Lectures

THE RIGHT'S REASONS: CONSTITUTIONAL CONFLICT AND THE SPREAD OF WOMAN-PROTECTIVE ANTIABORTION ARGUMENT

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INTRODUCTION

In *Gonzales v. Carhart*,[1] the Supreme Court upheld the Partial-Birth Abortion Ban Act,[2] emphasizing that government may regulate the methods employed to perform an abortion "to show its profound respect for the life within the woman"[3] and to vindicate the interest in protecting potential life first recognized in *Roe v. Wade*.[4] *Carhart* discussed an additional justification for restricting abortion—to protect *women* as well as the unborn:

> Whether to have an abortion requires a difficult and painful moral decision. *Casey*, *supra*, at 852-853 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*

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1. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).
2. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. V 2005).
3. *Carhart*, 127 S. Ct. at 1633.
4. Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation."); *see also Carhart*, 127 S. Ct. at 1633.

> . . . .
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> . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[5]

The only support for these assertions the opinion provided was an amicus brief from the conservative law center The Justice Foundation that quoted affidavits gathered by Operation Outcry from women who claimed to have been coerced into and harmed by abortion.[6]

Carhart's woman-protective rationale for restricting abortion is scarcely considered in the Court's cases,[7] and was not discussed by Congress in enacting the Partial-Birth Abortion Ban Act.[8] But the

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5. *Carhart*, 127 S. Ct. at 1634 (citations omitted) (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner at 22–24, *Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436684).

6. *See Carhart*, 127 S. Ct. at 1634 (citing Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner, *supra* note 5, at 22–24). Operation Outcry, a project of The Justice Foundation, collected the affidavits later cited in the Cano brief as part of its mission "to end legal abortion by exposing the truth about its devastating impact on women and families." *See* Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner, *supra* note 5, at app. 11-106 (sampling "178 Sworn Affidavits of Post Abortive Women" of the approximately 2,000 on file with The Justice Foundation); Operation Outcry: A Project of The Justice Foundation, http://www.operationoutcry.org (last visited Apr. 31, 2008).

7. *But cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992). The *Casey* Court noted:

> In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

Id.

8. See the factual findings of the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201, 1201–06, *reprinted in* 18 U.S.C. § 1531 note (Supp. V 2005) (findings), as well as the House Report on the Act, H.R. REP. NO. 108-58. Congress did consider, in some detail, the potential physical harms of later abortions. *See* Partial-Birth Abortion Ban Act of 2003 § 2, 117 Stat. at 1201–06, *reprinted in* 18 U.S.C. § 1531 note (findings); H.R. REP. NO. 108-58 (2003). Congress made no mention, however, of the psychological harm caused by abortions. The Nebraska District Court opinion in *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004)—the district court opinion in *Gonzales v. Carhart*—confirms this view. The lengthy 269-page decision in *Carhart v. Ashcroft* summarized the entire congressional record without discussing the prevention of psychological harm as a purpose of the statute. *Id.* at 822–52. Nor

claim that women need protection from abortion has been spreading within the antiabortion movement for decades and played a central role in arguments for the abortion ban that was enacted in South Dakota in 2006.[9] In the week before South Dakota's referendum, the *New York Times* offered this account of the debate over the abortion ban:

> [T]he most extreme arguments are nowhere to be found. No bloody fetuses fill billboards, no absolute claims are being offered about women's rights. Instead, . . . [t]he supporters of the ban . . . speak in gentle tones about how abortion hurts women. "I refuse to show pictures of dead babies," said Leslee Unruh, who leads Vote Yes For Life, the group that is campaigning for the law, reflecting on methods used by anti-abortion groups. "That's what the old way was, and that's why they were losing all these years."[10]

In fact, the South Dakota Task Force to Study Abortion, which recommended that the state ban abortion in 2005, heavily relied on the same Operation Outcry affidavits that Justice Kennedy cited in *Carhart*.[11] The Operation Outcry affidavits were first gathered by the

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do appellate decisions record such a purpose. *See* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006), *vacated*, 224 Fed. Appx. 88 (2d Cir. 2007); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd* 127 S. Ct. 1610 (2007).

The woman-protective argument that appears in *Carhart* seems to have entered the case not through findings of Congress or the lower courts, but rather through amicus briefs filed in the Supreme Court, including the brief filed by The Justice Foundation on behalf of Sandra Cano and 180 Women Injured by Abortion, *see* Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner, *supra* note 5, as well as briefs of several other organizations, *see* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1025–26 & n.142 [hereinafter Siegel, *The New Politics of Abortion*] (surveying woman-protective antiabortion argument in amicus briefs filed in *Carhart*).

9. The ban was defeated in an election-day referendum. *See* Siegel, *The New Politics of Abortion*, *supra* note 8, at 991, 993.

10. Monica Davey, *National Battle over Abortion Focuses on South Dakota Vote*, N.Y. TIMES, Nov. 1, 2006, at A5. Leslee Unruh was exhilarated by the *Carhart* decision, which she viewed as affirming and enabling her work:

> "I'm ecstatic," said Leslee Unruh, an antiabortion activist in South Dakota. "It's like someone gave me $1 million and told me, 'Leslee, go shopping.' That's how I feel."
>
> She spent the day conferring with lawyers on how to leverage the ruling to maximum effect in the states. "We're brainstorming, and we're having fun," she said.

Stephanie Simon, *Joyous Abortion Foes to Push for New Limits*, L.A. TIMES, Apr. 19, 2007, at A25.

11. The brief filed in *Carhart* draws this link. *See* Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner, *supra* note 5. One hundred eighty "post-abortive" women joined Sandra Cano's brief, which offers ninety-six pages of excerpts from affidavits testifying to "their

antiabortion movement for a lawsuit on behalf of the original plaintiffs in *Roe* (Norma McCorvey)[12] and *Doe* (Sandra Cano)[13] seeking to introduce new evidence of abortion's harm to women as grounds for reopening their cases[14]—a "history-making effort to

real life experiences" of how "abortion in practice hurts women's health." *Id.* at 2. The brief informs the Court that the affidavits provided were merely a sampling from "approximately 2,000 on file with The Justice Foundation." *Id.* at app. 11. The South Dakota Task Force Report repeatedly relies on the affidavits. *See* S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 21–22, 33, 38–39 (2005), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf.

12. *See* Brief in Support of Rule 60 Motion for Relief from Judgment at 2, McCorvey v. Hill, No. 3:03-CV-1340-N (N.D. Tex. 2003), 2003 WL 23891671 (seeking to reopen *Roe v. Wade*, 410 U.S. 113 (1973)).

In 1995, Norma McCorvey, the original *Roe* plaintiff, was converted by the Rev. Philip "Flip" Benham, Operation Rescue's national director (who later changed the organization name to Operation Save America). *See* Crossing Over Ministry, The Real Story About Jane Roe, http://crossingover.bravehost.com/realstory.html (last visited Apr. 31, 2008) (offering McCorvey's account of her conversion); Operation Save America, Our Director, http://operationsaveamerica.org/misc/misc/director.html (last visited Apr. 31, 2008) (featuring a photograph of McCorvey being baptized by Rev. Benham in a swimming pool in Dallas, Texas); Douglas S. Wood, *Who is 'Jane Roe'?*, CNN.COM, June 18, 2003, http://www.cnn.com/2003/LAW/01/21/mccorvey.interview/. After attending a Human Life International Conference in 1997, McCorvey began to shift in her intramovement allegiances, and by 1998 was converted to the Catholic Church by Father Frank Pavone, the International Director of Priests for Life. *See* Press Release, Roe No More Ministries, Coming Home to Rome (June 15, 1998), *available at* http://www.priestsforlife.org/testimony/roecatholicnormapressrelease.html; Norma McCorvey, My Journey into the Catholic Church, http://crossingover.bravehost.com/press/addition.htm (last visited Apr. 31, 2008). Pavone seems to have introduced McCorvey to Harold Cassidy, who in turn enlisted her in a legal campaign to undermine *Roe*. *See* Interview by Father Frank Pavone with Harold Cassidy (Catholic Family Radio broadcast Oct. 31, 1999), *available at* http://www.priestsforlife.org/radio/lifeandchoice.htm (interviewing Cassidy about his work on the suit); *see also* Interview by Rick Marschall with Allan E. Parker, Jr., *reprinted in The Man Who Would Reverse* Roe v. Wade*: Exclusive Interview with Allan E. Parker, Jr.*, RARE JEWEL MAG., Jan.–Feb. 2005, *available at* http://www.rarejewelmag.com/articles/view_by_group.asp?group=2005-01%20(Jan/Feb):%20The%20Sanctity%20of%20Life (interviewing Parker about Harold Cassidy's role in beginning legal work with McCorvey).

13. *See* Memorandum of Law in Support of Rule 60 Motion for Relief from Judgment at 1–2, Cano v. Bolton, No. 13676 (N.D. Ga. 2005), 2005 U.S. Dist. LEXIS 41702, *available at* http://www.thejusticefoundation.org/images/64456/DoeRule60Memorandum.pdf (seeking to reopen *Doe v. Bolton*, 410 U.S. 179 (1973)).

14. In 2003, Allan E. Parker of The Justice Foundation, and co-counsel Harold Cassidy, who had drawn McCorvey and Cano into a New Jersey case seeking to impose tort liability on abortion providers, together filed a motion to reopen *Roe*. *See generally* Kathleen Cassidy, *Post-Abortive Women Attack* Roe v. Wade, AT THE CENTER, Winter 2001, http://www.atcmag.com/v2n1/article6.asp (describing how Parker and Cassidy began working together in the Donna Santa Marie case, with Parker representing McCorvey and Cano as amici curiae and Cassidy representing Donna Santa Marie). Parker and Cassidy argued that under *Agostini v. Felton*, 521 U.S. 203 (1997), a Rule 60(b) Motion was the appropriate mechanism for reopening a case and bringing it back to the Court to change one of its own precedents, and used such a motion to argue that the Court should reopen *Roe* in light of an alleged change in understanding

overturn *Roe v. Wade*"[15] in which an architect of South Dakota's

of the facts concerning when life begins and whether access to abortion is in women's interest. *See* Brief in Support of Rule 60 Motion for Relief from Judgment, *supra* note 12, at 9–11, 28–30. The focus of the brief's argument and the affidavits appended to it was to put before the Court evidence alleging abortion's harm to women. *See id.* at 35–42. The brief contained lengthy affidavits from "More Than One Thousand Post-Abortive Women," Affidavits and Exhibits from post-abortion syndrome experts Theresa Burke and David Reardon, and client intake records from Pregnancy Care Centers, a "crisis pregnancy center." (Crisis pregnancy centers have been established by the antiabortion movement for the purpose of dissuading women from considering abortion.) *Id.* at 4. *See also* Memorandum of Law in Support of Rule 60 Motion for Relief from Judgment, *supra* note 13, at 12–19 (citing "post-abortive" women's affidavits stating that abortion had caused them psychological disorders, suicidal ideations, and physical complications, and were often the result of coercion by relatives, sexual partners, or circumstance). For reports of the litigation, see Allen Turner, *30 Years Later, "Jane Roe" Takes Her Case Back to Court*, HOUSTON CHRON., Feb. 20, 2004, at A1; Giles Hudson, Justice Foundation, *History in the Making: 'Roe' Files Motion to Re-Open Roe vs. Wade, the Landmark Case Legalizing Abortion*, SCI. BLOG, June 17, 2003, http://www.scienceblog.com/community/older/archives/K/0/pub0191.html.

When the Fifth Circuit held the motion moot, Judge Edith Jones concurred in a lengthy opinion designed to place the argument of the affidavits in the public record. McCorvey v. Hill, 385 F.3d 846, 850–51 (5th Cir. 2004) (Jones, J., concurring). Judge Jones observed:

> McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision. Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions. Second, *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling.

Id.; *see also American Morning: Abortion Challenge* (CNN television broadcast June 18, 2003) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0306/18/ltm.16.html). In the broadcast, Daryl Kagan observed:

> Norma McCorvey may yet get her case overturned, but the way it's going to be done is the conventional way of new justices on the court, cases coming up through the system in the ordinary way. That's where she may win. She's not going to win by getting the case of *Roe v. Wade* overturned.

Id.

15. Solicitation for the Justice Foundation affidavits expressly advises the public about the litigation purposes for which the affidavits will be used: "The National Foundation for Life and the Texas Justice Foundation urge you to become part of this history-making effort to overturn *Roe v. Wade*." Kathleen Cassidy, *Post-Abortive Women Attack Roe v. Wade*, LIFELINE: A LEGAL NETWORK IN SUPPORT OF LIFE (Life Legal Defense Foundation, Napa, Cal.), Winter 2001, at 10, 10, *available at* http://www.lldf.org/pdf/winter2001.pdf; *see also* Siegel, *The New Politics of Abortion*, *supra* note 8, at 1034 n.171 (quoting movement appeals for Operation Outcry affidavits).

After *Carhart*, Operation Outcry began using the decision to solicit more affidavits. *See* The Justice Found., The Supreme Court Is Listening!, http://64304.netministry.com/images/

abortion restrictions[16] played a leading role. The Operation Outcry affidavits were then introduced in South Dakota[17] and the Supreme Court,[18] and have since been entered into state legislative hearings in a number of other states as well.[19] The Outcry affidavits express the new rallying cry of the antiabortion movement. Claims that abortion hurts women and that women are coerced into abortion are now prominently featured on antiabortion websites,[20] and are invoked in

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WhywecollectDeclarationsw-pic-July07_4_.pdf (last visited Apr. 31, 2007). The Justice Foundation publication explained:

> Your testimony can help restore justice and end abortion[.]
>
> Although the Court acknowledged the harm of abortion, it also stated it had "no reliable data to measure" the extent of the problem. The most effective way to show the Court the magnitude of the problem is to collect a much larger number of testimonies.
>
> The Justice Foundation has collected affidavits and declarations through its project, Operation Outcry, from approximately 2000 women since the year 2000. This largest known body of direct, sworn testimony in the world that shows the harmful effects of abortion . . . has been submitted to the U.S. Supreme Court; the U.S. Senate Judiciary Committee; state legislatures in Georgia; Louisiana; Mississippi, Ohio, South Dakota, and Texas; and, to lawmakers around the world.

Id.

16. Harold Cassidy, attorney for Mary Beth Whitehead in the "*Baby M*" surrogacy case, *In re* Baby M, 537 A.2d 1227 (N.J. 1988), was an architect of the campaign to reopen *Roe*, *see supra* notes 12–14, and has played a key role in drafting and defending recent abortion legislation in South Dakota, *see* Siegel, *The New Politics of Abortion*, *supra* note 8, at 1027; *see also id*. at 1025 (related litigation work).

17. *See* S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 21–22, 33, 38–39.

18. For a discussion of the Supreme Court's use of the affidavits in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), see *supra* note 11 and accompanying text.

19. For Ohio, see Marley Greiner, *God's Politics at the Statehouse: Ohio Abortion Hearing Goes to Sunday School*, FREE PRESS (Columbus, Ohio), July 2, 2006, http://www.freepress.org/departments/display/18/2006/2070 ("Lisa Dudley, a paralegal and traveling witness for the San Antonio-based Justice Foundation's anti-abortion Operation Outcry project . . . presented 2000 affidavits from women claiming their abortions were forced or coerced."); *Ohio Abortion Ban Gets Hearing*, CTR. FOR BIOETHICAL REFORM, http://www.cbrinfo.org/CBRMidwest/0706.html (last visited Apr. 31, 2008) ("Stellar testimony was given by . . . several post-abortive women from Operation Outcry."). For Mississippi, see Operation Outcry, Lisa Dudley's Testimony—Mississippi (Mar. 23, 2006), http://www.operationoutcry.org/pages.asp?pageid=37528 ("Because of the scientific evidence we now have, because of testimony upon testimony of women about how abortion hurt them, because we now know it is not good for women and it really isn't a choice, abortion should no longer be legal."); Operation Outcry, Tracy Reynolds' Testimony—Mississippi (Mar. 23, 2006), http://www.operationoutcry.org/pages.asp?pageid=37529. For Oklahoma, see Calvey Capitol Update, Compiled Press Reports from the Week of January 13-20, 2007 (Jan. 20, 2007), http://www.kevincalvey.com/1-20-06.htm ("Oklahoma Operation Outcry ladies give testimonies on the devastation of abortion."). Operation Outcry claims to have introduced the affidavits into legislative hearings in Georgia, Louisiana, Mississippi, Ohio, South Dakota, and Texas. The Justice Found., *supra* note 15.

