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Keynote Address: Untying the Moral Knot of Abortion

Caitlin E. Borgmann*

Abortion is commonly identified as one of the most compelling moral issues of our time.¹ Politicians and the media describe the debate in dramatic terms, often referring to it as a “war.”² These theatrical descriptions have done a disservice to our public conversation about abortion, in that they have functioned as a “conversation stopper.”³ We assume that there are two sides, that these two sides are far apart, and that they are irrevocably entrenched. We are also led to believe that the key moral question in the debate is the value of the embryo or fetus.⁴ I argue that these perceptions are false. If we look beyond the

* Professor of Law, CUNY School of Law. These remarks were presented as a keynote address at the Symposium, *Roe at 40—The Controversy Continues*, held at Washington and Lee School of Law on November 8, 2014. The author thanks Carol Sanger for helpful conversations, and participants in a faculty forum at CUNY School of Law for comments on an earlier version of this address. The author is grateful to Dean Sam Calhoun and members of the Washington and Lee Law Review for inviting her to present this address.

1. See, e.g., *The Abortion War*, ALJAZEERA (Aug. 29, 2012, 2:41 PM), <http://www.aljazeera.com/programmes/faultlines/2012/08/20128288841399701.html> (last visited Mar. 5, 2014) (“Since it was legalised in 1973, the issue of abortion has polarised the US . . . Why is a medical procedure being reframed as a deeply divisive moral issue in the US?”).

2. *Id.*; Robin Marty, *The Next Battle in the Abortion Wars*, POLITICO (Jan. 14, 2014), <http://www.politico.com/magazine/story/2014/02/south-dakota-abortion-wars-103596.html#Ux1aIdyZbZc> (last visited Mar. 10, 2014) (on file with the Washington and Lee Law Review).

3. Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 553 (2009) [hereinafter Borgmann, *The Meaning*].

4. See, e.g., Bonnie Steinbock, *Abortion, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 1–4* (Mary Crowley ed. 2008) (“The central ethical question in the abortion debate is over the moral status of the embryo and fetus.”), available at <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2400>.

hyperbole, we see that most people do not view the issue in such stark terms. The public holds complex and sometimes contradictory views about the morality of abortion. For most of the public, abortion seems to present a muddle of potential moral questions, and the most pressing among them apparently have relatively little to do with the moral status of the embryo or fetus, and much to do with judgments about women's appropriate behavior and their proper role in society.⁵

These subtleties do not make for exciting news headlines. But they are critical for us to understand. We cannot know whether a given abortion restriction makes sense if we do not know what societal problem or moral evil it aims to ameliorate. Today, I want to begin to untangle the moral knot of abortion so that we can try to have an honest conversation about what is really at stake. In the end, I will argue, the moral aspect of abortion that we should see codified in law is a woman's dignity and autonomy in making her own decision about the fate of her pregnancy and, thereby, her life. I conclude that this concept of autonomy is far better protected by the *Roe v. Wade*⁶ decision than by the undue burden standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁷

In the summer of 2013, Texas passed a controversial new set of abortion restrictions, some of which have been challenged in federal court.⁸ The federal district judge's opinion in the case described the abortion debate in the dramatic terms we typically find in the media and in political discourse. Judge Yeakel wrote:

Today there is no issue that divides the people of this country more than abortion. It is the most divisive issue to face this country since slavery. When compared with the intensity, emotion, and depth of feeling expressed with regard to abortion, the recent arguments on affordable healthcare,

5. E.g., David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1886 (1995); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 356 (1992).

6. 410 U.S. 113 (1973).

7. 505 U.S. 833, 874 (1992).

8. See generally *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-CV-862-LY, 2013 WL 5781583 (W.D. Tex. Oct. 28, 2013), *rev'd in part* No. 13-51008, 2014 WL 1257965 (5th Cir. Mar. 27, 2014).

increasing the debt ceiling, and closing the government retreat to near oblivion.⁹

This statement should give us pause. Is the country really this exercised over abortion? Is the issue more divisive than segregation? Than the internment of Japanese-Americans? Than red baiting? Than the Vietnam War? When Texas Governor Rick Perry convened a special legislative session to consider the omnibus abortion legislation,¹⁰ a poll showed that eighty percent of Texas voters did not want abortion to be raised during the special session, sixty-three percent said the state has enough restrictions on abortion, and seventy-one percent thought that the Governor and the legislature should be more focused on the economy and jobs.¹¹ Judge Yeakel's description is clearly hyperbole, yet this kind of hyperbole about abortion is so common that we often take it for granted.

