

NOTES

DESTABILIZING DISCOURSES: BLOCKING AND EXPLOITING A NEW DISCOURSE AT WORK IN *GONZALES V. CARHART*

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INTRODUCTION

ON April 18, 2007, the Supreme Court decided *Gonzales v. Carhart*,¹ in which the Court upheld Congress's Partial Birth Abortion Ban Act of 2003² as constitutional against a facial challenge despite the lack of a health exception. Remarkable in its factual similarity to *Stenberg v. Carhart*,³ the Court distinguished *Gonzales* by suggesting that unlike the Nebraska statute⁴ at issue in *Stenberg*, Congress had adequately and concretely defined the procedure in the Partial Birth Abortion Ban Act.⁵ Applying the undue burden test established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶ the Court questioned whether an intact dilation and extraction procedure ("D & E")⁷ is ever medically nec-

¹ 127 S. Ct. 1610 (2007).

² Pub. L. No. 108-105 § 3 (codified as amended at 18 U.S.C. § 1531 (2007)).

³ 530 U.S. 914 (2000).

⁴ Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 2003).

⁵ *Gonzales*, 127 S. Ct. at 1629–30.

⁶ 505 U.S. 833, 874 (1992) (plurality opinion).

⁷ An intact D & E differs from a standard D & E in that in the former, the fetus is "delivered" to a point where all but its head is outside the woman's body, at which point the physician punctures the skull and removes brain material; in the latter, the fetus is pulled apart in the process of extracting it from the uterus. See *Gonzales*, 127 S. Ct. at 1620–23; *Stenberg*, 530 U.S. at 924–29. Both are largely performed in the second trimester. *Stenberg*, 530 U.S. at 924–27. The medical term "intact D & E," used in *Gonzales*, the term "D & X," used in *Stenberg*, and the term "partial birth abortion" refer to the same procedure. For consistency and clarity, this Note uses the term "intact D & E" throughout, as it is the term used most often, though not exclusively, in *Gonzales* to describe the procedure.

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Destabilizing Discourses

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essary, and found a women's health exception unnecessary.⁸

Observers have characterized *Gonzales* as an attempt to chip away at the abortion right, as judicial deference to the state's regulation of health care, as a signal that the Court's new constituency will look to support greater restrictions on abortion, and as an affront to women's autonomy. Scholars have also recognized a new element in the Court's analysis: "In the course of upholding the Partial Birth Abortion Ban Act, the Court adopted for the first time a woman-protective justification for restricting access to abortion."⁹ The portion of the *Gonzales* opinion exhorting this justification is worth reproducing in full:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . [I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. . . . 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 human form.¹⁰

The woman-protective discourse is identified by its suggestion that women need protection from physicians and their own bad decisions. Rather than focusing exclusively on harm to the fetus, this discourse focuses on the woman—but the only woman occupying the woman-protective discourse is the maternal woman, misled by

⁸ *Gonzales*, 127 S. Ct. at 1636–37.

⁹ Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *Emory L.J.* 815, 837 (2007) [hereinafter Siegel, *Sex Equality Arguments*]; see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 *U. Ill. L. Rev.* 991, 991–93 (2007) [hereinafter Siegel, *New Politics*]. While this Note cribs the adjective "woman-protective" from Professor Siegel's articles, the intention here is to describe a *discourse* rather than a *justification* or *argument*. The discourse does provide a justification, but is capable of (and does) much more work.

¹⁰ *Gonzales*, 127 S. Ct. at 1634.

her physicians, unaware of her own “natural” maternal instincts, and ignorant of the consequences of her choices.

The purpose of this Note is to identify and analyze the interrelated discourses at work in *Gonzales*, focusing on the woman-protective discourse, in order to reveal the discourse’s origins, expose its manipulations of *Casey*’s undue burden test, and identify its strengths and weaknesses. Part I of this Note defines and describes the discourses at work in *Gonzales*, focusing on the cumulative work these discourses perform together and noting a meaningful series of shifts over time. Part II analyzes the woman-protective discourse in a variety of ways in order to draw out its assumptions, expose its historical predecessors, and outline exactly how it has manipulated the undue burden test. Part III examines ways in which this discourse can be resisted, using more traditional feminist methods, as well as ways in which it can be exploited to destabilize the undue burden test and promote women’s autonomy in non-abortion contexts.

I. TRACING DISCOURSES AT WORK IN *GONZALES V. CARHART*

Gonzales uses a number of discourses to situate the undue burden test in the context of American law. This test weighs the woman’s right to terminate her pregnancy before viability, established in *Roe v. Wade*,¹¹ against the interest of the state in protecting potential life.¹² However, this test does not exist in a vacuum. Discourses¹³ do not exist in isolation; instead, they interact with

¹¹ 410 U.S. 113, 154 (1973) (“We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

¹² The undue burden test, crafted in *Casey*, declares that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. . . . *On the other side of the equation* is the interest of the State in the protection of potential life.” 505 U.S. at 871 (emphasis added).

¹³ Discourses describe a subject, and thus create a diffuse network of power relations structuring, defining, and allowing interpretation of a subject. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, at ix (Routledge 1990). The term “discourse” as used in this Note references Michel Foucault’s description, which claims that

discourse is not a slender surface of contact, or confrontation, between a reality and a language . . . [; it] describe[s] not the dumb existence of a reality, nor the canonical use of a vocabulary, but the ordering of objects. . . . [Discourses are

each other—they clash, weave together, some expand while others contract, others strengthen complementary discourses, and together they create ideological frameworks. These frameworks have effect in personal, political, medical, and legal arenas, among others. *Gonzales* is notable not only for a shift in jurisprudence that could easily be explained by a change in the Court's constituency, but also the ways in which particular legal discourses, new and old, work together to justify—or oppose—this shift.

The discourses at work in *Gonzales* fall into three general categories based on the entity upon which each focuses: fetus-focused discourses, physician-focused discourses, and woman-focused discourses. The first grouping, fetus-focused discourses, consists of two distinct discourses: the fetal life discourse, which arises in *Roe* and remains a crucial element in *Casey* and *Stenberg*; and the fetal pain discourse, which surfaces in the *Stenberg* dissents.¹⁴ The second grouping, the physician-focused discourses, can also be organized into two predominant strains: the appropriate medical judgment discourse, which first appears in *Roe*; and the ethical-protective discourse, which becomes recognizable as a separate, significant discourse in *Stenberg*. Finally, *Gonzales* contains a third grouping of three distinct woman-focused discourses: the women's rights discourse, present in *Roe* and its progeny; the women's health discourse, also present throughout, but more prevalent in *Stenberg* and *Gonzales*; and the woman-protective discourse, which arises in nascent form in the *Stenberg* dissents, but reaches its full expression in *Gonzales*. The *Gonzales* opinion implicitly reconfigures the framework justifying restrictions on abortions using the full complement of these discourses, but with particular emphasis on the woman-protective discourse. While others have noted this trend,¹⁵ a fuller examination of the discourses in *Gonzales* and its

not] groups of signs, but . . . practices that systematically form the objects of which they speak.

Michel Foucault, *The Archaeology of Knowledge* 54 (A.M. Sheridan Smith trans., Routledge 2d ed. 2002) (1969).

¹⁴ 530 U.S., at 953 (Scalia, J., dissenting); id. at 958–60 (Kennedy, J., dissenting); id. at 984–89 (Thomas, J., dissenting). Consequently, this discourse was also addressed, albeit cursorily, in the majority and concurring opinions. Id. at 923 (majority opinion); id. at 951–52 (Ginsburg, J., concurring).

¹⁵ Reva Siegel identifies and analyzes the court's woman-protective justification or argument in various articles. See Siegel, *Sex Equality Arguments*, supra note 9, at 835;

precursors has yet to be performed. This Part performs a close reading of *Roe* through *Gonzales* as a means of executing such an examination of the discourses therein.

A. The Fetus-Focused Discourses: From Life to Pain

Discourses centered on the fetus have taken up considerable space in the legal conversation on abortion. The fetus-focused discourses fall into one of two distinct camps: discourses focused on the fetus's right to a life and those focused on the pain of the fetus during the abortion procedure. The former appears in the opinions from *Roe* through *Gonzales*; the latter, however, emerges in the *Stenberg* decision and takes up increasing space in the *Gonzales* decision. While the ostensible reason for this change is that the legislation at issue prohibits a *type* of abortion because of its brutality or similarity to infanticide, rather than prohibiting abortion altogether as in *Roe*,¹⁶ or placing restrictions on all abortions or the abortions of particular groups of women as in *Casey*,¹⁷ the increased use of the fetal pain¹⁸ discourse serves to evoke visceral sympathies, indirectly affecting the undue burden test.

1. Fetal Life Discourse

The question whether a fetus is alive has played a central role in the abortion debate. This argument was at the heart of the state's interest in preserving potential life, as the major discourse justifying its rationale. In *Roe*, Texas argued that its "interest and general obligation to protect life then extends . . . to prenatal life," only to be overcome when the life of the pregnant woman is also endangered.¹⁹ The Court reduced this argument to its underlying tenet:

Siegel, *New Politics*, supra note 9. The rise of the concept of fetal pain is detailed by two scholars addressing "fetal pain legislation." See Katherine E. Engelman, *Fetal Pain Legislation: Protection Against Pain Is Not an Undue Burden*, 10 *Quinnipiac Health L.J.* 279, 281 (2007); Hannah Stahle, *Fetal Pain Legislation: An Undue Burden*, 10 *Quinnipiac Health L.J.* 251, 252 (2007).

¹⁶ See *Roe*, 410 U.S. at 117–18.

¹⁷ See *Casey*, 505 U.S. at 844.

¹⁸ This Note cribs the term "fetal pain" from two articles that use the term "fetal pain legislation" to refer to the proposed and defeated 2006 bill entitled the Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. (2006). See Engelman, supra note 15, at 281; Stahle, supra note 15, at 252.

¹⁹ *Roe*, 410 U.S. at 150.

“that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.”²⁰ The Court recognized that acknowledging the constitutional personhood of fetuses would lead to a troubling result—in no situation could a fetus be terminated without due process of law.²¹ The Court also stressed that historically the legal definition of ‘person’ did not include the unborn.²² Thus, the Court found the basis of the fetal life argument, legal personhood, to be incoherent and historically unsupported.²³

Casey suggests that since *Roe*, the fetal life discourse had gotten short legal shrift in comparison to the woman’s abortion right.²⁴ In affirming the state’s interest in potential life, *Casey* presented the undue burden test as “the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”²⁵ Thus, the Court in *Casey* upheld a woman’s right to an abortion while emphasizing the legitimacy of the state’s interest in the *potential* human life of the fetus, and via the undue burden test placed these two potentially competing interests in opposition. This is where the fetal life discourse took on its present-day shape and legal function.

In *Stenberg*, the Court recognized that “[t]he Nebraska law, of course, does not directly further an interest in the potentiality of human life by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion.”²⁶ Nebraska, however, asserted that despite its regulation of one method of performing the abortion procedure, its laws showed “concern for the life of the unborn” and attempted to “prevent cruelty to partially born children,” among other concerns.²⁷ Justice Stevens’s concurring opinion clarifies that the Nebraska claim rests on the assertion that the intact D & E procedure is “more brutal, more gruesome, [and]

²⁰ Id. at 156.

²¹ Id. at 157.

²² Id. at 158.

²³ However, while a fetus does not have the constitutionally protected rights associated with *personhood*, it can act as a legal entity in which *others* may have an interest. Id. at 161–63 (analyzing examples in tort and property law).

²⁴ 505 U.S. at 871 (citing *Roe*, 410 U.S. at 163) (“[T]he State’s important and legitimate interest in potential life . . . has been given too little acknowledgment and implementation by the Court in its subsequent cases.”).

²⁵ Id. at 876.

²⁶ 530 U.S. at 930 (internal quotation marks omitted).

²⁷ *Stenberg*, 530 U.S. at 930–31.

less respectful of potential life” than other abortions, and thus more closely resembles infanticide.²⁸ Justice Kennedy confirms this in his dissent, which states that the procedure’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.”²⁹ Justice Thomas’s dissent claims that the prohibited procedure “resembles infanticide and threatens to *dehumanize* the fetus.”³⁰ He implicitly repudiates *Roe*’s holding that a fetus does not have personhood status by suggesting the legislatures are concerned with the fetus’s humanity, or personhood.

The trend becomes increasingly marked in *Gonzales*, in which the Court sanctions this permutation of the fetal life discourse. Justice Kennedy asserts that “by common understanding and scientific terminology, a fetus is a *living organism* while within the womb, whether or not it is viable outside the womb.”³¹ This statement forms the first step of Justice Kennedy’s argument, establishing that after conception, *life*—not merely potential life—exists independently from fetal *personhood*.³² Justice Kennedy next cites Congress’s determination “that the abortion methods it proscribed had a disturbing similarity to the killing of a newborn infant, and thus it was concerned with drawing a bright line that clearly distinguishes abortion and infanticide.”³³ He notes that “[t]he Court has

²⁸ Id. at 946 (Stevens, J., concurring).

²⁹ Id. at 963 (Kennedy, J., dissenting).

³⁰ Id. at 1002 (Thomas, J., dissenting) (emphasis added). While it is internally contradictory that by viewing the human-like body of the fetus and becoming aware of its likeness to a borne human infant one is effectively *dehumanizing* the fetus, this argument carries weight.