20. One of the most vivid illustrations is David Reardon's Elliot Institute website, which is making special efforts to disseminate the coercion frame in a series of posters it offers visitors to

support of the abortion ban that will appear on the South Dakota ballot this fall.[21]

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the website. *See* Abortion is the Unchoice, Print Ads, http://www.unfairchoice.info/display.htm (last visited Apr. 31, 2008). Several of the ads include the claim that sixty-four percent of abortions are coerced and that sixty-five percent of women who have had abortions suffer symptoms of post-traumatic stress disorder. *Id.*

The harm-to-women approach has spread throughout the antiabortion movement on multiple levels. Several leading antiabortion organizations feature woman-protective reasoning as a primary argument against the availability of abortion. *See, e.g.*, *The Bitter Price of Choice*, AM. FEMINIST, Spring 1998, at 14, 16, *available at* http://www.feministsforlife.org/taf/1998/spring/Spring98.pdf (featuring several articles about the physical and psychological price women pay for abortion rights); Concerned Women for America, Abortion's Physical and Emotional Risks, http://www.cwfa.org/articledisplay.asp?id=3111&department=CWA&categoryid=life (last visited Apr. 31, 2008) ("Regardless of the supposed 'normalcy' of abortion, the procedure continues to pose countless physical and emotional risks to American women—sometimes even costing them their lives."); Focus on the Family, FAQ: What Can You Tell Me About the Possible Link Between Abortion and Breast Cancer, http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=420 (last visited Apr. 31, 2008) ("Recent studies reveal a correlation between abortion and breast cancer."); Focus on the Family, Post-Abortion Kit for Women, http://resources.family.org (search for "post-abortion kit," then follow "Post-Abortion Kit for Women" hyperlink) (last visited Apr. 31, 2008) (offering a Post-Abortion Kit for a suggested donation of twenty-seven dollars, which "provides hope, healing, and ultimately freedom for women suffering the after-effects of abortion" and includes "the encouraging book, *Forgiven and Set Free*"); Nat'l Right to Life Comm., Is Abortion Safe?, http://www.nrlc.org/abortion/ASMF/#Is_Abortion_Safe (last visited Apr. 31, 2008) (providing links to articles describing abortion as physically dangerous due to risks of pain, bleeding, hemorrhage, and infection, and psychologically damaging due to risks of developing suicidal ideations, substance abuse problems and "post-abortion syndrome," among other problems); Operation Rescue, Post Abortion Healing, http://www.operationrescue.org/?p=80 (last visited Apr. 31, 2008) ("Post-Abortion Syndrome (PAS) is a type of Post-Traumatic Stress Disorder. It occurs when a woman is unable to work through her emotional responses due to the trauma of an abortion.").

Other antiabortion organizations feature the harm-to-women argument as one among many abortion-related concerns. *See, e.g.*, Am. Life League, Abortion Risks, http://www.all.org/article.php?id=10117 (last visited Apr. 31, 2008) (listing breast cancer, "post-abortion grief," and "emotional and physical disturbances" as among the most common risks of abortion); Priests for Life, After Abortion, http://www.priestsforlife.org/afterabortion/index.htm (last visited Apr. 31, 2008) (listing healing resources); Pro-Life Action League, Getting Help, http://www.prolifeaction.org/faq/help.htm (last visited Apr. 31, 2008) (listing organizations and books for "post-abortion healing").

21. For the abortion ban that South Dakota voters will consider in the 2008 election, see South Dakota Initiated Measure 11, An Act to Protect the Lives of Unborn Children, and the Interests and Health of Pregnant Mothers, By Prohibiting Abortions Except in Cases Where the Mother's Life or Health Is At Risk, and in Cases of Rape and Incest (2008), *available at* http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2008/2008regulateperformanceofabortions.pdf. Vote Yes For Life, the organization leading the initiative drive for the ban, posts the *South Dakota Task Force Report on Abortion* prominently on its website, as well as endorsements that invoke woman-protective arguments on behalf of the proposed ban. *See* Vote Yes For Life, Endorsements for the Initiative, http://www.voteyesforlife.com/initiative.html (last visited Apr. 31, 2008). Among the endorsements are statements from: Jack Willke, former

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Until the Court's decision in *Carhart*, the rise of gender-based antiabortion arguments was barely noticed in the mainstream press or by scholars outside the public health field. I first encountered woman-protective antiabortion argument (WPAA) in the legislative history of the South Dakota ban.[22] Having written on sex-equality justifications for the abortion right[23] and on the role of social movement conflict in forging new constitutional understandings,[24] I was fascinated by the appearance of new justifications for protecting the right to life—by the vivid evidence that there was ongoing evolution in the right's reasons.

president of National Right to Life Committee ("My total experience has also long since convinced me that abortion certainly kills a living human, but it is also very dangerous and damaging to mothers and to many fathers."); American Association of ProLife Obstetricians and Gynecologists ("The medical literature attests to a rather marked increased incidence, after elective abortion, of suicide. Depression, substance abuse, and relational difficulties are increased. . . . There is also evidence of a future increase in breast cancer incidence, particularly from the loss of the 'protective effect' against breast cancer conferred on the woman by a full term pregnancy."); Frank Pavone, head of Priests for Life ("As National Pastoral Director of Rachel's Vineyard, I see every day the damage abortion does to the mothers and fathers of aborted children."); ALIVE! Women with a Passion ("[A]bortion is harmful not only to the tiny baby, but also to the woman and others involved. The so called freedom to choose that Planned Parenthood offers is actually bondage. If you are in bondage from an abortion or maybe even multiple abortions, please know that there is support for you. There is healing and forgiveness and a place of rest for you."). *Id.*; *see also* Vote Yes For Life Endorsements, http://www.voteyesforlife.com/initiative.html#SamuelCasey (last visited Apr. 31, 2008) (reporting the endorsement of Samuel B. Casey, Executive Director & CEO of the Christian Legal Society, and explaining that the proposed ban is based on the state's Task Force Report on Abortion).

22. During the debate over the South Dakota abortion ban, Sarah Blustain and I reported on the striking transformation in antiabortion argument in evidence there. *E.g.*, Reva Siegel & Sarah Blustain, *Mommy Dearest?*, AM. PROSPECT, Oct. 2006, at 22, 22, *available at* http://www.prospect.org/cs/articles?articleId=12011. I then published a lecture documenting the history and claims of the woman-protective argument and demonstrating, in light of this evidence, that an abortion ban based on the woman-protective justifications South Dakota offered violates the Equal Protection Clause. Siegel, *The New Politics of Abortion*, *supra* note 8, at 1040–50.

23. *E.g.*, Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992) [hereinafter Siegel, *Reasoning from the Body*]. For an account of how equality arguments for the abortion right have evolved, see generally Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality Arguments for Reproductive Rights*].

24. *E.g.*, Reva B. Siegel, Brennan Center Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1350–66 (2006) [hereinafter Siegel, *Constitutional Culture*].

There has been little inquiry into the history of the post-abortion syndrome (PAS) claim,[25] and even less attention given to the developments in antiabortion advocacy that led to the transformation of PAS, a therapeutic discourse, into WPAA, a legal and political argument. This Lecture investigates the social movement dynamics that produced woman-protective antiabortion argument, and explores the political conditions under which leaders of the antiabortion movement embraced gender paternalism and began to supplement or even supplant the constitutional argument "Abortion kills a baby" with a new claim "Abortion hurts women."

The Lecture offers a provisional first account of the rise and spread of WPAA. It traces the development of gender-based antiabortion advocacy, examining the rise of post-abortion syndrome (PAS) claims in the Reagan years and the first struggles in the antiabortion movement about whether the right to life is properly justified on the ground of women's welfare. My story then follows changes in the abortion-harms-women claim, as it is transformed from PAS—a therapeutic and mobilizing discourse initially employed to dissuade women from having abortions and to recruit women to the antiabortion cause—into WPAA, a political discourse forged in the heat of movement conflict that seeks to persuade audiences *outside* the movement's ranks in political campaigns and constitutional law. I tell a story in which social movement mobilization, coalition, and conflict each play a role in the evolution and spread of this constitutional argument, in the process forging new and distinctly modern ways to talk about the right to life and the role morality of motherhood in the therapeutic, public health, and political rights idiom of late twentieth-century America.

As importantly, the rise of women-protective anti-abortion argument illustrates the role that social movement conflict plays in establishing the Constitution's authority and meaning. In the United States, longstanding traditions teach those estranged from government's interpretation of the Constitution that they can mobilize in protest and assert alternative understandings of it; but

25. The best account I have since found is Ellie Lee, *Reinventing Abortion as a Social Problem: "Postabortion Syndrome" in the United States and Britain*, *in* HOW CLAIMS SPREAD: CROSS-NATIONAL DIFFUSION OF SOCIAL PROBLEMS 39, 46–47 (Joel Best ed., 2001). For a lengthy profile of "post-abortion syndrome" activists written in the wake of the South Dakota ban campaign, see Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 27, 2007, § 6 (Magazine), at 40.

rarely if ever do advocates succeed in persuading officials to adopt a movement's views unmodified. To earn the confidence of the people, advocates must counter opposing arguments and are often moved to revise their claims in the quest to persuade. The quest to persuade disciplines insurgent claims about the Constitution's meaning, and may lead advocates to express convictions in terms persuasive to others, to internalize elements of counterarguments and to engage in other implicit forms of convergence and compromise. Social movement conflict, when constrained and channeled by constitutional culture, can thus promote forms of solidarism and attachment, and help steer constitutional development in democratically responsive ways. Struggles of this kind can inform judicial review and, as I have elsewhere argued, infuse the Constitution with new meaning and authority.[26]

The appearance of WPAA in the pages of the United States Reports marks a crucial phase of the claim's legal and political authority—a new, although far from final, chapter in the evolution of the right's reasons. The stakes of this development did not escape notice. *Carhart*'s discussion of gender-paternalist justifications for abortion restrictions prompted passionate objection from Justice Ginsburg and three other dissenting Justices, who insisted that this new rationale for restricting abortion enforced unconstitutional stereotypes about women's agency and women's roles.[27] If effective movement advocacy helped loft WPAA into the pages of the United States Reports, its future trajectory will be shaped by new rounds of

26. *See* Siegel, *Constitutional Culture*, *supra* note 24, at 1350–66.

27. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., joined by Stevens, Souter, & Breyer, JJ., dissenting). Justice Ginsburg argued:

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

Id. (internal citations and quotation marks omitted). For my account of the sex equality objections to woman-protective antiabortion argument, see Siegel, *The New Politics of Abortion*, *supra* note 8.

movement conflict and responsive adjudication—a dynamic that *Carhart*'s majority and dissenting Justices all seemed to appreciate. This Lecture's story is thus, in a very deep sense, unfinished.

Struggle over abortion has precipitated ongoing public conflict about our understanding of women. This Lecture is one of several reflections on the abortion controversy in which I explore the historic logic of that debate.[28] The Lecture offers an extended meditation on the question: What constitutional understanding of "women" has the Supreme Court embraced when *Carhart* observes:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid*.
>
> . . . .
>
> . . . The State has an interest in ensuring so grave a choice is well informed.[29]

I. WOMAN-PROTECTIVE ANTIABORTION ARGUMENT IN THE SOUTH DAKOTA CAMPAIGN

South Dakota offers a rich site to begin exploring the basic tenets of the abortion-hurts-women argument. As I have noted, Leslee Unruh, who led the referendum campaign in support of the ban, quite openly acknowledged that she was avoiding conventional fetal-protective argument: "I refuse to show pictures of dead babies . . . . That's what the old way was, and that's why they were losing all these years."[30] The formal legislative history of the ban, a seventy-page *Report of the South Dakota Task Force to Study Abortion*,[31] is by far the most comprehensive government account of the arguments and evidence for protecting women from abortion. The Report's findings include traditional fetal-focused items, emphasizing that a

28. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Siegel, *Constitutional Culture*, *supra* note 24; Siegel, *The New Politics of Abortion*, *supra* note 8; Siegel, *Reasoning from the Body*, *supra* note 23; Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 23.

29. *Carhart*, 127 S. Ct. at 1634 (majority opinion).

30. Davey, *supra* note 10 (quoting Leslee Unruh).

31. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11.

fetus is a "whole separate unique living human being"[32] and reporting on new studies concerning the physiology of human development.[33] But more than half of the ten findings and over half of the Report itself focus on women.[34] In these portions of the Report, the Task Force advanced its dual claim: that a regime of legally protected abortion posed a threat to women's freedom and a threat to women's health, exposing women to abortions they do not want and, in all events, should not have.[35]

The Report substantiates these claims with two types of evidence: narrative and empirical. South Dakota justified banning abortion on the ground that women in the state had not in fact chosen to have abortions; rather they were misled or coerced into having abortions. For these claims, the Task Force relied on the Operation Outcry affidavits that would be cited later in *Carhart*. The South Dakota Task Force asserted it received the testimony of 1,950 women,[36] reporting that "[v]irtually all of them stated they thought their abortions were uninformed or coerced or both."[37] The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or even the clinic—because "[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child."[38] Alternatively, the Report asserted that even if women chose the procedure, they should not have, advancing two very different kinds of evidence to substantiate the claim.

To substantiate the claim that abortion harms women, the Report offered empirical evidence. Citing PAS studies that contravene the conclusions of government and professional authorities,[39] the Report asserted that a woman who is encouraged "to

32. *Id.* at 5.

33. *Id.* at 23–24.

34. *Id.* at 31–58, 65–69.

35. *Id.* at 54.

36. *Id.* at 38. For information on the genesis of the affidavits, see *supra* notes 12–20 and accompanying text.

37. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 38. The Report relies heavily on the affidavits and repeatedly cites the affidavits as evidence. *See, e.g.*, *id.* at 33 ("We find all of these testimonies moving and the following are examples of their expressions of guilt, sadness, and depression.").

38. *Id.* at 56.

39. *Id.* at 41–52; *see also infra* note 131 (quoting the South Dakota Task Force Report

defy her very nature as a mother to protect her child,"[40] is likely "to "suffer[] significant psychological trauma and distress,"[41] and will be put at risk of a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation[42] to breast cancer.[43] The South Dakota legislature embraced the findings of the Task Force rather than the judgments of leading psychology and psychiatry professionals and government oncologists,[44] and banned abortion to "protect the rights, interests,

rejecting the medical findings of ACOG and APA).

40. *Id.* at 56.

41. *Id.* at 47–48.

42. *Id.* at 43–44. The Report cited testimony from a number of well-known antiabortion advocates asserting that women who have abortions "experience higher rates of mental health problems." *Id.* at 43. Dr. Priscilla Coleman, for example, argued that based on her review of twelve studies that she and her had colleagues had published, "Women with a history of induced abortion are at a significantly higher risk for the following problems: a) inpatient and outpatient psychiatric claims, particularly adjustment disorders, bipolar disorder, depressive psychosis, neurotic depression, and schizophrenia; b) substance use generally, and specifically during a subsequent pregnancy; and c) clinically significant levels of depression, anxiety, and parenting difficulties . . . ." *Id.* at 42–43.

43. *Id.* at 52. While government has closely investigated the question of whether abortion is linked to an increased incidence of breast cancer and concluded that the evidence shows no association, *see infra* note 44, the Task Force Report refuses to follow those findings. It strongly intimates that a correlation between abortion and breast cancer exists when it observes that "[s]orting out the science and truth of this matter is of the utmost importance so that relevant informed consent information can be provided to women considering an abortion," *id.* at 52, and, further, that "it is clear that the CDC [Center for Disease Control] statistics [on abortion mortality] do not include the vast majority of deaths due to abortions because they do not include deaths from suicide, deaths from physical complications from abortions, and *deaths due to any of the cancers in which abortions may be a significant contributing factor*," *id.* at 49 (emphasis added).

