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# Capturing the Judiciary: Carhart and the Undue Burden Standard

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## **CAPTURING THE JUDICIARY: *CARHART* AND THE UNDUE BURDEN STANDARD**

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# Capturing the Judiciary: *Carhart* and the Undue Burden Standard

Khiara M. Bridges\*

## *Abstract*

*In Planned Parenthood of Southeastern Pennsylvania v. Casey,<sup>1</sup> the Supreme Court replaced the trimester framework, first articulated nineteen years earlier in Roe v. Wade,<sup>2</sup> with a new test for determining the constitutionality of abortion regulations—the "undue burden standard."<sup>3</sup> The Court's 2007 decision in Gonzales v. Carhart<sup>4</sup> was its most recent occasion to use the undue burden standard, as the Court was called upon to ascertain the constitutionality of the Partial-Birth Abortion Ban Act, a federal statute proscribing certain methods of performing second- and third-trimester abortions.<sup>5</sup> A majority of the Court held that the regulation was constitutionally permissible, finding that it did not impose an undue*

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1. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (upholding a woman's right to an abortion and creating the undue burden standard to protect that right).

2. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman has a right to decide whether to terminate her pregnancy, but that a state may regulate areas protected by this right in the interests of safeguarding health, maintaining medical standards, and protecting fetal life).

3. See *Casey*, 505 U.S. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

4. See *Gonzales v. Carhart*, 550 U.S. 124, 157, 163–64 (2007) (finding the Partial-Birth Abortion Ban Act constitutional because the state's interests in protecting the dignity of "the life within the woman" and the "dignity and reputation" of doctors who perform partial-birth abortions outweighed the need for maintaining the availability of the intact dilation and evacuation (intact D&E) procedure).

5. See *id.* at 155 (assessing the constitutionality of the Partial-Birth Abortion Ban Act).

*burden on a woman's right to terminate her pregnancy.<sup>6</sup> In order to determine why it is that the undue burden standard has been incapable of striking down laws that limit a woman's ability to elect an abortion, this Article conducts a close reading of Carhart. The close reading reveals Carhart to be, at base, a logically sound opinion; however, its primary and fundamental weakness is that it proceeds from a highly problematic and disputed assumption—namely, that the fetus is a morally-consequential entity. It is this magnificently undecided presupposition that forms the basis of the Carhart majority's argument that abortion harms women,<sup>7</sup> a contention for which the decision has gained notoriety. Furthermore, the undue burden standard has come to reflect this presupposition inasmuch as the standard, too, presupposes the inherent "life" and moral value of the fetus. As such, this Article argues that the undue burden standard has become ineffective because, built into it at present, are assumptions about the always already valuable "life" of the fetus that, in any given instance, overdetermine the questions that the Court asks when weighing the constitutionality of a regulation that limits abortion by protecting fetal "life." When the standard presupposes the existence of a valuable fetal "life," it is likely that any legislation aimed at protecting that "life" will pass constitutional muster. The Article attempts to rehabilitate the standard by proposing an "agnostic undue burden standard"—that is, an undue burden standard that proceeds from the assumption that the moral status of the fetus is not known. The agnostic undue burden standard would ensure that the state corrupts neither the pregnant woman's ability to contemplate the moral status of the fetus that she carries nor her ability to contemplate whether the moral status so accorded should affect her decision to continue her pregnancy. If reconceptualized in the way that this Article proposes, an undue burden might be thought to reference those measures that impose upon the woman a conception of the inherent, moral value of fetal life—in derogation of her own personal views concerning fetal life, or in derogation of whether she believes that those views should determine the trajectory that her pregnancy takes.*

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6. *See id.* ("The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.")

7. *See id.* at 159–60 ("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 . . .").

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*I. Introduction*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>8</sup> the Supreme Court replaced the trimester framework, first articulated nineteen years earlier in *Roe v. Wade*,<sup>9</sup> with a new test for determining the constitutionality of abortion regulations—the "undue burden standard."<sup>10</sup> The Court's 2007 decision in *Gonzales v. Carhart*<sup>11</sup> was its most recent

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8. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (upholding a woman's right to an abortion and creating the undue burden standard to protect that right).

9. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman has a right to decide whether to terminate her pregnancy, but that a state may regulate areas protected by this right in the interests of safeguarding health, maintaining medical standards, and protecting fetal life).

10. See *Casey*, 505 U.S. at 878 ("To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis."); see also *id.* ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.").

11. See *Gonzales v. Carhart*, 550 U.S. 124, 157, 163–64 (2007) (finding the Partial-Birth Abortion Ban Act constitutional because the state's interests in protecting the dignity of "the life within the woman" and the "dignity and reputation" of doctors who perform partial-birth abortions outweighed the need for maintaining the availability of the intact dilation and evacuation (intact D&E) procedure).

occasion to use the undue burden standard, as the Court was called upon to ascertain the constitutionality of the Partial-Birth Abortion Ban Act, a federal statute proscribing certain methods of performing second- and third-trimester abortions.<sup>12</sup> In a fascinating opinion authored by Justice Kennedy, a majority of the Court held that the regulation was constitutionally permissible, finding that it did not impose an undue burden on a woman's right to terminate her pregnancy.<sup>13</sup>

*Carhart* reveals that the undue burden standard, as currently formulated, is incapable of defending the abortion right from being diminished by incrementalist legislation.<sup>14</sup> The first aim of this Article is to identify, precisely, the features of the undue burden standard that make it ineffective protection of the abortion right;<sup>15</sup> the second aim of the paper is to rehabilitate the standard by excising those problematic features and proposing a model that better accords with *Casey* and U.S. Constitutional

12. *See id.* at 141 ("Any physician who knowingly performs a partial birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both." (citing 18 U.S.C. § 1531 (2000 ed., Supp. IV))).

13. *See id.* (finding that the "Act does not on its face impose a substantial obstacle").

14. In her concurrence in *Stenberg v. Carhart*, which struck down a similar statute criminalizing certain methods of performing second and third trimester abortions, Justice Ginsburg described such bans as incrementalist methods designed to enervate the abortion right. *See Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (Ginsburg, J., concurring). Citing a dissenting opinion written by Judge Posner, Justice Ginsburg noted that the criminalization of the abortion method at issue was "not because the procedure kills the fetus, not because it risks worse complications for the woman than alternative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy." *Id.* at 951–52 (citations omitted). Instead, she writes, "the law prohibits the procedure because the State legislators seek to chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Casey*." *Id.* at 952.

Siegel offers an excellent exploration of *Carhart* as the product of an antiabortion social movement motivated by the belief that seeking a gradual diminishment of the abortion right, as opposed to seeking an outright ban, would be the more successful political strategy. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1707–12 (2008) [hereinafter Siegel, *Dignity*]. Siegel noted that "the Partial-Birth Abortion Ban Act was of a piece with prevailing antiabortion strategy," as the movement, faced with lack of popular support for the Human Life Amendment, "began to develop strategies to reverse *Roe* incrementally, through legislation and litigation that would erode support for abortion one step at a time." *Id.* at 1709. Siegel also discusses how the incrementalist strategy has produced major rifts in the antiabortion movement. *See id.* at 1709–10 n.51 (quoting one antiabortion advocate who called incrementalism the "devil's work" and emphasized that each "cleverly crafted incremental legislative initiative[] ends with a tiny unspoken caveat: '... and then you can kill the baby'").

15. *See infra* Part II.A–III (describing the problems with the current undue burden standard).

law.<sup>16</sup> The argument, then, is not that the undue burden standard is *inherently* incapable of defending the abortion right from being weakened.<sup>17</sup> Rather, the argument is that, in its current formulation, the undue burden standard is unable to preserve what is still recognized within constitutional law as an important, if not a fundamental, right; accordingly, the standard must be reconfigured if it is to provide the protection that women need and the Constitution demands.

In order to identify the source of the undue burden standard's current weakness, I undertake a close reading of *Carhart* and analyze the operation of the undue burden standard within the majority opinion.<sup>18</sup> This investigation reveals *Carhart* to be, at base, a logically sound opinion; however, its primary and fundamental weakness is that it proceeds from a highly problematic and disputed assumption—namely, that the fetus is a morally consequential entity. Specifically, the opinion in *Carhart* is written as if the majority *knows* that the fetus has/is an inherently valuable "life"<sup>19</sup>—as if the moral status of the fetus has been decided.<sup>20</sup> It is this

16. See *infra* Part III (suggesting revisions to the current standard).

17. See *infra* Part IV.A (explaining how a revised undue burden standard would operate effectively).

18. See *infra* Part II (providing a close analysis of *Carhart*).

19. I use quotations around the word "life" when I am not using the term to signify the (relatively) morally neutral capacity possessed by living biological organisms. The quotation marks index a reference to the "life" that has moral, theological, and/or spiritual significance—a notion of "life" that some believe is simultaneous to the biological life of the living organism. See *infra* Part II.B (discussing the conflation of biological life with moral life).

20. It is important to note at the outset that I assume that the position that the Court has taken regarding the fetus is an entirely moral position—as opposed to a religious or theological position. See *infra* note 74 and accompanying text (discussing the debate surrounding whether the view that the fetus is morally consequential should always be understood as a religious position or whether it could also be understood as a purely moral position). Furthermore, I assume that, although this position may be informed by religion or theology, it remains capable of being described as a secular and *moral* position. Justice White has articulated eloquently the secular basis for concluding that the fetus is a morally significant entity:

[O]ne must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. . . . [T]he continued existence and development—that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy . . . .

Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting).

magnificently undecided (and potentially undecidable) presupposition that forms the basis of the *Carhart* majority's argument that abortion harms women,<sup>21</sup> a contention for which the decision has gained notoriety.<sup>22</sup> Justice Kennedy, writing for the majority, asserted the simple truth of this argument: "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."<sup>23</sup> However, the argument that abortion harms women rests on the presupposition that the fetus is a morally consequential entity of the highest degree. Furthermore, the undue burden standard in *Carhart* reflects this presupposition inasmuch as the standard, too, presupposes the inherent "life" and moral value of the fetus.<sup>24</sup> As such, this Article argues that the undue burden standard is ineffective because, built into it at present, are assumptions about the always already valuable "life" of the fetus that, in any given instance, overdetermine the questions that the Court asks when weighing the constitutionality of a regulation that protects fetal "life."<sup>25</sup> When the

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21. In arguing that abortion harms women, the Court states:

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.

*Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

22. See *infra* note 36 (discussing several commentators' criticism of the Court's conclusion that abortion harms women).

23. *Carhart*, 550 U.S. at 159. Justice Ginsburg, writing in dissent, disputes the facticity of the claim that abortion harms women as well as indicates its origin in antiabortion social movements. See *id.* at 158 (Ginsburg, J., dissenting) ("[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.'"). Reva Siegel offers a helpful compendium of studies disproving any innate link between induced abortion and psychological damage or trauma. See Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1653 n.44 (2008) [hereinafter Siegel, *The Right's Reasons*] (listing several such studies); see also *id.* at 1668–73 (describing how the abortion-harms-women argument was developed strategically and deployed by an anti-abortion social movement seeking to present itself as concerned with the woman as much as it was concerned with the fetus and, in so doing, to build its base of supporters); Siegel, *Dignity*, *supra* note 14, at 1726–33 (demonstrating how the antiabortion movement has advanced the claim "not only that women will be harmed by abortion but that they have been pushed into abortions they do not want and misled into abortions they will regret").

24. See *infra* Part II.B (explaining *Carhart*'s understanding of the value of "life").

25. See *infra* Part III (describing how the notion of "life" corrupts the undue burden standard).



standard presupposes the existence of a valuable fetal "life," it is likely that any legislation aimed at protecting that "life" will pass constitutional muster.

As a solution to this predicament, this Article proposes that the assumption that the moral status of the fetus is known and that the Supreme Court knows it can be replaced by a skepticism towards the knowability of this question.<sup>26</sup> Likewise, the undue burden standard should be similarly ambivalent towards the question of whether the fetus is/has a "life." The skepticism that I propose would counsel that the undue burden standard should assume that the moral status of the fetus is not known (and may not ever be known). I refer to the latter formulation as the "agnostic" version of the undue burden standard. I propose that an agnosticism towards the question of fetal life will revitalize the undue burden standard, thereby enabling it to competently protect the abortion right from further diminishment. The agnostic undue burden standard that I propose would ensure that there exists a space around the abortion decision wherein a woman would be free to decide whether and when over the course of her pregnancy she will grant the fetus a consequential moral status, and if so, whether she will allow the moral status so granted to determine the trajectory of her pregnancy. The agnostic undue burden standard would create conditions within which a moral pluralism could develop around the fetus and abortion, more generally. Differently stated, a space of moral pluralism should surround the exercise of a right as important as the abortion right; it is this space that a morally neutral—indeed, an agnostic—undue burden standard patrols.

Part II conducts a close reading of *Carhart*, placing the argument that abortion harms women within the larger conceptual apparatus erected by Congress and affirmed by the Court in its review of the federal Partial-Birth Abortion Ban Act. This Part reveals that the foundational assumption upon which the majority's logic rests is the presupposition that the moral status of the fetus is objectively knowable and, further, that the Court knows it. Part III continues the discussion by exploring how the Court's confidence with regard to the moral status of the fetus—that is, that the fetus is a morally consequential "life"—has been incorporated into the undue burden standard. This Part argues that such an incorporation overdetermines the questions that the Court asks with the standard, making the standard incapable of defending the abortion right from being diminished by fetal "life"-protective measures. This Part goes on to describe an alternative

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26. See *infra* Part III (suggesting a new undue burden standard).

undue burden standard that does not proceed with the same assumptions regarding the fetus's moral status. This alternative standard, the agnostic undue burden standard, would ensure that the state does not corrupt the woman's ability to decide for herself what moral status her fetus has and the consequences thereof. Part IV describes the agnostic undue burden standard in action—demonstrating how it would be used to adjudicate the constitutionality of several fetal "life"-protective laws that have been, or may be, passed by various states. A brief conclusion follows in Part V.

## II. A Close Reading of *Carhart*

In *Carhart*, the Court was called upon to determine the constitutionality of the "Partial-Birth Abortion Ban Act of 2003" [PBA], a federal statute that prohibited second- and third-trimester "intact D&E" procedures<sup>27</sup> by imposing criminal sanctions on physicians using the method.<sup>28</sup> The immediate precursor to *Carhart* was the Court's decision in

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27. See *Gonzales v. Carhart*, 550 U.S. 124, 124 (2007) (explaining the history of the Act and the previous decisions on abortion). "Dilation and evacuation" procedures are most commonly used to perform abortions taking place after the first trimester. Most first trimester abortions are accomplished with a vacuum aspiration procedure, during which the physician empties the contents of the uterus with a suctioning device. See *Stenberg v. Carhart*, 530 U.S. 914, 923 (2004) (noting that ninety percent of all abortions take place in the first trimester and that the most predominant method for first trimester abortions is "vacuum aspiration").

28. *Carhart*, 550 U.S. at 141. The most relevant provisions of the statute, cited in *Carhart* are the following:

(a) Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, . . .

(b) As used in this section—

(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; . . .

. . . .

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section . . . .

*Stenberg v. Carhart*,<sup>29</sup>—a case in which the Court was called upon to determine the constitutionality of a Nebraska statute that similarly prohibited certain methods of second- and third-trimester abortions. The Court in *Stenberg* struck down the statute, finding that the legislation was unconstitutional both because it lacked a health exception and because it unduly burdened the abortion right due to its effective proscription of most second- and third-trimester abortion procedures.<sup>30</sup> In *Carhart*, the Court was asked to consider a revised version of the statute at issue in *Stenberg*, which included language that defined the criminalized procedure to a greater level of specificity than its *Stenberg* predecessor.<sup>31</sup>

*Carhart* held that the statute was constitutional—finding that it "further[ed] the legitimate interest of the Government in protecting the life of the fetus that may become a child."<sup>32</sup> Moreover, the Court found that the criminalization of this specific type of abortion procedure did not unduly burden a woman's abortion right because the proscription "expresses

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*Id.* (citing 18 U.S.C. § 1531 (2000 ed., Supp. IV)). Nonintact, or standard, D&E procedures differ from the intact D&E insofar as the physician does not attempt to extract the fetus intact from the uterus, instead, the physician dismembers the fetus and removes it from the woman's body in parts. *See id.* at 135–36 (describing the nonintact, or standard, D&E procedure).

29. *Stenberg*, 530 U.S. at 914, 945–46 (finding a similar Nebraska abortion statute unconstitutional).

30. *Id.* at 938, 945–46 (finding the statute unconstitutional for these reasons).

31. The Nebraska statute defined a partial-birth abortion as:

[A]n abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

NEB. REV. STAT. § 28-326 (1998).

32. *Carhart*, 550 U.S. at 146. Against the charge that the statute was void for vagueness, the Court responded that the language in the federal Act, unlike the Nebraska statute, clearly "define[d] the line between potentially criminal conduct on the one hand and lawful abortion on the other." *Id.* at 149. Moreover, the Court found that the scienter requirement, providing that a physician must *intend* to perform an intact D&E procedure, "alleviate[d] vagueness concerns." *Id.* The Court also held that although the statute did not contain a health exception, it survived constitutional scrutiny because "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.* at 164.

respect for the dignity of human life"<sup>33</sup>—a goal that, per *Casey*,<sup>34</sup> the state can pursue, although the state's pursuit of the goal may, directly or tangentially, burden the abortion right.<sup>35</sup>

In the process of upholding the federal PBA, the Court made the claim for which the *Carhart* decision is probably most identified: abortion harms women.<sup>36</sup> However, this argument is part of a more elaborate conceptual

33. *Id.* at 157

34. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (noting that abortion regulations that allow the state to "express profound respect for the life of the unborn are permitted").

35. See *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (authorizing the state to pursue the goal of promoting respect for the dignity of human life).

Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

*Id.*

36. See *id.* at 159 (arguing that "[s]evere depression and loss of esteem can follow" an abortion); see also Rebecca E. Ivey, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1455 (2008) (noting that the "woman-protective discourse, which arises in nascent form in the Stenberg dissents . . . reaches its full expression in *Gonzales*"); Martha K. Plante, "Protecting" *Women's Health: How Gonzales v. Carhart Endangers Women's Health and Women's Equal Right to Personhood Under the Constitution*, 16 AM. U. J. GENDER SOC. POL'Y & L. 389, 400 (2007) (arguing that "the Court mocked the role that a woman's mental health plays in the abortion decision, implying that women are not competent to make such serious decisions and must be saved from themselves by the state and the courts"); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 121 (2008) (noting that Justice Kennedy looked to an "amicus brief describing the discredited 'post-abortion syndrome'" for support of the claim that "abortion . . . by its nature [is] harmful to women"); Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 4 (2008) (arguing that Justice "Kennedy, assuming facts not in evidence, gave to abortion-rights opponents something they have sought for a number of years—official recognition of the women's regret rationale"). Siegel offers an engaging genealogy of the abortion-harms-women argument, which she calls "woman-protective abortion argument"—describing its origins as a therapeutic discourse designed to discourage women from terminating their immediate pregnancies and tracing its transformation into a legal and political argument made by anti-abortion social movements that was ultimately accepted by the majority in *Carhart*. See Siegel, *The Right's Reasons*, *supra* note 23, at 1643–51 (describing the evolution of the abortion-harms-women argument). Indeed, Siegel's academic interest in the abortion-harms-women argument predated the Court's decision in *Carhart*. In earlier scholarship, she argued that abortion regulations that were premised on the belief that abortion harms women violate equal protection guarantees contained in the Constitution. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 993 (2007) (analyzing "the state's claimed interest in protecting women from abortion" showing "that these justifications rest on gender stereotypes about women's capacity and women's roles," and

apparatus that begins with the logic that Congress advanced in justification of the federal PBA.<sup>37</sup> The next section starts the analysis there.

