *Gonzales*, 127 S.Ct. 1610, 1634 (2007). Justice Kennedy retained his powerful pro-motherhood language despite a bitter attack by Justice Ginsberg [sic].

memo dismisses concerns about Justice Kennedy's receptivity to the equal protection claim, several times referring to equal protection concerns as "ridiculous" and "silly."<sup>269</sup>

The memo's dismissal of the equal protection claim reflects a view of women that Cassidy regularly expresses in legal fora and other venues in which he is advancing his antiabortion arguments.<sup>270</sup> Cassidy's conception of

It was not a coincidence that Justice Kennedy cited to the "friend of the court" brief of Sandra Cano (the "Doe" in *Doe v. Bolton*) which related the experiences of post abortive women. Of all the Justices on the Court, perhaps Justices Kennedy and Roberts would be most receptive to South Dakota's women's interest analysis.

*Id.* at 10.

269. See Cassidy, *supra* note 268, at 18 ("We do understand that Justice Ginsberg [sic] does agree with Riva [sic] Siegel that the *Roe v. Wade* analysis should be discarded and replaced with her equal protection violation analysis. But there is no credible evidence that [other Justices] would fully adopt that analysis. . . . More importantly, the Equal Protection analysis would not be worse for us because it is a ridiculous argument. If Mr. Bopp's willing Court that he sees coming in the future would swat away the *Roe* analysis on any reasoning, they surely would swat away Ginsberg's [sic] silly equal protection argument. Actually, Ginsberg [sic] pressing that equal protection argument might be good for our objectives. Justice Kennedy surely did not join her dissent in *Gonzales*, and clearly thinks it is ridiculous. If he thought it could be the law of the land, it is one more reason, along with all of the good facts and law South Dakota gives him, to go back to his old position of striking down *Roe*.").

270. See, e.g., text accompanying *supra* notes 245-248. In a recent interview, Cassidy observed:

I'm going to say something that may be controversial: There is crisis thinking. I don't care how smart a woman is, I don't care how responsible she is, how in control of her life, there's something about that particular circumstance of pregnancy. The decision has got to be one she can live with for her entire life, and the woman in that position is very vulnerable. It may not be popular to say that, but it is the reality. And part of the problem of abortion is that it is more about what we would like a woman to do than what she is really wired and capable of doing. To have a policy built on a premise that a woman can kill her own child and that it's okay is terrible.

....

There are women who think they are informed, and later find out that they are not informed. And that phenomenon comes in many degrees. There can be women, and there are some, surely, who make a decision that is informed, and it is voluntary, and even they will find out later that it's not. They're not liberated by it; they're enslaved by the experience. In fact, in many ways they were enslaved by the experience before they made this so-called free and informed decision, because there is a culture and society and sexual partners who have come to expect her to be able to perform or to act in a certain way, and those expectations have enslaved her. Not only have they enslaved her in terms of her ability to get an abortion, but also to behave in ways that lead to the pregnancy in the first place.

protecting women is fundamentally at odds with the understanding of women's dignity on which the modern constitutional order rests. A ban statute based on the South Dakota Task Force Report on Abortion violates, not only *Casey*, but the Court's equal protection cases, which prohibit laws "protecting" women in this way.<sup>271</sup>

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Sarah Blustain, *The Right Not To Choose: TAP Talks to Prominent Anti-Abortion Lawyer Harold Cassidy*, AM. PROSPECT, Apr. 13, 2007, [http://www.prospect.org/cs/articles?article=the\\_right\\_not\\_to\\_choose](http://www.prospect.org/cs/articles?article=the_right_not_to_choose).

271. See Siegel, *supra* note 15, at 1078 (analyzing South Dakota's 2006 abortion ban and the woman-protective arguments of the state task force report on which it was based, and concluding that "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").

It does not help that ban statutes such as South Dakota's, which deny women the capacity to make decisions in matters of motherhood, often exempt women from responsibility for seeking an abortion. South Dakota's past and current proposed bans would impose criminal liability on abortion-providers only and would not criminalize the conduct of women who seek or obtain an abortion. See Initiative Petition, An Act To Protect the Lives of Unborn Children, and the Interests and Health of Pregnant Mothers, § 13, available at <http://www.voteyesforlife.com/docs/Petition.pdf> ("Nothing in this Act subjects the pregnant woman upon whom any abortion is performed or attempted to any criminal conviction and penalty for an unlawful abortion."); see also H.B. 1215, 2006 Leg., 81st Sess. § 4 (S.D. 2006) (repealed 2006) (same). The Partial-Birth Abortion Ban Act at issue in *Carhart* similarly assigns liability for performing intact dilation and extraction abortion procedures only to doctors. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(e) (2000) ("A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section . . ."). Before *Roe*, many statutes prohibiting abortion imposed liability on doctors but did not criminalize the conduct of women who underwent abortion procedures. See *Roe v. Wade*, 410 U.S. 113, 151 (1973) ("[I]n many States . . . the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.").

