Columbia Law School
Scholarship Archive

Faculty Scholarship | Faculty Publications

2012

About Abortion: The Complications of the Category

Carol Sanger
Columbia Law School, csanger@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

 Part of the Health Law and Policy Commons, and the Law and Gender Commons

Recommended Citation

Carol Sanger, *About Abortion: The Complications of the Category*, 54 ARIZ. L. REV. 849 (2012).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/948

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Isaac Marks Memorial Lecture:
April 5, 2012

ABOUT ABORTION: THE COMPLICATIONS OF THE CATEGORY

Carol Sanger*

I. ABOUT "ABOUT"

My subject this afternoon is abortion, a subject that for the last 40 years has embedded itself in American consciousness, American politics, and American culture with remarkable durability and reach. Looking only at the first decade of this century—from George W. Bush to Barack Obama, to use two presidential landmarks—abortion has been central to how Americans conceptualize, debate, and sometimes resolve all sorts of things: foreign aid, health care reform, high school sex education, and judicial nominations to the Supreme Court. Abortion has been at the heart of disputes over what products Walmart keeps on its shelves, whether Super Bowl fans should watch or boycott half-time advertisements, and what health care services are available to pregnant servicewomen serving abroad.[1] Reliably divisive, the subject is never far out of sight; it stands at the ready to stir the pot or, depending on one's viewpoint, to bring sudden clarity to whatever issue is under discussion.

Each year brings new controversies over *something* to do with abortion. Some involve popular culture: rap lyrics (*Can I Live?)* sung by a fetus to his

---

* Barbara Aronstein Black Professor of Law, Columbia Law School. Deep thanks to the Dean and Faculty of the University of Arizona and to Mrs. Selma Marks and her family for the honor of presenting the 2012 Isaacs Marks Memorial Lecture. I also thank the staff of the *Arizona Law Review*, particularly Stuart Kottle and Julie Wilson, for their excellent work, and Jeremy Waldron for our continuing discussions of hard topics.

1. *See* Doe v. United States, 419 F.3d 1058, 1060–61 (9th Cir. 2005) (upholding a regulation barring military health services from funding abortions, including an instance where a sailor's wife aborted her anencephalic fetus).

abortion-minded mother;[2] the slow creep of abortion decision-making into television programs, both real (*Pregnant and 16*) and fictional (*Friday Night Lights*, *Sex and the City*, and even *Maude* ages ago);[3] or the question of whether a *Doonesbury* series on Texas's ultrasound requirement should be carried on the funnies page, the editorial, or cancelled altogether.[4] Other abortion controversies bring to the surface issues of long-standing social tension, such as those around race. In 2011, a huge billboard appeared in Manhattan featuring a pretty black child in a sundress above the caption "The Most Dangerous Place for an African American is in the Womb."[5] Similar billboards ("Black Children are an Endangered Species") went up in Atlanta, all part of a larger pro-life outreach campaign to minority communities denouncing legal abortion as part of a genocidal plan.

Things seem to be about abortion even when the link to abortion may not on first glance be entirely clear—a ban on stem cell research, a bomb at the 2000 Atlanta Olympics, the brain-dead Terry Schiavo—or where on second glance, the connection may not be entirely accurate. I have in mind the proposition that abortion increases a woman's chance of developing breast cancer (and whether such discredited data would be posted on the National Cancer Institute website)[6] or

---

2. *See* Annette John-Hall, *Rapper's Abortion-Themed Video Is Striking a Chord*, PHILA. INQUIRER, Aug. 2, 2005, at E01; Kelefa Sanneh, *An Unborn Fetus with a Message for Mom*, N.Y. TIMES, June 26, 2005, § 2, at 1.

3. Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 822 n.427 (2006) (discussing how abortion is a taboo topic on television) [hereinafter Sanger, *Infant Safe Haven Laws*].

4. Ewen MacAskill, *Doonesbury Abortion Cartoon Dropped by US Newspapers*, GUARDIAN, March 12, 2012, at 21.

5. Shalila Dewan, *To Court Blacks, Foes of Abortion Make Racial Case*, N.Y. TIMES, Feb. 27, 2010, at A1. The claim is that the disproportionately high rate of abortion among minority women results from a white conspiracy to decimate the black population. Population researchers have a different explanation. *See* Joerg Dreweke, *No Conspiracy Theories Needed: Higher Abortion Rates Among Women of Color Reflect Higher Rates of Unintended Pregnancy*, GUTTMACHER INST. (Aug. 13, 2008), http://www.guttmacher.org/media/nr/2008/08/13/index.html. The New York billboard was itself the subject of further controversy; the child's picture had been taken two years earlier at an unconnected photo shoot at a modeling agency. *See* Associated Press, *Mother of Girl in Anti-abortion Ad Wants Apology*, WALL ST. J., March 5, 2011.

6. *See* H. Comm. on Oversight & Gov't Reform, Investigating the State of Science Under the Bush Administration: Breast Cancer Risks, http://oversight.house.gov//politicsand-science/examplebreastcancer.htm (last visited Oct. 1, 2009). In 2003, the National Cancer Institute website was corrected to report that "having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer." Nat'l Cancer Inst., *Abortion, Miscarriage, and Breast Cancer Risk*, http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage (last visited May 31, 2012); *accord* Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 3 (2006). Nonetheless, five states still include information in their mandatory pre-abortion counseling materials on a possible link between abortion and breast cancer. Chinue Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POL'Y REV. 4 (2006).

the *Freakonomics* claim that legalizing abortion lowered the crime rate.[7] There is also public contestation over the preliminary question of whether a particular issue has anything to do with abortion in the first place. Consider the enactment in recent years of "Missing Angel Acts,"[8] statutes that authorize the issuance of birth certificates for stillborn infants. The Acts resulted from lobbying by bereaved parents who successfully argued in state after state that a fetal *death* certificate, the form of documentation that has traditionally accompanied stillbirth, failed to capture the true nature of their loss.[9] Despite enormous sympathy for the parents, concerns were raised (in some states) that creating birth certificates for children who never lived—certificates commemorating life before and in the absence of live birth—might eventually play a part in the continuing campaign against abortion.[10] Missing Angel supporters insist that the legislation is *not* about abortion, but only about providing parents solace through the official recognition of their child's existence.[11] The concern remained, however, that it may no longer be possible to cabin the cultural or political meaning of anything to do with fetal life or death in the United States.[12] Thus, the language of Missing Angel Acts was clarified to make sure that stillborn birth certificates could be issued only on parental request, and never in a case of abortion.[13] The example illustrates how cautious the subject of abortion has made everyone (not always unreasonably so) and how attentive citizens have become to even the *possibility* of an abortion connection.

---

7. *See* John J. Donohue III & Steven D. Levitt, *Further Evidence that Legalized Abortion Lowered Crime: A Reply to Joyce*, 39 J. HUM. RESOURCES 29 (2004); John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 106 Q. J. ECON. 379 (2001). *See also* Christopher L. Foote & Christopher F. Goetz, Comment, *The Impact of Legalized Abortion on Crime*, 123 Q. J. ECON. 407 (2008). *But see* Ted Joyce, *Did Legalized Abortion Lower Crime?*, 39 J. HUM. RESOURCES 1 (2004); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 186 (2004) (concluding that increased incarceration, increases in the number of police, the receding crack epidemic, and legalized abortion are all factors in the decline of crime); John R. Lott Jr. & John Whitley, *Abortion and Crime: Unwanted Children and Out-of-Wedlock Births*, 45 ECON. INQUIRY 304 (2007).

8. *See MISSing Angels Bill (MAB) Legislation-State Chart*, M.I.S.S. FOUND. (July 25, 2011), http://missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61 (noting that as of July 25, 2011, 32 states have enacted Missing Angels Bills).

9. *See* Carol Sanger, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 272 (2012) [hereinafter Sanger, *"The Birth of Death"*].

10. *See id.* at 274, 305–08; *see also* Allison Stevens, *The Politics of Stillbirth*, AM. PROSPECT (July 13, 2007), http://prospect.org/article/politics-stillbirth (highlighting the fear of abortion rights advocates that issuing "certificates for stillborn birth" will chip away at abortion rights).

11. *See* Sanger, *"The Birth of Death,"* at 306; *see also* M.I.S.S. FOUND., http://www.missingangelsbill.org (last visited Oct. 30, 2011).

12. *See* Sanger, *"The Birth of Death,"* at 305.

13. *Id.* at 307; Frequently Asked Questions, M.I.S.S. FOUND. (Nov. 10, 2010), http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=75&Itemid=41.

So what is going on? Why is so much around us about abortion? My argument here is that so many things are about abortion, at least in the United States, because abortion itself is about so many things. I therefore want to begin by setting out the central categories into which abortion falls as a way of beginning to understand how much is at stake when people talk about or around the issue. That is to say, in this lecture I want to talk about "about."

In proceeding, it may be useful to start with an accepted definition of abortion. The term refers to the induced (intentional) termination of a pregnancy through the destruction of the embryo or fetus.[14] Where abortion is legal, this is usually performed by a doctor either surgically (with instruments), or since the development and subsequent approval of the drug mifepristone in the late 1990s, through induced miscarriage (this is called "medical abortion").[15] So abortion is, perhaps in the first instance, a medical procedure and in this regard a crucial aspect of obstetric care within the medical, research, and public health communities. Thirteen percent of all deaths included in maternal mortality statistics worldwide are deaths from unsafe abortions.[16]

The characterization of abortion as medical is important in other, non-clinical ways. It matters to how abortion is treated at law, for like other forms of medical care, abortion is subject to regulation as part of the state's general interest in the health and welfare of its citizens. Under the state's "police power," *all* doctors are licensed, medical facilities inspected, and drugs tested before they are approved for use. Of course, the regulation of abortion is not *quite* the same as that of other medical procedures. Since the development of a robust pro-life movement following the Supreme Court's 1973 decision in *Roe v. Wade*,[17] abortion has become the most regulated medical procedure in the United States.[18]

Abortion is also about rights. In *Roe*, the Supreme Court announced that the constitutional right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[19] Until then, abortion had not

---

14. *See Abortion Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/abortion (last visited Sept. 29, 2012).