*A. The Fetus-qua-Infant and How "Abortion Harms Women"*

In the course of arguing that the state may constitutionally burden the abortion right with laws that express "profound respect" for fetal life, *Carhart* approvingly cites Congressional Findings surrounding the federal PBA, documenting Congress's concern with "drawing a bright line that clearly distinguishes abortion and infanticide."<sup>38</sup> The Court went on to "confirm the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned."<sup>39</sup> The federal PBA was intended to draw this boundary. The criminalization of intact D&E procedures, which are, according to Congress, dangerously mimetic of infanticide in a way that nonintact D&E procedures are not, is advanced as a proper exercise of a state engaged in "promot[ing] respect for life, including the life of the unborn."<sup>40</sup>

In order to find the federal PBA constitutional, the *Carhart* majority had to legitimate the boundaries drawn by Congress, reasoning that the lawfulness of an abortion procedure ought to be achieved by its *distance from* infanticide.<sup>41</sup> The majority's task is to support a logic wherein the differences between intact and nonintact D&E procedures acquire *constitutional* significance—wherein one procedure approximates infanticide so closely that its proscription remains constitutional, while the other has such sufficient distance from infanticide that it is legitimately untouched by the proscription of its sibling procedure.<sup>42</sup> To accomplish this

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concluding that "[e]nacting a law to compel a pregnant woman to become a mother for these reasons violates the Equal Protection Clause").

37. See *infra* Part II.A (discussing Congress's justification for the PBA).

38. *Carhart*, 550 U.S. at 158.

39. *Id.*

40. *Id.* at 157.

41. See *id.* at 158 ("The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned.").

42. Other scholars have noted the novelty that characterizes the *Carhart* majority's attempt to find constitutional significance in the differences between intact D&E procedures and nonintact D&E procedures. One scholar has written that "the Court's willingness to draw sharp lines between procedures on the grounds of vague and unbounded concerns about 'coarsening society' represents a novel lens through which to analyze reproductive rights." Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories*

task, the Court had to accept Congress's reasoning that the abortion procedure is more like infanticide the closer the aborted fetus, or abortus, resembles an infant when it is removed from the uterus.<sup>43</sup> Conversely, the less the abortus approximates an infant upon its removal from the woman's body, the greater the distance the procedure has from infanticide. Within the legislature's logic, infanticide is inflicted on infants assuming a human form; abortions are inflicted on fetuses not assuming a human form. When a physician purports to perform an abortion procedure on an object that assumes the human form, the bright line between infanticide and abortion is transgressed, and the state may legitimately proscribe the "abortion" procedure.<sup>44</sup>

Yet, the conceptual apparatus erected by Congress in the federal PBA and legitimated by the Court in *Carhart* proceeds from a problematic assumption—that is, that the fetus is appropriately likened to an infant. To begin, there is no fundamental justification for attaching legal significance to the form that the abortus assumes *upon its removal from the woman's body*. When one takes as one's point of reference the form the fetus

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*of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1568 (2008). She notes that this lens, a "repugnance lens," may be used to justify severe limitations on reproductive rights. *Id.*

43. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant,' and thus it . . . clearly distinguish[ed] abortion and infanticide." (citations omitted)).

44. There also seems to be other boundaries that are transgressed in the performance of the intact D&E procedure—at least within the conceptual apparatus constructed by Congress and affirmed by the Court. It would appear that, for Congress and the *Carhart* majority, there are obstetricians and there are abortionists. Obstetricians deliver infants during the process of a live birth; abortionists conduct abortions during abortion processes. In pulling the body of the fetus into the vagina via breech extraction in the course of the intact D&E, the abortionist acts as would an "obstetrician delivering a child." *Stenberg v. Carhart*, 530 U.S. 914, 959 (2000) (Kennedy, J., dissenting). However, subsequent to the breech extraction, which is properly performed pursuant to a live birth, the physician aspirates the contents of the fetus's brain and performs an abortion. In this way, the intact D&E procedure transgresses the demarcations between live birth and abortion processes by using the process of a live birth to conduct an abortion. As Justice Kennedy wrote in his dissent in *Stenberg*, "We are referred to substantial medical authority that [the intact D&E] perverts the natural birth process to a greater degree than [nonintact] D&E, commandeering the live birth process until the skull is pierced." *Id.* at 962–63. He approvingly cites an amicus curiae brief, which argued that the intact D&E procedure "is aberrant and troubling because the technique confuses the disparate role of a physician in childbirth and abortion." *Id.* at 963. After noting that the intact D&E procedure requires doctors to use "the natural delivery process to kill the fetus," he concludes that the State was justified in proscribing the procedure, as "the natural birth process has been appropriated." *Id.* at 964; *see also Carhart*, 550 U.S. at 160 (arguing that the intact D&E "perverts a process during which life is brought into the world").

assumes *in utero*, the object of the intact D&E procedure is identical to the object of the nonintact D&E procedure. When the intact fetus being sustained by the woman is the referent, one can appreciate that the intact D&E procedure is no more and no less like infanticide than nonintact D&Es.<sup>45</sup> If one chooses to liken an *in utero* fetus to an infant, one can appreciate that infanticide of this fetus-cum-infant may be accomplished by

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45. The Court in *Stenberg* specifically made this point, arguing that "the notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg*, 530 U.S. at 946–47.

It is interesting that the Court in *Carhart* did not consider the form that the fetus assumes within the woman. From one angle, one could understand the Court's refusal to consider the fetus *in utero* as a rejection of visual technologies, which tend to disregard the fact that the visualized, free-floating, seemingly autonomous fetus is being sustained *by a woman*. These technologies have been roundly criticized by feminists and other scholars. Rosalind Petchetsky makes this argument cogently:

The fetus in utero has become a metaphor for "man" in space, floating free, attached only by the umbilical cord to the spaceship. But where is the mother in that metaphor? She has become empty space. . . . [T]he autonomous, free-floating foetus merely extends to gestation the Hobbesian view of born human beings as disconnected, solitary individuals. [This] abstract individualism . . . efface[s] the pregnant woman and the foetus' dependence on her. . . .

Rosalind Petchetsky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in *REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD, AND MEDICINE* 57, 63 (Michelle Stanworth ed., 1987).

Insofar as the Court appears to reject the assumption of the perspective allowed by these technologies, one could argue that the Court is assuming a feminist or woman-centered position. However, from another angle, one could understand the Court's refusal to consider the fetus *in utero* as its acquisition of the perspective of the (likely gendered male) physician who sees the abortus when it is removed from the woman. That is, it is the physician performing the abortion who sees the form that the object of the procedure assumes.

Interestingly, Justice Kennedy proclaims to reject this perspective in his dissent in *Stenberg*. Chastising the majority for using medical terminology—such as "transcervical procedures," "osmotic dilators," "instrumental disarticulation," and "paracervical block"—to describe the procedure at issue, Kennedy writes that "the majority views the procedure from the perspective of the abortionist." *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting). In *Stenberg*, Justice Kennedy argues that the majority should assume "the perspective of the society shocked when confronted with a new method of ending human life." *Id.* at 957; *see also id.* at 962 (noting that "abortion is fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life"); *cf. Ivey, supra* note 36, at 1461 (reading Justice Kennedy's account of the intact D&E abortion procedure in *Carhart* as assuming the perspective of the medical personnel, who "can see and thus internalize" the event). Accordingly, in placing primacy on the form of the *ex utero* fetus assumes over the *in utero* fetus, it would appear that *Carhart* has indeed acquired the perspective of the observing society, which may react in horror to the form that the abortus assumes. Notably, the woman, whose body once sustained the abortus, is *also* not explicitly included in this perspective.

decapitation or the piercing of the infant's skull (which occurs during the intact D&E procedure), just as it may be accomplished by dismemberment (which occurs during the nonintact D&E procedure).<sup>46</sup> Differently stated, the proximity to infanticide need not turn on the form the fetus assumes after the procedure; it may just as well turn on the form the fetus assumes before the procedure. If the latter is the point of reference, intact and nonintact D&Es are indistinguishable in their approximation to infanticide.

Now, of course, the goal here is not to argue that Congress somehow erred when it failed to *also* criminalize nonintact D&E procedures. Instead, the point is that it is arbitrary to select the post-abortion fetus as the referent for determining a procedure's approximation to infanticide.<sup>47</sup> Furthermore, and more problematically, the Court's acceptance of the conceptual apparatus posited by Congress obscures that, in order for any abortion procedure to approximate infanticide, *the fetus must first be likened to an infant*. That the Court does not question whether Congress may legitimately liken the fetus to an infant intimates towards a conclusion that I will elaborate later: the Court is proceeding from the assumption that it knows the moral status of the fetus and, further, that this moral status is one of a value-possessing "life."<sup>48</sup>

Yet, the Court expands upon the conceptual apparatus offered by Congress by inserting it into a larger ontology of motherhood; moreover, this is a metaphysics of motherhood that leads the Court to assert that abortion harms women. To explain: after a relatively unexceptional (if provocative, insofar as it included graphic descriptions of the abortion procedure at issue) discussion of the potential vagueness, overbreadth, and

46. See *supra* note 28 and accompanying text (describing the nonintact D&E procedure).

47. The *Carhart* dissent similarly recognized the arbitrariness of the Court's decision. Justice Ginsburg, writing for Justices Stevens, Souter, and Breyer, argued:

Delivery of an intact . . . fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality.

*Carhart*, 550 U.S. at 181 (Ginsburg, J., dissenting). As indicated by the dissent, the majority's logic contains contradictions and inconsistencies; after *Carhart*, constitutional protection will still be afforded to abortion procedures that produce aborted fetuses that resemble infants (subsequent to digoxin-preceded intact D&E procedures as well as abortions performed through medical inductions and cesareans).

48. See *infra* Part II.B (unpacking the meaning of a "value-possessing 'life'").



unduly burdensomeness of the federal PBA, *Carhart* takes a jarring, almost inexplicable turn<sup>49</sup> when it proclaims, "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."<sup>50</sup> It is this slightly maudlin, highly disputable,<sup>51</sup> yet effectively vapid statement that is the springboard for the Court's elaboration of its ontology of life, motherhood, and abortion.<sup>52</sup>

As discussed above, the Court accepts Congress's reasoning that the abortion procedure is more disrespectful of human life the closer the object of the procedure resembles a child; accordingly, the intact D&E procedure, with its infant-like abortus, may be criminalized because of the high level of disrespect it shows for human life.<sup>53</sup> Yet, the Court introduces its discussion of the issue with avowals of the "bond of love the mother has for her child" as the "ultimate expression" of "respect for human life."

It would appear that, for the Court, the more the object of the procedure approximates a child, the more the woman undergoing the abortion procedure approximates a mother, and the more disrespect is shown human life by the procedure that would disrupt that always already bond between mother and child. Conversely, the less the object of the procedure approximates a child, the less the woman undergoing the procedure approximates a mother, and the less disrespect is shown human life by the procedure that would disrupt that bond. Following this logic, one can then understand the significance of the Court's conclusion that:

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49. See Laura J. Tepich, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 383 (2008) (noting that Justice Kennedy's "lapse" into a reflection on the "bond of love" between mother and child is "an unconnected and completely unsubstantiated reflection about motherhood").

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

51. Indeed, the majority's statement that "respect for human life finds an ultimate expression in the bond of love the mother has for her child" might best be described not as disputable, but rather as *inarguable*. See Turner, *supra* note 36, at 41 (noting that the Court's opinion is based on an "inarguable premise and conclusion about abortion and 'women'"); cf. Tepich, *supra* note 49, at 383 (describing the Court's statement that "respect for human life finds an ultimate expression in the bond of love the mother has for her child" as "completely without support").

52. Tepich notes that "[i]t remains a mystery to this author and to countless other bystanders, including Justice Ginsburg, where exactly Justice Kennedy came up with these sweeping conclusions about the nature and moral nuances of motherhood" and describes this part of the majority opinion as a "moral meandering through the realm of motherhood." Tepich, *supra* note 49, at 385.

53. See *Gonzales*, 550 U.S. at 158 ("Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant,' and thus it was concerned with 'drawing a bright line that clearly distinguishes abortion and infanticide.'" (citations omitted)).

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 on her unborn child, a child assuming the human form.<sup>54</sup>

Within the majority's metaphysics, when the object of the procedure approximates a child, the woman approximates motherhood; yet the Court's citation to the "self-evident" fact that a woman will suffer more if she learns that her abortus resembled a child reveals that, also a part of this metaphysics, is the belief that the more the woman approximates motherhood, the more damage the procedure inflicts on her. Conversely, the less the object of the procedure approximates a child, the less the woman approximates motherhood, and as a result, the less the damage that is inflicted by the abortion.<sup>55</sup>

Again, this conceptual apparatus proceeds from the dubious assumption that respect for human life ought to be aligned with an abortion procedure that produces fragments of an infant; respect for human life could just as easily be aligned with the abortion procedure that produces an intact fetal body.<sup>56</sup> Moreover, it is not self-evident that a woman approximates motherhood by the form her abortus assumes. An alternative

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54. *Id.* at 159. Turner observes that the majority states that only "some women" regret their decisions to abort. Turner, *supra* note 36, at 41. However, when the wholesale proscription of an abortion method is based on the state's desire to protect "some women" from the regret that they may experience after undergoing an abortion, "the operative meaning of 'some women' is, in effect, 'all women.'" *Id.*

Turner goes on to note that the woman's regret rationale may be extended to justify the prohibition of other abortion methods—specifically, "the equally 'brutal' and 'gruesome' but still lawful procedure of D&E by dismemberment." *Id.* at 41–42. He writes, "*Gonzales* thus provides a judicially validated wedge for those who see and will certainly use the Court's decision to extend the reach of the regret rationale beyond the intact D&E setting in their continuing effort to chip away at and ultimately achieve the interment of the Roe-Casey legal regime." *Id.* at 42; see also Suter, *supra* note 42, at 1578 ("[I]f the goal is to protect women from [ ] 'severe depression and loss of self-esteem' . . . by not permitting her to choose how her fetus will be killed, why may it not protect her more securely by not permitting her an abortion at all?" (quoting Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. REV. BOOKS, May 31, 2007, at 21)).

55. It should be noted that, although the question for the Court is how closely the woman approximates motherhood, within the worldview articulated, the woman is already a "mother" by virtue of her pregnancy; further, she remains a "mother" without regard to the trajectory her pregnancy takes. Accordingly, the woman who has successfully terminated a pregnancy and has come to "struggle with grief . . . and sorrow" when she learns that a doctor "pierce[d] the skull and vacuum[ed] the fast-developing brain of her unborn child" can still, rightfully, be referred to by the Court as a "mother."

56. This would enable the fetus to be interred, for example.

ontology is suggested by Justice Ginsburg in her dissent, where she notes that "notwithstanding the 'bond of love' women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity."<sup>57</sup> An alternative ontology might hold that the form the abortus assumes is irrelevant to the woman's status as a mother; what is relevant, on the contrary, is the wantedness of her pregnancy and her desire to be a mother. A "mother" is not simply identifiable by biological fiat, but rather is an identity a woman assumes—agentively and consciously.

Yet, forming the condition of possibility for the Court's acceptance of the fetus-as-infant analogy and its subsequent insertion into a larger ontology of motherhood—ultimately leading the majority to think it "self-evident" that abortion harms women—is the Court's confidence about the knowledge it possesses regarding the moral status of the fetus. Simply put, the Court assumes that the fetus is a morally weighty entity—a "life" that deserves its utmost respect and deference.

### B. The Question of "Life"

Resonant in the *Carhart* majority opinion is a binary composed of "alive" and "dead,"<sup>58</sup> a binary that speaks most directly to the argument that I ultimately make: The Court assumes that it knows of the moral status of the fetus and this assumption unfairly overdetermines the questions that the Court asks with the undue burden standard.<sup>59</sup> Within the Court's logic, some things are alive; other things are dead. There is no zone of indistinction between these two categories; further, there are no categories external to them. Moreover, the only signifier capable of describing that passage from one existential category to the next is "kill"; a "live" thing must be "killed" in order to become a "dead" thing. For the *Carhart* majority and the Congress that passed the federal PBA, the fetus, prior to the abortion procedure, is a "live" thing residing amongst the other natural phenomena in the "alive" category. The dilemma, then, that the Court must adjudicate concerns the proper technique by which the "live" fetus *in utero*

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57. *Gonzales v. Carhart*, 550 U.S. 124, 184 n.8 (2007) (Ginsburg, J., dissenting).

58. *See id.* at 158 ("Congress determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant,' and thus it was concerned with 'drawing a bright line that clearly distinguishes abortion and infanticide.'" (citations omitted)).

59. *See infra* Part III (explaining this argument).

becomes a "dead" fetus *ex utero*. That is, the Court must decide whether it will give constitutional protection to a technique by which the fetus is "killed." Blunt in its task, this is the terminology the Court uses.<sup>60</sup>

The categories of "alive" and "dead" articulated and manipulated in the majority opinion in *Carhart* are logical consequences of a foundational premise—that the fetus has a morally significant "life."<sup>61</sup> Indeed, this is the first announcement that the Court makes, after reciting the procedural posture of the case: "The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion

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60. See, e.g., *Carhart*, 550 U.S. at 136 ("Once *dead*, moreover, the fetus' body will soften, and its removal will be easier." (emphasis added)); *id.* at 138 ("Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is *dead* before it is removed." (emphasis added)); *id.* at 136 ("Some doctors, especially later in the second trimester, may *kill the fetus* a day or two before performing the surgical evacuation." (emphasis added)); *id.* at 138 ("Dr. Haskell's approach is not the only method of *killing the fetus*." (emphasis added)).

The majority performs a fascinating rhetorical move when it cites a doctor who testified in the lower court concerning the method that he uses for performing intact D&E abortion procedures. The Court's quotation of the doctor is as follows:

Yet one doctor would not allow delivery of a live fetus younger than [twenty-four] weeks because "the objective of [his] procedure is to perform an abortion," not a live birth. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to collapse the skull" and kill the fetus before it is born.

*Id.* at 139. The placement of the quotation marks in the Court's citation of this physician's testimony reveals that the physician did not describe himself as "killing" the fetus before it is "born." The Court provides the text of the doctor's testimony as he provides exacting detail of the abortion technique that he uses; however, the Court performs its own editorializing when it "finishes" the physician's sentence. That is, it is the voice of the *majority*, and not the physician, that describes the physician as "killing the fetus before it is born."

One could argue that the Court's use of terms such as "living fetus" and "kill" does not reflect the Court's own worldview, but rather, indicates that the Court is merely ventriloquizing the statute at issue. This is to say that it is the statute that contains a logic of "alive" versus "dead," with "killing" being the apt and only descriptor for the passage from one category to the next; moreover, it is the statute that criminalizes the behavior of a physician who would "kill[] a human fetus" after performing "an overt act that the person knows will kill the partially delivered living fetus." See *id.* at 142 (citing the federal Partial-Birth Abortion Act, codified in 18 U.S.C. § 1531). However, the majority opinion does not merely make use of the statute's terminology, but rather expands upon the worldview that the terminology presupposes—specifically in its affirmation of the federal PBA as an exercise of the state engaged in the legitimate practice of protecting fetal life, an affirmation that culminates in the unfalsifiable statement that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child." *Id.* at 158.

61. See *infra* notes 64–74 and accompanying text (explaining the use of quotation marks around the word "life").

procedures in some detail."<sup>62</sup> Later in the opinion, the Court provides color as to how it arrived at its early-announced conclusion that the fetus has a life: it proclaims, "The Act does apply to both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not . . . viable outside the womb."<sup>63</sup>

The rhetorical trick that Justice Kennedy performs by referring to the fetus as a "living organism" is that it appears that he only contemplates the unchallenged *biological* fact of fetal life. However, throughout the opinion, the fetal life that is spoken of is not prosaic, biological life, but rather morally consequential "life." That is, the biological life that characterizes the "living organism" is not usually considered weighty enough to be the target of constitutionally protected state expressions of "profound respect"; plain biological life, when terminated, does not commonly suggest "grief," "anguish," "profound sorrow" and the expectation that "severe depression and loss of esteem"<sup>64</sup> will follow; biological life at its most exemplary does not generally conjure up "the bond of love the mother has for her child";<sup>65</sup> indeed, "biological life" usually may be thought to be sustained within the uterus, not the "womb."<sup>66</sup> The vocabulary and the imagery that the majority uses when speaking about the biological life of the fetus as a living organism suggests that the Court believes that morally salient "life" *also* attaches to the biological life of the fetus—that is, that the fetus is an entity of significant moral value.

In seamlessly attaching "moral life" onto "biological life," the majority mimics the larger, cultural processes by which the two types of life are made simultaneous to one another. Historian Barbara Duden tracks these processes in her compelling "history of life not as an object but as a notion"—a history that tracks the "conditions under which, in the course of one generation, technology along with a new discourse has transformed . . . the unborn into a life, and life into a supreme value."<sup>67</sup> She notes the role

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62. *Carhart*, 550 U.S. at 134.

