

Gonzales v. Carhart: Abortion Law that Looks Like Family Law

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ABSTRACT

The U.S. Supreme Court's most recent abortion opinion, *Gonzales v. Carhart*, upheld a ban on the "partial-birth" abortion procedure. Incorporated into the language and reasoning of the Court's opinion were two presumptions about parent-child relationships found commonly in "family law" but not in "abortion law." The first is the presumption that it is good to preserve the natural bonds between parents and their biological children. The second is that children are relatively vulnerable as compared with adults and merit protection from the State when warranted. The author contrasts the themes and language in pre-*Gonzales* abortion law with the family law of parent-child relations. She then describes the *Gonzales* Court's move to adopt family law presumptions, and suggests reasons for the Court's move. Finally, she discusses possible additional changes in federal and state abortion laws and policies that the *Gonzales* decision could facilitate.

I. INTRODUCTION

Among the first aspects of the Supreme Court's most recent abortion case to attract commentary¹ was the majority opinion's assertion of a "bond" between a woman and her unborn "child."² The claimed existence of this

¹ See, e.g., Linda Greenhouse, "In Reversal of Course, Justices, 5-4, Back Ban on Abortion Method," *The New York Times* (April 19, 2007), p. A1; Robert Barnes, "Justice Kennedy: The Highly Influential Man in the Middle; Court's 5-4 Decisions Underscore His Power," *The Washington Post* (May 13, 2007), p. A1.

² *Gonzalez v. Carhart*, 127 S.Ct. 1619, 1634 (2007): "Respect for life finds an ultimate expression in the bond of love a mother has for her child."

bond by the majority in *Gonzales v. Carhart*³ was a precursor to the Court's allowing the state to ban the performance of an abortion procedure in which "the doctor extracts the fetus in a way conducive to pulling out its entire body,"⁴ save the head, before "collapsing" or "crush[ing]" its skull⁵ to "kill" the fetus.⁶ The law at issue called the banned procedure "partial-birth abortion"⁷ (because the fetus is mostly delivered of the woman at the time its existence is ended), but the Court used the term "intact dilation and extraction" ("intact D & E"), one of several terms employed by the medical community to identify what the statute bans.⁸ The *Gonzales* opinion was further noted for its meticulous descriptions of intact D & E and other abortion procedures, descriptions employing language about fetal life emphasizing its humanity and vulnerability.

Gonzales's concepts and language merit the attention they received. Their like have not been seen in previous Supreme Court abortion opinions. In fact, pre-*Gonzales*, the Court's abortion opinions are distinctly uncomfortable with language explicitly including fetal life within the category of human life. The opinions are not consistent with each other in their language about fetuses, nor are they internally consistent.⁹ Rather than seeing a bond between the woman and her fetus, they see confrontation; with the state taking the fetus's side by restricting or even regulating abortion.¹⁰ Even in its two abortion opinions most explicitly asserting the importance of gestating human life—*Webster v. Reproductive Health Services*¹¹ and *Planned Parenthood of Southeastern*

³ *Gonzales*, 127 S.Ct. at 1610.

⁴ *Ibid.* at 1622.

⁵ *Ibid.* at 1623.

⁶ *Ibid.*

⁷ The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. §153 (2000 ed., Supp. IV).

⁸ *Gonzales*, 127 S.Ct. at 1621.

⁹ See *infra* Section II.

¹⁰ *Ibid.*

¹¹ 492 U.S. 490 (1989).

*Pennsylvania v. Casey*¹²—the Supreme Court did not perform the full bow toward fetal humanity executed in *Gonzales*. In *Webster*, for example, the Court spoke merely about the state’s interest in “protecting the potentiality of human life”¹³ and allowed states to decline to fund and provide abortion services, and to mandate viability testing for fetuses at twenty weeks or more gestation. In *Casey*, the Court referred to the “potential life” within the woman¹⁴ and upheld laws requiring informed consent, a 24-hour waiting period, parental consent, and reporting requirements. The *Gonzales* Court, on the other hand, not only spoke of the fetus in terms usually reserved for born life¹⁵ but also allowed the state to ban entirely a particular abortion procedure in the name of assisting women, the medical profession, and “respect for life”¹⁶ generally.

Another way of characterizing how *Gonzales* differs from prior abortion cases is to say that the *Gonzales* Court appeared to adopt presumptions about parents and *unborn* children widely used within the family law applicable to relationships between parents and their *born* children. These include, first, the presumption that there exists a strong bond between a parent and his or her biological offspring, such that the bond should be preserved whenever possible. Second, family law presumes that children are naturally vulnerable, that their parents have the primary right to protect them, but that the state will step in either to review or supplant parental decisions whenever children’s welfare is seriously compromised or attacked. *Gonzales* appears to rely on these presumptions for the same reason that myriad family laws do: in deference to their claimed self-evident nature and in response to the assertions of the involved adults. *Gonzales*, in other words, is abortion law that looks and feels more like family law. It is a distinct break from the Supreme Court’s prior abortion jurisprudence.

The Court’s behavior, however, raises the question of the wisdom of

¹² 505 U.S. 833 (1992).

¹³ *Webster*, 492 U.S. at 516.

¹⁴ *Casey*, 505 U.S. at 871.

¹⁵ *Gonzales*, 127 S.Ct at 1634 (“infant life”).

¹⁶ *Ibid*.

bringing abortion law more into conformity with extant family law. A preliminary objection to this course of action is obvious: on its face the parent-child relationship between a mother and her born child is different from the relationship that a woman has with a still-gestating fetus. There is a reason, in other words, why many states allow women to surrender their children for adoption only after their birth, not before,¹⁷ for after birth the tie has a somewhat different quality. There is a reason why there often appears to be a more profound sense of loss when a young child dies than when a miscarriage occurs. Yet, this objection is not sufficient. It is possible that these are differences in degree, not in kind, between parental relationships with unborn and with born children, and between the vulnerability of born and unborn human life. *Gonzales's* eye-witness description of intact D & E abortions, for example, portrays the relative vulnerability of the fetal life involved. *Gonzales* also suggests that cutting off the woman-offspring relationship via abortion can cause a kind of “maternal” suffering, relying for this conclusion upon several sources: the *Casey* plurality opinion, 180 post-aborted women via an *amicus* brief, and abortion doctors.¹⁸ A body of scientific literature confirms this possibility, for the literature indicates that some women’s abortions affect their later parenting and family life decisions.

Certainly too, there must be acknowledged another possible reason for bringing abortion law and the rest of family law into greater harmony: the federal constitutional law on abortion explicitly traces its origins to earlier constitutional family law decisions about parent-child relations (a point discussed in Section IV, *infra*). From this perspective alone, it seems that, at the very least, abortion law should not behave inconsistently with the family law of parent-child relations.

There are sufficient reasons, in other words, for pursuing the question of greater harmony between abortion law and other family laws concerning parent-child relations, especially along the lines suggested by the *Gonzales* majority: first, taking as self-evident the existence of a bond between biological parents and their children; and second, acknowledging children’s vulnerability as self-evident. The consequences of this

¹⁷ See, e.g., Uniform Adoption Act § 2-404(a)(1994).

¹⁸ *Gonzales*, 127 S.Ct at 1632–34.

harmonizing will need to be considered closely. What are the likely consequences, and not only for abortion laws? What are the consequences for the well-being of women, of children, of other family members, and of society? It is an explicit fear of pro-choice advocates that when lawmakers focus upon fetal vulnerability and maternal-child bonding, women lose, because society will come to see women as they did in the past—as fit only for maternal roles and tasks.¹⁹ Are there ways to acknowledge bonds between parents and their children, and children’s dependency upon adult care and mercy, without setting women back?

In order to pursue these questions, this essay will proceed as follows. Section II will explore family law’s reliance on two presumptions regarding parent-child relationships: the existence of a natural bond between parents and their offspring, and the vulnerability of children. Section III will show how these presumptions do not figure in pre-*Gonzales* abortion jurisprudence. In fact, directly contrary presumptions often arise. Section IV will discuss those portions of the *Gonzales* majority opinion that take up the matter of a relationship between a woman and her “unborn child,”²⁰ and the vulnerability of the latter. The change that *Gonzales* represents for abortion jurisprudence will be highlighted by contrasting the Court’s majority opinion with the dissenting opinion of Justice Ruth Bader Ginsburg. Justice Ginsburg relies heavily upon language and themes stressed in prior abortion cases. Section V takes up the question of the wisdom of extending typical family law presumptions about the parent-child relationship to the to abortion context. It looks at relevant empirical data and medical research on the relationship between abortion and family well-being in order to claim that there is wisdom in bringing abortion jurisprudence back into the family law fold from which it sprang. The conclusion suggests possible consequences of this course of action.

II. TWO FAMILY LAW PRESUMPTIONS

¹⁹ See, e.g., Reva B. Siegel, “The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,” *Univ. of Illinois. Law Review* (2007): 991.

²⁰ *Gonzales*, 127 S.Ct at 1634.

REGARDING THE PARENT-CHILD RELATIONSHIP

Parents and Children Have a Relationship the Law Should Protect

Many of the most familiar areas of family law operate upon the assumption that it is self-evident that biological parents²¹ have a strong natural bond with their children. Particular laws, therefore, act to protect and preserve those bonds. In the area of adoption, for example, the law regularly takes care to give natural parents time to change their minds after their initial surrendering of their biological child to a would-be adoptive parent or parents.²² Even in states not providing a set time-period within which a natural parent may revoke consent, consent may ordinarily be revoked upon evidence of fraud, undue influence, or duress.²³ States are also required to provide opportunities for unmarried biological fathers to receive notice and an opportunity to be heard respecting proceedings intended to terminate their parental rights in favor of an adoptive parent or parents.²⁴

Statutes determining legal parentage—and thus the rights and obligations incident to parentage—are another obvious place to look for the law’s adopting the presumption that biological parents are attached to their children. Typically, such statutes rely upon genetic and gestational connections to determine parentage. The statute of Rhode Island is typical: “Birth parent,” is “the person who is legally presumed under the laws of

²¹ Of course, adopted children are treated at law as the natural children of their parents. See, e.g., 001-24 *Minnesota Family Law Practice Manual* §24.09 (Matthew Bender and Co., 2006): “After a decree of adoption, the child becomes the legal child of the adopting parents and the relationship between the child and the adopting parents is the same as between a legitimate child and natural parents”; *In re Adoption of Edgar*, 853 N.E. 2d 1068, 1072 (Mass App. Ct., 2006). This article, however, focuses upon biological parents because of the biological relationship between women seeking abortions and the fetuses they carry.