15. Susan Dudley & Stephanie Mueller, *What is Medical Abortion?*, NAT'L ABORTION FED'N (SEPT. 2008), http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/medical_abortion.pdf.

16. Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, REV. OBSTETRICS GYNECOLOGY 122, 122–26 (2009).

17. 410 U.S. 113 (1973).

18. *See* Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 359–71 (4th Cir. 2002) (upholding various state abortion regulations). In his dissent, Judge Robert Bruce King described the effect of abortion regulations in other states: "[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors' closets—that is challenged in this case." *Id.* at 371–72 (King, J., dissenting); *see State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INST. (Sept. 17, 2012), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

19. 410 U.S. at 125, 153.

been a "right," it was simply legal in some states and illegal in others. And in states where it was illegal, abortion was not about rights or medicine. It was about crime and all that follows from defining an act as criminal: surveillance, prosecution, and punishment of abortion providers, though interestingly not of the women themselves (an interesting point to consider).[20] In many ways, abortion is still about crime even though the procedure itself is no longer criminal. As a matter of politics, its legality seems ever up for grabs, and abortion is still *associated* with crime, as sidewalk protesters (or counselors) plead with abortion patients not to kill their babies, and as abortion providers are themselves shot and killed.

Abortion is also about other claims to rights. Some of *Roe*'s most ferocious opponents are defenders of state's rights who contend that the legal status of abortion should have remained a matter for state legislatures to determine, not federal courts.[21] This view of rights and constitutional structure often links up with particular theories of constitutional interpretation. Because the word "abortion" is not mentioned in the text of the Constitution, there has been ongoing contestation about which (if any) of the provisions or animating values that *are* in the text provide the clearest and most hospitable accommodation for a woman's interest in controlling both her reproductive body and her life. In *Roe*, the Supreme Court determined that the right derived from a constellation—a "penumbra" in the Court's inventive phrase—of several other explicit provisions understood to protect aspects of privacy.[22] This was resisted by those (including four dissenting justices) who thought the right itself was an invention, unsupported by constitutional text or precedent. In an influential 1973 article, constitutional law scholar John Hart Ely put the matter this way: "[*Roe*] is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."[23]

Other scholars, quite secure about the Court's textual authority to consider criminal abortion statutes, have since suggested that women's right to reproductive control might also or more satisfactorily have been framed in terms of sex equality or autonomy or dignity.[24] The Court itself has since used the language of liberty in characterizing the nature of the right. Still others have invoked freedom of religion and the Thirteenth Amendment's prohibition on involuntary servitude. The right to abortion has also been explicated and defended on non-constitutional bases, such as on human rights grounds and the right to health.[25]

---

20. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 168–71 (1997).

21. MARY ANNE GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 30 (1987).

22. 410 U.S. at 129.

23. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

24. *See* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack. M. Balkin ed., 2005).

25. Christina Zampas & Jaime M. Gher, *Abortion as a Human Right: International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 250 (2008) (observing that the African Women's Protocol is the only legally binding human rights instrument that explicitly affirms women's reproductive rights, including abortion, as human rights).

Doctors too have made rights-based claims about abortion. Some argue that their right to practice medicine is infringed by statutes that prohibit certain methods of abortion or that require them to tell their abortion patients that a fetus is a human being or feels pain.[26] Other doctors argue that they have a conscientious right not to participate in abortion at all, or as medical students even to learn about it.[27] Forty-six states have now enacted "conscience clauses," permitting physicians and other medical professionals, such as nurses and pharmacists, to refuse to provide or participate in "abortion-related services."[28] In 1996, Congress enacted the Coats Amendment, protecting training hospitals from losing federal funds if they chose not to provide abortion training in obstetric residency programs, as otherwise required by the accrediting board for medical schools.[29]

Of course, in addition to women's rights, states' rights, and doctors' rights, there are vigorous and important claims made on behalf of the fetus that it too has rights and interests. Indeed, many pro-life supporters would say that abortion is really *only* about an embryo or a fetus' right to develop until its natural birth—its right to life—and that the rest is noise. Whether the fetus has constitutional rights or moral rights, or any other claim to respect, there is no question about its centrality in any discussion of abortion in the United States today. Fetal life, sometimes now just called "life," now competes with—or has perhaps overtaken—pregnancy as the operative essence of what abortion is about. And while rejecting the claim that a fetus is a legal person, the Supreme Court has held that a state may decidedly take the fetus' interests into account in regulating abortion, and that states may now do so from the moment of conception.[30]

Abortion is also about religion, and for some it is about sin. In the view of Pope John Paul II, as presented in the 1995 papal encyclical, *Evangelium Vitae* (*Gospel of Life*), the modern world faces a struggle between a culture of life and a culture of death. The Culture of Life is defined as "unconditional respect for the right to life of every innocent person from conception to natural death"; in

---

26. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 940–44. Caroline Mala Corbin has made an interesting First Amendment argument on behalf of abortion patients required to listen to legislative scripts. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009); Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 101(2012).

27. *See State Policies in Brief: Refusing To Provide Health Services*, GUTTMACHER INST. (2008), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. Federal law also contains provisions allowing medical providers to refuse to perform abortions on the grounds of conscience. *See* 42 U.S.C. § 300a-7 (1973); *see also* JODY FEDER, CONG. RESEARCH SERV., RS21428, THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS (2005), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf.

28. *See State Policies In Brief: Refusing To Provide Health Services*, *supra* note 27.

29. *See Church and Medicine: An Overview*, PHYSICIANS FOR REPROD. CHOICE & HEALTH (Oct. 6, 2006), http://www.prch.org/church-and-medicine-an-overview.

30. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

contrast, the Culture of Death is "a veritable structure of sin."[31] This view had consequences for the temporal world of politics. Pope Benedict XVI, as Bishop Ratzinger, stated in 2005 that "a Catholic would be guilty of formal cooperation in evil and so unworthy to present himself for Holy Communion" were he or she to vote for a candidate because of the candidate's permissive stand on abortion.[32] Accordingly, during the 2008 presidential campaign, the Catholic Bishop of Boston urged priests to deny Holy Communion to Senator John Kerry for his support of legal abortion.[33] The Bishop of Colorado extended the ban to "Catholics who vote for candidates that stand for abortion" explaining that "Catholic politicians who advocate for abortion . . . place themselves outside of full communion with the Church and so jeopardize their salvation" and that Catholic voters may "suffer the same fateful consequences."[34] During the 2012 presidential campaign, Vice President Joe Biden received a similar warning.[35] Of course, not all religions take this position, though similar teachings (and similar efforts to persuade parishioners) are found in other denominations. For now, my point is simply that abortion in the United States is often about religion and its influence.[36]

For others, *morality* is the key, whether informed by religious or secular precepts. The legal philosopher Ronald Dworkin has put the case in terms of the sacredness of human life, which, he explained, need not be understood as a theological category.[37] Other philosophers and ethicists anchor their views in notions of "dignity," "personhood," or "humanity."[38] To be sure, moral propositions are not always advanced in the measured tones of philosophers. A Mississippi Supreme Court judge put the argument for morality rather differently

---

31. POPE JOHN PAUL II, EVANGELIUM VITAE: ENCYCLICAL LETTER ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE ¶ 21, (Mar. 25, 1995), *available at* http://www.newadvent.org/library/docs_jp02ev.htm. "Among all the crimes which can be committed against life," said the Pope, "procured abortion has characteristics making it, together with infanticide . . . an unspeakable crime." *Id.* ¶ 58.

32. *See generally* Gregory C. Sisk & Charles J. Reid, Jr., *Abortion, Bishops, Eucharist, and Politicians: A Question of Communion*, 43 CATH. LAW. 255 (2004) (discussing abortion from the perspective of the Catholic Church).

33. Laurie Goodstein, *Bishop Would Deny Rite for Defiant Catholic Voters*, N.Y. TIMES, May 14, 2004, at A13; Laurie Goodstein et al., *The 2004 Campaign: The Abortion Issue; Vatican Cardinal Signals Backing for Sanctions on Kerry*, N.Y. TIMES, April 24, 2004, at A13.

34. Most Reverend Michael J. Sheridan, A Pastoral Letter to the Catholic Faithful of the Diocese of Colorado Springs on the Duties of Catholic Politicians and Voters (May 1, 2004), *available at* http://www.ewtn.com/library/bishops/capolvot.htm.

35. Michael Peppard, *Paul Ryan, Catholic Dissident*, N.Y. TIMES, Oct. 16, 2012, at A31.

36. *See* JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 255–56 (2003).

37. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 25 (1994).