³¹ *Gonzales*, 127 S. Ct. at 1627 (emphasis added). Justice Kennedy’s word choice complements the reconfigured fetal life discourse characterizing the fetus as *alive*, whether or not it is a person.

³² *Casey* contains the first linguistic slippage suggesting a third category between potential life and legal personhood: fetal life after viability, which in *Casey* is neither potential, nor legal. See *Casey*, 505 U.S. at 870 (“[V]iability . . . is [when] there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the *independent existence of the second life* can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”) (emphasis added).

³³ *Gonzales*, 127 S. Ct. at 1633–34. Infanticide was not always reviled. In the seventeenth and eighteenth centuries, infanticide was seen in a more sympathetic light. Changes in sexual ideologies and increased access to and effectiveness of birth control in the late nineteenth and twentieth centuries made infanticide less understandable.

in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish *life* and are close to actions that are condemned.”³⁴ While Justice Kennedy mentions that in the case he cites, *Washington v. Glucksberg*,³⁵ the Court dealt with assisted suicide, he does *not* make the distinction that assisted suicide is concerned with the life of an entity recognized *as a person* by the law. *Gonzales* moves *outside* the boundary of legal personhood. Thus, the second step of Justice Kennedy’s argument consists of extending the boundary-drawing argument to entities without personhood status, a linguistically subtle but ideologically dramatic move.

Justice Kennedy’s reconfiguration of the fetal life discourse prepares him to use it, in conjunction with other discourses, to suggest that the Act is necessary to preserve the ethics of society as a whole: “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.”³⁶ In this scenario, certain abortions create the palpable danger that society will forget the difference between fetuses and babies—the difference denoted by birth and accrual of legal personhood—and that respect for human life, particularly for the vulnerable, will diminish.

2. *Fetal Pain Discourse*

Increasingly present in recent judicial opinions examining restrictions on abortion is the discourse of fetal pain, in which visceral descriptions detailing how abortion procedures subject fetuses to pain justify restrictions on the procedures allowed or require additional notifications, waiting periods, or other conditions with potential to unduly burden a woman’s right to an abortion. While the fetal life discourse justifies the state’s interest in preserving potential life, the fetal pain discourse adds a sympa-

Poverty, youth, and illegitimacy have disappeared as excuses available to the accused. See Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 *Fordham Urb. L.J.* 527, 546–47 (2006).

³⁴ *Gonzales*, 127 S. Ct. at 1634 (emphasis added).

³⁵ 521 U.S. 702, 732–35 (1997).

³⁶ *Gonzales*, 127 S. Ct. at 1634.

thetic component—while the fetal pain discourse does not explicitly affect the undue burden test, by intertwining with the fetal life discourse, the latter becomes more potent.³⁷ Fetal pain discourse claims that the fetus is a life—a concept validated by the reconfigured fetal life discourse—and that this living entity not only feels pain,³⁸ but furthermore has a right not only to life, but to protection from pain.

The fetal pain discourse emerges in the *Stenberg* decision and becomes more prevalent in the *Gonzales* decision. In *Stenberg*, Justice Breyer's majority opinion recognizes the fetal pain discourse as it arises in Nebraska's justification of its statute, which claims that the statute "prevent[s] cruelty to partially born children."³⁹ Justice Breyer does not draw out what Nebraska means by "cruelty,"⁴⁰ although the legal definition is "[t]he intentional and malicious infliction of mental or physical suffering on a living creature, [especially] a human[,] abusive treatment[, or] outrage."⁴¹ Fetal suffering or pain, therefore, is the subtext of the cruelty claim asserted by Nebraska. While Justice Breyer need not deal with this claim for the purpose of his analysis, three of the four *Stenberg* dissents harness the discourse of fetal pain.

Justice Kennedy's strategy is not just to describe fetal pain; it is also to describe the visual experience of witnessing fetal pain, a means to provoke an emotional, sympathetic response in readers.⁴²

³⁷ See *infra* note 45 and accompanying text.

³⁸ The claim that a fetus is aware of pain is contested. See Stahle, *supra* note 15, at 258–59 (citing J.A. Burgess & S.A. Tawia, *When Did You First Begin to Feel It?*, 10 *Bioethics* 1, 3, 18, 23 (1996); Sampsa Vanhatalo & Onno van Nieuwenhuizen, *Fetal Pain?*, 22 *Brain & Dev.* 145, 145–46 (2000)) (arguing conscious pain response can be measured at thirty weeks); see also Engelman, *supra* note 15, at 281–82 (citing Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 *JAMA* 947 (2005)) (disputing findings that conscious pain response cannot be measured before twenty-nine weeks). Both articles acknowledge that scientific studies present conflicting evidence and that assessments of fetal pain are subjective and contingent.

³⁹ *Stenberg v. Carhart*, 530 U.S. 914, 930–31 (2000).

⁴⁰ Instead, Justice Breyer suggests that preventing cruelty and the other purposes suggested by Nebraska are inapplicable to the omission of a health exception for the pregnant woman. *Id.* at 931.

⁴¹ *Black's Law Dictionary* 405 (8th ed. 2004).

⁴² Justice Kennedy's description of the procedure has been criticized as "graphic" or an attempt to shock the reader. See Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 *UMKC L. Rev.* 713, 736 (2007); see also Caitlin E. Borgmann,

Justice Kennedy describes the lawful standard D & E procedure⁴³ as brutally as the prohibited intact D & E procedure;⁴⁴ however, he notes that they differ because “witnesses to the procedure report *seeing* the body of the fetus moving outside the woman’s body. At this point, the abortion procedure has the *appearance* of a live birth.”⁴⁵ This describes what medical personnel, or other human beings, can *see* and thus internalize. It is only by projecting the fetus into the adult human psyche that Justice Kennedy can insist that the reader understand fetal pain.

Justice Thomas’s dissent uses the same technique, though he does not limit the analysis to the intact D & E. To him, fetal pain traumatizes adults in both procedures.⁴⁶ Justice Thomas follows this claim with a tale of one human’s experience of *visual* sympathy for *perceived* fetal pain:

The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby’s brains out. Now the baby went completely limp.⁴⁷

This narrative works because it allows the reader to *visualize* the scene, which can create a sympathetic response to the fetus’s movements—whether or not the fetus itself feels pain. It is not important for this discourse that a fetus undergoing this procedure feels pain, because it is likely that a fetus of the same gestational

Winter Count: Taking Stock of Abortion Rights after *Casey* and *Carhart*, 31 *Fordham Urb. L. J.* 675, 712 (2004).

⁴³ *Stenberg*, 530 U.S. at 958–59 (Kennedy, J., dissenting) (“The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”).

⁴⁴ *Id.* at 959–60 (Kennedy, J., dissenting) (“With only the head of the fetus remaining in utero, the abortionist tears open the skull. . . . The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull.”).

⁴⁵ *Id.* at 959 (Kennedy, J., dissenting) (citation omitted) (emphasis added).

⁴⁶ *Id.* at 983 (Thomas, J., dissenting) (“The most widely used method of abortion during this stage of pregnancy is so gruesome that its use can be traumatic even for the physicians and medical staff who perform it.”).

⁴⁷ *Id.* at 1007 (Thomas, J., dissenting).

age undergoing another abortion procedure would also feel pain. It is only when adult humans can *see* the fetus that its purported experience of pain matters. The visual component is key. The discourse itself does not impinge upon the undue burden test, in that pain is not an explicit factor. Nonetheless, Justices Scalia, Kennedy, and Thomas each use the fetal pain discourse to bolster the fetal life discourse, which *does* affect the test.⁴⁸

In *Gonzales*, Justice Kennedy juxtaposes “an abortion doctor’s clinical description”⁴⁹ with a “description from a nurse who witnessed the same method performed on a [twenty-six and a half]-week fetus,”⁵⁰ after which he includes the testimony Justice Thomas cites in his *Stenberg* dissent.⁵¹ Justice Kennedy also adds the following: “He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.”⁵² This textual juxtaposition of the two accounts, followed by the characterization of the doctor’s behavior, suggests that not only is Justice Kennedy using the fetal pain discourse in conjunction with the fetal life discourse to elicit sympathy and elide the distinction between fetus and newborn, but that he is also using the ethical-protective discourse⁵³ to suggest that doctors performing abortions have been desensitized to *both* fetal pain and fetal life. Justice Kennedy then turns to the congressional finding that “[i]mplicitly approving such a *brutal* and *inhumane* procedure by choosing not to prohibit it will further coarsen society to the *humanity* of not only *newborns*, but all vulnerable and innocent *human life*.”⁵⁴ Whether by analogy or by visual transposition, Justice Kennedy accepts the discourse of fetal pain as legally relevant, despite its lack of direct relevance to the undue burden test.

Justice Kennedy also ties the fetal pain discourse to the woman-protective discourse, asserting that “a mother who comes to regret

⁴⁸ Justices Stevens and Ginsburg argue that the *visibility* of the procedure does not equate it to infanticide, nor does fetal pain override the interests of the woman. See *id.* at 946 (Stevens, J., concurring); *id.* at 951 (Ginsburg, J., concurring).

⁴⁹ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1622 (2007).

⁵⁰ *Id.*

⁵¹ See *supra* note 47 and accompanying text.

⁵² *Gonzales*, 1217 S. Ct. at 1622–23 (citing H.R. Rep. No. 108-58, p. 3 (2003)).

⁵³ See *infra* notes 73–83 and accompanying text.

⁵⁴ *Gonzales*, 1217 S. Ct. at 1633 (citing 18 U.S.C. § 1531 note (2000 ed., Supp. IV)) (emphases added).

her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event . . . 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.”⁵⁵ Justice Kennedy’s language assumes that it is because of the *pain* the fetus purportedly suffers and the woman’s “natural” *sympathy*, invoked when she becomes aware of a description of the procedure that allows her to *visualize* it, that she would experience augmented suffering and grief. Without the fetal pain discourse, the woman-protective discourse⁵⁶ would not work.

Though *Roe* denies the fetus personhood status under the Constitution, the fetal pain discourse works in conjunction with the fetal life discourse in order to bridge this gap. These discourses then intertwine with the ethical-protective discourse, the regulatory discourse,⁵⁷ and the woman-protective discourse to affect the undue burden test and create a different result than that in *Roe*, *Casey*, or *Stenberg*—ostensibly using the same approach.

B. The Physician-Focused Discourses: From Judgment to Mistrust

There are two important strains of physician-focused discourse in *Roe* and its progeny. The appropriate medical judgment discourse suggests that physicians, not courts or legislatures, are the appropriate arbiters of health decisions. The seemingly complementary, but at times oddly contradictory, ethical-protective discourse claims that physicians have enormous power over their patients and over the ethics of society at large; for this reason, the government must protect humans from doctors’ questionable ethical choices, and protect doctors from their own ethical leanings, both of which threaten to taint the ethics of American society at large.

1. Appropriate Medical Judgment Discourse

Justice Blackmun, in *Roe*, cites the concept of the doctor’s medical judgment as a baseline, acknowledging that during “the first trimester, the abortion decision and its effectuation must be left to

⁵⁵ Id. at 1634.

⁵⁶ See *infra* notes 127–49 and accompanying text.

⁵⁷ See *infra* note 82 and accompanying text.

the *medical judgment of the pregnant woman's attending physician*"⁵⁸ and "subsequent to viability, the State . . . may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in the appropriate necessary judgment*, for the preservation of the life or health of the mother."⁵⁹ Justice Blackmun indicates that until the point where there is a compelling justification for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and *basic responsibility for it must rest with the physician*."⁶⁰

Casey reiterates this discourse as a corollary to the Court's analysis of the Pennsylvania informed consent statute. While reaffirming the physician's exercise of medical judgment, the Court holds that the state can require the physician to provide the pregnant woman with information that is "truthful and not misleading."⁶¹ Unlike *Roe*, *Casey* characterizes the abortion decision as a *non-medical* decision made by the *woman*, not the physician.⁶² The informed consent provision, the Court suggests, reduces "the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."⁶³ This suggestion assumes that the woman's interest in making an informed decision is *infringed* by the physician, who does not wish to inform her of the potential consequences of the procedure. This is the opposite of the relationship posited by Justice Blackmun in *Roe*, where the woman and physician work together to decide what is in the woman's best interest.⁶⁴ Thus, the Court places the woman and physician in a potentially oppositional dynamic, and ultimate authority for the abortion decision is transferred to the woman—albeit a woman over whom the state and the physician may exercise a paternalistic power. This oppositional dynamic not only replaces the cooperative dynamic, it also introduces the state into the dynamic as potential protector of the woman and physician watchdog. This opens the door to increased state inter-

⁵⁸ *Roe v. Wade*, 410 U.S. 113, 164 (1973) (emphasis added).

⁵⁹ *Id.* at 164–65 (emphasis added).

⁶⁰ *Id.* at 166 (emphasis added).

⁶¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

⁶² *Id.* at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position.").

⁶³ *Id.* at 882.

⁶⁴ See *supra* notes 58–60 and accompanying text.

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ference with the portion of the abortion decision involving the appropriate medical judgment of the physician.

This heightened ability to requisition the physician for the state's purposes appears in the regulations at issue in *Stenberg*, where the physician is proscribed from performing one specific procedure despite the possibility that it could be the most appropriate option available for a particular woman in the physician's judgment. Breyer relies upon the factual findings of the district court, which revealed a division of medical opinion about whether the procedure was safer in certain instances than alternative procedures, and *Casey's* language to question this assertion, stating that "*Casey's* words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion."⁶⁵ By reaffirming the appropriate medical judgment discourse, Justice Breyer upholds the health exception's focus on the individual woman and her health needs, as assessed by her physician, and thus reconfigures the physician as contiguous to and supportive of a woman's decision to elect an abortion.