²² See, e.g., Ark. Stat. Ann. §9-9-220 (2003): revocation within 10 days if in best interest of the child; 23 PA CONS. L §2711 (2004); Uniform Adoption Act § 2-404(a) (1994): revocation within 192 hrs after child’s birth.

²³ See, e.g., Mass. Gen. Laws ch. 210 §2 (2007); Colo. Rev. Stat. §19-5-104(7) (2005).

²⁴ *Lehr v. Robertson*, 463 U.S 248 (1983).

this state to be the father or mother of genetic origin of a child.”²⁵

Another area of family law evidencing the law’s preference to preserve the relationships between parents and their children concerns child abuse or neglect. When the state seeks to terminate parental rights on either of these grounds, the law sets the hurdles high. The state must provide “clear and convincing evidence” of the existence of parental misconduct or failure, often in addition to evidence that the termination would be in the child’s best interests.²⁶ Additionally, even after a child is removed from his or her parent’s home on the grounds of misconduct or inability, there must occur a reasonable effort to reunify the child with his or her parents.²⁷ Even the federal Adoption and Safe Families Act of 1997,²⁸ which emphasized permanency planning for children (versus family reunification) to a much greater degree than earlier law, continues to require reasonable reunification efforts, save in dire circumstances involving, for example, very lengthy foster care periods, murder, or felony assault.²⁹

In the area of custody law, the Supreme Court has held that a parent has a federal constitutional right to the primary custody and care of his or her children.³⁰ Additionally, in custody contests between two parents, a significant number of U.S. jurisdictions look favorably upon joint custody awards in the name of preserving the child’s relationship with *both*

²⁵ R.I. Gen. Laws §15-7.2-1 (1956); see also Cal. Fam. Code §8512 (2004): “‘Birth parent’ means the biological parent, or, in the case of a person previously adopted, the adoptive parent.”

²⁶ *Santosky v. Kramer*, 455 U.S. 745 (1982). See, e.g., 211.447.4 RSMo. (Supp. 2005); *In re A.M.C.*, 265 S.W.3d 386, 393 (Mo. App. E.D. 2000); Ga. Code Ann. §15-11-94(a)(2004); Neb. Rev. Stat. §43-292 (2004); *In re Int. of Shelby L.*, 270 Neb. 150 (2005).

²⁷ See, e.g., Ga. Code Ann., §15-11-94 (2004).

²⁸ 42 U.S.C.A. §671(a)(15)(A), P.L. 105-89 (1997).

²⁹ 42 U.S.C.A. §671(a)(15)(D) (1997).

³⁰ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944): “It is cardinal with us that the custody, care, and nurture of the child reside first in the parents....”

biological parents. A “large minority of jurisdictions”³¹ have moved to joint custody presumptions on the strength of their deference toward the importance of maintaining all parent-child bonds. Even considering that joint custody is coming under additional scrutiny recently,³² it remains a sort of legal and personal ideal when the parents are able to cooperate and the arrangement serves the best interests of the child.³³

Even when a biological parent loses a custody or visitation contest to a person who is not a biological parent, it may be on the ground that the child has formed a parent-like relationship—as a “psychological” or “de facto” parent—with the third party, a relationship that the biological parent has allowed or even encouraged to form.³⁴ In other words, the grant of custody or of visitation rights to one who is not a child’s biological parent is regularly a variation on the general theme or presumption of deference to the parent-child bond, not a rejection of it.

This brief overview of some of the most frequently litigated areas of

³¹ David Meyer, “The Constitutional Rights of Non-Custodial Parents,” 34 *Hofstra Law Review* 1461, 1472 (2006), citing Andrew Schepard, “Children, Courts and Custody, Interdisciplinary Models for Divorcing Families,” and Linda D. Elrod & Robert G. Spector, “A Review of the Year in Family Law: ‘Same-Sex’ Marriage Issue Dominates Headlines,” 38 *Family Law Quarterly* 777, 789-95 (2005).

³² *Ibid.* at 1472–73: “Initially, joint custody was eagerly embraced by legislators and judges as a way of validating and encouraging the involvement of both parents. Over time, its reception has become more mixed. Some have criticized joint custody on the ground that it awards fathers rights without corresponding duties, and that it has induced some mothers to cede property or support rights in exchange for sole custody. And some scholars have recently detected a general retreat from joint custody, with more judges limiting it to cases where both parents consent to the idea.”

³³ Andrew Schepard, “Taking Children Seriously: Promoting Cooperative Custody After Divorce,” 64 *Texas Law Review* 687, 705 (1985), suggesting that the empirical evidence demonstrates the “regular contact with both parents,” after divorce provides a child improved parenting.

³⁴ See, e.g., *Rubano v. DiCenzo*, 759 A. 2d 959 (R.I. 2000); *V.C. v. M.J.B.*, 163 N.J. 2000, 748 A. 2d 539 (2000); Carolyn Wilkes Kaas, “Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases,” 37 *William & Mary Law Review* 1045 (1996).

family law certainly indicates that lawmakers regularly act on the presumption that the bonds between parents and their biological children are self-evident and ought to be preserved. The next presumption readily apparent across family law concerns the vulnerability of the child.

Children Are Self-Evidently Vulnerable and Require Protection, First from Their Parents, and Failing This, from the State

There is a second presumption underlying a significant number of family law rules. It is that children are self-evidently vulnerable, particularly relative to adults, and require special solicitude and protection. Parents have the first duty and the first right to shield their vulnerable children; if they fail, the state may step in on the children's behalf.

Federal constitutional law on parent-child relations highlights children's relative neediness or vulnerability by insisting that the primary trait of the legal relationship between parents and their children is "duty." John Locke's *Second Treatise on Government* well summarizes the position articulated over time in U.S. family law: "The Power that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Offspring."³⁵

Beginning in the earliest constitutional cases that treat the relationship between the parents and the state relative to children, the Supreme Court has explicitly articulated versions of this Lockean principle.³⁶ In a case affirming parents' rights to direct their children's education, for example, the Court said: "[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."³⁷ In a later case concerning the right of an unwed father to notice and a hearing regarding the adoption of his biological child, the Court stated explicitly that the "rights of the

³⁵ John Locke, *Second Treatise on Government*, sec. 58, ed. Thomas P. Peardon (Indianapolis IN: Liberal Arts Library, 1952).

³⁶ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

³⁷ *Pierce*, 268 U.S. at 535.

parents are a counterpart of the responsibilities they have assumed.”³⁸ In this latter case, after finding that the father had not stepped forward to assume responsibility for the child, the Court held that the “Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.”³⁹ The state could rather move forward without the father so as to consider the child’s best interests.

Several other particular areas of family laws aptly illustrate the law’s concern for the child’s vulnerability, as well as the state’s willingness to step forward when parents are unwilling or unable to protect their own children. The areas of child abuse and neglect, of course, come immediately to mind. Especially in recent decades, these areas of law have grown in size and sophistication, leading to more widespread and effective lawmaking, in response to increased sensitivity to the degree of children’s physical and mental vulnerability relative to adults.

There are many other, if less headlining, areas of family law that involve the shielding of children. For example, bans on incestuous marriages are based, in part, upon the belief that such marriages are most likely to operate to the disadvantage of young children who would be exploited by older relatives.⁴⁰ Limits upon the age at which children may marry without their parents’ or a judge’s consent are also based upon children’s immaturity and consequent vulnerability.⁴¹ Adoptions—the extinguishing of a parent’s rights over a particular child, and the establishing of new parental rights in another—are not effective by mere private agreement, but require a state inquiry into the fitness of the adoptive parents.⁴² States also will not automatically agree to custody and child

³⁸ *Lehr v. Robertson*, 463 U.S. 248 (1983).

³⁹ *Ibid.*

⁴⁰ Note, “Inbred Obscurity: Improving Incest Laws in the Shadow of the ‘Sexual Family,’” 119 *Harvard Law Review* 2464 (2006).

⁴¹ Lynn Wardle, “International Marriage and Divorce Regulation and Recognition: A Survey,” 29 *Family Law Quarterly* 497, 501 (1995).

⁴² See, e.g., 1 *Ohio Family Law* §3.20 (Note), Anderson’s *Ohio Family Law* (Matthew Bender & Co., 2006); 1-16 *New Jersey Family Law* §16-15 (Matthew Bender & Co., 2004).

support terms privately agreed upon by divorcing parents in a separation agreement.⁴³ Finally, prior to granting a couple a divorce, increasing numbers of jurisdictions are requiring parents to complete “parent education” courses to learn how effectively to parent children in a post-divorce context.⁴⁴

A Caveat

Two particular areas of family law have not adopted the presumptions about parent-child bonds and children’s vulnerability described above. These include the areas of assisted reproductive technologies (ARTs) and same-sex marriage. It appears, rather, that they have been more strongly influenced by pre-*Gonzales* abortion precedents stressing adult needs and interests, and exhibiting indifference toward the separation of children from their biological parents. With respect to ARTs, for example, it is generally agreed that the dearth of regulation regarding ARTs—consequently permitting the separation of children from their biological parents and the triumph of adult interests—is traceable, in part, to abortion law. The 2004 report from the President’s Bioethics Commission, *Reproduction and Responsibility*, listed as the first probable reason for the lack of regulation regarding ARTs that “[p]roposed efforts to regulate or monitor assisted reproduction are viewed by many people through the prism of *Roe v. Wade*.... Defenders of reproductive freedom want no infringement of the right to make personal reproductive decisions. This situation creates a powerful disincentive for any regulation of the uses of reproductive technologies.”⁴⁵ In the only Federal Court of Appeals decision to affirm a constitutional right to procreate using ARTs, *Lifchez v. Hartigan*,⁴⁶ the court affirmed a lower court’s conclusion that the right

⁴³ See, e.g., Uniform Marriage and Divorce Act §306(b) (1998).