It is also irresponsible and unhelpful. For decades, the media and politicians have grown accustomed to describing the abortion debate as a heated battle that divides the country.¹² And while this black-and-white portrayal does not depict reality, the public seems drawn to its simplicity. The abortion debate has fallen prey to the more general phenomenon of news as entertainment.¹³ We

9. *Id.* at *1.

10. See Josh Rubin, *After Divisive Debate, Texas Senate Approves Restrictive Abortion Measure*, CNN, <http://www.cnn.com/2013/07/13/politics/texas-abortion-measure/> (last updated July 23, 2013) (last visited Jan. 8, 2014) (explaining that the Texas governor called a "second special session" of the state legislature to consider the abortion bill) (on file with the Washington and Lee Law Review).

11. *Texas Voters Oppose Governor Perry's Omnibus Abortion Bill*, GREENBERG QUINLAN ROSNER RES. (June 20, 2013), <http://gqrr.com/articles/2013/06/20/texas-voters-oppose-governor-perry-s-omnibus-abortion-bill/> (last visited Jan. 8, 2014) [hereinafter *Texas Voters*] (on file with the Washington and Lee Law Review).

12. See, e.g., Julie Rovner, *State Battles Over Abortion and Family Planning Heating Up*, NPR.ORG (May 27, 2011, 1:59 PM), <http://www.npr.org/blogs/health/2011/05/27/136717917/state-battles-over-abortion-and-family-planning-heat-up> (last visited Jan. 8, 2014) ("The national debate on abortion continues on a high boil in several states.") (on file with the Washington and Lee Law Review).

13. See, e.g., MORRIS P. FIORINA, *CULTURE WAR?* ix (2005); Jack M. Balkin, *How Mass Media Simulate Political Transparency* 3 (Yale Law Sch. Legal Scholarship Repository, Paper No. 259, 1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1258&context=fs>

are more captivated by what Jack Balkin calls the “sporting elements of political conflict”¹⁴—the battles, the winners and losers, the polarization—than by the substantive aspects of public policy.¹⁵ Indeed, viewing the abortion battle as hopelessly intractable relieves us from having to grapple with the more difficult questions of what the public actually believes and what that means for abortion policy.

Before turning to a closer examination of the public’s actual views on abortion, we might ask why it is that we do not typically have this conversation. The problem is, in part, that the public debate is dominated by politicians and advocates, none of whom seem particularly interested in focusing on the messy middle of public opinion.¹⁶

Pro-life activists have no interest in highlighting the gulf between their own extreme views and the views of the public. They prefer to gloss over these differences with the vague but appealing term “life.” I have referred to the term “life” as a Rorschach inkblot—its meaning is in the eye of the beholder.¹⁷ “Life” looks at the issue with a soft focus lens, obscuring the clear moral lines that might offend or alienate the public. The term appeals to people because we are never forced to pin down what it means: Does it mean the embryo is just like a person, and therefore that abortion is murder? Or does it merely mean that the embryo is biologically alive? Does it mean the embryo has the potential to become a person who has a meaningful life, with the kinds of emotional attachments and commitments we associate with our own lives? The soft-focus lens of the term “life” allows the pro-life movement to avoid staking out a specific moral position. This rhetoric does not clarify the moral aspect of abortion at all—indeed, that is its very point.

Abortion rights advocates, on the other hand, often think that it’s possible to “bracket” the moral question of abortion, as

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14. Balkin, *supra* note 13, at 3.

15. *See id.*

16. *See* FIORINA, *supra* note 13, at ix.