The dissents by Justices Thomas and Kennedy find that this gives the physician too much power as against the state. Justice Kennedy finds that "the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. . . . [I]t is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people."⁶⁶ He questions the physician's motivations, because if the procedure is not the safest choice for the woman, then the physician is choosing to perform the procedure for self-serving reasons. What those reasons might be remains unstated. Justice Kennedy maintains that "[a] ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all. . . . This, of course, is the vice of a health exception resting in the physician's discretion."⁶⁷ Justice Thomas explicitly suggests that "[a]ny doctor who wishes to perform such a procedure . . . will be able to do so with impunity."⁶⁸ The health exception becomes a site where meaning is extremely contestable—is the health exception's purpose to protect the

⁶⁵ *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

⁶⁶ *Id.* at 964–65 (Kennedy, J., dissenting).

⁶⁷ *Id.* at 972 (Kennedy, J., dissenting).

⁶⁸ *Id.* at 1013 (Thomas, J., dissenting).

woman's health, to preserve the physician's discretion, or to limit the discretion of outlaw physicians? In the *Stenberg* dissents, the two latter purposes override the first, and enable use of the health exception to put pressure on the abortion right.

In *Gonzales*, Justice Kennedy suggests that the health exception has become "tantamount to allowing a doctor to choose the abortion method he or she might prefer."⁶⁹ He insists that "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community."⁷⁰ These characterizations impugn the physician's medical judgment as flawed and self-interested, as well as out of sync with the standards of the medical profession, significantly restricting, even eliminating, space for the physician to judge the individual circumstances of patients. Justice Kennedy insists on the oppositional nature of the physician-patient relationship in the abortion context: "some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails."⁷¹ The physician is thus hindering the woman's choice by obscuring information relevant to the woman's decision and the state is intervening in the physician-patient interaction *for the woman's benefit*, protecting the woman from her physician's potential duplicity. The discourse of the physician's appropriate medical judgment is rendered toothless by imposition of the woman-protective discourse.⁷² In sum, the instability of the discourse of the physician's appropriate medical judgment has created a contested space in the women's health exception.

⁶⁹ *Gonzales v. Carhart*, 127 S. Ct. 1610,1634 (2007).

⁷⁰ *Id.* at 1636.

⁷¹ *Id.* at 1634 (internal citations omitted).

⁷² Justice Ginsburg notes that the solution is unsuited to the problem: "The solution . . . then is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead the Court deprives women of the right to make an autonomous choice, even at the expense of their safety." *Id.* at 1648-49 (Ginsburg, J., dissenting) (citation omitted). Justice Ginsburg resists imposition of the woman-protective discourse and places the doctor in a protective role over the woman's health, but not her decision: "The court's allowance only of an 'as-applied challenge in a discrete case,' jeopardizes women's health and places doctors in an untenable position In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their *best judgment* as to the safest medical procedure for their patients." See *id.* at 1652.

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2. Ethical-Protective Discourse

Roe is relatively devoid of explicit reckonings with the concept of social ethics. While Justice Blackmun notes that Texas has attempted to “adopt[] one theory of life”⁷³ and recognizes “the wide divergence of thinking on this most sensitive and difficult question,”⁷⁴ the ethics of the medical profession is not addressed. *Casey* similarly refuses to validate the government’s offered purpose of protecting social ethics to justify government attempts to place restrictions on abortion, instead claiming that “[m]en and women of good conscience can disagree, and we suppose some always shall disagree Our obligation is to define the liberty of all, not to mandate our own moral code.”⁷⁵ The tendency, in *Roe* and *Casey*, is to shy away from sanctioning legislative rationales that impose a single moral point of view on either physicians or the public.

In *Stenberg*, the Court recognizes that this is exactly the rationale Nebraska claims for its statute. Nebraska argued that “the law ‘show[s] concern for the life of the unborn,’ ‘prevent[s] cruelty to partially born children, and *preserve[s] the integrity of the medical profession.*”⁷⁶ While Justice Breyer’s majority opinion finds these aims irrelevant because of the lack of a health exception, Justice Kennedy’s dissent elaborates: “States also have an interest in forbidding medical procedures which, in the State’s reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.”⁷⁷ He claims that “*Casey* recognized that ‘abortion is fraught with consequences *for the persons who perform and assist in the procedure and for society which must confront the knowledge that these procedures exist*, procedures some deem nothing short of an act of violence against innocent human life.”⁷⁸ The argument assumes that the medical community must be protected (by legislators) from the potential ethical ramifications of their own work, which often involves the border between life and death. This

⁷³ *Roe*, 410 U.S. at 162.

⁷⁴ *Id.* at 160.

⁷⁵ *Casey*, 505 U.S. at 850.

⁷⁶ *Stenberg*, 530 U.S. at 930–31 (emphasis added).

⁷⁷ *Id.* at 961.

⁷⁸ *Id.* at 962 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 852) (emphasis added).

is a danger not to physicians, but to society, which must be protected from any infectious moral decay that might emanate from the profession.⁷⁹

Justice Kennedy reiterates and develops this rationale in *Gonzales*: “Congress was concerned . . . with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion[,] . . . [which] ‘confuses the medical, legal, and ethical duties of physicians to preserve and promote life. . . .’”⁸⁰ The intact D & E procedure will confuse physicians’ moral radars, Justice Kennedy suggests, which will lead them to respect life less in all medical procedures. Justice Kennedy also cites Congress’s determination that “partial-birth abortion, more than standard D & E, ‘undermines the public’s perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.’”⁸¹ Not only are physicians’ morals hopelessly confused by participation in this procedure, the public comes to view physicians as antithetical to health and life, rather than protective of it. Restrictions on abortion, thus, help doctors by protecting their morals as well as their reputations as healers. In sanctioning these purposes, the Court must make a logical jump. The reasoning behind regulating ethics of a profession is to ensure no harm comes to *patients*.⁸² Instead the Court sanctions

⁷⁹ This argument is inconsistent with the argument that a physician’s medical judgment might be self-interested. If physicians’ moral health is declining, this is an unconscious leaning; conversely, if a physician performs abortions for political or convenience reasons this is a conscious choice to disregard the health of the patient. For the latter argument, see *supra* notes 66–72 and accompanying text. These are two very different rationales that *should* not easily coexist, but they do just that in Justice Kennedy’s rhetoric.

⁸⁰ *Gonzales*, 127 S. Ct. at 1633 (citing 18 U.S.C. § 1531 note (2000 ed., Supp. IV)).

⁸¹ *Id.* at 1635 (citing 18 U.S.C. § 1531 note (2000 ed., Supp. IV)).

⁸² This is an example of a supplementary medical discourse, the regulatory discourse, which is unexceptional in its simplest expression: the government has the right to establish rules of ethics for professionals. The Court accepts that one of the state’s interests is regulating the medical profession: “a State may properly assert important interests in safeguarding health, in *maintaining medical standards*, and in protecting potential life.” *Roe*, 410 U.S. at 154 (emphasis added). While *Casey*, *Stenberg*, and *Gonzales* focus on the last of these interests, various Justices throughout these (and other) cases use the regulatory discourse if it bolsters their argument. In *Gonzales*, Justice Kennedy wed the regulatory discourse to the ethical-protective discourse: “There can be no doubt the government ‘has an interest in protecting the integrity of the medical profession.’ Under our precedents it is clear the State has a significant role to play in regulating the medical profession.” *Gonzales*, 127 S. Ct. at 1633 (citing

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the idea that ethical regulation of the profession protects physicians from *their own* vulnerability to ethical decay, rather than protecting patients from harm.

In sum, the Court has moved from a focus on the physician as trusted advisor and protector of a woman's health to a characterization of the physician as vulnerable to ethical decay and concerned with interests counter to women's health—whatever those unspoken interests may be. While the appropriate medical judgment discourse has taken up space in each decision as a component of the woman's health exception, it is attacked in the *Stenberg* dissents and in *Gonzales* as allowing a single physician or small sect of physicians to perform intact D & E procedures, or partial-birth abortions “with impunity.”⁸³ The physician becomes an outlaw, self-interested, vulnerable to moral decay, and reviled by the general public.

C. Woman-Focused Discourses: From Privacy to Protection

Two woman-focused discourses appear first in *Roe* and extend through its progeny: the women's rights discourse and the women's health discourse. While *Roe* emphasizes the importance of women's reproductive privacy⁸⁴ and health,⁸⁵ and *Casey* recognizes the importance of women's “ability to control their reproductive lives,”⁸⁶ *Gonzales* instead suggests that women, while they retain the abortion right, must be protected from some of what that right confers upon them, thus entangling the women's rights and women's health discourse with the new woman-protective discourse, enabling a new judicial construction of the woman.

Washington v. Glucksberg, 521 U.S. 702, 731 (1997); Barsky v. Board of Regents of Univ. of N.Y., 347 U.S. 442, 451 (1954)). In doing so, Justice Kennedy uses the strength and legitimacy of the regulatory discourse to buttress his arguments holding Congress's purposes justifiable.

⁸³ *Stenberg*, 530 U.S. at 1013 (Thomas, J., dissenting).

⁸⁴ 410 U.S. at 153–54.

⁸⁵ *Id.* at 153.

⁸⁶ 505 U.S. at 856 (citing Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* 109, 133 & n.7 (rev. ed. 1990)).

1. Women's Rights Discourse

While *Roe* does not introduce the women's rights discourse, the Court uses such a discourse to justify, for the first time, a woman's right to abortion. Justice Blackmun agrees with the appellant's argument that there exists "a right . . . possessed by the pregnant woman, to choose to terminate her pregnancy . . . embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."⁸⁷ He notes that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸⁸ Justice Blackmun imposes strict scrutiny upon statutes placing restrictions on this right by classifying it as a fundamental right, requiring that any regulation restricting that right must be justified by a compelling state interest.⁸⁹ Finally, he sets forth the trimester framework,⁹⁰ in which the state's legitimate interests in protecting both women's health and the potentiality of human life grow in substantiality over the course of the pregnancy and at viability becomes "compelling."⁹¹

Casey most explicitly addresses abortion as a liberty right, though the undue burden test it applies allows greater state intrusion on the woman's right than in *Roe*. *Casey*'s joint opinion notes that "[nineteen] years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned."⁹² While the Court begins by affirming that the "law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"⁹³ it reconfigures the concept of liberty:

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 de-

⁸⁷ *Roe*, 410 U.S. at 129.

⁸⁸ *Id.* at 153.

⁸⁹ *Id.* at 155.

⁹⁰ *Id.* at 164–65.

⁹¹ *Id.* at 162–63.

⁹² *Casey*, 505 U.S. at 844 (citation omitted).

⁹³ *Id.* at 851 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

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fine one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁹⁴

The Court explicitly recognizes the personal autonomy of a woman over her own life, in 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.”⁹⁵ *Casey* recognizes the positive repercussions of *Roe*, asserting that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”⁹⁶ The Court then asserts that “[t]he effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny . . . , as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.”⁹⁷ Thus, the women's rights discourse moves from a privacy rationale⁹⁸ to one invoking individual liberty.

Justice Blackmun's concurrence characterizes regulations on abortion as byproducts of outmoded concepts of women's “natural” capacity and role:

By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the natural status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. . . . [T]hese assumptions about women's place in

⁹⁴ Id. at 851.

⁹⁵ Id. at 852.

⁹⁶ Id. at 856.

⁹⁷ Id. at 896.

⁹⁸ This focus on privacy perhaps coincides with normative ideas of women's appropriate sphere of existence in the early and middle twentieth century.

society “are no longer consistent with our understanding of the family, the individual, or the Constitution.”⁹⁹

This rejection of women’s “natural” role introduces a new strain in the women’s rights discourse. Justice Blackmun’s argument suggests how women’s role in law and society has depended upon the simplification of woman’s meaning to contain only that derivative of her reproductive capacity; she can only be understood as a mother.

In *Stenberg*, the women’s rights discourse fades into the background. Justice Breyer’s majority opinion addresses issues of women’s health, only generally restating *Casey*’s assertion that before viability the woman has a right to choose to terminate her pregnancy.¹⁰⁰ Justice Stevens’s concurring opinion links the women’s rights discourse to the women’s health discourse via the appropriate medical judgment discourse. He argues that *Roe*’s holding “makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.”¹⁰¹ Thus, a woman’s exercise of liberty prohibits interference of the state, but allows a doctor to provide an individually focused medical opinion. Justice Ginsburg, however, sees a pretense that threatens women’s autonomy: “if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.”¹⁰² She thus implies that any legislature’s claim that prohibiting intact D & E is a way of expressing profound respect for potential human life is not only illogical, but duplicitous.

⁹⁹ *Casey*, 505 U.S. at 928–29 (Blackmun, J., concurring in part) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724–26 (1982); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976)).

¹⁰⁰ *Stenberg*, 530 U.S. at 930. The focus on women’s health corresponds to the nature of the challenges brought against the Nebraska law, but also reflects a movement away from the women’s rights discourse.

¹⁰¹ *Id.* at 946 (Stevens, J., concurring).

¹⁰² *Stenberg*, 530 U.S. at 952 (Ginsburg, J., concurring) (citing *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting)).