⁴⁴ Margie Gearler & Karen R. Blaisure, “1998 Nationwide Survey of Court-Connected Divorce Education Programs,” 37 *Fam. & Con. Cts. Rev.* 36 (1999); Jeffrey T. Cookston et al, “Prospects for Expanded Parent Education Services or Divorcing Families with Children,” 40 *Fam. Ct. Rev.* 190 (2002).

⁴⁵ *Ibid.* at 8.

⁴⁶ 735 F. Supp 1361 (N.D. Ill. 1990), *aff’d without opinion, sub nom. Scholberg v. Lifchez*, 914 F. 2d 260 (7th Cir., 1990).

of “privacy and reproductive freedom” established in *Roe v. Wade* was broad enough to encompass a right to access *in vitro* fertilization.

Consequently, today neither state nor federal laws ban transactions of sperm, eggs, or embryos, with the result that children are regularly separated from their biological parents. State parentage laws simply confirm adult choices in this regard by cutting off any parental rights of gamete or embryo “donors” and by vesting such rights in the one or two persons intending to rear the child.⁴⁷ Nor are there laws directed to protecting children from the risks posed to their health by a host of ART procedures or outcomes, including but not limited to multiple births, genetic abnormalities, pre-implantation genetic diagnosis, selective reduction (the aborting of one more fetuses in multiple pregnancies), egg or embryo freezing and thawing, and others.⁴⁸

The development of the law concerning same-sex unions has also sometimes relied upon pre-*Gonzales* abortion law and has reflected the latter’s stance toward parent-child relations and children’s vulnerability. *Roe* and *Casey* were relied upon explicitly by the plaintiffs in *Goodridge v. Massachusetts Dept of Public Health*⁴⁹ to argue that the Constitution protects adult individuals’ “personal decisions” about the family, including the decision to marry a person of the same sex.⁵⁰ These same cases were referenced by the Massachusetts Supreme Court to conclude that decisions about “whether and how to establish a family” are matters of “individual” liberty.⁵¹ In the end, the *Goodridge* court affirmed unions that, by definition, result in the separation of every child of every such union from at least one of his or her biological parents. The court also performed a

⁴⁷ The President’s Council on Bioethics, *Reproduction and Responsibility*, at 51, n.95, Harry D. Krause et al., *Family Law: Cases, Comments and Questions* (6th ed.), 399–401; Helen Alvaré, “The Case for Regulating Collaborative Reproduction; A Children’s Rights Perspective,” at 26–27.

⁴⁸ See Helen Alvaré, “The Case for Regulating Collaborative Reproduction,” at 26–31.

⁴⁹ 798 N.E.2d 941 (Mass 2003).

⁵⁰ See Plaintiffs’ Motion for Summary Judgment, *Goodridge v. Dept. of Public Health*, No. 01-1647-A (2001 WL 35920961); opinion 14 Mass Rptr. 591 (2002).

⁵¹ See 440 Mass, 309, 329.

noticeably cursory and biased review of the literature on children's well-being in same-sex households, before concluding that granting "marriage" status to such unions would not harm children's interests.⁵²

The contents of these two areas of family law do not alter the conclusion that family law generally has accepted as self-evident a bond between parents and their children as well as children's vulnerability and need for protection. Rather, they simply confirm the influence of abortion law. The treatment of children and parent-child relationships in both of these areas also suggests that, unless *Gonzales* marks the beginning of a change, abortion law is already influencing family law's treatment of born children and their relationship with their parents.

To conclude this section, then, it is axiomatic with family law generally that children are relatively vulnerable and that the law should respond with a willingness to step in when parents are failing. It is also assumed that parents feel bonded to their children and that family law should take care to preserve these bonds when possible. We now turn to abortion law to consider how, pre-*Gonzales*, the Supreme Court's abortion cases have declined to incorporate either of these presumptions. Instead, sometimes the Court has ignored both of them, and sometimes it has supplanted them with contrary presumptions.

III. THE SUPREME COURT'S ABORTION CASES HAVE IGNORED OR CONTRADICTED FAMILY LAW'S PRESUMPTIONS REGARDING PARENTAL ATTACHMENT AND CHILD VULNERABILITY

There are many Supreme Court decisions treating the constitutionality of state or federal abortion regulations or restrictions. It is accurate to summarize their treatment of the parent-child relationships by saying that while some make general references to the painful or difficult⁵³ nature of

⁵² I have written previously in detail concerning the treatment of children's interests in each of the leading state cases affirming same-sex unions, and by the Massachusetts Constitutional Convention in Helen Alvaré, "The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage & its Predecessors," 16 *Stanford Law & Policy Review* 135, 171-82 (2005).

⁵³ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992): "[Abortion] is an act fraught with consequences: for the woman who must live with the

the abortion decision—presumably an oblique reference to a relationship between the woman and her developing fetus—it is most common to find the situation of a pregnant woman seeking an abortion depicted as a confrontation or contest between rights’ holders, with the state taking the fetus’s part as against the woman. It is also common to see—not a preference for maintaining relationships—but a preference for their termination in the face of claims that a born child easily burdens a woman’s ability to realize her needs and interests. Also, rather than stressing the vulnerability of the fetus, the abortion cases devote considerable attention to the vulnerability of the woman seeking an abortion. Symbolic of the Court’s reluctance to employ family relationship concepts in abortion cases is its inability during three decades of decisions to decide precisely what to call the entity that is being aborted and what to call the woman seeking the abortion. This is important because without a “child” and a “mother” there can be by definition no parent-child relationship at issue in the abortion context.

For reasons of length, it would be impossible to consider every Supreme Court abortion case since *Roe v. Wade* in 1973. Happily, the leading abortion cases—*Roe v. Wade*,⁵⁴ *Thornburgh v. American College of Obstetricians and Gynecologists*,⁵⁵ *Webster v. Reproductive Health Services*,⁵⁶ *Casey v. Planned Parenthood*,⁵⁷ and *Stenberg v. Carhart*⁵⁸—accurately capture the most crucial themes and language concerning parent-child relations present in the Court’s pre-*Gonzales* abortion jurisprudence.

Strength of Biological Parent-Child Relationship

implications of her decision.... for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing sort of an act of violence against innocent human life....”

⁵⁴ 410 U.S. 113 (1973).

⁵⁵ 476 U.S. 747 (1986).

⁵⁶ 429 U.S. 490 (1989).

⁵⁷ 505 U.S. 833 (1992).

⁵⁸ 530 U.S. 914 (2000).

In *Roe v. Wade*,⁵⁹ the Supreme Court began the practice of using several labels per case for the entity being aborted and for the woman seeking the abortion. Sometimes they called the former a “fetus,”⁶⁰ sometimes “prenatal life,”⁶¹ sometimes “potential life”⁶² or the “potentiality of human life,”⁶³ sometimes an “unborn,”⁶⁴ and sometimes “unborn child.”⁶⁵ Sometimes the Court avoided a label completely by calling abortion only a woman’s right to “terminate her pregnancy.”⁶⁶ As for the woman, she was called, alternately, the “pregnant woman,”⁶⁷ the “patient,”⁶⁸ the “woman,”⁶⁹ and the “mother” whose “maternal health”⁷⁰ was at stake. The *Roe* Court also pioneered another theme that figured prominently in later abortion cases, namely, that what lay between the mother and the fetus in her womb was a contest not a relationship. On the child’s side, the contest was waged by the state, whose interest began in earnest at viability because the fetus presumably at that time the “has the capability of meaningful life outside the mother’s womb.”⁷¹

The *Thornburgh v. American College of Obstetricians and Gynecologists*⁷² case, seven years post-*Roe*, involved a statute as likely as any to

⁵⁹ 410 U.S. 113 (1973).

⁶⁰ *Ibid.* at 162.

⁶¹ *Ibid.* at 156, 163.

⁶² *Ibid.* at 163.

⁶³ *Ibid.* at 162.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at 153.

⁶⁷ *Ibid.* at 162.

⁶⁸ *Ibid.* at 163.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 163-64.

⁷¹ *Ibid.* at 163.

⁷² 476 U.S. 747 (1986).

invite the Court to consider the topic of a parent-child relationship in the abortion context. Pennsylvania had passed an “informed consent” law requiring abortion doctors to inform their patients about the availability of certain information regarding fetal development, possible medical risks of abortion, risks of childbirth, and the possibility that various types of financial and medical assistance could be available to her.⁷³ The *Thornburgh* Court, rather than taking the opportunity to note any possible maternal-fetal relationship, spoke of a contest between the mother and the fetus. In fact, the Court essentially accused Pennsylvania of trying to make a pregnant woman feel a relationship with her fetus, against her will and her best interests. The Court claimed that Pennsylvania was seeking to “intimidate” women into continuing their pregnancies⁷⁴ and to “confuse and punish” them.⁷⁵

Nine years post-*Thornburgh*, *Webster v. Reproductive Health Services*⁷⁶ offered the Court another opportunity to discuss the possibility of a mother child relationship in the abortion context. The Missouri legislature had passed a law with a preamble stating that the “natural parents of an unborn child had protectable interests in the life, health, and well-being of their unborn child.”⁷⁷ Like *Roe*, however, the *Webster* Court exhibited uncertainty as to the nature of the parties at interest in an abortion context. The fetus was called both “potential human life”⁷⁸ and the “fetus as a form of human life.”⁷⁹ The woman seeking the abortion was most often referred to simply as “the woman,”⁸⁰ or the “pregnant

⁷³ *Thornburgh*, 476 U.S. at 761.