44. After careful inquiry, both the National Cancer Institute and the World Health Organization have concluded that abortion is not associated with an increased risk of breast cancer. *See* Nat'l Cancer Inst., Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk (May 30, 2003), http://www.nci.nih.gov/cancertopics/factsheet/Risk/abortion-miscarriage; National Cancer Institute, Summary Report: Early Reproductive Events and Breast Cancer Workshop (Mar. 25, 2003), http://www.cancer.gov/cancerinfo/ere-workshop-report; World Health Org., Fact Sheet No. 240: Induced Abortion Does Not Increase Breast Cancer Risk (June 2000), http://www.who.int/mediacentre/factsheets/fs240/en/index.html; *see also* Siegel, *The Politics of Abortion*, *supra* note 8, at 1012 n.100 (discussing the history of the inquiry).

There is a substantial body of scholarship that repudiates claims of post-abortion syndrome. *See* Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194, 1202–03 (1992) ("The best studies available on psychological responses to unwanted pregnancy terminated by abortion in the United States suggest that severe negative reactions are rare, and they parallel those following other normal life stresses."); David A. Grimes & Mitchell D. Creinin, *Induced Abortion: An Overview for Internists*, 140 ANNALS INTERNAL MED. 620, 624 (2004) ("[Based on a review of the literature], [i]nduced abortion does not harm women's emotional health . . . . Indeed, the most common reaction to abortion is a

and health of the mother, and the life of her unborn child,"[45] and "the pregnant mother's natural intrinsic right to a relationship with her child."[46] Yet it was not solely empirical evidence that led the South Dakota legislature to embrace the abortion-harms-women argument. Numbers and stories reinforced each other: the Operation Outcry affidavits and other narrative testimony played a crucial role.

The day the statute was introduced in the South Dakota legislature, Nicole Osmundsen, who counsels women at a Sioux Falls crisis pregnancy center—a center that tries to deter women from

profound sense of relief. In some studies, abortion has been linked with improved psychological health because the abortion resolved an intense crisis in the woman's life." (citations omitted)); Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 168 CANADIAN MED. ASS'N J. 1257, 1257–58 (2003) ("[David Reardon and his colleagues] report that subsequent psychiatric admission rates were higher for women who had an abortion than for women who delivered. . . . This conclusion is misleading . . . . It is inappropriate to imply from these data that abortion leads to subsequent psychiatric problems . . . . The findings of Reardon and colleagues are inconsistent with a number of well-designed earlier studies . . . . All of these studies concluded that the emotional well-being of women who abort an unplanned pregnancy does not differ from that of women who carry a pregnancy to term."); Brenda Major et al., *Personal Resilience, Cognitive Appraisals, and Coping: An Integrative Model of Adjustment to Abortion*, 74 J. PERSONALITY & SOC. PSYCHOL. 735, 741 (1998) ("Overall, our sample of women did not report high levels of psychological distress 1 month following their abortions . . . . On average women also reported relatively high levels of positive well-being (M = 4.60 on a 6-point scale, SD =.69) and very high satisfaction with their abortion decision (M = 4.05 on a 5-point scale, SD = .94)."); Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777, 777, 780 (2000) ("Most women do not experience psychological problems . . . 2 years postabortion, but some do. Those who do tend to be women with a prior history of depression . . . . Results support prior conclusions that severe psychological distress after an abortion is rare."); Lisa Rubin & Nancy Felipe Russo, *Abortion and Mental Health: What Therapists Need to Know*, 27 WOMEN & THERAPY 69, 73 (2004) ("Antiabortion advocates allege that 'postabortion syndrome' is a type of post-traumatic stress disorder (PTSD), though no scientific basis exists for applying a PTSD framework to understand women's emotional responses to a voluntarily obtained legal abortion."); Nancy Felipe Russo & Jean E. Denious, *Violence in the Lives of Women Having Abortions: Implications for Practice and Public Policy*, 32 PROF. PSYCHOL. 142, 142 (2001) ("When history of abuse, partner characteristics, and background variables were controlled, abortion was not related to poorer mental health."); Nada Stotland, *The Myth of Abortion Trauma Syndrome: Update, 2007*, 42 PSYCHIATRIC NEWS 28, 28 (2007) ("[T]he assertions of psychological damage made by legislatures and the Supreme Court are contrary to the scientific evidence. . . . APA [American Psychiatric Association] invests millions of dollars and years of expert deliberation to craft the titles and definitions of psychiatric diagnoses. 'Abortion trauma syndrome' and 'post-abortion psychosis' are inventions disguised to mimic those diagnoses, and they demean the careful process. . . . Co-opting psychiatric nomenclature and basing public policy on false assertions are not [worthy of our highest respect]."); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (failing to recognize post-abortion syndrome).

45. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 69.

46. *Id.* at 67. The Report calls the mother's right "fundamental." *Id.* at 9.

having abortions—testified to the South Dakota legislature that women

> . . . . [later suffer problems ranging from] depression, uncontrollable crying, bonding issues with subsequent children, regrets, to drug and alcohol abuse, to eating disorders . . . to suicide attempts and very very destructive behaviors . . . . The most significant example I can give you was the woman . . . who could no longer vacuum her house because she can't hear the sound of a vacuum; it reminds her of the suction machine of her abortion procedure. . . . Do they ever fully recover? I would fair to say no [*sic*].[47]

In this account, a woman who has an abortion has been injured in her very womanhood—she is impaired in her capacity to perform as a wife and mother. The vacuum image is striking—and recurrent. Esther Monica Ripplinger reported "[f]ear of vacuum cleaner," as one of her post-abortive symptoms in Operation Outcry–provided testimony to the Supreme Court in *Gonzales v. Carhart*.[48] Indeed, I can find variants of Osmundsen's claim reaching back to the 1980s. Consider Paula Ervin's *Women Exploited: The Other Victims of Abortion*[49]: "'Some women can't vacuum their rugs because the sound of the vacuum cleaner reminds them . . . of the fact that they've had an abortion,' Carol K.—a post-abortive woman and now a post-abortion counselor—told Ervin. 'So when they're cleaning their rugs, they can't do it. They call their husband or a friend in to vacuum their rugs for them.'"[50] The vacuum symptom expresses abortion's harm to women in the language of trauma and repressed memory. The claim is powerful enough that it has been repeated for two decades now.[51]

There are antecedents for this form of sex role–based argument against abortion. Claims that women who aborted pregnancies would suffer for resisting pregnancy and motherhood were common in the medical profession's campaign to criminalize abortion and

47. *Hearing on H.B. 1215 Before the H. Comm. on State Affairs*, 2006 Leg., 81st Sess. (S.D., Feb. 8, 2006) (testimony of Nicole Osmundsen) (audio file available at http://legis.state.sd.us/sessions/2006/1215.htm, quote 15 minutes and 50 seconds into the file).

48. Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner, *supra* note 5, apps. 76–77.

49. PAULA ERVIN, WOMEN EXPLOITED: THE OTHER VICTIMS OF ABORTION (1985).

50. *Id.* at 55.

51. The movement's crisis pregnancy centers played a key role in diagnosing and publicizing PAS symptoms, including vacuum-associated trauma. *See infra* note 68 and accompanying text.

contraception in the nineteenth century[52]—and these claims exerted force on psychology in the era of abortion's decriminalization.[53] But in the years after *Roe*, the antiabortion movement did not publicly advance its arguments for criminalizing abortion in these sex role–based terms. In this period, the movement's core arguments against abortion urged, "It's a baby!"—and not, "It's a mother!"[54] In the years after *Roe*, it was not the antiabortion movement that was making claims about protecting women's choices and women's health; *these were the claims and frames of the movement's abortion-rights adversaries*.

So how did the antiabortion movement come to attack abortion in the language of the abortion rights claim? In arguing that legal protection for abortion threatens women's health and freedom, the South Dakota Task Force to Study Abortion relied heavily on authorities in the national antiabortion movement, providing a chain of references that assist in reconstructing the genesis and spread of WPAA.[55]

II. A SOCIAL MOVEMENT HISTORY OF WOMAN-PROTECTIVE ANTIABORTION ARGUMENT

In what follows, I offer an initial account of the development and spread of the abortion-harms-women argument, which I understand to be a "collective action frame." Social movement theorists interested in the role that meaning plays in the dynamics of mobilization study "collective action frames," the beliefs that move

52. Nineteenth-century antiabortion advocates argued that contraception and abortion caused all manner of harms to women. Horatio Robinson Storer, the leader of the abortion criminalization campaign, argued that "[i]ntentionally to prevent the occurrence of pregnancy, otherwise than by total abstinence from coition, intentionally to bring it, when begun, to a premature close, are alike disastrous to a woman's mental, moral, and physical well-being." HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 76 (1867). Another commentator, Edwin Hale, wrote that "abortion brings sickness and perhaps death, or numerous other evils in its train, besides *remorse*, which will come sooner or later." EDWIN M. HALE, THE GREAT CRIME OF THE NINETEENTH CENTURY 10 (1867). For a survey of arguments for criminalizing abortion and contraception in the nineteenth century, see Siegel, *The New Politics of Abortion*, *supra* note 8, 1000–02; Siegel, *Reasoning from the Body*, *supra* note 23, at 280–323.

53. For a sampling of mid-twentieth-century psychological literature, much of it Freudian, analyzing women's rejection of motherhood as an emotional disorder, see generally Lee, *supra* note 25.

54. For an account of Dr. Jack Willkie, see *infra* text accompanying note 69.

55. For analysis, see Siegel, *The New Politics of Abortion*, *supra* note 8, at 1014–29.

people to make common cause with one another.[56] They analyze the "frame alignment processes" that connect individual and group understandings of identity, interest, and injury in such a way as to motivate and direct collective advocacy for political change.[57]

The story I have been able to reconstruct so far suggests that WPAA has *intra*- and *inter*-movement logic; it is both expressive and strategic. As I will show, (1) claims about post-abortion syndrome first appeared in the 1980s as a therapeutic, mobilizing discourse within the antiabortion movement, deployed primarily among women volunteers and clients in the "crisis pregnancy" network during a period when the antiabortion movement generally argued the moral and political case against abortion in fetal-focused terms; (2) Leaders of the antiabortion movement who passionately argued abortion as a question of protecting the unborn initially resisted woman-centered forms of antiabortion argument, but (3) came to embrace the claim strategically, under conditions of escalating social movement conflict, through a learning process in which they came to believe in the argument's power to persuade audiences outside the movement's ranks.

A. Post-Abortion Syndrome: A Mobilizing Discourse

The concept of "post-abortion syndrome" on which so much of the South Dakota Task Force Report is based was first proposed in the early 1980s by Vincent Rue, who has since become an international authority in the antiabortion movement whose work is cited nine times in the Report.[58] In 1981, Rue—then a professor of family relations who directed the Sir Thomas More Clinics of Southern California—testified before the Senate about abortion's social effects.[59] His testimony, which described abortion as

56. *See* Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1721 (2006); David A. Snow, *Framing Processes, Ideology, and Discursive Fields*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 380, 384 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

57. David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464 (1986). *See generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, ANN. REV. SOC. 611 (2000) (providing a theoretical overview of the concept).

58. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 39, 41, 44, 45, 53, 54.

59. *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 329–39 (1981) (testimony of Vincent Rue).

"antifamily," elaborated that charge in a bill of particulars culminating in the claims that "abortion emasculates males," "abortion reescalates the battle between the sexes," and "abortion is a psychological Trojan Horse for women"—a claim Rue advanced by attacking the pervasive clinical view within psychology that the procedure had "only temporary, nonpathological, and limited adverse emotional sequelae."[60] In Rue's view, "guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will."[61]

Over the next several years, Rue and a doctoral student named Anne Speckhard elaborated these claims by drawing on the then-new concept of post-traumatic stress disorder (PTSD).[62] The PTSD concept had only recently been developed to explain the experience of Vietnam War veterans. Rue and Anne Speckhard modeled the diagnostic criteria of abortion trauma on the American Psychological Association's Diagnostic and Statistical Manual (DSM) while greatly expanding the symptomatology.[63]

In this therapeutic form, post-abortion syndrome was embraced by women in the antiabortion movement who first heard Rue speak at a National Right to Life Committee (NRLC) convention in 1982 and soon thereafter organized Women Exploited By Abortion (WEBA).[64] "We desperately wanted to help create a safe place for

60. *Id.* at 330–31.

61. *Id.* at 332. An appendix to Rue's prepared statement identified studies of abortion dating back to the 1960s whose "major findings" were summarized in a list beginning: "Abortion is poor treatment for mental illness or prevention," "Abortion increases bitterness toward men, especially the father," "More motherly and more mature women feel more post-abortion guilt," "The stress from previous abortions can delay preparation for subsequent childbearing and retard mother child bond formation," "Clinical study suggesting post-abortion anxiety and disruption of marital sexual relations." *Id.* at 363 (prepared statement of Vincent Rue); *see also* Vincent Rue, *Forgotten Fathers: Men and Abortion*, AM. LIFE LOBBY, Feb. 1985, at 6, 9 ("Abortion is a far greater dilemma for men than researchers, counselors and women have even begun to realize.").

62. *See Abortion and Family Relations: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 337, 357–59 (1981) (testimony of Vincent Rue) (describing the alleged psychological consequences of abortion on women).

63. Lee, *supra* note 25, at 46–47. Vincent Rue is credited with first invoking the concept of post-abortion trauma in congressional hearings and at antiabortion conferences in the early 1980s. *Id.* at 63. Anne Speckhard then wrote a dissertation on the concept, which she completed in 1985. Anne Catherine Speckhard, The Psycho-Social Aspects of Stress Following Abortion (May 1985) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author).

64. Olivia Gans, Nat'l Right to Life Comm., When the Mothers Found Their Voice: The Emergence of the Post-Abortion Presence in America (Jan. 1998), http://www.nrlc.org/news/1998/NRL1.98/oliva.html. Gans noted:

any woman to speak freely about her own pain and find healing and peace," one of its founding members later recalled.[65] Although the DSM does not recognize PAS, WEBA, a small organization with membership in the thousands in the 1980s, was able to disseminate large volumes of PAS broadcasts and publications through the Christian Broadcast Network (CBN) and other evangelical institutions.[66] As importantly, volunteers began to use PAS narratives to dissuade women from considering abortion and to help women manage conflict they associated with abortions at the movement's growing network of "crisis pregnancy" counseling centers (CPCs).[67]

> We desperately wanted to help create a safe place for any woman to speak freely about her own pain and find healing and peace . . . . Most importantly, pro-lifers understood how deeply women were lied to by abortionists. They realized that the mothers of the unborn children killed by abortion were themselves the second victims of abortion.

Id.

65. *Id.*

66. SARA DIAMOND, SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT 97–98 (1989) ("'We want to neutralize the word "choice,"' says Nola Jones, one of the leaders of Victims of Choice, a spin-off from a nationwide project called Women Exploited by Abortion (WEBA)."); *see also* Gans, *supra* note 64 ("The post-abortion arm of the pro-life movement was absolutely created by women for women who learned too late what was really at stake in their 'choice.'").

67. Harold O.J. Brown, Dr. C. Everett Koop, and Francis Schaeffer founded the Christian Action Council (later known as Care Net) in 1975. Joseph A. D'Agostino, *Conservative Spotlight: Care Net*, HUMAN EVENTS, Aug. 4, 2003, at 22, 22. "Christian Action Council began as a political lobby when evangelical Protestants joined Catholics in their post-*Roe v. Wade* opposition to abortion. Six years later, in 1981, the CAC began organizing crisis-pregnancy centers." Tim Stafford, *Inside Crisis Pregnancy Centers*, CHRISTIANITY TODAY, Aug. 17, 1992, at 20, 23; *see also* Jane Gross, *Anti-Abortion Revival: Homes for the Unwed*, N.Y. TIMES, July 23, 1989, at A1 ("Leaders of anti-abortion organizations say they were delinquent in the early years of the movement, slow to offer help to desperate women while they themselves were lobbying, legislating and invading abortion clinics. But since the early 1980's, when the Rev. Jerry Falwell opened a home for unwed mothers . . . organizations including the National Right to Life Committee and the Christian Action Council have built a network of alternative services for pregnant women contemplating abortion.").