In his dissent, Justice Kennedy refers twice to women's choices: he reinterprets *Casey*'s holding that the state "may enact laws 'which in no real sense deprive women of the ultimate decision,'" ¹⁰³ and notes that Nebraska "chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while [it] still protected the woman's autonomous right of choice as reaffirmed in *Casey*." ¹⁰⁴ Thomas similarly situates the woman's right as unharmed by the Nebraska law, which Justice Thomas suggests is "not designed to strike at the right itself." ¹⁰⁵ He also uses the concept of autonomy in a notably different context: "The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." ¹⁰⁶ The fetus has autonomy, which confers rights oppositional to the woman, whose right, according to Justice Thomas, is tied to her bodily integrity, *not* her choice whether to reproduce. Thus, the women's rights discourse becomes less potent, and more vulnerable, when the health exception becomes the site of the debate.

In *Gonzales*, Justice Kennedy introduces the woman's choice when reaffirming *Casey*, stating that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy,'" ¹⁰⁷ however, "regulations . . . are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." ¹⁰⁸ The next mention of a woman's choice comes in the context of psychological distress: "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed." ¹⁰⁹ Justice Kennedy re-contextualizes the discourse of women's choice, formerly synonymous with women's rights, in a woman-protective discourse that effectively short-circuits that choice. Thus the women's rights discourse, once so emphatically expressed in

¹⁰³ *Stenberg*, 530 U.S. at 965 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 875).

¹⁰⁴ *Id.* at 979 (Kennedy, J., dissenting).

¹⁰⁵ *Id.* at 1006 (Thomas, J., dissenting).

¹⁰⁶ *Id.* at 1007 (Thomas, J., dissenting).

¹⁰⁷ *Gonzales*, 127 S. Ct. at 1626 (citing *Casey*, 505 U.S. at 879).

¹⁰⁸ *Id.* at 1627 (citing *Casey*, 505 U.S. at 877).

¹⁰⁹ *Id.* at 1634 (citing Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 22–24, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380)).

Casey, has diminished in later cases, yielding to a focus on the health exception and introduction of the woman-protective discourse.

2. *Women's Health Discourse*

The woman's health discourse is present throughout the cases, but morphs perceptibly in each one. *Roe* first recognizes women's health as a legitimate state concern that can no longer justify restrictions on abortion. Justice Blackmun notes that the decrease in mortality rates from early abortions has made the procedure less risky than normal childbirth, and that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."¹¹⁰ Instead, the Court lists the physical, psychological, and socioeconomic danger to the health of pregnant women:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. . . . Mental and physical health may be taxed by child care. There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.¹¹¹

Because health concerns can weigh on either side of the equation—in support of abortion or in support of carrying to term—the decision must be assessed on an individual, case-by-case basis, which is the province of the woman and her physician, not courts or legislatures.

The *Casey* opinion reiterates the women's health discourse by noting that "[r]egulations designed to foster the health of a woman

¹¹⁰ *Roe*, 410 U.S. at 149 (footnote omitted).

¹¹¹ *Id.* at 153. This language is relevant to both the women's health discourse and the woman-protective discourse, and for this reason is referenced again below. See *infra* note 129 and accompanying text.

seeking an abortion are valid if they do not constitute an undue burden.”¹¹² The Court takes care to emphasize that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”¹¹³ Nonetheless, the women’s rights discourse does the majority of work in this opinion because women’s health issues are not ostensibly at stake.¹¹⁴ Justice Blackmun does address women’s health by suggesting that Chief Justice Rehnquist has only a superficial concern with women’s health: “for the Chief Justice, only women’s *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision.”¹¹⁵ Chief Justice Rehnquist suggests that “the waiting period helps ensure that a woman’s decision to abort is a well-considered one, and reasonably furthers the State’s legitimate interest in maternal health and in the unborn life of the fetus,”¹¹⁶ thus employing the woman’s health discourse *against* the woman’s rights discourse, rather than justifying the health exception.

Stenberg, in addressing the women’s health exception, must explicitly deal in terms of the women’s health discourse. Nebraska’s argument that “the law does not require a health exception unless there is a need for such an exception,”¹¹⁷ is novel. This argument redefines the women’s health discourse, and thereby the health exception itself, as peripheral to *Casey*’s holding. It also suggests that abortion procedures can be entirely outside the scope of medical necessity—and that convenience-based or political concerns can

¹¹² *Casey*, 505 U.S. at 878.

¹¹³ *Id.*

¹¹⁴ Regarding the spousal consent provision, *Casey* expands the definition of “family violence” to psychological abuse, marital sexual assault, child abuse, and fear of retaliation. See *id.* at 888–91.

¹¹⁵ *Id.* at 941 (Blackmun, J., concurring in part). This Note will deal with this language again because it is relevant to both the women’s health discourse and the woman-protective discourse. This dual relevance results from the complicated and intertwined nature of these discourses. See *infra* notes 134–135 and accompanying text.

¹¹⁶ *Id.* at 969 (Rehnquist, C.J., dissenting in part). This Note will also deal with this language again as relevant to both the women’s health discourse and the woman-protective discourse. See *infra* note 136 and accompanying text.

¹¹⁷ *Stenberg*, 530 U.S. at 931.

take precedence over medical ones. The argument creates a space for contesting the legitimacy of abortion as a medical procedure and subtly accusing pro-choice advocates, physicians, and even women of a hidden agenda. Justice Breyer's opinion accepts the terms of this argument while challenging its factual basis,¹¹⁸ creating an opening in the *Casey* framework by accepting the *possibility* that an established medical procedure may not be necessary. Those wishing to restrict abortion by arguing that a health exception is unnecessary need only find appropriate facts for their argument to be sustained. Justice Kennedy's dissent views the Nebraska law as acceptable because it "deprived no woman of a safe abortion,"¹¹⁹ and he argues that "[w]here the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method."¹²⁰ He claims that "Dr. Carhart does not decide to use the [intact D & E procedure] based on a conclusion that it is best for a particular woman,"¹²¹ placing the women's health discourse and the appropriate medical judgment discourse in strict opposition.

Gonzales first reaffirms *Casey*'s holding confirming legitimate interests in protecting the woman's health and potential human life.¹²² When addressing the statute's lack of a health exception, Justice Kennedy notes that "[t]he prohibition in the Act would be unconstitutional . . . if it 'subject[ed] [women] to significant health risks.'"¹²³ Justice Kennedy takes nearly the same constellation of facts as in *Stenberg*, including that "[t]here is documented medical disagreement whether the Act's prohibition would ever impose

¹¹⁸ *Id.* at 931–32 ("The problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart.").

¹¹⁹ *Id.* at 965 (Kennedy, J., dissenting).

¹²⁰ *Id.* at 967 (Kennedy, J., dissenting). This language places women's physical health and women's moral health on par with one another, and situates the legislature in the role of protecting the moral health of the woman. The women's health discourse and the woman-protective discourse intertwine here. For this reason, the cited language also appears below in the discussion of the woman-protective discourse. See *infra* note 140 and accompanying text.

¹²¹ *Id.*

¹²² *Gonzales*, 127 S. Ct. at 1626.

¹²³ *Id.* at 1635 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006)) (emphasis added).

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significant health risks on women,¹²⁴ but instead of resolving medical uncertainty in favor of preventing possible danger to women's health, Justice Kennedy resolves it in favor of the legislature's freedom to express its "respect for human life at all stages in the pregnancy."¹²⁵ The opposite ruling, "would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription."¹²⁶ Thus, the health exception becomes a matter of legislatures' freedom of expression and physicians' disinclination to obey the law, not women's health.

3. Woman-Protective Discourse: A New Development

In *Roe*, the Court announces the end of a woman-protective health discourse connected to the physical threat inherent in abortion procedures: "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."¹²⁷ This is effectuated in *Roe*'s trimester framework, wherein the state may not regulate abortion prior to the first trimester, and can only impose regulations intending to express the state's interest in potential life after viability.¹²⁸ Justice Blackmun includes a partially psychological argument justifying the woman's constitutional right:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.¹²⁹

¹²⁴ *Id.* at 1636.

¹²⁵ *Id.* In *Stenberg*, Justice Breyer relies exclusively on *Casey*'s explicit requirement that a post-viability regulation contain a health exception. In *Gonzales*, Justice Kennedy cites cases regarding other types of legislation in areas where there is medical or scientific uncertainty, effectively overruling *Casey*'s holding regarding the health exception.

¹²⁶ *Gonzales*, 127 S. Ct. at 1638 (Ginsburg, J., dissenting).

¹²⁷ *Roe*, 410 U.S. at 149.

¹²⁸ *Id.* at 164–65.

¹²⁹ *Id.* at 153. This language is relevant to both the women's health discourse and the woman-protective discourse. See *supra* note 111 and accompanying text.

While couched in the terms of justifying women's ability to choose whether or not to have children, the psychological rationale expressed here is later employed to justify the opposite end.

Casey's joint opinion suggests that some state intrusion into the abortion decision is acceptable, if its purpose is to "foster the health of a woman seeking an abortion"¹³⁰ or "express profound respect for the life of the unborn"¹³¹ and it does not impose an undue burden on a woman's right to choose an abortion. The Court holds that "requiring that the woman be informed . . . is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion,"¹³² suggesting that women are unable to adequately understand their circumstances and the resources available to them. However, *Roe*'s holding that after viability the state must include an exception "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"¹³³ is explicitly reaffirmed.

Justice Blackmun, as noted above,¹³⁴ suggests Chief Justice Rehnquist's dissent contains the seed of a new, troubling discourse: "for the Chief Justice, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision."¹³⁵ Chief Justice Rehnquist's belief that "the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus,"¹³⁶ suggests that he assumes, like the joint opinion, that women are in need of guidance and possibly even protection from their own bad decisions. *Stenberg* moves the debate directly to the heart of the health exception, where the women's rights discourse is overshadowed by the women's health discourse, as well as the physician-focused discourses. Justice

¹³⁰ *Casey*, 505 U.S. at 878.

¹³¹ *Id.* at 877.

¹³² *Id.* at 883.

¹³³ *Id.* at 879.

¹³⁴ See *supra* note 115 and accompanying text. Again, this language is relevant to both the women's health discourse and the woman-protective discourse; consequently, this Note analyzes the language once in each section.

¹³⁵ *Casey*, 505 U.S. at 941 (Blackmun, J., concurring).

¹³⁶ *Id.* at 969 (Rehnquist, C.J., dissenting).

Breyer highlights the physician-focused discourses, pronouncing that “[b]y no means must a State grant physicians unfettered discretion in their selection of abortion methods.”¹³⁷ He brings the women’s health discourse into the equation when he tempers this assertion by saying that “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception.”¹³⁸ The health exception, in *Stenberg*, remains focused on the woman’s health. However, in Justice Kennedy’s dissent, another discourse begins to arise. Justice Kennedy notes that “[b]y its regulation, Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected.”¹³⁹ This suggests that both the physician and the woman are in need of moral instruction, which may take the form of an outright prohibition, rather than the provision of relevant information. He further maintains that “[w]here the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method.”¹⁴⁰ Because a woman’s autonomous decisionmaking on the ultimate choice whether to bear a child has been repeatedly affirmed, and because *Roe* and *Casey* emphasize the importance of women’s health, Justice Kennedy suggests that Nebraska is *augmenting* the woman’s (and the physician’s) questionable *moral* health by restricting abortion.

In *Gonzales*, the woman-protective discourse arises in new form. The women’s health exception, according to Justice Kennedy, does not protect women’s health. Instead, it allows “some part of the medical community . . . disinclined to follow [Congress’s] proscription”¹⁴¹ to subvert the law. Thus, the woman is removed from the health exception. She emerges in the unlikely space of Congress’s interest in “promot[ing] respect for life, including life of the unborn.”¹⁴² This respect for life “finds an ultimate expression in the

¹³⁷ *Stenberg*, 530 U.S. at 938 (quotation omitted).

¹³⁸ *Id.*

¹³⁹ *Id.* at 964 (Kennedy, J., dissenting).

¹⁴⁰ *Id.* at 967. This language previously appeared in the discussion of the women’s health discourse, to which it is also relevant. See *supra* note 120 and accompanying text.

¹⁴¹ *Gonzales*, 127 S. Ct. at 1638.

¹⁴² *Id.* at 1633.

bond of love the mother has for her child.”¹⁴³ Justice Kennedy draws out the connection by asserting that, “some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”¹⁴⁴ This injury to a woman’s natural maternal instincts emerges as a new health injury, one which Justice Kennedy finds in order to meld government interests in fetal life with the woman’s interests, whether or not those interests are known to her.

This construct, however, would allow Congress to prohibit *all* abortions. Justice Kennedy tailors it to apply only to intact D & E procedures by noting that “[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails.”¹⁴⁵ The doctor thus deprives women of knowledge and thereby inhibits their free choice. The state’s interest in promoting respect for the life of the unborn now coincides with an unspoken state interest in the woman’s choice, knowledge, and mental health. Justice Kennedy illustrates his argument by drawing a portrait of the women he seeks to protect:

[i]t 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 human form.¹⁴⁶

In this illustration, a necessarily maternal woman’s natural instincts toward fetal preservation are protected from the physicians who choose the procedure for their convenience and subsequently do not inform the woman of the graphic nature of the procedure.

Justice Kennedy is open about the ramifications of such a statute: “It is a reasonable inference that a *necessary* effect of the regulation and the knowledge it conveys will be to encourage some

¹⁴³ Id. at 1634.