⁷⁴ *Ibid.* at 759.

⁷⁵ *Ibid.* at 762.

⁷⁶ 429 U.S. 490 (1989).

⁷⁷ Mo.Rev.Stat. §§ 1.205.1(1), (2), 1.205.2 (1986).

⁷⁸ *Webster*, 429 U.S. at 514.

⁷⁹ *Ibid.* at 520.

⁸⁰ See, e.g., *Webster* 429 U.S. at 508.

woman,”⁸¹ yet her status as mother was also indirectly confirmed by reference to her “maternal health.”⁸² *Webster* also very explicitly envisioned the mother and child in a contest versus a relationship by stating that the balance that the Court had tried to strike in its abortion cases was between the “claims of the state to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort....”⁸³

Even the 1992 *Casey v. Planned Parenthood of Southeastern PA*⁸⁴ decision—regarded as a substantial setback by pro-choice activists due to its holding that abortion is a constitutional liberty interest versus a “fundamental” right—did not move abortion law in the direction of the family law on parent-child relations. The *Casey* Court, rather, continued the theme of confrontation. The Court portrayed the abortion right as protecting the liberty of the “individual” woman⁸⁵ against the state’s interest in what the Court now called “the life of the fetus that may become a child.”⁸⁶ The *Casey* plurality observed, but did not further develop, that abortion was “an act fraught with consequences for others,” including the spouse, the family, society, doctors, the woman, and “depending on one’s beliefs, for the life or potential life that is aborted.”⁸⁷ In the end, though, despite acknowledging obliquely the possibility that some family members might feel themselves in some sort of relationship with the fetus, the *Casey* Court struck down Pennsylvania’s law requiring a woman to notify her spouse about her abortion plans.

Looking finally at *Stenberg v. Carhart*,⁸⁸ the first Supreme Court decision on the question of “partial-birth abortion,” the Court stressed

⁸¹ *Ibid.* at 509.

⁸² *Ibid.* at 515.

⁸³ *Ibid.* at 520.

⁸⁴ 505 U.S. 833 (1992).

⁸⁵ *Ibid.* at 853.

⁸⁶ *Ibid.* at 846.

⁸⁷ *Ibid.* at 852.

⁸⁸ 530 U.S. 914 (2000).

throughout the opinion that there is one paramount interest in abortion jurisprudence, the woman's interest in "choos[ing] whether to have an abortion."⁸⁹ There is no suggestion of any relationship between the woman, or anybody else, and the fetus. Terms used for the fetus are far removed from those suggestive of a parent-child relationship; it is called a "pregnancy," "potential human life," "the contents [of the uterus]," and a "fetus" all on the same page of the opinion.⁹⁰ Women seeking abortions are usually simply called "women,"⁹¹ although there are some references to their "maternal" situation⁹² and, via quotations of earlier cases, to the woman as a "mother."⁹³

It is fair to conclude that in the leading abortion decisions from *Roe* through *Stenberg v. Carhart*, the family law theme of a self-evident relationship between parent and biological child is absent. Rather, the Supreme Court's abortion cases refrain from casting the fetus in the role of a child or the woman in the role of a mother, and envision the woman and the state as locked in a contest over the fate of the fetus, a contest in which her freedom is very much at stake.

Vulnerability of Child

The abortion cases also do not exhibit a second theme common in the family law of parent-child relations: the vulnerability of the child and the corresponding duties of the parents and the state to shield the child. Rather, these cases stress the vulnerabilities of the woman seeking an abortion, and of women in society generally, on account of their status as child-bearers. To the extent children's relative weakness is taken up at all, it is to suggest that children born following unwanted pregnancies will likely suffer unhappiness.

Looking first at *Roe*, its most substantial discussion of the fetus concerns whether there is anything in the history of the Constitution or

⁸⁹ *Stenberg*, 530 U.S. at 914.

⁹⁰ *Ibid.* at 923.

⁹¹ *Ibid.* at 929.

⁹² *Ibid.* at 928.

⁹³ *Ibid.* at 930 (quoting *Casey*, 530 U.S. at 879).

American laws to indicate that lawmakers understood the fetus as a legal “person” entitled to the 14th Amendment’s protection of “life.” The Court concluded that there was not: “In short, the unborn have never been recognized in the law as persons in the whole sense.”⁹⁴ It was the pregnant woman’s vulnerability, instead, that took center stage in *Roe*. Immediately following its announcement that the Constitution contains a privacy right that includes abortion, the Court expounded in emotional terms about the harms that women might suffer without access to legal abortion:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.⁹⁵

In *Thornburgh*, Pennsylvania seemed to invite consideration of the theme of child vulnerability, with its statute requiring that near-viability abortions be performed using the method most likely to deliver the child alive.⁹⁶ But again, the Court’s opinion spoke only about the woman’s vulnerability. In fact, the *Thornburgh* opinion is noteworthy among all of the abortion opinions for its nearly complete focus upon the woman’s situation, which established the theme in abortion cases that even in the cause of preserving the life of her viable fetus, a woman should bear no increased medical risk at all.⁹⁷ It was only in Justice White’s dissent in *Thornburgh* that the family law theme of the child’s vulnerability appeared. He stated that, although the Court had located the abortion right in constitutional family law stressing parental duties to children, abortion

⁹⁴ *Roe* 410 U.S. at 162.

⁹⁵ *Ibid.* at 153.

⁹⁶ *Thornburgh* 476 U.S. at 769.

⁹⁷ *Ibid.* at 769.

involves parents “assault[ing]” rather than protecting their children.⁹⁸

The *Webster* Court, despite upholding the non-binding preamble of a Missouri law (reciting the “protectable interests in life, health, and well-being” of the unborn child, who possesses the “same rights enjoyed by other persons”⁹⁹), said nothing in its own name on the theme of the vulnerability of children.

Casey returned to the theme of the woman’s vulnerability and even expanded it in the process. For the *Casey* plurality, women are not only vulnerable when they have unwanted pregnancies but are generally socially vulnerable due to their ability to bear children. On the first theme, the Court opined that women required the abortion right to avoid the “anxieties” and “physical constraints” that “only she must bear” in a pregnancy.¹⁰⁰ On the second theme, the plurality claimed that the abortion right is an essential part of the foundation of modern social freedoms for women. First, because women have for a long time come to rely “on the availability of abortion in the event that contraception should fail.”¹⁰¹ Abortion provides women, in other words, definitive “control [over] their reproductive lives.”¹⁰² Without abortion, said the Court, women’s right to “participate equally in the economic and social life of the Nation” would be compromised.¹⁰³

The *Casey* Court considered the possible vulnerability of the fetus only once, and only post-birth. Apparently presuming that an unwanted pregnancy would always result in an unwanted child or a child without proper assistance, the Court opined that “a parent’s inability to provide the nurture and care of the infant is a cruelty to the child and an anguish to the

⁹⁸ *Ibid.* at 792, n.2.

⁹⁹ *Webster*, 429 U.S. at 504–07, citing Mo.Rev.Stat. §§ 1.205.1(1), (2), 1.205.2 (1986).

¹⁰⁰ *Casey*, 505 U.S. at 852.

¹⁰¹ *Ibid.* at 856.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at 859.

parent.”¹⁰⁴

Stenberg, relying heavily on *Casey*, also stressed the woman’s vulnerability, not the fetus’s, despite the nature of the abortion procedure at issue in that case, which the Court acknowledged to be “gruesome” and “distressing”¹⁰⁵ since it involves the stabbing and suctioning of a nearly fully delivered fetal body. The *Stenberg* Court, instead, discussed at significant length the mother’s health interests in maintaining access to every abortion method believed by some group of doctors to provide a marginal safety benefit for the mother in a particular instance.¹⁰⁶ Only when referring to the opinion of some Americans, that abortion is the “death of an innocent child,”¹⁰⁷ did the majority opinion use language ascribing any vulnerability to the fetus.

In sum, not only do abortion opinions fail to feature the two family law themes described above, but they propose distinctly contrary themes instead. In the next section, I will describe how the *Gonzales* Court reverses the course of abortion jurisprudence by affirming an attachment between biological parents and their offspring and by emphasizing the vulnerability of fetal life.

IV. *GONZALES*: ABORTION LAW THAT LOOKS LIKE FAMILY LAW

This section will show how the majority opinion in *Gonzales v. Carhart* goes about bringing abortion jurisprudence into greater conformity with family law’s presumptions about parent-child relations. I will treat this matter in the order of the two family law themes identified above, then highlight the significance of the majority’s move by contrasting its language and themes with those found in the dissenting opinion of Justice Ginsburg.

Biological Parents’ Attachment to their own Children

¹⁰⁴ *Ibid.* at 853.

¹⁰⁵ *Stenberg*, 530 U.S. at 946 (Stevens, J., concurring); *Casey*, 505 U.S. at 951, (Ginsburg, J., concurring.)

¹⁰⁶ *Ibid.* at 931–38.

¹⁰⁷ *Ibid.* at 920.

The majority opinion in *Gonzales* states outright that a bond exists between a woman and her biological offspring, and that the severance of this bond via abortion—particularly via the intact D & E procedure—may cause significant and lasting pain for the woman. Regarding the bond itself, the majority wrote: “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”¹⁰⁸ One should first note that the use of language of “mother” and “child” puts the Court immediately into a family law context. So does the majority’s use of these additional labels for the fetus: “a living organism while within the womb,” “unborn child,” “infant life,” and “child assuming the human form.”¹⁰⁹

Continuing the discussion of this relationship between the woman and her offspring, the Court further observes that, as a consequence of this bond, abortion can be a “difficult and painful moral decision.”¹¹⁰ It states further that “some women...come to regret their choice the abort the infant life they once created and sustained.... Severe depression and loss of esteem can follow.”¹¹¹ For these points, the majority opinion explicitly relies upon an *amicus* brief filed by 180 women who experienced abortion, led by the woman who was the plaintiff in *Doe v. Bolton*¹¹² (*Roe*’s companion case). Also as a consequence of the mother-child bond, the Court observes that women will likely suffer more anguish if doctors are allowed to perform intact D & E abortions. The Court bases this conclusion on two sources. First, the testimony of doctors in the New York case challenging a partial-birth abortion ban, who stated that “they do not describe to their patients what [the D & E and intact D & E]

¹⁰⁸ *Gonzales* 127 S.Ct. at 1634.