17. *See* Caitlin E. Borgmann, *Roe v. Wade’s 40th Anniversary: A Moment of Truth for the Anti-Abortion Rights Movement*, 24 STAN. L. & POL’Y REV. 245, 246–47 (2013) [hereinafter Borgmann, *Roe v. Wade’s 40th*].

Thomas Nagel has put it.¹⁸ They prefer not to have a conversation about the moral status of the embryo because they want people to be able to make up their own minds about it.¹⁹ As a result, they do not challenge the meaning or consistency of a person's statement that "life begins at conception." Rather, they tend to simply say, it's fine for you to believe that, but don't impose it on other people.

Unfortunately, the public is not too interested in having its own views examined in detail either. The black-and-white depiction of abortion as a fierce battle is a much simpler and more fascinating story. And the images the media feeds us seem to support its validity. The news coverage features impassioned politicians and advocates who state their positions in stark, easy-to-grasp terms. We see images of fervent protestors with signs, and we watch fury against abortion translate to violence when abortion providers are murdered.

In fact, though, most Americans do not align themselves with either side in this abortion "war."²⁰ Decades of polling show that the black-and-white depiction of the abortion debate is not accurate. In 2012, the American Enterprise Institute published a public opinion study that summarized polling data on abortion from 1975 to 2011.²¹ The study concluded that "[o]pinion on abortion has been very stable. . . . [I]t is also deeply ambivalent."²² While substantial numbers agree with the statement, "abortion is murder," there is broad support for the idea that abortion should be the woman's decision.²³ The researchers found that the majority of Americans do not want *Roe v. Wade* to be overturned, but they favor restrictions on

18. Thomas Nagel, *Progressive but Not Liberal*, N.Y. REV. BOOKS (May 25, 2006), <http://www.nybooks.com/articles/archives/2006/may/25/progressive-but-not-liberal/?page=1> (last visited Jan. 13, 2014) (on file with the Washington and Lee Law Review).

19. See Borgmann, *The Meaning*, *supra* note 3, at 555.

20. See FIORINA, *supra* note 13, at 34, 52–54 (arguing that the common claim of American polarization over the issue of abortion is false).

21. KARLYN BOWMAN & ANDREW RUGG, AM. ENTER. INST., ATTITUDES ABOUT ABORTION 2 (2012), http://www.aei.org/files/2012/01/20/-attitudes-about-abortion-39-years-of-polling_131350993384.pdf (compiling and summarizing polling results on abortion since *Roe v. Wade*).

22. *Id.*

23. *Id.* at 3–6.

abortion, including notification of spouses, parental consent, twenty-four-hour waiting periods, and bans on publicly funded abortions.²⁴

We need to look more closely at what seems to motivate the public's views on abortion, including the restrictions it appears to support. Good public policy demands a clear understanding of the problem it is supposed to address. Once we understand what problem the public wants fixed, we can assess questions like whether that justification can validly support a law restricting women's autonomy, whether it is based on a sound factual foundation, and whether the proposed restriction actually furthers its objective.

Polls consistently show that Americans do not want to ban abortion, although they do support many restrictions on it.²⁵ It is not just polling data that demonstrate the public's unwillingness to ban abortion. Even states like Mississippi and South Dakota, which have led the nation in passing onerous and creative new abortion restrictions, have not been able to get voters to approve embryonic personhood measures or abortion bans through ballot initiatives.²⁶ It is perhaps even an open question whether the public would, if asked to vote directly, support many of the less extreme restrictions we are seeing passed today. The Texas omnibus bill was highly unpopular, according to polls.²⁷ Similarly, so-called "partial-birth abortion" bans were perceived to have broad public support.²⁸ But on the few occasions when the

24. *Id.* at 17–18, 20–21.

25. *Id.* at 2.

26. See *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEDIA, [http://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_\(2011\)](http://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_(2011)) (last visited Jan. 12, 2014) (reporting that a majority of Mississippi residents voted against a ballot measure defining life as beginning at conception) (on file with the Washington and Lee Law Review); *South Dakota Abortion Ban, Initiated Measure 11 (2008)*, BALLOTPEDIA, [http://ballotpedia.org/South_Dakota_Abortion_Ban,_Initiated_Measure_11_\(2008\)](http://ballotpedia.org/South_Dakota_Abortion_Ban,_Initiated_Measure_11_(2008)) (last visited Jan. 12, 2014) (reporting that a majority of South Dakota citizens voted against a ban on abortion that contained only a few exceptions) (on file with the Washington and Lee Law Review).