38. *See generally* ABORTION CONTROVERSY: 25 YEARS AFTER *ROE VS. WADE*, A READER (Louis Pojman & Francis J. Beckwith eds., 2d ed. 1998); DAVID BOONIN, A DEFENSE OF ABORTION (2003); THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (John T. Noonan Jr. ed., 1970).

in a 2001 opinion: "Ever since the abomination known as *Roe v. Wade* became the law of the land, the morality of our great nation has slipped ever downwards to the point that the decision to spare the life of an unborn child has become an arbitrary decision based on convenience."[39] Of course, it is important to remember that the invocation of morality does itself tip the scale against a decision to abort. Depending on the circumstances of the pregnancy, for many women the decision to *have* an abortion (or for a doctor to perform one) may itself be regarded as a moral act.[40]

But let us return to Mississippi and the judicial characterization of abortion as an "arbitrary decision based on convenience."[41] The assessment brings us to the matter of sex, for whatever else abortion may be about, it is certainly about sex and sexual culture. Pregnancy is necessarily connected to sex, and attitudes about sex—with whom, how often, for what purpose—are tucked into people's views on abortion, and this includes their views on abortion law. Consider the law's differential treatment of pregnancy depending on what kind of sex brought it about. In the days when abortion was illegal, many states made an exception for pregnancies resulting from *involuntary* sex (rape or incest). But even now when abortion is *legal*, these exceptions still have currency. In 2011, 32 states that as a general matter refuse to pay for the abortions of Medicaid patients will do so in cases of rape or incest.[42]

Pregnancy resulting from *voluntary* sex is another matter, perhaps especially for teenagers. There is a general consensus that teenagers who get pregnant have been a bit too frisky for their own good and should not be able to have an abortion ("an arbitrary decision based on convenience," in the judge's words) just because they want one.[43] In contrast to other places (all of Western Europe, say) where teenage sexuality is accepted as developmentally normal, teenage sex in the United States is more often taken as a sign of trouble.[44] Despite our highly sexualized culture, teenage girls aren't really supposed to "do it." They are supposed to be the kind of daughters their parents imagine them to be. This explains why sex education and contraceptive preparedness have been regarded as provocative rather than prudent behavior. It also explains the popularity of the parental involvement statutes now in place in more than 30 states. These are laws that require a pregnant minor either to notify or get consent from one or both parents (different states have different schemes) before she can consent to an abortion. If the parents are unwilling to do so, the minor must then petition her local court for permission and participate in what is known as a "judicial by-pass

---

39. R.B. v. Mississippi, 790 So. 2d 830, 835–36 (Miss. 2001) (Easley, J., concurring).

40. Sepper, *supra* note 26, at 105, 124.

41. *R.B.*, 790 So. 2d at 836 (Easley, J, concurring).

42. *See State Policies in Brief: State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Oct. 1, 2012), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

43. *R.B.*, 790 So. 2d at 836 (Easley, J., concurring).

44. *See* Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT. J. L. POL'Y & FAM. 305, 313 (2004).

hearing."[45] In these hearings, a judge takes evidence to assess whether or not the minor is mature enough to decide about abortion. If the judge decides the minor is *not* sufficiently mature, he must in the first instance reject her petition. (Yes, this means the immature minor now proceeds on to motherhood.) The statutes reveal concerns not only about teen sex and abortion but also anxieties about family structure and parental authority.

Parental involvement statutes further illustrate that abortion is also, and ferociously, about legislative lawmaking. Since *Roe* was decided in 1973, state legislatures have enacted thousands of statutes regulating abortion provision, procedures, and practice, and thousands more are on the way.[46] Abortion is also increasingly the subject of the more populist lawmaking process, or what is sometimes called "direct democracy," as personhood amendments and other abortion-related measures have begun to appear more regularly on state ballot measures.[47] In November 2008 alone, the voters in South Dakota, Colorado, and California were respectively called upon to decide whether all abortions should be banned, whether the word "person" should be defined as starting at conception, and whether parental notification is a good idea.[48] In 2011, Mississippi rejected a personhood amendment.[49] All this voting, by legislators and by citizens, shows familiarity with and acceptance of abortion as an inherently political subject, one whose legal status remains unsettled as a matter of politics, if not a matter of constitutional law, subject to ongoing supervision and near perpetual review.

Of course, that abortion is about politics is hard to miss in the United States, where office-seekers from school board members all the way up regularly campaign as being in support of or in opposition to (nearly all are in opposition) legal abortion. The political nature of abortion is quite distinctive when compared to other countries. In the United States, abortion has become not only a political issue, but a partisan one. To be a Republican, at least in recent years, means that your party officially opposes a woman's right to choose abortion; being a Democrat means your party supports that right.[50] As historian Jill Lepore observes, this means that abortion and abortion-related issues, such as federal funding for

---

45. *See* Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 417–18 (2009) [hereinafter Sanger, *Decisional Dignity*].

46. The exact number introduced between January 1, 2011 and April 21, 2011 was 916. *See State Legislative Trends: Hostility to Abortion Rights Increases*, GUTTMACHER INST. (April 12, 2011), http://www.guttmacher.org/media/inthenews/2011/04/12/index.html. For a detailed analysis, see *Laws Affecting Reproductive Health and Rights: Trends in the First Quarter of 2011*, GUTTMACHER INST. (2011), http://www.guttmacher.org/statecenter/updates/2011/statetrends12011.html.

47. Sanger, *Decisional Dignity*, at 412–13.

48. *Id.*

49. Katharine Q. Seelye, *Voters Defeat Many G.O.P.-Sponsored Measures*, N.Y. TIMES, Nov. 8, 2011, at A20.

50. Jill Lepore, *Birthright: What's Next for Planned Parenthood,* NEW YORKER, Nov 14. 2011. Lepore notes that abortion was not always a partisan issue. In 1972, polls showed that a majority of Republicans *and* Democrats agreed with the proposition that a decision about abortion should be left to the pregnant woman and her doctor. *Id.*

Planned Parenthood, now sink or swim legislatively depending on voters' views on party issues that have nothing to do with abortion, such as economic policy.[51] In contrast, in England, party affiliation does not determine a politician's position on abortion: one can be a Tory and support reproductive rights; one can be a Liberal and oppose them.

Abortion is not only a matter of *legislative* politics. In states that elect the judiciary, judges also run on the issue. Nothing could be clearer than the campaign slogan for a Kentucky district judgeship: "Jed Deters is a Pro-Life Candidate."[52] Mr. Deters lost the contest, but was censured by the state Judicial Commission for making campaign statements that "committed or appeared to commit" him with respect to issues likely to come before the court, a violation of the rules of judicial ethics.[53] In upholding Deters' censure, the Kentucky Supreme Court expressed "no doubt" that Deters had intended to commit himself on pro-life issues: He had "freely testified that 'any good Catholic is pro-life,' that Kenyon County has a high percentage of Catholic voters, and that his statement . . . would 'hopefully' give him a 'distinct edge in the race,' since 'you're in it to win. You do what it takes.'"[54] The case begins to give us a practical sense of the nature and scope of abortion realpolitik. Whatever one's moral or religious views on abortion, there is also the strategic use of the topic if one is "in it to win."

In addition to the particularities of electoral politics, abortion is also about a more general dimension of civic life, and that is national identity. We are perhaps more able to see this when looking outside our own borders. Ireland and Poland provide two good examples. Ireland's restrictive abortion law—abortion is illegal although women are now permitted to travel abroad to obtain a legal abortion—is deeply connected to Irish identity.[55] This identity, what one scholar has called "a particularly gendered nationalism," draws from defining aspects of Irish culture: Catholicism, patriarchal family structure, and moral absolutism.[56] Liberalization of abortion law would undermine not only each of these values individually but also their sum—Irishness. In Poland, abortion reform (the return to strict regulation) in the post-socialist era has been understood not to undermine but to reinstate Polish

---

51. *Id.*

52. Deters v. Judicial Ret. & Removal Comm'n, 873 S.W.2d 200, 201–03 (Ky. 1994). I note that in 2002, in *Republican Party of Minnesota v. White*, the United States Supreme Court invalidated a Minnesota Code of Judicial Conduct provision prohibiting judicial candidates from "announcing" their views on disputed legal and political issues. 536 U.S. 765, 788 (2002). In a 5–4 decision, the Court held that that the prohibition violated the First Amendment rights of judicial candidates. *Id.* Although it is unclear if *White*, which dealt with an "announce" clause, necessarily invalidates "commit clauses," that were at issue in the *Deters* case, it seems quite clear that judicial candidates after *White* are freer to express their views—if not their commitment regarding future cases—on the matter of abortion. *Id.* at 765.

53. *Deters*, 873 S.W.2d at 202.

54. *Id.* at 201–03.

55. *See* LISA SMYTH, ABORTION AND NATION: THE POLITICS OF REPRODUCTION IN CONTEMPORARY IRELAND 9 (2005).

56. *Id.* at 33.

values.[57] As political scientist Katherine Verdery has explained, the politics of abortion has "agitated nearly all post-socialist countries, as pro-natalist nationalists strive for demographic renewal of their nations following what they see as socialism's 'murderous' abortion policies."[58]

Is there a relation between abortion and national identity in the United States? We are, of course, a complex country (who isn't?) and other than rooting for our team on fields of friendly and sometimes not so friendly strife, there may be no one American view on anything. Yet, in trying to understand what abortion is about, it is worth pondering the relation between abortion and national identity, or the values that underlie a claimed national identity. There is not time here to fully pursue this aspect of "aboutness," but there are promising leads. For example, political scientist James Morone has argued that we are at core a "hellfire nation."[59]

But putting the matter of national character aside, there are also more intimate ways to characterize what abortion is about, for it is rarely *only* a matter of politics and policies. Abortion is a deeply personal decision that more than a million American women make each year as each confronts a pregnancy that is or has become unwanted. These numbers are meaningful. Almost a third of all women in the United States will have an abortion at some point in their reproductive lives—that 30-year stretch in which pregnancy is possible over and over and over again.[60] The number of women who have *thought* about abortion is likely much, much larger: Four million women in the United States have babies each year, and surely some of them will have considered doing otherwise. Even Sarah Palin, pregnant with her fifth child at age 44, acknowledged the "fleeting thought:" "I'm out of town. No one knows I'm pregnant. No one would ever have to know."[61]

Abortion is therefore about all the things women consider as they assess the place of a child and the meaning of motherhood in their lives at a particular moment in time. These include a woman's faith, her finances, and her plans and aspirations for the future.[62] They also often include an assessment of her relationships with and obligations to existing (or non-existing) partners, as well as relations with and obligations to the children she already has; after all, more than a third of all women who terminate a pregnancy are mothers already. Thus, abortion is not only about abstract conceptions of motherhood, as an imagined pregnancy sometimes is. It is an unflinchingly concrete decision about intimate relations and

---

57. *See generally* Andrzej Kulczycki, *Abortion Policy in Postcommunist Europe: The Conflict in Poland,* 21 POPULATION & DEV. REV. 471 (1995).