¹⁰⁹ See, respectively, *Gonzales* at 1615, 1620, 1634.

¹¹⁰ *Gonzales* 127 S.Ct. at 1634, *citing Casey*, at 852-53; note here, usually one sees this observation at the beginning of an argument in favor of retaining the abortion right as the private choice of a particular woman to make such difficult and moral decisions without interference by the state. It is unusual, maybe unique, to see this phrase used in the introduction of an argument to allow any aspect of the right of abortion to be restricted by the state.

¹¹¹ *Gonzales* 127 S.Ct. at 1634.

¹¹² 410 U.S. 178 (1973).

procedures entail in clear and precise terms.”¹¹³ Second, the claimed self-evident fact that a woman, post-abortion, would be more likely to suffer greater anguish learning that the intact D&E was employed because she “allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”¹¹⁴

A final noteworthy aspect of the Court’s treatment of a mother-child bond is how prominently it figures in the legal outcome of *Gonzales*. The Court upholds the constitutionality of the Partial Birth Abortion Ban Act, in part, on the grounds that the evidence of the possible harm to women, society, the medical profession, and “respect for life,”¹¹⁵ stemming from the performance of intact D&E abortions, means that the Court *cannot* conclude that the “congressional purpose” of the act was to “place a substantial obstacle in the path of a woman seeking an abortion.”¹¹⁶

Children’s Vulnerability

The *Gonzales* majority opinion also speaks specifically about the theme of the self-evident vulnerability of children and the corresponding duties arising from this. The major means by which *Gonzales*’s majority highlights this theme is its relatively lengthy and detailed descriptions of abortion methods, including but not limited to intact D&E.

The first relevant aspect of the Court’s descriptions is its regular use of hard-hitting words to describe what abortion methods do to fetal bodies: “killing,” “decapitating,” “crush[ing],” “pierc[ing],” “ripp[ing],” “dismemberment,” and “caus[ing] the fetus to tear apart.”¹¹⁷ It notes that the doctor might have to make ten to fifteen “passes” in order to pull out all of the pieces of the fetal body.¹¹⁸ Yet even this language highlighting fetal vulnerability pales in comparison to the Court’s incorporation into

¹¹³ *Gonzales* 127 S.Ct. at 1634, citing *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436, 466, n.22.(2004).

¹¹⁴ *Ibid.* at 1634.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* at 1635, quoting *Casey*, 505 U.S. at 878.

¹¹⁷ *Ibid.* at 1614–17, 1621, 1623–24, 1628–29.

¹¹⁸ *Ibid.* at 1621.

its opinion of the entire eyewitness account of a partial-birth abortion provided by a nurse to at a hearing before Congress:

Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head. The doctor kept the head right inside the uterus....

The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp....

He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.¹¹⁹

Finally, the *Gonzales* Court emphasizes the child's vulnerability with its statements regarding how others witnessing, performing, or even thinking of the procedure (the woman is included here) are likely affected. They experience the child as helpless and dependent. Regarding the doctors who perform abortions, for example, the Court refers to the statement of a doctor at the trial level that it is a "difficult situation"¹²⁰ for medical staff who find themselves dealing with a fetus that has still "some viability to it, some movement of limbs."¹²¹ The Court holds that the government can legitimately conclude that a procedure such as intact D&X—which is more "shocking"¹²² than other abortion procedures—might cause a coarsening of the profession trained to care for human lives, and of the public's view of the profession, especially due to how the procedure "perverts a process during which life is brought into the world."¹²³

Justice Ginsburg's Dissent

¹¹⁹ *Gonzales*, 127 S.Ct. at 1622-23, citing H.R. Rep. No. 108-58, p. 3 (2003).

¹²⁰ *Ibid.* at 1623.

¹²¹ *Ibid.*

¹²² *Ibid.* at 1634.

¹²³ *Ibid.* at 1635, citing 18 U.S.C. § 1531 769 (2000 ed., Supp. IV).

The change that *Gonzales* marks in abortion law appears even more evident when considered against Justice Ginsburg's dissenting opinion. Emphatically restating themes found in earlier abortion cases, most particularly *Casey*, Justice Ginsburg states that the centerpiece of abortion jurisprudence is a "woman's autonomy to determine her life's course and thus to enjoy equal citizenship status."¹²⁴ No matter which dictionary one consults, "autonomy" appears as a concept opposite to the notion of "relationship." It describes behavior that is "self-governing," "self-directing,"¹²⁵ and "independent[t]."¹²⁶ It is derived from the Greek *autonomia*, "having its own laws."¹²⁷ Justice Ginsburg would have held in *Gonzales* that if some doctors claim that a banned abortion procedure is marginally safer for a woman in any particular circumstances, the ban must fall, with no need to consider how the procedure handles the fetus.¹²⁸

Concerning the particular question of the existence of a mother-child bond—and whether abortion might therefore cause pain to women—Justice Ginsburg is emphatic that women do not suffer significantly harmful effects from their abortions.¹²⁹ In an extraordinarily long footnote, Justice Ginsburg cites studies and articles disclaiming the existence of anything like "post-abortion syndrome."¹³⁰ Further discussion of the weight and content of these articles is contained in section IV, *infra*. At the moment, it is sufficient to say that Justice Ginsburg seems more eager to disclaim the possibility of abortion-related suffering than the evidence might support, or even that her prior statements have suggested.

Finally, Justice Ginsburg restates the theme found so often in pre-

¹²⁴ *Ibid.* at 1641 (Ginsburg, J., dissenting).

¹²⁵ *Merriam-Webster Online Dictionary*, www.m-w.com/dictionary/autonomy (visited July 17, 2007).

¹²⁶ *The American Heritage Dictionary of the English Language*, 4th ed., 2000.

¹²⁷ AskOxford.com, at www.askoxford.com/concise_oed/autonomy?view=uk (visited July, 17 2007).

¹²⁸ *Gonzales*, 127 S.Ct. at 1644–45 (Ginsburg, J., dissenting).

¹²⁹ *Ibid.* at 1648 (Ginsburg, J., dissenting).

¹³⁰ *Ibid.* at 1648, n. 7 (Ginsburg, J., dissenting).

Gonzales abortion cases about the vulnerability of women. Using language and terms more insistent than any earlier abortion opinion, Justice Ginsburg opines that without legal abortion, women would be returned to the sort of “pre-feminist” existence of “ancient” times, vulnerable to all earlier preconceptions and oppressions that had beleaguered women.¹³¹ She presents abortion, in other words, as a linchpin of female liberation, as “central[.]” to women’s lives.¹³² No portion of her opinion considers fetal vulnerability.

There is no guarantee in the volatile world of Supreme Court abortion opinions (a sort of judicial soap opera for academics and even the public) whether the new majority perspective on abortion at the Supreme Court will “hold” for one more opinion, for none, or for many. (In a fact, toward the end of her stinging dissent, Justice Ginsburg finally declares that “[a] decision so at odds with our jurisprudence should not have staying power.”¹³³) There is no doubt, however, that if it holds, abortion law will come to look more like the rest of family law. In the following section, I will suggest that there is wisdom in better harmonizing abortion law with the rest of family law. In my conclusion I will suggest possible consequences that might arise from this course of action.

V. THE RATIONALE FOR ADOPTING FAMILY LAW PRESUMPTIONS IN ABORTION CASES

Some assume that abortion law must remain inherently distinct from the remainder of family law given that only the former area concerns *preventing* the coming to fruition of a developed family relationship, a parent-child relationship. Yet there are several reasons why this might be too simplistic a conclusion, both at the practical, experiential level, and at the level of the law.

Abortion Law Was Derived from Family Law

In *Roe v. Wade*, women’s constitutional right to choose abortion was

¹³¹ *Ibid.* at 1649 (Ginsburg, J., dissenting).

¹³² *Ibid.* at 1649–50, 1653.

¹³³ *Ibid.* at 1653 (Ginsburg, J., dissenting).

grounded in large part upon earlier Supreme Court decisions about parents' fundamental rights respecting the custody and care of their children. In the course of seeking constitutional support for the existence of a privacy right sufficiently broad to encompass abortion, *Roe* specifically cited and relied upon previously identified substantive due process rights concerning "family relationships" and parents' rights to make decisions about "child rearing and education."¹³⁴ Here, the Court cited its prior decisions in *Prince v. Massachusetts*,¹³⁵ *Meyer v. Nebraska*,¹³⁶ and *Pierce v. Society of Sisters*.¹³⁷ Yet in each of these cases, the two family law presumptions discussed above are fully visible. The *Prince* Court, for example, spoke famously of the rights and duties of biological parents with respect to their dependent children: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹³⁸ *Prince* also spoke clearly about the child's relative vulnerability and need for protection, citing society's "interests...to protect the welfare of children, and the state's assertion of authority to that end." "The last is no mere corporate concern of official authority," continued the Court, but "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."¹³⁹

In his dissent in the *Thornburgh* case, Justice Byron White acknowledged the *Roe* Court's explicit reliance on family law precedents when he wrote that "the Court has justified the recognitions of a woman's fundamental right to terminate her pregnancy by invoking decisions upholding claims of personal autonomy in connection with the conduct of

¹³⁴ *Roe*, 410 U.S. at 153.

¹³⁵ 321 U.S. 158, 166 (1914).

¹³⁶ 262 U.S. 390 (1923).