A large number of leaders in the antiabortion movement have recently defended the view that criminal abortion statutes should not impose liability upon women who have abortions. *One Untrue Thing*, NAT'L REV., Aug. 1, 2007, <http://article.nationalreview.com/?q=ZjkwNWQ4ZDQ2NTljNDg4MjUyYWl5ZWQoNDVjMTkxYjg#more>. (quoting seventeen antiabortion activists, including Clarke Forsythe, president of Americans United for Life, who asserts that "the woman is the second victim of abortion" and that "the purpose behind that [antiabortion] law was not to degrade women but to protect them"). The view that law should control women's abortion decisions without imposing criminal sanctions on women who seek abortions seems widely shared in the antiabortion movement. In short documentary video clip that appeared on the internet in 2007, antiabortion protesters are asked, "What should happen to women who would get abortions, if abortions were to become illegal?" YouTube Video, Libertyville Abortion Demonstration, [http://www.youtube.com/watch?v=Uk6t\\_tdOkwo](http://www.youtube.com/watch?v=Uk6t_tdOkwo). The protesters react with surprise to the question, responding variously, "I haven't thought about that one," "Pray for them," and "I don't have an answer for that." *Id.*

Modern case law enforcing constitutional guarantees of liberty and equality for women emerged precisely as the Court repudiated the understanding that government could single out women as a group and impose limitations on their capacity to make life choices in order to protect women and ensure that women would fulfill their natural roles as wives and mothers.<sup>272</sup> Justice Ginsburg voices just this constitutional objection to woman-protective antiabortion argument:

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. *Compare, e.g.,* *Muller v. Oregon* (1908) (“protective” legislation imposing hours-of-work limitations on women only held permissible in view of women’s “physical structure and a proper discharge of her maternal funct[ion]” ); *Bradwell v. State* (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. . . . The paramount destiny and mission of woman are to fulfil[1] the noble and benign offices of wife and mother.”) *with* *United States v. Virginia* (1996) (State may not rely on “overbroad generalizations” about the “talents, capacities, or preferences” of women; “[s]uch judgments have . . . impeded . . . women’s progress toward full citizenship stature throughout our Nation’s history”); *Califano v. Goldfarb*, (1977) (gender-based Social Security classification rejected because it rested on “archaic and overbroad generalizations” “such as assumptions as to [women’s] dependency” . . .).<sup>273</sup>

The new gender paternalism is in fact the old gender paternalism: laws (1) based on stereotypes about women’s capacity and women’s roles that (2) deny women agency (3) for the claimed purpose of protecting women from coercion and/or freeing them to be mothers. Gender paternalism of *this* kind violates the very forms of dignity that *Casey*—and the equal protection cases—protect.

South Dakota’s efforts to reverse *Roe* challenge far more than the Court’s substantive due process decisions. The state’s effort to use law to enforce traditional conceptions of women’s capacities and roles strikes at modern understandings of women’s citizenship. These understandings are not simply embodied in *Roe* or *Casey*; they inhere in the equal protection cases, and

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272. See Section III.B.

273. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J. dissenting) (citations omitted).

beyond the case law, are rooted in the norms and forms of community from which these decisions emerged.<sup>274</sup> For this reason, even as the Court's decisions play a role in limiting woman-protective antiabortion argument,<sup>275</sup> constitutional limits on woman-protective antiabortion argument do not depend solely on the authority of the Court's past decisions. To the contrary, the Constitution's dignity-based constraints on woman-protective antiabortion argument are alive in the forms of normative appeal we make on one another, today, inside and outside of courts of law. Should the Supreme Court adopt the modes of reasoning about women expressed in the South Dakota Task Force Report, far more than the abortion right would be in jeopardy.

There are, in short, deep constitutional objections to abortion restrictions based on the woman-protective arguments we have examined. But these constitutional debilities are not the only problem with the claim. The woman-protective antiabortion argument is itself confused, about the capacities of women who consider abortion and the forms of community support that might be responsive to their needs. Women who consider abortion may be in great need, but the remedy that woman-protective antiabortion argument offers does not address those needs.