58. KATHERINE VERDERY, THE POLITICAL LIVES OF DEAD BODIES: REBURIAL AND POSTSOCIALIST CHANGE 36 (1999).

59. MORONE, *supra* note 35, at 3.

60. *Facts on Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2012), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html.

61. SARAH PALIN, GOING ROGUE: AN AMERICAN LIFE 171–72 (2009).

62. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 117–18 (2005).

family composition—how many children there are to be and whether a particular man is to become a father (and perhaps a husband or partner as well). And it is about the impact of all of this on her life now and the shape of her life in the future.

Because we are talking here mostly about women's lives, abortion is also necessarily about gender. It is about gender both in terms of who ultimately gets to decide (she does) and how and with whom her decision and its consequences are negotiated (often a more complicated matter). She gets to decide not only because it is her pregnant body right now, but also because of the profound significance of motherhood for women over time. As the Supreme Court soberly observed in *Roe*:

> 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, for all concerned, 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.[63]

Although the Court does not use the word gender in explaining the relationship between motherhood and profound distress, it offers the classic example of the gendered order of social life: the assignment of childcare, or more broadly child-*raising*, to women.

To be sure, many citizens believe or are invested in this traditional set-up, a seemingly natural scheme where men (if no longer quite hunters) and women (no longer quite hearth-bound gatherers) nonetheless occupy distinctive and for some, appropriate roles. For those who feel anxious about the stability of this once durable boy–girl arrangement, abortion is likely to be deeply unsettling, for control over reproduction—consenting to sex, using contraception, deciding about control over abortion—is everything. As the Supreme Court acknowledged in *Planned Parenthood v. Casey*, "[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."[64] Although this is surely an accurate description, not everyone agrees with women's equal participation.

Another way to frame the matter is to consider abortion's relation to power. The right to decide about abortion gives women significant authority over their lives, at least with regard to motherhood. That same authority also has the power to create obligations for others. I have in mind the men who will now become fathers; more on men in a moment. But the authority vested in women has an even grander and more profound sweep. Anthropologist Rayna Rapp observes that deciding about abortion "forces each woman to act as a moral philosopher . . . , adjudicating the standards guarding entry into the human community for which she serves as normalizing gatekeeper."[65] Rapp's work

---

63. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

64. 505 U.S. 833, 856 (1992).

65. RAYNA RAPP, TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA 131 (1999).

focuses on abortion decisions occasioned by the diagnosis of fetal disability, but her point holds more generally. Control over whether a new person comes into being—the *gatekeeping of human existence*—is powerful stuff indeed.

In thinking about gender and abortion, it is of course important to consider the role and responses of men. For example, a new man-based ground of opposition to abortion known as male post-abortion trauma has recently been introduced into the public discussion.[66] But as an empirical matter (in contrast to an anecdotal one), we do not know much about men's preferences with regard to pregnancies they have brought about. To be sure, in *Casey*, the Supreme Court accepted that husbands, or enough of them, if notified beforehand about their wife's intent to seek an abortion, might well use physical or mental coercion to prevent her from acting. Spousal notification laws are one of the few examples in the last 20 years where the Court has found a statute operated to create a "substantial obstacle" to a woman exercising her rights under *Roe*. It makes sense then that pregnant women in abusive relationships are least likely to inform a partner about the pregnancy or a subsequent abortion.[67] But absent domestic violence, it appears that male partners generally go along with whatever decision the woman makes, although certainly there are cases where men want the woman to abort and are frustrated by their legal inability to require that. Thus, although state legislatures seem to assume that men would dissuade (or otherwise block) a woman from obtaining an abortion, we really don't know what outcome most men prefer.

However, in thinking about the relationship between men and abortion, I am at present less interested in men's responses to a woman's abortion than in what we know about how men might make abortion decisions themselves. That is, what factors would men consider in figuring out what to do about impending and unwanted *fatherhood* were the matter under their control? In posing the question, I am not asking what would men do if they actually *became* pregnant. My thought is that in that case, men would have become women, and we might well be exactly where we are today except with women on top of the heap instead of someplace lower down.

One way to get at the question of what men *might* do is to look at what they *have* done in circumstances where they have had legal authority over some form of prenatal life. I have in mind the small trove of frozen embryo cases. These are cases in which couples have mutually created and stored embryos for future use but have since broken up and now only one of the pair wants to proceed with implantation.[68] Because there has been no implantation, there is no pregnancy. Yet

---

66. *See, e.g.*, C.T. Coyle, *Post Abortion Trauma in Men Still Overlooked*, FATHERHOOD FOREVER, http://www.fatherhoodforever.org/articles/post-abortion-trauma-in-men-still-overlooked (last visited Oct. 8, 2012). *But see* Nada L. Stotland, *The Myth of Male Abortion Trauma*, 268 J. AM. MED. ASS'N 2078–79 (1992).

67. Rachel K. Jones et al., *Perceptions of Male Knowledge and Support Among U.S. Women Obtaining Abortions*, 21 WOMEN'S HEALTH ISSUES 117, 117–23 (2011).

68. *See* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (based on his own childhood experience in a children's home, former husband did not want any potential

there are at least the raw materials and something approaching pregnancy. The frozen embryo cases are about as close as we may presently come to approximating an abortion decision for men.

Are the things that matter to men in deciding about parenthood so very different from the things that matter to women? If, as some of the frozen embryo cases suggest, the calculations by men and women turn out to be similar—concern over the potential child's future welfare,[69] distress over an ongoing relationship with the other parent,[70] an unwillingness to consider adoption as an acceptable alternative[71]—then we might untether abortion from the deeply gendered anchor of motherhood and consider, if only for a moment, what abortion regulation would look like if its subjects were men. One suspects that it would not look quite the same as it does now, with assumptions of incompetence, layers of second-guessing, and invasive counseling. The sort of complicated and self-regarding analysis that women engage in when deciding what to do in the face of an unwanted pregnancy might be less often dismissed as mistaken, ill-informed, or too hasty were men's lives on the line in the same way that unhappily pregnant women perceive theirs to be.

In this regard, as the Supreme Court itself has suggested, the availability of legal abortion sits as a kind of cosmic wallpaper against which other sorts of decisions—about jobs, about relationships—are made all the time, and by men as well as women. In 1992, the Court had occasion to reconsider its decision in *Roe* in *Planned Parenthood v. Casey*. In that case, as part of its stare decisis analysis, the Court assessed the societal impact of *Roe*, concluding that "for two decades of economic and social developments, people have organized their intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[72] In *Casey*, the Court decided *not* to overrule *Roe* in large part because so many people had "ordered their thinking and living around that case."[73] It is time then to join the Court in taking "judicial notice" of the accepted relation between abortion law and how ordinary reproductive people are able to go about their daily lives.

Each of these characterizations of what abortion is about—medicine, religion, law, politics, sexual culture, the organization of intimate relationships, the shape of a woman's life, and national identity—provokes its own set of anxieties and controversies. Within medical schools, there are debates about whether

---

children raised without a father and a mother); Roman v. Roman, 193 S.W.3d 40, 43 (Tex. Ct. App. 2006) (former husband could not imagine an ongoing relationship with his former wife, as the existence of children would necessarily produce).

69. *Davis*, 842 S.W.2d at 597.

70. *Roman*, 193 S.W.3d at 40–43.

71. *Davis*, 842 S.W.2d at 597.

72. Planned Parenthood Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).

73. *Id.* ("The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.").

abortion should be a required subject or an optional one.[74] Within law, parties argue about how to square a woman's right to choose an abortion with the First Amendment rights of sidewalk protestors urging her not to.[75] Within religion and moral philosophy, theologians and scholars worry that the language of dignity may be poisoned or consecrated by the abortion debate.[76]

Things get even more complicated and often more contentious when conceptions of abortion from one sphere or discipline bump into those from another. These collisions happen all the time and in kaleidoscopic combinations: rights and religion, medicine and morality, commerce and culture, legislatures and courts, gender and law, politics and everything. The slow and convoluted approval process by the Food and Drug Administration of the morning-after pill Plan B illustrates again the tumble of disciplinary factors—commercial, scientific, and political—that distinguish the treatment of abortion, here within the administrative state.[77] As June Carbone and Naomi Kahn explain, the administrative controversy over Plan B demonstrated "the conflagration of the anti-abortion religious stance—the mere possibility that the drug might make implantation in the uterine wall less likely is enough for some opponents to label it 'abortion'—with the determination to bring back pregnancy as the penalty for improvident sex."[78] The examples highlight again how abortion is rarely only about one thing. Rather, individual preferences, private and public conceptions of morality, and political maneuvering swirl around one another in a perfect storm of contention.

Because the classification of abortion as one kind of issue or another matters in how abortion is viewed—how the issues are framed, who gets to weigh in, the available scope of action—the integrity of the categories is important. I don't mean that the contours of any particular category are fixed in meaning but rather that before advocates are able to draw upon the full range of structural, social, or doctrinal advantages of a particular category, there ought to be some degree of assurance that the categorization is accurate, that there is "fit."

---

74. *See* Angel M. Foster et al., *Educational and Legislative Initiatives Affecting Residency Training in Abortion*, 290 J. AM. MED. ASS'N 1777, 1777 (2003); *see also supra* note 27.