63. *Id.* at 147. One commentator has noted that this statement reveals that Justice Kennedy believes that the fetus represents not merely "potential life," but rather "life" unqualified. See Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1615 (2008) ("This statement forms the first step of Justice Kennedy's argument, establishing that after conception, life—not merely potential life—exists independently of fetal personhood.").

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

65. *Id.*

66. *Id.* at 147.

67. BARBARA DUDEN, *DISEMBODIED WOMEN: PERSPECTIVES ON PREGNANCY AND THE*

that religion has played in this conflation of moral and biological life, quoting then Cardinal Ratzinger, now Pope Benedict, who argued that "right from fertilization is begun the adventure of a human life."<sup>68</sup> While fertilization arguably marks the beginning of biological life, for the Cardinal, moral life also begins at that point. Duden writes, "He is accepting a definition from the current frame of a natural science, investing the object so defined with moral and religious significance and attributing to this object the status of a person."<sup>69</sup> Within certain philosophies, the appearance of the scientific fact suggests the appearance of a moral fact.

Such philosophies have gained great currency recently.<sup>70</sup> Indeed, the signifier "life" has come to signify moral life in the same moment that it

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68. *Id.* at 21.

69. *Id.* The rhetorical act by which moral life is made concurrent with biological life is readily apparent in a fuller quote of Cardinal Ratzinger's argumentation:

Certainly no experimental datum can be in itself sufficient to bring us to the recognition of a spiritual soul; nevertheless, the conclusions of science regarding the human embryo provide a valuable indication for discerning by the use of reason a personal presence at the moment of this first appearance of a human life: How could a human individual not be a human person?

*Id.*

70. The administration of George W. Bush helped to popularize philosophies attesting to the simultaneity of biological life and moral life through its campaign to promote a "culture of life" in the U.S.—a phenomenon that Sanger tracks in her exposition on infant "safe haven" laws. Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 800–08 (2006) [hereinafter Sanger, *Infant Safe Haven Laws*]. Sanger quotes the former President's first usage of the phrase "culture of life" at a dedication of the Pope John Paul II Cultural Center:

The culture of life is a welcoming culture, never excluding, never dividing, never despairing and always affirming the goodness of life in all its seasons. In the culture of life, we must make room for the stranger. We must comfort the sick. We must care for the aged. We must welcome the immigrant. We must teach our children to be gentle with one another. We must defend in love the innocent child waiting to be born.

*Id.* at 802. As indicated by the figure of the "innocent child waiting to be born," the supremely valuable "life" about which the "culture of life" was concerned and which merited protection began at conception—upon the advent of biological life. Writes Sanger, "Life" now refers to unborn life, no longer from the moment of quickening or from the point of viability, but from the first instant of fertilization . . . [T]he culture of life only appears to have liberated the meaning of 'life,' as the word has actually become synonymous with 'unborn life.'" *Id.* at 806. Moreover, the "life" protected by the "culture of life" continued, unchanged, until death. Accordingly, the stem cell, the fetus, and the brain dead—alongside the stranger, the sick, the aged, and the immigrant—were all in possession of the "life" that would be embraced by the "culture of life" *Id.* at 803–04. As the phrase "the culture of life" began to appear in the official Republican Party Platform, several presidential proclamations, the 2005 State of the Union Address, and several Senate resolutions, the

signifies biological life: "[T]he term *life* (and *a life*) has become an idol, and controversy has attached a halo to this idol that precludes its dispassionate use in ordinary discourse."<sup>71</sup> And again, more expansively:

*Life* itself is not an amoeba word, since it does not have any application as a technical term in scientific discourse. Unlike *zygote* and *fetus*, it does not stem from the language of a disciplinary thought collective. And yet it acquires motivating and emotional power from being used by experts, not only because they use it with pathos but because they claim special competence in understanding its meaning. Therefore, the semantic trap into which the use of "a life" leads is not due primarily to its ambiguity but to its vapidness.<sup>72</sup>

It seems that the *Carhart* majority is not adjudicating the question of the constitutional protection that ought to be afforded to certain techniques of ending fetal *biological* life; rather, the majority is adjudicating the question of whether to afford constitutional protection to a procedure that "ends" the morally weighty, pathos-invoking, emotionally consequential "life" of the fetus.<sup>73</sup> By accepting fetal "life" as the object of the intact D&E procedure, the Court has taken a moral position regarding the status of the fetus.<sup>74</sup> It is a moral position,

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particular philosophy of "life" that it presupposed gained currency. *Id.* at 803.

71. DUDEN, *supra* note 67, at 2.

72. *Id.* at 75; see also Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 406 (1992) [hereinafter, Dworkin, *Unenumerated Rights*] (describing abortion opponents' views about the wrong occasioned by abortion in a manner similar to Duden's description of "life"). Dworkin writes that opponents "assume that human life is *intrinsically* valuable, and worthy of a kind of awe, just because it is human life. *Id.* They think that once a human life begins, it is a very bad thing—a kind of sacrilege—that it end prematurely . . ." *Id.* He writes about this "life" as "sacrosanct" and depicts it as possessing an "inherent value"; indeed, when this "life" is destroyed, it is tantamount to having committed a taboo. *Id.* at 406–07.

73. The majority's premise that the fetus has a (morally cognizable) "life," which exceeds its status as a "living organism," likely explains the majority's insistence upon referring to the fetus's "body"—even when citing physicians who, presumably proficient in the "scientific terminology" referenced approvingly by the majority earlier in its opinion, refer to fetal "tissue," and not fetal "bodies." See *Gonzales v. Carhart*, 550 U.S. 124, 137 (2007). For example, the majority cited a doctor who testified in the lower court as saying that "[i]f I know I have good dilation . . . and I think I can accomplish . . . the abortion with an intact delivery, then . . . I don't close [my forceps] quite so much, and I just gently draw the *tissue* out attempting to have an intact delivery, if possible." *Id.* (emphasis added).

74. It would be incorrect to argue that the view that moral life is simultaneous to biological life is necessarily a religious position, although many well-respected jurists and scholars have made such an argument. See, e.g., *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 565–67 (1989) (Stevens, J., concurring) (arguing that the belief that "life" begins at conception necessarily has a "theological basis" and that laws that distinguish between

abortion and contraception are invalid under the First Amendment because they could serve "no identifiable secular purpose"); LAURENCE TRIBE, ABORTION: A CLASH OF ABSOLUTES 116 (1990) [hereinafter TRIBE, ABORTION] (stating that "beliefs about the point at which human life begins" have a "theological source"); Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21 (1973) [hereinafter, Tribe, *Forward*] ("[A]t this point in the history of industrialized Western civilization, that decision [to choose conception as the point at which human life begins] entails not an inference from generally shared premises, whether factual or moral, but a statement of religious faith."); Dworkin, *Unenumerated Rights*, *supra* note 72, at 155 ("We may describe most people's beliefs about the inherent value of human life—beliefs deployed in their opinions about abortion—as *essentially* religious beliefs."); *id.* at 158 ("Procreative decisions are fundamental in a different way; the moral issues on which they hinge are religious in the broad sense . . . , touching the ultimate purpose and value of human life itself.").

Dworkin even goes so far as to found the right to abortion in the First Amendment's guarantee of freedom of religion. *See id.* at 165 ("[A]ny government that prohibits abortion commits itself to a controversial interpretation of the sanctity of life and therefore limits liberty by commanding one essentially religious position over others, which the First Amendment forbids."); *see also* Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 340 (1995) (contending that all "moral regulations are essentially religious in nature").

Professor Tribe remains ambivalent on the point of the simultaneity of moral positions and religious positions regarding the fetus, however. He appears willing to concede the "theological source" of beliefs concerning the advent of morally significant "life," yet is unwilling to argue that the religiosity of these beliefs dictate that the government, pursuant to principles regarding the separation of church and state, stay uninvolved in the dispute. He writes that, "as a matter of constitutional law, a question such as this, having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it." TRIBE, ABORTION, *supra* note 74, at 116. He concludes that "the arguments of pro-choice advocates about the religious nature of attempts to define the beginning of a person's existence as a separate human being really don't answer the question of whether or not abortion must be left to unfettered personal choice." *Id.*

Nevertheless, I assume that the position that the Court has taken regarding the fetus is an entirely moral position—as opposed to a religious or theological position. *But see* Dworkin, *Unenumerated Rights*, *supra* note 72, at 414 ("[B]eliefs about the intrinsic importance of human life are distinguished from more secular convictions about morality, fairness, and justice."). Moreover, I assume that, although this position may be informed by religion or theology, it remains capable of being described, at the end of the day, as a *moral* position. *Cf.* Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 379 (1985) (discussing the "moral status" of the fetus). Greenawalt argues that:

If the moral status of the fetus and desirable legal policy are not resolvable on rational grounds, individuals must decide these questions on some nonrational basis. For many persons, the basis for judgment is supplied in whole or part by religious perspectives, which either indicate the fetus' moral status or gravely influence one's mode of thinking about it.

*Id.*; *see also* Sanger, *Infant Safe Haven Laws*, *supra* note 70, at 807 (stating that although the "life" referenced in the "culture of life" "sounds secular enough, its rhetorical value is much enhanced by its association with Christianity" and noting that "[t]he phrase comes straight from the Vatican"). Accordingly, while I find attractive Dworkin's argument that beliefs



furthermore, that is highly debated; the truth of the position has not been decided.<sup>75</sup> However, Justice Kennedy, writing for the majority, purports to have decided this question, and he allows that knowledge to be his guide.<sup>76</sup>

Moreover, the majority's assertion that, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb"<sup>77</sup> unsettles some of the

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about the fetus are "essentially religious" in nature and, consequently, that the right to an abortion might be locatable in the First Amendment's provision of religious freedom, I do not accept that argument here. Instead, I will assume that the belief that the fetus is/has a "life" and, as a cause or an effect of this "life," is a morally significant entity can be a wholly moral, nonreligious, position; as a result, I do not argue that the majority's opinion in *Carhart* implicates the First Amendment at all.

75. See Dworkin, *Unenumerated Rights*, *supra* note 72, at 408 ("The sanctity of life is . . . a highly contestable value.").

I do not attempt to answer the question of what new knowledge will need to be acquired before the moral status of the fetus, and at what point "life" begins, can be decided. *Cf.* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 799–800 (1986) (White, J., dissenting) (noting that the informed consent provisions that were struck down as unconstitutional in *Akron* required physicians to tell their patients seeking abortions that life begins at conception and, consequently, "to advance tendentious statements concerning the *unanswerable* question of when human life begins" (emphasis added)). Greenawalt has argued that science cannot answer these important questions for us. See Greenawalt, *supra* note 74, at 374 (contending that science cannot resolve the moral status of the fetus and noting that "neither factual knowledge nor technology can establish how much consideration the fetus deserves"). However, perhaps future scientific and nonscientific discoveries will bring additional information to the debate surrounding the fetus's moral status—allowing for a larger moral consensus to build around the fetus and enabling a "rational secular morality to resolve public policy about abortion." *Id.* at 372. Nevertheless, it remains true that, at present, no such moral consensus—nor moral majority, nor moral preponderance—has been built around the fetus.

76. Commentators have pointed out that the Justice Kennedy, as well as the others who signed on to his majority opinion in *Carhart*, is an avowed Catholic. See Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at 19 ("[T]hat all of the Catholic justices voted as they did in *Gonzales* might have nothing to do with their personal religious beliefs. But given the nature of the issue, the strength of the relevant precedent, and the inadequacy of the court's reasoning, the question is too obvious to ignore."); Turner, *supra* note 36, at 3 ("All five justices in the majority in *Gonzales* are Roman Catholic. The four justices who are not all followed clear and settled precedent."). This observation buttresses the argument that the beliefs about the fetus—that the fetus is "life"—that guided the majority are inherently religious in nature. However, such a conclusion need not follow; the fact that all of the Justices in the *Carhart* majority are Catholic could be nothing more than mere coincidence. See John Yoo, *Partial-Birth Bigotry*, WALL ST. J., Apr. 28, 2007, at A8 ("[N]o one thinks religious belief explains the views of the dissenting justices. Justices Stephen Breyer and Ruth Bader Ginsburg, it seems, are Jewish, while Justices John Paul Stevens and David Souter presumably are Protestants.").

77. *Carhart*, 550 U.S. at 147.

presumptions underlying the markers employed in abortion jurisprudence. Essentially, the Court argues that, as a living organism, the previable fetus has/is as much of a "life" as the postviable fetus. This description of all fetuses as "alive", as opposed to some other ontological category of existence, should be interrogated for how it disquiets the tests formulated in abortion jurisprudence—tests that the *Carhart* majority must ultimately deploy, if it is not to overturn *sub silentio Casey* and the standards that it pronounced.<sup>78</sup>

To begin, the Supreme Court's abortion jurisprudence since *Casey* has rested on the bright line that separates the category of viable fetuses from nonviable fetuses.<sup>79</sup> Most fundamentally, nonviable fetuses may be the objects of a legal abortion.<sup>80</sup> Viable fetuses, however, may not always be so; they have interests that—in concert with the state's interest in the potential of viable fetuses to become infants—trump the needs, wants, and desires (but not the health or life) of the women who carry them.<sup>81</sup> The distinction that separates the viable from the nonviable fetus is patently significant: From the perspective of the pregnant woman and the doctor who would perform an abortion for her, it distinguishes those abortions that may be procured within the letter of the law from those that may only be obtained only under the possibility of criminal sanction. *Carhart* rehearses the magnitude of the boundary separating viable and nonviable fetuses through its citation of *Casey*:

First is the recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference

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78. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 874 (1992) (upholding a woman's right to an abortion and creating the undue burden standard to protect that right).

79. See *Stenberg v. Carhart*, 530 U.S. 914, 939 (2000) (holding that a Nebraska regulation was unconstitutional because it unduly burdened the right to choose to have an abortion before viability); see also *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 975 (N.D. Cal. 2004) (finding that the Partial-Birth Abortion Ban Act of 2003, which imposed penalties on "physician[s] who . . . perform[ ] a partial-birth abortion," unconstitutionally posed an undue burden on a woman's right to choose partially because the Act did not distinguish between previability and postviability).

80. See *Carhart*, 550 U.S. at 156 (stating that "the Act, as we have interpreted it, would be unconstitutional 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'" (quoting *Casey*, 505 U.S. at 878)).

81. See *Casey*, 505 U.S. at 879 ("[S]ubsequent to the viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary . . . for the preservation of the life or health of the mother.").

from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>82</sup>

The question in *Carhart* was whether the criminalization of one technique for performing abortions unduly burdened the abortion right for the woman carrying a pre-viable fetus, and whether the lack of health exception in the law made it constitutionally infirm as it relates to all abortions, both pre-viability and postviability. The significance of the "viability" marker, and that the Court might have struck down the law as a substantial obstacle to pre-viability abortions without regard to its lack of health exception, is a holdover from *Roe*, where the Court held that the "State's important and legitimate interest in potential life" reaches the "compelling" point at viability.<sup>83</sup> Because there is a compelling state interest in "fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."<sup>84</sup> However, prior to viability, there is presumably no compelling interest in "fetal life"; accordingly the state may not substantially limit a woman's ability to terminate her pregnancy during that time.

The question then becomes: why viability? Why did Justice Blackmun, writing for the *Roe* majority, find that *viability* marked the point where the state's important and legitimate interest in "potential life" sufficiently matured, became compelling, and justified the possible proscription of abortion altogether? I offer the following as explanation: For Justice Blackmun, viability makes sense as a site at which to make distinctions between legitimate interests and compelling interests—as a site before which to allow abortions and after which to ban abortions—because he takes seriously the distinction that he draws between "potential life" and

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82. *Carhart*, 550 U.S. at 145 (quoting *Casey*, 505 U.S. at 846).

83. *Roe v. Wade*, 410 U.S. 113, 153–54, 163–64 (1973) (holding that a woman has a right to decide whether to terminate her pregnancy, but that a State may regulate areas protected by this right in the interests of safeguarding health, maintaining medical standards, and protecting potential life).

84. *Id.*

unqualified "life."<sup>85</sup> Note that when Blackmun announces one of the fundamental holdings of the decision, he refers to previable fetuses as in possession of "potential life" and postviable fetuses as in possession of a, without qualifications, "life."<sup>86</sup> Viability, then, is the point at which the *potential life* of the fetus emerges as a *life*, thereby affording the fetus a whole or quasi-whole membership within the human community—and thereby making it a legitimate target for regulations designed to protect it.<sup>87</sup>

If we accept the above reasoning as justification for assigning constitutional significance to viability, then one understands as highly significant Justice Kennedy's casual assertion in *Carhart* that the "fetus is a living organism while within the womb, whether or not it is viable outside the womb," as well as his relatively cavalier description of the pre- and post-viability abortion procedures at issue as concerning "a particular

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85. Justice Blackmun suggests as much when, arguing in dissent sixteen years later, he defends *Roe*:

The viability link reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.

*Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553 (1989) (Blackmun, J., dissenting).

86. See *Roe*, 410 U.S. at 163 ("With respect to the State's . . . interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.").

87. See *Webster*, 492 U.S. at 553 (Blackmun, J., dissenting) ("The viability line reflects the biological . . . fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot . . . be regarded as a subject of rights or interests distinct from . . . those of the pregnant woman."). However, Laurence Tribe reaches a different conclusion about why Justice Blackmun chose viability as the point at which to allow for the proscription of abortion. Writing shortly after the decision in *Roe*, Tribe wrote that Justice Blackmun did not choose viability "because of some illusion that this biologically arbitrary point signals 'any morally significant change in the developing human' and certainly not because of any . . . notion that the fetus is intrinsically a human being from that technology-dependent point forward . . ." Tribe, *Forward*, *supra* note 74, at 27. I disagree. Justice Blackmun's careful usage of "potential life" and "life" suggests that he believes that the previable fetus (signified by "potential life") does not possess the same moral significance as the postviable fetus (signified by "life"); accordingly, the "biologically arbitrary" point of viability would absolutely signal a "morally significant change in the developing human." See *Webster*, 492 U.S. at 553 (Blackmun, J., dissenting) (discussing the issue).

manner of ending fetal *life*."<sup>88</sup> With these simple pronouncements, the majority asserts the *insignificance* of viability as a site distinguishing potential life from unqualified life. With this pronouncement, *Carhart* makes the "bright line" of viability no more than an arbitrary moment, a moment among moments, within the continuous, always already "life" of the fetus. As such, *Carhart* can be read to eliminate the significance of viability as a marker, and therefore eliminate the significance of the distinction between the pre-viable and post-viable stages of pregnancy.<sup>89</sup> What follows from the evanescence of the distinction between pre- and post-viable stages of pregnancy and the differing levels of gravity that have been attributed to them is that the justification for curbing the ability of the state to proscribe abortions outright during pre-viability is also eliminated. As such, *Carhart* opens the way for the outright proscription of *all* abortions, as what is now at stake is already and always "life."<sup>90</sup>

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88. *Gonzales v. Carhart*, 550 U.S. 124, 134, 147 (2007).

89. Justice Kennedy argues in favor of diminishing the significance of viability in his dissent in *Stenberg*, noting that the state has an interest in promoting "the dignity and value of human life, even life which cannot survive without the assistance of others." *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting). Indeed, perhaps the most paradigmatic form of human life that cannot survive without the assistance of others is the pre-viable fetus.

90. This is not a new argument; indeed, since *Roe* was decided in 1973, those Justices who believe that there ought not to be a Constitutionally protected right to an abortion had made variations of the claim that viability is an arbitrary point at which the state's interest in fetal life becomes compelling and, accordingly, that the trimester framework did not properly respect that interest. *See, e.g., Webster*, 492 U.S. at 519 ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation [only] after viability."); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 746, 795 (1986) (White, J., dissenting) ("The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. . . . [T]he State's interest, if compelling after viability, is equally compelling before viability."); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting) (stating that *Roe* recognized the State interest in protecting the fetal life, but that "the point at which these interests become compelling does not depend on the trimester of pregnancy," rather that "these interests are present throughout pregnancy"); *id.* at 461 ("[P]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. . . . [Choosing] viability as the point . . . the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or . . . afterward.").