¹³⁷ 268 U.S. 510 (1925).

¹³⁸ *Ibid.* at 166, citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹³⁹ *Ibid.* at 165.

family life, the rearing of children, marital privacy, the use of contraceptives, and the preservation of the individual's capacity to procreate."¹⁴⁰

It is a sound point, then, that *Roe* saw the relationship between a woman and her fetal offspring in the context of parent-child relationships, relationships that had heretofore been understood to be dominated by notions of parental attachment and duty toward children. But is this a sufficient reason to insist that abortion law operate according to the same presumptions employed generally in the family law dealing with the parent-child relation? Is consistency the highest value in this situation? Or is it better to say that since the vast body of family law involves mostly *born* children, it is nonsensical to care whether abortion law is out of step with the rest of family law? The next section suggests that this latter conclusion is wrong, because, insofar as family well-being is concerned, there may not be so clean a break between how adults' and society experience and perceive decisions about unborn and about born children.

The Abortion Decision May Be Experienced as a "Family Decision"

There is evidence that abortion is experienced by some women, and some men, as a decision about parenting, before, during, and after the abortion decision itself. The abortion may, for example, cause grief similar to the grief experienced at the loss of a born child. The child's innocence and vulnerability may play a role in both situations. Abortion may also affect decisions about whether or not to have children in the future. Or it may affect the quality of adults' relationships with future children, or with one another.

Pro-choice advocates, including Justice Ginsburg and others, speak in two conflicting ways about the evidence of any link between abortion and parenting decisions. On the one hand, they regularly acknowledge that abortion is "painfully difficult,"¹⁴¹ presumably because the woman has feelings for her offspring and/or feelings about what the abortion procedure does to him or her. It is common, for example, for pro-choice politicians to affirm the emotional difficulties of having an abortion to the point of advocating a national campaign to reduce abortion. Senator

¹⁴⁰ *Thornburgh* 476 U.S. at 791 (White, J., dissenting).

¹⁴¹ *Gonzales* 127 S.Ct. at 1648 (Ginsburg, J., dissenting).

Hillary Clinton regularly affirms that abortion should be “safe, legal and rare,” and more recently supported a goal of “zero” abortions for the nation.¹⁴² She has referred to abortion as “sad,” “tragic,” and “heart wrenching.”¹⁴³ Senator Barack Obama refers to women “anguish[ing]” over abortion decisions and promises to work to reduce abortion numbers.¹⁴⁴ Governor Rudolph Giuliani speaks quite similarly.¹⁴⁵ All no doubt are implicitly observing that abortion involves the choice deliberately to prevent or terminate a parent-child relationship.

On the other hand, those supporting legal abortion insist that claims about post-abortion maternal suffering as influencing future behavior are scientifically wrong and even socially disastrous for women. Justice Ginsburg’s *Gonzales* dissent is an excellent example of this argument. Reva Siegel, a leading abortion scholar on whom Justice Ginsburg firmly relies in *Gonzales*,¹⁴⁶ agrees when opining that abortion restrictions grounded upon protecting women from abortion’s claimed harmful consequences are unconstitutional and paternalistic attempts to enforce “sex stereotypes.”¹⁴⁷

This present essay is interested in this debate only insofar as it

¹⁴² Christina Bellantoni, “Hillary’s ‘Zero’ Abortions Goal Hit,” *The Washington Times* (June 8, 2007), p. A8.

¹⁴³ Hillary Clinton, at www.ontheissues.org/Senate/Hillary_Clinton_Abortion.htm (Senate debate, Manhattan, NY October 8, 2000) (last visited July 15, 2007).

¹⁴⁴ *Ibid.*

¹⁴⁵ “Abortion is wrong, abortion shouldn’t happen, personally you should counsel people to that extent” on The Situation Room, interview With Rudy Giuliani:, April 4, 2007- 19:00ET, at <http://transcripts.cnn.com/TRANSCRIPTS/0704/04/sitroom.o3.html> (visited July 15, 2007).

¹⁴⁶ See *Gonzales* 127 S.Ct. at 1641 (Ginsburg, J., dissenting), citing Reva Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,” 44 *Stanford Law Review* 261 (1992); Reva Siegel, “Rethinking Sex and the Constitution,” 132 *University of Pennsylvania Law Review* 955, 1002-28 (1984).

¹⁴⁷ See *supra* n19, Reva B. Siegel, “The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,” *University of Illinois Law Review* 991, 991 (2007).

concerns the possible relationship between abortion and the well-being of the family. It does not take the position that legislators should enact abortion restrictions in order to protect women from themselves or to ensure that women's social role is limited to maternity. Women have the power to avoid that role entirely or to combine it with additional roles in most cases; to suggest otherwise is to propose a drastically limited belief about the scope of women's freedom. This essay rather pursues the possibility that, if abortion is a decision about family, with the power to affect family relationships, then abortion law should employ the same insights and presumptions about the family employed in many other areas of family law. These have been understood over time and across many areas of family law to reflect family life as it is actually lived and to help strengthen this most critical of institutions for the good of the whole society. I have already described in Section I, *supra*, the effects of the influence of the pre-*Gonzales* family paradigm in the areas of ARTs and same-sex marriage: parents and children are more easily separated and adults' interests easily trump children's. What follows suggests that there is sufficient evidence about the possible effects of abortion on family well-being to support the conclusions of the *Gonzales* majority, that abortion law should no longer reject traditional family law assumptions about parent-child bonding and about children's vulnerability.

Full examination of the literature—really, the heated controversy—on the question of abortion's impact upon women, including upon their future family relations, would require a very lengthy article indeed. And it should be noted preliminarily, that shockingly little comprehensive research has been performed in the United States about the effects of abortion, considering that there is no other surgery so frequently experienced by American women.¹⁴⁸ This is part of the reason why the conflicting sides of the abortion debate can still “talk past” one another on the particular subject of abortion's effects. Considering all this, however, one can still reasonably conclude that the nuanced statements of the

¹⁴⁸ There are over 4000 abortions each day in the U.S. See Alan Guttmacher Institute, *Facts on Induced Abortion in the United States* (2006), at http://www.guttmacher.org/pubs/fb_induced.abortion.html. (visited July 21, 2007).

Gonzales majority, that “some”¹⁴⁹ women experience suffering after abortion, suffering of a specifically maternal nature, concerning the fate of a vulnerable child, have sufficient bases in fact to warrant some action in response to them.

The first evidence to consult about abortion’s aftermath is that employed by the *Gonzales*’s majority opinion. It first cites Justice Sandra O’Connor’s plurality opinion in *Casey*, which states as self-evident the conclusion that abortion is a “difficult and painful moral decision” with implications for the entire family and for society.¹⁵⁰ Next, the majority cites affidavits of 180 post-aborted women, gathered together in an *amicus* brief that sets forth in plain, raw language their post-abortion experiences.¹⁵¹ A review of the affidavits in this brief reveals anecdotal but consistent evidence of the link that these pregnant women felt with their developing fetuses, the pain that they experienced when the link was terminated, and its effects upon their future family lives. “I had a natural desire to have my baby and to raise her,” begins one woman.¹⁵² Many affidavits reported a relationship between an abortion and later marital difficulties: “The deep emotional scars were a large contributing factor in my divorce.”¹⁵³ Another ties her abortion to her “emotionally abusive relationship for 11 years until my divorce.”¹⁵⁴ A high percentage of the affidavits report effects upon later child-rearing: “Now with my 6 year-old son, I am overly protective to a fault. His relationship with his father is damaged because of my own fears of losing my son.”¹⁵⁵ Some expressed

¹⁴⁹ *Gonzales* 127 S.Ct. at 1634.

¹⁵⁰ *Ibid.* at 1634, citing *Casey* at 852–53 (opinion of the Court).

¹⁵¹ Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24., 127 S. Ct. 1634, 2006 WL 1436684.

¹⁵² Affidavit of Sandra Cano (Doe, p. 26-27 of Brief, 2006 WL 1436684), para 9.

¹⁵³ Donna M. Razin, Fla, p. 31, in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 1436684..

¹⁵⁴ Affidavit of Elizabeth Campbell (CA), p. 43 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 1436684.

¹⁵⁵ Affidavit of J.L.M. (Texas) p. 32 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 1436684; Affidavit of Becky

the inability to be with children,¹⁵⁶ or even the need to “punish myself” by sterilization so that no more children could be conceived. Some spoke of their horror in contemplating what abortion did to the body of their unborn child. Some spoke of trouble bonding with later born children.¹⁵⁷ Again and again, the affidavits claim that the women suffered depression, many to the point of substance abuse or even suicide.¹⁵⁸

Another theme within the affidavits is the suffering of the biological father of the fetus. It does not figure as prominently as the theme of maternal suffering, but it does appear regularly. One woman reported that she married the father of the aborted fetus but that “[w]e had all girls and he is plagued with the guilt of killing his possible only son.” Later she states: “We divorced.”¹⁵⁹ Another writes about her husband: “We are the

Abell (OK) p. 37 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 1436684: “I was an overprotective mother. I ‘overdid’ everything—to compensate for what I had done.” Affidavit of Elizabeth Campbell (CA), p. 43 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 1436684: “Overprotective parent to the point of smothering my children.” Affidavit of Hemda Ben-Judah, The State of GA, p. 37 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 14: “I am overly protective of my own children.”

¹⁵⁶ Deborah R Paine (Georgia), App. B. at p. 19 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 14: “In my need to punish myself, I had a tubal ligation (sterilization). So now I am childless. After killing my children, I did not deserve to be a mother.”

¹⁵⁷ Affidavit of D.M. (KS) p. 53 in Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 127 S. Ct. 1634, 2006 WL 14: “problems bonding with my first baby and feeling natural maternal feelings.”