¹⁴⁴ Id. (citing Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 22–24, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380)).

¹⁴⁵ Id.

¹⁴⁶ Id.

women to carry the infant to full term, thus reducing the absolute number of late-term abortions.”¹⁴⁷ Not only is the prohibition on a specific procedure construed as educational—and as “encouragement”—in regard to its effect on a woman, it is seen as in effect extending to *all* late-term abortions, which suggests that the difference between procedures is intellectually and morally irrelevant. Finally, Justice Kennedy brings the argument full circle: “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.”¹⁴⁸ Thus everything—even the mental health of the woman—rests in the legitimate interest of the state in promoting respect for life.¹⁴⁹

In sum, the Court employs various woman-focused discourses in order to construct the woman’s right to choose an abortion. The *Roe* decision focuses on the right to privacy as inclusive of the woman’s right to choose an abortion, and employs the woman’s health discourse to invalidate the suggestions that abortions are without exception bad for women’s health. The Court characterizes potential psychological harm to women as an effect of forcing a woman to carry an unwanted pregnancy to term. *Casey* focuses on the woman’s rights discourse rather than a privacy justification of the right to choose abortion, and attempts to immobilize a respect for women’s health in the women’s health exception. In *Stenberg*, the woman’s rights discourse, most prominent in *Casey*, becomes obscured as the dispute moves to the woman’s health exception, focusing on the woman’s health discourse and highlighting, in dissents, arguments that women’s psychological health is burdened by certain abortion procedures—the woman-protective discourse.

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ Justice Ginsburg notes that instead of correcting women’s supposed lack of knowledge about the surgical procedures involved in an intact D & E, Justice Kennedy would “inform” women by banning the procedure, which is patently illogical. *Id.* at 1648–49 (Ginsburg, J., dissenting). She also identifies and challenges the protectionist rationale of the majority opinion. Protecting women from the consequences of their choices, suggests Ginsburg, “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.” *Id.* at 1649.

This discourse inverts the characterization set forth in *Roe*, which suggests that forcing women to carry children to term—preventing women from choosing—causes psychological harm. Finally, *Gonzales* ignores the woman's rights discourse, and weaves the woman's health discourse and woman-protective discourse together in order to suggest that not only are intact D & E procedures never medically necessary, they (like all abortions) are psychologically harmful. The potential psychological harm present in choosing a particular *type* of abortion justifies prohibiting women from choosing a *potentially* harmful procedure. This argument has the potential to affect much more than one particular abortion procedure.

In respect to the collective work done by the discourses identified in this Part, the *Gonzales* opinion finalizes the work of the *Stenberg* dissents as the discourses become productively tangled. As in the *Stenberg* dissents, the woman's health exception becomes focused upon medical discretion and is occupied by physician-focused discourses rather than woman-focused discourses, allowing the fetus-focused discourses to become dominant. The increasing textual and ideological space the fetus occupies becomes legally sanctioned, supporting the argument that "[t]he *Gonzales* decision further expanded the legal status of a fetus, while diminishing that of the woman."¹⁵⁰ In addition to this displacement of the women's health discourse, women's mental health is revived in the context of justifying the state's legitimate interest in expressing respect for potential life or fetal life. The question becomes whether this resurfacing of the women's health discourse, intertwined with the woman-protective discourse, is space occupied by the woman, the fetus, or both—the last of which would seem to be an impossible result of the undue burden test, which necessarily opposes the woman-focused and fetus-focused discourses. In *Gonzales*, the discourses coexist, but they only justify one end: preservation of the fetus. Thus, the fetus-focused discourses can claim the space as their own.

Post-*Gonzales*, the legal framework of the undue burden test gives substantially more space to the fetus than the woman. Though the undue burden test from its inception in *Casey* gave significant space to the fetus, that space has been enlarged by *Gonza-*

¹⁵⁰ Stahle, *supra* note 15, at 274.

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les, and the space allotted to women has diminished dramatically. By situating the fetus-focused and woman-focused discourses in the same site, exploitation of the undue burden test becomes possible.

II. MANIPULATIONS AND BAD PRECEDENTS: ANALYZING THE WOMAN-PROTECTIVE DISCOURSE

Part I of this Note outlined and described the discourses at work in *Roe* through *Gonzales* in detail. Part II will analyze the discursive work in a number of ways, focusing on the work done by the woman-protective discourse. First, this Part will explain how the woman-protective discourse manipulates the undue burden test. Second, it will examine the assumptions underlying the woman-protective discourse, identifying what the discourse attempts to conceal, and explore the discourse's historical origins in order to expose its potentially questionable precedents. Third, and finally, it will set forth the claim that the woman-protective discourse rests on assumptions and precedents that the Supreme Court has already explicitly rejected as invalid. In whole, this Part focuses on legal and theoretical means of subverting the discourse, and precedes a discussion of activist means of resisting and exploiting the discourse in Part III.

A. Manipulating the Undue Burden Test

The frameworks that the Court establishes to manage constitutional questions are varied. As one of these frameworks, the undue burden test weighs various interests against one another. In order for this undue burden test to have meaning, those making constitutional arguments must deploy various discourses in order to justify their positions within the test's framework. Looking closely at the undue burden test as defined in *Casey* is a useful springboard toward understanding its malleability, the ways in which Justices, among others, have been able to manipulate it in *Casey* itself and beyond, and its potential for changing the terms of the abortion debate.

Prior to replacing the trimester framework with the undue burden test, the joint opinion in *Casey* defined the stakes: "The woman's right to terminate her pregnancy before viability is . . . a

rule of law and a component of liberty we cannot renounce. *On the other side of the equation* is the interest of the State in the protection of potential life.”¹⁵¹ The Court rejected the trimester framework’s ability to adequately calculate the result of this opposition in various circumstances, despite acknowledging the usefulness of a rigid framework to fiercely guard the woman’s abortion right as against the state.¹⁵² *Casey* reflects movement towards allowing the state to encourage women to consider various arguments in favor of carrying a pregnancy to term: “Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to *encourage her to know* [about arguments against abortion and availability of alternatives and assistance]. The Constitution does not forbid a State or city . . . from *expressing a preference* for normal childbirth.”¹⁵³ The joint opinion’s problem with the trimester framework is that it “suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman’s interest; and in practice it undervalues the State’s interest in potential life, as recognized in *Roe*.”¹⁵⁴ Thus, the joint opinion discards the trimester framework, and looks for a more suitable formula.

The Court looks to the concept of an undue burden, used to discern whether a particular law strikes at the heart of a right, or whether it merely makes access to that right slightly more difficult or more expensive. This gives the state more leeway to assert its interests. “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.”¹⁵⁵ Thus, the joint opinion hails the undue burden test as flexible and adequately protective of both state interests and individual rights.

In defining the concept of an undue burden, the Court claims that the term is “shorthand for the conclusion that a state regulation has the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁵⁶ In

¹⁵¹ *Casey*, 505 U.S. at 871 (emphasis added).

¹⁵² *Id.* at 872.

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *Id.* at 873.

¹⁵⁵ *Id.* at 876.

¹⁵⁶ *Id.* at 877 (emphases added).

further defining this standard, the Court asserts that “[r]egulations which do no more than create a structural mechanism by which the State . . . 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.”¹⁵⁷ This covers the state rationale that it is regulating abortion for the purpose of expressing respect for fetal life. Additionally, the undue burden test acknowledges the state’s ability to “enact regulation to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”¹⁵⁸ Thus, the Court validates the state’s interest in women’s health as a permissible purpose for invoking restrictions on abortion. Finally, the Court adds an element to this fluid analysis by preserving a single element of the *Roe* framework, the health exception, within the undue burden test: “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁵⁹ This exception is not defined further, perhaps because of its inapplicability to the regulations under scrutiny in *Casey*. However, that lack of definition allows much strategic manipulation of the exception.¹⁶⁰

The women’s health exception defined in *Roe* and *Casey* is the only piece of the *Roe* trimester framework that *Casey*’s undue burden test retained. However, in draining the rigidity from the pre-

¹⁵⁷ *Id.* at 877.

¹⁵⁸ *Id.* at 878.

¹⁵⁹ *Id.* at 879 (quoting *Roe*, 410 U.S. at 164–65).

¹⁶⁰ While *Doe v. Bolton*, a companion case to *Roe*, briefly discusses the health exception, the Court in its discussion notes that “[w]hether, in the words of the Georgia statute, ‘an abortion is necessary’ is a professional judgment that the Georgia physician will be called upon to make routinely,” leaving the health exception to be defined by each woman’s physician, an opening that could have been exploited in later abortion jurisprudence. 410 U.S. 179, 192 (1973). Nonetheless, since *Casey* the Court has overlooked *Doe*’s version of the health exception in favor of *Casey*’s phrasing, with its blanket requirement of a health exception. See, e.g., *Stenberg*, 530 U.S. at 937–38; *Gonzales*, 127 S.Ct. at 1635. The only exception is the *Gonzales* opinion, which also cites *Ayotte v. Planned Parenthood of N. New England*, a recent decision that makes no reference to *Doe*. *Gonzales*, 127 S. Ct. at 1635 (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327–28 (2006)).

viability portion of the framework, *Casey* allowed similar flexibility into *Roe*'s post-viability holding. The way in which *Gonzales* deciphers the health exception decouples the concept of necessity and that of appropriate medical judgment, hence the development of arguments that a woman's health exception is unnecessary when banning an abortion method. It is unclear, however, that these two concepts were intended to operate separately. By decoupling the terms by which the health exception is defined, Nebraska set the stage in *Stenberg* for a radical reconceptualization of the health exception portion of the undue burden test.

It is important to note that the decoupling of the elements of the health exception did not initially accomplish its goal. In *Gonzales*, this logic is accompanied by various discourses that take the woman out of the woman's health exception, instead reconfiguring a woman-focused discourse in the service of the state. The woman-protective discourse appears in order to bolster the legitimacy of the overt legislative purpose, "express[ing] respect for the dignity of human life."¹⁶¹ By aligning women's health with the preservation of fetal life, the state can claim to be acting for the good of all, with the exception of physicians performing abortions.

This is exactly what Congress claims in its findings: "A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy."¹⁶² What this does, in addition to eviscerating the woman from the woman's health exception, is to confuse the assumptions underlying the undue burden test, in which the woman's interest in autonomy and choice weighs in direct opposition to the state's interest in potential life. If the woman's and the fetus's interests are in alignment, can one possibly be an undue burden on the other? The "Court has made clear that a State may *promote* but not *endanger* a woman's health when it regulates the methods of abortion,"¹⁶³ which is the basis of the *Casey* requirement of an exception "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹⁶⁴ In suggesting that regulations on abortion—even a unilateral prohibition—

¹⁶¹ *Gonzales*, 127 S. Ct. at 1633.

¹⁶² 18 U.S.C. § 1531 note (2000 ed., Supp. IV).

¹⁶³ *Stenberg*, 530 U.S. at 931 (emphasis added).

¹⁶⁴ *Casey*, 505 U.S. at 879.

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promote a woman's health by protecting her from emotional and psychiatric repercussions of her decisions, those opposing abortion are reconfiguring the undue burden test.

This reconfiguration is troubling not only because it appears to justify a sea change in the Court's abortion jurisprudence, but also because, by undermining the assumptions upon which the undue burden test is built, *Gonzales* implicates its legitimacy as a useful legal construct. However, examining the discourses that make *Gonzales* possible may suggest other possibilities. The woman-protective discourse, for example, incorporates highly suspect assumptions and can be traced to worrisome antecedents. The next Section will expose those assumptions and identify the troubling precedents, in preparation for the third Part's suggestions for strategic resistance.

B. Assumptions: Nature, Maternity, and the Mind

The woman-protective discourse Justice Kennedy invokes in his majority opinion is not of his own making; instead, he cites twice to the Amici Brief of Sandra Cano ("Cano brief"), the former "Mary Doe" in *Doe v. Bolton*,¹⁶⁵ decided at the same time as *Roe*. The Cano brief first explains why Cano is submitting a brief in support of the legislation: "Mrs. Cano in fact never wanted an abortion in *Doe v. Bolton* and fraud was perpetrated on the Court."¹⁶⁶ Thus, the brief's inaugural assertion implies that unsophisticated women can be tricked or forced by others, in this case family members and lawyers, into making reproductive choices that are not their own. The brief then states that "the 'health' exception has been broadly interpreted and thereby ultimately led to partial-birth abortion."¹⁶⁷ The health exception is construed as justifying a procedure that, rather than promoting women's health, destroys it.

¹⁶⁵ 410 U.S. 179 (1973).

¹⁶⁶ Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 1, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380). This assertion is supported by Cano's affidavit, which accuses her mother, step-father, and lawyer of attempting to trick her into having an abortion and, when that was unsuccessful, litigating the *Doe* case without her consent and subsequently refusing to assist her in caring for her child, forcing her "to surrender [her] rights and give [her] baby up for adoption." *Id.* at App. A, ¶¶ 4–10.

¹⁶⁷ *Id.* at 1.

While asserting her tale of being used as a legal guinea pig, Cano discusses her moral beliefs about abortion:

[The] assertion . . . that abortion is performed for the mother . . . is the cruelest misrepresentation of all. My own circumstance, the one used to justify legal abortion in the first place, is a perfect example of this reality. . . . All of these other people—the doctors, nurses, and clinics[—]were using the Court to do what they thought was in my interest. They pressured the Court claiming I need the right to terminate the life of my own child. . . . Unfortunately, the legal right to an abortion was sought in my case because others thought it was too hard for them to give me real help. The abortion was sought for them, not for me.