Well before *Casey* replaced the trimester framework with the undue burden standard, and well before it was demonstrated that any standard that presupposes the continuous "life" of the fetus is incapable of adequately protecting a woman's abortion right, Justice Blackmun presciently predicted such an outcome. In his scathing dissent in *Webster*, which upheld various regulations that increased the cost of an abortion and functioned to limit its availability, Justice Blackmun noted that when fetal "life" is imagined as existing,

Interestingly, the majority opinion in *Carhart* contains a fascinating moment in which the Court is presented with evidence—coming, ironically, from a proponent of the abortion right—that viability may not be as bright of a line as Justice Blackmun had hoped it would be when he wrote the majority opinion in *Roe*; however, the *Carhart* majority, clearly sympathetic to the position that viability is an arbitrary occasion during the always already significant "life" of the fetus, disregards this evidence and proceeds with conceptualizing viability as a *definite*, if not definitive, moment in fetal life. To explain: The categories of viability and nonviability do a lot of work within abortion jurisprudence. One can argue that at least part of the reason why they were offered up to do this work was because they were thought not to be subject to interpretation: Fetuses are either viable, or they are not.<sup>91</sup> But, the *Carhart* Court had been presented

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unchanged, from fertilization until birth, the state is justified in restricting abortions at any point during a woman's pregnancy. See *Webster*, 492 U.S. at 555 (Blackmun, J., dissenting) ("Since, in the plurality's view, the State's interest in potential life is compelling as of the moment of conception, . . . every hindrance to a woman's ability to obtain an abortion must be 'permissible.'). Because he believed the Court to be taking a turn towards an understanding of "life" that began at conception, and because he likely understood the consequences of building an abortion jurisprudence around such a notion of "life," Blackmun concluded his opinion pessimistically: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still remain at liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." *Id.* at 560.

91. This is not to deny that the Court has recognized that scientific innovation allows for some movement of the line at which fetal viability will be drawn. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) ("We have seen how . . . advances in neonatal care have advanced viability to a point somewhat earlier [in pregnancy]."); *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) ("As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."). While the Court has acknowledged that medical technology may affect the gestational age at which a fetus becomes viable, the question for the Court is when fetal viability begins, not the quantity of viability present in the fetus. For the Court, science determines *when* viability occurs for the fetus, not *how much* viability a fetus has. However, the physician that the *Carhart* majority quotes suggests that it may be equally reasonable to think of viability not as a binary, but rather as a spectrum or zone. See *Carhart*, 550 U.S. at 140 (quoting the physician as saying that he sometimes removes from a woman's body a fetus that has "some viability to it, some movement of limbs").

*Webster*, which upheld a Missouri regulation that required that physicians test fetuses for viability before performing an abortion on a woman more than twenty weeks pregnant, supports the claim that the Court is interested in determining *whether or not* a fetus is viable, as opposed to *how much* viability a fetus has. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519–20 (1989) (upholding the Missouri statute requiring tests for viability prior to obtaining an abortion). The Court interpreted the statute as establishing a presumption of fetal viability at twenty weeks that could be rebutted by tests establishing fetal weight and lung capacity. *Id.* at 515. For the Court, at issue was the question of whether a particular

with evidence disputing this simple dichotomy. Quoted in the majority opinion is a physician who testified about the "difficult situation" in which he and his staff are placed when, in the course of performing an abortion, he removes from a woman's body a fetus that has "'some viability to it, some movement of limbs.'"<sup>92</sup> With the simple description of a fetus that has "some viability to it," this unnamed doctor exposes viability as a concept that cannot be always apprehended as dichotomous. Viability, instead, may be a continuum. Accordingly, the jurisprudential naming of viable fetuses as distinct from nonviable fetuses is revealed to be an act of construction. It is an act of fabricating, and then stabilizing, boundaries that may be desirable insofar as they are helpful tools in the adjudication of constitutional dilemmas, yet have no privileged relationship to the material world. That is, instead of merely *describing* the material world, these boundaries and the categories they produce *construe* the material world; they are no more than one set of many interpretive lenses through which the material world may be viewed. Yet, the *Carhart* majority ignores this competing logic regarding the concept of viability; it assumes instead that viability is neither an act of construction nor a spectrum with so many shades of gray. The majority says nothing about these possibilities and, instead, remains committed to assuming that viability is fairly and appropriately conceptualized in dichotomous terms.<sup>93</sup>

The question is why. Why did the majority reject an opportunity to demonstrate what could be described as Justice Blackmun's folly or, more benignly, his act of judicial construction? Why did the majority ignore an occasion to propose that viability—having no clear, defined relationship to the material world—is an unsound structure around which to build an abortion right, and consequently, that the abortion right ought to be

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twenty-week fetus was viable—not the alternative question of how much viability the particular twenty-week fetus has.

92. *Carhart*, 550 U.S. at 140 (citations omitted).

93. What if the Court apprehended and acknowledged viability as a concept that refused description in binary terms? What if the Court respected that a fetus could have "some viability to it"—that it could limn the falsely dichotomous categories posited in *Casey* and the subsequent abortion cases? Abortion jurisprudence would likely not crumble into an abyss of intelligibility as its foundation is pulled out from under it. Rather, the Court might keep viability as the event which separates legal and illegal abortions; however, the Court would have to, explicitly, interpret this site. Moreover, in the process of interpreting this site, the Court might have to admit that, contrary to the presuppositions upon which it has formerly relied, viability does not simply correspond to a site that exists "out there" in the material world. Instead, there is some interpretive space between the signifier "viability" and the thing that it signifies. Accordingly, when the Court names a moment as the moment of "viability," it constructs the thing that it names.

reconsidered? I imagine that the majority felt no need to parse the metaphysics of viability in order to intimate towards the conclusion that the abortion right, as presently constructed, begs for its own dismantling. The majority might be aware that with its simple offer that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb," it has introduced the fetus as "life" into constitutional law and, in so doing, has paved the way for the reversal of *Roe*.<sup>94</sup>

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In this Part, I have hoped to demonstrate that at the very foundation of *Carhart* rests the disputed proposition that the fetus is a morally significant "life" that deserves reverence of the highest order. The majority opinion in *Carhart* proceeds from the assumption that the Court has found an answer to the vexing, divisive, highly debated question of what moral status ought to be given to the fetus. Gone are the days when the Court felt itself incapable of deciding this question—when a humble majority once wrote, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."<sup>95</sup> Retiring the humility that once characterized the Court's approach to the ontological issues raised by abortion,<sup>96</sup> the *Carhart* majority assumes that all fetuses, viable or not, are

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94. Other scholars have similarly interpreted *Carhart* as laying the conditions of possibility for the overturning of *Roe*. See, e.g., Cynthia D. Lockett, *The Beginning of the End: The Diminished Abortion Right Following Carhart and Planned Parenthood*, 11 J. GENDER RACE & JUST. 337, 337–38 (2008) (giving a grim account of a fictional United States of the future, in which the Court's decision in *Carhart* directly led to the reversal of *Roe* and the subsequent deaths of over 10,000 women from illegal abortions); Plante, *supra* note 36, at 389 ("Taken to its logical conclusion, *Carhart* diminishes the rights extended in *Roe v. Wade* so significantly that it suggests a de facto overruling of *Roe* is imminent."); Suter, *supra* note 42, at 1569 (arguing that *Carhart* represents "an attempt to strengthen the Court's weighting of the state's interest in potential human life, which may one day uphold a ban of previable abortions"); *id.* at 1586 (stating that *Carhart* "begins to undo the well-established precedent that the state may not prohibit previable abortions and opens the door to future bans of previable abortion procedures based on visceral concerns about the sensibilities of the community and the medical profession").

95. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

96. Ironically, while *Carhart* represents the Court moving away from a humility with regard to its confidence in its ability to decide the ontological questions and moral issues that abortion raises, the Court is arguably becoming *more* humble about its ability to be the grand, final arbiter of other moral questions. Suzanne Goldberg writes about how the Court, in the past, had felt certain that it could declare the "right" morality; presently, however, the knowledge that it could not divine the "right" moral position among the various positions



entities with moral value—that is, that the fetus is a "life" in the morally significant, weighty, "supreme value" sense of the term.<sup>97</sup> This proposition led the Court to the axiomatic conclusion that abortion harms women. Moreover, this proposition is what eviscerates the undue burden standard.

Part III explores how ideas about the fetus as a morally significant, theologically informed, spiritually inclined "life" have been built into the undue burden standard. This Part argues that when the undue burden standard proceeds from the assumption that the fetus is a morally consequential "life," the ability of the standard to protect the abortion right from diminishment decreases. This Part goes on to trace the contours of an undue burden standard that refuses such assumptions—that is, the morally agnostic undue burden standard.

### *III. The Burdens of the Undue Burden Standard*

The undue burden standard represents the compromise that the Supreme Court has struck between competing social movements.<sup>98</sup> This

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that exist among the nation's citizens has led the Court away from relying on morals-based rationales for laws. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1289 (2004). Goldberg argues that,

Whatever credibility the Court might have possessed previously to announce moral consensus on particular issues has slipped away entirely . . . . The lack of an authoritative alternative to majoritarian preferences that could enable meaningful, objective assessment of proposed moral justifications has reinforced, in turn, the Court's disinclination to rely on morality-based justification.

*Id.*

97. Justice Kennedy has an established record of evoking "life" in its morally significant, weighty, "supreme value" sense. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy J., dissenting) (noting the "intrinsic value of human life, including the life of the unborn").

98. Some may argue that politics and social movements should play no role in Constitutional interpretation. Nevertheless, it remains that *Casey* and its finding that the Constitution protects a woman's right to abortion were, in part, the results of social movement and protest. In her excursus on the doctrine of *stare decisis*, Justice O'Connor writes about the damage to the Court's authority that would occur if the Court capitulated to the "pro-life" movement and overturned *Roe* just nineteen years after it was decided. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (describing the danger in the scenario of the Court overturning *Roe* without demonstrating that it was acting independently of "political pressure," saying, "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question"). Indeed, O'Connor suggests that *Roe* should be upheld, if for no other reason than the fact that upholding *Roe* permits the Court to

standard purports to balance the interests of those desiring to protect the (morally significant) "life" of the fetus from an untimely and premature "death" against the interests of those who may disagree that the fetus has a "life" or who may believe that, even conceding the existence of fetal "life," a woman ought not to be coerced to sustain the "life" of an unwanted fetus.<sup>99</sup> However, the alive/dead binary, and the pathos with which the

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demonstrate to the country that it is not a political branch. *See id.* at 869 ("[T]o overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."). Essentially, O'Connor's exposition concedes that politics and social movements indeed played a role in *Casey*—if only to convince the Justices to cling to *Roe* all the more tenaciously. So conceded, it is fair to conclude that the undue burden standard intended was constructed in such a way as to bring the "contending sides of a national controversy to end their national division." *Id.* at 867. That is, it was a compromise.

99. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("*Casey*, in short, struck a balance. The balance was central to its holding."). While the nature of this balance may be articulated as one between "individual rights" and "state interests," I do not think it incorrect to conceptualize the competition in terms of differing beliefs surrounding the moral status of the fetus. *Cf.* Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1, 53 (1996) ("As applied in *Casey*, the undue-burden test operates . . . as an expression of the ultimate balance between individual abortion rights and conflicting state interests . . ."). Accordingly, while it is appropriate to claim that the undue burden standard balances the state's interest in potential life against the woman's individual right to an abortion, it is equally appropriate to claim that the undue burden standard balances the interests of those who believe that the moral status of the fetus as a "life" should (always, or in most cases) dictate the trajectory that pregnancies should take against those who do not believe that the fetus is a moral subject or who do not think that the fetus's moral status is always dispositive. Furthermore, the latter formulation might be a preferable description of the interests balanced by the undue burden standard insofar as it is frequently forms the substance behind slogans of "individual rights" and "state interests."

Interestingly, when Justice O'Connor began formulating the undue burden test in her dissenting opinion in *Akron*, the standard was substantially different from the form that it would ultimately assume in *Casey*. *See Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) ("The 'undue burden' in the abortion cases represents the required threshold inquiry that must be conducted before this court can require a state to justify its legislature actions under the exacting "compelling state interest standard."). As Justice O'Connor articulates the undue burden standard, in *Akron*, a finding that a regulation imposed an "undue burden" on the abortion right did not mean that the regulation was constitutionally infirm; it meant that the reviewing court must then subject the regulation to strict scrutiny. *See id.* (articulating the standard). Alternatively, a finding that a regulation did not impose an "undue burden" on the abortion right meant that the reviewing court must subject the regulation to rational basis scrutiny. *See id.* at 452 (arguing that if a regulation is not unduly burdensome, then the court should limit its determination to the question of whether "the negotiation rationally relates to a legitimate state purpose"); *see also* Appleton, *supra* note 99, at 51 ("In its 1983 incarnation, Justice O'Connor's undue-burden test served as a threshold for strict scrutiny, with less burdensome interferences

Court describes the fetal "life" that would be "killed" by the intact D&E procedure—and all other abortion procedures—intimate that the Court has aligned itself ideologically with one of the competing social movements in this area. Differently stated, the Court, with a modernist confidence, professes to know the moral status of fetal "life" and its inherent value; moreover, this is a knowledge, a truth, which the anti-abortion/pro-"life" campaign also claims to know. The undue burden standard, as deployed in recent abortion jurisprudence, reflects this "truth" to the point that one could argue that the standard has become ineffective in accomplishing its purpose of balancing competing interests.<sup>100</sup>

To elaborate upon the last point: the undue burden standard must represent a balance between the interests of those who would protect fetal "life" against those who would protect the decisional autonomy and bodily integrity of the woman (a woman who may or may not ascribe to notions of fetal "life").<sup>101</sup> The standard is less effective as a compromise when it

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evoking only rational-basis review."). Because a finding of an undue burden triggered strict scrutiny—a scrutiny that implies that a law regulates on the basis of a suspect classification or that a law infringes upon a *fundamental right*—while no such finding dictated that rational basis scrutiny was appropriate, one could argue that such a formulation of the undue burden standard balanced the interests of those who believed that the right to an abortion is a fundamental right against those who disagree.

100. Others have argued that the undue burden standard has become an ineffective protection of the abortion right because the Court uses it as if it was nothing more than a rational basis review. See *Carhart*, 550 U.S. at 187 (2007) (Ginsburg, J., dissenting) (noting that "[i]nstead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act"); see also Tepich, *supra* note 49, at 382 ("This new standard becomes even more troubling . . . when one realizes how far it strays from the precedent established in *Casey* . . . . While claiming to use the undue-burden standard in *Carhart*, Justice Kennedy in fact employs rational-basis review . . ."). While the undue burden standard may be approximating rational basis review, it is because the presumption of fetal "life" prevents the Court from being more critical of abortion regulations. Cf. *id.* at 383 (arguing that the undue burden standard, as deployed by the Court in *Carhart*, represents a "complete evisceration of the *Casey* undue-burden standard" (quotations omitted)).

101. One scholar has similarly noted that the undue burden standard, as deployed in *Carhart*, no longer operates as an effective balance between competing interests; however, this scholar argues that the standard's inefficacy results from the fact that the interest in women's health and the interest in the life of the fetus weighed against one another in *Casey*. See Ivey, *supra* note 36, at 1486 (stating that prior to *Carhart*, "the woman's interest in autonomy and choice weighs in direct opposition to the state's interest in potential life"). However, after *Carhart*, the interest in women's health—that is, her *psychological* health—weighs against abortion. See *id.* (quoting Congressional findings, which avowed also that "[a] ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy" (quotations omitted)). When both the interest in fetal life and the interest in women's health weigh against abortion, the undue burden standard balances nothing and tends to allow all restrictions on abortion to pass

purports to balance the interests of those who would protect (always already valuable) fetal "life" against those who would not protect (always already valuable) fetal "life." A contest had on such terms pits a morally superior party against a morally debased one—a view of the abortion debate that an individual Justice may have but which, importantly, the standard must not embody and the jurisprudence must not reflect.

Furthermore, when the undue burden standard endeavors to "balance" the interests of those who would protect the fetus's right to "life" against those who would *not* protect the fetus's right to "life," the standard and its operation function to merely reiterate the existence and value of fetal "life." It bears repeating that this is a position that is highly disputed<sup>102</sup> and that the Court is not institutionally empowered to decide.<sup>103</sup> Consider again the Court's consideration of the criminal abortion statute at issue in *Roe*:

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constitutional muster. *See id.* (asking "[i]f the woman's and fetus's interests are in alignment," could "one possibly be an undue burden on the other"); *see also id.* at 1486–87 (concluding that "in suggesting that regulations on abortion—even a unilateral prohibition—promote a woman's health by protecting her from emotional and psychiatric repercussions of her decisions, those opposing abortion are reconfiguring the undue burden test").

102. Dworkin summarizes the debate concerning the moral status of the fetus as one between a side that "thinks that a human fetus is already a moral subject" and another side that "thinks that a just-conceived fetus is merely a collection of cells under the command not of a brain but of only a genetic code." RONALD M. DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 10 (1993). My point is to emphasize that neither side of the debate concerning whether or not the fetus is a moral subject has emerged victorious; furthermore, I emphasize that neither side of the debate may *ever* emerge as victorious. This is not to argue that we are required to be indifferent towards the question of the fetus's moral status as a result of the impossibility of objective knowledge about it. *See* TRIBE, *ABORTION*, *supra* note 74, at 119 ("[I]t's hard to agree with those who insist that this question [of the fetus's moral status], simply because it lacks a meaningful scientific or otherwise purely 'objective' and incontrovertible answer, can have no 'answer' at all."); *see also id.* at 120 ("We may have no answer, but we cannot deny either that the question is important or that it makes sense to ask it."). But rather, it means that the judiciary may not legitimately incorporate one position regarding the fetus into the standard with which it balances the interests of those who believe in the moral significance of the fetus against those who disbelieve. *See infra* Part III.A (expanding on this point).

103. Professor Charo's work regarding the Human Embryo Research Panel is a constructive point of comparison. *See generally* R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 6 *STAN. L. & POL'Y REV.* 11 (1995). The Human Embryo Research Panel, brimming with "expertise in embryology, medicine, law, philosophy, and personal experience," was assembled by the federal government to determine the moral status of the embryo such that guidelines could be formulated regarding the federal funding of embryo research. *Id.* at 13. Although the Panel did manage to produce guidelines, these guidelines were not based on the definitive moral status of the embryo having been found; indeed, "no clear-cut answer to the moral status of the embryo could be found." *Id.* at 11. Professor Charo argues that the guidelines "would have been immeasurably strengthened . . . if it had squarely acknowledged that it is impossible for a

Texas urges that . . . life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question.<sup>104</sup>

The opinion then goes on to discuss theories regarding the beginning of morally significant "life" within various schools of thought and areas of the law, stating at one point that "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth."<sup>105</sup> This is an implicit recognition that it is legitimate and reasonable to believe that morally significant "life" begins subsequent to a live birth. Yet, contrast that recognition with *Carhart* in its approving citation of Congress's argument that "implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life."<sup>106</sup> Contrast *Roe*'s acknowledgement that the "life" of the "supreme value" kind may possibly only begin subsequent to a live birth with *Carhart*'s finding that the criminalization of intact D&E

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governmental body to determine the moral status of the embryo . . ." *Id.* at 12. She argues that the Panel's conclusions regarding federal financing of embryo research would have been strengthened "if they had been supported by arguments focusing on the interests of research opponents and proponents rather than conclusions concerning the moral status of the embryo." *Id.* at 13. Similarly, I argue that it is impossible for a governmental body—in this case, the judiciary—to determine the moral status of the fetus; yet, the Supreme Court in *Carhart* appears to have "determined" this status. Moreover, while Charo contends that the Panel's focus ought to have been on the interests of opponents and proponents of embryo research, I contend instead that the Court ought to "get out of the business" of philosophizing about the fetus's moral status and proceed with a moral agnosticism towards this question. *Id.* at 159–60. The undue burden standard should embody this agnosticism.

104. *Roe v. Wade*, 410 U.S. 113, 160 (1973); *see also* Charo, *supra* note 103, at 20 (reading this passage of *Roe* as articulating Justice Blackmun's sense that "government cannot make findings of theological or philosophical fact on the status of prenatal life"). It should be obvious that the *Roe* Court in this passage was referencing morally significant "life," and not mere biological life, when it claims that it need not "resolve the difficult question of when life begins." *Roe*, 410 U.S. at 159.

105. *Roe*, 410 U.S. at 161; *see also* Charo, *supra* note 103, at 20 (arguing that the *Roe* majority "opinion did not try to assign a precise moral or legal status to fetal life").

106. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

procedures "expresses respect for the dignity of human life."<sup>107</sup> While *Roe* hesitated to take a position with regard to the moral status of the fetus and the "life" it may or may not have, *Carhart* appears fully confident of the fetus's moral status and is comfortable in allowing the decision to deny constitutional protection to the intact D&E procedure to hinge on that moral status. And so, it would seem that not only has the post-*Roe* abortion jurisprudence rejected *Roe*'s trimester framework, but it has also rejected *Roe*'s refusal to decide that a morally intelligible "life" begins at some point prior to birth.