¹⁵⁸ Affidavit of H.T. (Texas) App. B at p.30 in Brief for Sandra Cano et al.: “Experienced major clinical depression during and after birth of oldest living child after I learned how abortions were performed and more about fetal development.” “Experience major clinical depression during and after birth of oldest living child after I learned how abortions were performed and more about fetal development.” Affidavit of H.T. (Tex.), p. 42.; Affidavit of T.D. (PA), p. 51 in Brief for Sandra Cano et al.: “My twelve year old daughter has just read this form and I am wanting to die. Right now.”

¹⁵⁹ Kathleen Vaunae Hansel (CA) p. 47 in Brief for Sandra Cano et al.: “inability to make decisions regarding out two living children. It almost destroyed our

walking wounded.... forever.... My husband became suicidal as I did. We will always blame each other and never be guilt free.”¹⁶⁰

Stated simply, these testimonies concern parent-child relations. They are about decisions concerning—not strangers at arms’ length to the woman or the man, not someone else’s offspring—but about one who is perceived to be both vulnerable and in a family relationship with the woman and the man. Are these testimonies extremely unrepresentative of the millions of women who have had legal abortions in the decades since its legalization? It is impossible to say with certainty one way or another. There is no definitive evidence on a national scale. To repeat an important observation made above, despite the fact that women have abortions more than any other surgery, the National Institutes of Health, the preeminent health research facility in the U.S., has not attached an abortion question to any one of its longitudinal studies about women’s health.¹⁶¹ Yet one group that counsels women post-abortion reports over 100,000 women in post-abortion recovery programs in 2004 alone.¹⁶² Another reports conducting 500 retreats for post-abortion women annually to discuss the difficult aftermath of their abortions.¹⁶³ Unless these women cannot accurately characterize their own thinking, unless they are completely the victims of guilt induced by outsiders, the *Gonzales* majority is not incorrect that “some” women experience loss and sadness after abortion.

In addition to the material relied upon by the *Gonzales* majority, helpful information about possible effects of abortion comes from overseas studies, from countries with less controversial political environments where abortion is concerned. This research is helpful particularly

marriage.”

¹⁶⁰ Affidavit of O.F., MD, p. 50 in Brief for Sandra Cano et al.

¹⁶¹ See generally www.nih.gov. A review of all of the topics available under NIH’s subject heading “Women’s Health” discloses no category for “abortion.” See <http://www.health.nih.gov/search.asp/28>.

¹⁶² Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, 23, *Gonzales*, 127 S. Ct. 1634.

¹⁶³ Emily Bazelon, “Is There a Post-Abortion Syndrome?” *The New York Times*, (Jan. 21, 2007), p. 1.

when it is based, not on women who self-identify as “post abortion” (because reliable evidence suggests that many post-aborted women will deny their abortions,¹⁶⁴ itself a possible indicator of distress), but on all woman receiving medical care from a centralized national health care system. In a register linkage study in Finland, for example, that reviewed state records of women’s lifetime medical histories, researchers found that post-aborted women had a rate of suicide in the year following their abortion six times greater than women who gave birth. The researchers drew two possible conclusions. Either abortion harms mental health, or there are common risk factors for abortion and suicide.¹⁶⁵ A later Welsh study concluded that the former explanation is more likely.¹⁶⁶ It reviewed women’s medical records pre- and post-abortion and found no increased risk of suicide before abortion among the women who had abortions. But it also found that the rate of suicide among women after having induced abortions was twice the rate of women giving birth. Quite recently, Finnish researchers performed a follow-up register linkage study and concluded that post-aborted women face a two-and-a-half times greater risk of suicide, accidental death, or homicide in the following year than do women who gave birth.¹⁶⁷ Most recently, several New Zealand researchers, led by a self-described “pro-choice atheist,”¹⁶⁸ published a widely-

¹⁶⁴ See, e.g., Elise F. Jones and Jacqueline Darroch Forrest, “Underreporting of Abortion in Surveys of U.S. Women: 1976 to 1988,” 29 *Demography* 113-126 (February 1992); F.L. Mott, “Fertility Related Data in the 1982 National Longitudinal Surveys of Work and Experience of Youth,” Center for Human Resource Research, Ohio State University, 1983, suggesting that based on national abortion rates, approximately 60% of women having abortion conceal their abortions from researchers with the National Longitudinal Study of Youth.

¹⁶⁵ Gissler et al., “Suicides after Pregnancy in Finland, 1987-94: Register Linkage Study,” *British Medical Journal* 1431-34 (1996).

¹⁶⁶ Morgan et al, “Letters,” *British Medical Journal* 903 (1997).

¹⁶⁷ M. Gissler et. al., “Injury death, suicides and homicides associated with pregnancy, Finland 1987-2000,” 15 *European Journal of Public Health* 459-63 (2005).

¹⁶⁸ Warren Throckmorton, “Abortion and Mental Health,” *The Washington Times* (Jan. 21, 2006), p. A13: “‘I’m immune from that charge [of having a pro-life agenda] because I’m pro-choice,’ he says.” See also Elliott Institute, “Evidence

noted study in the *Journal of Child Psychology and Psychiatry* that found that it is “difficult to disregard the real possibility that abortion amongst young women is associated with increased risks of mental health problems.”¹⁶⁹ This study’s robust criticism of the continued position of the American Psychological Association (claiming a “low” risk of psychological harm)¹⁷⁰ has led the APA to convene a new task force on “Mental Health and Abortion” slated to consider new evidence on post-abortion effects for a report due in 2008.¹⁷¹

In sum, there are credible reports regarding women suffering after abortion. They are not solely focused upon abortion’s effects upon the family, but it is reasonable to believe that some of the general effects cited—depression, suicidal ideation—easily translate to family relationship difficulties.

What about the fact, however, that some studies can be cited for the proposition that many—even most—women do not suffer mental or family problems after abortion? While these studies are accused of exhibiting serious research methodology flaws,¹⁷² so are some of the studies claiming post-abortion distress.¹⁷³ In this set of circumstances, it seems that a reasonable position for any side of the abortion debate claiming interest in the cause of women might be as follows: first, pursue a study at the highest possible level, specifically avoiding prior noted methodological flaws. This likely means directing the NIH to add abortion questions to

Doesn’t Matter” in APA Abortion Advocacy, at <http://www.lifesite.net/ldn/2006/fed/060216A.html> (visited July 16, 2007).

¹⁶⁹ David M. Fergusson et al., “Abortion in Young Women and Subsequent Mental Health,” 47 *Journal of Child Psychology and Psychiatry* 16, 23 (2006).

¹⁷⁰ *Ibid.* at 23.

¹⁷¹ See Warren Throckmorton, “Abortion and Psychology,” *The Washington Times* (May 18, 2007), p. A17.

¹⁷² See, e.g., David Reardon, “A Study of Deception: Feminist Researcher ‘Proves’ Abortion Increases Self Esteem,” at <http://www.afterabortion.info/PAR/V3/n4/RUSSO.htm> (visited July 16, 2007).

¹⁷³ See, e.g., Justice Ginsburg’s footnote in *Gonzales* suggesting that the only two studies she cites claiming post-abortion distress are fatally flawed. *Gonzales* 127 S.Ct. at 1648, n.7 (Ginsburg, J., dissenting).

one or more of their long-term studies about women's health. Make sure, in particular, that the study does not suffer from women's under-reporting of their abortions, from self-selected cohorts, or from an inability to separate out women with (versus without) prior mental health histories pre-abortion. Second, credit existing studies that employ credible methods. At the moment, these certainly include the European registry studies that do not by their nature under-report the class of women having abortions and that have the capacity to determine if a woman seeking an abortion had a pre-abortion history of mental health difficulties. Third, consult other relevant literature and common sense. The literature on miscarriage indicates, for example, that suffering regularly follows miscarriages. Regularly, this suffering affects women's future family relationships.¹⁷⁴ Could women deliberately obtaining, or being pressured to obtain, the abortion of their offspring, escape similar suffering entirely? In sum, with our current state of knowledge about pregnancy loss generally, and post-abortion reactions particularly, it appears more reasonable to surmise that abortion has effects upon family relationships than to surmise the opposite.

But what about Justice Ginsburg's *Gonzales* dissent, which asserts emphatically that abortion does not lead to worse effects for women than childbirth? Justice Ginsburg speaks as if her sources definitively put the argument to rest. Yet on close inspection, her sources cannot bear that weight, for four reasons. Before examining these, however, it should be noted that Justice Ginsburg begins by erroneously claiming that the

¹⁷⁴ See, e.g., Susan O'Doherty, et al. *About What Was Lost: 20 Writers on Miscarriage, Healing and Hope* (2007); Kristen M. Swanson et al., "Contexts and Evolution of Women's Responses to Miscarriage during the First Year after Loss," 30 *Source Research in Nursing & Health* 2 (Feb. 2007); Elizabeth H. Lamb, "The Impact of Previous Perinatal Loss on Subsequent Pregnancy and Parenting," 11 *Journal of Perinatal Education* 33 (Spring 2002); Dirini Tsartsra & Martin P. Johnson, "The Impact of Miscarriage on Women's Pregnancy-Specific Anxiety and Feelings of Prenatal Maternal-Fetal Attachment During the Course of a Subsequent Pregnancy: An Exploratory Follow-up Study," 27 *Journal of Psychosomatic Obstetrics & Gynecology* 173 (2006); Annette Kerstin et al., "Psychological Stress Response After Miscarriage and Induced Abortion," 66 *Psychosomatic Medicine* 795 (Sept.-Oct. 2004).

majority opinion asserts that *all* post aborted women suffer regret.¹⁷⁵ In fact, the majority spoke only of “some” women.¹⁷⁶ Turning to the four reasons why Justice Ginsburg’s rebuttal of the majority is ultimately unconvincing, they are as follows.

First, she calls abortion a “painfully difficult” decision¹⁷⁷ but asks the reader to assume that such decisions have no painful or difficult consequences, even for “some” women.