For one account of the rise of the CPCs, see DIAMOND, *supra* note 66, at 96–97, noting that "[b]y 1986, there were an estimated 2,100 such centers." Sara Diamond describes CPC practices in the 1980s:

> In centers that attempt to disguise their anti-abortion stance, women are typically given a urine test and while waiting for the results are shown an anti-abortion film such as "The Silent Scream." Counsellors [*sic*] make frequent reference to the woman as the "mother" and to "the baby." They describe with certainty the horrible physical and emotional effects of abortion in an effort to get women to sign up for the center's plan to "help" the woman find a loving (Christian) family wanting to adopt her unborn child.

Id. at 97. By the decade's end David Reardon—whose work is cited by South Dakota almost as frequently as Rue's—had begun the work of institutionalizing PAS, publishing *Aborted Women: Silent No More*, and founding the Elliot Institute to support and study abortion "survivors."

CPCs played a key role in disseminating PAS discourse through the antiabortion movement.[68]

Yet despite the spread of PAS discourse through the CPCs and on CBN broadcasts, woman-focused claims were not the public face of the antiabortion movement. During the 1980s, antiabortion advocacy remained fetal-focused, emphasizing the importance of protecting the unborn. In the decade after *Roe*, advocates such as Jack Willke of the National Right to Life Committee and Bernard Nathanson earned international renown by drawing on new, in utero photography featured in *Life Magazine* to argue the morality of abortion through visual images of the fetus—most famously, in the video *Silent Scream*.[69] During the 1980s, the movement advocated

S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 41, 43, 44, 45, 50; Elliot Inst., David C. Reardon, Biographical Sketch, http://www.afterabortion.info/biograp.html (last visited Apr. 31, 2008).

68. To take an example considered earlier, the CPCs have played a role in disseminating the belief that the sound of a vacuum is a trigger for PAS symptoms. *See supra* notes 47–51 and accompanying text. Pregnant Pause, a prolife internet resource maintained by Ohio Right to Life, cites the PAS criteria established by Ann Speckhard and Vincent Rue: "Persistent symptoms . . . [include] [p]hysiologic reactivity upon exposure to the events or situations that symbolize or resemble some aspect of the abortion . . . [such as] breaking out in profuse sweating upon pelvic examinations or hearing vacuum pump sounds." Pregnant Pause, Recognizing Post Abortion Syndrome, http://www.pregnantpause.org/aborted/seepas.htm (last visited Apr. 31, 2008). Ramah International, a Catholic CPC clearinghouse, claims that "the sound of a vacuum cleaner's suction" may trigger "flashbacks." Ramah Int'l, Post-Abortion Syndrome (PAS), http://ramahinternational.org/post-abortion-syndrome.html (last visited Apr. 31, 2008). The Northern Hills Pregnancy Center in Spearfish, South Dakota counsels clients that abortion may cause "[i]nability to tolerate the sound of a vacuum cleaner or dentist's drill, because it sounds like the suction machine." SIECUS (SEXUALITY INFORMATION & EDUCATION COUNCIL OF THE UNITED STATES) PUBLIC POLICY OFFICE, STATE PROFILE: SOUTH DAKOTA 3 (2005), *available at* http://www.siecus.org/policy/states/2004/South%20Dakota.pdf.

69. In the 1970s, Jack Willke first drew on new photographic technologies to pioneer antiabortion argument through pictures of the embryo/fetus in utero—a technique that he and others perfected in ensuing decades. *See* Cynthia Gorney, *The Dispassion of John C. Willke*, WASH. POST, Apr. 22, 1990 (Magazine), at 20, 24. Bernard Nathanson's antiabortion film, *The Silent Scream*, popularized these images. *See generally* Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 264 (1987) ("*The Silent Scream* marked a dramatic shift in the contest over abortion imagery. [I]t [shifted]. . . antiabortion rhetoric from a mainly religious/mystical to a medical/technological mode[,] . . . bringing the fetal image 'to life.'").

The Silent Scream argues the case against abortion as a question concerning the importance of protecting unborn life. But if the visual and narrative argument of the film is paradigmatically fetal-focused, at several junctures the film does give voice to woman-focused arguments against abortion that were then just beginning to circulate. *See* Silent Scream, Script & Photos, http://www.silentscream.org/silent_e.htm (last visited Apr. 31, 2008). The film explains:

outside abortion clinics through increasingly confrontational practices of "rescue"—seeking to save the unborn through at times violent argument with providers and patients, until such time as the movement could ratify a Human Life Amendment.[70] (As Randall Terry queried, "If a child you love was about to have his arms and legs ripped off, and you could intervene to save him, what would you do? . . . You would do whatever you could to physically intervene and save the life of that child. That is the appropriate response to murder.")[71]

In this period, PAS arguments were not simply overshadowed by fetal-focused arguments;[72] at times PAS arguments were powerfully

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> In discussing abortion we must also understand that the unborn child is not the only victim. Women themselves are victims, just as the unborn children are. Women have not been told the true nature of the unborn child. They have not been shown the true facts of what an abortion truly is. Women in increasing numbers . . . hundreds . . . thousands . . . and even tens of thousands have had their wombs perforated, infected, destroyed. Women have been sterilized, castrated, all as a result which they have had no true knowledge. This film and other films which may follow like it, must be a part of the informed consent for any woman before she submits herself to a procedure of this sort.

Id.

70. *See generally* James Bopp, *An Examination of Proposals for a Human Life Amendment*, *in* RESTORING THE RIGHT TO LIFE: THE HUMAN LIFE AMENDMENT 3 (J. Bopp ed., 1984) (discussing contemporary proposals for a Human Life Amendment). The examples of violent confrontations are numerous. *See, e.g.*, James Barron, *Violence Increases Against Abortion Clinics in '84*, N.Y. TIMES, Nov. 5, 1984, at B15, (reporting nineteen fires and explosions at clinics in 1984); Marjorie Miller, *200 Protest Bombs, Fires at Abortion Centers*, L.A. TIMES, Jan. 22, 1985, pt. 2, at 2 (describing a rally protesting clinic violence); Charles Piller, *Anti-Abortion War: Frustration Gives Birth to Violence*, L.A. DAILY J., Dec. 16, 1982, at 4 (reporting a spike in violence against abortion providers); *Six Protesters Storm Abortion Clinic; Two Hurt*, L.A. TIMES, Mar. 27, 1986, pt. 1, at 6 (reporting the storming of a Florida abortion clinic).

71. Randall A. Terry, *Operation Rescue: The Civil-Rights Movement of the Nineties*, POL'Y REV., Winter 1989, at 82, 83.

72. For a contemporary source that captures the relative visibility of these two very different faces of the movement, see Stafford, *supra* note 67, at 20.

> Say the word *prolife* and the mind's eye sees picketers jamming sidewalks outside the Supreme Court, "rescuers" hauled off by police using chokeholds, protestors chanting that abortion is murder. *Prolife* is an army fighting in the streets, struggling for the allegiance of voters, congressmen, governors, and judges.
>
> But a different, quieter, nonpolitical war goes on in the hearts and minds of women contemplating abortion. . . . They are often terrified and embarrassed as, amid the rhetoric and emotion of political war, they make one of the most crucial decisions of their lives. . . . Fighting for their allegiance is a different kind of prolife force, an invisible, unpublicized army of women. Few of its volunteers would be willing to picket or protest. Their style is care, not confrontation.
>
> . . . .
>
> . . . As Christians, they . . . believe that supporting pregnant women is the most

opposed by antiabortion advocates who thought PAS arguments an ungrounded distraction from the real moral stakes of the abortion debate. This battle played out within the Reagan administration itself.

In 1980 Ronald Reagan was elected, in part through the efforts of a new, pan-Christian coalition that attacked abortion as a sign of secular humanism and declining family values.[73] With Phyllis Schlafly pioneering the way by showing how linking ERA and abortion could attract new voters,[74] Paul Weyrich, Richard Viguerie, and others helped Jerry Falwell found Moral Majority in 1979, emphasizing abortion as an issue around which Christians might mobilize.[75] The strategy proved wildly successful. Antiabortion advocates now had friends in the Oval Office. As PAS claims began to spread in the antiabortion movement, Reagan's advisers Dinesh D'Souza and Gary Bauer persuaded the President to ask his Surgeon General, C. Everett Koop, who was appointed as a well-known antiabortion advocate, to make official findings that abortion posed a public health threat to women, on the model of Koop's successful antismoking campaign.[76] If Koop made such findings, D'Souza reasoned, the

> practical way to limit [abortion].

Id.

73. *See* Post & Siegel, Roe *Rage*, *supra* note 28, at 420–21.

74. *See* Siegel, *Constitutional Culture*, *supra* note 24, at 1389–93.

75. There are several accounts of a meeting in Lynchburg, Virginia, among Reverend Jerry Fallwell, Richard Viguerie, and Paul Weyrich, at which Weyrich "proposed that if the Republican Party could be persuaded to take a firm stance against abortion, that would begin to split the strong Catholic voting bloc within the Democratic Party. The New Right leaders wanted Falwell to spearhead a visibly Christian organization that would apply pressure to the GOP." SARA DIAMOND, NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT 66 (1998). Cynthia Gorney provides a similar account:

> So it was apparently by mutual consensus, Weyrich and company advising and Falwell seeing the pragmatic and moral wisdom of the plan, that abortion—the subject likeliest to reel in conservative Catholics and disenchanted Democrats (often, but not always, the same people)—was placed at the head of the Moral Majority's sweeping agenda.

CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 346 (1998). Focusing on abortion allowed the New Right to subsume seemingly disparate religious groups: "It was Weyrich's idea to blur the distinctions between secular right-wingers, fundamentalist Protestants, and anti-abortion Catholics by merging abortion into the panoply of new right, 'pro-family' issues." MICHELE MCKEEGAN, ABORTION POLITICS: MUTINY IN THE RANKS OF THE RIGHT 23 (1992). "No other social issue had the political potential to galvanize the evangelical Protestants whom Weyrich, Viguerie, and Phillips were determined to bring into the political process." *Id.* at 22.

76. Chris Mooney offers this account:

> In a July 1987 memo to Gary Bauer, then-White House policy analyst Dinesh D'Souza hit on a clever idea. Remarking on the effectiveness of previous surgeons general in the battle against smoking, D'Souza suggested having Koop produce a

administration could argue that a changed understanding of *Roe's* factual premises warranted its reversal.[77] But Koop refused to apply the public health antismoking paradigm to abortion, concluding instead that there was insufficient scientific evidence to draw conclusions about abortion's health consequences for women.[78] Koop

> report on the health consequences of abortion. The hope was to change the focus of the abortion debate, shifting away from legal questions toward a health oriented approach that would "rejuvenate the social conservatives." Soon afterward, in a speech to pro-lifers, Reagan called upon Koop to produce such a report.

CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 46 (2005). For another account of Dinesh D'Souza's role in putting PAS on President Reagan's agenda, see John B. Judis, *An Officer and a Gentleman*, NEW REPUBLIC, Jan. 23. 1989, at 19, 22. Koop's own account, C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA'S FAMILY DOCTOR (1991), describes his efforts to discharge the responsibilities of office while contending with concerns of the administration and the antiabortion movement, *id.* at 274–77. For another account of the development of the PAS argument during the Reagan years, see Lee, *supra* note 25, at 55.

77. *See* Judis, *supra* note 76, at 22 ("White House aide Dinesh D'Souza had convinced the president that by documenting the terrible psychological effects of abortion, Koop's report could lay the basis for overturning *Roe v. Wade*."). *But see* KOOP, *supra* note 76, at 274 (calling the plan a "silly idea").

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), Focus on the Family and the Family Research Council submitted a joint amicus brief reporting that "immediate negative reactions [for women who have an abortion] include[] guilt, depression, grief, anxiety, sadness, shame, helplessness, hopelessness, sorrow, lower self-esteem, distrust and hostility toward self and others," while "long-term and delayed negative psychological effects [following abortion] include severe grief, isolation from social settings, suicide attempts, abdominal pains and severe depression, especially on the abortion or birth anniversary dates." Brief for Focus on the Family and Family Research Council of America as Amici Curiae Supporting Appellants at *19, *21, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127645. The same groups filed similar arguments in Hodgson v. Minnesota, 497 U.S. 417 (1990), arguing that "[t]he long-term adverse psychological effects, which include denial, depression, isolation, alienation, suicide attempts and a family of psychiatric symptoms called Post Abortion Stress (PAS), appear to be more problematic and more devastating for the adolescent aborter." Brief of Focus on the Family and Family Research Council of America as Amici Curiae Supporting Respondents at 3, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-1125 and 88-1309), 1989 WL 1127329.

78. In response to President Reagan's request, Koop conducted a comprehensive investigation into the health effects of abortion on women, consulting numerous scientific, medical, psychological, and public health experts. *See* Letter from C. Everett Koop, U.S. Surgeon Gen., to President Ronald Reagan (Jan. 9, 1989), *reprinted in* 21 FAMILY PLANNING PERSPECTIVES 31 (1989). In 1987, Koop "met privately with 27 different groups which had philosophical, social, medical or other professional interests in the abortion issue . . . such as the Right to Life National Committee [*sic*], Planned Parenthood Federation of America, the U.S. Conference of Catholic Bishops, the American College of Obstetricians and Gynecologists and women who had had abortions." *Id.* Koop noted that the Public Health Service had evaluated the "almost 250 studies . . . which deal[t] with the psychological aspects of abortion" and had found them methodologically flawed. Based on his thorough review of existing literature, Koop concluded that "at this time, the available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those pro-life or of those prochoice. . . . [T]he data do not support the premise that abortion does or does not cause or

urged that the movement should keep its moral focus on protecting unborn life.[79] "The pro-life movement had always focused—rightly, I thought—on the impact of abortion on the fetus," Koop reasoned.[80] "They lost their bearings when they approached the issue on the grounds of the health effect on the mother."[81]

B. Countermobilization: Changing Conditions of Argument

Publicly questioned by the government's top antiabortion advocate, the PAS argument might have died in the 1980s. But by the early 1990s, the antiabortion cause suffered a series of setbacks that empowered critics of the fetal-focused argument *within* the antiabortion movement. Polls registered the American public's ambivalence and division about abortion and its recoil from clinic violence.[82] With Republican appointees to the Court, *Roe* was now hanging by a thread—and its supporters mobilized.[83] In 1992 Bill Clinton, a strong supporter of abortion rights, was elected with support from the women's movement,[84] and the Supreme Court, with

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contribute to psychological problems." *Id.* He cautioned: "Anecdotal reports abound on both sides. However, individual cases cannot be used to reach scientifically sound conclusions." *Id.* Koop closed his letter by saying: "I regret, Mr. President, that in spite of a diligent review on the part of many in the Public Health Service and in the private sector, the scientific studies do not provide conclusive data about the heath effects of abortion on women." *Id.* at 32.

79. Koop testified questioning scientific evidence for PAS just after Focus on the Family and Family Research Council submitted an amicus brief in *Webster* asserting that the evidence of PAS's physical and psychological harms to women was sufficient basis for the Court to reverse *Roe*. *See* Judis, *supra* note 76, at 22. For Koop's statement, see *Medical and Psychological Impact of Abortion: Hearing Before the Subcomm. on Human Resources & Intergov't Rel. of the H. Comm. on Gov't Operations*, 101st Cong. 193 (1989) (testimony of C. Everett Koop, M.D., Surgeon General, Department of Health & Human Services). For Koop's critique of the PAS argument, see KOOP, *supra* note 76, at 274–75. For another antiabortion advocate's critique of woman-protective arguments against abortion, see Francis J. Beckwith, *Taking Abortion Seriously: A Philosophical Critique of the New Anti-Abortion Rhetorical Shift*, 17 ETHICS & MED. 155, 162 (2001).

80. KOOP, *supra* note 76, at 274–75.

81. *Id.* at 275.