But no matter how hard life happens to be, no one has the right to kill a baby—especially the baby’s mother. She is the trustee of her child’s life. She, of all people, has the sacred duty to protect the child. *But the child’s interests are not at odds with her own. They are in concert with one another.* The mother derives a great benefit from her relationship with her child. It is as beneficial to her as it is the child. *It is never in the interest of a mother to terminate the life of her own child.*¹⁶⁸

The reconfiguration of interests emerges here, and it is important to note *how* this occurs. The interests of women and child concur because the mother *always* and *only* benefits by having a child, in Cano’s belief. Earlier, in describing why she did not cave to the pressure to obtain an abortion, she asserts “the abortion was not in my interest. I was the mother of a baby for whom I was responsible. I had a natural desire to have my baby and to raise her.”¹⁶⁹ Thus, the conflation of the woman’s interests with the fetus’s interests is entirely dependent upon invocation of the maternal instinct—the “natural desire”¹⁷⁰ to be a mother.

Included with Cano’s description of her situation are the affidavits of 180 women who did have abortions, but not partial birth abortions. The Cano brief asserts that “after thirty-three years of real life experiences, post-abortive women . . . now attest that abor-

¹⁶⁸ Id. at App. A, at ¶¶ 17–18 (emphases added).

¹⁶⁹ Id. at App. A, at ¶ 9. Cano did succeed in having her baby, but not in raising her. It was forced adoption, and not forced abortion, that deprived her of her child.

¹⁷⁰ Id.

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tion hurts women and endangers their physical, emotional, and psychological health.”¹⁷¹ This argument extends to all abortions, although it is used to justify the ban on one procedure. The brief carefully refuses to make this connection, though the dots are *almost* connected. The brief stresses that “[i]t is not, however, the method of abortion that creates the health risk, it is the abortion itself. . . . Thus, the State would actually be endangering the woman’s health by allowing partial-birth abortion.”¹⁷² This sentence is illogical—the correct conclusion is that the state is endangering women’s health by allowing abortions of *any* type.

However, the underlying purpose—arguing all abortions harm women and should thus be prohibited—is not the only portion of the argument revealed in the Cano brief. Although the brief provides information on potential negative health consequences to women, such as the full complement of side effects from the intact D & E procedure, the focus quickly turns to the emotional side effects: “Some women may feel guilty, sad, or empty, while others may feel relief that the procedure is over. Some women have reported serious psychological effects after their abortion, including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse.”¹⁷³ The brief presents findings that further link psychological damage to the rupture of a natural bond between the woman and her child, denying that “a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. [This] is beyond the *normal, natural, and healthy* capability of a woman whose *natural instincts* are to

¹⁷¹ Id. at 5.

¹⁷² Id. at 9 (emphasis added). Immediately following this argument, the brief analogizes that,

[i]n other procedures such as [inserting] silicone breast implants, a woman and her doctor cannot make that surgery choice because the [FDA] placed a moratorium on the device due to the health risks that were involved. Therefore, *they should not be able to ‘choose’ abortion* which is a more dangerous and risky procedure.

Id. (emphasis added).

¹⁷³ Id. at 16 (quoting Texas Dep’t of Health, *A Woman’s Right To Know* 16 (2003), available at <http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf>).

protect and nurture her child.”¹⁷⁴ The brief then invokes “Post-abortion Syndrome,” the brainchild of Dr. Vincent Rue, Ph.D.¹⁷⁵ This highly contested¹⁷⁶ syndrome is essentially a post-traumatic stress disorder that stems from the traumatic experience of abortion. The brief then closes with the plea, “Congress and state legislatures should be allowed to protect women by holding hearings, making findings of fact, and enacting legislation based on the evidence.”¹⁷⁷ While this argument has many weak points, it is more germane to this Note’s analysis to point out its assumptions than to analytically dismantle it.¹⁷⁸

The basis for this woman-protective argument is that women are unable to protect themselves from the unwanted psychological consequences of their own choice to abort.¹⁷⁹ This is striking in its similarity to the language in *Roe* suggesting similar consequences

¹⁷⁴ Id. at 19 (quoting Report of the South Dakota Task Force to Study Abortion 47–48 (Dec. 2005), available at http://www.voteyesforlife.com/docs/Task_Force_Report.pdf (emphases added)).

¹⁷⁵ Id. at 19.

¹⁷⁶ Justice Ginsburg thoroughly canvasses the literature on post-abortion syndrome and finds little support for its existence. See *Gonzales*, 127 S. Ct. at 1648 n.7 (Ginsburg, J., dissenting).

¹⁷⁷ Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 26, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380).

¹⁷⁸ Those wishing to counter this claim have many arguments at their disposal. First, the assumption that a woman’s natural bond with a child creates a trauma when that bond is separated should allow for not only the prohibition of all abortions, but prohibition of all adoptions of children with living mothers. Second, the factual basis for the post-abortion syndrome is challenged in many medical articles. Third, even those authorities conceding the possibility of post-abortion syndrome suggest it is less common than post-partum depression, thus dislocating depression from an explicit association with abortion. Fourth, women with either wanted or unwanted pregnancies experience post-partum depression, thus marking depression as a possibility no matter what the conditions surrounding the pregnancy. Fifth, the idea that women must then be protected from depression can easily be challenged by noting that (1) the government doesn’t prohibit women from undergoing birth, and (2) the government doesn’t prohibit men or women from participating in war (instead encouraging participation), from which post-traumatic stress disorder can result. *Supra* note 176.

¹⁷⁹ Dr. David Reardon, Ph.D., cited in the Cano brief as “one of the world’s leading experts on the effects of abortion on women,” also originated the argument that abortion harms women and that this argument should be used strategically to pursue anti-abortion objectives. Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 22, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380); see also David C. Reardon, *Making Abortion Rare: A Healing Strategy for a Divided Nation* (Acorn Books 1996).

as a result from *denying* a woman's choice.¹⁸⁰ The overarching difference is that *Roe's* discourse assumes the woman is in the best place to decide whether aborting or carrying her pregnancy to term is ultimately the best choice, considering her mental health as a portion of the decision. The Cano brief, however, suggests that women cannot foresee this psychological trauma, cannot protect themselves—by *choosing* not to have an abortion, an option to which the woman-protective discourse draws no attention—and thus insists that the state intervene. The woman-protective discourse must hide the woman's rational capacity—the capacity to decide to carry a pregnancy—in order for this argument to work.¹⁸¹ The discourse must focus instead on the natural, maternal bond between the woman and child—which, in the internal logic of the woman-protective discourse, women who choose abortion do not comprehend until it is severed.

The assumptions of the woman-protective discourse include the following: (1) that the woman has a natural predisposition toward a maternal role, and thus will have a natural “bond of love [with] her child”;¹⁸² (2) that the woman is unable to rationally understand that this bond exists; (3) that the woman is unable to rationally understand that she has the option to carry the pregnancy to term as well as to abort; (4) that the woman is unable to rationally understand the benefits and risks of both procedures and make a responsible decision; (5) that medical professionals providing abortions are unwilling to assist women in making an informed and rational choice; and (6) that a woman cannot be held liable for the repercussions of her own choice, such as regret, depression, or physical consequences,¹⁸³ as if she were a rational, responsible, adult human.

¹⁸⁰ See *Roe*, 410 U.S. at 153.

¹⁸¹ This is not to say that no woman regrets an abortion—the Cano brief *does* show that some women regret their abortions, and Justice Kennedy is correct in citing the brief for this point. However, rational human beings, in exerting their freedom to choose, can choose incorrectly and have no remedy for the regret they may feel.

¹⁸² *Gonzales*, 127 S. Ct. at 1634.

¹⁸³ Consent is defined as patients undergoing medical procedures of any type are routinely required to assess those risks. If the physician fully discloses the risks as required, and a risk is realized despite the physician's non-negligent care, the law holds that because the patient rationally determined the risk was worth taking she cannot recover for injury; this is inherent in the doctrine of informed consent. Black's Law Dictionary 323 (8th ed. 2004).

These assumptions pervade Justice Kennedy's passage on "the reality" of women's maternal nature and its necessary consequences:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.¹⁸⁴

Thus, women's reality is defined by their maternal function, not their capacity to rationally choose the best alternative available.

This suggestion that women are naturally maternal rather than rational is not new, nor is it ancient—the ideology is Victorian. The "naturally" maternal woman that is decoupled from her ability to reason is taken directly out of the separate spheres ideology of the Victorian era.¹⁸⁵ As an ideology, the concept of separate spheres describes not a historical reality, but a normative impulse in society—it suggests a widely held system of meanings and standards by which society regulated and passed judgment upon itself and its constituents.

¹⁸⁴ *Gonzales*, 127 S. Ct. at 1634 (citation omitted).

¹⁸⁵ See Karen V. Hansen, *A Very Social Time: Crafting Community in Antebellum New England* 15–16 (1994) ("The 1820s and 1830s gave birth to a new dictum regarding the place of middle-class white women that dovetailed neatly with the separation of work from family life, and public from private space. . . . The advice literature encouraged wives and mothers to focus their energies on caring for their families and uplifting the morals of society. Women were to guard their sphere and rightful place—the home—with all the virtues imbued in a proper wife-mother. . . ."); see also Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835*, at 197 (1977); Jayme A. Sokolow, *Eros and Modernization: Sylvester Graham, Health Reform, and the Origins of Victorian Sexuality in America* (1983); Amy Kaplan, *Manifest Domesticity*, 70 *Am. Literature* 581 (1998); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 *Am. Q.* 151, 152 (1966). The model of the "separate spheres" has been heavily criticized. Professor Cathy N. Davidson, for example, argues that "those binaric terms suggest [that] according to this metaphor, nineteenth-century America was neatly divided up according to an occupational, social, and affective geography of gender." Cathy N. Davidson, *Preface to No More Separate Spheres!*, 70 *Am. Literature* 443, 444 (1998). While separate spheres ideology by no means describes a historical reality, it *does* describe an ideological construct affecting both sexes in the nineteenth century.

An over-generalized synopsis of separate spheres ideology is that in Victorian America, industrialization brought (mostly male) workers out of the home economy.¹⁸⁶ While the ideology of separate spheres, which posited that men entered the increasingly industrial public sphere and women remained in the private sphere, was a response to new conditions, it resulted in an entrenched dichotomy where men represented one extreme and women represented its opposite.¹⁸⁷ Thus men became aligned with the public sphere, the economy, industrialization, labor, rationality, competitiveness, and the mind.¹⁸⁸ Women, conversely, represented the private, domestic sphere, familial relationships, emotion, spirituality and morality, submissiveness, and the body.¹⁸⁹ Men thought while women felt; men produced and women reproduced.

The trouble with this revival of the separate spheres ideology within a contemporary discourse is not merely its Victorian character. Instead, the concern is that ideologies of the “natural” can entrench social inequities and justify actions hostile to individual rights. By exposing the woman-protective discourse as derivative of the separate spheres ideology of the nineteenth century, the discourse becomes vulnerable to a pre-existing set of critiques, including the charge that such ideologies explicitly incorporate sex stereotyping.¹⁹⁰

C. Invalid Underpinnings: The Legal Problem with the Woman-Protective Discourse

The dichotomy between the woman as natural, maternal, and associated with the body and the man as rational, creative, and associated with the mind is nothing less than sex stereotyping of the

¹⁸⁶ See Hansen, *supra* note 185, at 15–16. This is an ideological, rather than a historically accurate, description.

¹⁸⁷ See Sokolow, *supra* note 185, at 40.

¹⁸⁸ See Hansen, *supra* note 185, at 17.

¹⁸⁹ *Id.*

¹⁹⁰ See Siegel, *supra* note 9, at 831 (“The Court’s insistence that abortion regulation not enforce the gender-stereotypical understandings of the separate spheres tradition also shaped its application of undue burden analysis, specifically its rejection of a spousal notice requirement on the grounds that the abortion law reflected ‘a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.’”) (citing *Casey*, 505 U.S. at 898).

sort the Supreme Court has specifically identified as illegitimate: “Under [precedent] culminating in *United States v. Virginia (VMI)*, even statistically accurate generalizations about ‘typically male or female tendencies’—such as men’s greater aggressiveness versus women’s comparatively more cooperative temperament, or men’s tendency to harass and women’s victimization by sex harassment—cannot be grounds for official, sex-based discrimination.”¹⁹¹ Generalizations as to typically female characteristics, such as assuming a woman has a natural impulse toward maternal feelings, are explicitly prohibited by these cases. However, though there are cases that seemingly find all stereotyping impermissible, such as *United States v. Virginia*, in which the Court reiterated its view that “State actors . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females”¹⁹² and *J.E.B. v. Alabama ex rel. T.B.*, where the Court found that equal protection principles, as applied to gender classification, mean that state actors may not rely on overbroad generalizations to “mak[e] judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.”¹⁹³ There are exceptions to this general rule that validate protectionist rationales, such as *Michael M. v. Superior Court* where the Court justified a statutory rape statute applicable only to men ostensibly based on women’s ability to become pregnant.¹⁹⁴

Sex stereotyping gender discrimination as relevant to abortion arises in *Bray v. Alexandria Women’s Health Clinic*, where clinics performing abortions sued Operation Rescue, an anti-abortion group, to enjoin their demonstrations outside clinics under a theory that such demonstrations are a private conspiracy motivated by gender-based discriminatory animus.¹⁹⁵ Justice Scalia’s majority opinion suggests that “opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition

¹⁹¹ Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 *Emory L.J.* 941, 948 (2007) (citing *United States v. Virginia*, 518 U.S. 515, 541, 544, 550 (1996)).