Second, her most important source¹⁷⁸ (whose verbatim conclusion about abortion’s effects she adopts as her own) is the leading pro-choice research organization in the United States, the Alan Guttmacher Institute. Following this, she cites a story in *The New York Times* that failed to report any of the recent or leading European or New Zealand studies discussed above. Justice Ginsburg’s remaining citations rely heavily on the American Psychological Association (APA) and on former leaders and representatives of the APA, Drs. Stodland and Russo.¹⁷⁹ Yet in a very recent interview with Dr. Russo regarding the above-described New Zealand findings, Dr. Russo acknowledged that “mental health effects [of

¹⁷⁵ *Gonzales* 127 S.Ct. at 1648 (Ginsburg, J., dissenting): (“The 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.”

¹⁷⁶ *Ibid.* at 1634.

¹⁷⁷ *Ibid.* at 1634, n.7.

¹⁷⁸ Cohen, “Abortion and Mental Health: Myths and Realities,” 9 *Guttmacher Policy Rev.* 8 (2006). The Alan Guttmacher describes itself as originally a “semiautonomous division” of the nation’s largest abortion provider, the Planned Parenthood Federation of America. See <http://www.guttmacher.org/about/history.html>. It claims today to be an “independent” corporation, but publishes in every instance material favoring Planned Parenthood’s policies in favor of legal abortion.

¹⁷⁹ American Psychological Association, *APA Briefing Paper on the Impact of Abortion* (2005); Schmiege & Russo, “Depression and Unwanted First Pregnancy: Longitudinal Cohort Study,” 331 *British Medical Journal* 1303 (2005); Stodland, “The Myth of Abortion Trauma Syndrome,” 268 *JAMA* 2078, 2079 (1992); American Psychological Assn, Council Policy Manual: (N)(I)(3), Public Interest (1989).

abortion]” are not relevant to the APA’s decision making about whether or not to support legal abortion. The APA has assumed its current position from the perspective of abortion as a “civil rights” issue.¹⁸⁰ In other words, Justice Ginsburg’s heavy reliance on the APA for medical conclusions about abortion’s effects is misplaced.

Third, Justice Ginsburg makes no references whatsoever to the more recent and most widely respected European and New Zealand studies finding increased risks for some women post-abortion.

Fourth, Justice Ginsburg does not mention, let alone credit, the testimonies of the only post-aborted women to address the *Gonzales* Court on this topic via their *amicus* brief. It is an odd and even hypocritical gesture in a dissenting opinion otherwise vocally supporting the intelligence and autonomy of women to be willing to give complete credence to the male abortion doctors who provided the bulk of the testimony that claimed possible medical necessity to provide intact D & E abortions.

In sum, it appears that there is credible evidence from medical sources, confirmed by the public claims of post-aborted women, that a significant number of women experience distress, often related to future family relations, as a result of abortion. It is not clear that the material found in the sources cited by Justice Ginsburg could easily trump such evidence. In fact, even Justices Ginsburg’s and O’Connor’s abortion opinions have regularly suggested that there is something inherently difficult and troubling for a woman, and possibly her whole family, about a decision in favor of abortion. These difficulties could arise, it seems, only if the woman or her family perceive abortion as a severance of a type of parent-child relation or the harming of a relatively vulnerable creature.

For purposes of making abortion law, then, it is reasonable that ordinary family law presumptions about women’s relations with their offspring should be consulted. Of course, more research in this area could help strengthen or undermine what is now known about the effects of abortion on women or families. But at this point, it seems clear that at the least a reasonable observer cannot dismiss the possibility that a woman’s

¹⁸⁰ Warren Throckmorton, “Abortion and Mental Health,” *The Washington Times* (Jan. 21, 2006), p. A13, quoting Nancy Felipe Russo, referred by the APA to answer the reporter’s questions about the New Zealand study.

decision to have an abortion is a decision possibly affecting family relationships in the future, including the well-being of future children.

VI. CONCLUSION

This article has suggested that the *Gonzales* Court has moved in the direction of bringing abortion law and the rest of family law into greater harmony and that it might be wise for future abortion laws and policies to do the same. This is so not only because abortion law has its origins in family law but also because of the real possibility that abortion decisions are experienced by women and maybe other relatives as parent-child relationship decisions about vulnerable children.

But where might such a move lead? In particular, would it lead to a new paternalism on the part of the state and to sex-stereotyping of women, as Justice Ginsburg and some commentators fear? I believe that the answer is no. My conclusion will suggest rather that if abortion law were to adopt typical family law presumptions, several consequences might follow: first, better investigation into the family-related health outcomes of abortion and therefore better informed consent for women; second, more restrictions on the performance especially of later abortions; third, better efforts to avoid unwanted pregnancies; and fourth, greater willingness to harmonize parenting and employment and other social roles for women.

Preliminarily, it should be noted, given that abortion laws come from legislatures, that none of my suggested outcomes can come to pass without the support of a democratic majority willing to enact them. It should also be noted that none of these outcomes necessitate “re-sex-stereotyping” of women. In fact, I will shortly argue that it is the *failure* to acknowledge self-evident facts about parents’ bonds with their children and children’s needs that has prevented further and necessary legal and other progress for women.

A final preliminary observation concerns the difference between employing observations about parents and their pre-natal offspring in the service of laws limiting abortion, versus employing them solely in the service of providing abortion-minded women more information. Pro-choice advocates strenuously insist that the latter is the only position authentically assisting women. But if women experience abortion as a

kind of parent-child decision—and there is substantial evidence that they do—then the law’s typical stance toward these types of decisions is not a wholly inapplicable or inappropriate model to presume that parents ordinarily wish to preserve a relationship with their biological children and to presume that children sometimes require special protection. That this may result in some limiting of a very broadly defined abortion right is not by itself a conversation-stopper. No member of the parent-child dyad has unlimited legal rights in any other family context outside abortion. *Gonzales*, by introducing into abortion law this trait of family law, is simply bringing abortion law back to its roots, while harmonizing it with a more realistic assessment of women’s and others’ actual experience of abortion.

Turning to possible outcomes of allowing abortion law to take into consideration parents’ bonds with their children and children’s relative weakness, a first outcome might include the pursuit of high-level research about the effects of abortion on women, on family well-being, and on children. The notable dearth of such important research has been mentioned several times. This research might include, for example, studies about the nature of the ties, if any, that women feel for the fetal life they carry, whether their pregnancy is “wanted” or “unwanted,” “expected” or “unexpected.” It might also identify and measure the effects of abortion upon women’s later family choices and relationships. It could also study abortion’s effects, if any, on later born children, and on men. The fetal experience of various types of abortions might also be explored. If this type of research were pursued, it goes without saying that there would result better counseling and informed consent available for women seeking abortions.

A second possible outcome of taking parent-child bonds and children’s vulnerability seriously might be the restriction of particularly gruesome or painful types of abortions. Such laws would aim either to protect fetal life from pain, or to avoid disrupting more developed parent-child type bonds, or both. They might take several forms: fetal anesthesia requirements, bans on certain abortion methods, or bans on later-term abortions.

A third possible outcome might involve better efforts to avoid unwanted pregnancies. The complete debate over how best to accomplish this is beyond the scope of this article. I would, however, offer this

observation: simply dispensing more contraception from public and private sources over the past nearly four decades has not answered the problem of high rates of out-of-wedlock births or abortions in the U.S. Nor has a stepped up focus upon abstinence programs in recent years. The full answer must be more complex, must look beyond the moment that a woman or a couple decide to have sexual relations. It must also address the many reasons why so many people (women included) fail to respect or acknowledge the procreative aspect of sexual relationships, fail to respect woman's unique gifts and burdens in connection with pregnancy, childbirth, and child rearing, and fail to respect children's needs for sufficient resources and a secure and stable upbringing.

Thinking more broadly, a fourth possible outcome involves further action to harmonize childbearing with a wide variety of social freedoms for women. Of course, this would involve the goal just described above: preventing pregnancies in situations that give rise to tremendous conflicts between caring properly for children and women's achieving sufficient education or income. Out-of-wedlock pregnancies are the prime example of such situations. It would also involve, however, a mixture of state and private laws and policies that would improve the cost, availability, and flexibility of employment and education for women to a degree not yet accomplished. This outcome specifically addresses the fears of pro-choice leaders and scholars that acknowledging parent-child bonds and children's needs can only result in the sex-stereotyping of women. Certainly, the *Gonzales* Court's acknowledgment only of a "mother-child" bond helps give rise to this concern. The Court spoke as if fathers have no similar feelings for their offspring, and more ominously, as if they do not bear responsibility either respecting abortion or childbirth. While it is likely that the Court addressed only the mother's bond because she is legally alone in the abortion context—the father having no effective power—still, the Court would have done better to acknowledge that both biological parents have feelings and responsibilities toward their offspring. At the same time, the Court's failure to mention fathers does not change the fact that denying the self-evident connection mothers feel for their children will not contribute to the cause of women's progress. In fact, the opposite is easily argued: progress and freedom for women, and for men, necessitates helping them to "do justice" both to their perceived personal obligations as well as to their obligations to their employers and to the

wider society. Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, will only result in policies reinforcing a male model of social life and of employment,¹⁸¹ e.g., a model in which no institution need “flex” or change to allow women or men to meet children’s needs. Insisting, on the other hand, that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet, is both more realistic, and a more likely premise for a successful argument in favor of family-friendly work and education policies. This is true even if, as past decades have shown, women are more likely than men to take advantage of these policies by, for example, working flexible or part-time hours.

Denying that women feel a deep bond with their children, or that women perceive and respond to children’s natural vulnerability, does not reflect women’s lives. Nor does it seem the most likely path toward convincingly demanding effective accommodation for the educational and employment aspirations women hold. In fact, it is essentially a claim that women’s childbearing abilities and maternal responses are inherent disabilities. This argument is not only flawed but sexist in the most fundamental sense. It is no premise for a true or effective feminism.

¹⁸¹ See generally Joan Andrews, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000), arguing that modern employment laws and policies are largely based upon the model of an ideal male worker, unencumbered by child care interests or responsibilities.