27. See *Texas Voters*, *supra* note 11 (reporting that a majority of Texas voters believed the state already had enough restrictions on abortion and that the state government's efforts should be devoted to other problems).

28. BOWMAN & RUGG, *supra* note 21, at 19.

public was invited to weigh in directly on the issue via ballot initiatives, voters rejected the bans.²⁹ Nevertheless, polls do show that the public supports, at least in theory, restrictions like parental involvement laws, waiting periods, and funding bans.³⁰ What might account for this?

The public's opposition to abortion bans, coupled with its support for lesser restrictions, shows that the public does not view an embryo or fetus as a person, or abortion as murder. Polling results confirm this, especially as to the early stages of pregnancy. For example, most Americans are morally unconcerned with the destruction of embryos in contexts other than abortion. Large majorities of the public in a recent Pew Research Center poll thought that non-abortion procedures that involve the destruction of embryos, including embryonic stem cell research and in vitro fertilization, are either morally acceptable or are not a moral issue at all.³¹ And even as to later stages of

29. See, e.g., *Colorado Partial-Birth Abortion Act (1998)*, BALLOTPEDIA, [http://ballotpedia.org/Colorado_Partial-Birth_Abortion_Act_\(1998\)](http://ballotpedia.org/Colorado_Partial-Birth_Abortion_Act_(1998)) (last visited Jan. 8, 2014) (reporting that a majority of Colorado citizens voted against a "partial-birth abortion" ban) (on file with the Washington and Lee Law Review); *Maine Partial-Birth Abortion Initiative, Question 1 (1999)*, BALLOTPEDIA, http://ballotpedia.org/Maine_Partial-Birth_Abortion_Initiative,_Question_1_ (1999) (last visited Jan. 8, 2014) (reporting that a majority of Maine citizens voted against a "partial-birth abortion" ban) (on file with the Washington and Lee Law Review).

30. BOWMAN & RUGG, *supra* note 21, at 17–18, 20–21.

31. See *Abortion Viewed in Moral Terms: Fewer See Stem Cell Research and IVF as Moral Issues*, PEW RES. CENTER (Aug. 15, 2013), <http://www.pewforum.org/2013/08/15/abortion-viewed-in-moral-terms/> (last visited Jan. 8, 2014) [hereinafter *Abortion Viewed in Moral Terms*] (showing that only 22% of the United States adult population believes embryonic stem cell research is morally wrong and only 12% believes in-vitro fertilization is morally wrong, the rest believing these procedures are morally acceptable or not a moral issue at all) (on file with the Washington and Lee Law Review). In vitro fertilization (IVF) in the United States nearly always entails creating extra human embryos (that is, inseminating more eggs than will be transferred in a given cycle). See Andrea D. Gurmankin et al., *Embryo Disposal Practices in IVF Clinics in the United States*, 22 POL. & LIFE SCI. 4, 6 (2004), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1006&context=bioethics_papers (explaining that 97% of the IVF clinics studied create extra embryos). While practices at IVF clinics vary, the vast majority of clinics that create excess embryos dispose of at least some of these. See *id.* (explaining that 94% of clinics studied practiced some form of embryo disposal).

pregnancy, the public supports abortion in circumstances that would appear incompatible with viewing a fetus as a person.³²

What then could be driving the public's support of abortion restrictions? One could say that the public believes that embryos and fetuses have value, just not as much value as a person. This would mean that the state's power to protect them might be outweighed in certain circumstances. Certainly this could explain why the public would tolerate or support some restrictions. But the *embryo's* moral value does not change depending on the *woman's* reasons for obtaining an abortion. Therefore, we still must account for how the public distinguishes among those considerations that outweigh the embryo or fetus's right to exist and those that do not. This is especially so when it comes to restrictions on early abortions since the public apparently places relatively low value on embryonic life, as evidenced by its lack of concern for the destruction of embryos in other contexts.