¹⁹² 518 U.S. at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

¹⁹³ 511 U.S. 127, 139 n.11 (1994).

¹⁹⁴ 450 U.S. 464, 467 (1981) (plurality opinion); see Pillard, *supra* note 191 at 951 (calling *Michael M.*’s rationale “fearful gender protectionism”).

¹⁹⁵ 506 U.S. 263, 267–69 (1993).

to (or paternalism towards) women.”¹⁹⁶ By making such a suggestion, he implicitly contends that paternalism towards women qualifies as gender-based discriminatory animus. In fact, Justice Scalia goes so far as to say that the animus requirement need not “be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women.”¹⁹⁷ He notes that in a case of assertedly benign discrimination, the purpose must focus “upon women *by reason of their sex*” and gives the example of “‘*saving*’ women *because they are women* from a combative, aggressive profession such as the practice of law.”¹⁹⁸ By Justice Scalia’s logic, saving women because “the bond of love the mother has for her child”¹⁹⁹ is ruptured when they choose abortions, because it is “beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child,”²⁰⁰ focuses on women *because they are women*—because women *should* be maternal, whether or not their actions are maternal.

Scalia also observes that in *Bray*, the district court found that the petitioners “define[d] their ‘rescues’ not with reference to women, but as physical intervention ‘between abortionists and the innocent victims’”²⁰¹ Conversely, the woman-protective discourse *does* define its ostensible target as a woman: Justice Kennedy’s distraught mother, “who comes to regret her choice to abort [and] must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know. . . .”²⁰² The woman-protective discourse focuses on saving the woman, because she is naturally maternal, from a procedure that threatens to rupture the natural bond between woman and child. Justice Scalia acknowledges in *Bray* that if paternalism—which equates to sex stereotyping and thus gender discrimination—is ex-

¹⁹⁶ *Id.* at 270.

¹⁹⁷ *Id.* at 269–70.

¹⁹⁸ *Id.* at 270 (first emphasis added).

¹⁹⁹ *Gonzales*, 127 S. Ct. at 1634.

²⁰⁰ Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioners at 19, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (No. 05-380) (citing Report of the South Dakota Task Force to Study Abortion (Dec. 2005), available at http://www.voteyesforlife.com/docs/Task_Force_Report.pdf).

²⁰¹ *Bray*, 506 U.S. at 270.

²⁰² *Gonzales*, 127 S. Ct. at 1634.

posed, or patently appears on the surface, as in Justice Kennedy's woman-protective argument in *Gonzales* and the Cano brief, one could argue that such a gender-based animus is clear.²⁰³ In the context of a Supreme Court opinion like *Gonzales*, arguments justified by a woman-protective discourse should be automatically disqualified, as they were in *United States v. Virginia*.

In sum, by suggesting that regulations on abortion promote a woman's health by *protecting her*, the woman-protective discourse reconfigures the undue burden test by aligning the woman's interest in her own mental health with the state's interest in fetal life. To be successful, the woman-protective discourse must obscure the woman's rational capacity to make the choice that is best for her. The discourse must focus instead on the "natural" maternal bond between the woman and child. The suggestion that women are naturally maternal, but not naturally rational, is lifted directly from the Victorian ideology of separate spheres, which naturalizes social inequities and sex stereotypes. Identifying the discourse as a form of sex stereotyping, and thus gender discrimination, exposes the woman-protective discourse to legal attack via *United States v. Virginia* and *Bray*, among others.

III. RESISTING AND EXPLOITING THE WOMAN-PROTECTIVE DISCOURSE

The woman-protective discourse has proven effective in garnering support from no less than a majority of Justices currently on the Supreme Court of the United States. In addition to the legal arguments that can be galvanized to counter its influence, other avenues exist for challenging a discourse resting on such a protectionist rationale. This Part, a discussion of activist tactics, will suggest two methods by which feminist concerns might be vindicated: resisting the discourse and exploiting the discourse. Resistance to discourses justifying restrictions on women's rights is the traditional methodology for stripping them of their ideological power. However, there are also ways in which the discourse has done work that can be exploited and used to effect feminist goals.

²⁰³ *Bray*, 506 U.S. at 270.

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A. Resisting the Discourse

The assumptions underlying the woman-protective discourse suggest a number of ways in which it can be resisted. The discourse focuses on the woman, but it necessarily constructs the woman to emphasize a “natural” vulnerability, creating a need for protection. This constructed woman necessarily includes some women’s experiences and excludes others. Articulating the shortcomings of the discourse and identifying competing discursive possibilities may be helpful in defusing its ability to do legal and ideological work.

1. Challenging Discourses of the Natural

The woman-protective discourse is based on a specific conception of woman’s nature—specifically, a conception of the woman as necessarily, naturally, essentially maternal. As noted above, this construct can be traced to Victorian ideology of the separate spheres, which linked women to domesticity, family, the home, the private sphere, and the body (as opposed to the mind). Over the course of the twentieth century this construct has been discredited, although it has erupted in the form of a stereotype justifying gender differences or inequities.

While stereotypes based on the concept of women’s natural maternal role have been discredited—for the most part—as legal justifications of discriminatory behavior,²⁰⁴ they do continue to have ideological capital, and persistently crop up in contested legal space, such as abortion and pregnancy-based employment discrimination. Professor David B. Cruz recognizes the work done by stereotypes in a case of sex discrimination on the basis of pregnancy: “The . . . policy was an example of an ideologically driven rule with inegalitarian effects. It discriminated against women, and it did so in the service of an ideological, gendered, naturalized view of pregnancy and childrearing—that is, of the processes of procreation and reproduction of individuals and society.”²⁰⁵ Woman’s role

²⁰⁴ See *United States v. Virginia*, 518 U.S. 515, 541 (1995); *J.E.B. v. Alabama*, 511 U.S. 127, 139 (1984); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); cf. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 467 (1981).

²⁰⁵ David B. Cruz, *Heterosexual Reproductive Imperatives*, 56 *Emory L.J.* 1157, 1158–59 (2007) (citing *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977)).

as mother is naturalized, and women, in judicial language, are described as mothers, rather than women.

In each abortion case, terminology is at stake. The Court, in *Roe*, takes no notice of the assumptions built into the language it uses: "As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved."²⁰⁶ Justice Blackmun, despite his defense of the abortion right, uses the terms woman and mother interchangeably. This is a linguistic choice with consequences—calling a woman a mother posits a child, not a potential child, and also confuses gender (woman) with role (mother). Cruz notes the prevalence of the term "pregnant mother" in *Roe*: "She is not a pregnant *woman* or pregnant *female*, where those might perhaps be understood as factual biological terms. Rather, she is a *mother*, which reflects an assumption not simply about biology but about her proper role."²⁰⁷ *Casey* clutters terminology further, and by the time *Stenberg* and *Gonzales* come to the Court, the terms "woman" and "mother" represent the political and ideological divide. The meaning of mother as a normative role for *all women*, whether or not abortion becomes an issue in their lives, is obscured by its overtly political usage within the abortion debate.

While exposing this underlying impulse toward maternity is helpful, it is also necessary to juxtapose the abject lack of a similar impulse regarding men. Male sexuality and female sexuality are treated in markedly different manners by the law. Professor Elizabeth A. Reilly notes their disparate treatment by the Supreme Court in the context of reproduction: "The Court treats male fertility as of primary and overriding importance to the individual male, while treating female fertility as a subject of concern to others, including society, and thus more appropriately subject to external controls."²⁰⁸ Regulation of female sexuality extends far beyond re-

²⁰⁶ *Roe*, 410 U.S. at 159.

²⁰⁷ Cruz, *supra* note 205, at 1161 (citing *Roe*, 410 U.S. at 150).

²⁰⁸ Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 *Am. U. J. Gender & L.* 147, 183 (1996) (citing *Skinner v. Oklahoma*, 316 U.S. 565, 566 (1942); *Buck v. Bell*, 274 U.S. 200, 207 (1927)). The fifteen-year gap between *Skinner* and *Buck* also explains some of the differences in responses to sterilization, but the point remains that women's reproductive capacity is a dangerous force, while men's is a right, and a part of male personhood.

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strictions on abortion, to sterilization, sex education, contraceptive access, work-family policy, and more. This regulation expresses an anxiety about female reproduction as well as female agency: “when the state regulates women as childbearers, it legislates the ideology of motherhood. Furthermore, it eliminates the possibility of self-definition.”²⁰⁹ Thus, by imposing restrictions on abortion, Congress and state legislatures are telling women how to be mothers, and eliminating other options.

The woman-protective discourse is particularly rife with contentions regarding women as mothers. It is based upon the assumption that all women, who, by becoming pregnant are characterized as mothers, feel a natural, maternal bond to their fetus that is ruptured by abortion. The underlying message is double-pronged. Two types of women abort their children: the first is the woman who feels this maternal bond, but aborts anyway, resulting in psychological trauma; the second is the woman who does not feel this maternal bond, and aborts, who is necessarily already traumatized via her lack of maternal instinct, also a pathology.

These women have emerged before: the Victorian hysteric also represented a variety of female pathologies. The hysteric of the Victorian era was a then modern riff on the Hippocratic hysteric, whose uterus, through lack of appropriate use, “dried up, lost weight, and consequently was able to migrate in search of moisture.”²¹⁰ The Victorian-era hysteric transformed the literally misplaced uterus with a metaphoric version, where female anatomy “is explicitly denied, [but] is implicitly retained in the notion of a biologically necessary and predetermined feminine character and role.”²¹¹ Thus, the Victorian hysteric represented not medical reality, but “the power of a discourse, building over centuries, to con-

²⁰⁹ Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 *Ohio St. L.J.* 1205, 1285 (1992).

²¹⁰ Janet Beizer, *Ventriloquized Bodies: Narratives of Hysteria in Nineteenth-Century France* 4 (1993).

²¹¹ *Id.* at 7 (citing Francois Laplassotte, *Sexualité et névrose avant Freud: Une mise au point*, 3 *Psychanalyse à l'université* 205 (1978)) (discussing the “modernization” of genital theories of hysteria).

struct and convey an image of woman.”²¹² Thus, this semi-medical term came to represent more than mere pathology. Instead, “[f]igure of femininity, label of disorder and difference, hysteria was available for a wide and often contradictory range of aesthetic and political purposes: instrument of misogyny, agent of differentiation, magnet diagnosis of society’s multiple ills,”²¹³ among others.

The similarities, however, between the overt pathology of the Victorian hysteric and the implied pathology of the aborting woman do not end there. Professor Janet Beizer suggests that in the discourses of hysteria “the recurrent and methodical attribution of woman’s frightening difference to her maternal destiny serves to circumscribe and contain—if at times only barely—what is otherwise marked as pathological.”²¹⁴ Here, hysteria contains non-procreative sexuality: that sexuality is necessarily pathological and destructive of the maternal role. In the same way, the woman-protective discourse pathologizes certain sexualities that undermine the maternal—those that suppose a woman can legitimately choose not to be maternal. The woman-protective discourse insists that a woman can only inhabit a maternal role when pregnant, and if she does not, pathology is inevitable. This explicitly defines roles for women, and concurrently defines the role of men, in turn limiting autonomous possibilities for both.

2. Exposing the Paternalistic Nature of the Discourse

Closely related to challenging the assumption of “natural” maternalism of the woman-protective discourse is exposing its assumptions as paternalistic, or obviating women’s capacity for rational choice. This has to do with exposing the assumption that the woman is unable to decide without assistance from the legislature as regards her reproductive capacity. There are two strains of discourse combined here: the pathologized non-maternal woman and the irrational maternal woman, both cribbed from Victorian ideologies and minimally altered. Neither a correctly maternal woman

²¹² *Id.* at 8 (citing Francois Laplassotte, *Sexualité et névrose avant Freud: Une mise au point*, 3 *Psychanalyse à l’université* 205 (1978)) (discussing the “modernization” of genital theories of hysteria).

²¹³ *Id.* at 8.

²¹⁴ *Id.* at 38–39.

nor an incorrectly non-maternal woman align with the rational capacity for autonomous decisionmaking.

The woman-protective discourse is paternalistic, in that rather than supporting women's autonomy by providing the tools needed to make an informed decision, legislatures feel justified in denying women the ability to decide at all. The discourse does this by suggesting women do not decide in the first place; physicians instead hold the decisional reins. Thus, women's autonomy is unaffected by restrictions, which instead protect women from physicians.

The fact that legislators, by restricting, are taking away decisionmaking capacity from the women they ostensibly represent is obscured. Thomas makes liberal use of narratives that mask the active nature of the legislature in imposing restrictions on women's autonomous choice. For example, he suggests that it is the Court, not the legislature, imposing values on the American people: "The Court's expansive application of *Roe* in [the 1970s and 1980s], even more than *Roe* itself, was fairly described as the 'unrestrained imposition of [the Court's] own extraconstitutional value preferences' on the American people."²¹⁵ The legislature disappears, and women, as part of the American people, are seen as restricted by the Court's decision to allow them to decide.²¹⁶ This is taken one step further in the woman-protective discourse, which posits that one decision a woman had been able to make was always incorrect—the decision to have an intact D & E. The woman-protective discourse suggests that doctors act in direct opposition to women's health, that women act in direct opposition to their own health, and that only legislatures can discern and therefore decide what is in every woman's best interest.