75. Another example is abortion clinic protestors who claim that the First Amendment gives them the right to be seen by patients and others entering the clinics. In these cases, however, the relevant sensation might be hearing rather than sight. In *Hill v. Colorado*, 530 U.S. 703 (2000), Justice Stevens framed the discussion around statutory protections of "the unwilling listener." *Id.* at 708. For the argument that mandated abortion counsel impermissibly intrudes upon a woman's right to be free from compelled listening, see Corbin, *supra* note 26.

76. *See generally* Aurel Kolnai, *Dignity*, 51 PHILOSOPHY 251 (1976); Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520 (1989).

77. *See* NAOMI KAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 180–84 (2009).

78. *Id.* at 182.

Consider the distinction between abortion as a medical issue and what we might call the "medicalization of abortion."[79] I use that term to mean treating non-medical aspects of abortion as though they were in fact medical in order to gain the regulatory benefits of the category. We see this in the transformation in some states of the familiar concept of *medically* informed consent into something closer to what I have called "morally informed consent;" the requirement that pregnant women be told that human life begins at conception is a good example.[80] This is not to say that women may not take their conceptions of life (or anything else) into account when deciding what to do. My point is only that they should be able to do so as a matter of individual conscience and not as the result of pressure from the state in the name of regulating anything so long as it is called medical.

This is all to say then that as we know from daily life in the United States, abortion is all about us, fervently contested throughout the culture as citizens try to persuade one another to recognize or reconsider what abortion is really about and to incorporate that better view into their own beliefs and behaviors.

II. THE VISUALITY OF ABORTION

Controversies about abortion in the United States are not hard to miss. We hear about them on talk radio, from the pulpit, in Congress and statehouses, on the campaign trail, and from news sources of all kinds. But in addition to all this talk, abortion's unmissability in American culture also has a powerful *visual* component, and this too influences how Americans have come to think about abortion. The signs and symbols associated with abortion occupy real, physical space, and in this sense too, abortion is "about" us visually in everyday sorts of ways.

Depending on one's neighborhood or route home, one sees billboards celebrating fetal life or suggesting adoption as an alternative.[81] Drivers stuck in traffic can read bumper stickers on the car in front: "I'm a Child not a Choice" from one perspective; "Mind Your Own Uterus" from the other.[82] There are "Choose Life" license plates and special pro-life billboard-trucks that trawl the highways displaying aborted fetal parts.[83] City dwellers, more likely to pass

---

79. *See* ELLIE LEE, ABORTION, MOTHERHOOD, AND MENTAL HEALTH: MEDICALIZING REPRODUCTION IN THE UNITED STATES AND GREAT BRITAIN (2003).

80. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 397–403 (2008) [hereinafter Sanger, *Seeing and Believing*].

81. *Graphic Anti-Abortion Billboard Disturbs Orlando Residents*, WFTV.COM (May 11, 2005, 5:13 PM), http://www.wftv.com/news/4478170/detail.html (reporting on neighborhood distress caused after a Center for Bio-Ethical Reform ("CBR") poster of a "fetus, torn into pieces and covered in blood" was displayed on a residential street).

82. Peggy Hau, *The Politics of Law, Language, & Morality: Thucydides & the Abortion Debate*, 8 S. CAL. INTERDISC. L.J. 711, 736 (1999) (discussing "Abortion Stops a Beating Heart" bumper stickers).

83. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 641–44 (2008) (discussing the legality of states' issuances of controversially themed license places).

newsstands than billboards, find their abortion cues in magazine headlines—Sarah and Bristol Palin holding their babies on the cover of *In Touch* magazine ("We're Glad We Chose Life"),[84] or on public transportation. Subway cars in New York and buses in St. Louis display placards from the anti-abortion "Abortion Changes You" ad campaign ("A grandchild is missing").[85] Some people wear tiny fetal feet lapel pins; others, on occasion, don "I Had an Abortion" T-shirts.[86]

In addition to displays that are deliberately positional, abortion visuals also take a less argumentative form. I have in mind the ordinary but pervasive presence of fetal imagery throughout the culture, at rallies, yes, but also in advertisements ("Is Something Inside Telling You to Buy a Volvo?");[87] on postage stamps;[88] and significantly, on colleague's desks nestled among other family photographs. Ultrasound scans grace shower invitations, refrigerator magnets, and pregnancy journal webpages as happily expectant women and their families display the cuteness that is to come, or for some, the personality who is already here.[89] Babies too are sometimes part of abortion's visual presence. Think of the sleeping Palin baby lovingly and quite publically passed among the candidates' families during his mother's acceptance speech at the 2008 Republican National Convention.[90]

In sum, we are used to seeing images of fetuses—generic and particular, frightening and friendly—and part of the abortion story I want to tell concerns the relation of this familiar imagery to abortion regulation. The visual aspect of

---

84. *In Touch Exclusive Interview & Photos: Sarah & Bristol Palin, "We're Glad We Chose Life,"* IN TOUCH (Jan. 13, 2010 10:21 PM), http://www.intouchweekly.com/entertainment/news/touch-exclusive-interview-photossarah-bristol-palin-were-glad-we-chose-life#.UHOwKk08CSo.

85. ABORTION CHANGES YOU, http://www.abortionchangesyou.com/ (last visited Oct. 8, 2012).

86. I HAD AN ABORTION (A film by Gillian Aldrich and Jennifer Baumgardner 2005); JENNIFER BAUMGARDNER, ABORTION & LIFE (2008).

87. Janelle Sue Taylor, *The Public Fetus and the Family Car: From Abortion Politics to a Volvo Advertisement*, 4 PUB. CULTURE 67, 67 (1992).

88. Margaret B. McNay & John E.E. Fleming, *Forty Years of Obstetric Ultrasound 1957–1997: From A-Scope to Three Dimensions*, 25 ULTRASOUND MED. & BIOLOGY 3, 50 fig.43 (1999).

89. *See generally* LISA M. MITCHELL, BABY'S FIRST PICTURE: ULTRASOUND AND THE POLITICS OF FETAL SUBJECTS 3 (2001) (discussing how a trip to the sonographer has become "[o]ne of the most common rituals of pregnancy").

90. There are also more subtle (perhaps subconscious) baby-killing-related messages. I have in mind the "Don't Abandon Your Baby" posters that were an essential part of the Safe Haven campaigns discussed earlier. Designed to discourage women who were hiding their pregnancies from killing their newborns at birth—the much publicized "dumpster babies"—the posters and other Safe Haven publicity also underscored social conceptions of how wickedly some women behave toward babies and, by implication, to fetuses too. The dissemination of Safe Haven messages about the *dangerousness* of pregnant women, about what they are capable of doing, is one example of how issues become abortion-inflected. In the Safe Haven case, the connection was direct; much of the legislation was proudly and publically sponsored by state right to life organizations. Sanger, *Infant Safe Haven Laws, supra* note 3.

abortion is rarely analyzed as a matter of law, yet *seeing* (or what one court has called "sensory and contemporaneous observance")[91] is now an important feature in how abortion is understood and how it is regulated. Of course, if seeing something is understood to make the thing observed more reliable, more true, and more real, then we should expect the law to take fetal imagery into account, as it has begun to do as part of what we might think of as "the visuality of law." The law has considered the significance of fetal imagery not only with regard to mandatory ultrasound statutes, but in other areas not usually associated with reproductive rights. These include criminal sentencing (are fetal photos prejudicial?),[92] employment worker's rights (may fetal scan badges be worn at work?),[93] and prison discipline (are fetal pictures "fighting words"?).[94] Fetal life and fetal looks are now part of American life. Visual politics has combined with visual technology, and the law has seized upon both in a campaign to encourage women to choose against abortion.

It is important, however, not simply to accept that fetal imagery works as lawmakers expect it to (woman seeking abortion sees fetus, woman changes mind). This cuts in both directions. A recent Canadian study shows that women who chose to look at a fetal scan before an abortion under a completely voluntary scheme did not change their minds about the procedure after looking. Moreover, sometimes the information imparted by an ultrasound is the very thing that makes a woman decide against proceeding with what may have been a much wanted

---

91. Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968).

92. *See* Erazo v. State, 167 S.W.3d 889 (Tex. Ct. App. 2005) (holding that admission of a fetal photograph was likely to appeal to the jury's emotions and therefore harmful error). *But see* People v. Rios, No. G031541, 2004 Cal. App. Unpub. LEXIS 6026 (Cal. Ct. App. Jun. 24, 2004) (upholding the inclusion of graphic photos of a bloody stillborn fetus in a rape prosecution of the father of a fetus where the probative value of the photos outweighed the danger of undue prejudice); Rogers v. State, Nos. 05-05-00283-CR, 05-05-00284-CR, 2006 WL 475795 (Tex. Ct. App. Mar. 1, 2006) (upholding the trial court's admission into evidence of autopsy photographs of a uterus removed from the victim's body, placenta, and an eight-to-nine-week-old fetus as relevant to issue of whether the fetus was alive at the time the victim was shot); Hicks v. Commonwealth, No. 0430-06-4, 2007 WL 1244558 (Va. Ct. App. May 1, 2007) (holding that the autopsy photographs of the deceased victim's fetus as relevant to proving an element of the offense).

93. Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1339 (8th Cir. 1995).

94. Wishnatsky v. Schuetzle, No. 97-1130, 1998 U.S. App. LEXIS 5966 (8th Cir. Mar. 27, 1998) (per curiam) (holding that a prisoner had not met his burden of demonstrating that the warden's policy was not reasonably related to penological interest in security). The warden of North Dakota State Penitentiary instituted an "aborted fetus policy" prohibiting prisoners from possessing pictures of aborted fetuses after the display of such pictures provoked verbal and physical confrontations among prisoners. *Id.* at *2. A prisoner objected to the policy on First Amendment grounds after prison officials screened his mail for "postcards of unborn children, both alive in the womb and dead through abortion." *Id.* CBR offers e-cards of bloody aborted fetuses which website visitors can email as they like. *See Ecards*, CENTER FOR BIO-ETHICAL REFORM, http://www.abortionno.org/Resources/ecards.html (last visited Aug. 28, 2008).

pregnancy.[95] Some pregnancies become unwanted precisely because an ultrasound scan reveals one or another fetal anomaly or disqualifying characteristic.