Of the millions of women who have or consider abortions, many become pregnant without wanting to; it is not responsive to their needs to deny access to abortion "as birth control" without teaching young men and women about contraception, as South Dakota would.<sup>276</sup> Of the millions of women who have

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274. See *supra* notes 187-188 and accompanying text.

275. See, e.g. Section I.A. (discussing the debate between incrementalists and absolutists in the antiabortion movement); *supra* note 98 (discussing incrementalist efforts to block abortion restrictions in South Dakota); *supra* note 266 (quoting memorandum of James Bopp, cautioning antiabortion community against adopting absolutist abortion restrictions that might move Justice Kennedy to join *Carhart's* dissenting Justices in imposing equal protection limitations on abortion regulation); Section II.B (discussing how the case law allows government to express respect for life in a form that respects women's decisional autonomy); Subsection II.C.1. (discussing how *Casey* restricts incrementalist informed consent regulation to forms that respect women's decisional autonomy); Section III.A (discussing the ways *Carhart* recognizes fetal-protective and woman-protective discourse as part of an abortion-rights framework).

276. *Voteyesforlife.com* urges voters to support the proposed ban to stop abortion "as birth control." *Vote Yes For Life*, *supra* note 101 ("[T]his bill prohibits abortions used as birth control."). But the leader of the group supporting the ban opposes public education about birth control. The Task Force specifically refused to include a recommendation supporting sexual education when recommending that the state ban abortion, leading to the resignation of its antiabortion chairwoman. See *supra* note 186; see also Siegel, *supra* note 22, at 138. Many of the groups that oppose abortion now advocate abstinence education. See Post & Siegel, *supra* note 152, at 412-24 & n.232.

or consider abortions, some are mentally ill. It is not responsive to their needs to offer them coerced motherhood rather than counseling—nor is it respectful to regulate the decision making of capable women as if they were mentally ill.<sup>277</sup> Of the millions of women who have or consider abortions, some are in abusive relations or lack resources to care for their existing family. It is not responsive to their needs to offer them coerced motherhood rather than the resources and support that would allow them to choose motherhood without harm to themselves and their loved ones.

The new gender paternalism does not merely generalize or stereotype. Like the old gender paternalism, the new gender paternalism points to social sources of harm to women—abuse, poverty, or work/family conflict—and offers control of women as the answer.<sup>278</sup> Women in need deserve better.

Consider the woman-protective claim in light of this information from the Guttmacher Institute:<sup>279</sup>

(1) *One-Third of American Women Will Have an Abortion.* “At least half of American women will experience an unintended pregnancy by

277. Social scientists report that preexisting psychiatric illnesses, depression, and psychosis often predict post-pregnancy mental health difficulties, regardless of pregnancy outcome. Anne C. Gilchrist, Philip C. Hannaford, Peter Frank & Clifford R. Ray, *Termination of Pregnancy and Psychiatric Morbidity*, 167 *BRITISH J. PSYCHOL.* 243, 247 (1995); Sarah Schmiede & Nancy Felipe Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 *BMJ* 1303, 1306 (2005); Laurie Schwab Zabin, Marilyn B. Hirsch & Mark R. Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status, and Subsequent Pregnancy*, 21 *FAM. PLAN. PERSPS.* 248, 248 (1989); G. Zolose & C.V.R. Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 *BRITISH J. PSYCHOL.* 742, 742 (1992).

This group of women with preexisting psychiatric illness deserves support. But isolating women with preexisting psychiatric illness and requiring them involuntarily to continue pregnancies they wish to end, or subjecting them to government pressure to do so, hardly responds to their needs, or the needs of others dependent on them. Bearing a child—or another child—may well exacerbate mental health problems, and certainly will if the women are pushed into bearing an unwanted child without appropriate counseling and material support.

If pregnant women with preexisting psychiatric illnesses need help, it is counseling that is genuinely open to finding the path that best suits a woman and her family. Making this group of vulnerable women the target of regulation that expresses views about the morality of abortion violates their dignity—just as pointing to women with psychiatric illness as a reason for regulating the decisions of all women violates their dignity.

278. Consider, for example, the efforts of David Reardon, *see supra* notes 73, 87, 91-92 and accompanying text, and Harold Cassidy, *see supra* notes 95-101 and accompanying text. The common law also protected women by restricting their agency. *See supra* text accompanying note 231.