This Section has drawn out how the woman-protective discourse suggests a woman is not capable of making this rational choice and instead assigns that choice to a body that discursively disappears in certain constitutional arguments. To counter this, Justice Ginsburg's dissent reminds the reader of women's capacity for rational choice: "[t]he solution the Court approves, then, is *not* to require

²¹⁵ *Stenberg*, 530 U.S. at 980 (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting)).

²¹⁶ Of course, this reflects on various philosophies of the essence of judicial review. However, the disappearance of the legislature is a discursive phenomenon that occurs in some arguments, which have the effect of obscuring its role.

doctors to inform women, accurately and adequately[;] . . . [i]nstead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”²¹⁷

3. Revealing the Women Outside of the Discourse

When Justice Kennedy invokes the woman-protective discourse, he paints a portrait of the woman in need of protection:

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.²¹⁸

This is the woman for whom Justice Kennedy is speaking, the only one posited by the woman-protective discourse. This woman is a mother. She is naturally maternal and feels profound grief and sorrow upon having *any* abortion. She is also uninformed and unable to make a correct choice. She has been had by her doctor, who has misled her into allowing him or her to viciously murder her unborn child. Justice Kennedy speaks on behalf of this woman, imploring the reader to pity her, to protect those like her from the evils of abortion. This sentimental²¹⁹ discourse has many shortcomings, perhaps the greatest of which is that it speaks for only one type of woman.

Who, then, is missing? Justice Ginsburg describes the woman carrying an unwanted pregnancy caused by nonconsensual sexual activity²²⁰ and the woman who is in such desperate straits that she

²¹⁷ *Gonzales*, 127 S. Ct. at 1648–49 (Ginsburg, J., dissenting).

²¹⁸ *Id.* at 1634.

²¹⁹ See Andrea L. Hibbard & John T. Perry, *Law, Seduction, and the Sentimental Heroine: The Case of Amelia Norman*, 78 *Am. Literature* 325, 328 (noting that sentimental discourses “spiritualiz[ed] female anguish and sexualize[ed] male domination”); Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 *Mich. J. Gender & L.* 1, 20–23 (2007) (describing “[t]he sentimental vision of the virtuous woman”).

²²⁰ *Gonzales*, 127 S. Ct. at 1648 n.8 (Ginsburg, J., dissenting) (“Notwithstanding the ‘bond of love’ women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity.” (citing *Casey*, 505 U.S. at 891 (“[O]n an average day in the United States, nearly 11,000 women are

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will seek an illegal abortion,²²¹ noting that these two are not mutually exclusive. In these situations, particularly when pregnancy is the result of rape, even those subscribing to the woman-protective discourse might comprehend a woman's lack of maternal feeling. Justice Ginsburg also reveals the groups of women who typically are candidates for second trimester abortions such as the intact D & E procedure: adolescents, who are likelier to remain unaware of their pregnancy until the second trimester; poor women, who have difficulty gaining timely access to abortion of any variety; and women whose fetuses have severe anomalies and health problems that "cannot be diagnosed or do not develop until the second trimester."²²² Justice Ginsburg does not develop this further, but does suggest that Justice Kennedy is not thinking of all women when he draws his sentimental portrait. By revealing the women outside the scope of the woman-protective discourse, the women who may experience relief or feel they have made the correct decision, Justice Ginsburg reveals the women who do not need protecting.

B. Exploiting the Discourse

In addition to traditional techniques of resistance, the woman-protective discourse can be exploited in a variety of ways. Simply looking at the way the woman-protective discourse manipulates the undue burden test suggests ways in which feminist discourses can effect similar legal change. Additionally, the woman-protective discourse can be found working in tandem with other potentially productive discourses that argue for expanding support systems for women that have repercussions in arenas beyond that of abortion rights.

1. Reconfiguring the Undue Burden Test: Colliding Interests

The undue burden test erected in *Casey* creates an equation in which women's interests in their autonomy directly oppose and compete with the state's interests in potential life. Women's health, however, can arise on both sides of the equation. The state can im-

severely assaulted by their male partners. Many of these incidents involve sexual assault."))).

²²¹ Id. at 1649 n.9.

²²² Id. at 1642 n.3.

pose restrictions on abortion for reasons of protecting women's health, but the ability of the state to impose restrictions on abortion is limited by the necessary inclusion of a woman's health exception. Because this exception arises to *prevent* restrictions on abortion, the woman's interest in her own health weighs against both the state's interest in fetal health *and* state regulations that purport to protect women's health, but in fact pose a danger in the appropriate medical judgment of the physician. Those promulgating the woman-protective discourse in the abortion debate have found the undue burden test a most workable and flexible framework, capable of producing results like *Gonzales*. However, the flexibility of this framework has potential for further reconfiguration.

In *Gonzales*, it is important to note that the women's interest in autonomy, while recognized, was then marginalized. The women's interest in her own health was sublimated in the woman-protective discourse, aligning the woman's interest in her own health with the state's interest in women's health and the state's interest in potential life. However, the fact that these interests are malleable, and can be manipulated to line up on the opposite side of the undue burden test as anticipated by the test's creators is key. Looking to the interests that traditionally align to support regulations on abortion, and identifying ways in which these interests can be *realigned* create potential for further manipulation of the undue burden test—an exploitation that can be performed by various ideological interest groups.

Certain scenarios may suggest particular realignments. In *Gonzales*, it is only for a particular woman, the maternal, naturalized woman for whom Justice Kennedy speaks,²²³ that the alignment is arguably descriptive. Individual stories suggest such reconfigurations. For example, an intact D & E was formerly an option when severe fetal health problems were diagnosed later in pregnancy. Women who have undergone the procedure have become more vocal in the face of the Partial Birth Abortion Ban Act. Their stories suggest that the women come to a rational decision to abort based primarily on the best interest of the *fetus*: one woman who was four months pregnant discovered her fetus had a fatal spinal

²²³ See *supra* note 146 and accompanying text.

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cord and brain defect, and on her physician's advice chose the procedure likeliest to allow her to become pregnant and give birth in the future;²²⁴ a woman who, nineteen weeks pregnant, found her fetus had severe hydrocephalus and would be born stillborn,²²⁵ and a woman who, twenty weeks pregnant, learned the twins she was carrying each suffered from different health maladies giving the healthier one a five percent chance of survival outside the womb.²²⁶ These stories stress that attempts to preserve fetal life *in their specific situation* would be futile, and could impede the woman's capacity to bear future children. In addition, given the conditions from which the fetuses suffered, one could argue that giving birth to such a fetus would actually *prolong* the period during which the fetus is exposed to pain. This particular scenario harnesses the fetal pain discourse as well as the maternal assumptions of the woman-protective discourse and suggests the possibility that the interests of the fetus—as well as future fetuses and future children—and the interests of the woman *can* align in a manner that supports even partial birth abortion.²²⁷

If the interests here align in this configuration, can Congress be correct in legislating a ban on a procedure that effectively reduces fetal pain and supports maternity? Could Congress legislate man-

²²⁴ Joan Biskupic, "Partial Birth" Cases Test Abortion Rights' Limits, USA Today, Oct. 30, 2006, at A1, available at http://www.usatoday.com/news/health/2006-10-29-abortion-cover_x.htm.

²²⁵ Mary-Dorothy Line, Letter to the Editor, Commonweal, June 14, 1996, at 2, available at http://findarticles.com/p/articles/mi_m1252/is_n12_v123/ai_18420058/pg_1.

²²⁶ Gina Gonzales as told to Barry Yeoman, I Had an Abortion When I Was Six Months Pregnant, Glamour, Oct. 2001, at 204, available at <http://www.barryyeoman.com/articles/gina.html>.

²²⁷ Another scenario is when the woman conceives while using drugs and continues that use at least until she finds she is pregnant. State programs funding birth control or sterilization for such women suggest that the state currently expresses an interest in preventing such pregnancies. See Camille A. Nelson, American Husbandry: Legal Norms Impacting the Production of (Re)Productivity, 19 Yale J.L. & Feminism 1, 40–41 (2007). Carrying fetuses exposed to hard drugs to term may also serve to increase or prolong fetal pain. While few other scenarios reconfigure the fetal interest in this manner, they may anchor the state's interest in women's health. For example, women living in abusive situations where a pregnancy increases their vulnerability to violence creates a configuration in which the threat to their physical health should trump any threat abortion poses to their psychological health. In fact, it is the threat to the health and safety of women in situations of domestic violence that led the Court to strike down as unconstitutional the spousal notification provision in *Casey*. See 505 U.S. at 887–98.

datory partial birth abortion when interests align in such a way that it would be selfish and non-maternal for a woman to carry a pregnancy to term? In fact, this reconfiguration exposes the two options for government imposition above as illegitimate, shedding light on *Gonzales*. What it realistically suggests, however, is that perhaps women's interest in their own autonomy, women's interest in their own health, the state's interest in potential life, and the state's interest in protecting women's health should be mediated differently, on a case-by-case basis. This cannot be done by either a court or a legislature. Instead, the courts and the legislatures should trust women to their own autonomous, rational capacities, and must disregard claims that women must be protected—from their own faulty reasoning, from their own non-maternal impulses, from doctors who wish to “perform [partial birth abortions] . . . with impunity,”²²⁸ from their own grief and sorrow over the decisions they have made.

In sum, showing how the undue burden test contorts under these pressures suggests that the test is deficient because it assumes monolithic, universal interest configurations. The state interest in promoting potential life is not as indiscriminate as *Casey*'s undue burden test, or even *Roe*'s trimester framework, assumed. Neither the Court nor the legislature is capable of issuing case-by-case determinations of various interests, particularly when those determinations require individualized medical knowledge. While it is unlikely in the current climate, the malleability of the undue burden test suggests that it could give way to formation of an extralegal arena in which interests are weighed by the woman and her physician, even past the viability line.

2. Using the Breadth of the Woman-Focused Discourse in Other Areas of Feminist Concern

Another way in which the woman-protective discourse can be exploited is to harness the idea that women's health is an area of significant concern, while detaching it from any paternalistic assumptions—the hallmarks of the woman-protective discourse. Though eradicating paternalism in this discourse may be difficult,

²²⁸ *Stenberg*, 530 U.S. at 1013 (Thomas, J., dissenting).

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the focus on women's mental and physical health could effect dramatic change.

Those looking to support women's health, particularly in the reproductive arena, have many issues of concern, the least of which is partial birth abortion. Contraceptive access and equity, adequate health insurance coverage, appropriate sex education, sexual assault prevention, and domestic abuse prevention are more pervasive concerns. Work-family issues also constrain women's reproductive choices. The contemporary workplace is replete with features dating from a period of "legally enforced, sex-based separate spheres, and have a disproportionate adverse impact on women."²²⁹ In order to support women's reproductive health, society needs to ensure reproduction is an act that neither taxes a woman's health nor endangers her livelihood.

In an interesting variant of the woman-protective discourse, some pro-life organizations suggest "that if mothers had more ability to participate in society as equals, women might feel less need for abortion."²³⁰ Professor Cornelia Pillard notes that "Feminists for Life (FFL), a nonprofit organization declaring itself in favor of equality for women and against abortion, makes some claims that resonate with those of some pro-choice feminists, and which should be common ground in the reproductive rights battles."²³¹ Many feminists would agree with "FFL's mission statement, '[n]o woman should be forced to choose between pursuing her education and career plans and sacrificing her child.'"²³² Pillard notes that while FFL's ultimate goal, preventing abortion, is not in line with traditional feminist ideals, its means to this end, "advocating 'affordable housing and healthcare for new parents, fighting family caps in welfare reform, working for expansion of the Violence Against Women Act, and seeking better enforcement on child support,'"²³³ are the same ends pursued by traditional feminists. Although the ultimate goal is preventing abortion, not promoting women's

²²⁹ Pillard, *supra* note 191, at 982 (citing Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 71-72 (2000)).

²³⁰ *Id.* at 981.

²³¹ *Id.* at 981.

²³² *Id.* at 981 (quoting Feminists for Life of America Homepage, <http://www.feministsforlife.org/who/aboutus.htm>).

²³³ *Id.* at 981.

health or autonomy, the fact that other issues of feminist concern are receiving attention is positive. Despite ideological differences, that various groups are mobilized to make work and family more reconcilable suggests that the woman-protective discourse, while a potent tool creating a partial victory for pro-life organizations, is not so unilateral a tool that it cannot, in other hands, be employed for a different use.

CONCLUSION

This Note suggests that at times when the project of ensuring women's legal autonomy seems to have suffered a setback, it is possible to find ways in which the setback can instead be used to open up new avenues, new possibilities. In the arena of abortion rights, the introduction of a woman-protective discourse, while disheartening, is not without its own potential to disrupt the legal constraints on women's autonomy. Not only are there legal and scholarly options for challenging the discourse's legitimacy, it may also be challenged on an activist level. Feminists may resist the discourse in traditional ways, by challenging its assumptions of women's natural maternalism, exposing its paternalism, and revealing the women it does not describe, and analyze and subsequently exploit the discourse to feminist ends. The goal of these strategic challenges is to expose the power of discourse to effect ideological and legal change and to suggest ways in which feminists, in both scholarly and activist roles, can work to secure women reproductive autonomy.