Virtually all of the common restrictions states have imposed on abortion since *Roe* are the product of a pro-life movement strategy to dismantle the right to abortion one incremental step at a time.³³ A major goal of the incrementalist strategy has been to create public disfavor for abortion by making it disfavored in the law. Thus, movement leaders have supported measures like requiring parental involvement in minors' abortion decisions or making women wait twenty-four hours before getting an abortion.³⁴ Incremental restrictions are designed to insidiously chip away at the constitutional right to abortion. They are usually promoted under some other justification than stopping abortions, such as protecting women's health.³⁵ There are two possible reasons why the general public may support such

32. See, e.g., *Abortion Poll Finds Support for 20-Week Ban*, HUFFINGTON POST (July 11, 2013, 7:25 AM), http://www.huffingtonpost.com/2013/07/11/abortion-poll_n_3575551.html (last visited Jan. 8, 2014) (on file with the Washington and Lee Law Review).

33. See Borgmann, *Roe v. Wade's 40th*, *supra* note 17, at 245–47 (discussing this strategy); Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, Bopp, Coleson & Bostrom, to Whom It May Concern (Aug. 7, 2007) (on file with the author) (same).

34. Borgmann, *Roe v. Wade's 40th*, *supra* note 17, at 245; see also Memorandum from Bopp & Coleson, *supra* note 33 (justifying support for these measures).

35. See *infra* notes 40–41 and accompanying text (discussing TRAP laws).

incremental restrictions. One is that people may be misled into thinking that the stated justifications are sincere and are grounded in fact. The other is that their support is influenced by the black-and-white rhetoric that abortion is wrong. Let us consider each in turn.

Most incremental restrictions are premised on some implicit or explicit factual assumption about abortion, women, or abortion providers. For example, parental notice requirements imply that most teens do not voluntarily talk to their parents about abortion, and that a law will make them more likely to do it. In fact, both of these assumptions are false.³⁶ Similarly, so-called “informed consent” requirements are often justified on the grounds that abortion is physically dangerous because, for example, it causes breast cancer or increases a woman’s risk of suicide.³⁷ Neither of these assertions is backed up by science.³⁸ Moreover, abortion is one of the safest medical procedures, with 0.3% of patients in the United States experiencing a major complication.³⁹ Targeted

36. See UCSF BIXBY CTR. FOR GLOBAL REPROD. HEALTH, ADOLESCENTS AND PARENTAL NOTIFICATION FOR ABORTION 2 (2008), http://bixbycenter.ucsf.edu/publications/files/ParentalNotification_2008Sep.pdf (summarizing studies and explaining that 61% of girls in states without parental involvement laws involve at least one parent in their abortion decisions, and that “[t]here is no evidence that a government mandate will positively increase the frequency or quality of communication” between parents and daughters).

37. See, e.g., Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL’Y REV. 6, 11 (2007), <http://www.guttmacher.org/pubs/gpr/10/4/gpr100406.pdf> (noting that six states refer to a possible higher breast cancer risk and four states indicate the risk of “experience[ing] suicidal thoughts” or “suffer[ing] from ‘postabortion traumatic stress syndrome’” in materials given to those considering an abortion as part of “informed consent” requirements).

38. See, e.g., *Summary Report: Early Reproductive Events and Breast Cancer Workshop*, NAT’L CANCER INST., (Mar. 4, 2003), <http://www.cancer.gov/cancer-topics/causes/ere/workshop-report> (last updated Jan. 12, 2010) (last visited Jan. 8, 2014) (evaluating evidence on reproductive events and breast cancer, and concluding that “[i]nduced abortion is not associated with an increase in breast cancer risk”) (on file with the Washington and Lee Law Review); Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1179–87 (2014) (discussing scientific evidence showing that abortion does not cause mental health problems).