279. *See* GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES* (2008), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

- age 45, and, at current rates, about one-third will have had an abortion.”<sup>280</sup>
- (2) *60% Have Children*. “About 60% of abortions are obtained by women who have one or more children.”<sup>281</sup>
  - (3) *The Abortion Rate is Higher Among Poor Women*. “The abortion rate among women living below the federal poverty level (\$9,570 for a single woman with no children) is more than four times that of women above 300% of the poverty level (44 vs. 10 abortions per 1,000 women).”<sup>282</sup>
  - (4) *There Are a Few Common Reasons Women Have an Abortion*. “The reasons women give for having an abortion underscore their understanding of the responsibilities of parenthood and family life. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or partner.”<sup>283</sup>
  - (5) *Age*. “Fifty percent of U.S. women obtaining abortions are younger than 25: Women aged 20–24 obtain 33% of all abortions, and teenagers obtain 17%.”<sup>284</sup>
  - (6) *Use of Contraception*. “Forty-six percent of women who have abortions had not used a contraceptive method during the month they became pregnant.”<sup>285</sup>

280. *Id.* (citing Rachel K. Jones et al., *Repeat Abortion in the United States*, Occasional Report No. 29 (2006), available at <http://www.guttmacher.org/pubs/2006/11/21/or29.pdf>; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 *FAMILY PLANNING PERSPECTIVES* 24 (1998); Guttmacher Instit., *State Facts About Abortion: New York*, 2006, [http://www.guttmacher.org/pubs/sfaa/new\\_york.html](http://www.guttmacher.org/pubs/sfaa/new_york.html)) (last visited May 5, 2008).

281. *Id.*

282. *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 226 (2002), available at <http://www.guttmacher.org/pubs/journals/3422602.pdf>).

283. *Id.* (citing Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPROD. HEALTH* 110 (2005), available at <http://www.guttmacher.org/pubs/journals/3711005.html>).

284. *Id.*

285. *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Contraceptive Use Among U.S. Women Having Abortions in 2000–2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 294 (2002)).

## CONCLUSION

What often gets lost in conversations about woman-protective justifications for restricting abortion is that there are alternative—and constitutional—modes of protecting women who are making decisions about motherhood. The legal arguments for protecting women from abortion that this essay has examined depend on unconstitutional stereotypes about women's roles and capacities. They are based on deeply contested descriptive claims. They ask the legal system to reason about the circumstances of some women as representative of all women, and propose interventions to help women that often seem wholly unresponsive to the claims of harm they assert.

We have reason to be concerned if even some women who decide to end a pregnancy are vulnerable or confused. We have reason to be concerned if women who decide to end a pregnancy or defer motherhood would choose differently if they had other options—such as more resources to feed their existing family, the ability to raise a child and finish school or keep a job, the ability to live independently from an abusing partner, or counseling that might enable her to leave or stay in a relationship. In other words, women who make choices about the exercise of their rights do so under life constraints of the kind that shape every decision (e.g. entering a contract of employment or marriage), and we may find these constraints disturbing, because we are concerned about the welfare of unborn generations, women, their partners and families, and/or their communities.

Blanket restrictions on abortion are not designed to address these concerns. They violate the dignity of women who are fully competent to make decisions, and do absolutely nothing to help women who are subject to coercion or mental confusion, or to alter the pressures on women who have decided ending a pregnancy is the best choice under the life circumstances and institutional arrangements in which they find themselves.

There are in fact myriad public policy interventions other than restrictions on abortion that would help women avoid unwanted pregnancy and bring wanted pregnancies to term without harm to themselves and their families.<sup>286</sup>

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286. See Editorial, *Behind the Abortion Decline*, N.Y. TIMES, Jan. 26, 2008, at A16 (reporting that according to a newly released Guttmacher Institute study, between 2000 and 2005, the number of abortions performed yearly in the U.S. declined from 1.3 million to 1.2 million):

Almost two-thirds of the decline in the total number of abortions can be traced to eight jurisdictions with few or no abortion restrictions—New York, New Jersey, Massachusetts, Illinois, California, Oregon, Washington State and the District of Columbia. These are places, notes the Guttmacher Institute's president, Sharon Camp, that have shown a commitment to real sex education, largely departing



These interventions respect women's dignity and self-sovereignty in ways that give differently inflected meaning to the dignity of human life. They promote an affirmative and avowedly transformative vision of family values concerned with sexual freedom, accessible health care, the integration of those who engage in caregiving work into spheres of citizenship, and the commitment to help all who are struggling to support and raise families. The existence of these alternative understandings is relevant to the judicial enforcement of the Constitution precisely as it makes clear that debate about abortion grows out of the vision of community that shapes our understanding of human dignity—and that the law of abortion is only one place in which it can be vindicated.