In sum, the Court has accepted a disputable and disputed position about the moral status of the fetus by accepting the premise that the fetus has a morally meaningful "life"; furthermore, this presupposition has been wedged into the undue burden standard—making the question that the Court must answer in each instance that it hears a case regarding an abortion regulation one concerning how to strike a compromise between those interested in the fetus's "life" and those not interested in its "life." Stated differently, when the undue burden proceeds from the assumption that the fetus is a "life," it overdetermines the questions that the Court asks when adjudicating the constitutionality of an abortion regulation.

As presently conceptualized, the Court asks whether a regulation unduly burdens the abortion right by *excessively* expressing respect for and giving deference to the "life" of the fetus; conversely, the Court asks whether a regulation only, duly, burdens the abortion right by temperately and judiciously expressing respect for and giving deference to the "life" of the fetus. These are problematic constructions of what qualifies as undue and due burdens.<sup>108</sup> *If reconceptualized in the way that I propose, an undue burden might be thought to reference those measures that impose upon the woman a conception of the inherent, moral value of fetal life—in*

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107. *Id.*

108. The *Casey* plurality opinion explains that "undue burden" is synonymous with a "substantial obstacle"; accordingly, any legislation that places a substantial obstacle in a woman's path to an abortion is, consequently, "unduly burdensome," and therefore unconstitutional. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). If the terms are indeed equivalents, then one may strike the adjectives from the phrases and read *Casey*'s holding as positing that the state may *constitutionally* impose "burdens" on, and "obstacles" in front of, a woman's right to choose an abortion. This may be a refreshingly honest portrayal of how scores of women, physically and mentally burdened with unwanted pregnancies, *experience* the state's "legitimate"—and post-*Casey*, constitutional—expressions of its "profound respect" for the potential life of the fetus.

*derogation of her own personal views concerning fetal life, or in derogation of whether she believes that those views should determine the trajectory that her pregnancy should take.* Similarly, a due burden might be thought to refer to those measures that do *not* impose upon the woman any particular conception of the moral status of the fetus.

When the ideology of one of the disputants is built into the very standard that is supposed to balance the interests of the disputants, the standard operates illegitimately. In essence, the jurisprudential deck is stacked—to the detriment of the interests of one party. The result is not justice (to the extent that justice within abortion jurisprudence is imagined as respect for competing moral worldviews within the law), but tautology. Effectively, to the extent that the undue burden standard has built into it the intrinsic and indisputable fact and value of fetal "life," the antiabortion movement has "captured the Judiciary."<sup>109</sup>

While I am making the argument that the Court has accepted a highly contested position regarding the moral status of the fetus and that the Court has illegitimately embedded this position into the undue burden standard, it is important to recognize that this argument is dramatically different from the claim that the government may *never* regulate based on some notion of morality. While there are scholars who present forceful, convincing

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109. This is not to say that the undue burden standard has always operated illegitimately; that is, this is not to say that the notion that the fetus has a "life" has been built into the undue burden standard from its inception. Consider the following: *Casey* found that the undue burden standard suitably balanced the woman's interest in terminating an unwanted pregnancy against "the interest of the State in the protection of *potential life*," and argued that while the "*Roe* Court recognized the State's 'important and legitimate interest in protecting the *potentiality* of human life,'" the trimester framework failed to adequately protect that potentiality due to the fact that it prohibited states from burdening the woman's right to abortion during the first trimester. *Id.* at 871 (emphasis added); *see also id.* at 873 (saying that the trimester framework "undervalues the State's interest in potential life"). The *Casey* plurality opinion appears indecisive as to whether it intends to argue that that which is aborted is "life" or "potential life." At several points in the beginning of the opinion, Justice O'Connor writes that the question of abortion concerns "life or potential life." *Id.* at 852. She notes that abortion is "an act that is fraught with consequences for others: for the woman who must live with the implications of her decision; . . . and, depending on one's beliefs, for the life or potential life that is aborted." *Id.* Elsewhere, she writes that "[t]he trimester framework . . . does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life." *Id.* at 876. Yet, as the opinion progresses, O'Connor appears to decide that that which is at stake in the question of abortion is not really life, but rather "potential life"; accordingly, she refers only to "potential life" in the latter Parts of the opinion. *See id.* at 877–901 (referring only to "potential life" rather than "life or potential life"). Overall, it would appear that *Casey* was ambivalent with regard to the question of fetal "life"; accordingly, insofar as *Carhart* proceeds from the conviction that the fetus has a "life," it represents a dramatic departure from *Casey*.

arguments that "it is never permissible for government to regulate an individual's behavior if the government's primary motivation for the regulation is to enforce the moral beliefs of those who control the political process," and consequently, "government policy must be premised primarily on some rationale other than morality" in order to pass constitutional muster,<sup>110</sup> this is not the argument that I am advancing here. Instead, I am willing to assume, *arguendo*, that included within the state's broad police power is the power to regulate for the purpose of guarding the morality of the state's subjects;<sup>111</sup> as a result, I accept that the rationale for a regulation may be a bare moral conviction.<sup>112</sup>

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110. Gey, *supra* note 74, at 331. Other scholars also make cogent arguments to the effect that the state ought to regulate with a moral neutrality—arguments with which I tend to agree. In a scathing critique of the Defense of Marriage Act, a federal statute that sought to deny same-sex couples the right to legally marry, ethicist Walen argues that "our culture is permeated by a current of authoritarian moral thinking," with "many in our culture think[ing] that questioning or revising certain received truths only leads to chaos and immorality; they believe that if the state does not enforce their values, disaster will follow." Alec Walen, *The 'Defense of Marriage Act' and Authoritarian Morality*, 5 WM. & MARY BILL OF RTS. J. 619, 621 (1997). Walen argues that the inability to see that there is "virtue in the state being neutral between competing moral conceptions . . . symbolizes the extent to which we as a culture have not yet come to terms with the ideals of liberty and equality that we espouse." *Id.* However, it is not my aim, in this Article, to argue that the Constitution commands a moral relativism from states.

111. See, e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 503 (1986) (arguing that the police power "is an exercise of the sovereign right of the Government to protect the lives, health, *morals*, comfort and general welfare of the people" (emphasis added) (citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905))).

112. The Court's decision in *Lawrence v. Texas* arguably restricted the truth of this statement. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . ." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

Suzanne Goldberg makes an interesting argument that although the Supreme Court, prior to *Lawrence v. Texas*, consistently avowed that the state may shape public morality through law and, consequently, may pass laws that serve no other purpose but to guard the morality of the public, the post World War II Court had never upheld a law based on the sole justification that the law protected the morals of the people—with the only exception being the now-reversed decision in *Bowers v. Hardwick*. See Goldberg, *supra* note 96, at 1235–36, 1245 ("Notwithstanding its ubiquitous rhetorical endorsements of government's police power to promote morality, it turns out that the Court has almost never relied exclusively and overtly on morality to justify government action."). Goldberg argues that *Bowers* was anomalous insofar as it was the only decision since the mid-twentieth century to rely on a purely morals-based rationale for upholding a law. *Id.* at 1256; see also *Bowers*, 478 U.S. at 196 (stating that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is an adequate rationale for upholding the law at issue). She writes, "[M]ajority opinions in cases referencing and endorsing government's power to regulate morals have almost never relied exclusively on an explicit,



However, the rationale for an *abortion* regulation may not be a bare moral conviction. In effect, the undue burden standard affirmed that a woman's interest in terminating a pregnancy was such an important one that it would not be subordinated to the morality of others, even a moral majority.<sup>113</sup> Essentially, while the state may, generally speaking, impose its morality on its subjects by outlawing or regulating conduct on moral grounds, it cannot legitimately do so when the conduct involves abortion.<sup>114</sup>

The undue burden standard is the tool with which the judiciary ensures that the state has not imposed its morality—specifically, its views

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pure reference to morality to uphold a law, typically choosing instead to sustain government action based on observable societal harms." Goldberg, *supra* note 96, at 1259. She offers the Court's decision in *Paris Adult Theatre v. Slanton I*, which is frequently cited as a case in which the Court affirmed the legitimacy of the state to regulate on the basis of morals alone, as nothing more than a rhetorical affirmation of "the sufficiency of morals-based rationales." *Id.* at 1269 (citing *Paris Adult Theatre v. Slanton I*, 413 U.S. 49 (1973)). She writes, "[T]he decision itself specifically disavowed reliance on moral interests. . . . The Court's reference to [the State's right to maintain] a 'decent society,' although left undefined, must be understood to fall outside moral concerns, given the earlier stress on the morally neutral nature of the obscenity law." *Id.* at 1269–70. She also notes that the Court "identified several other interests that might legitimately support regulation of obscenity. In connection with public safety, for example, the Court pointed to reports of 'an arguable correlation between obscene material and crime.'" *Id.* at 1270. Goldberg goes on to explain the inconsistency between the Court's pro-morals rhetoric and its anti-morals practice in terms of a tension between the Court's desire and duty to screen whether morals-based rationales are merely a cover for impermissible and unconstitutional biases and the Court's concern with the counter-majoritarian difficulties produced when it uses its own moral standards to strike down morality-protective laws passed by the electorate. *Id.* at 1237–38.

Gey argues, quite convincingly, that the rationale for a state policy ought never to be a bare moral conviction. See Gey, *supra* note 74, at 331 ("[G]overnment policy must be premised primarily on some rationale other than morality . . ."). He argues that moral regulation corrupts democracy insofar as it forces the morality of the present moral majority upon future citizens and moral majorities, indefinitely extending what would be temporary political power. *Id.* at 332. Accordingly, he would require that every regulation have both an "amoral purpose" as well as a "substantially amoral effect." *Id.* at 391.

113. Gey, *supra* note 74, at 333 (arguing that "the Supreme Court typically exempts the category of fundamental rights from [the] general rule" that "the Constitution does not limit the government's authority to regulate and enforce morality"); see also *id.* at 362 ("The constitutional demand that morally laden decisions be insulated from state regulation is also a central feature of the Court's abortion decisions."); *id.* ("The Court's drift away from the trimester framework of *Roe v. Wade* has not diminished the support a majority of the Court continues to express for the central element of moral relativism at the heart of the privacy right.").

114. See *id.* at 365 (contending that "the majority in *Casey* made the . . . determination that no governmental entity—neither the Court nor the legislature—may make the value judgment that abortion is immoral and then impose that judgment through legal sanctions on those who disagree").

concerning the moral status of the fetus—on its subjects. In so doing, the standard guarantees that there exists a space around the abortion decision wherein a woman would be free to decide whether and when over the course of the pregnancy she would grant the fetus a moral status, and if so, whether she would allow the moral status so granted to determine the trajectory of her pregnancy. In other words, the undue burden standard would create conditions within which a moral pluralism could develop around the fetus and abortion, more generally.<sup>115</sup>

#### *A. The Morally Agnostic Undue Burden Standard*

In order for the courts to ensure that the state's view regarding the moral status of the fetus has not contaminated or contracted the space of moral pluralism that ought to surround the abortion decision, the undue burden standard must itself be uncommitted to any view of the fetus's moral status. Accordingly, when I describe the standard as operating illegitimately, this is to say that the standard is not proceeding with a moral agnosticism—a position that fully accepts that it does not know the truth of the fetus's moral status and that an objective truth on the matter is an impossibility. Instead, the standard currently proceeds with a conviction regarding the truth of the fetus as possessor of the supreme value of "life." Because the standard proceeds from the assumption held by one of the contesting parties in the abortion debate, the standard functions not as a dispassionate arbiter of competing parties' interests, but rather as an apparatus that reiterates the correctness of one parties' view while tending to decide questions in its favor.

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115. Dworkin has reached a similar conclusion, although he makes his argument in terms of "conformity" and "responsibility." Dworkin, *Unenumerated Rights*, *supra* note 72, at 408. He argues that the state ought not to attempt to produce "conformity" in beliefs regarding the fetus's moral status by imposing its views on the people; instead, the state should seek to instill "responsibility"—that is, deliberation about the significance of the fetus, pregnancy, and abortion. *Id.* He writes,

If we aim at responsibility, we must leave citizens free, in the end, to decide as they think right, because that is what moral responsibility entails. If, on the other hand, we aim at conformity, we deny citizens that decision. We demand that they act in a way that might be contrary to their own moral convictions, and we discourage rather than encourage them to develop their own sense of when and why life is sacred.

*Id.* Essentially, Dworkin's insistence that responsibility, as opposed to conformity, should be the aim of abortion regulations coincides with my argument that a moral pluralism should be allowed to develop around the fetus. The undue burden standard, then, is the means of protecting that end.

While I maintain that the present undue burden standard is operating illegitimately, I also maintain that this illegitimacy is not an inherent one,<sup>116</sup> that is, the categories of undue and due burden need not presuppose the truth of one claimant's position. Consider the following: The undue burden standard might operate more legitimately if, built into the standard, is not a positive philosophy regarding fetal life, but rather an *agnosticism* toward fetal life.<sup>117</sup> It is important to clarify that an agnostic toward fetal life does not argue that fetuses absolutely do *not* have an inherently valuable life. Instead, the agnostic that I champion asserts that we—those in the

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116. Shortly after the Court in *Casey* announced that the undue burden standard was the new standard to use when adjudicating the constitutionality of abortion regulations, Metzger argued that the Court had provided little guidance regarding the methodology for applying the standard and, as a result, the standard was incapable of protecting the abortion right from being unnecessarily and unjustifiably burdened by regulations. See Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2026 (1994) (seeking to "underscore the weakness of the standard in the form specified by the joint opinion" and "demonstrate[] that the abortion undue burden standard is virtually unique in its lack of protection against unnecessary and unjustified burdens on a constitutionally protected right"). Metzger drew upon other areas of constitutional law—the dormant Commerce Clause; the First Amendment analysis used for content-neutral, traditional forum speech; and the endorsement test of the Establishment Clause—to articulate a methodology that might be used to enable the undue burden standard to provide protection for the abortion right. *Id.* at 2025. While Metzger's argument may be true, and while part of the reason why the undue burden standard is currently unable to defend the abortion right from being enfeebled by incrementalist regulation is the lack of methodological guidance offered in *Casey*, I believe that another important explanation of the standard's feebleness is its acceptance of the notion of the fetus as a moral entity with an always already valuable "life"—that is, the standard has become enervated because embedded within it, at present, is the assumption that the fetus has a significant moral worth. Metzger did not address this corruption of the standard; her aim was to look at what was missing from the standard—not at what was present within it. Accordingly, I offer the present analysis as a helpful addendum to Metzger's vital and prescient work.

117. The Supreme Court's First Amendment jurisprudence parallels the argument that I make here regarding the undue burden standard. Gey argues that in the free exercise of religion cases,

The Court does not merely require the political majority to tolerate contrary views. Rather it affirmatively adopts the amoral position: The government may not prohibit political, religious, or moral dissent because under our constitutional system the government is denied the power to endorse one version of truth over another.

The Establishment Clause is the specific embodiment of this requirement that the government maintain an agnostic attitude towards religion.

Gey, *supra* note 74, at 358. With respect to the fetus, the government ought to similarly adopt the "amoral position," as "the government is denied the power to endorse one version of [fetal] truth over another." *Id.* The basis of this argument is not the Establishment Clause, but rather the importance of the abortion right and the undue burden standard's status as an apparatus that balances competing interests.

anti-abortion/pro-"life" camp, those in the pro-choice movement, philosophers, theologians, pregnant women, nonpregnant women, lawyers, state and federal legislators, and importantly, the judiciary—do not *know* whether fetuses have an inherently valuable "life." They might; they might not. In the absence of an answer to this question, the standard that balances the interests of those who would answer the question differently must not commit to an answer to the question; indeed, the standard must actively commit to an acknowledgment that it does not know the answer to the question.<sup>118</sup> An undue burden standard with an agnosticism toward fetal life, then, would balance the interests of those who believe that fetuses have meaningful moral value against those who disagree or who prioritize the morally significant life of the woman and the path that she wants her extant life to take above the "life" or potential life of the fetus.

If one accepts the proposition that the undue burden standard operates illegitimately when it proceeds from the assumption that the fetus possesses an inherently valuable "life," and if one accepts the proposition that the standard would operate more legitimately if it proceeds with a certain agnosticism toward fetal life, then one has to reconcile these propositions with the guidance that the *Casey* plurality gave when it first enunciated the undue burden standard. In *Casey*, the plurality specified that "undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>119</sup> It continued:

A statute with this *purpose* is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the *effect* of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.<sup>120</sup>

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118. Essentially, the morally agnostic undue burden standard respects the plurality of moral views concerning the fetus. As such, it will be a hard pill to swallow for those who "cannot abide the thought of [having] merely one moral view among many," as the law will not necessarily reflect "their moral outlook." Walen, *supra* note 110, at 639. And so, the morally agnostic undue burden standard is a response to "the current of moral authoritarianism," as it forces would-be moral authoritarians to understand competing moral positions regarding the fetus not as *immoral* positions, but rather, truly, competing *moral* positions.

119. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion).

120. *Id.* (emphasis added).

One can ground the contours of a morally agnostic undue burden standard in this passage. Here, the Court articulates two components of an abortion regulation: its purpose and its effect.<sup>121</sup> While a legislature may take a position regarding the moral status of the fetus and regulate abortion from the assumption that the fetus has/is an inherently valuable "life," this speaks only to the *purpose* prong of the analysis. That is, a state may regulate with the *purpose* of dissuading women from having abortions and, thereby, protecting fetal "life."<sup>122</sup> *However, this purpose may not*

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121. One scholar has recently conducted an especially insightful exploration of *Casey*'s directive that a law places an unconstitutional undue burden on the abortion right when it "has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion." Note, *After Ayotte: The Need to Defend Abortion Rights with Renewed "Purpose"*, 119 HARV. L. REV. 2552, 2566 (2006) [hereinafter *After Ayotte*] (emphasis added) (quoting *Casey*, 505 U.S. at 877). The author argues that although, "[b]y its plain terms, this is a disjunctive test," the Supreme Court and most lower courts have refused to analyze abortion regulations' purposes as distinct from their effects. *Id.* The author notes that the Court's opinion in *Mazurek v. Armstrong* indicated the Court's awareness of the possibility of disarticulating legislative purposes from legislative effects. *Id.* at 2566 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). In *Mazurek*, the Court wrote, "[E]ven assuming . . . that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render the . . . law invalid[,] there is no basis for finding a vitiating legislative purpose here." *Mazurek*, 520 U.S. at 972. "We do not assume unconstitutional legislative intent even when statutes produce harmful results; much less do we assume it when the results are harmless." *Id.* (citations omitted). Although this language appears rather pessimistic on the likelihood that the Court will ever strike a law based on its unconstitutional *purpose*, the author remains hopeful, concluding that *Mazurek* can "be read as agnostic toward the purpose prong." *After Ayotte*, *supra* at 2566; cf. *Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting) (arguing that Justice Ginsburg's *Stenberg* concurrence "suggest[s] that even if the Nebraska statute does not impose an undue burden . . . , the statute is unconstitutional because it has the *purpose* of imposing an undue burden," and that "Ginsburg's presumption is . . . squarely inconsistent . . . with our opinion in *Mazurek*").

The proposal contained within this Article similarly understands as a *disjunctive* test *Casey*'s directive that a law may not have the "purpose or effect" of creating a substantial obstacle in front of the abortion right. However, unlike the Note discussed above, this Article's proposal does not argue that the Court ought to strike laws based on unconstitutional purposes. Instead, this Article's proposal removes legislative purposes from judicial review while providing guidance to the Court seeking to determine whether a law has unconstitutional effects.

122. In truth, the claim that a state may regulate with the *purpose* of dissuading women from undergoing an abortion may actually concede too much. To be sure, *Casey* explicitly stated that "an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (emphasis added). One may argue that this directive prohibits a state from passing regulations with the *purpose* of deterring women from having abortion. However, the riposte would be that this statement from *Casey* does not prevent states from regulating with the purpose of dissuading women from abortion; it only prevents states from regulating with the purpose of dissuading women from

*overwhelm a statute's effects.* There are at least two ways for a morally committed legislature to accomplish this necessary disjunction between its purposes and a regulation's effects.