39. Susan A. Cohen, *New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate*, 10 GUTTMACHER POL’Y REV. 2, 4 (2007).

regulation of abortion providers and facilities, also known as TRAP laws, are based on the false assertion that abortion is poorly regulated and performed in an unsafe manner.⁴⁰ An example of such a law is the Texas requirement that abortion providers have admitting privileges at a nearby hospital.⁴¹ This restriction wrongly implies that abortion patients will often end up in emergency rooms and that most other providers of outpatient procedures have such admitting privileges.⁴² TRAP laws ignore that abortion is not only exceptionally safe but is one of the most heavily regulated of medical procedures.⁴³ If the public accepts the false factual assertions made in support of these restrictions, they may support them because they believe they are really protecting women.

Another possible explanation for the public's support of incremental restrictions has more to do with the vague pro-life rhetoric denouncing abortion. This rhetoric fuels imprecise, poorly thought-out moral impressions: Abortion is bad. We are not sure exactly why, but we know that it's morally questionable in some way. Therefore, women who get abortions must also be bad. Likewise, abortion providers must be shady and out to make money by preying on women. Many of the incremental restrictions feed into this generalized disapproval of abortion. TRAP laws are needed to rein in the crooked abortion providers. Waiting periods are needed because pregnant women are irresponsible and need to be forced to reflect on the gravity of their behavior.

In fact, much opposition to abortion seems rooted in a belief that abortion encourages or excuses women's sexual

40. See Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, 16 GUTTMACHER POL'Y REV. 7, 7, 11–12 (2013) (explaining that TRAP laws often use concern for public health to conceal an actual purpose of making abortions less accessible to the public).

41. H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013).

42. See *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 797–99 (7th Cir. 2013) (questioning the medical justification for Wisconsin's admitting privileges requirement).

43. See Gold & Nash, *supra* note 40, at 7–8 (explaining that abortion in the United States has consistently been an extremely safe medical procedure and that it has been highly regulated by the states).

irresponsibility. Abortion is an easy way out for licentious or rash behavior. People may also find unsettling or off-putting the idea that a pregnant woman would reject motherhood.⁴⁴ Enduring the burdens of pregnancy, childbirth, and parenting is how women can make amends for poor choices about sex. Incremental restrictions fit this pattern. Many of these restrictions seem intended to make abortion less “easy” or appealing for women by imposing burdens that we do not impose when a woman chooses childbirth.⁴⁵ Spousal or parental notice requirements suggest that women are not capable of making a responsible decision on their own, and that they cannot be trusted to consult family members voluntarily. Funding bans ensure that poor women bear the financial consequences of their irresponsible behavior. Pre-abortion ultrasound mandates amount to a kind of shaming process in which women’s own bodies are used to show them the visual evidence of their guilt.⁴⁶

The theme of women’s irresponsibility also explains the popularity of certain exceptions to abortion bans. Polling shows that the public is most sympathetic to abortion in cases of serious endangerment of the woman’s health, grave fetal anomalies, and rape or incest.⁴⁷ What all of these have in common are circumstances beyond the woman’s control.⁴⁸ Health crises and fetal anomalies offer reasons for the abortion besides an easy way out from the burdens of motherhood. They suggest that the woman would embrace her pregnancy if only she could. They also

44. See Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 414 (2013) (arguing that a “principal driver of abortion disgust” is “the idea that women would renounce motherhood given the opportunity to embrace it”).

45. See Borgmann, *Roe v. Wade’s 40th*, supra note 17, at 259–60.

46. See Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. (forthcoming 2014) (“Sonogram requirements threaten a woman’s sense of autonomy over her bodily decision-making by giving no weight to her right to refuse. The woman has done (or is about to do something) bad, and so she forfeits her right to the inviolability of her body.”).

47. See BOWMAN & RUGG, supra note 21, at 12 (illustrating that, generally, a majority of the population believes abortion should be legal under certain circumstances such as when the pregnancy is the result of rape).

48. See *id.* (noting that a majority of the population would allow abortion in three situations completely out of the mother’s control).

show that, while we expect women to bear the burdens of pregnancy, childbirth, and perhaps parenting, there are some burdens we think are too much. Cases of rape and incest demonstrate most vividly the theme of irresponsibility or culpability. Women who become pregnant as a result of voluntary sex are guilty. They caused their own predicament. Women who were raped are innocent. To make them bear the burdens of pregnancy and childbirth would be unfair.