As advocates of traditional family values would be the first to tell us, one reason the abortion debate is so passionately fought is because it is a conversation in a community with deeply different understandings of women, sexuality, faith, family, and community.<sup>287</sup> In the 1990s, Paul Swope, then head of Carenet, a national network of crisis pregnancy centers, explained to the readership of *First Things*—a leading journal among conservatives in the Catholic intelligentsia and beyond—what market testing revealed about why young women chose abortion. He advised his audience to trust his report as based on opinion research by state-of-the-art marketing experts. The report is remarkable for the ways it explains to this conservative audience what market research revealed about the motivations and understanding of young women who sought abortions—how their experience of the abortion decision radically differed from the “pro-life” movement’s understanding of it. Swope reported:

Unplanned motherhood, according to the study, represents a threat so great to modern women that it is perceived as equivalent to a “death of self.” While the woman may rationally understand this is not her own literal death, her emotional, subconscious reaction to carrying the child to term is that her life will be “over.” This is because many young women of today have developed a self-identity that simply does not

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from the Bush administration’s abstinence-only approach. These jurisdictions also help women avoid unintended pregnancies by making contraception widely available.

*Id.*; see also David J. Landry et al., *Factors Associated with the Content of Sex Education in U.S. Public Secondary Schools*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 261, 262 (2008), available at <http://www.guttmacher.org/pubs/psrh/full/3526103.pdf> (“In many Western, developed countries with adolescent pregnancy and STD rates lower than U.S. rates, there is not only greater societal acceptance of sexual activity among teenagers, but also more comprehensive and balanced sex education and greater access to condoms and other forms of birth control.”).

287. See Post & Siegel, *supra* note 152, at 412–24 & 423–25 n.232; *supra* note 159.

include being a mother. It may include going through college, getting a degree, obtaining a good job, even getting married someday; but the sudden intrusion of motherhood is perceived as a complete loss of control over their present and future selves. It shatters their sense of who they are and will become, and thereby paralyzes their ability to think more rationally or realistically.

When these women evaluate the abortion decision, therefore, they do not, as a pro-lifer might, formulate the problem with the radically distinct options of either “I must endure an embarrassing pregnancy” or “I must destroy the life of an innocent child.” Instead, their perception of the choice is either “my life is over” or “the life of this new child is over.” Given this perspective, the choice of abortion becomes one of self-preservation, a much more defensible position, both to the woman deciding to abort and to those supporting her decision.<sup>288</sup>

Swope himself seems at least in part to grasp the chasm in world understanding separating those who decide to end a pregnancy and those who would use law to stop them. A community that sees women choosing an abortion as wanting to avoid “an embarrassing pregnancy” does not fathom the situation of women who experience “[u]nplanned motherhood . . . as equivalent to a ‘death of self.’”

In the political imaginary of many Americans abortion is for “those” women. Yet nearly one third of American women will have an abortion by the age of 45,<sup>289</sup> and today, all women—even those who oppose abortion—lead lives shaped by this choice, even if it is the kind of choice that they expect never to exercise. Americans are not entirely confident about what it means to entrust women with authority, much less *this* kind of authority; yet, in different ways, most Americans understand that affording women control over the decision whether to bear a child helps women traverse the gap between the ideal and the actual—in love, family, work, and community<sup>290</sup>—with dignity.

A century ago, a woman who protested the ways her community denied women “voluntary motherhood”<sup>291</sup> explained the value of “self-sovereignty.”

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288. Paul Swope, *Abortion: A Failure to Communicate*, 82 *FIRST THINGS* 31, 32 (1998).