We might then ask: If looking is shown not to be a determinant in an abortion, what function it does serve?

III. TALKING ABOUT ABORTION

Abortion is not an easy subject to talk about. This is so at the level of lawmaking, as well as in more personal realms—among friends, within families, and between partners. Thus, although abortion has been the subject of loud public debate for some 40 years, at these other levels of discourse the subject remains decidedly muted. The difficulties of discussion have connected and reinforcing causes. There is, for starters, the provocative problem of basic vocabulary: Termination of pregnancy or abortion? Pro-life or anti-choice? Fetus or unborn child? Pregnant woman or mother? The choice is not only a matter of political or philosophical outlook, but often one of context. Few people—including, I suspect, few pro-choice people—when handed an ultrasound scan by an eager friend or cousin are likely to offer congratulations on the friend's *fetus*. To do so isn't in the spirit of the moment; it misses the sense of occasion when news of a wanted pregnancy is shared.

On the other hand, the distinction between "fetus" and "child" is crucial when either word is used in a statute, particularly in association with or in substitution for the other. Consider, for example, the inclusion of embryos and fetuses under the definition of "child" in federally funded insurance programs.[96] Throughout the lawmaking process, political objectives and understandings govern, not social ones. Sometimes the use of the term is negotiated, as we saw when proponents of Missing Angel Acts accepted the word "fetus" in place of "child" as part of a compromise in the drafting of stillborn birth certificate legislation.[97]

To be sure, prenatal life is not always referred to in just one way (embryo) or the other (child), even by the same people or regarding the same pregnancy. The vocabulary of reproduction often progresses in stages. Couples move into the language of "baby" as a pregnancy develops, *provided* that the pregnancy is coming along well. In contrast, couples undergoing prenatal diagnostic testing not uncommonly distance themselves from the language of "baby" until they have received the final results and have decided whether or not to continue the pregnancy.[98] This kind of linguistic and conceptual distancing is not uncommon in other pregnancies that are or that have become unwanted.

---

95. *See* Kenneth B. Schechtman et al., *Decision-Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies*, 99 AM. J. OBSTETRICS & GYNECOLOGY 216, 217 tbl.1 (2002).

96. 42 C.F.R. § 457.10 (2012) (defining "child," for purposes of federally funded state insurance programs, to include "an individual under the age of 19 including the period from conception to birth").

97. *See* Sanger, *"The Birth of Death," supra* note 9, at 306–08.

98. RAPP, *supra* note 63.

Another reason that abortion may not be much talked about at a personal level is that it remains a private matter, a woman's alone to reveal or discuss. Privacy not only underlies the right, but in a more social sense, it underlies the practice as well. One reason is abortion's intense physicality. Whatever else abortion may be—sin or blessing, impossibility or necessity, a source of sadness or a source of relief—it is also a matter of the body—real, intimate, and physical—and for this reason alone it may not be the stuff of common or casual conversation. As anthropologist Rosanne Cecil has observed with regard to other forms of pregnancy loss, such as miscarriages, "pregnancy loss is frequently accompanied by a considerable amount of physical pain, blood, and mess," and this too explains why the subject goes undiscussed.[99]

In addition to abortion's bodily aspect, women are also reluctant to talk about abortion because the costs of doing so are perceived, often reasonably, as high. As the Supreme Court recognized in *Casey*, some pregnant women fear physical restraint or punishment from belligerent husbands; this concern anchored the Court's holding that Pennsylvania's spousal notification created a "substantial obstacle" to obtaining an abortion and was therefore unconstitutional.[100]

Talking about abortion also puts women at *reputational* risk. Is it possible to imagine an American woman politician (or professor or dinner guest or employee) mentioning that she had an abortion at some point in her life? (It is, I suspect, the revelation that will do women politicians in, rather as affairs sometimes do for men.) In recent years, perhaps particularly among the young, having an abortion is taken as an indication of bad character, though whether for its revelation of sexual activity, of reproductive unpreparedness, or of basic immorality, I am not sure.[101] Even among women who terminate a pregnancy following an unwelcome prenatal diagnosis, there appears to be hierarchies of acceptable reasons and language. As Ayelet Waldman discovered when she joined the online abortion support group Heartbreaking Choices, her willingness to describe her abortion *as an abortion* was not well-received by others in the support group who wanted to distinguish the *termination* of wanted pregnancies from other, seemingly more casual *abortions*.[102] As one abortion provider explained to me, patients tend to agree on only three acceptable reasons for an abortion: "rape, incest, and mine."[103] There seems then to be less sympathy or solidarity even *among* women who have chosen abortion than one might expect.

---

99. Rosanne Cecil, *Introduction* to THE ANTHROPOLOGY OF PREGNANCY LOSS: COMPARATIVE STUDIES IN MISCARRIAGE, STILLBIRTH AND NEONATAL DEATH 2 (Rosanne Cecil ed., 1996).

100. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 893–94 (1992).

101. *See* Susan Dominus, *The Mysterious Disappearance of Pro-Choice Women*, GLAMOUR, Aug. 2005, at 200, 201 ("Today's twentysomethings . . . [have] never lived through the sordid conditions of back-alley abortions . . . . It's ancient history to them, and about as compelling.").

102. AYELET WALDMAN, BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE (2009).

103. Private Conversation with an abortion provider (2012).

So far, I have characterized the reticence around abortion talk as a matter of *privacy*. But I want now to distinguish abortion privacy from what I call "abortion secrecy." The two—privacy and secrecy—certainly have strong resemblances: both describe methods of control over who gets to know what. Yet, while both are forms of concealment, they are not quite the same. We might think of privacy as the right to keep something to one's self (whether as a matter of law, tradition, custom, or even etiquette). If something is private, the person may divulge or not, and most of us would not want it otherwise. In contrast, I want to consider secrecy as a decision to keep things to oneself for fear of the consequences of doing otherwise. On this understanding, privacy is a source of power, while secrecy appears to be a more ominous and isolating phenomenon.[104] Keeping something secret because one has to is something different. To be sure, privacy is a means of keeping something secret. But it is the idea that one must invoke privacy to prevent harm that trips us into the need for secrecy, rather than the preference for privacy. Consider Judge Richard Posner's refusal to release even the redacted medical records of late-term abortion patients on the grounds that "skillful 'Googlers'" might be able to "put two and two together, 'out' the . . . women, and thereby expose them to threats, humiliation, and obloquy."[105]

My suggestion is that the need for secrecy underlies women's inability to talk about abortion and that has a price; just as in the not so distant past, the inability to talk about breast cancer or infertility or depression had a price. This is so not only in terms of the psychological relief and the comfort of companionship that talking sometimes provides, but also with regard to women's physical and mental health. As a United Nations Special Rapporteur reported in 2011, criminal abortion laws and "other legal restrictions" that affect women's access to abortion create a "vicious cycle": "Criminalization . . . results in women seeking clandestine, and likely unsafe, abortions. The stigma resulting from procuring an illegal abortion . . . perpetuates the notion that abortion is an immoral practice . . . , which then reinforces continuing criminalization of the practice."[106] Even where abortion is *legal*, the problem endures. As the Fourth Circuit stated in a 2002 case involving the confidentiality of medical records sought by the state: "[W]omen seeking abortions in South Carolina have a great deal more to fear than stigma. The protests designed to harass and intimidate women from entering abortion clinics, and the violence inflicted on abortion providers, provide women with ample reason to fear for their physical safety."[107]

---

104. *See* Alice Clapman, *Privacy Rights and Abortion Outing: A Proposal for Using Common Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545 (2003) (describing surveillance techniques of anti-abortion advocates).

105. N.W. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 929 (7th Cir. 2004).

106. Special Rapporteur of the Human Rights Council on Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Interim Rep.* 11 ¶ 35 (2011), *transmitted by Note of the Secretary-General*, U.N. Doc. A/66/254 (3 Aug. 2011) (by Anand Grover), *available at* http://www.acpd.ca/wp-content/uploads/2012/08/SR-Right-to-Health-Criminalization-of-SRHR-2011.pdf.

107. Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 377 (4th Cir. 2002).

The silence around abortion has implications not only for women, pregnant or not, but for *all* citizens with regard to the quality of lawmaking. As with other topics that in the past have dared not speak their name, we cannot act or regulate without a more thorough sense of the subject. It is hard to imagine, for example, the possibility of same-sex marriage, or even any discussion of it, when the word "homosexual" was itself unutterable and the word "gay" meant only cheerful. Talking more openly about abortion is particularly important now when regulation is often premised on the view that it is abortion and its supposed aftermath that harms women, rather than the regulation itself.

At present, public discussion about abortion is too often incomplete or coded and proceeds with an aura of mistrust about the choice and meaning of words. Certainly there have been fair grounds for mistrust. "Pregnancy Crisis Centers," listed in the Yellow Pages under "Abortion Services," turn out to be pro-life counseling agencies that arrange adoptions, not abortions.[108] (The problem is not the mission but its labeling.) Statutes are given politically purposeful titles that do not capture all of what they are about, or that do so in the spirit of George Orwell's *1984*. Alabama's mandatory ultrasound statute is called The Woman's Right to Know Act;[109] a Maryland ballot initiative liberalizing that state's abortion laws was challenged on the grounds that its title ("Abortion Revisions") intentionally misled voters.[110] (The challenge was upheld and then reversed.)[111] Our interest here, of course, is less the title of any statute—although it is impossible not to appreciate the rhetorical brilliance of the Unborn Child Pain Prevention Act[112]—than its content: the ways and means by which lawmakers regulate abortion providers and patients. But citizens are not just the subjects of law, they are also supposed to make law, directly or indirectly, and we cannot advance how we think about something—and certainly not how we should regulate it—until we start to talk about it.[113]

IV. TALKING ANEW

What then might a public conversation about abortion look like if the collective we took a deep breath, dusted ourselves off, and considered anew the values and topics that constitute "talking about abortion"? I am not quite talking about consciousness-raising, though there are worse ideas. If a third of all American women will have had an abortion by age 45, everyone must know

---

108. *See* Mother & Unborn Baby Care v. State, 749 S.W.2d 533 (Tex. Ct. App. 1988).