These inferences, of course, are just that. It is hard to know exactly how the public feels about abortion restrictions because the people pushing for these restrictions are not the general public. The point of the incrementalist strategy is to increase opposition to abortion no matter the reasons.⁴⁹ This is where we see the vague rhetoric against abortion weakening our public debate. We see public policy being formed based on simplistic declarations unmoored from the inevitably more nuanced facts.⁵⁰ Normally, we should diagnose what social problem we are trying to fix before we decide how to fix it. Instead, abortion restrictions are enacted based on disingenuous sound bites and factual falsehoods that activists advance and the media dutifully repeats. The congressional legislation to ban abortions at twenty weeks of pregnancy—passed by the House in June 2013 and introduced by Senator Lindsey Graham in November 2013—is a perfect illustration of this.⁵¹ The ban is based on the scientifically dubious claim that fetuses can feel pain at twenty weeks.⁵²

49. Memorandum from Bopp & Coleson, *supra* note 33, at 5 (advising that “[t]he pro-life movement must at present avoid fighting on the more difficult terrain of its own position, namely arguing that abortion should not be available in cases of rape, incest, fetal deformity, and harm to the mother,” but acknowledging moral inconsistency exceptions for these cases).

50. See MORRIS FIORINA, DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS 73 (2009) (“Facts give way to ideology. Facts consistent with one’s position are emphasized, and those that are inconsistent are ignored or denied altogether. And if inaccurate or distorted information makes ordinary people believe such claims of no common ground, the potential for positive political action declines.”).

51. See Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) (prohibiting performance of abortion in most circumstances if the probable age of the fetus is twenty weeks or older); Pain-Capable Unborn Child Protection Act, S. 1670, 113th Cong. (2013) (same).

52. See, e.g., Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS’N 947, 947 (2005) (concluding that

Senator Graham intimated that, by this stage of pregnancy, “you become you.”⁵³ At the same time, both the House and Senate versions contain exceptions for rape and incest, exceptions wholly inconsistent with the entire premise of the bans.⁵⁴

This is no way to do public policy. Obviously, we ought not to be passing laws based on false factual premises. And the judgments about women that I have just described are equally troubling as bases for legislation. Why are these moral judgments about women not permissible foundations for law? First, the law must be based on reason. We ought to demand consistency in our laws. We cannot say that here an embryo has value and here it does not. Second, to try to codify moral judgments this nuanced is a hopeless task.⁵⁵ The law is a blunt instrument, and we will often find that it produces unfair results. For example, who are we to presume that women having an abortion are rejecting motherhood, when the majority already are mothers, and when many are doing it precisely to protect existing children, or to be able to have children when they are financially able?⁵⁶ And finally, whatever moral opinions we have about whether women are making a good decision are overridden by a far more important moral imperative: honoring the dignity and autonomy of women.

Women choosing abortion are indeed making a moral decision. They are making a decision that reflects significant, conscientious deliberation over how best to govern their lives. Far

“fetal perception of pain is unlikely before the third trimester”).

53. Mario Trujillo, *Graham Readies 20-Week Abortion Ban*, THE HILL (Nov. 23, 2013, 10:20 AM), <http://thehill.com/blogs/healthwatch/abortion/189067-graham-proud-to-lead-20-week-abortion-fight-in-senate> (last visited Jan. 8, 2014) (“I am proud to lead this charge. This is a debate worthy of a great democracy. When do you become you: at twenty weeks of a pregnancy? What is the proper role of the government in protecting that child?” (quotations omitted)) (on file with the Washington and Lee Law Review).

54. See Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) (providing that the twenty-week ban will not apply if “the pregnancy is the result of rape, or the result of incest against a minor”); Pain-Capable Unborn Child Protection Act, S. 1670, 113th Cong. (2013) (same).