289. GUTTMACHER INST., *supra* note 279.

290. See *supra* text accompanying notes 282-283.

291. On the “voluntary motherhood” claims of Elizabeth Cady Stanton and other nineteenth-century woman’s rights advocates, see Siegel, *supra* note 93, at 304-08. Organizations such as Feminists for Life claim the legacy of early feminists on the grounds that many opposed abortion. See Feminists for Life of America, Mission Statement, <http://www.feministsforlife>

Retiring from leadership of the woman's suffrage movement after a half century of advocating for the vote and still almost three decades from its attainment, Elizabeth Cady Stanton made her case for "self-sovereignty" in a widely reported speech delivered to the Congress and disseminated nationally, entitled *The Solitude of the Self*<sup>292</sup>:

The talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, and to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty. Rich and poor, intelligent and ignorant, wise and foolish, virtuous and

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.org/who/joinus.htm (last visited Apr. 14, 2008) ("Feminists for Life of America continues the tradition of early American feminists such as Susan B. Anthony, who opposed abortion."). But nineteenth-century suffragists organized not to criminalize abortion, but rather to seek the enfranchisement of women and reform of the law of marriage, which they viewed as oppressing women. See Ellen Carol DuBois, "*The Pivot of the Marriage Relation*": *Stanton's Analysis of Women's Subordination in Marriage*, in ELIZABETH CADY STANTON, *FEMINIST AS THINKER* 82, 88 (Ellen Carol DuBois & Richard Candida Smith eds., 2007).

The leaders of the nineteenth-century suffrage movement viewed abortion as a symptom of wrongs in the social organization of sex and childbearing in marriage. See Siegel, *supra* note 93, at 308-14. To some suffragists, marriage—and the sexual and economic subordination it entailed—was little more than "legalized prostitution," of which abortion was an unsurprising result. See Siegel, *supra* note 93, at 307 n.184 (quoting an editorial in the suffragist publication *Revolution* asking, "[I]f Christian women are prostitutes to Christian husbands, what can we expect but the natural sequence—infanticide?"); *id.* at 307 (quoting Abigail Duniway, editor of the suffragist paper *The New Northwest*, stating, "All work becomes oppressive that is not remunerative. To this idea, more than any other, may be traced the prejudice against bearing children which has become so ingrafted upon the minds of married women, that tens of thousands annually commit ante-natal murder"). By contrast, those who led the nineteenth-century campaign to criminalize abortion and contraception argued that marriage only became "legalized prostitution" when sex was disassociated from procreation. Leaders of the criminalization campaign attacked abortion as a social malaise caused by woman suffragists "who teach that their married sisters may save time and vitality for high and noble pursuits by 'electing' how few children shall be born to them." *Id.* at 304. See generally *id.* at 308-14 (showing deep differences in belief about sex and family roles that separate nineteenth-century woman suffragists and those who led the nineteenth-century campaign to criminalize abortion and contraception).

292. On the occasion of her retirement at age seventy-six as president of the National American Woman Suffrage Association, Elizabeth Cady Stanton gave a widely reported speech entitled *The Solitude of Self* which she then repeated in an address before the U.S. House Committee on the Judiciary and the U.S. Senate Committee on Woman Suffrage in 1892. The speech was published in the *Women's Journal*, and 10,000 copies of it from the *Congressional Record* were printed and distributed around the country. See VIVIAN GORNICK, *THE SOLITUDE OF SELF: THINKING ABOUT ELIZABETH CADY STANTON* (2005); Elizabeth Cady Stanton, *The Solitude of Self*, *WOMEN'S J.*, Jan. 23, 1892, at 1-8.

vicious, man and woman; it is ever the same, each soul must depend wholly on itself.

Whatever the theories may be of woman's dependence on man, in the supreme moments of her life, he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. no one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown.

From the mountain-tops of Judea long ago, a heavenly voice bade his disciples, "Bear ye one another's burdens," but humanity has not yet risen to that point of self sacrifice, and if ever so willing, how few the burdens are that one soul can bear for another. . . . And so it ever must be in the conflicting scenes of life, in the long weary march, each one walks alone. We may have many friends, love, kindness, sympathy and charity, to smooth our pathway in everyday life, but in the tragedies and triumphs of human experience, each mortal stands alone.

. . .

[T]here is a solitude, which each and every one of us has always carried with him, more inaccessible than the ice-cold mountains, more profound than the midnight sea; the solitude of self. Our inner being, which we call ourself, no eye nor touch of man or angel has ever pierced. It is more hidden than the caves of the gnome; the sacred adytum of the oracle; the hidden chamber of eleusinian mystery, for to it only omniscience is permitted to enter.

Such is individual life. Who, I ask you, can take, dare take on himself the rights, the duties, the responsibilities of another human soul?<sup>293</sup>

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293. Stanton, *supra* note 292; see ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN'S RIGHTS* (1998).