109. Woman's Right to Know Act, ALA. CODE § 26-23A-1 (2012).

110. Kelly v. Vote Know Coal. of Maryland, Inc., 626 A.2d 959 (1993).

111. *Id.*

112. Unborn Child Pain Awareness Act, S. 51, 109th Cong. (2005), 151 Cong. Rec. S512 (daily ed. Jan. 24, 2005).

113. Other countries *have* been able to do so. Consider the parliamentary debate that preceded the 1967 Abortion Reform Act in the United Kingdom. See the second reading of the debate on the enactment of the Medical Termination of Pregnancy Act at 732 Parl. Deb., H.C. (5th ser.) (1966) 1067, 1067–1166; *see also* Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373 (2003).

someone who has. Yet I suspect that lots of people, perhaps mostly men, don't think that they do and are therefore able to distance themselves from the phenomenon in any personal way. Nor is my aim some sort of cheerful gesture toward compromise. I doubt there is some kind of harmonic convergence hovering above ready to sort out the abortion issue if we all just listened more carefully. Nonetheless, to the extent that there is sense and profit in talking about abortion and its regulation—as there must be in a society that takes both the process of lawmaking and the well-being of citizens seriously—there is more to say.

There is also some indication this is a good time to do so. At the moment, the right to abortion seems relatively secure, at least as a matter of constitutional law.[114] Without the threatened reversal of *Roe* looming over everything, as it has for some 40 years, there is perhaps room to consider aspects of abortion that were thought too risky, from an advocacy perspective, to discuss.

In other ways too, abortion has become a more acceptable, if no less contentious, topic of discussion. It is not only that teenagers decide about it on television. Abortion is no longer a forbidden subject as a matter of law, as was the case under Republican administration "gag rules." Beginning with President Reagan in 1988, a series of federal rules and regulations prohibited even the mention of abortion in any program which received federal funds, including family health clinics.[115] That physicians are no longer completely gagged may not guarantee that there is more generosity in listening to one another, but there is at least more space.[116]

To be clear, in urging that we "dust ourselves off," I do not mean that we should start all over again and unwind the basic holding in *Roe*. I proceed with

---

114. NATHANIEL PERSILY ET AL., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (2008). To be sure, some states have enacted legislation that recriminalizes abortion automatically the moment it is constitutionally possible to do so. *Title X 'Gag Rule' Is Formally Repealed*, 3 GUTTMACHER REP. ON PUB. POL'Y 12, 13 (2000), http://www.guttmacher.org/pubs/tgr/03/4/gr030413.html

115. *See generally* Rust v. Sullivan, 500 U.S. 173 (1991); Carole I Chervin, *Title X Family Planning Gag Rule: Can the Government Buy up Constitutional Rights*, 41 STAN. L. REV. 401 (1989).

116. Popular movies tell us something about this space. While most nice girls (or even scruffy ones) in movies still do not abort (think *Knocked Up* or *Juno*), there is now a wider array of representations about women weighing the decision. KNOCKED UP (Universal Pictures 2007); JUNO (Fox Searchlight Pictures 2007). Yes, in 2007, the adorable Juno gave her baby to a childless lady with a beautifully done-up nursery, but there is also Mike Leigh's sobering 2004 depiction in *Vera Drake* of the post-war prosecution of the kindliest abortionist one could ever meet. VERA DRAKE (UK Film Council 2004). And the earlier comedy *Citizen Ruth* gave us a clueless and pregnant Laura Dern ("Good God! This is a calamity!") set upon by caricatured (I think) advocates from both sides eager to claim her as their perfect poster child. CITIZEN RUTH (Miramax Films 1996). These portrayals stand in interesting contrast to *Godfather II*, where as some may remember, Kay Corleone reveals to her stunned husband she hadn't suffered a miscarriage but had deliberately aborted her pregnancy in order to end "this Sicilian thing": "It was an abortion, an abortion, Michael! . . . Something that's unholy and evil." THE GODFATHER: PART II (Paramount Pictures 1974).

abortion's basic legality firmly in place. Even so, there is much to discuss about the shape that abortion's legality has taken and the political and constitutional reasons why it has taken that shape. Part of the project includes considering aspects of abortion that are often avoided, deflected, or rejected outright in existing conversations. I have in mind, for those who support legal abortion, acknowledging the importance of fetal life to those who oppose it. And for those who want to criminalize abortion, there must be greater engagement with the idea that there is something valuable about the lives of women and their families to put in the balance.

In urging that public discussion of abortion is improved by consideration of central concern of the other, I am not suggesting that the issue of abortion would be put to bed if we just showed one another a little more respect. Disagreement about abortion is not at its core a problem of civility, though we do know the damage and intellectual intransigence that results from uncivil and fractious exchange—for example, a Republican congressman shouting "baby-killer" on the floor of the House during the health care debate (and at a pro-life legislator).[117] After 40 years of contention, disagreement about abortion is unlikely to melt away like the Wicked Witch of the West.

At the same time, in a *civil* society, points of affinity are worth pursuing for their own sake, even if they do not conclusively resolve the contentious debate that abortion has become in our county.[118] Yet even when the stakes are high and intractable, things can sometimes be made better. Pro-choice people are not murderers and pro-life people are not idiots. It is therefore worth pushing a bit further on how abortion regulation works and whether it can be defended—taking into account everything that is at stake in the debate on both sides.

V. WHAT'S AT STAKE

What exactly *are* the deep concerns of each side that seem to go unacknowledged by the other? For those who oppose legal abortion, the heart of the matter is the unassailable (for them) value of fetal life from the moment of conception. From the pro-choice side, the cherished value is the value of *women's* lives as secured by the right to decide and to implement reproductive decisions.

In urging that more attention be paid by each side to the other's concern, it is worth pausing for a moment to consider briefly why this hasn't happened in the past. The view that protected personhood starts at conception has been

---

117. *See* Bart Stupack, *What My Amendment Won't Do*, N.Y. TIMES, Dec. 9, 2009, at A43.

118. For an excellent discussion on civility, see Arizona Law Review Symposium, *Political Discourse: Civility, and Harm*: Benard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 344 (2002); Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375 (2012); Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 442 (2012); Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 456 (2012); Kenji Yoshino, *The 'Civil' Courts: The Case of Same-Sex Marriage*, 54 ARIZ. L. REV. 468 (2002).

challenged for a number of familiar reasons. Some of these reasons are anchored in biology (the question of what level of neurological development constitutes a person or registers pain or produces sentience);[119] others have had a theological basis (the historically changing views on ensoulment); still others are more philosophical in nature.[120]

There has also been strategic opposition to the proposition that life starts at conception. To acknowledge that there might be *something* to fetal life—that fetal life might have a claim to characterization as human life—has risked conceding the core of the anti-abortion case (that it is murder). I want to develop a more complicated and I think, more accurate account of women's views on fetal life, recognizing that the category of "woman" is itself formidable, dense, and diverse. Surely it is possible to support (and to say one supports) legal abortion and at the same time to appreciate or value (and to say one appreciates or values, if that is the case) fetal life. But this is getting ahead of my story. Right now we are reviewing the sorts of arguments made against taking seriously the central pro-life concern that human life starts at conception. Most of these counter-arguments are familiar; many are persuasive.

There is, however, one argument about the pro-life position that gets us nowhere in terms of talking together about abortion. This is the argument that pro-life people cannot mean what they say when they say that a human fetus is the moral equivalent of human child. In his important 1993 book *Life's Dominion*, Ronald Dworkin summarizes the "standard view" of what each side in the abortion debate says it believes:

> One side thinks the human fetus is already a moral subject, an unborn child from the moment of conception. The other side thinks that a just conceived fetus is merely a collection of cells, no more a child than a just fertilized chicken egg is a chicken or an acorn is an oak.[121]

Dworkin is particularly concerned about the "highly ambiguous claim" that the "scalding rhetoric of the pro-life movement seems to presuppose" that "a fetus is from the moment of its conception a full moral person with rights and interests equal in importance to any other member of the moral community."[122] What both sides believe, he explains, is that all forms of human life have innate value and are in this sense sacred: "[A]lmost everyone who opposes abortion really objects to it" not because they really think an embryo is a person but because they believe that "it is intrinsically a bad thing . . . when human life at any stage is deliberately extinguished."[123]

---

119. *See* I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 235–42 (2011)

120. A good starting place is always Judith Jarvis Thompson, *In Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971); *see also supra* note 37.

121. DWORKIN, *supra* note 36, at 10.

122. *Id.* at 13.

123. *Id.* at 14.