82. For an account of the spread of confrontational and violent protest at the clinics, see DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 51–101 (1994).

83. *See* WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 38–43 (2004); *see also* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 179 (1989) (describing ads run by abortion rights groups).

84. *See* DIAMOND, *supra* note 75, at 142–43 ("The panic with which many in the Christian Right viewed the incoming Clinton administration was then reinforced by Clinton's prompt fulfillment of campaign promises he had made to prochoice voters."); SALETAN, *supra* note 83,

its multitude of Republican appointees, preserved and narrowed *Roe* in *Casey*.[85]

These political and legal setbacks, and the killing of several clinic doctors,[86] prompted deep concerns inside the antiabortion movement about the confrontational frames that dominated 1980s advocacy.[87]

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at 218 ("In the weeks that followed Bill Clinton's election to the presidency, several leading pro-life strategists essentially surrendered the twenty-year struggle to outlaw abortion.").

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

Several amici advanced the woman-protective argument in *Casey*. A coalition of antiabortion groups defended Pennsylvania's waiting period and informed consent statutes on the ground that "the emotional, psychological and physiological repercussions [of abortion on women] can be long-lasting and destructive." Brief of Feminists for Life of America, Professional Women's Network, Birthright, Inc., and Legal Action for Women as Amici Curiae Supporting Respondents at 6, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902), 1992 WL 12006409. Another brief in *Casey* advanced dual fetal-protective and gender-protective concerns for "the health and welfare of the patients—both mother *and* child." Brief of United States Catholic Conference, Christian Life Commission, Southern Baptist Convention, and National Association of Evangelicals as Amici Curiae Supporting Respondents at 27, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902), 1992 WL 12006414. A third amicus brief, submitted by the National Legal Foundation, relied on extended testimony by Vincent Rue to conclude that "information on the probable gestational age of the unborn child . . . is relevant not only to the risks associated with the performance of an abortion, but also to the psychological well-being of the woman." Brief of National Legal Foundation as Amicus Curiae Supporting Respondents at 13–14, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902), 1992 WL 12006416. Vincent Rue testified about post-abortion syndrome in defense of the Pennsylvania informed consent statute at issue in *Casey*, but the district court, citing the Koop investigation, found Rue's testimony "not credible" and "devoid of . . . analytical force and scientific rigor." Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1333–34 (D. Pa. 1990), *rev'd on other grounds*, 947 F.2d 682 (1991), *rev'd on other grounds*, 505 U.S. 833 (1992).

86. For information on clinic violence in the early 1990s, see Bill Kaczor, *2 Slain in 2nd Fla. Abortion Attack*, CHI. SUN-TIMES, July 30, 1994, at 1; Richard Lacayo, *One Doctor Down, How Many More?*, TIME, Mar. 22, 1993, at 46, 47; Tamar Lewin, *Abortion Providers Attempt To Handle Growing Threat*, N.Y. TIMES, Dec. 31, 1994, at 8; T.J. Milling, *Abortion Clinic Fire Ruled Arson by Investigators; Container of Gas Lowered Through Rooftop AC Vent*, HOUSTON CHRON., Oct. 12, 1993, at A13; Laurie Taylor, *Right-to-Life Turns to Terror*, L.A. DAILY J., Mar. 26, 1993, at 6. *See generally* Serena Mayeri, *Civil Rights on Both Sides: Reproductive Rights and Free Speech in* Schenck v. Pro-Choice Network of Western New York, CIVIL RIGHTS STORIES 293, 318 (Myriam E. Gilles & Risa L. Goluboff eds., 2008) (describing the events surrounding the murder of an abortion provider).

87. In the late 1980s and early 1990s, antiabortion advocacy grew increasingly confrontational. *See, e.g.*, Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives: Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (reporting Randall Terry, Operation Rescue founder, as denying that his organization's campaigns are responsible for violence but as vowing to "do everything we can to torment these people [doctors] . . . to expose them for the vile, blood-sucking hyenas that they are" through invasive harassment tactics (alteration in original)); *see also* Sandi DuBowski, Planned Parenthood Federation of America, *Storming Wombs and Waco: How the Anti-Abortion and Militia Movements Converge*, 2 FRONT LINES RES., Oct. 1996, at 1, 10 (noting that as the pro-life movement converges with the militia movement, abortion, "along with taxes, homosexuality, gun control, and anti-

Responding to a letter writer who asked "Isn't it right to shoot abortionists, just as you would defend your own child from a criminal?," Frederica Mathewes-Green, longtime spokeswoman for Feminists for Life, objected:

> [I]t is *not* "your own child." Someone else is the literal mother of that child and you cannot save that child unless you persuade her first. She has reasons for wanting an abortion, and shooting the abortionist won't solve those problems. *If we saw ourselves as her servants, not as dashing caped avengers, we'd be more successful.*[88]

The clinic murders provided an opening for members of the antiabortion movement to question the violent—and gendered—presuppositions of the "rescue" paradigm, and enhanced the legitimacy and strategic appeal of alternative, less confrontational

environmentalism," is becoming a "'bridge' issue among religious political extremist factions, as well as a bridge to a wider public from which to recruit"); Jeffrey White, *Half-Cocked: The Reverend Trewhella's Call to Arms*, CITY EDITION, Aug. 25, 1994, at 6 (describing Planned Parenthood's release of video footage showing Missionaries to the Preborn leader Reverend Matthew Trewhella calling for "armed insurrection" against abortion providers and activists, and reporting that Trewhella, who served jail time for violating an injunction against clinic protest, publicly advocated that pro-lifers form a militia and buy automatic assault weapons as presents for children).

The killings of abortion providers immediately adversely affected the movement's public stature. *See* Ben Ehrenreich, *Operation Miscue*, L.A. WEEKLY, Apr. 5, 2002, at 1 ("[I]n the mid-'90s, Operation Rescue 'took the brunt of the heat' for the escalating violence, says Troy Newman. 'It became very, very unpopular within churches and on street corners to say that you were pro-life, because if you said you were pro-life, all of a sudden people equated you with being a bomber and a murderer.'"). Leadership of the antiabortion movement struggled to contain the adverse publicity. *See, e.g.*, Michael Ebert, Response to Letter to the Editor (Shooting Abortionists), FOCUS ON THE FAMILY CITIZEN, Jan. 17, 1994, at 12 ("As Dr. James Dobson has said, we can't be pro-life and pro-death at the same time. Nothing strengthens the hands of the pro-abortion legislators more than for pro-life people to appear irrational, violent and anarchistic. Those involved in the pro-life movement must be careful to maintain godly behavior and loving attitudes."); Marcia Ford, *Pro-Life Leaders Denounce Violence*, CHARISMA, Oct. 1994, at 78 ("In the wake of the abortion-related slayings this summer in Pensacola, Fla., pro-life leaders around the country differed on the direction the pro-life movement should take. But on one point, there was unanimous agreement: Paul Hill—charged with the killings—is not on their side. . . . Meanwhile two Christian legal organizations were split in their initial responses to the slayings in Pensacola."); *see also* John W. Kennedy, *Killings Distort Pro-Life Message*, CHRISTIANITY TODAY, Sept. 12, 1994, at 56 ("Most pro-life groups quickly denounced the most recent murders . . . . On the day of the shooting, 14 pro-life organizations called a joint press conference . . . to condemn the shootings.").

88. Frederica Mathewes-Green, *Noisy, Empty Gestures, The Shooting War: Imprecision in Pro-Life Storytelling Leads to Wrong Conclusions*, WORLD, Jan. 21, 1995, at 30 (emphasis added).

modes of argument.[89] By the mid-1990s, the authority of the rescue paradigm was in decline, and palpably so. In 1994, Gregg Cunningham, who produced *Hard Truth*, a video showing aborted babies, observed how woman-friendly practices of appeal in the movement's crisis pregnancy centers diverged from the rescue and baby-saving paradigm, and worried that reliance on this mode of appeal in the CPCs and in the public arena marked a turn from the movement's commitment to stopping abortion and saving life:

> As shocking as it may sound, there is growing evidence that significant numbers of U.S. pregnancy center staffers are committed to "empowering women" but ambivalent about "saving babies." This perverse abortion-tolerant mindset mirrors the parochialism of pro-life demonstrators who sometimes seem so obsessed with saving babies that they display indifference to the plight of women in crisis pregnancy.[90]

Remarking on "[t]his particular estrangement between activists who are 'for women' and those who are 'for babies' (a.k.a. 'against abortion')," he criticized Guy Condon, president of the CPC movement, for downplaying its antiabortion politics and changing the organization's name from Christian Action Council to "Care Net." Cunningham complained that Condon had "taken office promising to deemphasize what his organization is against (abortion) and reemphasize what it is for (women)."[91] The CPCs increasingly refused to confront their clients with visual evidence of baby killing,[92] and

89. *See Pro-Life Pro-Choicers? Is Extremism in Defense of Unborn Children a Vice or a Virtue?*, WORLD, Jan. 15, 1994, at 22 (editorial remarks by Gregg Cunningham); *supra* notes 66–67, 72 and accompanying text (illustrating CPC practice).

90. *Pro-Life Pro Pro-Choicers?*, *supra* note 89.

91. *Id.* Guy Condon, president of Care Net (formerly Christian Action Council), had been quoted as saying: "Given the atmosphere today, we thought Christian Action Council sounded like a pressure group, a special interest group. . . . Our aim has always been care and service to pregnant mothers." *Id.*

92. Cunningham disagreed with the less confrontational mode of counseling women:

> With the term "compassionate ministries" gaining popularity as a pseudonym for crisis pregnancy work, perhaps we need to ask how many of these projects show compassion for both mothers *and* babies.
>
> . . . .

antiabortion advocates in the public arena were increasingly reticent as well. "How can we expect politicians to risk the disfavor of their constituents or pastors the anger of their parishioners when so much of the pro-life movement subordinates the survival of babies to avoid damaging 'larger interests'?"[93]

Cunningham understood that his mode of advocacy was losing ground within the antiabortion movement, and wrote in an effort to slow the change. But the setbacks of the early 1990s—Clinton's election, the *Casey* decision, and public recoil from clinic violence—had created conditions within the movement that favored the spread of new forms of advocacy first forged at the movement's CPCs.

C. Crossing from the CPCs to Electoral Politics: Woman-Protective Justifications for Criminal Abortion Restrictions

Cunningham worried about Condon's use of woman-protective argument not simply at the CPCs, but in another arena: the arena of public policy debate. As Cunningham appreciated, during the early 1990s, leaders of the antiabortion movement had begun to explore strategic uses of woman-centered modes of argument for a new audience. In this period, movement leadership experimented with using talk of post-abortion harms not simply to deter pregnant women from choosing abortion or to recruit them to the movement's ranks, but also to persuade Americans *outside* the ranks of the antiabortion movement to support the movement's claims.

With accumulating setbacks eviscerating antiabortion's moral authority and political momentum, the movement's leaders were in search of new ways of persuading voters of abortion's evils—especially those voters who continued to support abortion rights. Political strategists realized that PAS talk had strategic utility. A 1992 *Christianity Today* article registered the potential of CPC practice to answer feminist criticisms of the antiabortion movement: "Three complaints are made against the prolife movement: that it is

> . . . [A] more subtle problem exists among centers that are 'against' abortion but to a lesser degree than they are '"for"' something else. For instance, many crisis pregnancy operations are commendably evangelical. But in proselytizing women for Christ, counselors are often forbidden from using visual aids that, though effective in protecting babies who would otherwise die, might also risk offending mothers who could thereby be made less responsive to the gospel.

Id.

93. *Id.* at 24. Cunningham specifically criticized the public advocacy of C. Everrett Koop and Billy Graham.

dominated by men, that it treats women's tragic dilemmas judgmentally, and that it does nothing to care for babies after they are born. The work of CPCs overturns each of these charges."[94] For audiences concerned about protecting women's rights, woman-focused antiabortion argument was potentially conflict resolving: it could reassure those who hesitated to prohibit abortion because of concerns about women's welfare that legal restrictions on abortion might instead be in women's interest.[95]

And so in the early 1990s, leaders of the antiabortion movement began to use PAS for new purposes and for a new audience. In the process, they transformed PAS, a therapeutic discourse concerned with informing women's decisionmaking about abortion, into woman-protective antiabortion argument (WPAA), a political discourse that seeks to persuade voters who ambivalently support abortion rights that they can help women by imposing legal restrictions on women's access to abortion. Whereas PAS grew up in therapeutic and mobilizing relationships in which abortion-hurts-women testimonials had important expressive functions, WPAA took shape in political relationships in which the abortion-hurts-women argument had important strategic functions. In the 1990s, antiabortion advocates sought to explain to audiences that at least ambivalently supported the abortion right why women would benefit from the imposition of legal restrictions on abortion. As they did so, they fused PAS empirics and stories with traditions of gender-paternalist argument that justify restrictions on women's agency as needed to protect women from coercion and free women to be mothers. However traditional in structure, this new protectionist argument was expressed in a quite contemporary idiom. As a political discourse designed to rebut feminist, pro-choice claims, WPAA came to internalize elements of the arguments it sought to counter[96]—fusing the public health, trauma, and survivors idiom of PAS with language of the late-twentieth-century feminist and abortion-rights movement.

The emergence of the woman-protective antiabortion argument is clearly illustrated in the career of Jack Willke, head of the National Right to Life Committee. Willke pioneered fetal-focused arguments

94. Stafford, *supra* note 67, at 24.

95. *See infra* note 106 and accompanying text.

96. On the ways political argument is shaped in the movement-countermovement dynamic, see Siegel, *Constitutional Culture*, *supra* note 24, at 1330–31, 1363–66.

in the 1970s,[97] and honed this mode of advocacy throughout the 1980s, but embraced WPAA in the early 1990s after market research convinced him that advancing claims about women's rights and welfare would help him persuade the uncommitted ambivalent middle. Writing in 2001, Willke recalled his conversion ten years earlier:

> We had been making steady progress . . . [in] educating the nation, beyond reasonable doubt, that human life, in its complete form, began at the first cell stage. . . . Then pro-abortion activists . . . changed the question. No longer was our nation arguing about killing babies. The focus, through their efforts, had shifted off the humanity of the unborn child to one of women's rights. They developed the effective phrase of "Who Decides?"
>
> . . . .
>
> Pro-lifers were still teaching in the traditional method that had brought such astounding and continuing success until that time. They were still proving that this was a baby and telling how abortion killed the baby. However, increasingly, these facts fell on deaf ears, for this did not address the new argument of women's rights. This had to be answered, but we did not know what the effective answer was. The only way to find out would be by extensive market research. That's how they had come up with the idea of changing the question to "Who decides?" That was how we would discover how to countermand their new sales pitch. This would require extensive research, focus groups, polling and the testing of new ideas.
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> . . . .
>
> . . . We did the market research and came up with some surprising findings. We found out that while three-fourths or more of the people in the United States now admitted this was a child who was killed, two-thirds of the same people felt that it was all right to give the woman the right to kill. We found out that the basic problem in the minds of the general public was that, by their own evaluation, most were undecided on this issue. They felt that pro-life people were not compassionate to women and that we were only "fetus lovers" who abandoned the mother after the birth. They felt that we were violent, that we burned down clinics and shot abortionists. We

97. *See supra* note 69.