One way is to join a purpose to champion a belief in the moral consequence of the fetus with *an additional* purpose that is silent on the question of the fetus's moral status. Combining a morally salient purpose with a morally silent one arguably produces a statute that has a morally neutral effect. An instructive, but far from obvious, place to look for understanding this technique is First Amendment case law concerning nude dancing.

In *Barnes v. Glen Theatre, Inc.*,<sup>123</sup> the Court was called upon to determine the constitutionality of an Indiana public indecency statute that proscribed all forms of complete public nudity and, in so doing, required would-be nude dancers to wear G-strings and pasties.<sup>124</sup> A splintered Court held that the statute violated neither the dancers' nor the club proprietors' rights to freedom of expression as guaranteed by the First Amendment.<sup>125</sup> After finding that nonobscene nude dancing "is expressive conduct within the outer perimeters of the First Amendment, . . . [but] only marginally so,"<sup>126</sup> the plurality, reviewing the law with a lower level of scrutiny than the strict scrutiny that it typically used for regulations that infringe upon protected conduct, found the public indecency statute "justified despite its

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abortion when that legislative purpose places a substantial obstacle in front of the abortion right. Simply put, mere dissuasion does not amount to a substantial obstacle. Moreover, *Casey* goes on to explicitly affirm that a state may pass laws "designed to persuade [the pregnant woman] to choose childbirth over abortion." *Id.* at 878 (emphasis added).

At any rate, the purpose prong of *Casey* has gone relatively unexplored, and it ought to be plumbed for the potential that it has to protect the abortion right from further diminishment. See Tobin, *supra* note 36, at 126 (arguing that elucidation of the purpose prong in *Casey* has been minimal); see also *After Ayotte*, *supra* note 121, at 2569 (arguing that the purpose prong needs to be explored as it can function to reduce costs on the judiciary by striking laws that are clearly inconsistent with established precedent).

123. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571–72 (1991) (plurality opinion) (holding that the Indiana statute did not violate the dancers' or club owners' First Amendment rights).

124. *Id.* at 563.

125. *Id.* at 571–72.

126. *Id.* at 565–66. Some commentators have emphasized that the Court did not provide any explanation for its finding that nude dancing was expressive conduct, and if so, why it was only "marginally" protected by the First Amendment. See, e.g., Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 (2005) (noting that "[w]ithout further explanation," the plurality determined that nude dancing was expressive conduct, but "exiled" it "to this undefined and previously unheard of 'margin' of the First Amendment").

incidental limitations on some expressive activity."<sup>127</sup> Furthermore, Indiana's interest in protecting the people's morality, alone, was a legitimate justification for the law. Citing *Paris Adult Theatre I v. Slaton*,<sup>128</sup> and *Bowers v. Hardwick*,<sup>129</sup> the plurality wrote, "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."<sup>130</sup>

Nine years later in *City of Erie v. Pap's, A.M.*,<sup>131</sup> the Court was asked, once again,<sup>132</sup> to determine the constitutionality of a Pennsylvania public indecency ordinance that functioned to require all would-be nude dancers to don G-strings and pasties.<sup>133</sup> Reviewing the statute under the same lower level of scrutiny that it used in *Barnes*,<sup>134</sup> a plurality held that the ordinance

127. *Barnes*, 501 U.S. at 567.

128. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (upholding a Georgia statute prohibiting the showing of obscene movies partly on the grounds that the state could "protect 'the social interest in order and morality'" (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957))).

129. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia statute criminalizing "homosexual sodomy" on the grounds that the state could regulate on "notions of morality").

130. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion). This point was emphasized by Justice Scalia, writing in concurrence. Noting that he did not think that the statute regulated expressive conduct and, accordingly, did not implicate the First Amendment at all, Justice Scalia argued that the regulation ought to have been reviewed under a rational basis scrutiny. *Id.* at 580 (Scalia, J., concurring). Furthermore, morality was a rational basis for regulating. *See id.* at 575 ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral."). Accordingly, he would have upheld the statute as a rational effort to protect the morality of the community. *See id.* at 580 ("Moral opposition to nudity supplies a rational basis for its prohibition.").

131. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion) (holding that the Pennsylvania ordinance did not violate the First Amendment because it passed the *O'Brien* test).

132. The lower courts argued that the *Barnes* decision was splintered in such a way that no clear precedent could be derived from it. *See id.* at 285 (quoting the lower court's statement that "'aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some *First Amendment* protection, we can find no point on which a majority of the *Barnes* Court agreed'" (emphasis added) (quoting *City of Erie v. Pap's, A.M.*, 719 A.2d 273, 277 (Pa. 1998))).

133. *See id.* at 289 (describing the issue before the Court).

134. *See id.* (affirming that the instant ordinance, like the ordinance at issue in *Barnes*, should be reviewed with the less demanding *O'Brien* test).

did not violate the First Amendment,<sup>135</sup> however, this time, the Court did not base its decision on the notion that morality alone provided sufficient grounds for banning public nudity.<sup>136</sup> Instead, the Court held that the statute was a permissible infringement on dancers' and proprietors' right to freedom of expression because the state was justified in seeking to prevent negative "secondary effects" of nude dancing and nude dancing establishments.<sup>137</sup> In explaining that the ordinance did not have the purpose of banning the "erotic message" conveyed by nude dancing, but rather had the purpose of regulating the "secondary effects" of nude dancing, the Court wrote:

The ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland . . . . Put another way, the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment.<sup>138</sup>

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135. *See id.* at 296 (concluding that the public indecency ordinance is "justified under *O'Brien*").

136. *See id.* (stating that "public health" and "safety" justified the use of the state's police powers). The refusal of the plurality to rest its holding on the state's interest in morality was lamented by Justice Scalia in his concurrence. *See id.* at 310 (Scalia, J., concurring) ("The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment . . . that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.").

137. *Id.* at 291 (plurality opinion). In his concurrence in *Barnes*, Justice Souter presciently championed the view that public indecency statutes like the ones at issue in *Barnes* and *Pap's* should be upheld under a "secondary effects" rationale. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (writing "separately to . . . [concur] in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments"). He partially dissented in *Pap's* because he believed that the plurality, and his earlier concurring opinion in *Barnes*, erred insofar as neither required the state to show evidence revealing "the seriousness of the threatened harm or . . . the efficacy of its chosen remedy." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 314 (2000) (Souter, J., dissenting). He blamed his earlier failure in *Barnes* to demand an evidentiary basis for the regulation at issue on "[i]gnorance, sir, ignorance." *Id.* at 316.

138. *Pap's*, 529 U.S. at 291 (plurality opinion) (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986)). In the preamble to the ordinance, the council had stated that the regulation was directed at "nude live entertainment" establishments, whose "activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.'" *Id.* at 290 (quoting *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998)). That "nude live



In resting its decision on the state's interest in regulating "secondary effects," the Supreme Court implicitly rejected the claim that morality is a sufficient, or legitimate, justification for laws that infringe upon recognized constitutional rights.<sup>139</sup>

*Pap's* suggests that the state may be convinced of the immorality of a nude body displayed in public. It may, as a consequence, ban public nudity for the purpose of protecting the moral well-being of the community. However, in order for a regulation so intended to pass constitutional muster, its moral purpose must be combined with another, nonmoral purpose—like the prevention of the violence, criminality, and disease that is thought to be associated with public nudity. We can begin a productive analogy to abortion jurisprudence: Consider *Casey's* discussion of a rule that requires women to be informed that "there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."<sup>140</sup> Such a rule may have been promulgated by a state convinced that the fetus is/has a "life." It may have passed the rule with the purpose of likening the fetus to an infant and, in so doing, convincing the woman that her fetus is a "life." However, in order for the rule so intended to pass constitutional muster, its moral purpose must be combined with another, nonmoral purpose—like the simple intent to make sure women faced with unwanted pregnancies are

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entertainment" establishments have such "deleterious effects" on the communities in which they are situated has been questioned. *See, e.g.,* Adler, *supra* note 126, at 1125 ("What exactly is so dangerous about the naked female body? Why make this leap from sexuality to violence?").

139. *See* Adler, *supra* note 126, at 1119 (noting that the rationale offered by the Court in *Pap's* "eclipsed the Barnes plurality's dubious reliance on morality"). Although the Court's holding in *Pap's* represents a decided move away from morals-based legislation, it nevertheless has been criticized by politically liberal commentators. The *Pap's* dissenters, which included Justices Stevens and Ginsburg, argued that the plurality's acceptance of the "secondary effects" rationale in the context of a regulation that imposed incidental effects on speech was novel and improper, as the "secondary effects" doctrine had, until then, only been used in the context of adjudicating the legality of zoning restrictions. *See Pap's*, 529 U.S. at 326 (Stevens, J., dissenting) (terming the plurality's decision a "doctrinal polyglot"). The dissenters also pointed out the seeming illogic in the majority's reasoning—that is, that the violence, criminality, and disease that were thought to be an adjunct to nude dancing establishments could be prevented by requiring dancers to wear G-strings and pasties. *See id.* at 323 ("To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."). Indeed, the plurality appeared to admit as much. *See id.* at 301 (plurality opinion) ("To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects.").

140. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

aware of the breadth of their options.<sup>141</sup> The combination of the morally salient purpose with the morally silent one helps to ensure that the regulation has a morally neutral effect. Indeed, informing women that they may be entitled to welfare assistance should they decide to carry the pregnancy to term *appears* to be a morally neutral piece of advice—saying very little to nothing at all about the legislature's beliefs in the moral status of the fetus.

Yet, combining a morally salient purpose with a morally silent one is just one technique of ensuring the moral neutrality of a law's effect. There is another way to ensure that a state's intent to champion its moral views regarding the fetus does not overwhelm a regulation's effects: If the state insists upon coercing a woman to hear arguments in favor of understanding

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141. *Pap's* raises the question of whether the constitutionality of a law ought to depend on the legitimacy of the state's motives in passing it. That is, if a state bans public nudity with the improper purpose of squelching the erotic message that nude dancers communicate, should the regulation be saved from unconstitutionality if the state can point to a proper purpose for the regulation—like preventing the negative "secondary effects" of nude dancing establishments—although that purpose may not have been the *actual* motivation for the regulation? The *Pap's* plurality answered the question in the affirmative, stating that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Pap's*, 529 U.S. at 292. The danger in the Court's holding lies in the possibility that the state will knowingly infringe First Amendment rights, yet offer a post hoc rationalization for the infringement that then saves the law from unconstitutionality. See, e.g., Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 317 (1996) (arguing that allowing states to proffer "secondary effects" as a post hoc justification for regulations that infringe upon speech "permits an end run around the First Amendment: The government can always point to some neutral, non-speech justification for its action").

The analogous question in the abortion context is whether a regulation should be saved from unconstitutionality if a morally silent purpose for it could be divined, although the state might have actually passed the law with a morally salient purpose. For two reasons, the answer to this must also be an affirmative one. First, a state's purpose in passing a law does not overdetermine how it will affect women. Because the morally agnostic undue burden standard inquires into the moral neutrality of the *effects* of laws, a state's intent to convince a woman that her fetus is/has a "life" by requiring that she be given a list of adoption agencies, for example, does not translate into women actually hearing the state's moral message; it does not translate into the law having the *effect* of speaking to the fetus's moral status. The morally silent purpose of making women aware of the range of options available to them—a purpose the state may not have had—ensures the quieting of the state's moral message. Second, the state's actual, moral purpose in passing a law ought not to render a statute unconstitutional because abortion jurisprudence to date suggests that it is absolutely permissible for a state to regulate abortion with moral purposes. See *infra* notes 142–46 and accompanying text (discussing *Rust v. Sullivan* and *Casey*, which provide that states may regulate abortion with moral purposes). To ensure the moral neutrality of the effects of laws passed with moral purposes, however, the state must present both sides of the moral debate. This is the argument that I next develop. See *infra* notes 147–49 and accompanying text (suggesting a new standard).

the fetus as a "life," then the state should be required to *also* provide information regarding alternative moral views. If *both* sides of the debate regarding the fetus's moral status are presented, one can conclude that the regulation has a morally neutral effect.

*Casey*, together with the Court's decision in *Rust v. Sullivan*,<sup>142</sup> intimate that a legislature need not be reserved when advocating its moral views of the fetus—that is, that a state need not always combine a morally salient purpose with a morally silent one in order to save a regulation from unconstitutionality. Indeed, *Rust* and *Casey* suggest that the state may openly promote its beliefs in fetal "life." When upholding a federal regulation that prohibited recipients of Title X funds from providing abortions, abortion counseling, or referrals to abortion providers—and, in the course of so doing, restricted the ability of the indigent women who rely upon the recipients of Title X funds to elect an abortion—the majority in *Rust*, citing *Maher v. Roe*,<sup>143</sup> wrote that "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment . . .'"<sup>144</sup> Furthermore, in *Casey*, the plurality explained that "a state measure designed to persuade [the pregnant woman] to choose childbirth over abortion will be upheld if reasonably related to" the state's goal of expressing "profound" respect of the fetus;<sup>145</sup> moreover, "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."<sup>146</sup> However, while a state may "make a value judgment favoring childbirth over abortion" and inform a woman about "philosophic and social arguments of great weight" that may counsel her to bring her pregnancy to term, the Court has never held that the state may do this to the exclusion of informing a woman about "philosophic and social arguments of great weight" concerning the sociogenesis of the fetus as a "life."<sup>147</sup> The Court has never argued that the state must *not* inform a

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142. See *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (concluding that regulations restricting the use of federal funds to fund abortions do not violate "the First or Fifth Amendments to the Constitution").

143. See *Maher v. Roe*, 432 U.S. 464, 480 (1977) (holding that Connecticut did not violate the Constitution by refusing to fund nontherapeutic abortions).

144. *Rust*, 500 U.S. at 192–93 (quoting *Roe*, 432 U.S. at 474).

145. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

146. *Id.* at 872–73.

147. In *Rust*, the majority argued that the abortion rights of indigent women were not violated by the state's refusal to allocate funds to enable them to actually procure abortions—although the refusal effectively precluded poor women from exercising any

woman that "reasonable people, throughout the centuries, have disagreed" about the truth of those weighty "philosophic and social arguments . . . that can be brought to bear in favor of continuing the pregnancy to full term."<sup>148</sup> The state convinced of fetal "life" must present both sides of the argument if the regulation is not to corrupt the space of moral pluralism that should surround the exercise of an important right; indeed, the state convinced of fetal "life" must present both sides of the debate if abortion jurisprudence is

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abortion rights that they may have. *Rust*, 500 U.S. at 203. The Court said, "In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 193. This statement may be read to imply that the state may also promote one viewpoint (i.e., the fetus is/has a "life") to the exclusion of others (i.e., the moral status of the fetus is unknown and is subject to debate, the fetus is only "potential life," etc.). However, the *Rust* majority was careful to limit its holding to the specific context of Title X; it took pains to articulate that women remained wholly free to receive abortions, abortion counseling, and abortion referrals from non-Title X providers. *See id.* at 203 ("Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." (quoting *Maier v. Roe*, 432 U.S. 464, 475 (1977))). The distinction between negative rights and positive rights was paramount in the decision. *See id.* at 193 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."). Accordingly, it does not follow that, outside of the Title X context, the state may encourage one viewpoint of the fetus over another. That is, although the state may have no *affirmative duty* to help women realize their rights, the state nevertheless may not *interfere* in the exercise of rights—by championing one view of the fetus over another. Moreover, if *Casey* allows the state to so interfere by allowing women to be told of "philosophic and social argument of great weight that can be brought to bear in favor of continuing the pregnancy to full term," then the interference must be impartial; women must be informed of alternative arguments.

148. Gey makes an interesting argument concerning this point. He writes,

[I]f a woman has a right to determine for herself the attributes of personhood that attach to the fetus, it is inconsistent to uphold legislation intended to ensure that a woman makes her moral decision about abortion in a "thoughtful and informed" manner, and that she takes into account all the "philosophic and social arguments of great weight that can be brought to bear in favor of continuing her pregnancy to full term."

Gey, *supra* note 74, at 363 n.171 (quoting *Casey*, 505 U.S. at 872). Certainly, the state denies the woman the full opportunity to decide which attributes of personhood that she believes attaches to the fetus when it gives only a partial survey of the "philosophic and social arguments of great weight" pertaining to the fetus. Accordingly, I argue that, instead of denying a state interested in protecting fetal "life" the opportunity to present arguments that favor the continuation of a pregnancy, the state may do so only if such arguments are *in addition to* a presentation of arguments that do not lead her to continue her pregnancy because of a moral imperative demanded by the fetus's status as a moral entity. As such, a more generous review of the "philosophic and social arguments of great weight" spoken of by Justice O'Connor would not function to "manipulate the moral decisions of pregnant women" in the way that Gey fears. *Id.*

to be consistent with *Lawrence* and the developments in First Amendment Law, both counseling that the state may not legitimately impose its morality on its subjects.<sup>149</sup>

In sum, when a regulation is challenged, the morally agnostic undue burden standard can be used to determine if, in practice, the morally committed legislature succeeded in creating law that was sufficiently morally agnostic in its effect. If the effect of the law shows a commitment to a moral position regarding the fetus—because it has a sole purpose to convince a woman about the propriety of the state's views regarding the fetus's moral status, or because it champions one view regarding the fetus to the exclusion of other views—an agnostic undue burden standard must strike it down.<sup>150</sup>

As such, a legislature, convinced of the always already "life" and consequent moral value of the fetus may have the purpose of "creat[ing] a structural mechanism that express[es] profound respect for the life of the unborn"; however, that structural mechanism must not show the state's

149. See Adler, *supra* note 126, at 1119 n.52 ("Morality has always been a problematic justification of banning speech; it has become even more so in light of the Court's decision to overrule *Bowers v. Hardwick* [with *Lawrence*], on which the *Barnes* plurality had partially relied." (citations omitted)).

150. Other scholars have proposed an undue burden standard that disaggregates the purpose of a regulation from its effects. See Gey, *supra* note 74, at 391 (arguing that, when reviewing an abortion regulation, the Court should determine if a regulation has a "primarily amoral purpose," as well as a "substantially amoral effect"); Metzger, *supra* note 116, at 2043–44 (arguing that the undue burden standard should reflect the dormant Commerce Clause standard insofar as the latter's two-tiered approach provides insight as to how judges could examine unduly burdensome purpose and effects); *id.* at 2044 (noting that "[i]n dormant Commerce Clause doctrine, the illegitimate purpose is economic protectionism and discrimination," while "in the abortion context, it is the intentional creation of substantial obstacles in the path of a woman seeking to abort a nonviable fetus"); *id.* at 2045 (noting that in the effects prong of both dormant Commerce Clause analysis and the undue burden standard, "increased costs and delays, even if incidental, may prove to be undue burdens"); *cf.* Appleton, *supra* note 99, at 62–63 (arguing that a regulation's purpose and effects should be considered together); *id.* at 62 ("[I]f an anti-abortion purpose alone spelled invalidity, the [*Casey*] opinion could not have cited . . . Justice O'Connor's previous dissents, which regularly ignored a statute's anti-abortion purposes to focus instead on the absence of an undue burden according to the law's effects."); *id.* at 62–63 (arguing that if anti-abortion effects alone determined invalidity, it would make the undue-burden test "unnecessarily problematic" because it "would implicate a wide range of decisions . . . that have *unintended* effects and consequences"); *id.* at 63 ("While the abortion-funding cases virtually conceded the anti-abortion purposes underlying the selective funding schemes they upheld, the cases emphasized the absence of any cognizable effect on the challengers.").

While other scholars have argued that a regulation might have unduly burdensome purposes *or* unduly burdensome effects, this instant proposal is the first to suggest a disarticulation of the moral purpose of a regulation from its moral effects.

metaphorical cards so to speak, as the *effect* of the mechanism must do no more than to clear a space for the woman's contemplation of fetal life.<sup>151</sup> Accordingly, the regulation must say nothing at all about fetal "life" (at least ostensibly), or it must present arguments both for and against according a moral status to the fetus. A morally agnostic undue burden standard, then, would determine whether the regulation is morally neutral in practice and as experienced by women. Differently stated, the rehabilitated standard proposed herein would simply determine if a law has the effect of providing women with a morally neutral occasion for reflection.