55. See Borgmann, *The Meaning*, *supra* note 3, at 603–07.

56. See GUTTMACHER INSTITUTE, FACTS ON INDUCED ABORTION IN THE UNITED STATES (2013), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (“About sixty-one percent of abortions are obtained by women who have one or more children.”).

from being irresponsible, women choosing abortion are doing so because they believe it is the *most* responsible decision they can make. However we may feel about the fact that a woman is unintentionally pregnant—and let us not forget that a man helped cause that predicament—we ought to applaud her for making the most prudent decision she can in light of that circumstance. At the very least, we should respect her right to make that decision. We allow people to make important moral decisions in other contexts, even if we don't agree. For example, we allow people to decide to have another child when they already have many, and when the new child might stretch the family's resources and ability to provide for their existing children. We might have a moral opinion about this, but we do not think it should be made illegal.

Let us consider where *Roe v. Wade* comes down on the issue of women's autonomy. Criticism of *Roe* has become commonplace even among some liberal legal scholars.⁵⁷ My purpose here is not to defend *Roe*'s reasoning or its stated rationales. Rather, I would like to examine the *frameworks* of *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and the extent to which they advance or inhibit women's autonomy and dignity.

The *Roe* opinion may lionize doctors, but *Roe*'s framework protected women's autonomy by leaving to them the decision whether to continue a pregnancy, up until the point of fetal viability. Fetal viability marked the earliest moment when the state could impose *its* moral view of abortion on the woman.⁵⁸ Before this, a state could regulate abortion only to protect women's health, and the strict scrutiny standard ensured that

57. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (agreeing with the principles behind *Roe* and indicating they would be valid if enacted by legislation, but offering several critiques of the *Roe* opinion); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash* (Yale Law Sch., Pub. Law Working Paper No. 131, 2007), available at <http://ssrn.com/abstract=990968> (discussing legal scholars who have credited *Roe* with provoking a popular backlash against abortion rights).

58. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

disingenuous claims to protect women's health would be ferreted out.⁵⁹

Now, the governing framework is the undue burden standard established by *Casey*,⁶⁰ as further interpreted by *Gonzales v. Carhart*.⁶¹ These decisions have weakened protection for women's autonomy in two ways. First, they have expanded the permissible reasons a state may regulate abortion before viability to include moral opposition to abortion.⁶² In addition, the scrutiny applied to such regulation has been weakened from strict scrutiny to the undue burden standard.⁶³ The Court in *Gonzales v. Carhart* paid extraordinary deference to congressional fact-finding, applying the undue burden standard in a manner that allows states and pro-life advocates to promote and defend abortion restrictions based on disingenuous reasons and misrepresentations of the facts.⁶⁴ *Casey* and *Carhart* have thus helped to impoverish our public debate about abortion. These decisions have encouraged superficial, unthoughtful treatment of the abortion issue.

Abortion is cheap ethics. It allows us to point our finger from the comfort of our chairs, without putting a lot of thought into the issue and without making sacrifices. It is much less satisfying to see abortion as a nuanced, complex moral decision not well suited to bright legal line-drawing. It is harder to acknowledge that the problems affecting women that truly cry out for our attention are daunting issues like poverty, job discrimination, racism, homophobia, rape, and domestic violence. But it has been forty years since *Roe v. Wade* was decided. This country is not at war

59. *Id.*; see also, e.g., *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 75–79 (1976) (striking down ban on saline amniocentesis method of abortion, which the legislature claimed was necessary to protect women's health).

60. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

61. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

62. See *id.* at 156–60 (providing the congressional justifications for the Partial-Birth Abortion Ban Act); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 680–82, 689–95 (2004) [hereinafter Borgmann, *Winter Count*] (discussing *Casey's* expansion of permissible justifications for pre-viability abortion restrictions).

63. See Borgmann, *Winter Count*, *supra* note 62, at 680–89 (discussing the significance of the undue burden standard).

64. See generally Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Appeals to Science in the Abortion Controversy*, 17 *J.L. & POL'Y* 15 (2008).

over that decision. This country is ready to move on, to attend to the unfinished task of ensuring that all women are treated as full, equal, and respected members of our society. Let us turn our attention to that charge.