Dworkin's argument about sacredness is powerful and persuasive: The intrinsic value of human life may well identify what truly concerns everyone about abortion. But it is less the soundness of the argument than Dworkin's view about what people really think. The problem is not tone, even though no one is ever too thrilled about being told what they "really" think. Rather, I think that Dworkin is wrong in substance about what many pro-life people now think. The citizens of South Dakota have inscribed the view into state law, defining abortion as the termination of "the life of a whole, separate, unique, living human being."[124] Even discounting for its symbolic and instrumental value, the language expresses a new attitude toward embryonic life. It is as though the acorn now *instantiates* the oak. In this regard, consider the dramatic opening of natural law philosophers Robert George and Christopher Tollefsen's book *Embryo: A Defense of Human Life*.[125] The authors describe how little Noah Benton Markham, "one of the youngest residents of New Orleans to be saved from Katrina," was nearly drowned in the hurricane's flood waters but was at last rescued through the heroic efforts of ten emergency responders.[126] It turns out that at the time of his rescue, Noah was an embryo floating along with 1400 other frozen embryos in a canister of liquid nitrogen.[127] George and Tollefsen conclude that "if those officers had never made it to Noah's hospital, there can be little doubt that the toll of Katrina would have been fourteen hundred human beings higher than it already was."[128]

I myself have serious doubts about calculating Katrina's death toll this way. I think frozen embryos, and not little children, would have been lost had the nitrogen canister gone under. (Which is not to say that frozen embryos have no intrinsic value.) But I have *no* doubt that George and Tollefsen, sophisticated natural law scholars, believe that embryos are endowed with exactly what Ronald Dworkin finds impossible to accept that they really mean: "rights and interests equal in importance to those of any other member of the moral community."[129] Moreover, I think it is not possible to talk to Robert George or others about abortion—as I think it is important to do—without accepting that his position on the matter is exactly what he says it is. Certainly, some demonstrations of fetal personhood are hard to take. In 2011, two fetuses "testified" before an Ohio legislative committee in support of a bill banning abortion after the detection of a fetal heartbeat.[130] The witnesses' mothers were hooked up to ultrasound machines and the images projected onto a giant screen so that committee members could see and hear the amplified heartbeat pulses. To many, widescreen fetal testimony may seem just like a piece of political showmanship.

---

124. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (Supp. 2008).

125. ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 2 (2008).

126. *Id.*

127. *Id.*

128. *Id.*

129. DWORKIN, *supra* note 36, at 13.

130. William Hershey, *Fetuses' Heartbeats Played at House Hearing*, DAYTON DAILY NEWS, March 3, 2011, at A4; Julie Carr Smyth, *Abortion Foes Using Images To Make Point—Hard to Ignore Fetus with Beating Heart*, COM. APPEAL, March 6, 2011, at A9.

But it is neither political showmanship (at one end of the persuasion scale) nor philosophical argumentation (at the other) that produces the increasing naturalness of regarding fetuses as persons in ways that once might have seemed impossible. For in addition to whatever biological criteria the fetus meets for its being a human (as opposed to a frog), and whatever intrinsic value it has for its sacredness, it also has come to have some of the *social* attributes of a child in ways that were not so 30 years ago. (Thus Dworkin's critique may simply be outdated.) A mix of reinforcing practices and beliefs, elaborated by the use of fetal imagery, has led to a realization of the fetus as a child, not only in the generic-bumper-sticker sense ("I'm a Child, not a Choice!") but as a participating member of a family. Within weeks of conception, many fetuses have a known sex, a name, and a page on Facebook. In wanted pregnancies, social birth—the identification and incorporation of a child into its family during pregnancy—often precedes biological birth.[131] The phenomenon contributes to attitudes about fetal life more generally, though it is important to remember that "social birth" is not a legal category or status. Recognizing that a fetus may be a child within his family (indeed, some readers may have thought of their own fetuses this way) provides a means of understanding, without necessarily accepting, a central claim in the anti-abortion position.

And what fundamental piece of the pro-choice argument remains undervalued? The answer is deference to women's right to live under circumstances of dignity as full persons in the world. The conception of dignity has both substantive and procedural dimensions: what women are permitted by law to decide, and how they are treated by law as they decide.[132] This more complete and equal manner of negotiating one's life is impossible without control over decisions regarding reproduction. While this holds for all manner of reproductive control, including contraception, I want here to refine our sense of the kinds of harm that are at stake with abortion. Certainly much attention has been paid to the harms women suffer when they are unable to get abortions at all: the toll motherhood takes on their bodies and the constraints it imposes on women's ability to participate and to flourish in the market, in a profession, or in any other realm of endeavor. We are also woefully familiar with the harms that are suffered when women are unable to get *legal* abortions. Protecting women's health was at the heart of abortion reform in the twentieth century, and remains the abiding concern of reproductive rights movements in other countries today.[133] There has, however, been little public discussion of the harms women suffer by virtue of abortion *regulation*, even when they are able in the end to obtain a legal abortion.

---

131. *See* Sanger, *"The Birth of Death,"* at 282–87.

132. On substantive dimensions of dignity, see Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008) (explicating how respect for human dignity explains the deep structure of *Casey*'s undue burden test); on procedural dimensions of dignity, see Sanger, *Decisional Dignity*, *supra* note 44, at 18 (considering the dignitarian aspects of the process of deciding about abortion).

133. *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 66–91 (1984).

The omission is problematic if we are after a richer account of the stakes for women in abortion's regulation at law.

In discussing harm, I recognize the pro-life argument about what pregnant women are said to suffer by virtue of *having* abortions—the promised range of emotional harms, such as guilt, depression, and suicide.[134] After all, the 2005 South Dakota Task Force to Study Abortion reported that nearly every one of the 2,000 women who provided statements to the Task Force experienced " trauma" and testified that abortion was "destructive of [their] rights, interests, and health and should not be legal."[135] There is also Justice Anthony Kennedy's observation in *Gonzales v. Carhart*, the 2007 case upholding a federal ban on the intact dilation and extraction, that

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child . . . . While we find no reliable data to measure the phenomenon, it seems unexceptional to conclude that some women come to regret their choice to abort the infant life they once created and sustained."[136]

But *announcing* how abortion affects women, even as a legislative finding or (supreme) judicial notice is not enough. There *is* reliable data on the matter, and studies indicate that the primary emotion women experience after an abortion is relief and a feeling of well-being. This does not mean that an abortion decision may not be a hard decision, soberly taken, or that a woman might not regret that it is the decision to make at present. Many people wish their circumstances were other than they are when faced with a tough choice. But that is something different than wishing she had made a *different* decision.

Yet, we might consider whether there are structural reasons—reasons connected to abortion's regulation—to explain why women sometimes report such negative experiences. I want to suggest that women, along with everyone else in the United States, cannot help but be aware of the public reputation of abortion. There must be something suspect about a medical procedure excluded from public funding,[137] denied to military personnel and dependents,[138] unavailable in 87% of

---

134. *See* Elizabeth Shadigian, *Reviewing the Evidence, Breaking the Silence: Longterm Physical and Psychological Health Consequences of Induced Abortion*, *in* THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION 63, 68–69 (Erika Bachiochi ed., 2004) (concluding on the basis of two studies, one Finnish, and one from the United States, that women have higher long-term rates of suicide and self-harm following abortion); *see also* SDTF REPORT, S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 33, 43, 50 (2005), *available at* http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf [hereinafter S.D. TASK FORCE REPORT].

135. S.D. TASK FORCE REPORT, *supra* note 134, at 41–48.

136. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

137. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that states are not obligated under Title XIX to fund even medically necessary abortions).

138. *See* Doe v. United States, 419 F.3d 1058, 1060–61 (9th Cir. 2005) (upholding a regulation barring military health services from funding abortions, including an instance where a sailor's wife aborted her anencephalic fetus).

counties across the country,[139] and subject to unprecedented levels and modes of regulation.[140] *Roe* may have cleared away abortion's basic criminality, but even non-criminal requirements can create something *like* sanctions. The law can provide unpleasant options that fall short of formal retribution but still register as punishment. Judicial bypass hearings again provide a good example of this. The risk of public exposure and the uncertainty of outcome make the hearings a source of great anxiety for pregnant young women, *as they are meant to do.* As one Texas Supreme Court justice candidly stated, "[o]nce a minor becomes aware of what she must go through to obtain a judicial bypass, she will choose for herself to involve her parents."[141] There is also mandatory ultrasound, which can be understood at some level as an attempt to punish women who go ahead even after they have been "offered a look at their own unborn child." To borrow an old socio-legal concept, the process is the punishment.[142]

Hyper-regulation may not in every instance be intended punitively. It is, however, based on a fundamentally different conception of women. Much current legislation takes as its starting point that women do not quite understand what they are doing when they decide to end a pregnancy. That is why they must be told when human life starts, that this is their own fetus, that they could place it for adoption, and so on: The sort of information it now takes for women to provide legally informed consent.

This lecture is guided by a very different premise. I believe that women, even young women, understand very well what an abortion is. Women understand that abortion ends pregnancy and that if they have an abortion, they will not have a baby; that is its very point. The significance of an abortion decision may differ from woman to woman, from girl to girl. In deciding whether or not to continue a pregnancy, each will draw upon her own sensibilities, circumstances, and beliefs. But as with other deeply intimate decisions and commitments—who to marry, whether to pray, how to vote, *what to do with one's life*—I join others in the view that women themselves are able and best positioned to decide what is at stake. This returns us to the question of what abortion is about. The list is long, and the categories complex and challenging. But they are not impenetrable. That is to say,

---

139. *See* Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6, 10 (2008), *available at* http://www.guttmacher.org/statecenter/abortion2.html; *see also* Jack Hitt, *Who Will Do Abortions Here?*, N.Y. TIMES, Jan. 18, 1998, § 6 (Magazine), at 20.

140. *See* Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 359–71 (4th Cir. 2002) (upholding various state abortion regulations). In his dissent, Judge Robert Bruce King described the effect of abortion regulations in other states: "[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors' closets—that is challenged in this case." *Id.* at 371–72 (King, J., dissenting).

141. *In re* Jane Doe, 19 S.W.3d 346, 363 (Tex. 2000) (Enoch, J., concurring).

142. *See* MALCOLM FEELY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

women can make sense of them and decide for themselves, their children, and their families whether or not to have another child.