> were viewed as religious zealots who were not too well educated. Clearly, their image of us was one that had been fabricated and delivered to them in the print and broadcast media by a liberal press.
>
> After considerable research, we found out that the answer to their "choice" argument was a relatively simple straightforward one. We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan "Love Them Both," and, in fact, the third edition of our Question and Answer book has been so titled, specifically for that reason.[98]

Drawing on opinion research at his newly founded Life Issues Institute, Willke opened the third edition of his book on debating abortion—re-titled *Why Not Love Them Both*—by announcing that "[i]n the coming years, the hallmark of the pro-life movement at least, should not be just to save the baby, but to love them both."[99] The antiabortion movement could no longer focus on baby saving as its sole purpose. If the movement hoped to persuade Americans to support candidates, policies, and jurists who would change the law of abortion, it would have to use arguments of the kind used in the movement's crisis pregnancy centers:

> My message tonight is not what I said five or ten years ago. Five or ten years ago my emphasis would have been on the right to life and on saving babies. But now I want to tell those who are involved in women's helping centers that they are doing what I believe is the most important single thing that the pro-life movement is doing in our time. The big problem is that we have not publicized it enough—it's a light hidden under a bushel—and so my message will

98. J.C. Willke, *Life Issues Institute Is Celebrating Ten Years With a New Home*, LIFE ISSUES CONNECTOR (Life Issues Inst., Cincinnati, Ohio), Feb. 2001, at 1, 4, *available at* http://www.lifeissues.org/connector/01feb.html. For another account of Willke's shift in orientation, see Joseph A. D'Agostino, *Conservative Spotlight: Dr. John C. Willke*, HUMAN EVENTS, July 3, 1998, at 19, 19, *available at* http://findarticles.com/p/articles/mi_qa3827/is_199807/ai_n8804190. Willke provides a lengthier account of how he came to embrace this shift in antiabortion argument in John Willke & Barbara Willke, *Why Can't We Love Them Both?*, 7 LIFE AND LEARNING 10, 10–25 (1997), *available at* http://www.uffl.org/vol%207/willke7.pdf.

99. JOHN C. WILLKE & BARBARA H. WILLKE, WHY NOT LOVE THEM BOTH?: QUESTIONS AND ANSWERS ABOUT ABORTION 7 (3d ed. 1997); *see also id.* at 12–17 (recounting opinion research suggesting that "[w]hat is needed is to shout from the housetops the details of the pro-life movement's obvious compassion for women. When this is done, the folks in the middle [will] once again listen to us.").

> be very direct. We've got to go out and sing from the housetops about what we are doing—how compassionate we are to women, how we are helping women—not just babies, but also women.[100]

Willke and others in the movement who had long argued the case against abortion as a question of protecting the unborn had come to recognize that WPAA had strategic as well as mobilizing potential: it offered a framework for arguing with those *outside* the ranks of the antiabortion movement—the "conflicted middle"[101]—who might not share the movement's animating convictions about matters of faith or family.

Unlike Willke, David Reardon began emphasizing abortion's harm to women in the 1980s, when he opened his Elliot Institute, dedicated to the study of PAS. After Clinton's election, Reardon set out to transform PAS—a therapeutic discourse—into a political strategy responsive to the movement's difficulties in the 1990s. He set out this strategy in a series of articles which he combined into his 1996 book *Making Abortion Rare*[102]—the title an ironic homage to Clinton, who found a powerful way of talking to middle America with his slogan of making abortion "safe, legal and rare."[103]

Reardon joined Willke in arguing that the antiabortion movement needed a different strategy to appeal to "the 'fence sitting' 50 percent or more who feel torn between the woman and the child."[104] "Accepting the fact that the middle majority's concerns are primarily focused on the woman is a prerequisite to developing a successful pro-woman/pro-life strategy," he emphasized.[105] "*While*

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100. Willke & Willke, *supra* note 98, at 10.

101. *Id.* at 18.

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

103. *See* Robin Toner, *Anti-Abortion Group Maps Strategy*, N.Y. TIMES, June 27, 1993, at A14 ("Throughout the Presidential campaign [in 1992], in an attempt to reach for the center on this divisive issue, Mr. Clinton pledged to make abortion 'safe, legal and rare.'").

104. REARDON, *supra* note 102, at 32.

105. *Id.* at 26. Reardon published the central arguments of *Making Abortion Rare* in the Elliot Institute's *Post-Abortion Review* in the wake of the *Casey* decision. *See* David Reardon, *Politically Correct vs. Politically Smart: Why Politicians Should be Both Pro-Woman and Pro-Life*, POST-ABORTION REV., Fall 1994, at 1, 1–3, *available at* http://www.afterabortion.info/PAR/V2/n3/PROWOMAN.htm. Reardon argued:

> The abortion debate is about women's rights versus the rights of the unborn. Right?
>
> Wrong. That is the way the pro-abortionists and media have framed the debate. They have consciously defined this issue in terms which polarize the public and

committed pro-lifers may be more comfortable with traditional 'defend the baby' arguments, we must recognize that many in our society are too morally immature to understand this argument. They must be led to it. And the best way to lead them to it is by first helping them to see that abortion does not help women, but only makes their lives worse."[106] A "committed" pro-lifer understood the moral wrong of abortion as a wrong to the child, but others, less enlightened, needed to be "led" to this understanding, and would adopt it if they were first convinced that abortion was a harm to women. The diagnosis was remarkably similar to Willke's. But whereas Willke couched moral objection to abortion as a concern about women's welfare expressed in the language of Christian love, Reardon couched moral objection to abortion as a concern about women's welfare expressed in the language of public health. Talk of the trauma, sterility, and breast cancer risks that abortion posed to women would help alleviate the ambivalence of voters who were otherwise reticent to criminalize abortion out of concern that it would harm women.

> paralyze the middle majority—the "fence sitting" fifty percent or more who feel torn between both the woman and the child—into remaining neutral.
>
> . . . .
>
> To truly reframe the debate to our advantage, it is not enough to simply highlight the part of the frame touching on the rights of the unborn. Instead, we must expand the frame to include more parties, so that we can convincingly show that it is we who are defending the authentic rights of both women and children.
>
> In short, we must insist that the proper frame for the abortion issue is not women's rights versus the unborn's rights, but rather women's *and* children's rights versus the schemes of exploiters *and* the profits of the abortion industry.
>
> . . . .
>
> Reframing the abortion debate in this way is not difficult. But it does require pro-life candidates to become familiar with new facts, arguments, and media "sound bites."
>
> To begin, the pro-woman/pro-life candidate needs an agenda. This agenda would include support for legislation covering one or more of the following needs: 1) protecting women from being coerced into *unwanted* abortions; 2) guaranteeing the right of women to make free and *fully informed* decisions about abortion; 3) protecting the women most likely to be injured by requiring physicians to properly screen patients for characteristics which would place them at higher risk of physical or psychological complications; and 4) expanding the rights of injured patients to recover damages for physical or psychological harm resulting from abortion, even after very long periods of time, when an abortionist has failed to ensure that a woman's choice was truly free and informed, or fails to properly screen her for risk factors.

Id.

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

Reardon discusses the advantages of expressing judgments about the morality of abortion in the language of public health.[107] In *Making Abortion Rare*, Reardon describes empirical research on the psychological consequences of abortion (of the kind he conducts at the Elliot Institute) as documenting the moral evil of abortion and presenting it in terms that have authority for audiences not moved by direct appeals to divine law.[108] He writes:

> Christians rightly anticipate . . . that any advantage gained through violation of the moral law is always temporary; it will invariably be supplanted by alienation and suffering.
>
> *Thus, if our faith is true, we would expect to find compelling evidence which demonstrates that such acts as abortion, fornication, and pornography lead, in the end, not to happiness and freedom, but to sorrow and enslavement.* By finding this evidence and sharing it with others, we bear witness to the protective good of God's law in a way which even unbelievers must respect.[109]

Reardon presents arguments about abortion's harm to women as empirical, but research premised on these religious and moral beliefs does not appear to be empirical in the conventional social-scientific sense. In fact, Reardon based his claim that abortion harms women as well as the unborn on a claim of sex-role morality that Reardon openly and repeatedly articulated as he showed how the therapeutic discourse of PAS could be enlisted in the service of political argument. In developing the "pro-woman" strategy, Reardon counseled that antiabortion advocates needed, at all costs, to avoid debates between the rights of women and those of the unborn, and to insist at every point that—rightly understood—the best interests of

107. David C. Reardon, *A Defense of the Neglected Rhetorical Strategy*, 18 ETHICS & MED., Summer 2002, at 23, 26 ("[E]ducating the public about abortion-related injuries may make it easier for some . . . to conclude that abortion is a 'serious moral wrong.'").

108. REARDON, *supra* note 102, at 11; *see also* Elliot Institute, A List of Major Psychological Sequelae of Abortion, http://www.afterabortion.info/psychol.html (summarizing PAS research) (last visited Apr. 31, 2008).

109. REARDON, *supra* note 102, at 11 (emphasis added); *cf.* Frederica Mathewes-Green, *Doing Everything We Can: A Response to Francis J. Beckwith*, TOUCHSTONE, Jan./Feb. 2004, http://www.touchstonemag.com/archives/article.php?id=17-01-056-o ("[Showing that abortion hurts women is] my 'new rhetorical strategy,' and it was based on my own attempts to analyze the present problem and figure a way around it. Others devised parallel approaches, and addressed different segments of society. (I was mostly speaking on college campuses and in secular media, which is why I never brought in God-talk; for these audiences, it was immediate grounds for mental dismissal.)").

women and the unborn do not conflict. Reardon made no effort to substantiate the claim that the interests of women and the unborn do not conflict by ordinary empirical methods (for example, by identifying measures through which one could compare the situation of pregnant and caregiving women with other women not performing the work of motherhood). Rather, the claim of "no conflict" was a claim about role morality rooted in divine and natural law. A pregnant woman is a mother and a mother's interests are defined by the needs of her child, Reardon argued:

> Pro-life leaders who are nervous about focusing more attention on the woman for fear that it will distract attention away from the unborn, should meditate on the following truism: One cannot help a child without helping the mother; one cannot hurt a child without hurting the mother.
>
> This intimate connection between a mother and her children is part of our created order. Therefore, protecting the unborn is a natural byproduct of protecting mothers. This is necessarily true. After all, in God's ordering of creation, it is only the mother who can nurture her unborn child. All the rest of us can do is to nurture the mother.
>
> This, then, must be the centerpiece of our pro-woman/pro-life agenda. The best interests of the child and the mother are *always* joined—even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it.
>
> We can best help each by helping both. If we hurt either, we hurt both.
>
> The goal of our pro-woman/pro-life agenda is to lead our nation to an understanding of this reality.[110]

With this understanding of women's nature, rights, and interests, the antiabortion movement could finally answer feminist and pro-choice claims about women's rights. "[Pro-choice advocates] claim to be concerned about the welfare and autonomy of women. We claim to be more concerned, for the very good reason that abortion is injuring women, not helping them . . . ."[111] The antiabortion movement

110. Reardon, *supra* note 105, at 3.

111. REARDON, *supra* note 102, at 96.

was now positioned not only to answer the women's movement, *but also to appropriate its arguments*. Reardon argued that the movement should "take back the terms 'freedom of choice' and 'reproductive freedom'" and "emphasize the fact that we are the ones who are really defending the right of women to make an *informed* choice.[112] In this way, woman-protective antiabortion argument fused the therapeutic discourse of PAS with talk of choice and coercion drawn from feminism, constitutional law, and medical malpractice law.[113] (Reardon had just completed a casebook advising tort lawyers how to sue abortion providers.[114])

Willke and Reardon were not the only voices in the antiabortion community advising that the movement express its opposition to abortion in the language of women's rights. They were joined by Frederica Mathewes-Green, a key figure in the CPC movement and in Feminists for Life. In the 1990s, Mathewes-Green wrote a series of articles arguing that the antiabortion movement needed to address women's welfare if it wanted ever to persuade "the mushy middle."[115]

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112. *Id.*

113. *Id.* at 96–97 ("[O]ur pro-woman bill . . . increases the rights of women by simply ensuring that their decisions to accept a recommendation for abortion are fully voluntary and fully informed.").

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

> Last summer I was asked to write an introductory manual for attorneys on abortion malpractice. I have long dreamt of writing exactly such a book, so it didn't take any arm twisting to convince me to jump right into it.
>
> . . . .
>
> Life Dynamics, a pro-life group spearheading education efforts for attorneys interested in abortion malpractice, has already distributed over 10,000 copies of this manual. In addition, on March 4th and 5th, Life Dynamics sponsored a conference for attorneys interested in representing plaintiffs in abortion malpractice. I was one of sixteen presenters at this very successful event. Attendance at this conference sold out with 120 participants. Future conferences are expected.

Id.

115. As Mathewes-Green recalls:

> The "new rhetorical strategy" that Francis Beckwith critiques is getting up in years. My first book, *Real Choices: Listening to Women, Looking for Alternatives to Abortion*, was written in 1993. The Caring Foundation's first ads appeared in the mid-nineties, as did Paul Swopes's essay in *First Things* describing the results of their research. David Reardon's book *Aborted Women: Silent No More* appeared in 1987.
>
> Beckwith might have mentioned as well Dr. Jack Willke's early-nineties project to develop a concise response to the other side's "Who decides?" rhetoric (you may have seen "Love them both" placards) and the trend of pregnancy care centers to shift focus, changing from storefronts that discourage abortion to full-fledged medical clinics or professional counseling centers. The so-called "new" rhetorical strategies (for there are more than one) have been around for over a decade. No one yet, to my

Unlike Reardon and Willke, Mathewes-Green had struggled for some time in her views about whether and under what conditions criminal abortion laws promoted women's welfare.

As a college student in the 1970s, Mathewes-Green believed that abortion was "essential to liberation" because "[m]en were able to compete in the workplace, to succeed and get ahead, because they were not hampered by pregnancy and childrearing. Women could not enjoy the same success without the same freedom."[116] But after graduating, Mathewes-Green, who was born a Catholic, had a religious epiphany, and soon thereafter renounced abortion—on the ground that it killed the unborn and on the ground that abortion perpetuated women's inequality in matters of sex and child care.[117] During the 1980s she did not join the antiabortion movement as she did not "feel comfortable with the movement's 'right-wing' image,"[118] instead joining Feminists for Life and becoming the organization's vice president for communications in 1989.[119] In the early 1990s,

> knowledge, has evaluated their success, though that would be a useful service; we're still in the middle of this fight.
>
> How it happened was this: Pro-life leaders noticed that the primary message of the previous couple of decades, our insistence on the unborn child's full humanity and right to life, was no longer gaining ground. We had honed this message and it was ubiquitous and consistent, and we personally found it unassailable. Yet we were increasingly encountering people capable of dismissing it. Perhaps all the people susceptible to it had already been reached and converted. For the remainder, whom we termed "the mushy middle," it was falling on deaf ears. We didn't know why.
>
> . . . .
>
> One option might have been to back off from pressing the pro-life cause and undertake a broader national effort in remedial moral education. But most of us decided instead to attempt to get around this surprising roadblock by other means. We diversified, each person and group trying out strategies as they occurred to them. Some, of course, would continue to present the "It's a baby and it deserves protection" message. This is the backbone of the pro-life movement and our final motivation, and we aren't about to abandon it.
>
> But others looked at subsets of the pro-choice population and began crafting ways to reach them.

Mathewes-Green, *supra* note 109.

116. Frederica Mathewes-Green, *Becoming a Pro-Woman, Pro-Life Persuader*, 4 LIFE AND LEARNING 1, 1 (1994), *available at* http://www.frederica.com/writings/becoming-a-pro-woman-pro-life-persuader.html.

117. *See* Frederica Mathewes-Green, *Twice-Liberated: A Personal Journey Through Feminism*, TOUCHSTONE, Summer 1994, http://www.frederica.com/writings/twice-liberated-a-personal-journey-through-feminism.html [hereinafter Mathewes-Green, *Twice-Liberated*]; *see also* Mathewes-Green, *supra* note 109.

118. Mathewes-Green, *Twice-Liberated*, *supra* note 117.

119. Feminists for Life of America, *Remarkable Pro-Life Women III*, AM. FEMINIST, Summer 2003, at 17, *available at* http://www.feministsforlife.org/taf/2003/summer/FFLSummerTAF03.pdf.

Mathewes-Green was still reasoning about abortion within a social structural frame, attentive to the many reasons women sought abortion, and committed to the pursuit of volunteer action and social policies that would ameliorate these problems and thus support women in choosing motherhood.[120]

But even these policy proposals showed ambivalence about the prospects of legal interventions designed to support women outside the institution of marriage, and by 1994, Mathewes-Green resigned from Feminists for Life, no longer able to call herself a feminist.[121] Her articles for the remainder of the decade endorsed abstinence before marriage and fidelity within it as the basic prescription for women's welfare.