Accordingly, the undue burden standard that I propose would tell the following story: The standard was a compromise—between a social movement that champions the belief that the fetus has a significant moral status and that this status should determine the telos of a pregnancy and a social movement that disputes this moral status and/or disputes that the fetus's moral status should determine the course of a woman's pregnancy. While the state could proceed from the assumption that the fetus has a moral status and pass regulations that express profound respect for the morally significant "life of the fetus," the *undue burden standard*, however, will review these regulations with an eye towards determining whether they have unconstitutionally corrupted the space of moral pluralism that ought to surround the abortion decision. The nuance here is crucial: While state or federal legislatures can hold a particular view of the moral status of the fetus, the *judiciary*, armed with and deploying the undue burden standard, must ensure that that view has not corrupted the ability of the woman to decide upon her fetus's moral status and that status's implication for her immediate pregnancy. In so doing, the morally agnostic undue burden standard would patrol the space of moral pluralism that ought to surround the fetus and abortion, more generally.

### *B. The Present Undue Burden Standard, Redux*

A morally agnostic undue burden standard, then, would ask different questions than the present undue burden standard. Where the current standard asks, Does this regulation excessively express profound respect for fetal life, or does it express this profound respect moderately?, a morally agnostic standard would ask, Does this

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151. See Appleton, *supra* note 99, at 67 (arguing that "the goal of the restrictions upheld in *Casey* is not to decrease abortion but rather simply to push women to think longer and harder about abortion").

regulation do no more than clear a space wherein a woman can deliberate as to whether her fetus is an inherently valuable life and, if so, whether she can live with a decision to terminate it? The former set of questions distorts the terms of the compromise that the Supreme Court aimed to strike by putting forth the undue burden standard; the latter set better acknowledges competing moral worldviews involved in the abortion debate.

Furthermore, when one understands the substance of the questions that comprise the present, morally committed undue burden standard—when one understands that the Court is looking into the *zeal* with which a regulation expresses its *profound respect* for the always already valuable "life" of the fetus—one can see that the undue burden standard in its present deployment is fundamentally different from other standards used by the Supreme Court. That is, although the undue burden standard looks and sounds like an objective constitutional test, the questions asked by the illegitimately operating, present undue burden standard are vividly different than those asked by other constitutional standards.<sup>152</sup> Consider this: What if, when employing

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152. It is important to note that I am not arguing that the undue burden standard is the incorrect standard to utilize in abortion jurisprudence—that some other standard, like strict scrutiny or a more robust intermediate scrutiny, is more appropriate. Other scholars have competently made such cases. *See, e.g., id.* at 53 (noting that the undue burden standard "is a balance that, while favoring the government more than the balance fashioned by *Roe v. Wade*, nevertheless offers more hope to challengers than traditional rational-basis review"). Metzger has similarly contemplated the appropriate level of scrutiny that the undue burden standard ought to represent, contending that while it may appear that the undue burden standard is equivalent to an intermediate scrutiny, it is, in practice, more akin to a rational basis review. She states that "*Casey*'s reference to substantial obstacles as unconstitutional, and its emphasis on balancing the interests of the state and the pregnant woman, might suggest that the Court is now applying a form of intermediate scrutiny." Metzger, *supra* note 116, at 2032. However,

This conclusion seems unlikely given the use of rationality review to examine regulations imposing burdens not considered to be substantial obstacles. It is particularly noteworthy that *Casey* appeared to allow states to impose restrictions on abortion not amounting to undue burdens in order to achieve a legitimate interest, as opposed to the important or substantial state interest requirement usually employed under intermediate scrutiny.

*Id.* at 2032–33.

Rather than debating whether the undue burden standard is no more than a form of rational basis scrutiny or a failed attempt at intermediate scrutiny, I am silent as to the tier of scrutiny represented by the undue burden standard; similarly, I am silent about what tier of scrutiny the undue burden standard ought to be. Instead, I simply contend that, as currently deployed, the standard embodies an ideological bias and, consequently, cannot do the job that it was designed, and ought, to do.

strict scrutiny the Court asked not whether a regulation pursued a "compelling interest," but rather whether the regulation pursued a "morally righteous interest"?<sup>153</sup> When constructed in such a way, the (corrupted) test would overdetermine the results in any given instance. Within such a test, it is unlikely that a state's interest in "diversity" would be "morally righteous" enough to amount to a compelling state interest;<sup>154</sup> the protection of fetal "life," on the contrary, would likely satisfy the demands of "moral righteousness." This example aims to show how the undue burden standard's reflection of a moral perspective compromises its legitimacy as a constitutional test. While rational basis scrutiny might allow for the state to regulate morality, a moral position is not built into the test itself. While strict scrutiny might disallow the state from regulating morality, again, a moral position is not built into the test itself. However, a moral position is part and parcel of the present undue burden standard. The nuance here is crucial, as it reveals the present undue burden standard to be a judicial innovation—and a problematic one.

The argument that the present undue burden standard embodies an ideological bias does not lead to the conclusion that it is necessarily unjust, but rather that it is operating unjustly as it is currently deployed. Further, my argument is not that the standard is practically unworkable; indeed, in the next Part, I will show exactly how a morally agnostic version would function.

Moreover, the reconceptualization that I propose should not lead to the conclusion, popular in older versions of critical legal theory (especially theory coming out of the school of Critical Legal Studies), that the ideological bias locatable in the present undue burden standard evidences a characteristic that is common to all legal standards: It is raw power, rather than objective reasoning, that determines both how constitutional and other legal tests will be deployed as well as the results of that deployment, in any given instance. This line of argumentation

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153. Admittedly, within First Amendment jurisprudence, the tests employed by the Court tend to, at least, *sound* as if they have a moral-commitment; that is, they tend to invite the judges to determine constitutionality based on the judges' personally held senses of what is moral versus what is immoral. See Gey, *supra* note 74, at 338 ("[T]he Court has marked the line between protected and unprotected speech by reference to vague, value-laden terms such as 'prurient interest,' 'patent offensiveness,' and 'serious literary, artistic, political, or scientific value.'").

154. See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (2010), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).



holds that the present, illegitimate undue burden standard is one particular instantiation of an illegitimacy common to all categories; that is, that all standards embody a claimant's version of truth. This is because it is raw power that produces the standards in the first instance, or, in the second instance, that determines how they will be used. The argument would continue: With regard to the undue burden standard as currently deployed, it just so happens that the pro-"life"/anti-abortion camp has used its political power to embed its ideology regarding the fetus into the constitutional standard. This line of argumentation would go on to argue that if the morally agnostic undue burden standard that I champion were to be accepted by the Supreme Court, it would not change the fact that raw, political power will have determined the standard and its operation; in the case of the morally agnostic version of the standard, the pro-choice camp would have "captured the Judiciary" and embedded its ideology about the fetus's (lack of) consequential moral status into the constitutional test.<sup>155</sup> But the morally agnostic undue burden standard that I propose does not embody any version of truth; accordingly, it does not, and should not, reflect the belief that the fetus is not a "life" or is not an entity with moral worth. Rather, the morally agnostic undue burden standard holds no position regarding the moral status of the fetus. If it embodies any truth, it is the truth that one does not know, and may not ever know whether or not the fetus is a moral subject.

Having laid out the contours of a morally agnostic undue burden standard, how then would that standard operate? In the next Part, I apply the standard that I have proposed to several abortion regulations. As the constitutionality of these laws is litigated, it may give the Supreme Court the occasion in upcoming terms to articulate how the undue burden standard might legitimately operate.

#### *IV. The Morally Agnostic Undue Burden Standard in Action*

##### *A. Mandatory Ultrasound Laws*

Mandatory ultrasound laws range in levels of coerciveness. The least coercive laws simply require that a woman be given either written or verbal

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155. Cf. Gey, *supra* note 74, at 332 (arguing that the "logical consequence of a virtually unrestrained 'moral' political process" is "that constitutional theory must become the servant of political power").

information about where she can obtain an ultrasound,<sup>156</sup> the most coercive laws require that a woman be given an ultrasound as well as a description of the image.<sup>157</sup> At present, nineteen states have some form of an ultrasound requirement.<sup>158</sup>

Oklahoma's mandatory ultrasound law is one of the most severe. And while the law was recently struck down as a violation of the Oklahoma constitution's requirement that laws contain "single subjects,"<sup>159</sup> the Oklahoma legislature is considering re-passing the law in a form that is consistent with the single subject rule.<sup>160</sup> For these reasons, it is instructive to look at the recently invalidated law, as it likely indicates what mandatory ultrasound laws will look like in the future. The law provided that a physician "shall,"

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;
2. Provide a simultaneous explanation of what the ultrasound is depicting;
3. Display the ultrasound images so that the pregnant woman may view them; [and]
4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable . . . .<sup>161</sup>

This act probably would pass constitutional muster under the present undue burden standard. That is, the act can be justified as a legitimate exercise of a state interested in expressing "profound respect" for fetal

156. GUTTMACHER INSTITUTE, *supra* note 154, at 1.

157. *See* OKLA. STAT. tit. 63 § 1-738.3b (2009) (repealed 2010) (stating the provision).

158. *See* GUTTMACHER INSTITUTE, *supra* note 154, at 2 (listing states' ultrasound requirements). These states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and Wisconsin. *Id.*

159. Press Release, Center for Reproductive Rights, Oklahoma Supreme Court Finds Abortion Law Unconstitutional, Upholds State District Court Decision (Mar. 3, 2010), <http://reproductiverights.org/en/press-room/oklahoma-supreme-court-finds-abortion-law-unconstitutional-upholds-state-district-court-d> (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

160. *See id.* (explaining Oklahoma's possible restructuring of the law).

161. Tit. 63 § 1-738.3b.

"life." Oklahoma can persuasively argue that compelling a doctor to relate to the woman the raw, objective biological data about the fetus that she carries furthers the state's interest in fetal life. Indeed, Oklahoma can point to language in *Casey* itself, finding constitutionally permissible state informed consent requirements that women be given "truthful, nonmisleading information"—including, but not limited to, information about the "'probable gestational age' of the fetus."<sup>162</sup> Oklahoma can argue that its law does no more than provide gloss on the significance of the fetus's "probable gestational age" by detailing the physical properties, like cardiac activity and developed internal organs, that the fetus has by virtue of its probable gestational age. Oklahoma may even argue that, not only does the law fail to impose a *substantial* obstacle in a woman's path to an abortion, it imposes no *obstacle* at all. How could factual information about an image, an image away from which a woman may avert her eyes,<sup>163</sup> amount to an obstacle? My aim in presenting this line of argumentation is not to contend that it is convincing; rather, my aim is to demonstrate that the argumentation is only convincing under an undue burden standard that proceeds from the assumption that the fetus has/is a "life" and that the only question is *how much protection* a state can permissibly afford that "life."

What would be the disposition of such a law under an undue burden standard that was morally agnostic toward the question of fetal life? The Oklahoma law would likely be found constitutionally infirm under such a reconceptualized standard. However, the unconstitutionality of the regulation would not be based on the argument that the state subscribed to a notion of fetal "life" and passed the law for the purpose of protecting it. As mentioned earlier, within an agnostic undue burden standard, it is legitimate for the state to regulate with the *purpose* of expressing respect for morally significant fetal "life"—as long as a morally silent purpose can also be divined, or as long as the state requires the women to hear both sides of the debate regarding the moral status of the fetus.<sup>164</sup> And so, statements surrounding the passage of the act that suggest that its purpose was to promote a view of "life" would not be dispositive on the question of

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

163. OKLA. STAT. tit. 63 § 1-738.3b(C) (2009) (repealed 2010). The provision invites questions as to the permissibility of other forms of refusal that are not expressly "allowed" by the law. May a woman view the ultrasound screen, but plug her ears while her doctor gives a "medical description of the ultrasound image," thereby allowing herself the opportunity to interpret for herself the image being projected? May she avert her eyes and plug her ears?

164. *See supra* Part III (discussing the morally agnostic undue burden standard).

constitutionality.<sup>165</sup> Rather, the Court should look at the act in practice and determine whether the *effect* of its requirements is to corrupt the space of moral pluralism that ought to surround the abortion decision.<sup>166</sup> It is difficult to sustain the position that forcing a woman to view an ultrasound image of her fetus does not have the effect of imposing a view of the moral status of the fetus as an inherently valuable "life." That is, a Court employing a morally agnostic undue burden standard would have to strike down mandatory ultrasound viewing laws because of the work that such laws do to force upon the woman a particular idea about fetal "life."

Professor Carol Sanger's scholarship in this area is instructive.<sup>167</sup> First, Sanger disputes the notion that the image produced by ultrasound technology is neutral and objective, that it possesses no ideological predilection whatsoever.<sup>168</sup> Instead, this visual representation of the fetus

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165. Accordingly, the Court should not give dispositive weight to statements made during legislative debates both for and against the passage of the act. Nor could the Court give dispositive weight to statements made to constituents or to media, like those made by a supporter of the bill, Senator Todd Lamb. When asked why he supported passage of the bill, Senator Lamb responded, "I introduced the bill because I wanted to encourage life in society. In Oklahoma, society is on the side of life." Ron Jenkins, *Oklahoma Sued over New Abortion Ultrasound Law*, SFGATE.COM (Oct. 11, 2008), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/11/MN4O13F09F.DTL&type=health> (last visited Sept. 24, 2010) (on file with the Washington and Lee Law Review).

166. Accordingly, the Court might give great weight to the provision in the Oklahoma law that legally exempts from penalty a woman who refuses to look at the ultrasound screen during the coerced ultrasound. The clause provides that "[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images." Tit. 63 § 1-738.3b(C). This provision is particularly fascinating because it functions to disavow any claims that the coerced ultrasound is morally neutral, objective, and dispassionate. If the biological and visual data related by a doctor to the woman saddled with an unwanted pregnancy were strictly within the realm of impartiality, a woman might not feel the need to refuse to look; that the legislature knew of the radical partiality of the mere "information" forced upon a woman is evident in its felt need to expressly provide that a woman and her doctors would escape penalties if she averts her eyes. A reviewing Court may use this clause as evidence that there is something ideologically charged, and impermissibly so, about forcing women to undergo and view an ultrasound prior to an abortion. In essence, the effect of the regulation is to promote an impermissible view of fetal "life."

167. See generally Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) [hereinafter Sanger, *Seeing and Believing*] (discussing mandatory ultrasounds and their impact on abortion laws).

168. See *id.* at 380 ("To be sure, the sonogram itself has no point of view—it is a photograph—and on this account it is offered up as an objective datum incapable of bias.") The preamble to Alabama's mandatory ultrasound viewing law—notably, the "Woman's Right to Know Act"—is representative of this notion, offering fetal imaging as nothing more

has a cultural context; it is a context in which excited expectant mommies get their first ultrasounds<sup>169</sup> and morally significant *persons* get their photos taken.<sup>170</sup> Moreover, the woman seeking an abortion—a social being, after all—brings an extant cultural knowledge to her viewing of the ultrasound that makes impossible any dispassionate or detached understanding of the image.<sup>171</sup> The result is that the "simple" photograph of the fetus functions to make a powerful argument about the fetus's moral status: The fetus becomes a "life."<sup>172</sup> "[T]he ultrasound is meant to establish or simply to reinforce the state's position that the fetus is not just 'potential life' . . . but 'actual life,' with all the ideological and emotional force that word now comprises and exerts."<sup>173</sup> By "cleverly and cruelly capitaliz[ing] on the socialized meaning of fetal imagery,"<sup>174</sup> mandatory viewing laws compromise the space of moral pluralism that should surround the status of the fetus because they have the effect of "insisting that women take a particular view of fetal existence."<sup>175</sup> Understanding this, a Court

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than neutral and objective information. ALA. CODE § 26-23A-2 (2002). It reads:

The decision to abort is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting or life threatening. . . . [I]t is the purpose of this chapter to ensure that every woman considering an abortion receives complete information on the procedure, risks, and her alternatives and to ensure that every woman who submits to an abortion procedure does so only after giving her voluntary and informed consent to the abortion procedure.

*Id.*

169. *See* Sanger, *Seeing and Believing*, *supra* note 167, at 382 ("Mandatory ultrasound laws require women to participate physically in what has become a rite of full-term pregnancy: the first ultrasound.").

170. *See id.* at 379 ("[T]he technology and the practice of ultrasound have transformed the fetus from potential life to something that can have its picture taken, a trait which in our visual culture is as close to a marker of personhood as one can get.").

171. *See id.* ("Preexisting cultural familiarity with the public fetus and its status as an independent person, patient, and consumer has made affinity with one's own fetus an easy and natural next step.").

172. *See id.* at 406 ("[T]he imagery is rarely neutral, or at least rarely received as neutral. For some it powerfully represents nothing less than life.").

173. *Id.* at 377. Moreover, not only is the fetus a "life," but it is also a baby—the aborting woman's baby. *See id.* at 378 ("[T]hese statutes are unabashedly meant to transform the embryo or fetus from an abstraction to a baby in the eyes of the potentially aborting mother."). Through compelling a woman to view her ultrasound, she is encouraged to comprehend her abortion as killing her baby.

174. *Id.* at 406.

175. *Id.* at 408.

reviewing such statutes with an agnostic undue burden standard must strike them down as unconstitutional.

An agnostic undue burden standard would compel those desiring to protect fetal "life" to pursue their purpose with more ideologically neutral means or in ways that would not impose their moral worldviews on women or physicians. Accordingly, a potentially permissible version of the Oklahoma statute and other mandatory viewing laws might provide that a woman seeking abortion services be given the *option* of receiving an ultrasound and having the image described to her. Moreover, these laws might be saved from unconstitutionality if it provided that women "shall" also receive information about the fetus that proceeds from different assumptions. Accordingly, subsequent (or prior) to an ultrasound in which a physician provides a "medical description" of the image, a woman might also be informed that the image is not dispositive of fetal "life." She might be given information about how the biological fact of the fetus has become conceptualized as coincident with an idea of morally significant "life." She might be engaged in a *discussion* about how varying schools of thought throughout history have held differing views regarding the beginning of "life."<sup>176</sup> She might be encouraged to consider that it is she, ultimately, who must reconcile her own personally held views regarding "life" with her decision to terminate or continue her present pregnancy. An abortion regulation that compels the woman to engage in a conversation regarding "life" that is not overdetermined—that presents the belief that "life" begins at conception *together* with the belief that "life" is a vapid term that has been co-opted by a social movement that is not empowered to determine the origins of morally significant "life"—would not likely fall into the category of an unduly burdensome regulation. Such a conversation is congruent with an agnosticism toward fetal life.

It is important to mention that the conversation that I have described may ultimately persuade a woman to choose childbirth over abortion, as she may become convinced that her fetus is a "life" and that the fact of fetal "life" prohibits her from terminating her pregnancy. Indeed, the state may have enacted the regulation that provides an opportunity for such a conversation with the *purpose* of ultimately persuading a woman to come to this conclusion. However, the state may not coerce women to reach such

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176. The history given in *Roe* might be an instructive launching pad for such a discussion. See *Roe v. Wade*, 410 U.S. 113, 130–47 (1973) (examining approaches taken to abortion in "ancient attitudes," "The Hippocratic Oath," "the common law," "English statutory law," "American law," "the position of the American Medical Association," and "the position[s] of the American Public Health," and "American Bar Association[s]").

conclusions by providing them with only one side of the relevant debate. Accordingly, the state must present all arguments surrounding questions of fetal life. Moreover, it is through the presentation of such arguments—a presentation that clears a space for the flourishing of moral pluralism around the question of the fetus—that the state may, legitimately, express its "profound respect" for the fetus.

### *B. Fetal Pain Laws*

As of September 2009, nine states had passed fetal pain laws, which require that women be told that their fetuses are capable of feeling pain.<sup>177</sup> Georgia's statute is representative, requiring that women be informed that,

By 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks' gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks gestational age or older who undergo prenatal surgery.<sup>178</sup>

Fetal pain laws are problematic for many reasons, the most important one being that they may be misleading. In a helpful analysis, Harper Tobin describes how each of the statements that abortion providers must relate to their patients under these laws could mislead the lay hearer into believing that the scientific community has reached the conclusion that the fetus feels pain during an abortion procedure.<sup>179</sup> She notes that simply because the structures necessary for pain perception are in place, "their mere presence is insufficient," as they are not fully functional at early gestational ages.<sup>180</sup> She notes that while fetuses may demonstrate "evasive responses superficially suggestive of pain," there is considerable debate that "pain is actually experienced."<sup>181</sup> Finally, she notes that while "anesthesia is routinely administered to" fetuses undergoing prenatal surgery, the anesthesia serves purposes completely unrelated to preventing the fetus

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177. These states are Alaska, Arkansas, Georgia, Louisiana, Minnesota, Oklahoma, South Dakota, Texas, and Utah. GUTTMACHER INSTITUTE, *supra* note 154, at 2. The federal government considered, but failed to pass a similar bill in 2006. See Unborn Child Pain Awareness Act of 2006, H.R. 6099, 109th Cong. (2006) (stating the proposed legislation).