Mathewes-Green had long understood abortion as a symptom and cause of disorder in family structure. By the mid-nineties, she began self-consciously to integrate antiabortion advocacy with support for traditional family values, and to emphasize that some family structures were better than others. In 1996, Mathewes-Green criticized welfare as a cause of single motherhood, and urged adoption counseling for women bearing children outside of marriage. Adoption was more than an individual woman's alternative to abortion; adoption was the *movement*'s alternative to welfare, an integral policy element of an antiabortion initiative that favored marriage, a two-parent household, and the privatization of dependency.[122] That same year Mathewes-Green joined a statement in

120. *See* Frederica Mathewes-Green, *Unplanned Parenthood: Easing the Pain of Crisis Pregnancy*, POL'Y REV., Summer 1991, at 28, 28–35 (calling for increased funding to CPCs, taxpayer subsidies of childbearing to help encourage women not to abort, more cross-racial adoption, government promotion of marriage to build stable family units, flexible work programs, and parental consent statutes); *see also* Frederica Mathewes-Green, *Speaking Out: Why I'm Feminist and Prolife*, CHRISTIANITY TODAY, Oct. 25, 1993, at 13 (calling for everything from "volunteering at your local pregnancy center" to "strengthened child-support laws, compassionate maternity-leave policies, and adequate, accessible medical care").

121. Mathewes-Green, *Twice-Liberated*, *supra* note 117.

122. Frederica Mathewes-Green, *Pro-Life Dilemma*, *Pregnancy Centers and the Welfare Trap*, POL'Y REV., July/Aug. 1996, at 40, 41 [hereinafter Mathewes-Green, *Pro-Life Dilemma*], *available at* http://www.hoover.org/publications/policyreview/3574747.html ("[I]t is important to acknowledge that welfare causes more crisis pregnancies. By making single-parent households possible, welfare dollars remove the stigma of sex and pregnancy outside marriage.").

Opponents of abortion acted on the basis of views about family structure and property that, over time, came to play an increasingly visible part in the way they organized crisis pregnancy centers and antiabortion ministries. Their emphasis on adoption as an abortion alternative is expressive of these views.

First Things that denounced "abortion license" as a symptom of a decline in family morality and as responsible for many social ills.[123] By 2002, she had published an essay denouncing feminism for "three bad ideas"—abortion, promiscuity, and careerism.[124]

Mathewes-Green's emergent understanding that women could find redemption through marriage and motherhood by renouncing extramarital sex and excessive careerism led her to abandon her decades-old claim to speak against abortion as a feminist just as Reardon was beginning to infuse WPAA with the language of the women's rights movement. In fact, Mathewes-Green's longstanding career of speaking for women through the CPC movement amplified

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In the 1980s, Jerry Falwell led the way in urging CPCs to counsel pregnant single women to give their children to adoptive parents so the "child grows up in a solid, stable Christian home." David Johnston, *Jerry Falwell's 'Viable Alternative' to Abortion*, L.A. TIMES, Mar. 21, 1986, pt. 5, at 1. These views spread in the antiabortion movement in the 1990s, as conservatives endorsed a Contract with America that criticized welfare as responsible for the decline of the traditional family. *Cf. Family Values II: The Christian Coalition Signs On the Dotted Line*, BOSTON GLOBE, May 21, 1995, at 45 (reproducing a speech by Ralph Reed in which he argued that the country needs "a dramatic agenda to strengthen families" and that religious conservatives "supported the Contract with America" partly because it "encourage[d] adoption through the tax code"); Ronald Brownstein, *GOP's Battle Reaffirms Strength of Abortion Foes*, L.A. TIMES, Mar. 22, 1996, at A1 (noting how House Republicans' "'[C]ontract with America' marked the new emphasis" on issues including "the decline of the two-parent family" and "welfare reform that attempted to discourage illegitimacy").

By the mid-1990s, Mathewes-Green argued that CPCs should urge single women to give up babies for adoption to help reduce the number of female-headed households on welfare. Adoption "bolster[ed] the social institutions that undergird a healthy society and replace[ed] welfare bureaucracy with family-based alternatives." Frederica Mathewes-Green, *Pro-Life Dilemma*, *supra*, at 41–42; *id.* at 41 ("If the pregnancy-care movement could find effective ways to encourage women to choose adoption, they could help give children a two-parent home and offer both the children and their moms greater security."); Frederica Mathewes-Green, *Two Parents for Every Newborn*, ASSIST PREGNANCY CTR., http://www.assistcpc.org/articles/twoparents.shtml (last visited Apr. 31, 2008) ("Many clients wind up in single-parent households, often on the welfare rolls. . . . If the CPC movement could find effective ways to encourage women to consider adoption or marriage, they could move toward solutions that give children a two-parent home and allow them and their moms greater security.").

In this period, CPCs employed a variety of techniques to urge young mothers to give up their children for adoption, sometimes drawing criticism for the ways they pressured their clients. *See* Marc Cooper, *Robbing the Cradle*, VILLAGE VOICE, July 26, 1994, at 33, *available at* http://www.exiledmothers.com/adoption_facts/robbing_the_cradle.html (detailing stories about young, single mothers who were pressured and misled by CPC workers to give up their babies for adoption into two-parent families).

123. *The America We Seek: A Statement of Pro-Life Principle and Concern*, FIRST THINGS, May 1996, at 40, 40, *available at* http://www.firstthings.com/article.php3?id_article=3874 (quoted *infra* note 142).

124. Frederica Mathewes-Green, *Three Bad Ideas for Women*, TOUCHSTONE, Aug. 2001, *available at* http://www.frederica.com/writings/three-bad-ideas-for-women.html.

the feminist cachet of the "pro-woman, pro-life" stance that they were together elaborating.

In this form, the PAS claim has spread in the antiabortion movement, despite continuing objections from *within* the antiabortion movement that the "new rhetorical strategy (NRS)"[125]—as movement critic Frances Beckwith called it—compromises the movement's moral message and rests on suspect science. Writing in 2001, Frances Beckwith expressed concerns that Frances Koop and Gregg Cunningham had voiced in the early nineties, when they worried about the moral implications of recasting an argument about protecting the unborn into an argument about protecting women. Attacking David Reardon's work, Beckwith was particularly contemptuous. As he saw it, woman-protective antiabortion argument

> may have the unfortunate consequence of sustaining and perhaps increasing the number of people who think that unless their needs are pacified they are perfectly justified in performing homicide on those members of the human community, who pro-lifers believe, are the most vulnerable of our population. It is difficult to imagine that any reflective pro-lifer would think society would be morally better off in such a state of affairs.[126]

Beckwith also questioned the social science claims on which PAS rests: "One can question whether the research done by NRS proponents are examples of good social science, and whether the inferences they draw from these data are warranted."[127]

But, by the time Beckwith registered these objections, the "new rhetorical strategy" was already institutionally entrenched. Woman-protective antiabortion argument was no longer a minority view in the antiabortion movement. The argument that abortion hurts women had moved out of the movement's CPCs and had been embraced by a variety of men holding positions of authority in the movement's leadership. In 2003, Clarke Forsythe, head of Americans United For Life (AUL)—which coordinates the national legislative

125. *See* Francis J. Beckwith, *Taking Abortion Seriously: A Philosophical Critique of the New Anti-Abortion Rhetorical Shift*, ETHICS & MED., Fall 2001, at 155, 155, 157, *available at* http://www.findarticles.com/p/articles/mi_qa4004/is_2001/ai_n8978988/print (criticizing the work done by Reardon and arguing that "the new rhetorical strategy (NRS)" rests on bad ethical and weak empirical grounds).

126. *Id.* at 157.

127. *Id.* at 158.

strategy designed to chip away at *Roe*—reviewed the movement's successes and failures, focusing on the need to counter the "'myth' of abortion as a 'necessary evil.'"[128] The key, Forsythe concluded, is "to raise public consciousness concerning the damage abortion does to women. If Americans come to realize that abortion harms women as well as the unborn, it will not be seen as necessary."[129]

III. SPEAKING FOR WOMEN? SOUTH DAKOTA, AGAIN

With attention to these developments and crosscurrents in the antiabortion movement, we can see that the South Dakota Task Force to Study Abortion was the site of a struggle—not only between friends and foes of the abortion right, but *within* the antiabortion movement itself—about the kinds of evidence and arguments it would use to advance its case against abortion.

The Report was written in a process that alienated not only the minority in the Task Force that supported abortion rights, but remarkably also the *antiabortion* chairwoman of the Task Force, obstetrician Dr. Marty Allison. The Task Force's antiabortion chair voted against the report her own task force produced and then campaigned *against* the South Dakota ban because, she said, the Task Force had opposed motions to restrict the evidence it accepted to "data that is consistent with current medical science and based on the most rigorous and objective scientific studies."[130] The Report cited as authority PAS studies authored by Rue, Reardon, and others, in the face of contrary findings by the AMA, APA, ACOG, and National Cancer Institute; it rejected outright the APA and ACOG findings.[131]

128. Clark D. Forsythe, *An Unnecessary Evil*, FIRST THINGS, Feb. 2003, at 21, 21–22, *available at* http://www.firstthings.com/article.php3?id_article=437.

129. *Id.* at 22.

130. Marty L. Allison, South Dakota Campaign for Healthy Families, South Dakota Medicine: My View (July 2006), http://www.sdhealthyfamilies.org/statementma101606.php.

131. *See* S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 41–52. The Task Force rejected the medical consensus of the American College of Obstetricians and Gynecologists (ACOG):

> In the most recent edition of medical opinions set forth by the American College of Obstetricians and Gynecologists (Compendium of Selected Publications, 2005, Practice Bulletin #26), ACOG states: 'Long-term risks sometimes attributed to surgical abortion include potential effects on reproductive functions, cancer incidence, and psychological sequella. However, the medical literature, when carefully evaluated, clearly demonstrates no significant negative impact on any of these factors with surgical abortion.' The Task Force disagrees with this statement due to other testimony and materials.

The Task Force relied heavily on Operation Outcry's victim testimonies by women who regretted and grieved their abortions and claimed to have been coerced or pressured or mistakenly led to having abortions they did not want,[132] while making no effort to ascertain the conditions under which this testimonial evidence was gathered, or to determine its representativeness at all, and—this is a point Dr. Allison emphasized—while simultaneously excluding from the Report conflicting testimony and evidence gathered by the Task Force itself.[133]

Allison also opposed the Report because she wanted the Task Force to recommend a ban with a rape and incest exception (the final report excluded conflicting testimony that women supplied about raped women's need for abortion—in favor of quoting Jack Willke's "Why Can't We Love Them Both?"[134]) and because she believed that any ban on abortion should be accompanied by policies to reduce unwanted pregnancy through educating teens about contraception as

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Id. at 48. The Task Force also rejected the findings of the American Psychological Association (APA), by citing ideological differences as reason to question the APA's credibility:

> Dr. Harvey testified . . . that major medical and mental health professional organizations support her belief that post-abortion depression is without foundation in scientific studies. Her belief is that if the American Psychological Association (APA), for example, concludes that abortion has no lasting or significant health risks, that this determination is made by an objective scientific organization of psychologists.
>
> The Task Force is aware that the APA has submitted various amicus briefs before the U.S. Supreme Court supporting abortion rights and in opposition to any abortion regulations, including parental involvement in a minor child's abortion decision making. Further, the APA's position does not represent that, of the majority of its membership, but rather, the opinions of a group of members on various committees of interest. It has also advocated and supported other controversial positions on homosexuality and redefining child sexual abuse.
>
> Dr. Harvey also believes that in post-abortion research, association does not mean causation and that women should therefore not be advised of any possible adverse emotional outcomes. We do not find this position credible . . . .

Id. at 46.

132. *See id.* at 7, 33, 38–39. The Task Force claims that

> close to 2,000 women who have had abortions provided statements detailing their experiences, trauma, and the impact abortion has had on their lives. Of these post abortive women, over 99% of them testified that abortion is destructive of the rights, interests, and health of women and that abortion should not be legal.

Id. at 7.

133. Allison, *supra* note 130.

134. *See* S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 32 (quoting Willke & Willke, *supra* note 98).

well as abstinence.[135] The Task Force rejected all these motions, and instead included in the Report an endorsement of an abstinence-only sex education curriculum[136]—handing an important victory to Leslee Unruh, a national leader in the abstinence-only and CPC movements, who, as head of the National Abstinence Clearinghouse and a promoter of "purity balls" in South Dakota,[137] helped enact the state's ban and then led the campaign to defend it.[138]

Like Koop and Beckwith, Dr. Allison believed abortion restrictions should be enacted to protect the unborn, not women. Like Koop and Beckwith, Dr. Allison's commitment to the scientific method prevented her from endorsing movement claims about post-abortion syndrome. Instead, Dr. Allison supported abortion restrictions to protect the unborn while seeking to minimize the law's

135. Allison, *supra* note 130 ("[I]t is unethical to fail to educate our youth about all the ways to protect themselves from STDs and pregnancy."). For a similar report of Allison's objections, see, e.g., *Abortion Task Force Chair Disappointed with Final Report Process*, SIOUX CITY J., http://www.siouxcityjournal.com/articles/2005/12/14/news/south_dakota/bcb56c23098be88f862570d70018961b.txt (last visited Apr. 31, 2008); Cynthia Gorney, *Reversing* Roe, NEW YORKER, June 26, 2006, at 47, 49 (quoting Marty Allison observing of the Task Force Report, "[t]here's quite a bit of misleading or false information in there"); *see also* S.D. TASK FORCE TO STUDY ABORTION, REPORT OF MINORITY 20 (2006), *available at* http://www.womenrun.org/media/SD%20Minority%20Report.pdf (reproducing a Motion Submitted for the Record on Dec. 9, 2005 titled "Reproductive Health Decision Makers"); Lauren Bans, *The Anatomy of a Bad Law*, NATION, Mar. 30, 2006, http://www.thenation.com/doc/20060417/bans ("'There were huge, glaring omissions in the report,' [said minority member Kate Looby, South Dakota state director of Planned Parenthood.] 'Almost every one of our expert witnesses on both sides of the issue were asked, "Would you ever want to practice in an environment in which all abortions were illegal?," and almost every one of their own witnesses said, "Oh, God, I would never want to practice in an environment in which all abortions are illegal." Is that in the report? No.'").

136. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 70–71.

137. *See* Russell Shorto, *Contra-Contraception*, N.Y. TIMES, May 7, 2006, § 6 (Magazine), at 68, *available at* http://www.nytimes.com/2006/05/07/magazine/07contraception.html?_r=1&ei=5087%0A&en=27a30199f9128ffd&ex=1147233600&pagewanted=all&oref=slogin. In purity balls, fathers take their daughters on a date at a ball where the daughters pledge to their fathers to remain pure for them until they marry. *See NOW: No Right to Choose?* (PBS television broadcast Apr. 14, 2006) (transcript available at http://www.pbs.org/now/transcript/transcriptNOW215_full.html) (opposing educating teens about contraception and endorsing purity balls and abstinence until marriage education); *Everywoman: Purity Balls & Joline Makhlouf* (Al Jazeera English broadcast May 18, 2007), *available at* http://www.youtube.com/watch?v=KdM5sDXPu9w (quoting Leslee Unruh enthusing that "the purity ball is one of the favorite things that we do at the Abstinence Clearinghouse," and announcing "[w]e love the President. He's been a big pusher of abstinence until marriage education. . . . He said to me one time, what part of this do they not get? Abstinence works every single time").

138. *See* Davey, *supra* note 10 (quoting Unruh as a leader of Vote Yes For Life, the group campaigning for the ban); Siegel & Blustain, *supra* note 22, at 25 (noting that Leslee Unruh was "a driving force behind the South Dakota ban and the campaign manager of VoteYesforLife.com").

impact on women, insisting that the ban should have a rape exception and that the state should provide comprehensive sex education to help young women avoid unwanted pregnancies.

It was precisely this social scientific and public health approach to restricting abortion that estranged Chairwoman Allison from the antiabortion membership of the South Dakota Task Force. The antiabortion claim is now advocated by a coalition of groups—the traditional family values coalition (TFV) brokered by the Republican party in the 1970s and 1980s[139]—that endorses a more expansive understanding of antiabortion's morality expressly grounded in concerns about sexuality and family roles, and not simply in a concern about protecting the embryo or fetus.[140] As Randall Terry, founder of Operation Rescue, expressed the movement's vision in the mid-1990s:

> From the beginning when I founded Operation Rescue, the vision was not solely to end child-killing; the vision was to recapture the power bases of America, for child-killing to be the first domino, if you will, to fall in a series of dominoes. My feeling was, and still is, once we mobilize the momentum, the manpower, the money, and all that goes with that to make child-killing illegal, we will have sufficient moral authority and moral force and momentum to get the homosexual movement back in the closet, to get the condom pushers in our schools to be back on the fringes of society where they belong where women are treated with dignity, not as Playboy bunnies, etc., etc.[141]

This vision—which includes a commitment to abstinence, heterosexual marriage, and an ethic of privatized responsibility and dependency—is set forth in the movement's statements of principle, such as "The America We Seek" (published in *First Things* in the late 1990s),[142] or the Natural Family Manifesto that many TFV groups

139. *See supra* notes 73–74 and accompanying text.

140. *See, e.g.*, Post & Siegel, *supra* note 28, at 423–24 n.232 (showing that leading antiabortion groups campaign against same-sex marriage and endorse abstinence-only sex education curricula).

141. Pam Chamberlain & Jean Hardisty, *Reproducing Patriarchy: Reproductive Rights Under Siege*, PUB. EYE, Spring 2000, at 1, 13, *available at* http://www.publiceye.org/magazine/v14n1/PE_V14_N1.pdf (quoting a statement made by Randall Terry in WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA (1996)).

142. *The America We Seek*, *supra* note 123. The statement notes:

> The abortion license is inextricably bound up with the mores of the sexual revolution. Promotion of the pro-life cause also requires us to support and work with those who are seeking to reestablish the moral linkage between sexual expression and marriage, and between marriage and procreation. We believe that a renewal of American

endorsed in 2005.[143] It is a vision espoused by Susan Orr, the woman President Bush appointed to oversee the expenditure of nearly three hundred million dollars in federal family-planning monies. Orr, formerly of the Family Research Council, has spoken out in opposition to contraception as part of a "culture of death," and has authored a paper entitled, "Real Women Stay Married."[144] The movement seeks law to channel sex into marital, procreative expression.

It is because antiabortion advocacy is now nested in this broad-based coalition that the South Dakota Family Policy Council held a Protecting Life and Marriage Rally at the South Canyon Baptist Church in support of referendum provisions banning abortion *and* same-sex marriage that were on the South Dakota ballot in the November 2006 elections.[145] At the Protecting Life and Marriage Rally, keynote speaker Alan Keyes called abortion and same-sex marriage "one and the same issue."[146] "Abortion does at the physical level what homosexual marriage does at the institutional level," he said, explaining that both go against what God intended.[147] This account of abortion's wrong reaches far beyond the claim that a fertilized egg is a person. Instead, a belief that sex is properly

> democracy as a virtuous society requires us to honor and promote an ethic of self-command and mutual responsibility, and to resist the siren song of the false ethic of unbridled self-expression.

Id.

143. Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, FAM. AM. (SPECIAL EDITION), Mar. 2005, at 1, 1, *available at* http://www.heartland.org/pdf/17267.pdf. For discussion of the manifesto and the groups endorsing it, see Siegel, *The New Politics of Abortion*, *supra* note 8, at 1002–06.

144. Susan Orr, *Real Women Stay Married*, http://www.doesgodexist.org/MayJun01/RealWomenStayMarried.html (last visited Apr. 31, 2008); *see also* Ellen Nakashima, *Cut in Birth Control Benefit of Federal Workers Sought*, WASH. POST, Apr. 12, 2001, at A29 (quoting Orr's reply to President Bush's proposal to stop requiring all health insurance plans to cover birth control for federal employees: "[w]e're quite pleased, because fertility is not a disease").

145. The referendum was approved, and the South Dakota Constitution was amended to state: "Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota." S.D. CONST. art. XXI, § 9; *see also* Joyce Howard Price, *4 States OK Bans on Gay 'Marriage'; Four Others Likely; S. Dakotans Reject Abortion Ban; Stem-Cell Law Trails in Missouri*, WASH. TIMES, Nov. 8, 2006, at A12; Stephanie Simon, *South Dakota Scraps Abortion Ban; Voters Reject the Law Built with Little Leeway. A Prohibition of Gay Marriage Passes*, L.A. TIMES, Nov. 8, 2006, at A16.

146. Ryan Woodward, *Speakers Rally Against Abortion, Gay Marriage*, RAPID CITY J. (S.D.), Oct. 17, 2006, *available at* http://www.rapidcityjournal.com/articles/2006/10/17/news/local/news01a.txt.

147. *Id.*

restricted to marital and procreative aims would explain why the movement opposes abortion and same-sex marriage as "one and the same issues," and why so many antiabortion leaders support abstinence as the only form of sex education.[148] It is why the leader of the campaign to ban abortion in South Dakota runs the National Abstinence Clearinghouse and holds purity balls in Sioux Falls.[149] WPAA expresses the antiabortion claim in this more expansive normative register—telling of the individual suffering and social disrepair that flow from breach of sex and family role morality that many in the movement believe God has ordained.

But if WPAA is expressive, it is not simply a movement creed. As I have shown, it grew up as a movement *strategy*—a hybrid discourse that evolved in an effort to argue about the morality of abortion with those *outside* the ranks of the TFV movement. How then does WPAA persuade Americans outside the ranks of the TFV movement—the middle-of-the-road, fence-sitting majority of Americans to whom WPAA was designed to appeal? Movement strategists decided that *these* Americans were sufficiently concerned about women's welfare and women's rights that they could not be persuaded to adopt restrictions on abortion solely to protect the unborn.[150] To assuage the concerns of this audience, South Dakota has appropriated the language of the abortion rights movement to justify its abortion ban—claiming that banning abortions will protect women's health and freedom of choice.[151]

But how exactly is *this* claim persuasive? It persuades—if it persuades—by fusing some relatively new forms of talk about public

148. *Id.*; *see also, e.g.*, sources cited *supra* notes 140–44.

149. *See supra* note 137 and accompanying text. For the same reason, the *Natural Family Manifesto* condemns abortion while opposing sex outside marriage. Its statement of principles reads: "We affirm the marital union to be the authentic sexual bond, the only one open to the natural and responsible creation of new life." Carlson & Mero, *supra* note 143, at 15. The *Manifesto* then affirms the group's belief in the "sanctity of human life from conception to natural death," asserting that "each newly conceived person holds rights to live, to grow, to be born, and to share a home with its natural parents bound by marriage." *Id.* at 16.

150. *See* REARDON, *supra* note 102, at 96–97; *supra* note 98 and accompanying text; *see also* Michelle Vu, *Pro-Family Summit Faces Opposition*, CHRISTIAN POST, Sept 24, 2007, http://www.christianpost.com/article/20070924/29433_Pro-Family_Summit_Faces_Opposition.htm ("Leslee Unruh from the National Abstinence Clearinghouse shared about her group's new and successful way to ban abortion in South Dakota by framing the debate as a feminist issue. 'We're not saying "abortion is wrong,"' she said, according to the Times. 'We're taking women by the hand and saying "let us help you." The days of standing by abortion clinics with pictures of dead babies, that's over.'").

151. S.D. TASK FORCE TO STUDY ABORTION, *supra* note 11, at 47.

health and women's rights with some very old forms of talk about women's roles: Abortion *must* harm women because women are *by nature* mothers. Choosing against motherhood and subverting the physiology of pregnancy will make women ill—and in all events cannot represent what women really want, because any *real* woman wants what is best for her child. Women who seek abortions must have been confused, misled, or coerced into the decision to abort a pregnancy—because the choice to abort a pregnancy cannot reflect a normal woman's true desires or interests. Using law to restrict abortion protects women from such pressures and confusions—and frees women to be true women.

Through social movement struggles, a deeply gender-conventional vision of sex and family roles has been articulated in twentieth-century idiom—in a hybrid discourse combining the vocabularies of public health, medical malpractice, constitutional rights, and feminism that has the power to persuade legal and political audiences who might be estranged by direct appeal to nature, God, or custom.[152]

CONCLUSION: *CARHART*, REVISITED

I would like to conclude with a few reflections on the way my story bears on an understanding of the abortion right and the constitutional order that protects it. Since the 1990s, increasing numbers of antiabortion advocates have decided that the public's

152. Social movement struggle can lead advocates to express their claims in the norms of their adversaries—leading feminists to reason in gender-conventional frames and traditionalists to reason in feminist frames. The movement-countermovement dynamic thus translates movement claims into new forms, in the process often infusing them with new meaning. For an example of this dynamic in the debate over the ERA, see Siegel, *Constitutional Culture*, *supra* note 24, at 1406:

> In fact, if one looks at the ways the ERA's opponents accommodated concerns of the ERA's proponents and the ERA's proponents accommodated concerns of the ERA's opponents, one can see how the quest to persuade the American public about the Constitution's meaning can structure dispute without resolving it. The quest to win public confidence and to capture sites of norm articulation disciplines change agents, leading them to internalize elements of counterarguments and to other implicit forms of convergence and compromise. It supplies opponents in constitutional controversies incentive to reckon with the normative logic and popular appeal of opposing claims, rendering such claims intelligible as the expression of a contending, if despised, constitutional understanding. It structures a semantic field in which the Court can pronounce the Constitution's meaning.

Id.; *see also* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175 (1996) ("Status talk is mutable and remarkably adaptable: It will evolve as the rule structure of a status regime evolves.").

willingness to restrict abortion crucially turns on judgments about women. The movement has devised a way of arguing its case that is designed to quell these concerns. It has transformed PAS—a therapeutic discourse initially employed to recruit women to the antiabortion movement—into WPAA—a political discourse designed to persuade audiences outside the movement's ranks who are ambivalent about restricting abortion because of their concerns about women. To meet the concerns of this audience, the antiabortion movement is now arguing that restricting abortion promotes the health and freedom of women.

But how exactly is it that criminalizing abortion would free women and protect their health? To make this claim persuasive, the movement infuses feminist and public health frames with familiar stereotypes about women's capacity and women's roles on which the claim's persuasive power depends. These gender-conventional convictions—that women are too weak or confused to be held responsible for their choices, and need law's protection to free them to be mothers—help make reasonable abortion restrictions that are wildly over- and underinclusive and are unresponsive to the real dilemmas women face.

The antiabortion movement is not proposing to identify particular groups of women who have emotional difficulties or particular groups of women for whom ending a pregnancy is a second-best option and offer these women the various long-term resources they need to make different choices. Women who are mentally ill need more than abortion restrictions, while healthy women do not need to be treated as if they were mentally ill. A woman facing an unwanted pregnancy needs different forms of support than a woman who wants to bear a child but cannot provide for her existing family. Yet, WPAA offers abortion-restrictions as a one-size-fits-all cure for the many social circumstances that lead women to end a pregnancy. The claim is that by restricting *all* women, government can free women to be the mothers they naturally are. Woman-protective antiabortion argument is gender-paternalist in just the sense that the old sex-based protective labor legislation was. It restricts women's choices to free them to perform their natural role as mothers.[153]

153. In *Muller v. Oregon*, 208 U.S. 412 (1908), the United States Supreme Court upheld an Oregon statute placing maximum-hours restrictions on women as an appropriate measure to protect women's health and reproductive capacity, noting that long hours may result in

For this reason, I am prepared to argue that a law like South Dakota's violates forms of dignity and decisional autonomy guaranteed to women, not only by *Roe* and *Casey*, but also by the Supreme Court's equal protection sex discrimination cases. If the public would not ban abortion to protect the unborn but for the state's claims to be protecting women—as Jack Willke and David Reardon and Leslee Unruh seem to be saying—then it is fair to say that this use of public power is sex-based state action that reflects and enforces constitutionally prohibited gender stereotypes about women. The South Dakota statute is a life-defining exercise of public power against women premised on the view that government knows better than women what a (real) (normal) woman really wants and needs.

Whether or not South Dakota's law violates equal protection doctrine as presently understood—and I would argue that the case is strong that it does[154]—gender stereotyping of this kind has a pernicious effect on politics for just the reasons we treat gender stereotypes as constitutionally suspect. WPAA taps traditional forms of talk about women that abate public concern about coercive uses of state power against women. WPAA obscures the actual reasons women seek abortions—and offers little in response to these needs. Criminalizing abortion would not, for instance, address the needs of women who seek abortion because they lacked contraception, or were raped, or are living in an abusive relationship, or will have to drop out of work or school to raise a child alone, or are stretched so thin that they cannot emotionally or financially provide for their other children. Criminalizing abortion assuredly does not help women control the timing of motherhood. "Normal" women seek abortions for all these reasons—which criminal abortion laws would not repair. Criminal abortion laws cannot give women emotional or financial support or counseling or love—but they can restrict, degrade, and endanger women, especially women who do not want or are not able to conform their lives to the vision of the good life that seems to fund the South Dakota Task Force Report: abstinence before marriage and economic dependence within it.

Criminal abortion statutes may symbolize respect for traditional family values—but they instrumentalize too many women's lives in the process, dividing women who might make common cause in other

"injurious effects, upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care," *id.* at 421.

154. *See* Siegel, *The New Politics of Abortion*, *supra* note 8, at 1040–50.

contexts. The ongoing debate over the criminalization of abortion may well prevent women who live in diverse relations to the institution of motherhood from identifying the kinds of claims on the state through which they could in fact make common cause with one another.

The good news about the appearance of WPAA is that it makes brutally publicly clear that abortion regulation concerns judgments about women, and not simply the protection of unborn life. The bad news is that WPAA blunts public compunction about the coercive use of state power by actuating ancient stories about women's agency and women's roles that the Court has repudiated in its equal protection sex discrimination cases—but that still have potent purchase on the public imagination.

On the other hand, the good news is that even if these stereotypes persist and continue to shape debate about the kinds of family life government should support, one can see—*in the abortion debate itself*—that the equal citizenship norms the Court recognized in its 1970s sex discrimination cases *also* have life in public imagination. Women's rights, needs, and interests *matter* to the voting public to whom advocates for abortion restrictions are appealing. For this reason at least, they matter even to members of the antiabortion movement itself, so much so that these equal citizenship norms are beginning to be integrated into antiabortion argument. The good news is that with WPAA, the *antiabortion movement itself* seems to be acknowledging that restrictions on abortion must respect women's autonomy and welfare, even if Americans continue to argue about what this means.

To be sure, given my normative priors, I see plenty of bad news in this story. The story I have told may suggest the path through which the Court will ultimately eviscerate *Roe* and claim to reconcile criminal abortion laws with *Roe*'s remnants. The appearance of woman-protective antiabortion argument in the *Carhart* opinion makes vivid the possibility that I am tracing the history of an argument that has the power to shape *Roe*'s future:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a

> doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[155]

But the Justice who penned these paragraphs in *Carhart* also wrote, in *Casey*:

> Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[156]

In these passages, Justice Kennedy ties the question of regulating abortion to the long history of imposing motherhood on women, and insists that to break with this tradition, the Constitution makes women self-governing.

With the spread of woman-protective antiabortion argument and its seductively modern justifications for using law to impose motherhood on women, Justice Kennedy and the nation will once again have to decide, not only how to balance the liberty of the pregnant woman against the state interest in protecting potential life, but more fundamentally: what kind of women do constitutional guarantees of liberty protect? The dissenting Justices in *Carhart* believe the answer to this question was already forged in the 1970s, and appeal to Justice Kennedy and the nation to remain faithful to the understanding of women as self-governing expressed in the Court's equal protection cases: "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship

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

156. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

stature."[157] It is the meaning of this constitutional commitment that is now at issue, and that the next wave of abortion restrictions outside the Partial-Birth Abortion Ban Act will test.

157. *Carhart*, 127 S.Ct. at 1641 (Ginsburg, J., joined by Stevens, Souter, & Breyer, JJ., dissenting).