178. GA. CODE ANN. § 31-9A-4(a)(3) (2006).

179. Tobin, *supra* note 36, at 147.

180. *Id.* at 144.

181. *Id.* at 146.

from feeling pain, including "inhibiting fetal movement during a [medical] procedure," allowing access to the fetus, and preventing contractions and separation of the placenta.<sup>182</sup>

Moreover, the quasi-truthful, yet nevertheless misleading information that Georgia requires a woman to hear unconstitutionally communicates the state's message about the fetus's moral status. The ability of an entity to feel pain—that is, that a thing is a sentient being—invariably speaks to the moral status of the entity, as well as the respect and deference that ought to be afforded to it. The misrepresentation of the sentient capacities of the fetus accordingly misrepresents information that is relevant to the question of the fetus's moral status. Again, this is something that the state may not do. The woman seeking an abortion must be left a space, free of intentionally misleading information,<sup>183</sup> to contemplate her fetus's moral status and the consequences of that status on her decision to terminate her pregnancy. Under an agnostic undue burden standard, misinformation of the kind mandated by Georgia unconstitutionally contracts that space.

### C. Declaratory Laws

An interesting crop of abortion regulations are those that declare the fetus's moral status. At present, only South Dakota<sup>184</sup> and North Dakota<sup>185</sup> have passed such laws. Both regulations require that, as part of the informed consent process, women be told that the abortion procedure to which they are endeavoring to consent will "terminate the life of a whole,

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182. *Id.* at 147 (quoting Susan L. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 952 (2005)).

183. Jeremy Blumenthal has done provocative work on how the stressful conditions involved in seeking abortion services (and, simply, bearing an unwanted pregnancy) may leave persons in a vulnerable state and less inclined to be critical towards the information communicated to them; that is, persons are more easily persuaded when they are experiencing negative emotional states. See Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 26–27 (2008) (explaining the findings). He concludes, "[E]ven a truthful message may be misleading when it inappropriately takes advantage of emotional influence to bias an individual's decision away from the decision that would be made in a non-emotional, fully informed state." *Id.* at 27. He suggests that "the sort of emotional information that many States now provide in their 'informed consent' statutes can lead to such inappropriate emotional influence and thus should be examined more closely than heretofore." *Id.*

184. S.D. CODIFIED LAWS § 34-23A-10.1 (2009).

185. N.D. CENT. CODE, § 14-02.1-02 (2009).



separate, unique, living human being."<sup>186</sup> South Dakota's law also requires that women be told that "the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota."<sup>187</sup> In the challenge to South Dakota's law, the district court granted a preliminary injunction.<sup>188</sup> When comparing the South Dakota provision to the informed consent provision found constitutional in *Casey*, the court stated,

Unlike the truthful, nonmisleading medical and legal information doctors were required to disclose in *Casey*, the South Dakota statute requires abortion doctors to enunciate the State's viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether a fetus is a human being.<sup>189</sup>

The Court of Appeals, sitting en banc, overruled, however, finding that "'human being' in this case means 'an individual living member of the species of *Homo sapiens* . . . during [its] embryonic [or] fetal age."<sup>190</sup> Essentially, the court found that there was no ideological bias or theological underpinnings beneath the pronouncement that abortion terminates the "life of a . . . living human being."<sup>191</sup>

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186. S.D. CODIFIED LAWS § 34-23A-10.1 (2009); N.D. CENT. CODE, § 14-02.1-02 (2009).

187. S.D. CODIFIED LAWS § 34-23A-10.1 (2009).

188. *Planned Parenthood Minn., N.D., S.D., v. Rounds*, 375 F. Supp. 2d 881, 889 (D.S.D. 2005).

189. *Id.*

190. *Planned Parenthood Minn., N.D., S.D., v. Rounds*, 530 F.3d 724, 735–36 (8th Cir. 2008). This definition of "human being" was found in a different section of the South Dakota code. *Id.* at 727. Women were not required to be given this statutory definition; consequently, women, in practice, would only hear the statement that abortion terminates the life of a "whole, separate, unique, living human being"—a statement that is reasonably interpreted as "address[ing] whether the embryo or fetus is a 'whole, separate, unique' 'human life' in the metaphysical sense." *Id.* at 736 n.9. As Post explains:

A reasonable patient, upon being informed that she is terminating the life of a "human being," would not understand her doctor to be informing her that she is ending the life of a biological member of the species *Homo sapiens*. She would understand her doctor to be informing her that she is ending the life of a member of the human community who otherwise deserves life. Because this is the meaning that the term "human being" carries in debates about abortion, this is the way that the doctor's speech will be received and understood.

Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 958.

191. *Planned Parenthood Minn.*, 530 F.3d at 726. The dissent notes that the term "human being" is subject to multiple meanings; while it may "refer to purely biological

A Supreme Court deploying an undue burden standard with agnostic commitments might find the circuit court's reasoning a bit disingenuous. It might argue that "life" and "living human being" have been co-opted by a social movement that seeks to endow those words and concepts with meaning that goes beyond a purely biological definition.<sup>192</sup> Moreover, the Court might advise legislatures considering similar language for their state's informed consent processes that it may save such regulations from unconstitutionality if women were *also* presented a differing ideological view of fetal "life" (i.e., that the fetus is a biological entity whose ontological status as a morally significant "life" is unresolved), or if those informed consent processes make clear that they were referring to biological life as opposed to a theological/moral notion of "life" (i.e., physicians should explain that the abortion procedure "terminates the existence of a member of the species of *Homo sapiens* during its embryonic or fetal age").<sup>193</sup> Simply stated, declaratory laws like those of South and North Dakota impose upon the woman a particular conception of the moral status of the fetus and would be struck down by a Court employing an agnostic undue burden standard.

#### D. Casey-Like Informed Consent Requirements

The informed consent requirements that were found constitutional in *Casey*, mandating that women be informed about the nature of the abortion procedure,<sup>194</sup> the health risks attendant to abortion and childbirth, and the

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characteristics"—denoting a "bipedal mammal that is anatomically related to the great apes"—it "also may be a value judgment, indicating entitlement to the moral or political rights shared by all persons." *Id.* at 742 (Murphy, J., dissenting). In profound disagreement with the majority's conclusion that there is no ideological foundation beneath the pronouncement that "abortion will terminate the life of a whole, separate, unique, living human being," the dissent wrote, "In the context of abortion, the term 'human being' has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure." *Id.*

192. *See* Dresser, *supra* note 63, at 1615 (noting that the law in South Dakota "is seeking to impose consent demands that are . . . more unconventional, by requiring doctors to give women one position on the moral status of the developing fetus—a position not shared by many people in the United States").

193. *See id.* at 1622 ("If the government requires women to receive material about the moral value of developing human life, that material should describe the range of views people have on the topic.").

194. Of course, there are multiple ways to describe an abortion procedure—some more emotionally charged and morally committed than others. The description of the abortion procedure that women hear ought to be one that proceeds from a morally agnostic view of

probable gestational age of the fetus, would likely pass constitutional muster under a morally agnostic undue burden standard.<sup>195</sup> While they were probably passed by a legislature convinced of the significant moral status of the fetus, and while they were almost certainly passed with the *purpose* of convincing women to carry their fetuses to term, these purposes are not patently revealed in the effect of the statute. On their face, such informed consent requirements seem to do nothing more than supply women with enough information about their pregnancies and the abortion process such that the decisions that they make to end their pregnancies are sufficiently informed.<sup>196</sup> Likewise, requiring that abortion providers give

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the fetus; accordingly, as a baseline, it must be vigilant in its use of medical terminology. For example, a woman should be told that her "cervix will be dilated so that the physician can insert a vacuum aspirator into the uterus; thereafter, a suction will be used to empty the contents of the uterus"; she should not be told that her "cervix will be dilated so that the physician can insert a 'vacuum' into the 'womb' and suck the 'baby' out."

195. Moreover, the informed consent requirements that were struck down in *Akron*, requiring physicians to inform their patients that "the unborn child is a human life from the moment of conception," would likely be found unconstitutional under an agnostic undue burden standard; such a statement, purporting to describe as fact "one theory of when life begins," undoubtedly constricts the space of moral pluralism around the fertilized egg, the embryo, and the fetus. See *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 423 n.5, 444 (1983) (describing the statements required under the informed consent law). For the same reasons, such statements would be unconstitutional even if only found in the preamble to a state Act—even if they were not required to be expressed directly to a woman burdened with an unwanted pregnancy. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 504, 506 (1989) (refusing to rule on the constitutionality of a Missouri act's preamble, which stated that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being"). Justice Blackmun, writing in dissent in *Webster*, would have struck down the preamble because of his belief that it would have "the unconstitutional effect of chilling the exercise of a woman's right to terminate a pregnancy and of burdening the freedom of health professionals to provide abortion services." *Id.* at 539 n.1 (Blackmun, J., dissenting). Although a Court employing an agnostic undue burden standard would reach the same result as Justice Blackmun, the rationale of the decision would be based on the likelihood that the preamble would chill the flourishing of positions around the question of the fetus's moral status.

196. Interestingly, one can trace back to *Casey* the Court's concern in *Carhart* with the psychological consequences of abortion, and the possibility that a woman may come to regret her decision to abort. In upholding the constitutionality of Pennsylvania's informed consent requirements, the *Casey* plurality wrote, "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." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992). Indeed, one may trace the Court's concern with the psychological consequences of abortion all the way back to *Roe*, when Justice Blackmun's majority opinion showed concern about the psychological consequences to the woman of *not* being able to procure an abortion. He wrote:

Maternity, or additional offspring, may force upon the woman a distressful life

women "information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion"<sup>197</sup> does not have a singular moral effect. While such information may dissuade some women from terminating their pregnancies, this effect would not be due to the state having compelled the woman to accept its moral view of the fetus; the effect would be due to women being informed of options that they did not know they had—an effect that is completely independent of any moral suasion regarding the fetus. In truth, the informed consent requirements would be more accurate if, in addition to notifying women about the availability of state assistance if they carry their fetuses to term, they also notified women about the diminishment of privacy rights that they could expect if they came to rely upon public assistance, as well as the wholesale problematization of mothers who rely on public assistance within cultural

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and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

*Roe v. Wade*, 410 U.S. 113, 153 (1973). Commenting on this paragraph, one scholar has noted, "While couched in the terms of justifying women's ability to choose whether or not to have children, the psychological rationale expressed here is later employed to justify the opposite end." Ivey, *supra* note 36, at 1478.

Scholars have observed that while *Casey* understood the possibility that women would come to regret an abortion decision that was not fully informed as a reason to provide information to them, *Carhart* understands this same possibility as a reason to take the abortion decision out of their hands completely. See Dresser, *supra* note 63, at 1608–09 ("In *Casey*, the woman's potential regret justified making available to her supplementary information about abortion and her other options, but in *Gonzales*, it justified removing the abortion choice altogether."). Dresser goes on to summarize the jurisprudence concerning the informational obligations of the state as follows:

The Supreme Court has gone from saying that the government may not require, as part of informed consent, information that is designed to discourage the abortion choice, to saying that the government may require such material so that women will make 'mature and informed' decisions and will be protected from later regret, to saying that the government may simply eliminate an abortion choice so that women are protected both from anxiety that adequate information could provoke and from the regret that could come if later they were to learn that information.

*Id.* at 1617; see also Ivey, *supra* note 36, at 1469 ("While *Roe* emphasizes the importance of women's reproductive privacy and health, and *Casey* recognizes [a] women's 'ability to control their reproductive lives,' *Gonzales* . . . suggests . . . women, while they retain the abortion right, must be protected from some of what the right confers upon them.").

197. *Casey*, 505 U.S. at 881.

discourses.<sup>198</sup> Nevertheless, the absence of this important, entirely truthful information does not threaten the constitutionality of the statute as is.

Moreover, mandatory twenty-four- and forty-eight-hour waiting periods do not have the effect of producing meaning regarding the moral status of the fetus. Accordingly, the morally agnostic undue burden standard would not be capable of striking down such a statute *on the grounds that it contracts the space of moral pluralism that ought to surround the abortion right*. However, a Court reviewing such a law need not look to the effects that the law has on a woman's freedom to contemplate her fetus's moral status in order to find a mandatory waiting period constitutionally infirm; rather, the Court need only look to the *actual* effects that such laws have on the women that they impact. That is, while a mandatory twenty-four-hour waiting period might not be a "substantial obstacle" for the nonpoor woman living in Manhattan, it might effectively preclude the availability of a legal abortion for the poor woman living in rural South Dakota,<sup>199</sup> indeed, a mandatory twenty-four-hour waiting period might be an *absolute* obstacle to the poor woman who has only one day off from work, or only enough money to cover the cost of one round-trip bus ticket.<sup>200</sup> Which is to argue: Although the morally agnostic undue burden standard will strike down laws because they impose a moral position on women, it does not preclude the standard from also striking down laws because they have the effect of imposing a "substantial obstacle" on some, although not all, women.<sup>201</sup>

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198. See generally Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J.L. & SOC. POL'Y 62 (2008) (explaining the author of this Article's view).

199. See Metzger, *supra* note 116, at 2038 ("Yet regulations that are not burdensome in Pennsylvania may well be burdensome in other states where there are fewer abortion providers or a more rural and poorer population[,] . . . [t]hus some women may be denied effective exercise of their constitutional right to choose abortion.").

200. Metzger makes an interesting argument that the undue burden standard should utilize the analysis used for content-neutral, traditional forum speech in First Amendment cases, which requires a consideration of how the restriction on speech would affect less wealthy individuals and groups. See *id.* at 2067 ("[I]t appears that the alternative channels inquiry continues to involve a focus on the impact of a regulation on people with few resources."). Metzger argues that if this consideration were reflected in the undue burden standard, it would render unconstitutional regulations that function to increase the cost of abortion, making the procedure economically unavailable to poorer women. *Id.* at 2068 ("The Court would determine whether increased costs are slight or substantial explicitly from this perspective. If the Court found that a regulation would result in a significant increase in the cost of an abortion, the regulation would be struck down for imposing an undue burden.").

201. There may be much gained from an undue burden standard that takes into consideration differing subject positions, thereby enabling it to ask not just if a regulation

### V. *Some Concluding Thoughts*

The Supreme Court, in its recent abortion jurisprudence, is proceeding from the assumption that the fetus is/has a morally significant "life." This conception of the fetus corrupts the undue burden standard and, consequently, overdetermines the questions posed by that standard; moreover, it also overdetermines the answers to those questions. I have proposed replacing the present, morally committed undue burden standard with an agnostic version that assumes the radical and fundamental unknowability of the ontological status of the fetus. This reformulation of the undue burden standard will enable the Court to ask different questions about abortion regulations—questions which do not invite only one set of answers.

A critic may argue that, while it is arbitrary to privilege the position that the fetus is/has a "life" over an agnostic view of the fetus in abortion jurisprudence, it is equally arbitrary to privilege a position of agnosticism over one of fetal "life." Further, faced with arbitrariness without regard to which position one privileges, we make no mistakes by maintaining the status quo. My response is that, while the privileging of either position may be arbitrary, one accords *better* with the stories that we like to tell about this nation. Moreover, the position that is more congruent with our vision of this country is an agnosticism towards fetal life.

That the state has the power within its far-reaching police power to regulate things that touch on the morality of its citizenry, in order to protect the moral welfare of its subjects, is a proposition that is still accepted. However, history teaches that states ought to proceed with caution when attempting to construct or protect the moral soundness of the people; the propriety of moral positions is highly contentious and is subject to the vicissitudes of time and experience. Moreover, those periods in which the state forces its moral judgment upon large segments of the population that do not share its moral commitments tend to be looked back upon, always in retrospect, as unfortunate times in this nation's history. And so, that period in which the state undertook

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imposes an undue burden, but also *to whom* might a regulation impose an undue burden. See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673, 686 (1999) (noting that "[o]utgroup scholars, when confronted with the same event, were more likely to recognize the existence of multiple truths"). This undue burden standard would not unwittingly, yet invariably, reiterate the marginalization of some classes (and, disproportionately, races) of women, as it would take into account the multiplicity of subject positions within society. As such, this undue burden standard would "better suit[] the contemporary 'complexity of human society' than a constitutional jurisprudence based on categorically defined rights, with violations invariably subject to rigorous review." Appleton, *supra* note 99, at 61.

to protect its subjects from the "immorality" of alcohol consumption by compelling temperance is looked at, in retrospect, as unfortunate—a demonstration of moral righteousness that ultimately revealed itself as moral folly.<sup>202</sup> Similarly, those periods in which the state undertook to protect its subjects from the "immorality" of nonmarital sex is looked at, in retrospect, as unfortunate—a demonstration of a fascistic moral zealotry. And I am hopeful that the time will come when that period of time in which the state endeavored to protect its subjects from "homosexuals" and "homosexuality" can be looked at, in retrospect, as unfortunate—a demonstration of moral righteousness that ultimately revealed itself to be, simply put, wrong.<sup>203</sup>

Further, the privileging in constitutional law of moral agnosticism over fetal "life" is consistent with the moral and theological positions regarding fetal "life" held by judges and Justices who may, personally, believe that "life" begins at conception and the fetus and the life it possesses is always already valuable; accordingly, judges and Justices who are themselves convinced of the existence and value of fetal "life" may, nevertheless, utilize the morally agnostic undue burden standard to invalidate regulations that their personal beliefs may lead them to find desirable, if not required. This reconciliation between warring worldviews occurs because the agnostic undue burden standard is an *institutional* requirement that must be employed by the actors occupying the *institutional* role; accordingly, the men and women assuming judicial positions are required to bracket their own personal beliefs when performing the duties pursuant to that role.<sup>204</sup> That is, it is illegitimate for the law and its enactors to take cognizance of certain convictions, beliefs, and/or theories. The belief—indeed, the faith—that the fetus is an always already

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202. In truth, Prohibition was likely justified on the grounds of the state's interest in protecting public morality *as well as* public health. See Goldberg, *supra* note 96, at 1245 ("[T]he Court's older cases frequently sustained alcohol-related restrictions in the interests of the public health *and* morality."); *id.* at 1262 ("[A]s much as those . . . cases dramatize . . . moral threat[s] posed by alcohol, the Court never [relied on] the morality concern . . . alone; rather, risks to the public health and other secondary effects associated with alcohol consumption, such as crime, loomed at least as large as . . . moral decline.").

203. Here, I reference the fact that the right of gay and lesbian persons to marry their partners has continued to be denied on both the federal and state levels. However, *Lawrence's* holding that it is unconstitutional for the state to criminalize the sexual acts of gay and lesbian persons is, undeniably, a welcome step in the direction of ridding the nation of state-enforced morality. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

204. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision[;] [o]ur obligation is to define the liberty of all, not to mandate our own moral code.").

valuable "life" is one of those illegitimate beliefs that has no place in law. Consider on this point Justice Harlan's dissent in *Plessy*,

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>205</sup>

In his dissent, Justice Harlan essentially argues that the White race is superior to the Black race. Judges can be convinced of it; it can be a conviction that no amount of evidence can disprove for them. Indeed, Harlan appears to believe that as long as the White race "remains true to its great heritage and holds fast to the principles of constitutional liberty," it will maintain its superiority over all other races. However, Justice Harlan was also equally convinced that the White race cannot use the law as a means to facilitate its superiority. Analogously, many of those opposed to an abortion right may believe that the fetus has/is a "life." Judges can be convinced of the fact of fetal "life"; it can be a conviction that the image of the fetus serves to simply reiterate as truth for them. Indeed, Justice Kennedy appears to believe the simple, elegant fact of fetal "life"; it is such a truism that he can state, without citations, that the Partial Birth Abortion Ban Act of 2003 proscribes a particular manner of ending fetal life—with no indications that some believe "life" to be an overdetermined, yet vapid word that describes too much, yet not enough, whenever it is evoked. Surely, Kennedy is not the only Justice who presently sits on the Supreme Court who subscribes to the theory of fetal "life." But, as institutional actors, it is illegitimate for them to take cognizance of this theory when they are performing their institutional role. That is, if the "White race" could not use the law as a means to facilitating the end of White supremacy, believers in fetal "life," similarly, cannot use the law as a means to facilitating the end of reiterating their particular theory of fetal moral ontology.

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205. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). There is, of course, much more to say about *Carhart*, race, and racial justice. I will, indeed, say much more in future scholarship.